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(2023) 2 ILRA 6
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

Arbitration and Conciliation Application U/S 11(4) No. 58 of 2021

Bharat Petroleum Corporation Limited
...Applicant
Versus
M/s. Gupta & Company & Ors.
...Opposite Parties

Counsel for the Applicant:
Sri Komal Mehrotra

Counsel for the Opposite Parties:
Sri Preet Pal Singh Rathore, Sri Chandra Bhan Gupta, Sri Kamlesh Kumar Singh, Sri Bal Mukund Singh

A. Arbitration and Conciliation Act, 1996- Section 11(4). Section 40 -appointment of arbitrator- the issue arises for consideration is whether after death of one of the partners of the firm, this Court can appoint an Arbitral Tribunal for deciding the claim-Held-under section 40 of the Act, an arbitration agreement does not stand discharged on account of death of any party thereto, unless the right of action is extinguished by operation of law-section 45 of the Act clearly stipulates that notwithstanding the dissolution of a firm, the partner s continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution-The specific case of the applicant is that the surviving partners without informing the applicant about death of one of its partners, continued to transact business with it-Consequently, no merit in the contention that on account of death of one of the partners and resultant dissolution of the firm, the dispute between the parties could not be referred for adjudication to the arbitrator-As by operation of law, the Director, or his nominee cannot act as an arbitrator, therefore, the applicant has rightly approached to the Court to constitute an Arbitral Tribunal. (Para 1 to 17)

The application is allowed. (E-6)

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. Matter taken up in the revised call.

2. Sri Komal Mehrotra, learned counsel for the applicant and Sri Chandrabhan Gupta, learned counsel for respondent no.2 are present.

3. None present for respondent no.3.

4. The instant application has been filed under Section 11(4) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act') for appointment of an arbitrator to resolve the disputes between the applicant and Mahesh Chandra Gupta (since dead), Devi Prasad Gupta-opposite party no.2 and Shiv Prasad Gupta-opposite party no.3, who were carrying on business in the name and style of M/s. Gupta & Company (opposite party no.1), in pursuance of an agreement with the applicant pertaining to "dispensing pump and selling license" dated 08.02.2014.

5. The case of the applicant is that one of the partner of the firm namely, Mahesh Chandra Gupta died on 15.08.2018. Opposite party nos.2 and 3, the remaining partners, without informing the applicant-company, continued to carry on business in the name of the firm and received supplies

of petroleum products on 28.09.2018 but, did not make the payment thereof.

6. Arbitration Clause 19 stipulates that any dispute or difference between the parties arising out of the agreement will be referred to the sole arbitration of the Director (Marketing) of the Applicant-Company, or of some Officer of the Company nominated by him. The provisions of the Arbitration Act have been made applicable to the arbitration proceedings. It is urged that in view of Section 12(5) of the Arbitration Act, the Director (Marketing) of the Company, nor any officer of the company, could act as an arbitrator. Thus, the procedure prescribed under the agreement having failed by operation of law, an arbitrator be appointed by this Court.

7. Sri Chandra Bhan Gupta, learned counsel appearing on behalf of opposite party no.2 submits that since the license was in name of the partnership firm and as Mahesh Chandra Gupta, one of the partner of the firm had died, therefore, the firm stood automatically dissolved. It is submitted that in such circumstances, the matter cannot be referred to arbitration at all. He places reliance on Clause 13 of the Partnership deed between the partners, which is as follows:

"(13) That in event of the death of any partner, the partnership deed will come to an end and the same can be reconstituted only with formal written approval from Bharat Petroleum Corporation Limited. However the surviving partners can with the approval of the corporation in writing carry on the business of the said firm purely on temporary basis on the terms and conditions to be determined by the corporation at their sole discretion."

8. Learned counsel for the applicant, on the other hand, submits that the two surviving partners continued to carry on business in the name of firm and also received supplies of petroleum products, and therefore, there is no impediment in appointment of an arbitrator nor the claim of the applicant would stand defeated automatically on the said ground.

9. The issue which thus arises for consideration is whether after death of one of the partners of the firm, this Court can appoint an Arbitral Tribunal for deciding the claim of the applicant against the firm. No doubt, by virtue of Section 42 of the Indian Partnership Act, 1932 (hereinafter referred to as the 'Act'), a partnership firm stands automatically dissolved, in the event one of the partners of the firm dies, but it is subject to there being no contract to the contrary. Clause 13 of the Partnership deed contains a contract to the contrary between the partners. It permitted the surviving partners to carry on business in firm's name with the approval of the Applicant-Company. Moreover, the case of the applicant is that the surviving partners without informing the applicant about the death of one of the partner on 15.08.2018, continued to transact business in the firm's name and also received supplies of petroleum products on 28.09.2018 and thus, cannot escape liability to make the payment or to get the dispute decided, nor can resist constitution of Arbitral Tribunal to adjudicate upon the claim of the applicant.

10. Section 50 of the Partnership Act, which is relevant, is extracted below:

***"50. Personal profits earned after dissolution.**-Subject to contract between the partners, the provisions of*

clause (a) of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up:

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in the section shall affect his right to use the firm-name."

11. Relevant part of Section 16 of the Act is also extracted below:

*"**16. Personal profits earned by partners.-**Subject to the contract between the partners, -*

(a) if a partner derives any profits for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm-name, he shall account for that profit and pay it to the firm;"

12. Under Section 40 of the Arbitration and Conciliation Act, 1996, an arbitration agreement does not stand discharged on account of death of any party thereto, unless the right of action is extinguished by operation of any law. Section 45 of the Act clearly stipulates that notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution. The specific case of the applicant is that the surviving partners without informing the applicant about death of one of its partners, continued to transact business with it. Consequently, I find no merit in the contention that on account of death of one of the partners and resultant dissolution of the firm, the dispute between the parties could not be referred for adjudication to the arbitrator.

13. As by operation of law, the Director (Marketing) or his nominee cannot act as an arbitrator, therefore, the applicant has rightly approached this Court to constitute an Arbitral Tribunal.

14. The application is **allowed.**

15. This Court proposes the name of Sri Rahul Sahai, Advocate for being appointed as Arbitrator. His address is 20/12 A, Panna Lal Road, Allahabad (Mobile No. 9415235110). He will be paid fees in accordance with the Fourth Schedule.

16. Let consent of Sri Rahul Sahai, Advocate be obtained by the office in terms of Section 11(8), read with Section 12(1) of the Act by sending a letter to him.

17. In case, the proposed arbitrator does not give his consent or the disclosures in terms of sub-section (1) of Section 12, the application will be listed before the Court for the limited purpose of proposing name of alternate arbitrator.

(2023) 2 ILRA 8
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.02.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 7719 of 2022

Abdul Razak Peediyakkal ...Applicant
Versus
U.O.I. ...Opposite Party

Counsel for the Applicant:
Pranav Agarwal

Counsel for the Opposite Party:
Kuldeep Srivastava, Shiv P. Shukla

(A) Criminal Law - Bail - The Prevention of Money Laundering Act, 2002 - Sections 2(u) - *"proceeds of crime"* , Section 3, 4, 44, 45 & 70 , Indian Penal Code, 1860 - Sections 120B & 121A ,143, 147, 153B r/w 149, 153A/295A/124A , Arms Act, 1959 - Section 3,5 (1) (a) r/w 25 (1) (a), The Explosives Substances Act, 1908 - Section 3,4 & 5 , The Unlawful Activities (Prevention) Act, 1967 - Section 13,16,18,20, The Information Technology Act, 2002 - Section 65/72/76 .

(B) The Prevention of Money Laundering Act, 2002 - Section 45 - Offences to be cognizable and non-bailable - Twin conditions - (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. (Para - 23)

Cases related to offence of money laundering - Applicant (PFI member) a big businessman based in Abu Dhabi - role of applicant different from co-accused - criminal conspiracy - accused of engaging in illegal activities - remitting funds to PFI through hawala or other underground channels - not cooperated in investigation - Foreign funds raised/collected abroad by PFI, CFI and their related organizations - more than Rs.100 Crore deposited in PFI and its related entities over the years.**(Para - 13,14,16)**

HELD:- Bail application of the present applicant does not qualify the twin conditions of Section 45 of the PMLA, as the applicant is based in Abu Dhabi and the proceeds of crime are in crores. Factum of guilt can be proved or disproved before trial court. Direction to conclude trial within six months and take any appropriate coercive steps in accordance with law.**(Para - 23)**

Bail application rejected. (E-7)

List of Cases cited:-

1. Vijay Madanlal Choudhary & ors. Vs U.O.I. & ors., 2022 SCC OnLine SC 929

2. Babulal Verma & anr. Vs Enforcement Directorate & anr., 2021 SCC OnLine Bom 392

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Mr. Rizwan, learned counsel for the applicant and Sri Kuldeep Srivastava, learned counsel for the Enforcement Directorate.

2. As per learned counsel for the applicant, the present applicant is in jail since 10.03.2022 in ECIR No.ECIR/02/HIU/2018, under Sections 3, 4 & 70 of the Prevention of Money Laundering Act, 2002, Police Station - Directorate of Enforcement, APJ Abdul Kalam Road, New Delhi.

3. Learned counsel for the applicant has submitted that the present applicant has been falsely implicated in the case by the Enforcement Directorate (hereinafter referred to as "E.D.") inasmuch as no case is made out against the accused-applicant under Section 3 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as "the PMLA"), which is punishable under Section 4 of the PMLA.

4. Learned counsel for the applicant has submitted that the offence of money laundering as defined under Section 3 of the PMLA specifically posits that whosoever 'directly or indirectly attempts

to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money laundering.

5. Learned counsel has further submitted that the definition of 'proceeds of crime' is provided under Section 2 (u) of the Act which means "any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the nature of any such property".

6. Therefore, the commission of the scheduled/predicate offence by way of which "any property derived or obtained, directly or indirectly is a mandatory requirement for a 'property' to become 'proceeds of crime'. In support of his argument, learned counsel for the applicant has referred para-251 of the **Vijay Madanlal Choudhary and Others Vs. Union of India and Others, 2022 SCC OnLine SC 929,** which is being reproduced herein below:-

"251. The "proceeds of crime" being the core of the ingredients constituting the offence of money-laundering, that expression needs to be construed strictly. In that, all properties recovered or attached by the investigating agency in connection with the criminal activity relating to a scheduled offence under the general law cannot be regarded as proceeds of crime. There may be cases where the property involved in the commission of scheduled offence attached by the investigating agency dealing with that offence, cannot be wholly or partly regarded as proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act -- so long as the whole or some portion of the property has been derived or obtained by any person "as a result of" criminal activity relating to the stated scheduled offence. To be proceeds of crime, therefore, the property must be derived or obtained, directly or indirectly, "as a result of" criminal activity relating to a scheduled offence. To put it differently, the vehicle used in commission of scheduled offence may be attached as property in the concerned case (crime), it may still not be proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act. Similarly, possession of unaccounted property acquired by legal means may be actionable for tax violation and yet, will not be regarded as proceeds of crime unless the concerned tax legislation prescribes such violation as an offence and such offence is included in the Schedule of the 2002 Act. For being regarded as proceeds of crime, the property associated with the scheduled offence must have been derived or obtained by a person "as a result of" criminal activity relating to the concerned scheduled offence. This distinction must be borne in mind while reckoning any property referred to in the scheduled offence as proceeds of crime for the purpose of the 2002 Act. Dealing with proceeds of crime by way of any process or activity constitutes offence of money-laundering under Section 3 of the Act."

7. Learned counsel for the applicant has submitted that there are three predicate offences relating to the issue in question wherein the present applicant was not named. FIR No.276/2013 [1st Predicate Offence'] dated 23.04.2013 against 22 persons was registered under Sections 143, 147, 153B r/w 149 of the Indian Penal

Code, 1860; Section 5 (1) (a) r/w 25 (1) (a) of the Arms Act, 1959; Section 4 & 5 of the Explosives Substances Act, 1908 and Section 18 of the Unlawful Activities (Prevention) Act, 1967. The said case emanating from the FIR stands closed up to the Hon'ble Supreme Court vide its orders dated 13.04.2017 and 04.07.2017 in SLP (Criminal) Nos. 4511-4513 of 2017 and 2875 of 2017 respectively. Further, FIR No. 199/2020 dated 07.10.2020 [2nd Predicate Offence'], has been registered U/s 153A/295A/124A of the Indian Penal Code, 1860; 17 and 18 of UAPA and 65/72/76 of the Information Technology Act, 2002. FIR No.04/2021 dated 16.02.2021 [3rd Predicate Offence'] has been registered U/s 120B and 121A of the IPC; Sections 13, 16, 18 and 20 of UAPA; Section 3, 4, and 5 of the Explosives Substances Act and Section 3 and 25 of the Arms Act against Anshad Badharudeen and Firoz Khan.

8. Learned counsel for the applicant has reiterated that the present applicant is not an accused in any of the aforesaid three predicate offences. However, he has been arrested on 10.03.2022 pursuant to the ECIR in question.

9. Under the provisions of Sections 44 and 45 of PMLA, the E.D. has filed complaint and supplementary complaint under Sections 3, 4 & 70 of the PMLA dated 06.02.2021 and 06.05.2022 respectively. The aforesaid complaint has been filed against five accused persons, namely, K.A. Rauf Sherif, Atikur Rehman, Masud Ahmed, Sidique Kappan and Mohd. Alam. However, pursuant to the supplementary complaint four individuals/ entities have been made accused by the E.D. i.e Abdul Razak Peediyakkal (present accused-applicant), Ashraf Khadir alias Ashraf MK, Munnar Villa Vista Pvt. Ltd., Tamar India Spices Pvt. Ltd. Learned counsel for the applicant has fairly indicated the allegations against the present applicant in para-12 of the bail application, which reads as under:-

"12. The following principal allegations and the case set up against the Applicant/Accused in the Supplementary Complaint is as under:

I. The purported 1st and 2nd Predicate Offence (s) are the very basis on which the Applicant/Accused is being investigated in the present Complaint and Supplementary Complaint i.e. the same set of offences which the Ernakulum Judgement finds no substance in order to enlarge the main conspirator on bail;

II. Admittedly, the Applicant/ Accused is a long-time member of an organization known as Popular Front of India [PFI] and purportedly 12 cases have been registered against the PFI, in which admittedly the Accused/Applicant is not an accused;

III. Apparently, in terms of the investigation a residential plot viz. Munnar Villa Vista Project [Project], Munnar, Kerala is being developed with a motive to launder money and the Applicant/Accused is the largest shareholder of the Project;

IV. In terms of Supplementary Complaint, the Project has revealed certain discrepancies/irregularities in its funding mentioned therein. There is no allegation as regards the Applicant/Accused as regards the certain discrepancies/ irregularities in the funding of the Project. It is submitted that there per force cannot be any allegation against the Applicant/Accused inasmuch he is only a shareholder in the Project and has neither managerial nor directorial role thereto. True Copy of the Company Master Date of

Company 'Munnar Villa Vista Private Limited' as available on www.mca.nic.in is annexed herewith and marked as ANNEXURE A-6. True Copies of the minutes of the Board meeting dated 30.07.2018 and 01.07.2020 of Company 'Munnar Villa Vista Private Limited' is annexed herewith and marked as ANNEXURE A-7 [COLLY];

V. It is submitted that a bare reading of the table at Para 8 of the Supplementary Complaint establishes the following:

a) Monies amounting to Rs.33,72,043/- have been transferred from 11.07.2012 to 10.06.2020 to Rehab India Foundation, an NGO;

b) These are legitimate transactions through RTGS/NEFT, emanating from the coffers of the Applicant/Accused;

c) There is no averment that the said monies have been derived from the commission of any predicate/scheduled offence, let alone 1st Predicate Offence;

d) In any case the commission of the 2nd and 3rd so called Predicate Offence took place after the transactions of the Applicant/Accused dated 11.07.2012 to 10.06.2020, therefore, the 2nd and 3 ''predicate offences cannot per force lead to 'proceeds of crime'.

VI. Furthermore, a reading of Paras 8.3 to 8.7 nowhere delineates, how the monies transferred by the Applicant/ Accused emanate out of any Predicate Offence;

VII. The Applicant/Accused further submits that he has no business interests in Qatar, Malaysia and Switzerland. The Applicant/Accused only has business interests in Abu Dhabi. True Copy of the business interests of the Applicant/Accused are annexed herewith and marked as ANNEXURE A-8."

10. Learned counsel has further submitted that the main conspirator in terms of para-10 of the complaint, namely, K.A. Rauf Sherif was enlarged on bail by the Special Court for PMLA Cases under the PMLA, at Ernakulam, Kerala on 12.02.2021. He has also submitted that the E.D. vide e-mail dated 20.12.2021 asked the accused-applicant to appear before it at New Delhi on 27.12.2021 with the requisite documents. In response thereto, the accused-applicant vide e-mail dated 20.12.2021 requested from the E.D. to summon him in his Cochin office. Thereafter, the accused-applicant received further summons dated 14.02.2022 to appear in New Delhi on 19.02.2022 and the accused-applicant promptly appeared before the authorities at New Delhi. However, the E.D. has arrested the present applicant on 10.03.2022 from Calicut Airport without having any cogent reasons. Thereafter, he was sent to the judicial custody on 16.03.2022.

11. Learned counsel for the applicant has referred various judgments of the Apex Court to submit that it is a trite law that there exist three main factors while granting bail to any accused person i.e. (a) the accused shall not tamper with the evidence; (b) the accused shall not influence the witness(s) and (c) the accused shall not be at flight risk, therefore, gravity of offence cannot be the sole ground to deny bail. Learned counsel for the applicant has submitted that the present applicant undertakes that if he is released on bail, he shall abide by all terms and conditions of the bail order and shall not misuse the liberty of bail.

12. Learned counsel for the applicant has drawn attention of this Court towards the order dated 23.12.2022 passed by this

Court in Criminal Misc. Bail Application No.13642 of 2022 whereby co-accused Sidhique Kappan has been granted bail. Therefore, learned counsel has submitted that since co-accused Sidhique Kappan has been enlarged on bail, therefore, the present applicant may also be enlarged on bail on the basis of principles of parity.

13. *Per contra*, Sri Kuldeep Srivastava, learned counsel for the E.D. has submitted that during PMLA investigation, the fact emerged that the funds amounting to Rs.1.36 Crore, raised/collected abroad by the office bearers/ members/ activists of PFI, CFI and their related organizations, were routed to the Bank Accounts of K.A. Rauf Sherif, the National General Secretary of CFI. Further, the investigation against PFI has so far revealed that more than Rs.100 Crore have been deposited in the accounts of PFI and its related entities over the years. It has come into the notice of the Investigating Agency that foreign funds have been remitted to India through hawala/ underground channels and through remittance sent to the accounts of members/ activists/office bearers of PFI/CFI and other related organizations.

14. Initially, active participation of five accused persons have been noticed thorough reliable evidences and materials whose names have been indicated in the first complaint but after further investigation, name of the present applicant came into the notice, therefore, in the supplementary complaint, the applicant has been made accused. Pursuant to the exercise being undertaken through further investigation, role of the present applicant, who is a PFI member based in Kerala and Abu Dhabi, for doing the aforesaid illegal activities has been emerged. Thereafter, he has been issued summons to cooperate in the investigation. Since the present applicant is based at Abu Dhabi and is indulged in the aforesaid illegal activities i.e. remitting funds to PFI through hawala or other underground channels, therefore, he has not properly cooperated in the investigation, rather has stated time and again that the explanation so sought by the E.D. would be replied by his Chartered Accountant. As per admission of the present applicant before the E.D., he has stated that he became the member of PFI in 2014-15 and is still a member. He was made Divisional President in June, 2021, later he resigned from such post in December, 2021. He used to contribute to PFI in the form of monthly subscription. On being asked from him whether he had given any money in any other organization, he stated that he had donated money to Rehab India Foundation (hereinafter referred to as "RIF") as Zakath and has not remembered the exact amount but the same could be obtained from his Bank statement accounts.

15. As per Sri Srivatastava, learned counsel for the E.D., the applicant has admitted that though he was based in Abu Dhabi, he was still made the Director of Thejus in 2010. It has been noticed by the Investigating Agency that the accused-applicant has transferred a huge sum of Rs.33,72,043.00 over the period 11.07.2012 to 22.07.2020 to RIF. He explained that he had donated the aforesaid money to RIF as Jakath. Sri Srivastava has drawn attention of this Court towards para-7 of the complaint wherein the brief summary of result of investigation under PMLA relating to the present applicant has been given, which goes to show that the present applicant has transferred a substantial amount to Rehab India Foundation through three Bank accounts; one from HDFC Bank

and two from South Indian Bank vide two separate Bank accounts. Sri Srivastava has also drawn attention of this Court towards the remaining paragraph of para-7 of the complaint, more particularly, para 7.10, which explains "raising of funds abroad and their transfer to India through illegal channels". Para 7.10 (i) (ii) & (iii) indicates that the fund amounting to Rs.10 Crore in two installments were transferred by the present applicant to another PFI member Mohamed Ashraf Pilasheri of Calicut and that the explanation of proposal to buy a plot was a mere afterthought and pretext used by the applicant to conceal the true nature of movement of funds. Relevant extracts of the documents have been shown in the complaint.

16. Therefore, Sri Srivastava has stated that role of the present applicant is so serious and he being a big businessman based in Abu Dhabi, if released on bail, may abscond or may influence the trial proceedings as the trial is pending consideration before the learned trial court where the charges have been framed. He has also submitted that the role of the present applicant is altogether different from that of co-accused Sidhique Kappan, who has been granted bail by this Court on 23.12.2022 inasmuch as the role assigned to Sidhique Kappan is in respect of hatching criminal conspiracy with K.A. Rauf Sherif. Except the allegation that Rs.5,000/- were transferred in the Bank account of co-accused Atikur Rahman, there is no other transaction either in the Bank account of Sidhique Kappan or in the Bank account of co-accused.

17. Sri Srivastava has also submitted that if the bail of the present applicant is considered, satisfaction in respect of Section 45 of PMLA may be given inasmuch as unless the twin conditions mentioned under Section 45 of the PMLA are satisfied, the bail may not be granted. Therefore, Sri Srivastava has submitted that the present applicant may not take the aid of the dictum of the Apex Court in re; **Vijay Madanlal Choudhary** (supra) inasmuch as the law has been settled that even if any person is not named in the predicate offence(s), even then if his complicity comes into notice during investigation relating to the offence of E.D., he may very well be implicated.

18. Heard learned counsel for the parties and perused the material available on record.

19. At the very outset, it would be appropriate to indicate Sections 2 (u), 3 & 4 of the PMLA, which reads as under:-

***"2 (u)**. "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property.*

***3. Offence of money-laundering.**--Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.*

***4. Punishment for money-laundering.**--Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to*

fine which may extend to five lakh rupees:

***Provided** that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted."*

20. The aforesaid provisions of law have been aptly interpreted by the High Court of Bombay in re; **Babulal Verma and Another Vs. Enforcement Directorate and Another, 2021 SCC OnLine Bom 392**, from paragraphs 29 to 34, which are being reproduced hereunder:-

"29. The language of Sections 3 and 4 of PMLA, makes it absolutely clear that, the investigation of an offence under Section 3, which is punishable under Section 4, is not dependent upon the ultimate result of the Predicate/Scheduled Offence. In other words, it is a totally independent investigation as defined and contemplated under Section 2(na), of an offence committed under Section 3 of the said Act.

30. PMLA is a special statute enacted with a specific object i.e. to track and investigate cases of money-laundering. Therefore, after lodgment of Predicate/Scheduled Offence, its ultimate result will not have any bearing on the lodgment/investigation of a crime under the PMLA and the offence under the PMLA will survive and stand alone on its own. A Predicate/Scheduled Offence is necessary only for registration of crime/launching prosecution under PMLA and once a crime is registered under the PMLA, then the ED has to take it to its logical end, as contemplated under Section 44 of the Act.

31. The PMLA itself, does not provide for any contingency like the case in hand and argued by the learned counsel for the Applicants. Section 44(b) only provides for filing of a complaint or submission of a closure report by the Investigating Agency under PMLA and none else.

32. If the contention of the learned counsel for the Applicants that, once the foundation is removed, the structure/work thereon falls is accepted, then it will have frustrating effect on the intention of Legislature in enacting the PMLA. The observations of the Hon'ble Supreme Court in the case of State of Punjab v. Davinder Pal Singh Bhullar, (supra) in paragraph No. 107 and Sanjaysingh Ramrao Chavan (Supra) in para No. 17 are in context of the facts of the said case and pertaining to the offences under the provisions of IPC and P.C. Act and therefore, the same cannot be applied to the case in hand which arises out of a special statute namely PMLA enacted by the Legislature with an avowed object.

33. Hypothetically, "an accused' in a Predicate/Scheduled Offence is highly influential either monetarily or by muscle power and by use of his influence gets the base offence, compromised or compounded to avoid further investigation by ED i.e. money laundering or the trail of proceeds of crime by him, either in the Predicate/Scheduled Offence or any of the activities revealed therefrom. And, if the aforestated contention of the learned counsel for the Applicants is accepted, it will put to an end to the independent investigation of ED i.e. certainly not the intention of Legislature in enacting the PMLA. Therefore, if the contention of the learned counsel for the Applicants is accepted, in that event, it would be easiest mode for the accused in a case under PMLA to scuttle and/or put an end to the

investigation under the PMLA. Therefore, the said contention needs to be rejected.

34. In view of the aforesaid discussion, it is clear that, even if the Investigating Agency investigating a Scheduled Offence has filed closure report in it and the Court of competent jurisdiction has accepted it, it will not wipe out or cease to continue the investigation of Respondent No. 1 (ED) in the offence of money-laundering being investigated by it. The investigation of Respondent No. 1 will continue on its own till it reaches the stage as contemplated under Section 44 of the PMLA."

21. It is clear that a person may not be involved in original criminal activity that had resulted in generation of proceed of crime but he can join the main accused either as abettor or conspirator for committing the offence of money laundering by helping him in laundering the proceed of crime. Therefore, just because the applicant was not named or not prosecuted for the predicate offence, his prosecution for money laundering cannot be said to be illegal. Para-271 in re; **Vijay Madanlal Choudhary** (supra) is being reproduced herein below:-

"271. As mentioned earlier, the rudimentary understanding of "money-laundering' is that there are three generally accepted stages to money-laundering, they are:

(a) Placement : which is to move the funds from direct association of the crime.

(b) Layering : which is disguising the trail to foil pursuit.

(c) Integration : which is making the money available to the criminal from what seem to be legitimate sources."

22. Notably, the Apex Court in re; **Vijay Madanlal Choudhary** (supra) has held that provision in the form of Section 45 of PMLA, as applicable post amendment of 2018, is reasonable and has direct nexus with the purposes and objects sought to be achieved by the PMLA to combat the menace of money laundering having transnational consequences including impacting the financial systems and sovereignty and integrity of the country. While granting bail of an accused person, twin conditions of Section 45 of the PMLA will have to be adhered to.

23. For the convenience, Section 45 of the PMLA is being reproduced hereunder:-

***"45. Offences to be cognizable and non-bailable.**--(1) [Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence [under this Act] shall be released on bail or on his own bond unless--]*

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person who is under the age of sixteen years or is a woman or is sick or infirm [or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees], may be released on bail, if the special court so directs:

Provided further that the Special Court shall not take cognizance of any

offence punishable under section 4 except upon a complaint in writing made by--

(i) the Director; or

(ii) any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government.

[(1-A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.]

*(2) The limitation on granting of bail specified in [***] of sub-section (1) is in addition to the limitations under the Code of Criminal Pro*cedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

24. Considering the facts and circumstances of the issue in question, the bail application of the present applicant does not qualify the twin conditions of Section 45 of the PMLA inasmuch as at this stage it cannot be observed that the present applicant has not committed the offence for which the complaint has been filed against him. The proceed of crime is also in crores. The applicant is based at Abu Dhabi. The factum of guilt can be proved or disproved before the learned trial court. Learned counsel for the E.D. has informed that the trial in the present case is going on with good pace and the same may likely be concluded very soon, therefore, I am not inclined to grant bail to the present applicant, rather I would like to issue direction to the learned trial court to conclude the trial with expedition.

25. So far as claim of parity with co-accused Sidhique Kappan is concerned, the role assigned to Sidhique Kappan is in respect of hatching criminal conspiracy with K.A. Rauf Sherif. Except the allegation that Rs.5,000/- were transferred in the Bank account of co-accused Atikur Rahman, there is no other transaction either in the Bank account of Sidhique Kappan or in the Bank account of co-accused whereas the role of the present applicant is altogether different from that of co-accused Sidhique Kappan as the present applicant is based at Abu Dhabi and the proceed of crime is in crores, therefore, the present applicant cannot claim parity with co-accused Sidhique Kappan.

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

27. Learned trial court is directed to conclude the trial with expedition, preferably within a period of six months by fixing short date and no unnecessary adjournment shall be given to any of the parties. If any of the parties do not cooperate in the trial proceedings, the learned trial court may take any appropriate coercive steps in accordance with law.

28. Liberty is given to the applicant to file another bail application, if the trial is not concluded within the aforesaid stipulated time.

29. It is made clear that I have not entered into merits of the issue, therefore, learned trial court shall conduct and conclude the trial without being influenced from any observation or finding of this order as the observations are only confined to the disposal of this bail application.

(2023) 2 ILRA 18
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.01.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Civil Revision No. 4 of 2023

Dr. Sushil Suri ...Revisionist
Versus
Hari Suri & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Pritish Kumar, Shantanu Gupta

Counsel for the Opposite Party:
Akber Ahmad, Harsh Vardhan Mehrotra

A. Civil Law -Code of Civil Procedure, 1908-Section 115 - Court Fees Act,1870-Sections 7(iv-A), 7(v), (v-A), (v-B) (as inserted by State of U.P.)- Court fees-Computation-Market value-In cases where suits are filed in a court having unlimited pecuniary jurisdiction-Defendant does not have any vested right to raise objections regarding valuation of suit property and court fees paid thereon-However it is for Court concerned to consider same in case it finds valuation of suit property and Court fees paid thereupon to be arbitrary or demonstratively undervalued-Court fees for said suit would have to be calculated in reference to averments in plaint in terms of section 7(iv)(c) r/w section 7(v) and not ad valorem Court fee on market value-If suit would have been only for declaratory decree without consequential relief, Article 17(iii) of Sch. II would have been applicable.(Para 1 to 25)

The revision is allowed. (E-6)

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

1. Heard Mr. Pritish Kumar assisted by Mr. Shantanu Gupta Advocate learned counsel for petitioner, Mr. S.K. Kalia Senior Advocate assisted by Mr. Akber Ahmad learned counsel for opposite party No.1 and Mr. Abhinav Bhattacharya learned counsel for opposite parties 3 and 4.

2. Learned counsel for party admit that the opposite party no.2 is in relation to the opposite parties no.3 and 4, who are already represented and notices may be dispensed with. In view of aforesaid, notices to opposite party no.2 stand dispensed with and case is being adjudicated at admission stage with consent of learned counsel for parties since no questions of fact are involved.

3. Civil Revision under Section 115 of the Code Civil Procedure has been filed against order dated 3rd December, 2022 passed in regular suit No. 342 of 2015 whereby preliminary issue No.3 regarding valuation of suit and court fees paid thereon has been decided against revisionist-plaintiff.

4. Learned counsel for revisionist submits that revisionist had filed suit for partition of properties indicated in the plaint which included one residential plot, one commercial plot and a building. It is submitted that the suit was valued at Rs.2,72,12,403/- and court fees thereon was paid at 20 times the annual rental value in terms of Section 7(v)(I)(c) of the Court Fees Act, 1870 with regard to the two plots and similarly court fees was paid as per nagar palika rental in terms of section 7(v)(II). It is submitted that aforesaid method of determining market value of the properties is one of the modes of determination thereof which has been an accepted principle in various pronouncements as per U.P. Amendment to Court Fees Act, 1870.

5. It is submitted that however the trial court by means of impugned order while holding court fees to be payable in terms of Section 7(v)(I)(c) and Section 7(v)(II) has found the courts fees to be deficient on the ground that the revisionist-plaintiff was required to pay courts fees on the market value of the properties. It is further submitted that while indicating court fees to be paid in terms of aforesaid provisions, the impugned order does not indicate as to how the term market value has been determined by the trial court and even the short fall of court fees has not been indicated in the order leaving it to the wisdom of the revisionist-plaintiff to make good the deficiency. As such it is submitted that not only is the order impugned against provisions of Section 7 of the Act but also against settled law thereupon and is also vague.

6. Learned counsel has further submitted that it is admitted that trial court in present case has unlimited pecuniary jurisdiction and therefore the opposite parties-defendants do not have any right or locus to challenge the court fees paid by revisionist-plaintiff.

7. Learned Senior counsel appearing on behalf of opposite parties has refuted submissions advanced by learned counsel for revisionist with the submission that although the term 'market value' has not been defined any where in the Act but the same can not be taken to be the annual rental value particularly since the plots in question were never let out and is in fact required to be determined as per the circle rate notified by the Collector. It has been further submitted that suit being for partition of properties, there is no concept of plaintiff and defendant and all the parties to the proceedings have equal interest in the properties and therefore the defendant has a locus to raise objections regarding under valuation of suit and deficiency of court fees.

8. It has also been submitted that for proper determination of market value of the suit properties, the opposite parties - defendants had filed application No.C-144 before the trial court for issuance of commission and although objections C-155 were filed by the revisionist-plaintiff, the same has not been decided on the ground that it does not require any consideration.

9. Learned counsel has also adverted to the fact that in earlier proceedings between the parties pertaining to permanent injunction, regular suit bearing No. 1364 of 2012 filed by the present plaintiffs, the aforesaid three properties were shown valued at rupees ten crores and therefore it is inconceivable that market value of aforesaid three properties has been diminished to the extent as claimed in the present proceedings which have been filed only three years thereafter although price of land in Lucknow has been increasing at the rate of 15% per annum. It has been submitted that proper valuation of properties in question have been clearly indicated in written statement filed by defendants and as such valuation of suit was required to be done in accordance thereof and court fees also paid in such terms.

10. Learned counsel has also adverted to the plaint and the prayer indicated therein to submit that revisionist-plaintiff is seeking a declaration of cancellation of registered will dated 11th June, 2004 executed by late Govind Ram Suri without specific relief being prayed therefor and in such circumstances also the the prayer as

made in plaint was defective and court fees was required to be paid also in terms of cancellation of will deed.

11. In view of submissions advanced by learned counsel for parties, the following questions arise for determination in present revision:-

(A) Whether determination of 'market value' as contemplated under Section 7(v)(I)(c) would subsume annual rental value/nagar palika rental over plots or buildings amongst other modes of determination ?

(B) Whether in cases of unlimited pecuniary jurisdiction of trial court, defendant has any locus to raise objections regarding valuation of suit and court fees paid thereon?

(C) Whether ad valorem court fees was payable with regard to relief of declaration regarding will although no specific prayer for cancellation thereof was made?

12. The aforesaid questions are being answered as follows:-

Question-A: The provision for payment of court fees pertaining to properties to a suit for partition are indicated in Section 7 of the Act; the relevant portions of which are as follows:-

"7 (vi-A) for partition- In suits for partition.-

according to the full value of such share if on the date of presenting the plaint the plaintiff is out of possession of the property of which he claims to be a co-parcener or co-owner, and his claim to be a co-parcener or co-owner on such date is denied.

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-sections (v), (v-A) or (v-B), as the case may be.

7(v)For possession of lands, building or gardens. - In suits for the possession of land, buildings or gardens- according to the value of the subject-matter; and such value shall be deemed to be-

(I) where the subject-matter is land, and-

(a) where the land forms an entire estate or a definite share of an estate paying annual revenue to Government, or forms part of such an estate, and is recorded in the Collector's register as separately assessed with such revenue and such revenue is permanently settled-

thirty times the revenue so payable ;

(b) where the land forms an entire estate or a definite share of an estate paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid and such revenue is settled by not permanently-

ten times the revenue so payable;

(c) where the lands pays no such revenue or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue, and net profits have arisen from the land during the three years immediately preceding the date of presenting the plaint-

twenty times the annual average of such net profits ; but when no such net profits have arisen therefrom the market value which shall be determined by multiplying by twenty the annual average net profits of similar land for the three years immediately preceding the date of presenting the plaint;

(d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate

and docs not come under clause (a), (b) or (c) above-

the market value of the land which shall be determined by multiplying by fifteen the rental value of the land, including assumed rent on proprietary cultivation, if any ;

(II) where the subject-matter is a building or garden-

according to the market-value of the building or garden, as the case may be.

Explanation. - The word 'estate' as used in this sub-section, means any land subject to the payment of revenue for which the proprietor or farmer or raiyat shall have executed a separate engagement lo Government or which, in the absence of such engagement, shall have been separately assessed with revenue."

13. A perusal of the Act also indicates that the term 'market value' has not been defined anywhere in the Act although the same has been explained in a number of judgments of Hon'ble Supreme Court as well as this Court.

14. A reading of Section 7(V)(I)(c) provides for valuation and payment of court fees regarding lands which either do not pay any revenue or have been partially exempted from such payment or is charged with any fixed payment in lieu of such revenue and also contemplates when net profits have arisen from land or even otherwise when no such net profits have arisen then it is the market value which is to be determined. As noticed herein above the term 'market value' has not been defined under the Act but in the case of C.L. Basra versus Pearey Lal Basra & another reported in AIR 1960 Allahabad 590 has held as follows:-

" 19. The suit being for possession, court fee was payable under Section 7(v)(II) of the Court Fees Act, i.e. on the market value of the building. The term 'market value' has not been defined in the Act. and for this reason it can be determined in any manner considered proper. Strictly speaking, market value of a building cannot be taken to be the cost of its construction less depreciation. If buildings are in great demand and there is paucity of accommodation, people may be willing to pay a much higher value. But if there is no demand for buildings, for example, at bill stations like Mussoorie, the market value thereof i.e. the price at which people are willing to purchase them, would be less than the cost of construction less depreciation.

The market value will thus greatly depend on the supply and demand for building i.e. on a fluctuating factor. It is consequently difficult for parties to the proceeding to adduce evidence on the market value of a building, and for the courts to lay down how the market value should be calculated. It is for this reason that the cost of construction less depreciation is often regarded as a safe mode of computing the market value of a building. The market value can also be determined by other modes, for example, any rule framed by the Government or a rule approved of by the Courts of law, or any usage or custom prevalent in the area and having the force of law.

From a decision of the Custodian General of Evacuee Property in Mst. Aislia Bi v. Custodian of Evacuee Property, Bhopal, Case No. 27 of the Killings of the Custodian General Volume I by Bhawani Lal and Harbans Lal Mittal, it appears that the Evacuee Department regards 20 years produce as a fair estimate of market value of a house: in fact, as mentioned therein, at numerous occasions value of a house was fixed at 25 to 30 years' rent. When a quasi-

judicial tribunal has adopted the rule of assessing the valuation at 20 times the annual rent, the subordinate courts could adopt this rule, all the more, when for Government buildings rent is fixed on almost a similar basis.

In Uttar Pradesh annual rent of State owned residential buildings is invariably fixed at 6 per cent, of the valuation of the super-structure (cost less value of land). If this figure is taken as the guide, 16 2/3 times the annual rent shall be the valuation of the building alone. When the Munsif and also the learned District Judge determined the market value of the building including land at 20 times the annual rent, it cannot be said that they were in the wrong. In any case, that will not be a ground for interference by this Court."

15. In the case of Mitthoo Lal versus Gopal Chand reported in AIR 1979 Allahabad 226 the provisions of Section 7 pertaining to suit for partition has been considered in the following terms:-

19. Section 7(vi-a)' of the Court Fees Act relates to suits for partition. In the case of Mohd. Mustaq v. Mst Baqridan, AIR 1952 All 413 it was held that a suit for partition of the plaintiffs' share must be valued for purposes of jurisdiction under Section 4 of the Suits Valuation Act according to the share of the plaintiff. In this case an earlier decision of this Court was relied on. Thus there is a direct authority of this Court against the appellant. Moreover, the words used are "property involved in or the total of which is affected by the relief sought". In the instant case the respondent claims half share in the property. Thus the suit relates to the half share of the respondent in the property. The relief claimed relates to the half share of the respondent in the property. There is no dispute to the half share of the appellant in the property.

This point may be considered from another aspect. In suits for partition, where the plaintiff is not in actual possession of the property sought to be partitioned, relief of possession is claim- . ed. Section 7(VI-A) of the Court Fees Act lays down that in suit for partition the court fees is chargeable according to the one quarter of the value of the plaintiff's share, or according to the full value of the plaintiff's share, if the plaintiff was out of possession on the date of presenting the plaint. There is an explanation attached to this sub-clause. This explanation says that the value of the property shall be the market value computed in accordance with sub-section (V), Sub-sections (V-A) and (V-B) are not mentioned here because they are not applicable to the instant case. Section 7(V)(II) lays down that in suits for possession of a building, the court-fee chargeable is according to the market value of the building. Section 4 of the Suits Valuation Act also refers to Section 7(V) and it clearly says that suits for possession of a building for the purposes of jurisdiction shall be valued at the market value of the property involved. Thus where in a suit for partition the plaintiff also claims possession of the property allotted to him, he would be liable to pay court fee on the market value of the property upon which he seeks possession. Therefore, for the purposes of jurisdiction also the property upon which possession is sought has to be valued at its market value. Thus there is reciprocity between Section 7(V) of the Court Fees Act and Section 4 of the Suits Valuation Act.

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22. With regard to the market value there is a clear finding of the learned Munsif. There appears no mistake in

arriving at the said value. It shall be noticed that the learned Munsif fixed the value at 20 times of the annual rental. This is one of the modes of finding out the valuation and it cannot necessarily be said to be wrong."

16. The aforesaid judgment of Mitthoo Lal (supra) has been followed thereafter with approval in the case of Rama Kant Malviya versus District Judge, Allahabad and others reported in (2002)48 ALR 156.

17. Subsequently in the case of Tara Devi versus Sri Thakur Radha Krishna Maharaj, through Sebaits Chandeshwar Prasad and Meshwar Prasad and another reported in (1987) 4 Supreme Court Cases 69 it has been held as follows:-

"It is now well settled by the decisions of this Court in Sathappa Chettiar v. Ramanathan Chettiar [AIR 1958 SC 245 : 1958 Mad LJ (Cri) 148 : 1958 SCR 1024] and Meenakshisundaram Chettiar v. Venkatachalam Chettiar [(1980) 1 SCC 616 : AIR 1979 SC 989 : (1979) 3 SCR 385] that in a suit for declaration with consequential relief falling under Section 7(iv)(c) of the Court Fees Act, 1870, the plaintiff is free to make his own estimation of the reliefs sought in the plaint and such valuation both for the purposes of court-fee and jurisdiction has to be ordinarily accepted. It is only in cases where it appears to the court on a consideration of the facts and circumstances of the case that the valuation is arbitrary, unreasonable and the plaint has been demonstratively undervalued, the court can examine the valuation and can revise the same. The plaintiff has valued the leasehold interest on the basis of the rent. Such a valuation, as has been rightly held by the courts below, is reasonable and the same is not demonstratively arbitrary nor there has been any deliberate underestimation of the reliefs."

18. In the case of Agra Diocesan Trust Association versus Anil David and others reported in (2020) 19 Supreme Court Cases 183 it has been held as follows:-

" In the opinion of this Court, there was no compulsion for the plaintiff to, at the stage of filing the suit, prove or establish the claim that the suit lands were revenue paying and the details of such revenue paid. Once it is conceded that the value of the land [per Explanation to Section 7(iv-A)] is to be determined according to either sub-clauses (v), (va) or (vb) of the Act, this meant that the concept of "market value" -- a wider concept in other contexts, was deemed to be referrable to one or other modes of determining the value under sub-clauses (v), (va) or (vb) of Section 7(iv-A). This aspect was lost sight of by the High Court, in the facts of this case. The reasoning and conclusions of the High Court, are therefore, not sustainable."

19. Upon perusal of aforesaid judgments, it is apparent that concept of market value has been explained in the aforesaid judgments that it would have wider concept and would be deemed to be referable to one or other modes of determining the value under sub clauses (v)(va) or (v)(b) of Section 7(iv-a) and that annual rental value of a plot or building would be one of the valid modes of determination of valuation of suit property and payment of court fees thereupon.

20. The aspect of circle rate as notified by the Collector of district, in the considered opinion of this Court can not be a valid

proposition for determining market value of a suit property since the said aspect pertains to assessment of market value of landed property only for the purposes of registration of deeds and imposing stamp duty by revenue authorities. The same can not be extended for valuation of properties pertaining to partition suits and for payment of court fees thereupon. The concept is also explainable in another way that the circle rate is also dependent on the market value of immovable properties as per demand and supply and the said factor has also not been held to be appropriate in the case of C.L. Basra (supra) as quoted herein above particularly since demand and supply of immovable properties in a particular locality or district or even state is variable and may be a fluctuating factor.

21. The aspect of circle rate being taken for purposes of market value has already been deprecated by Division Bench of this Court in the case of M/s Nadeem Apartments Private Limited versus State of U.P. and others reported in 2004(55) ALR 575 to the effect that circle rate can never be taken to be the proper rate to assess actual market value of the landed property since it is meant only for the registration of sale-deeds for imposing stamp duty by revenue authority.

22. Learned counsel for opposite parties has also adverted to earlier suit filed by revisionist-plaintiff for permanent injunction in which a considerably higher valuation of properties was indicated and it has been submitted that valuation of property would not lower to such a considerable level as has been indicated in present suit which has been filed within three years thereafter.

23. The aforesaid submission does not hold good ground particularly in view of what has been held in the case of C.L. Basra (supra) that property prices in various localities keep fluctuating from time to time and it would be an onerous task for any court to keep determining such fluctuating rates every year and as such it would be appropriate that the average rental value of property should be taken and be multiplied as indicated in the provisions of Act itself.

24. Learned counsel for opposite parties have referred to the following various judgments to buttress his submissions:-

25. Onkarlal and others versus Ram Sarup and others reported in ILR 1954 All. 106(FB), Sanjay Tomar versus Shobha Saklani and another reported in 2018 SCC OnLine All 993 and Mohd Yamin and others versus Mulla Abdul Sattar and others reported in 2000 SCC OnLine All 492.

26. So far as judgment in the case of Onkarlal (supra) is concerned, it is evident that the same pertains to determination of court fees in case plaintiff is not in possession of property which is sought to be partitioned in the suit. The aforesaid judgment as such does not have any application in the present facts and circumstances of the case which pertains only to definition of the term 'market value' and not with regard to whether ad valorem court fees is payable in view of consequential relief sought.

27. The cases of Sanjay Tomar and Mohd Yamin (supra) are also inapplicable in the facts of case since it also involves the issue whether court fees payable should be as per the plaintiff's share or on the entire property since plaintiff was not in possession over the property sought to be partitioned. As such the said judgments also not pertaining to determination of market value, are also inapplicable.

28. Considering the aforesaid, it is apparent that payment of court fees taking annual rental value of any immovable

property is one of the safe methods for determining market value of property in terms of section 7 (V)(I)(c) of the Act and therefore the trial court has clearly erred in not accepting the same. The question therefore is answered in the affirmative in favour of revisionist-plaintiff.

29. **Question-B:** So far as this question is concerned, it is admitted between the parties the suit in question has been filed in court which has unlimited pecuniary jurisdiction.

30. With regard to the said question, it is admitted between the parties that suit proceedings are pending in a court which has unlimited pecuniary jurisdiction. In the light of aforesaid, Hon'ble Supreme Court in the case of Sujir Keshav Nayak versus Sujir Ganesh Nayak reproted in (1992) 1 Supreme Court Cases 731 has held as follows:-

"It is now well settled by the decisions of this Court in Sathappa Chettiar v. Ramanathan Chettiar [1958 SCR 1024 : AIR 1958 SC 245] and Meenakshisundaram Chettiar v. Venkatachalam Chettiar [(1980) 1 SCC 616] that in a suit for declaration with consequential relief falling under Section 7(iv)(c) of the Court Fees Act, 1870, the plaintiff is free to make his own estimation of the reliefs sought in the plaint and such valuation both for the purposes of court fee and jurisdiction has to be ordinarily accepted. It is only in cases where it appears to the court on a consideration of the facts and circumstances of the case that the valuation is arbitrary, unreasonable and the plaint has been demonstratively undervalued, the court can examine the valuation and can revise the same."

But the defendant has no right to raise such objection nor the court should delve into the matter after filing of written statement on evidence. The law on this aspect, thus, should be taken to be as under:

(1) Where the question of court fee is linked with jurisdiction a defendant has a right to raise objection and the court should decide it as a preliminary issue.

(2) But in those cases where the suit is filed in court of unlimited jurisdiction the valuation disclosed by the plaintiff or payment of amount of court fee on relief claimed in plaint or memorandum of appeal should be taken as correct.

(3) This does not preclude the court even in suits filed in courts of unlimited jurisdiction from examining if the valuation, on averments in plaint, is arbitrary."

31. A coordinate Bench of this Court in the case of Smt. Santosh Kumari and another versus Sukh Dev Singh, Civil Revision No. 555 of 2014 as follows:-

"5. The Court Fees Act was enacted to collect revenue for the benefit of the State and a contesting party cannot use it as a tool to obstruct the trial. It is difficult to understand what grievance the defendant can make by seeking to invoke the revisional jurisdiction on the question whether the plaintiff has paid adequate court-fee on his plaint. Whether proper court-fee is paid on a plaint is primarily a question between the plaintiff and the State. Even if the defendant believes honestly that proper court-fee has not been paid by the plaintiff, still he has no right to move the superior court against the order adjudging payment of court-fee payable on the plaint."

32. Upon applicability of aforesaid judgments in the present facts and circumstances, it is evident that in such case as the present one where the court has unlimited pecuniary jurisdiction, the defendant does not have any vested right to raise objections and in case where valuation is disclosed by the plaintiff on the relief claimed in the plaint, the same should be taken as correct. Since the plaintiff is free to make his own estimation of the reliefs sought in the plaint and therefore his valuation for the purposes of court fees has to be ordinarily accepted. The word of caution in such cases is only in case the court concerned comes to conclusion that the valuation is arbitrary, unreasonable or demonstratively undervalued. However the same does not give any right to the defendant to use it as the defence merely to frustrate the claims of the plaintiff.

33. Judgments cited by learned counsel for opposite parties with regard to same R. Ramamurthi Iyer versus Raja Rajeshwara Rao reported in (1972) 2 Supreme Court Cases 721 does not have any application in the present facts and circumstances since proceedings therein pertained to withdrawal of suit proceedings and for purchase of share in partition by a co-sharer as per valuation, which was not for the purposes of payment of court fees. Similarly the case of Dhiren Ghosh versus Mayarani @ Karibala Ghosh and others reported in 2018 SCC OnLine Cal 3487 pertained to an application filed by co-sharer under Order 1 Rule (10) of the Code of Civil Procedure since the proceedings pertained to partition. As such it is evident that judgments cited on that point by learned counsel for opposite parties do not have any application in the present case and it is therefore held that in cases where suits have are filed in a court having unlimited pecuniary jurisdiction, the defendant does not have any vested right to raise objections regarding valuation of suit property and court fees paid thereon. However it is for the court concerned to consider the same in case it finds valuation of suit property and court fees paid thereupon to be arbitrary or demonstratively undervalued, of which there is no finding recorded in the impugned order.

34. The question No.B therefore stands answered in favour of revisionist-plaintiff.

35. **Question-C:** With regard to aforesaid question, although learned counsel for opposite parties has submitted that the prayer made in the plaint is in the nature of seeking challenge to will dated 11.06.2004 executed by Sri Govind Ram Suri, but no specific prayer has been made for its cancellation. It is also submitted that there is no specific prayer either regarding cancellation of the aforesaid will-deed or even any declaration with regard thereto but the revisionist-plaintiff would be required to pay ad valorem court fees thereupon.

36. With regard to aforesaid question, it is evident that the impugned order has not dealt with any such contention nor does it appear to have been raised before it. A perusal of plaint will also indicate that there is no prayer made therein either for cancellation of any will-deed or for declaration of it to be void. As such, the aforesaid question may not require any adjudication by this Court particularly in view of the fact that the said question has already been answered by Hon'ble the Supreme Court in the case of Suhrid Singh versus 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."

37. The **Question-C** as such stands answered accordingly.

38. In view of aforesaid discussion, **Questions No.A and B** are answered in favour of revisionist. Resultantly, the revision succeeds and is allowed. Parties to bear their own costs.

(2023) 2 ILRA 27
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Civil Revision No. 115 of 2022

Aslam Qadeer ...Revisionist
Versus
Nayyar Jahan Raza & Ors.
...Opposite Parties

Counsel for the Revisionist:
Sri Kumar Anish

Counsel for the Opposite Parties:

A. Civil Law -Code of Civil Procedure, 1908-Section 151 - Order 22 - Rule 4-Substitution application filed for substituting the legal heirs of respondent no.1-application has to be made within the time prescribed in law for substituting the heirs of defendant and suit would abate only when the said application has not been filed within the time prescribed. (Para 1 to 27)

The revision is dismissed. (E-6)

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

1. Heard Sri Kumar Anish, learned counsel for the revisionist.

2. The present revision has been filed by Aslam Qadeer, defendant no.6, in Original Suit No.1003 of 2015 instituted by one Fatima Imran seeking a decree of specific performance of the contract against respondent nos.1 to 3 (defendant nos.1 to 3 in original suit) with further prayer that respondent nos.1 to 3 along with respondent nos.4 to 7 (defendant nos.5 to 8 in original suit) be directed to execute the sale deed.

3. During the pendency of the suit, Nayyar Jahan Raza (defendant no.1) died on 30.01.2021. After the death of Nayyar Jahan Raza, plaintiff/respondent no.8 filed substitution application 144A1/1 under Order 22 Rule 4 read with Section 151 of C.P.C. for substituting the legal heirs of Late Nayyar Jahan Raza.

4. During the pendency of substitution application 144A1/1, Irfan Khan one of the heirs of the Late Nayyar Jahan Raza also died on 30.05.2021. After the death of Ifran Khan, plaintiff/respondent no.8 filed an amendment application 146Ga seeking amendment in the substitution application 144A1/1 which was allowed by the trial court vide order dated 20.04.2022.

5. The order dated 20.04.2022 was challenged by the revisionist through Civil Revision No.65 of 2022 which was allowed by this Court vide judgement dated 27.06.2022 with liberty to the plaintiff/respondent no.8 to file a separate substitution application to substitute the heirs of Irfan Khan.

6. Thereafter, plaintiff/respondent no.8 again filed amendment application 175A, to which revisionist filed an objection stating therein that the said application is not maintainable as plaintiff/respondent no.8 was supposed to file separate substitution application because of the order of this Court dated 27.06.2022.

7. On the objection of the revisionist, application 175A was rejected by the trial court vide order dated 02.09.2022 with liberty to the plaintiff/respondent no.8 to file a fresh substitution application under Order 22 Rule 4 of C.P.C.

8. The plaintiff/respondent no.8 after the order of the trial court dated 02.09.2022 filed fresh substitution application 179A under Order 22 Rule 4 of C.P.C. for substituting the heirs of Late Irfan Khan.

9. The application 179A was objected to by the revisionist by filing an objection that application 179A under Order 22 Rule 4 of C.P.C. was not maintainable and is liable to be rejected as no application condoning the delay in filing the substitution application 179A has been filed. It is also stated that even otherwise this Court vide order dated 27.06.2022 directed the plaintiff/respondent no.8 to file a separate substitution application for substituting the heirs of late Irfan Khan within six weeks, and since six weeks period has expired and no delay condonation application has been filed, therefore, the said application was not maintainable and thus, the suit is abated against late Irfan Khan.

10. The trial court vide order dated 3.10.2022 allowed both applications i.e. application 179A and application 144A. So far as application 144A1/1 regarding the substitution of heirs of Late Nayyar Jahan Raza is concerned, the revisionist has no grievance. In the present revision, the

revisionist has assailed the order dated 03.10.2022 to the extent it allows application 179A of the plaintiff/respondent no.8 to substitute the heirs of Late Irfan Khan.

11. The submission has been advanced by the learned counsel for the revisionist only with respect to the order of the trial court allowing the application 179A. It is contended by the learned counsel for the revisionist that the trial court has committed jurisdictional error in allowing the said application inasmuch as the application 179A was not maintainable as the limitation for filing the substitution application to implead the heirs of Late Irfan Khan has expired and no application for condoning the delay has been filed with the substitution application. Learned counsel for the revisionist has further urged that as the application to implead the heirs of the Late Irfan Khan has not been filed within time, therefore, on the expiry of the period of limitation for filing a substitution application, the suit against Irfan Khan is abated and thus, order of the trial court so far as it allows the application 179A is liable to be set aside.

12. I have considered the submissions advanced by the learned counsel for the revisionist and perused the record.

13. The fact as emerges from the record are that Original Suit No.1003 of 2015 has been instituted by the plaintiff/respondent no.8 for a decree of specific performance of the contract against revisionist and respondent nos.1 to 7 (defendant nos.1 to 5 & 7 to 8). During the pendency of the aforesaid suit, Nayyar Jahan Raza (defendant no.1) had died on 30.01.2021, and plaintiff/respondent no.8 filed an application 144A1/1 for substituting the heirs of Late Nayyar Jahan Raza.

14. Before the said application could be allowed, Irfan Khan one of the heirs of the Late Nayyar Jahan Raza died on 30.05.2021. After the death of Irfan Khan, plaintiff/respondent no.8 filed amendment application 146A in substitution application 144A1/1 which was allowed by the trial court vide order dated 20.04.2022. The said order was set aside by this Court vide judgement dated 27.06.2022 passed in Civil Revision No.65 of 2022 with liberty to the plaintiff/respondent no.8 to file a fresh substitution application to substitute the heirs of Late Irfan Khan.

15. After the order dated 27.06.2022 passed by this Court, plaintiff/respondent no.8 submitted an application 175A for amendment in the plaint which was again contested by the revisionist. The trial court vide order dated 02.09.2022 rejected the application of the plaintiff/respondent for amending the plaint. Thereafter, plaintiff/respondent no.8 filed substitution application 179A which was allowed by the trial court vide order dated 03.10.2022.

16. In such factual backdrop, the question which arises for consideration in the present revision as to whether plaintiff/respondent no.8 should have filed a delay condonation application along with the substitution application for condoning the delay in filing the substitution application 179A and further, an application to set aside the abatement should also have been made by the plaintiff/respondent no.8 as the suit in respect of Irfan Khan was abated for not filing the substitution application within 90 days period from the date of death of Irfan Khan.

17. Before proceeding to deal with the contention advanced by the learned counsel for the revisionist, it would be apt to reproduce Order 22 Rule 4 (1) & (3) of C.P.C relevant in the present dispute:-

"4. Procedure in case of death of one of several defendants or of sole defendant- *(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.*

(2)...

*(3) Where within the time limited by law no applicati*on is made under sub-rule (1), the suit shall abate as against the deceased defendant"

18. A reading of Order 22 Rule 4 (1) of C.P.C. suggests that when the defendant dies and the right to sue survives, the Court on an application made on that behalf shall cause the legal representative of the defendant to be made a party and shall proceed with the suit. Order 22 Rule 4(3) of C.P.C. provides that where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

19. Now, in considering the said issue, the first question that crops up is when a person is said to be a defendant in a suit and when the limitation for filing the substitution application shall begin.

20. The word 'defendant' in Advanced Law Lexicon 6th Edition Volume 2 is defined as under:-

"(i). The party sued in an action. One who is sued (or prosecuted). The title "defendant" is more generally applied to a party in civil than in a criminal suit or proceeding.

(ii). The party against whom a charge or complaint is brought."

21. The word 'defendant' in Black's Law Dictionary Ninth Edition is defined as under:-

"A person sued in a civil proceeding or accused in a criminal proceeding."

22. Thus, from the aforesaid dictionary meaning of the word 'defendant', it can be culled out that a defendant is a person who has been impleaded in a suit and against whom the plaintiff has a cause of action and based on the said cause of action, the plaintiff is entitled to relief as claimed in the suit against said person. In other words, the 'defendant' means a person against whom any claim or charge is brought that he wishes to refute. Thus, a person would become a 'defendant' in any suit or proceeding only when he has been impleaded and has been called upon to refute the pleading of the suit or proceeding against him.

23. Now, to ascertain when Late Irfan Khan became the defendant in the suit and after his death, when provision of Order 22 Rule 4 of C.P.C. is attracted to enable the heirs of the Late Irfan Khan to file a substitution application, the facts of the case needs to be examined.

24. In the instant case, it is not in dispute that application 144A1/1 filed by the plaintiff/respondent no.8 was not decided on the date of death of Irfan Khan

who had died during the pendency of the substitution application. In the meantime, plaintiff/respondent no.8 filed two misconceived applications which were rejected by the court. Thereafter, the plaintiff/respondent no.8 filed substitution application 179A.

25. The substitution application 144A1/1 was not allowed, when the application 179A was filed, therefore, the suit could not have abated against Irfan Khan as he did not become the defendant in the suit for want of any order on the substitution application 144A1/1. Late Irfan Khan shall become defendant only after the substitution application 144A1/1 was allowed by the trial court and would become eligible to deny or refute the claim of the plaintiff/respondent no.8 after his substitution application was allowed and he has been substituted. Thus, he will become the defendant for the purpose of Order 22 Rule 4 of C.P.C. on the date his substitution application is allowed by the trial court. Given the language used under Order 22 Rule 4 (1) (3) of C.P.C., the application has to be made within the time prescribed in law for substituting the heirs of the defendant and the suit would abate only when the said application has not been filed within the time prescribed.

26. In the instant case, the application to substitute Irfan Khan was pending and was not allowed and till it was allowed, there was no question of substituting the heirs of the Late Irfan Khan. Thus, the limitation to substitute the heirs of the Late Irfan Khan would start running from 03.10.2022 when application 144A1/1 regarding the substitution of heirs of the Late Nayyar Jahan Raza is allowed by the trial court. It is not in dispute that on the date the substitution application 144A for substituting the heirs of Late Nayyar Jahan Raza was allowed, the application 179A to substitute the heirs of Late Irfan Khan was filed and pending before the court. Thus, this Court believes that there was no delay in filing the substitution application 179A to substitute the heirs of Irfan Khan, nor the suit could have abated against Irfan Khan since the substitution application 144A1/1 was not decided by the court below.

27. Thus, for the reasons given above, the civil revision lacks merit and is accordingly, ***dismissed*** with no order as to costs.

(2023) 2 ILRA 31
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.01.2023

BEFORE

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

Criminal Appeal No. 1371 of 2015

Lokesh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Araf Khan, Sanakshi Arora, Sri Lihazur R. Khan, Sri Rajesh Pathik, Sri Gaurav Kakkar, Sri Sanjay Kumar Dubey.

Counsel for the Respondent:
Govt. Advocate, Sri Satish Solanki

A. Criminal Law - Indian Penal Code, 1860 - Section 302 - Evidence Act, 1872 - Section 32 - Dying declaration - It is necessary for the prosecution to establish that the dying declaration was *recorded when the victim was in the fit state of mind* - merely certifying that the victim was conscious while recording the

statement, not sufficient - A specific satisfaction was warranted regarding fit metal state of the victim - In medical science two stages namely *conscious* and *a fit state of mind* are distinct and are not synonymous - One may be conscious but not necessarily in a fit state of mind - Merely stating that the patient is clinically fit does not amount to a satisfaction with regard to fit mental state of the patient - dying declaration must carry a certificate by the Executive Magistrate to the effect that it was a voluntary statement made by the deceased and that he had read over the statement to him (Para 46, 48, 50)

B. Criminal Law - Indian Penal Code, 1860 - Section 302 - Evidence Act, 1872 - Section 32 - Dying declaration - On the date of incident itself the dying declaration of the victim was recorded after the doctor certified that the victim, aged 18 years, was *clinically fit* for giving her dying declaration - no satisfaction recorded by the attending doctor that victim was in a fit mental state to give a voluntary statement - Deputy Collector, who was present at the time of recording of dying declaration of the victim, admitted that there was no recital in the declaration of the victim that the statement was read out to the victim & that it was a voluntary statement made by the deceased - Attending doctor stated that the injured was burnt over 90% of her body and her condition was deteriorating continuously, her pulse was weak - In the cross-examination he stated that the condition of the victim was much below normal but she was conscious -*Held* - dying declaration not reliable in the facts of the present case since the victim was not in a position to give any statement - the condition of the victim was critical and her trachea was blocked for which operation was proposed and, therefore, the victim was not in a position to speak or to get her dying declaration recorded - no satisfaction recorded by the Doctor about the victim being in a *fit mental state to give her statement* - Also, contents of the dying declaration inconsistent with the statements of prosecution witnesses (Para 55, 56,)

C. Criminal Law - Indian Penal Code, 1872 - Section 376 - Rape - it was claimed that four young men committed rape upon the victim, aged 18 years, but no injuries were found on her private parts & her hymen was old torn - vaginal swabs of the victim were sent for pathological examination wherein no spermatozoa found on the victim - medical evidence does not support commissioning of rape upon the victim (Para 37)

Dismissed. (E-5)

List of Cases cited:

1. Paparambaka Rosamma & ors. Vs St. of Andhra Pradesh (1999) 7 SC 695

2. Naresh Kumar Vs Kalawati & ors. 2021 SCC OnLine SC 260

3. Suriender Kumar Vs St. of Har. (2011) 10 SCC 173

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

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This criminal appeal is directed against the impugned judgment and order dated 11th February, 2015 passed by the Additional Sessions Judge, Court No.3, Hathras in Session Trial No. 97 of 2013 (State of U.P. Vs. Lokesh & 2 Others), arising out of Case Crime 296 of 2007, whereby accused-appellants- Lokesh, Dani and Indra have been convicted and sentenced for one year rigorous imprisonment each for the offence under Section 452 I.P.C. with fine of Rs.1,000/- each, in default thereof, to further undergo one month each additional imprisonment; life imprisonment for the offence under

Section 302/34 I.P.C. with fine of Rs. 5,000/- each, in default thereof, to further undergo, three months additional imprisonment; and ten years rigorous imprisonment for offence under Section 376 I.P.C. each with fine of Rs. 5,000/-, in default thereof, to further undergo three months each additional imprisonment, with an observation that all the sentences are to run concurrently.

2. We have heard Mr. Araf Khan, learned counsel appearing for the accused-appellants and Mr. Aruendera Singh, learned A.G.A. for the State as also perused the entire materials available on record.

3. This case is a classic example of how an unscrupulous person can utilise even a misery befallen on him to avenge his enmity by falsely implicating his enemy.

4. In the facts of this case, on the basis of a written report (Exhibit-ka/1) a first information report came to be lodged at Police Station M.M. Gate, Agra, as Case Crime No. Nil of 2007, under Sections 376 and 307 I.P.C. on 29th April, 2007, in respect of the incident occurred on 27.04.2007 at around 02:30 p.m., whereafter the FIR has been transferred to the Police Station-Sadabad, where the same was numbered as Case Crime No. 296 of 2007, under Sections 376, 307 and 452 I.P.C. The informant/P.W.-1 happens to be the father of the victim who had gone with his wife to his relative's place and was not present at the place of occurrence when the incident occurred. The victim/deceased aged 18 years was a 1st year law student studying in B.S.A. College, Mathura. When she was alone in her house and her grand-parents had gone towards the Jungle/forest, at around 2:30 p.m. the accused Lokesh, Dani, Indu/Indra, all sons of Surajmal and Hukum, friend of Lokesh, entered the house of the informant, grabbed the victim who was attending to the domestic chores and was intoxicated. The victim had objected to it but the four accused gagged her mouth and forcibly committed rape. With an intent to remove the evidence of crime, the accused then poured kerosene on the deceased; and set her ablaze, and fled. The victim was on the first floor of the house, rushed out screaming and somehow managed to come down the stairs whereafter neighbours tried to douse the fire. The informant was intimated about the incident and was told that they (neighbours) are bringing the victim to Agra. The informant was asked to meet them at S.N. Medical College, Agra. Persons from the village accordingly brought the victim in an injured state and her condition was critical. The victim was admitted in the emergency ward. She was struggling with life and death. On being asked, the victim informed P.W.-1/informant about the incident. On account of treatment and other exigencies, it was not possible for the informant/P.W.-1 to lodge a timely report and as the incident has to be reported to police, the informant has lodged the report at the police station. The F.I.R. was initially registered at Police Station M.M. Gate, Agra and was later transferred to Police Station-Sadabad, District Hathras, where it was registered as Case Crime No. 621-35 -Nil of 2007 under Sections 376 and 307 I.P.C.

5. On the date of incident itself i.e. 27.04.2007 the dying declaration of the victim was recorded after the doctor certified that the victim, aged 18 years, is clinically fit for giving her dying declaration. The contents of the dying declaration are reproduced hereinafter:

"आज दिनॉक 27.4.07 को थाना-एम.एम. गेट की सूचना के आधार पर S. N. Medical College में Burn patient कु० प्रीति D/o प्रकाश वीर, उम्र-लगभग 18 वर्ष, R/O - ऊँचा गाँव, P/S - सादाबाद, जिला-हाथरस का D.D. (मृत्यूपूर्व बयान) दर्ज किया। मरीज ने बताया कि आज दिनाॉक 27.4.07 को समय लगभग 2.30 pm. पर हमारे गांव के लोकेश, इन्दर ,दानी S/o सूरजमल तथा हुकुम S/o अज्ञात मेरे घर में घुस आए । मैं घर पर अकेली थी तथा बर्तन साफ कर रही थी। मेरे पिताजी खेत पर गए थे। माँ भी बाहर जानवरों के बेड़े में गई थी। इन लड़कों ने मुझे कोई चीज सुँघाई, जिससे मैं बेहोश होने लगी। इसके बाद इन लोगों ने मेरे साथ दुराचार (बलात्कार) किया । जब मुझे होश आने लगा तो देखा कि ये लोग अब भी मेरे साथ दुराचार कर रहे थे। ये लोग मेरे मुंह में कपड़ा ठूस दिए थे। मुझे होश आता देख ये सभी मुझे कमरे में बन्द कर दिए तथा घर में रखे मिट्टी के तेल को मेरे ऊपर डालकर आग लगा दिए और दरवाजा खोलकर भाग गए। आग लगने पर मैं जोर से चिल्लाई। मेरी आवाज (चीख) सुनकर लोग आए तथा आग बुझाए तथा Hospital में भर्ती कराये। ***इन लोगों के घर से हमारी पुरानी दुश्मनी है। इसी कारण इन लोगों ने ऐसा किया। इनको सख्त सजा मिलनी चाहिए। अब मुझे कुछ नहीं कहना है।"***

(Emphasis supplied by us)

6. The victim was taken first to S.N. Medical College, Agra, where the Doctor examined her. The victim had 90% burns. Smell of kerosene was present on her. The victim was referred for her internal examination to the District Government Women Hospital, Agra. Dr. Meera Mathur (P.W.-6) conducted the internal examination of the victim and opined as under:

"Internal Examination- No injury seen over private parts. Pubic hairs present. Vagina admits two fingers easily. Hymen was old torn. Uterus anteverted. Normal size. No burn marks present over private parts.

Vaginal smear taken and sent to pathology department, District Hospital, Agra for examination for the presence of spermatozoa.

For determination of age, case is referred to Chief Medical Officer, Agra."

7. With reference to opinion of P.W.-6, the vaginal swabs were sent for pathological report wherein no spermatozoa was spotted on the swabs.

8. As per the evidence collected during the course of the investigation, some procedure was to be performed upon the victim on 28th April, 2007. As the condition of the victim deteriorated, she was taken to Safdarjang Hospital, New Delhi, where she ultimately succumbed to her injuries on 14th May, 2007. The post-mortem report is on record as per which the approximate percentage of burn injuries is 90%. The cause of death was septicaemia due to following ante-mortem external burn injuries:

"Present on all over the body except patches of head, abdomen, pelvis and both feet. In state of burn injuries, line of redness, charring, granulation tissue are present on all involved areas."

9. In the post-mortem report, following is the status of internal examination of the victim:

"In head (scalp and skull) no abnormality detected. Brain; congested. In neck, naso-laryngo-pharynx-mucosed congestion. In chest, lungs congested, trachea and bronchi, mucosal congestion.

Further in chest, no abnormality detected in heart. In abdomen, stomach was empty, no abnormality was detected in mucosal wall. No abnormality was detected in intestines, liver, spleen, kidneys and pancreas. In pelvis, bladder was empty, no abnormality was detected in uterus, hymen tear in healing phase. No abnormality was detected in rest of structures inside the body."

The Autopsy Surgeon has further opined that the death of the victim could be caused due to other reasons including attempt to suicide.

10. After the death of the victim, the F.I.R. was converted to one under Section 302 I.P.C. in place of Section 307 I.P.C. The investigation proceeded in the matter wherein statement of various witnesses were recorded. One of the persons whose statement was recorded under Section 161 Cr.P.C. is Babu Lal who is the grand father of the victim. The investigation concluded with the submission of charge-sheet against four accused on 31st July, 2007. The list of witnesses to be produced by the prosecution contains a noticeable absentee i.e. grand father of the victim, namely, Babu Lal. Upon submission of the charge-sheet under Chapter XII Cr.P.C., the concerned Magistrate took cognizance and referred the matter to the Court of Sessions where charges were framed against the accused on 13th June, .2008 under Sections 376, 302/34 and 452 I.P.C. The charges so framed were read out to the accused-appellants, who denied the accusation and demanded trial.

11. The prosecution in order to prove its case has produced the first informant Prakash Veer as P.W.-1. This witness has supported the prosecution case in his examination-in-chief. He has clearly stated that when his parents (grand parents of the victim) had gone towards the Gher and forest, in the afternoon four accused entered in the house at around 2:30 P.M.; grabbed the victim; committed rape upon her; and whereafter set her ablaze by pouring kerosene so that the evidence could be destroyed. He has proved the contents of the first information report lodged in the matter. He has stated that the victim was admitted uptill 02.05.2007 at S. N. Medical College, Agra whereafter she was taken to Safadarganj Hospital, Delhi where she died.

12. In the cross-examination, P.W.-1 has stated that he and P.W.-3 are real brothers. They live in a double story house where their shares are already segregated. Northern portion of the first floor fell in the share of P.W.-1, while southern portion fell in the share of P.W.-3. This witness is a Law Graduate although he has not got himself registered. In the cross-examination, this witness has admitted that his brother (P.W.-3) has five children, who were living in the same house. He has denied the suggestion that either the victim set herself on fire or she caught fire accidentally while cooking food. He has further stated that while taking the victim to hospital, the victim informed her mother that in case she was present, the incident could be avoided. He has stated that while the victim was being taken to Ashoka Hospital, she was not conscious. She was largely unconscious and could open her eyes in between. The seriousness of victim increased and she was unconscious when she reached S.N. Hospital, Agra. It is then stated that around 06:00 p.m. the victim became conscious after she was given first aid treatment. He also stated that he was with his daughter in the emergency room and she narrated the entire incident to him.

He denied the suggestion that his parents were at home at the time of occurrence. He has also denied previous enmity between him and the accused persons. He has nevertheless admitted that in 1989 an incident occurred in respect of which cross cases were lodged between father of accused and the informant's family, in which a compromise was ultimately entered between them. He has further denied the existence of any criminal case.

13. P.W.-1 has been cross-examined at length and he has disclosed the topography of his house. There exists 5-6 rooms in the ground floor of the house while another 5-6 rooms exist on the first floor of the house. There is an open courtyard on the upper floor and the roof is open on the western side. There is about 10 feet height boundary around the house of P.W.-1. There is a kitchen on the upper floor measuring 8 x 7 feet. At the time of incident, the parents of the informant/P.W.1 were present in the house. While the mother of P.W.-1 lived with P.W.-3, his father was living on his side. He has admitted that he had left along with his wife and is not aware as to what was cooked by his daughter. He has denied any knowledge about the person who doused the fire after the victim came down the stairs.

14. P.W.-1 has also admitted that after the victim was admitted to the emergency ward there was no improvement in her condition which worsened later. P.W.-1 in his cross-examination has stated that the statement of his father under Section 161 Cr.P.C. about him along with his wife (P.W.-1 and P.W.-2) to relative's place at Agra and that grand-father Babu Lal and victim alone were in the house is correct. He has admitted that statement of his father under Section 161 Cr.P.C. was recorded in his absence. This witness has lastly stated that his statement before the court is based upon the hearsay information received from others.

15. P.W.-2, namely, Kamlesh Chaudhary (wife of first informant/P.W.-1) happens to be the mother of the victim and has supported the prosecution case. She has substantially adopted the stand taken by P.W.-1 at the stage of trial. In her cross-examination she has admitted that in the incident in question, the hands of her father-in-law Babu Lal also got burnt. However, Babu Lal had not accompanied the victim to the hospital. She has admitted that at the time of incident her father-in-law Babu Lal was living with her. She has also admitted that there was no estrangement, irritation or enmity between her father-in-law and herself. P.W.-2, has rather admitted that her father-in-law used to love them. A specific statement was made that there is no loss of love between the victim and her grand father. It is also admitted that on the date of the incident meals were prepared for her father-in-law by the victim.

16. P.W.-3 Raj Bahadur, who is the uncle of the victim, in his cross-examination has stated that he saw the accused running in the lane soon after the incident of fire. He claims that he raised an alarm after he saw the victim and with the help of villagers the fire was doused by him. He has also stated that the victim was taken to Agra in the vehicle of Yogesh for treatment. He has fully supported the prosecution case. This witness has been cross-examined. He has stated that his wife and children live with him in the same house and the age of his eldest daughter is 20 years. This witness has stated that about half an hour was consumed in dousing the fire.

17. P.W.-4 was posted as Head Moharir at Police Station M.M. Gate District Agra on the relevant date when the F.I.R. was registered. He has proved the Chik F.I.R. He has admitted that vide Entry No. 28 dated 27th April, 2007 in the G.D., an entry was made in the police station with regard to a burn patient having been admitted with 90% burns.

18. P.W.-5 is Doctor Ramkumar Gupta who has proved the pathological report as per which no dead or live spermatozoa has been found on the victim. P.W.-6 is Doctor Meena Mathur, who had conducted the internal examination of the victim, soon after she was referred by the S.N. Medical College, Agra to the District Government Women Hospital. This witness has clearly stated that there were no injury on the private parts of the deceased and her hymen was old torn. P.W.-7 Shivraj Singh was posted as Sub-Inspector at Police Station M.M. Gate, Agra and has incorporated the contents of the F.I.R. in the case diary and referred the matter to the concerned Police Station i.e. Police Station-Sadabad, District Hathras.

19. P.W.-8 Udai Veer Singh Baliyan is the Investigating Officer, who was posted at Police Station Sadabad. He has admitted that in the statement under Section 161 Cr.P.C. it is recorded that the victim Preeti is substantially burnt and is not in a position to speak and on account of obstruction in the trachea an operation is proposed to be conducted on 28th April, 2007. P.W.-1, however denied giving copy of the written report to him. He has also admitted that the victim was not in a position to give her statement and no inquiry was made from the concerned doctor in that regard.

20. P.W.-9 Mahesh Chandra, the then Assistant Sub-Inspector posted at Sarojini Nagar Police Station, New Delhi within the territorial limits of which Safdarjang Hospital is situated, has conducted the inquest of the deceased at Delhi and has also proved the same.

21. P.W.-10 Anil Kumar Soan is the Officer of the Forensic Science Laboratory, Agra who has proved the forensic report as per which no semen has been found on the victim.

22. P.W.-12 Ranveer Singh was the first Investigating Officer from the police Station Sadabad. This witness has recorded the statement of Babu Lal, who is the father of P.W.-1. The extract of the statement of Babu Lal recorded under Section 161 Cr.P.C. is referred to in the statement of P.W.-12, which is reproduced hereinafter:-

"बाबूलाल ने मुझे अपने ब्यान में बताया था कि रसोई में प्रीति ने खाना बनाने की तैयारी भी की थी। प्रीति अचानक जल गई। बाबूलाल प्रीति के दादा है। बाबूलाल ने अपने बयान में मुझे यह भी बताया था कि मैं प्रकाश वीर वाले मकान के हिस्से में रसोई के बराबर वाले कमरे में पहली मंजिल पर मौजूद था। प्रीति घर के बाहर खरंजे पर जली हुयी अवस्था में पहुंची थी। बाबूलाल से मेरे द्वारा यह पूछने पर कि आग कैसे लगी तो बाबूलाल ने मुझे बताया कि इस बारे में मुझे कोई जानकारी नहीं है। ***बाबूलाल ने मुझे बताया था कि जब वह खरन्जे पर पहुंचा जहाँ प्रीति जल रही थी तो वह केवल बचाओ-बचाओ कह रही थी। बाबूलाल ने अपने बयान में मुझे बताया था कि जब प्रीति जल रही थी तो उसने नहीं बताया था कि उसे किसी व्यक्ति ने जलाया था।***"

23. This witness has also recorded the statement of Raghuraj under Section 161 Cr.P.C., who has stated that the girl Preeti had not taken name of anyone in connection with the fire. The statement of Tara Singh has also been recorded by this witness in which he has stated that on the date of incident, while burning, she (victim) did not complain that someone had set her on fire or that someone had raped her. This witness has also recorded the statement of Bhuri Singh, who has stated that the victim had caught fire while cooking. She had not told that accused Lokesh, Dani, Indal, Hukum Singh raped her and thereafter set her on fire. Statement of Ramesh has also been recorded by P.W.-12 in which he has reiterated the same version as was stated by Bhuri Singh. Similarly, in the statement of Bhudevi, wife of Bhajan Lal, which has been recorded by P.W.-12 it has been stated that the victim has not taken any name and she told that she had caught fire while cooking food.

24. Dr. R. B. Lal, has been produced as P.W.-13, who had given the fitness certificate to the victim at the time of recording of her dying declaration. He has clearly stated that the injured was burnt over 90% of her body and her condition was deteriorating continuously. However, the victim was conscious but her pulse was weak. He has stated that when he inquired from the victim as to whether any untoward act has been committed, the victim gestured in affirmative. In the cross-examination this witness has admitted that he had not inquired about the cause of burn as the victim was not in a good condition and attempts were being made to save her life. A question was posed to this victim as to whether the questioning of victim could have posed any risk to her life? In reply, the Doctor opined that when all attempts were being made to save her life, he was not inclined to interfere with the team attending the victim. He has also stated that the condition of the victim was much below normal but she was conscious. He has also stated that just because on going treatment be not adversely affected, as such, he had not made any unnecessary queries from the victim.

25. P.W.-14 Rajesh Kumar Prajapati is the Deputy Collector of Mathura, who was present at the time of recording of dying declaration of the victim. He has stated that the victim was conscious and the Doctor had certified her to be fit to give her statement. This witness however has not been able to tell as to who was the Doctor present and what is the difference between a Doctor and Compounder. He has admitted that there is no recital in the declaration of the victim that the statement was read out to the victim nor the Doctor was inquired as to how the incident occurred with the victim.

26. P.W.-15 N.K. Chaudhary is the Investigating Officer, who has proved the topography of the house in which the incident occurred. P.W.-16 is Dr. Alexander F. Khanva, who is the Autopsy Surgeon and has proved the autopsy report. P.W.-17 Rakesh Chandra Sharma, who was the Investigating Officer and submitted the charge-sheet in the matter. P.W.-18 Jagdish is the village Chaukidar, who has stated that he informed the concerned police station about the incident after he acquired knowledge of it on phone from his wife. He has stated in his cross-examination that villagers informed him that while the victim was cooking food, she accidentally caught fire and got burnt.

27. On the basis of above evidence produced by the prosecution, the statements

of the accused-appellants have been recorded under Section 313 Cr.P.C. in which the accused have denied the accusation made against them. They have stated that since semen has not been found on the victim the commissioning of offence of rape is not proved. They have also stated that evidence has been falsely created and they have been implicated in the present case due to previous enmity.

28. On the basis of evidence so led in the matter by the prosecution the court below has come to the conclusion that the prosecution has proved its case beyond reasonable doubt and consequently the accused-appellants are convicted for the offences under Sections 452, 302/34 and 376 I.P.C. and sentenced to life imprisonment with fine, as already recorded above.

29. Challenging the judgment of the court below Mr. Araf Khan, learned counsel for the accused-appellants submits that the accused-appellants have been falsely implicated in the matter due to told enmity and false evidence has been created to implicate them. It is submitted that grand father of the victim, namely, Babu Lal was present in the house and had clearly admitted in his statement recorded under Section 161 Cr.P.C. that the victim had accidentally caught fire while cooking food and that is why the prosecution deliberately excluded him from the list of the witnesses prepared in the charge-sheet. Mr. Khan further submits that the investigation is faulty and attempt has not been made to ascertain the truth and for such purposes relevant witnesses, who were present in the house, have not been produced. It is urged that apart from Babu Lal, others who were present in the house were the family members of P.W.-3, who have not been produced. Mr. Khan further submits that the allegation of rape upon the victim is not substantiated as no injury was found on her and even the pathological report does not support commissioning of rape. He further submits that the dying declaration is not reliable in the facts of the present case since the victim was not in a position to give any statement. He next submits that no satisfaction is recorded by the Doctor about the victim being in a fit mental state to give her statement. No such satisfaction otherwise is recorded by the Magistrate/Deputy Collector, either. He submits that contents in the dying declaration regarding parents being present in the village is otherwise falsified by the statement of prosecution witnesses i.e. P.W.-1 and P.W.-2, which clearly shows that the narration of the facts in the dying declaration are incorrect. He also submits that the condition of the victim was critical and her trachea was blocked for which operation was proposed and, therefore, the victim otherwise was not in a position to speak or to get her dying declaration recorded.

30. Mr. Khan, learned counsel, therefore, submits that this is a case of accidental fire during cooking of food by the victim and the family members have taken advantage of it to falsely implicate the accused and thereby settle their old enmity. It is urged that the evidence on record has not been examined in correct perspective by the trial Court.

31. It is also urged on behalf of the accused-appellants that the incident was reported to police at Police Station Sadabad itself by P.W.-8 and the statements of various witnesses including Babu Lal, Raghuraj Singh, Tara Singh, Bhuri Singh and Bhudevi etc. were recorded as per

which it was a case of accidental burn and in order to get over it a subsequent F.I.R. was lodged, as an after-thought, falsely implicating the accused-appellants on the basis of which the accused-appellants have been convicted.

32. Sri Arunendra Singh, learned A.G.A. on the other-hand submits that the dying declaration has been proved wherein specific allegations of rape and pouring kerosene upon the victim are levelled along with the allegation of setting her on fire and, therefore, the prosecution has established its case beyond reasonable doubt. Mr. Singh also submits that P.W.-3 has otherwise seen the accused persons rushing out of lane soon after the incident which also supports the prosecution case about offence being committed by the accused. He thus submits that this is a case in which a young girl has been raped and then burnt to death which warrants no leniency and, therefore, the conviction of the accused-appellants merits no interference.

33. Prosecution case is that while first informant (P.W.-1) and his wife (P.W.-1 and P.W.-2) were out of the house and the victim alone was engaged in the domestic work in the house, all the four accused entered in the house in the afternoon at about 2:30 p.m. and finding the victim alone, grabbed her and sniffed some intoxicating substance on account of which she lost her consciousness. The accused also gagged her mouth by a cloth and subjected her to rape, one after the other and with an intent to alienate the evidence, they poured kerosene upon the victim and she was set ablaze. The victim in flames came down from the upper floor and the neighbours arrived and the fire was doused. The victim was then taken to Agra and the informant was also asked to reach S. N. Medical College, Agra. The victim admittedly was 18 years of age and was a student of L.L.B. first year. The prosecution in order to prove its case has essentially relied upon oral testimony of prosecution witnesses of fact and has also relied upon the dying declaration wherein the victim has specifically implicated the accused of subjecting her to rape and thereafter, setting her ablaze.

34. The trial Court has found the witnesses to be reliable and the dying declaration has also been found credible and reliable which formed the basis for conviction of the accused. The challenge to the prosecution case is primarily laid on the ground that dying declaration is not reliable; prosecution witnesses have made a false deposition on account of prior enmity between families of the informant and the accused. Mr. Khan, learned counsel for the accused-appellant also submits that the available evidence on record has not been produced by the prosecution and it toed the line of reasoning suggested by the informant (P.W.-1) for settling their personal scores.

35. In order to examine the contention advanced on behalf of the defence, we proposes to deal with all three aspects separately, one by one.

36. Before proceeding to discuss the issues raised in this appeal we may note some background facts. The three accused, namely Lokesh, Dani and Indu are the sons of one Surajmal who had inimical relations with the informant. This enmity was on account of a litigation between the parties commenced in the year 1989 in which a compromise is alleged to have been entered between the parties. Some criminal

proceedings also ensued between the parties. This defence version is clearly admitted by the prosecution witnesses. P.W.-1 in his statement. P.W.-1 has stated that though there was an enmity between the parties but he maintains no enmity towards the accused though the accused may be inimical to him. Cross cases were lodged between the informant and the father of the accused. A evasive reply was given in respect of criminal proceedings. Other prosecution witnesses have also not disputed the factum of prior enmity between the parties. The factum of enmity otherwise stands acknowledged categorically in the alleged dying declaration of the victim. From the evidence available on record, therefore, it is more or less admitted that the father of the accused, namely, Surajmal and the informant had inimical relations in the past on account of civil and criminal proceedings. The prosecution witnesses have also alleged some compromise but the details in that regard have not been placed by the prosecution in evidence. The law is settled that enmity is a double-edged sward inasmuch as it can be a cause for commissioning the offence and also for falsely implicating a person. The evidence on record, in this case, therefore, will have to be examined carefully in the context of inimical relations between the parties.

37. The evidence adduced by the prosecution reveals that soon after the incident occurred on 27.04.2007, the victim was taken to S.N. Medical College, Agra. For her internal examination, the victim was referred to the District Government Women Hospital, Agra. Notwithstanding severe burn on major parts of the body, the abdomen and her private parts were saved fortunately. The internal examination of the victim shows that there were no injury over the private parts of the victim. Victim's hymen was found to be old torn. There was no burnt marks present on the private parts of the victim. The injury report prepared by P.W.-6 has been proved by the doctor during the course of trial. The medical evidence also shows that vaginal swabs of the victim were sent for pathological examination wherein no spermatozoa has been found to exist on the victim. The medical evidence on record, therefore, does not support commissioning of rape upon the victim.

38. We find substance in the contention of the appellants' counsel that in an incident where a young girl/lady is forcibly subjected to an offence under Section 376 I.P.C. by four persons, some sort of injury would be caused to her. The prosecution case of rape, therefore, does not find corroboration from the medical evidence. This aspect has not been explained by the prosecution neither before the court below nor before us.

39. Prosecution case heavily relies upon the dying declaration of the victim which has already been extracted above. This dying declaration records the satisfaction of the Doctor that the victim was clinically fit for recording of her dying declaration.

40. The contents of the dying declaration are that the victim/deceased was alone at home and was cleaning utensils when the accused entered in the house. The victim has categorically stated that her father had gone to the field and her mother was attending the animals in their enclosure (Bada). This statement of fact contained in the dying declaration, however, does not find support from the prosecution witnesses themselves. The

evidence, in regard to the presence of victim's parents, is just the otherwise. The father of the victim has been adduced in evidence as P.W.-1 who has clearly stated that he had left to a relative's place early in the morning on the date of incident. Similar statement is made by the mother of the victim, who appeared as P.W.-2. The version of prosecution in the first information report, lodged after two days of the incident, is that the parents of the victim had gone to a relative's place at the time of occurrence. The evidence of prosecution, therefore, clearly proves that the recital in the dying declaration about victim's father having gone to the field and mother to the animals' enclosure (Bada) is incorrect. This contradiction in the dying declaration and the testimony of prosecution witnesses compel us to examine more carefully the contents of the dying declaration.

41. The attending circumstances in which the dying declaration of the deceased has been highlighted on behalf of the accused-appellants at length. Statement of P.W.-1 has been relied upon in which he has clearly admitted that by the time the victim reached Ashoka hospital, she was largely unconscious and only at times opened her eyes. P.W.-1 has categorically stated that the seriousness of victim increased with the passage of time. It is also stated that when she arrived at S.N. Hospital/Medical College, Agra she was unconscious. It is then stated that the victim became conscious at around 6:00 pm. The doctor who has examined the victim prior to recording of her dying declaration has stated that the victim had sustained superficial to deep burn injuries on substantial part of her body and the burn content is to the extent of 90%. The condition of the victim was continuously deteriorated. On being asked by the doctor as to whether any untoward incident has occurred with the deceased, she nodded and thereby answered in affirmative, by way of her gesture. The doctor has not stated that the victim made any statement herself. This doctor has been cross-examined and a specific question was put to him as to whether any effort was made to ascertain the reason of burn caused to the victim. To this, the doctor has replied that considering the condition of victim, it was not appropriate to put unnecessary questions to her as the anxiety was to somehow save her life. In reply to a further question as to whether the victim could die during the course of her questioning, the doctor has opined that serious attempts were being made to save her life and he did not think it proper to interfere with the attempt of the team who was trying to save the victim. He has further stated that at the time of medical examination the condition of the victim was much below normal (apparently suggesting that she was critical) but she was conscious.

42 At this juncture, we would also like to refer to the statement of the investigating officer who recorded the statement of P.W.-1 under Section 161 Cr.P.C. wherein he has admitted that victim was substantially burnt and was not in a position to speak. There was obstruction in the trachea and attempt was being made to conduct an operation. The statement, in that regard, is extracted here-in-after:-

"लड़की प्रीति काफी जल गई है तथा बोलने की स्थित में नहीं है, स्वांश नली में अवरोध होने के कारण कल दिनांक 28-4-07 की आपरेशन तैयारी हो रही थी। प्रकाश वीर से ***मैंने कल दिनांक 28-4-07 को घटना के सम्बन्ध में तहरीर मांगी तो उसने तहीर देने से मना कर दिया।***"

43. This witness has further stated that victim was not in a position to give her statement and that he made no inquiry from the doctor in that regard.

44. The evidence available on record, therefore, shows that the victim was in a critical state and her trachea was congested.

45. It has therefore to be seen as to whether the victim was in a position to make her dying declaration and whether necessary precaution had been taken by the prosecution to ensure that victim was in a proper mental shape to make a declaration.
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46. The primary evidence that the victim was in a fit mental state to make a dying declaration is of the attending doctor who has been produced as P.W.-13. We have noticed that this witness in his statement has mentioned the critical situation of the victim. There is no satisfaction recorded by the doctor on the dying declaration that victim was in a fit mental state to give a voluntary statement. P.W.1 has otherwise admitted that the victim was unconscious when she was brought to the S.N. Medical College at around 6:00 pm. He has also admitted that only after administering of first aid, the condition of the victim improved and she became conscious. It is not clear as to what kind of first aid was given to the injured victim but considering her serious condition, it is logical to expect that some short of pain killer may have been given to her. In such circumstances, mere recording of satisfaction by the doctor that patient was conscious, was not sufficient. A specific satisfaction was warranted regarding fit metal state of the victim. No such satisfaction has been recorded by the doctor. Merely stating that the patient is clinically fit does not amount to a satisfaction with regard to fit mental state of the patient. The ability of the victim to speak was severely compromised as per the prosecution evidence itself.

47. We are therefore doubtful of the victim being in a proper mental shape to have given a conscious voluntarily statement which could qualify to be a dying declaration. The Magistrate/Deputy Collector who has recorded the dying declaration of the victim has also admitted that no questions were put to the victim regarding her fit mental state.

48. At this juncture, we would like to refer to the observation of the Supreme Court in **Paparambaka Rosamma & Others Vs State of Andhra Pradesh** reported in (1999) 7 SC 695, wherein the Court while referring to the dying declaration observed that mere statement that patient is conscious while recording the statement is not sufficient. In a case where injured had sustained 90 % burn injuries, it was necessary to ascertain the fit mental state of the injured before accepting the dying declaration. Paragraph- 9 of the judgment is reproduced hereunder:-

"9. It is true that the medical officer Dr. K.Vishnupriya Devi (PW 10) at the end of the dying declaration had certified patient is conscious while recording the statement. It has come on record that the injured Smt. Venkata Ramana had sustained extensive burn injuries on her person. Dr. P.Koteswara Rao (PW 9) who performed the post mortem ***stated that injured had sustained 90% burn injuries.*** *In this case as stated earlier, the prosecution case solely rested on the dying declaration. It was, therefore, necessary for the prosecution to prove the*

dying declaration being genuine, true and free from all doubts and it was recorded when the injured was in a fit state of mind. In our opinion, the certificate appended to the dying declaration at the end by Dr. Smt. K.Vishnupriya Devi (PW 10) did not comply with the requirement inasmuch as she has failed to certify that the injured was in a fit state of mind at the time of recording the dying declaration. The certificate of the said expert at the end only says that patient is conscious while recording the statement. In view of these material omissions, it would not be safe to accept the dying declaration (Ex.P-14) as true and genuine and was made when the injured was in a fit state of mind. From the judgments of the courts below, it appears that this aspect was not kept in mind and resultantly erred in accepting the said dying declaration (Ex.P-14) as a true, genuine and was made when the injured was in a fit state of mind. ***In medical science two stages namely conscious and a fit state of mind are distinct and are not synonymous. One may be conscious but not necessarily in a fit state of mind. This distinction was overlooked by the courts below."***

(Emphasis supplied by us)

49. The observation made in the case of **Paparambaka Rosamma** (supra) has been reiterated in a subsequent decision of the Supreme Court in the case of **Naresh Kumar Vs. Kalawati & Others** reported in 2021 SCC OnLine SC 260, wherein the Supreme Court after referring to the above quoted paragraph no. 9 observed as under in para-13:-

"13. In the facts and circumstances of the present case, considering that the statements of the deceased have vacillated, ***there is no evidence about the fitness of mind of the deceased to make the dying declaration including the presence of the Doctor, the veracity and truthfulness of the dying declaration remains suspect.*** *It would not be safe to simply reject the probable defence of suicide, to reverse the acquittal and convict the respondents."*

(Emphasis supplied by us)

50. The statement of the Magistrate/Deputy Collector is categorical that the contents of the dying declaration were not read out to the victim and no satisfaction in that regard is otherwise recorded in the dying declaration. In **Suriender Kumar Vs. State of Haryana** reported in (2011) 10 SCC 173, the Supreme Court questioned the dying declaration also on the ground that such a satisfaction about the contents of the dying declaration having read out to the victim was missing. In paragraph no. 25 of the judgment, the Supreme Court observed as under:-

"25.As per the prosecution, the incident took place at 2 a.m. on 26.06.1991 and as per her statement, the occurrence of burning was in the evening of 25.06.1991, that is, the previous day. The ***dying declaration did not carry a certificate by the Executive Magistrate to the effect that it was a voluntary statement made by the deceased and that he had read over the statement to her.*** *The dying declaration was not even attested by the doctor. As stated earlier, though the Magistrate had stated that the statement had been made in mixed dialect of Hindi and Punjabi and the statement was recorded only in Hindi. Another important aspect is that there was evidence that Kamlesh Rani was under the influence of Fortwin and Pethidine injections and was not supposed to be*

having normal alertness. In our view, the trial Court rightly rejected the dying declaration altogether shrouded by suspicious circumstances and contrary to the story of prosecution and acquitted the appellant."

(Emphasis supplied by us)

51. It is in the context of the deliberations aforesaid that we are persuaded to attach importance to the wrong narration of facts in the declaration about the father being at the field and mother of the victim being in the animals' enclosure (Bada), to be crucial. The fact that dying declaration refers to an old enmity between the family is also not very natural. Though it is otherwise claimed that four young men committed rape upon the victim but the fact that no injuries were found on her private parts also assumes significance. It is otherwise admitted that there was old enmity between the two families, and therefore, possibility of false implication of three real brothers could have been orchestrated to ensure appropriate revenge for the old enmity. The dying declaration is therefore neither found credible nor can be relied upon in the facts of the present case. This aspect of the matter has not been examined by the trial court. The prosecution has failed to explain the circumstances, noticed above, which creates a doubt upon the dying declaration.

52. This takes us to the other limb of the prosecution evidence which is the oral testimony of its witnesses. Admittedly, none of the witnesses have seen the incident and there is no eye witness account. P.W.-1 and P.W.-2 admittedly were not present at the place of occurrence. The only testimony relevant is that of P.W.-3 who happens to be uncle of the deceased. He claims that he has seen the four accused coming out of the lane just around the time when the victim came down after she caught fire. This testimony of P.W.-3 is also not convincing and suffers from same infirmity, from which suffers the testimony of P.W.-1 i.e. the old enmity. Although, P.W.-3 states that he called the neighbours and assisted in fire being doused upon the victim but P.W.-1 and P.W.-2 in their statements have claimed that incident was informed to them by Jagveer (not produced) and not by P.W.-3. Presence of P.W.-3 at the place of occurrence is otherwise questioned on the ground that in the statements of other witnesses, namely, Smt. Sumitra and Smt. Sukhbiri under Section 161 Cr.P.C., it is noticed that P.W.-3 was driving his car when he received telephonic information that the victim had sustained burn injuries.

53. The relevant statements of Smt. Sumitra and Smt. Sukhbiri are reproduced herein below:

Statement of Smt. Sumitra

"दिनॉक 27.4.07को सुबह मै और सुखबीरी, गीता, सविता, चन्द्रवती, किशन सिंह, स्वतन्त्र सिंह हंसराज, विनोद ग्राम सिन सिनी नेम सिंह के घर मिलने गए थे। नेम सिंह की माता जी का स्वर्गवास हो गया। हम राज बहादुर S/o **बाबू लाल जो हमारे गांव के है उनकी टाटा सूमो से गए थे। 600 रू० डीजल के राज वहादुर को दिए थे राज वहादुर गाड़ी चला कर ले गया था। जब हम लौट रहे थे तो राया के पास राज वहादुर पर फौन आया कि कु० प्रीती जल गयी है तो राजवहादुर बहुत तेज गाड़ी चलाकर गांव आया था। तब तक लड़की प्रीती को गांव के लोग अस्पताल ले गये थे हमे लड़की प्रीती गांव मे नहीं मिली थी। राज वहादुर बाद में आगरा गया था।"**

Statement of Sukhbiri

"दिनॉक 27.04.07 को सुबह मै व सुमित्रा, गीता, सविता, चन्द्रवती मेरे पति किशन सिंह, स्वतन्त्र सिंह हंसराज, विनोद, राज बहादुर

की टाटा सूमो से सिन सिनी गए थे। राज वहादुर **गाड़ी चलाकर ले गया था। जब हम लोग वापस सिन सिनी से आ रहे थे तो (का०फटा) के पास 3.00 बजे के लगभग राज बहादुर पर फौन आया था कि लड़की प्रीती काफी जल गयी है। तो उसने गाड़ी तेज भगायी थी। जब हम लोग गांव में आए तो प्रीति को गांव वाले अस्पताल आगरा ले गए थे हम लोग सिन सिनी नेम सिंह के घर मिलने गए थे।** उनकी माता जी का स्वर्ग वास हो गया था।"

These two witnesses are not produced by the prosecution. No reasons are otherwise discernible for their non-production except that it was not clear whether they would support the prosecution version.

54. We are therefore, not much impressed by the oral testimony of P.W.3 nor we find his testimony reliable for forming an adverse opinion against the accused or with regard to their complicity. No other witness of fact has been produced by the prosecution. The oral testimony is thus not sufficient in the facts of the case to return a finding of guilt against accused-appellants. The circumstances relating to presence of P.W.-3 at the place of occurrence is not explained by the prosecution.

55. In the backdrop of the evidence led by the prosecution, we find it rather strange and unnatural that the grand father of the victim, namely, Babu Lal, who was present in the house and who had also sustained burn injuries in his hand (as per P.W.-2) was not produced by the prosecution. No plausible explanation in that regard has been placed. Babu Lal was otherwise a natural witness who admittedly was not inimical to the victim. The statement of Babu Lal under Section 161 Cr.P.C. has been noticed by P.W.-12 which supports the plea of defence that the incident occurred in some manner other than the manner suggested by the prosecution. Babu Lal has also admitted that victim never disclosed him that anyone was responsible for pouring kerosene or for causing burn injuries to the deceased. The statement of Bhu Devi wife of Bhajan Lal is also to similar effect and she too has not been produced in evidence. The witnesses of fact who were present on the spot were the relevant persons who could have thrown light on the manner in which the incident itself occurred. The fact that such evidence has been withheld by the prosecution renders the prosecution version wholly unreliable. Although, the Court below has referred to the evidence of prosecution but the fact that the contents of the dying declaration are inconsistent with the statements of prosecution witnesses and no satisfaction was recorded about the fit state of mind of victim has been overlooked. The inimical relations between the parties have also not been factored it.

56. Critical situation in which the victim was at the time of the making of dying declaration has also not been evaluated in correct perspective. In such circumstances, we cannot approve the findings returned by the Court below that the prosecution has established its case beyond reasonable doubts. The findings of the Court below holding the accused-appellants guilty of offence stands reversed.

57. In view of the discussions and deliberations held above, this appeal succeeds and is allowed. The judgment and order of conviction and sentence dated 11th February, 2015 passed by the Additional Sessions Judge, Court No.3, Hathras in Session Trial No. 97 of 2013 (State of U.P.

Vs. Lokesh & 2 Others), arising out of Case Crime 296 of 2007, against the accused-appellants, is set aside.

58. The accused appellants- Dani and Indra, who are reported to be in jail since 2007, shall be released forthwith, unless they are wanted in any other case on compliance of Section 437-A Cr.P.C. whereas the accused-appellant Lokesh, who is reported to be on bail, need not surrender and his bail bonds shall stand discharged subject to compliance of Section 437-A Cr.P.C.

59. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Hathras henceforth, who shall transmit the same to the concerned Jail Superintendent for release of the accused-appellants in terms of this judgment.

(2023) 2 ILRA 47
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2023

BEFORE

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

Public Interest Litigation No. 1969 of 2022

Kushwaha Mahasabha & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Gulab Chandra

Counsel for the Respondents:
Sri A.K. Goyal, Addl. C.S.C., Sri Siddhartha Srivastava

A. Public Interest Litigation(PIL)-Constitution of India,1950-Article 226-Mainatainability-Suppression of material facts-Petitioners deliberately concealed factum of petitioner No. 2 being a Government employee working as Assistant Teacher under basic education board-He has further concealed factum of various criminal cases registered by him/ against him against/by private respondents-PIL dismissed with heavy cost. (Para 1 to 22)

The petition is dismissed. (E-6)

List of Cases cited:

1. Abhyudya Sanstha Vs U.O.I. (2011) 6 SCC 145

2. Hari Narain Vs Badri Das (1963) AIR SC 1558

3. G. Narayanswamy Reddy Vs Govt. of Karnataka (1991) 3 SCC 261

4. Dalip Singh Vs St. of U.P. (2010) 2 SCC 114

5. Moti Lal Songara Vs Prem Prakash @ Pappu & anr. (2013) 9 SCC 199

6. Amar Singh Vs U.O.I. & ors. (2011) 7 SCC 69

7. Kishore Samrite Vs St. of U.P. & ors. (2013) 2 SCC 398

8. ABCD Vs U.O.I. & ors. (2020) SCC 52

9. Pushpa Devi M. Jatia Vs M.L. Wadhawan etc. (1987) 3 SCC 367

10. Shashi Vs Anil Kumar Verma (1995) 1 SCC 421

11. K.D. Sharma Vs SAIL & ors. (2008) 12 SCC 481

12. Dhananjay Sharma Vs St. of Har. & ors. (1995) 3 SCC 757

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

1. Present petition was filed by the petitioner claiming it to be in public interest, praying for the following reliefs:-

"i) Issue a writ, order or direction in the nature of writ of mandamus commanding to the respondent District Maqgistrate to proceed to take necessary action for removing unauthorized constructions and obstructions raised by the private respondents over the land No. 509, 510, 567, 569, 570, 571 Saidpur Hakins District Bareilly which has been axquired for carrying out Mini Bye Pass Road for public convenience within reasonable time, to meet out the ends of justice.

ii) Issue writ order or direction in the nature of writ of mandamus commanding to the respondent authorities to get the public money amount of compensation wrongly received by the respondent Anupama recovered from her with appropriate interest and to initiate penal action against her for playing fraud with the authorities in the interest of justice within stipulated time fixed by this Hon'ble Court.

iii) Issue writ order or direction in the nature of writ of Ad interim mandamus commanding to the respondent District Magistrate to take appropriate action on the complaint dated 05.07.2022 preventing obstructions and encroachment over the public utility land of Mini Bye Pass Road situated in village Saidpur Hakins, District Bareilly within reasonable time to secure the ends of justice."

2. Counter affidavit has been filed by the private respondents in November, 2022, copy thereof was given to the petitioners' counsel on November 28, 2022, but till date no rejoinder affidavit has been filed. An adjournment has been sought for filing the same, which we decline as sufficient time was available with the petitioners to file rejoinder affidavit specially keeping in view the pleadings made in the counter affidavit.

3. In the counter affidavit filed by the private respondents, copy of the F.I.R. has been annexed, which was lodged by the private respondent No. 5 against petitioner No. 2 under Sections 419, 420, 467, 468 and 471 I.P.C., P.S. Baradari, District Bareilly. It is further pleaded in the counter affidavit that after investigation, charge-sheet was filed against petitioner no. 2 and the Court concerned has even taken cognizance and the trial is pending.

4. As a counter, petitioner No. 2 got one F.I.R. registered against respondent No. 5 under Sections 195, 195-A and 420 I.P.C., P.S. Baradari, District Bareilly in which respondent No. 5 was arrested, released on bail. In that also the charge-sheet has been filed. However, in a Criminal Misc. Application No. 31925 of 2022, filed by respondent No. 5 for quashing of the F.I.R. and further proceedings, an interim stay has been granted by this Court on October 10, 2022. The matter is still pending.

5. It is further pleaded that even wife of respondent No. 5 got one F.I.R. registered against petitioner No. 2 under Sections 147, 148, 149, 452, 307, 323, 504, 506 and 427 I.P.C., P.S. Izzat Nagar, District Bareilly, in which the charge-sheet has been submitted.

6. It is further pleaded that another F.I.R. was lodged by domestic helper of respondent No. 5 against petitioner No. 2 under Sections 147, 427, 323, 394 and 336 I.P.C., P.S. Izzat Nagar, District Bareilly, in which investigation is going on.

7. Thereafter, the petitioner no. 2 filed an application under Section 156 (3)

against respondents No. 4 and 5 which was dismissed by the Special Judge, Prevention of Corruption, Court No. 1, Bareilly vide order dated September 24, 2021.

8. Respondent no. 5 also filed an application under Section 156 (3) Cr.P.C. against petitioner No. 2 and others before the Special Judge, Prevention of Corruption, Court no. 1, Bareilly, which was treated as a complaint case vide order dated March 28, 2022.

9. Still further, it is pleaded in the counter affidavit that petitioner No. 2 is working as Assistant Teacher under the Basic Education Board and is presently posted at Middle School (Poorv Madhyamik Vidyalaya), Sindhauli, District Bareilly.

10. In para-12 of the counter affidavit, it is pleaded that petitioner No. 2 is a history-sheeter. The petition filed by him before this Court bearing Criminal. Misc. Writ Petition No. 11931 of 2020 for closing the history-sheet, was dismissed by this Court on October 14, 2022.

11. At page-54 of the counter affidavit, a communication from the Superintendent of Police, Bareily to the District Magistrate, Bareilly way back in the year 2017, has been annexed, wherein details of various cases registered against petitioner No. 2 have been mentioned which reads as under:-

"i) Case Crime No. 162A of 1989 under Sections 149, 307, 323 I.P.C., Police Station Meerganj, District Bareilly;

ii) Case Crime No. 74 of 1996 under Sections 307, 504 I.P.C., Police Station Meerganj, District Bareilly;

iii) Case Crime No. 773 of 2014 under Sections 147, 148, 447, 511, 307, 504, 506 I.P.C., Police Station Izzat Nagar, District Bareilly;

iv) Case Crime No. 140 of 2017 under Sections 147, 148, 149, 307, 452, 323, 504, 506, 427, 341 I.P.C., Police Station Izzat Nagar, District Bareilly;

v) Case Crime No. 164 of 2017 under Sections 147, 148, 149, 427 I.P.C., Police Station Izzat Nagar, District Bareilly;

vi) Case Crime No. 165 of 2017 under Sections 188 I.P.C. and 30 Arms Act, Police Station Izzat Nagar, District Bareilly;"

12. In the instructions received by learned counsel for the State, there is nothing mentioned about the credentials of petitioner No. 2 or that he is a Government employee, however, what has been stated is that there is no double payment of compensation to the private respondent and as regards encroachments, a Committee was constituted to look into that aspect and it was found that there was no encroachment.

13. A perusal of the writ petition shows that the petitioners have deliberately concealed the factum of petitioner No. 2 being a Government employee working as Assistant Teacher under the Basic Education Board. He has further concealed the factum of various criminal cases registered by him/against him against/by the private respondents.

14. In view of the above, it is clear that there is material concealment of fact in the present case.

15. As to how a litigant who conceals material facts from the Court, has to be dealt with, has been gone through by Hon'ble the Supreme Court time and again and the consistent opinion is that he is not entitled even to be heard on merits.

16. In **Abhyudya Sanstha Vs. Union of India (2011) 6 SCC 145,** Hon'ble the Supreme Court, while declining relief to the petitioners therein, who did not approach the court with clean hands, opined as under:

"18. ... In our view, the appellants deserve to be non suited because they have not approached the Court with clean hands. The plea of inadvertent mistake put forward by the learned senior counsel for the appellants and their submission that the Court may take lenient view and order regularisation of the admissions already made sounds attractive but does not merit acceptance. Each of the appellants consciously made a statement that it had been granted recognition by the NCTE, which necessarily implies that recognition was granted in terms of Section 14 of the Act read with Regulations 7 and 8 of the 2007 Regulations. Those managing the affairs of the appellants do not belong to the category of innocent, illiterate/uneducated persons, who are not conversant with the relevant statutory provisions and the court process. The very fact that each of the appellants had submitted LPASW No. 82/2019 Page 7 application in terms of Regulation 7 and made itself available for inspection by the team constituted by WRC, Bhopal shows that they were fully aware of the fact that they can get recognition only after fulfilling the conditions specified in the Act and the Regulations and that WRC, Bhopal had not granted recognition to them. Notwithstanding this, they made bold statement that they had been granted recognition by the competent authority and thereby succeeded in persuading this Court to entertain the special leave petitions and pass interim orders. The minimum, which can be said about the appellants is that they have not approached the Court with clean hands and succeeded in polluting the stream of justice by making patently false statement. Therefore, they are not entitled to relief under Article 136 of the Constitution. This view finds support from plethora of precedents.

19. In ***Hari Narain v. Badri Das*** **AIR 1963 SC 1558, G. Narayanaswamy Reddy v. Govt. of Karnataka (1991) 3 SCC 261** and large number of other cases, this Court denied relief to the petitioner/appellant on the ground that he had not approached the Court with clean hands. In ***Hari Narain v. Badri Das*** *(supra),* the Court revoked the leave granted to the appellant and observed:

"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave made under Article 136 of the Constitution, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it LPASW No. 82/2019 Page 8 would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Thus, if at the hearing of the appeal the Supreme Court is satisfied that the material statements made by the appellant in his application for special leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained special leave from the Supreme Court on the strength of what he characterises as misrepresentations of facts contained in the petition for special leave, the Supreme Court may come to the conclusion that in

such a case special leave granted to the appellant ought to be revoked."

20. In **G. Narayanaswamy Reddy v. Govt. of Karnataka's case** *(supra)*, the Court while noticing the fact regarding the stay order passed by the High Court which prevented passing of the award by the Land Acquisition Officer within the prescribed time period was concealed and in the aforesaid context, it observed that :

"2. ... Curiously enough, there is no reference in the special leave petitions to any of the stay orders and we came to know about these orders only when the respondents appeared in response to the notice and filed their counter- affidavit. In our view, the said interim orders have a direct bearing on the question raised and the non-disclosure of the same certainly amounts to suppression of material facts. On this ground alone, the special leave petitions are liable to be rejected. It is well settled in law that the relief under Article 136 of the Constitution is discretionary and a petitioner who approaches this Court for such relief must come with frank and full disclosure of facts. If he fails to do so and suppresses material facts, his application is liable to be dismissed. We accordingly dismiss the special leave petitions."

21. In **Dalip Singh v. State of U.P. (2010) 2 SCC 114**, Hon'ble the Supreme Court noticed the progressive decline in the values of life and observed:

"1. For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahinsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

(emphasis supplied)

17. In **Moti Lal Songara Vs. Prem Prakash @ Pappu and another (2013) 9 SCC 199,** Hon'ble the Supreme Court, considering the issue regarding concealment of facts before the Court, while observing that "court is not a laboratory where children come to play", opined as under:

"19. The second limb of the submission is whether in the obtaining factual matrix, the order passed by the High Court discharging the accused-respondent is justified in law. We have clearly stated that though the respondent was fully aware

about the fact that charges had been framed against him by the learned trial Judge, yet he did not bring the same to the notice of the revisional court hearing the revision against the order taking cognizance. It is a clear case of suppression. It was within the special knowledge of the accused. Any one who takes recourse to method of suppression in a court of law, is, in actuality, playing fraud with the court, and the maxim supressio veri, expression faisi , i.e., suppression of the truth is equivalent to the expression of falsehood, gets attracted. We are compelled to say so as there has been a calculated concealment of the fact before the revisional court. It can be stated with certitude that the accused- respondent tried to gain advantage by such factual suppression. The fraudulent intention is writ large. In fact, he has shown his courage of ignorance and tried to play possum.

20. The High Court, as we have seen, applied the principle "when infrastructure collapses, the superstructure is bound to collapse". However, as the order has been obtained by practising fraud and suppressing material fact before a court of law to gain advantage, the said order cannot be allowed to stand."

(emphasis supplied)

18. Similar view has been expressed in **Amar Singh v. Union of India and others, (2011) 7 SCC 69 and Kishore Samrite v. State of Uttar Pradesh and others, (2013) 2 SCC 398.**

19. In a recent judgment in **ABCD Vs. Union of India and others (2020) 2 SCC 52,** Hon'ble the Supreme Court in the matter where material facts had been concealed, while issuing notice to the petitioner therein, exercising its suo-motu contempt power, observed as under :

"15. Making a false statement on oath is an offence punishable under Section 181 of the IPC while furnishing false information with intent to cause public servant to use his lawful power to the injury of another person is punishable under Section 182 of the IPC. These offences by virtue of Section 195(1)(a)(i) of the Code can be taken cognizance of by any court only upon a proper complaint in writing as stated in said Section. In respect of matters coming under Section 195(1)(b)(i) of the Code, in **Pushpadevi M. Jatia v. M.L. Wadhawan etc., (1987) 3 SCC 367** prosecution was directed to be launched after *prima facie* satisfaction was recorded by this Court.

16. It has also been laid down by this Court in Chandra **Shashi v. Anil Kumar Verma (1995) 1 SCC 421** that a person who makes an attempt to deceive the court, interferes with the administration of justice and can be held guilty of contempt of court. In that case a husband who had filed a fabricated document to oppose the prayer of his wife seeking transfer of matrimonial proceedings was found guilty of contempt of court and sentenced to two weeks imprisonment. It was observed as under:

"1. The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned.

2. Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice. Such persons are

required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice.

* * *

14. The legal position thus is that if the publication be with intent to deceive the court or one made with an intention to defraud, the same would be contempt, as it would interfere with administration of justice. It would, in any case, tend to interfere with the same. This would definitely be so if a fabricated document is filed with the aforesaid mens rea. In the case at hand the fabricated document was apparently to deceive the court; the intention to defraud is writ large. **Anil Kumar is, therefore, guilty of contempt."**

17. **In K.D. Sharma Vs. Steel Authority of India Limited and others (2008) 12 SCC 481** it was observed:

"39. If the primary object as highlighted in **Kensington Income Tax Commrs., (1917) 1 KB 486 : 86 LJKB 257 : 116 LT 136 (CA)** is kept in mind, an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the court with "soiled hands". Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the court does not reject the petition on that ground, the court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of court for abusing the process of the court."

18. In **Dhananjay Sharma Vs. State of Haryana and others (1995) 3 SCC 757** filing of a false affidavit was the basis for initiation of action in contempt jurisdiction and the concerned persons were punished."

20. It was held in the judgments referred to above that one of the two cherished basic values by Indian society for centuries is "satya" (truth) and the same has been put under the carpet by the petitioner. Truth constituted an integral part of the justice-delivery system in the pre-Independence era, however, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, the values have gone down and now a litigants can go to any extent to mislead the court. They have no respect for the truth. The principle has been evolved to meet the challenge posed by this new breed of litigants. Now it is well settled that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. Suppression of material facts from the court of law, is actually playing fraud with the court. The maxim supressio veri, expression faisi, i.e. suppression of the truth is equivalent to the expression of falsehood, gets attracted.

21. In the case in hand, the petitioner No. 2, who is a Government employee has not disclosed that he is serving as Assistant

Teacher with the Basic Education Board and further about various criminal cases pending between the parties, hence, a petition sought to be filed in public interest by him cannot be entertained. In our opinion, present petition deserves to be dismissed with special cost.

22. The present writ petition is, accordingly, dismissed with cost of ₹ 1,00,000/- which shall be deposited by petitioner No. 2 with the District Legal Services Authority, Bareilly within one month from today. On failure, the Basic Education Officer, Bareilly shall be entitled to recover the amount from the salary of petitioner No. 2 in five installments of ₹ 20,000/-, as his salary is stated to be about ₹ 70,000/- per month.

23. Before we part with the order, we are constrained to note that the instructions received by the State Counsel are not complete and comprehensive. The credentials of the petitioner No. 2 have not been mentioned, though it is part of the record as number of criminal cases have been registered against petitioner No. 2 and he is in litigation with the private respondents. The fact that he is a working Assistant Teacher with the Basic Education Board has also not been mentioned. The Basic Education Board may take appropriate action against petitioner No. 2 for misconduct and violation of service Rules as he is also claiming himself to be the President of petitioner No. 1.

24. Let copy of the order passed today be communicated to the Secretary, Basic Education Board, U.P., Lucknow and the Basic Education Officer, Bareilly by the Registrar (Compliance).

(2023) 2 ILRA 54
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2023

BEFORE

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

Second Appeal No. 313 of 1997

Ram Singh ...Appellant
Versus
Amar Singh & Ors. ...Respondents

Counsel for the Appellant:
Mr. Vijay Kumar Rai, Sri K.D. Tiwari, Sri K.D. Tripathi, Sri Shadab Ali

Counsel for the Respondents:
Sri K.K. Tiwari, Sri S.K. Pandey, Sri A. Singh Jadaon, Sri Anil Kumar Yadav, Sri Anil Singh, Dr. G.S.D. Mishra, Sri J.S. Tomar, Sri Kripa Shanker Yadav, Sri Pradeep Saxena, Sri R.S. Tomar

A. Civil Law - Civil Procedure Code, 1908-Section 100-Permanent prohibitory injunction-Substantial question of law-Lower Appellate Court dismissed the suit on the ground of absence of cause of action-Appellate court dismissed it for the plaintiff's failure to prove his case by evidence regarding the threat to his peaceful possession- Indeed, a cause of action disclosed by the plaintiff in his pleadings in ample measure that he is able to prove his title and possession but the suit being one for injunction to protect the plaintiff's possession from a threatened act of defendants-the dismissal of his suit would in no way debar the plaintiff from bringing in an action to protect his possession, should there be ever in future a threat to his peaceful possession of the suit property at the hands of the defendants or anyone else claiming through or under them-The cause of action in the suit is a very limited one and it is only that which the plaintiff has not been able to prove, to wit, a threatened

invasion of the plaintiff's possession by the defendants, which needs to be protected-It is well settled principle of law that injunction can be issued only on proof of actual interference or threat of interference and not in the absence of it.(Para 1 to 41)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Hafiz Muhammad Ibrahim & ors.. Vs Pande Chandan Singh & ors.. (1921) 63 Ind Cas 727

2. R.G. Janthakal Vs Bharat Parikh & Co. (1981) SCC OnLine Kar 72

3. Barid Baran Laha Vs Manjuri Ghoshal (2011) SCC OnLine Cal 204

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

This is a plaintiff's second appeal arising out of a suit for permanent prohibitory injunction.

2. This appeal was admitted to hearing on 1st of April, 1997 on the sole substantial question of law, to wit: *"Whether on the basis of positive averments in the written statement of the defendants that they were owner of the suit property on the basis of the Will and were in possession of the suit property as against the plaintiff's case of the title and possession, lower appellate Court should have dismissed the suit on the mere ground of absence of cause of action?"*

3. The facts giving rise to this appeal are these:

Ram Singh instituted Original Suit No. 494 of 1992 in the Court of the *Munsif*, Rampur against Amar Singh and six other defendants, seeking relief of permanent prohibitory injunction to the effect that the defendants, their servants and agents be restrained from forcibly dispossessing the plaintiff from the suit property comprising Plot Nos. 82 and 190 or interfering in his possession in any manner whatsoever. Amar Singh, defendant No. 1 is the plaintiff's father's brother, whereas other defendants are said to be his father's brother's sons. The plaintiff-appellant, Amar Singh, who shall hereinafter be called "the plaintiff', was a young man of 20 years, when he instituted the suit. His father, Kunwar Sen passed away after a brief illness on 13th of January, 1990. He was otherwise fit and healthy and aged about 50 years at the time of his demise. The plaintiff's father was the *bhumidhar* in possession of Plot No. 82, admeasuring 0.097 hectare and Plot No. 190, admeasuring 0.507 hectare, situate at Village Sendu Kaa Majra, Tehsil Swar, District Rampur. The said property shall hereinafter be called "the suit property'.

4. Upon the sudden death of the plaintiff's father, the plaintiff was left all alone, his mother having pre-deceased his father. The suit property, in consequence of his father's death, devolved upon the plaintiff and his name was recorded in the revenue records on 05.02.1990 by intestate succession. The plaintiff, thus, became *bhumidhar* in possession of the suit property.

5. It is the plaintiff's case that defendant No.1, his father's brother and the other defendants, his cousins, are vicious men, who harbour foul intentions. The defendants, without any right, foster the desire to take possession of the suit property, harm the plaintiff, posing a threat to his life and property. The defendants' intention is to usurp the plaintiff's property. It is the plaintiff's case that the defendants

have no title, interest or share in the said property nor are they in possession thereof. The defendants allege some kind of a right to the suit property on the basis of a Will. After the demise of the plaintiff's father, the defendants in order to harm the plaintiff, have secured some bogus and fictitious Will, purportedly executed by the plaintiff's father in the defendants' favour.

6. It is the plaintiff's case that his father was in good health and died after a brief illness. The Will attributing to him a testamentary disposition is the product of forgery. It is void. It has no binding effect upon the plaintiff. The plaintiff is the only son and the sole heir entitled to inherit his father's estate.

7. According to the plaint case, the defendants, without any right and in breach of the law, on 21.07.1992 attempted to forcibly trespass into the suit property and endeavoured to till it. They wanted to forcibly dispossess the plaintiff, but with the aid of third parties, the plaintiff repelled the attempted encroachment by the defendants. The defendants, however, went away extending death threats as also threats about forcibly taking possession of the suit property. It is then averred that in the event the defendants succeed in forcibly dispossessing the plaintiff, he would suffer irreparable loss and injury. The defendants, upon the plaintiff's efforts to amicably settle the matter, have declined, forcing the plaintiff to institute the present suit.

8. Defendants Nos. 1 to 6 put in a joint written statement. They generally denied the plaintiff's allegations and mostly pleaded through additional pleas. It is not disputed by the defendants that the recorded tenure holder of the suit property was Kunwar Sen, the plaintiff's father. In his lifetime, Kunwar Sen, according to the defendants, had executed a Will in the defendants' favour. After Kunwar Sen's demise, it is the defendants, who are in possession, tilling and reaping the crops. The defendants sought mutation of their names on the basis of the Will left behind by Kunwar Sen by moving the Tehsildar, Swar, District Rampur. The Tehsildar *vide* his order dated 26.07.1990 passed in Case No. 164/89-90 had ordered mutation of the defendants' name alongside the plaintiff on the basis of Kunwar Sen's last Will and testament.

9. The defendants and the plaintiff are co-sharers and co-tenure holders of the suit property, wherein the plaintiff had a one-third share. According to the defendants, on 05.02.1990, the plaintiff in connivance with the Kanoongo and the Lekhpal had got the entire suit property recorded in his name illegally, but the Kanoongo's order dated 05.02.1990 was set aside by the Tehsildar, Swar *vide* his order dated 26.07.1990. Since the plaintiff and the defendants are co-sharers and co-tenure holders in the suit property, the plaintiff is not entitled to an injunction.

10. It is the defendants' further case that defendant No. 7, Harish Chandra is a minor, aged 12 years. The plaintiff has not proceeded against him in accordance with the provisions of Order XXXII Rule 1 of the Code of Civil Procedure, 1908 (for short, "the Code'). The suit deserves to be dismissed on this ground. The plaintiff has played fraud on the Court and secured a temporary injunction on insufficient ground. Now, he wants a decree likewise. The defendants, on the basis of the aforesaid case, have asked the suit to be dismissed with special cost.

11. Upon the pleadings of parties, the following issues were framed by the Trial Court (translated into English from Hindi):

"1. Whether the plaintiff is the *bhumidhar* in possession of Plot No. 82, admeasuring 0.097 hectare and Plot No. 190, admeasuring 0.507 hectare?

2. Whether the plaintiff has no cause of action to institute the suit?

3. Whether the true owner of the property in dispute was Kunwar Sen, who left a Will in favour of the defendants and after his demise, it is the defendants alone, who are the owners in possession of the property in dispute?

4. Whether the suit is undervalued and the court-fee paid insufficient?

5. Whether defendant No. 7, Harish Chandra is a minor and the suit is barred by the provisions of Order XXXII Rule 1 CPC?

6. To what relief is the plaintiff entitled?"

12. The plaintiff, in support of his case, examined three witnesses, to wit, PW-1, Ram Singh, the plaintiff himself, Gokal, PW-2 and Ram Lal, PW-3. On behalf of the defendants, two witnesses were examined, that is to say, Amar Singh, DW-1, who is defendant No. 1 to the suit and Sukhlal, DW-2.

13. None of the Courts have referred to a summary of the documentary evidence in the impugned judgments, but on going through the records, this Court finds that the plaintiff filed two documents through a list, paper No. 9-C. The first of these documents is Ex. 1, a certified copy of an extract of the Six Yearly *Khatauni* for the fasli years 1395-1400, issued on 09.08.1990, relating to the suit property. The other document filed by the plaintiff bears Ex. No. 2. It is a Khasra relating to the suit property for the Fasli Year 1399.

14. On behalf of the defendants, an extract of a certified copy of the Six Yearly *Khatauni* for the period 1395-1400 Fasli was filed and marked as Ex. Ka-1.

15. The learned *Munsif*, who tried the suit, found for the plaintiff on Issues Nos. 1 and 3 as well as Issue No. 2. Issue No. 5 was also decided in favour of the plaintiff and against the defendants. In consequence of his findings on the various issues, the learned *Munsif* decreed the suit by his judgment and decree dated 30.03.1996.

16. The defendants - all seven, appealed the *Munsif*'s decree to the District Judge of Rampur *vide* Civil Appeal No. 40 of 1996. The appeal came up for hearing before the Additional District Judge-III, Rampur on 18.12.1996, who allowed the appeal by his judgment and decree of the said date, reversing the Trial Court and dismissing the suit.

17. Aggrieved, the plaintiff has preferred the instant appeal from the appellate decree.

18. Heard Mr. Vijay Kumar Rai, learned Counsel for the plaintiff and Mr. K.K. Tiwari, learned Counsel appearing on behalf of the defendants.

19. Both the Courts below have concurrently opined that the plaintiff is the owner in possession of the suit property. Apparently, the plaintiff has inherited the suit property from his father, Kunwar Sen, whose title is not disputed by the defendants either. The plaintiff is the only heir entitled to succeed to his father's *bhumidhari*. The Courts below have accepted that the plaintiff succeeded to it and also established his cultivatory possession over the same. The plaintiff is

recorded in the revenue records, also on that basis. The defendants, no doubt, have attempted to question the plaintiff's exclusive title by succession and set up a Will, that has not seen the light of the day in the suit. It was never produced in evidence by the defendants.

20. The defendants have merely asserted a co-sharers' right, which they have got on the basis of a Will that they claim was left in their favour by Kunwar Sen. The Will never being produced in e*vide*nce before the Courts below by the defendants, much less proved by examining the marginal witnesses in the manner pro*vide*d by law, the Courts below have rightly discarded the defendants' case. The plaintiff's case, based on succession, has been accepted, both about title and possession to the suit property. But, the question here is whether the plaintiff's possession has been threatened by the defendants, which may be protected by the Court's injunction.

21. The plaintiff wants his possession protected, because the defendants by their stand in their written statement and elsewhere in proceedings for mutation, have challenged the plaintiff's exclusive title and possession to the suit property on the basis of Kunwar Sen's alleged Will. The revenue authorities have not accepted the defendants' case to be recorded on the basis of the Will that they propound; nor have the Courts below. As already said, the moot question is: whether the defendants asserting a right to the suit property, claiming a share therein, is threat enough or a threat at all to the plaintiff's possession in the suit property? This is what the substantial question involved in this appeal is about.

22. The learned *Munsif* has regarded the threat emanating from the defendants' stand in the written statement and e*vide*nce claiming a right on the basis of Kunwar Sen's alleged Will to be good enough to constitute a cause of action for the plaintiff to seek injunction, protecting his possession. The learned *Munsif* has construed the cause of action in the widest sense of the term to include all facts on record, that may entitle the plaintiff to relief. In the learned *Munsif*'s view, the stand of the defendants, claiming in derogation of the plaintiff's right a share in the suit property on the basis of the Will must be held to be a cause of action, entitling the plaintiff to an injunction, protecting his possession. He has also looked into some e*vide*nce of a threatened dispossession that he has regarded as sufficient to translate the defendants' claim to the suit property into a threatened invasion of the plaintiff's right, which the plaintiff is entitled to protect by the Court's injunction.

23. The learned Counsel for the plaintiff before us has argued in the same vein to submit that given the acknowledged stand of the defendants, which is in derogation of the plaintiff's exclusive title and possession, the plaintiff cannot be non-suited for want of a cause of action, which the Lower Appellate Court has done.

24. The learned Counsel for the defendants has said that there is absolutely no e*vide*nce about any kind of a trespass or an apprehended trespass by the defendants in the suit property, entitling the plaintiff to an injunction.

25. The Lower Appellate Court has looked into the plaintiff's case in the plaint

and his e*vide*nce in the witness-box, where he has testified as PW-1.

26. Upon a careful scrutiny of the plaintiff's plea regarding the threatened invasion of his right and his testimony in the witness-box, the Lower Appellate Court has come to the conclusion that the plaintiff in his e*vide*nce failed to support his case about a trespass or threatened encroachment of the suit property by the defendants so as to disclose a cause of action for the grant of an injunction.

27. The Lower Appellate Court has taken note of the fact that the suit is not one for cancellation of the Will that the defendants have propounded to lay claim to the suit property. It is to prevent an unauthorized act of apprehended dispossession or encroachment into the suit property, that is, the cause of action and the relief claimed by the plaintiff is to prevent that encroachment. The Lower Appellate Court has particularly considered the plaintiff's cross-examination with reference to his pleaded case to find that there is no threat to his possession by the defendants, which the plaintiff seeks to be protected by the Court's injunction.

28. This Court will also briefly allude to the plaintiff's case and e*vide*nce to answer the substantial question of law involved in this appeal, but before that is done, it is imperative to do a survey of the law bearing on the point as to what a plaintiff must establish in order to succeed in an action brought to protect his possession, may be backed by title, from a claimed encroachment by the defendant. It is one thing to establish for the plaintiff that he has title to the suit property and also that he has possession; but, quite another to establish his case for the grant of an injunction to protect it. Even if the plaintiff does not have the title to the suit property, but establishes his settled possession, he is entitled to be protected absolutely against everyone, except the true owner or one who has title. The plaintiff may also be entitled to protect his possessory title against the true owner or the title-holder by a limited injunction, not to be dispossessed, except in accordance with law. But, that is besides the point and mentioned in order to place the question involved here in perspective.

29. No doubt, the plaintiff here has both title and possession to the suit property and there is no issue about it. The question is what cause of action must the plaintiff disclose and then prove, in order to entitle him to an injunction to protect his possession, founded on title or possessory title. The cause of action to protect possession must emanate from an allegation about a threatened dispossession at the hands of the defendants. The threatened dispossession being an apprehended injury must be proved by the plaintiff through unimpeachable e*vide*nce. If the plaintiff does not plead at all that he has a threat to his possession as regards the suit property, it may be said that he has no cause of action. If he alleges threat in his pleadings, but fails to prove it to the hilt by unimpeachable e*vide*nce, it would be a case for failure of his action; not a case of non-disclosure of a cause of action. Here, it is the former case; not the latter.

30. The plaintiff in paragraph Nos. 5, 8, 9 and 10 of the plaint has pleaded as follows:

"5- यह कि वादी अपने पिता का अकेला पुत्र है। प्रतिवादीगण निहायत असरदार व शरपसन्द तथा बदनियत किस्म के व्यक्ति हैं

और वह बिला हक व खिलाफ वादी की आराजी का वादी को अकेला जानकर कब्जा करना चाहता है तथा वादी को जानी व माल नुकसान पंहुचाना चाहते हैं तथा प्रतिवादीगण हर समय जान से मारने की फिक्र में लगे हुए हैं ताकि वादी को जान से मारकर उसकी समस्त जायदाद हड़प लें।

8- यह कि प्रतिवादीगण ने बिला हक व खिलाफ कानून दिनांक 21.07.1992 को आराजी निजाई पर जबरदस्ती कब्जा करने तथा उसे जोतने की कोशिश की और वादी को जबरदस्ती आराजी निजाई से बेदखल करना चाहा लेकिन वादी ने दीगर लोगों की मदद से प्रतिवादीगण को उनके मकसद में कामयाब नहीं होने दिया लेकिन प्रतिवादीगण वादी को आइन्दा मारने व आराजी निजाई पर जबरदस्ती कब्जा करने की धमकी देते हुए चले गये।

9- यह कि अगर प्रतिवादीगण अपने मकसद में कामयाब हो गए और उन्होंने वादी की आराजी पर जबरदस्ती कब्जा कर लिया तो वादी को नाकाबिले तलाफी नुकसान होगा तथा वादी तबाह व बर्बाद हो जायेगा। प्रतिवादीगण मना करने पर सुनवा नहीं हो रहे हैं मजबूरन वादी नालिशी है।

10- यह कि बिनाये दावा व तारीख 21.07.1992 को प्रतिवादीगण द्वारा वादी को आराजी निजाई से जबरदस्ती बेदखल करने की कोशिश करने से तथा मना करने पर सुनवा न होने से बमुकाम रामपुर अन्दर हदूद अदालत हाजा पैदा हुआ तथा न्यायालय को वाद की सुनवाई का क्षेत्राधिकार प्राप्त है।"

31. The plaintiff, who has testified in the witness-box as PW-1, has stated thus in his examination-in-chief:

"विवादित आराजी पर प्रतिवादीगण जबरदस्ती कब्जा करना चाहते थे इसलिए मैंने दावा कर दिया। प्रतिवादीगण के विरुद्ध मैंने तहसीलदार स्वार के यहां कार्यवाही की थी जिससे इनका नाम खारिज हो गया था और खतौनी में भी उसका अमल दरामद हो गया था। प्रतिवादीगण बदनियती के तौर पर मेरी आराजी पर नाजायज कब्जा करना चाहते हैं जिसका उन्हें कोई अधिकार नहीं है।"

32. By contrast, in his cross-examination, testifying as PW-1, has said:

"..... मैंने यह दावा इसलिए किया है कि वसीयतनामा झूठा है खारिज किया जाये इसी बात के बाबत मैंने अदालत से सहायता मांगी है। उस वसीयतनामे की तारीख मुझे याद नहीं जिसको मैंने खारिज कराना चाहा हो। मैंने सिर्फ यही सहायता मांगी है कि वसीयतनामा फर्जी है उसकी जांच की जाये।

..... <u>प्रतिवादीगण जोतने बोने कभी नहीं आये न उन्होंने कोई हक मांगा। अब से चार पांच वर्ष पहले भी उन्होंने नहीं जोता बोया । यह कहना गलत है कि 21.7.92 को प्रतिवादीगण विवादित सम्पत्ति को जोता हो और तब से मैं ही जोत बो रहे हैं।"</u>

(emphasis by Court)

33. The other witness examined on behalf of the plaintiff, that is to say, PW-2, has also not spoken a word in his entire testimony about a threat of dispossession or encroachment by the defendants that the plaintiff has faced in the past, or still faces. PW-3 has, likewise, also not said anything in his testimony relating to a threat of encroachment faced by the plaintiff. All these witnesses have denied execution of the Will by Kunwar Sen in the defendants' favour and affirmed the fact that the plaintiff is in cultivatory possession of the suit property after his father's demise.

34. The plaintiff in his cross-examination has explicitly said that he has instituted the present suit, because he wants the Court to cancel the Will, which is bogus. He has made it explicit that the only assistance he wants from the Court is to examine the validity of the forged Will that the defendants propounds. The plaintiff has then gone on to say in his cross-examination that the defendants have never come over to cultivate the suit property nor have they demanded any right in it. They have not cultivated the suit property 4-5 years back either. The most crucial words by PW-1 in his cross-examination are that it is incorrect to say that on 21.07.1992, the defendants tilled the suit property. Rather, the plaintiff said about himself that he is cultivating it ever since.

35. A perusal of the plaintiff's testimony does not speak a word about a threatened invasion of his possession in the suit property. Rather, he disowns any threat to his possession ever being extended by the defendants. It is for the said reason that the Lower Appellate Court has held the plaintiff disentitled to an injunction saying that there is no cause of action disclosed. In saying that, the Lower Appellate Court has gone slightly wrong, as already indicated hereinabove. A cause of action is indeed disclosed by the plaintiff very categorically in his pleadings, but he has not been able to prove his case of threatened or apprehended dispossession from the suit property by the defendants by his e*vide*nce. This is not to say that the plaintiff has not been able to prove his title or possession to the suit property, which he has done in ample measure. Rather, it is the defendants, who have not been able to establish their title to the suit property on the basis of the Will that they propound. They have also not been able to establish their possession in the suit property.

36. The suit being one for injunction to protect the plaintiff's possession from a threatened or impending act of disturbance thereof by the defendants, it was incumbent for the plaintiff to prove that. The plaintiff appears to have led e*vide*nce to establish his succession and dispel the defendants' Will by his e*vide*nce as if it were a suit to declare the defendants' Will void or seek a cancellation thereof. But, that is not what the suit is about. The cause of action in the suit is a very limited one and it is only that which the plaintiff has not been able to prove, to wit, a threatened invasion of the plaintiff's possession by the defendants, which needs to be protected. In this regard, reference may be made to a Bench decision of this Court in **Hafiz Muhammad Ibrahim And Others. vs Pande Chandan Singh And Others, (1921) 63 Ind Cas 727**, where it has been held:

"Before an injunction can be granted, the applicant must establish a legal right. He must then show an actual or threatened invasion of that legal right by the particular person ageist whom he wishes to claim an injunction, and he must give e*vide*nce which justifies the Court in thinking that there is a real substantial likelihood that the wrongful act complained of or apprehended will be repeated or done unless restrained by the Court. The e*vide*nce was not prepared in a way to bring those matters out and the Judge seems to as to have granted the injunction in both instances in a very perfunctory way. We are of opinion for the same reasons that we cannot grant an injunction directing the defendants, not to interfere with repairs of the chabutra."

37. The Karnataka High Court in **R.G. Janthakal v. Bharat Parikh & Co., 1981 SCC OnLine Kar 72** dealing with an issue of the kind that arises for consideration in this case, observed:

"9. I am unable to accede to that argument. The proper thing for the lower appellate Court would have been in the light of the submission of the defendant was to dismiss the suit (appeal) with the observation that in the event of the defendant, in any way, interfering with the peaceful possession and enjoyment of the plaintiff, the plaintiff would be at liberty to seek afresh an injunction. Instead of doing that, without discussing either the e*vide*nce on record or recording a finding that the defendant at any time had in fact interfered in some manner with the peaceful possession and right to carry on the mining operations in plaint schedule B area by plaintiffs, it was not proper for the lower appellate Court to grant injunction particularly when prayer for declaration did not relate to immoveable property namely, mining area in plaint schedule B area.

10. It is well settled principle of law now that injunction can be issued only on proof of actual interference or threat of interference and not in the absence of it....."

38. The Culcatta High Court in **Barid Baran Laha v. Manjuri Ghoshal, 2011 SCC OnLine Cal 204** considering the question about the proof of threat before an injunction can be granted remarked:

"12. It appears from the judgment of learned Trial Court that he placed much reliance on some portions of e*vide*nce of present respondent/defendant and came to the conclusion that the possession of appellant plaintiffs was under threat. The relevant parts of said depositions of respondent/defendant which learned Trial Court gave special emphasis are quoted below:--

"I am deprived of from my constitutional right to enjoy my property". Again in paragraph 22A of the affidavit D.W. 1 admitted "in spite of the said declaration by valid competent Courts, the plaintiffs are not considering the suit property to me." Even in cross-examination D.W. 1 stated the following. "The statement that I claim ownership and in spite of claiming ownership I cannot enjoy the suit property is correct. It is fact that at present properties are in possession of the plaintiffs. They are not delivering the possession of the properties in my favour."

13. Admittedly, for proper appreciation of e*vide*nce of a witness, the entire e*vide*nce is required to be read as a whole. Apart from that even if I examine those chosen out parts of statements of respondent/defendant, still it appears that there was no threatening whatsoever to the appellant/plaintiffs for dispossession. Learned Lower Appellate Court was justified in holding that there was no e*vide*nce whatsoever to show that present respondent/defendant was planning to sell out suit property and/or to dispossess the appellant/plaintiffs therefrom."

39. Before returning an answer to the substantial question of law framed in this appeal, it must be remarked that here is a case, where the plaintiff has proved both his title and possession to the suit property. All that he has failed in proving is a threatened invasion of his possession at the time when he instituted the suit. The consequence would be that the dismissal of his suit would in no way debar the plaintiff from bringing in an action to protect his

possession, should there be ever in future a threat to his peaceful possession of the suit property at the hands of the defendants or anyone else claiming through or under them.

40. The substantial question of law framed in this appeal is answered in the manner that in the face of averments in the written statement by the defendants that they were owners of the suit property on the basis of the Will and had possession too as against the plaintiff's case of title and possession, the Lower Appellate Court should not have dismissed the suit on the ground of absence of cause of action, but dismissed it for the plaintiff's failure to prove his case by e*vide*nce regarding the threat to his peaceful possession.

41. Thus, for reasons slightly different than those that have weighed with the Lower Appellate Court, this Court concurs in the conclusion.

42. In the result, this second appeal **fails** and is **dismissed.** In the circumstances of the case, parties shall bear their own costs in all Courts.

43. Let a decree be drawn up accordingly.

(2023) 2 ILRA 63
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.02.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ A No. 3479 of 2015

Madhyan Bhojan Rasoiya Mazdoor Sangh Husainganj, Lucknow ...Petitioner

Versus

U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Mrinal Chandra, Pradeep Saran

Counsel for the Respondents:
C.S.C., A.S.G., Archana Singh Tomar, G.M. Kamil, Neeraj Chaurasia

Constitution of India, 1950 - Art. 226, 23 & 24 - Code on Wages, 2019- Section 2(y) & 67 - Code on Wages (Central) Rules, 2019 Honorarium to Cooks, engaged for preparing Mid Day Meal in the institutions run & aided by the government - Cooks paid Rs.2,000/- per month which below the minimum wages - Held - Considering the fact that the amount called as "honorarium' is paid to the Cooks on a regular basis for a regular work being done, it is nothing but wages as defined under Section 2(y) of the Code on Wages, 2019 - payment of honorarium at rates far below minimum wages, to the Cooks cum Helpers who are engaged in providing Mid Day Meal is another form of forced labour, which is prohibited under Article 23 and 24 of the Constitution of India - G.O. dated 28.01.2014 & 20.09.2022 - Cooks , semi skilled workers - State Government kept the Cooks making Mid Day Meal in the institutions, classified at Serial No.22, as semi skilled workers and prescribed minimum wages for them at the rate of Rs.6,325/- per month through G.O. dated 28.01.2014 and which was subsequently enhanced to Rs.10,483/- in terms of G.O. dated 20.09.2022 - there is no reason why the petitioners who are performing the same job should not be extended the benefit of minimum wages as has been extended to the persons performing similar jobs but engaged by different employers - mandamus issued to ensure payment of minimum wages to the Cooks cum Helpers employed and preparing the Mid Day Meal (Para 31, 37, 38, 41)

Allowed. (E-5)

List of Cases cited:

1. People's Union for Civil Liberties Vs U.O.I. & ors. (Writ Petition (C) No.196 of 2001)

2. People's Union for Democratic Rights & ors. Vs U.O.I. & ors.; (1982) 3 SCC 235

3.Chandrawati Devi Vs St. of U.P. & ors. Writ - A No.9927 of 2020

4. Karbhari Bhimaji Rohamare Vs Shanker Rao Genuji Kolhe; (1975) 1 SCC 252

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Shri Mrinal Chandra, learned counsel for the petitioner; Shri Dev Rishi Kumar, learned counsel for respondent/Union of India and Shri Mukund Madhav Asthana, learned counsel appearing for the Mid Day Meal Authority.

2. Present petition has been filed highlighting the plight of workers who are engaged in preparing the mid day meals across various government run and government aided schools.

3. Contention of learned counsel for the petitioner is, that the petitioner is a union representing the persons who are employed as Cooks for preparing Mid Day Meal in the institutions run and aided by the government. The petitioner Union is a registered trade union. It is stated that with an aim of providing nutrition to the children in various schools of the District of Uttar Pradesh, Central Government and State Government, on cost sharing basis run a programme known as 'Mid Day Meal Programme' under the National Programme of Nutritional Support to Primary Education.

4. It is informed that the decision for providing nutritional support to the children initially flowed from the orders dated 28.11.2001 and 20.04.2004 passed by the Hon'ble Supreme Court in the case of ***People's Union for Civil Liberties v. Union of India & Ors. (Writ Petition (C) No.196 of 2001)*** (hereinafter referred to 'PUCL').

5. In terms of the directions given by the Supreme Court, Government Order dated 25.06.2004 (Annexure - 5) was issued wherein a decision was taken for providing Mid Day Meal to the students for a minimum period of 200 days in a calendar year. It was also provided that 25% of the expenses incurred for the said purpose shall be borne by the State through PMGY scheme, another 25% shall be provided by the State out of its own funds and the balance 50%, which includes the cost of grains,etc shall be provided by Union of India free of cost. The said Government Order also provided for constitution of a committee in the respective schools and at the Nagar Nigam levels.

6. In terms of the said Government Order, Cooks cum Helpers were to be appointed for a period of one year in different primary schools/junior high schools.

7. It is stated that Ministry of Human Resource Development, Government of India issued a letter dated 24.11.2009 whereby it was provided that the Cooks/Helpers preparing the Mid Day Meal in terms of the scheme would be entitled to an "*honorarium*' of Rs.1,000/- per month.

8. It is also argued by learned counsel for the petitioner that Government Order dated 24.04.2010 (Annexure - 8) was issued for providing Mid Day Meal to various educational institutions managed

by the State/local bodies, the non government aided colleges and Madarsas etc., and similar stipulation with regard to payment of *honorarium* of Rs.1,000/- per month was provided therein. In the said Government Order, it was further provided that the selection of the Cooks in respect of aided institutions, Madarsas, Self Help Groups and NGOs shall be done by them, however, in respect of the other institutions managed by the State and local bodies, the selection is to be done by the State. Thus, for the purpose of payment of quantum of *honorarium*, the institutions run by private management/madrasas on one hand and institutions run by Government/run under aid from government/managed by local bodies, on the other hand were treated on similar footing.

9. The quantum of *honorarium* was fixed through circular dated 29.07.10 at Rs.1,000/- per months to be paid by the Central Government and the State Government in the share as decided and recorded above.

10. Subsequently, by means of the order dated 09.07.2014 it was provided that the *honorarium* to the Cook cum Helper, shall be paid only for 220 working days and/or for a period of 10 months in a calendar year.

11. Learned counsel for the petitioner also places reliance on the Government Order dated 12.01.2015 wherein a similar stipulation has been made with regard to payment of *honorarium* for a period of 10 months. It is informed that subsequently the *honorarium* was increased from Rs.1,000/- per month to Rs.1,500/- per month and lastly vide Government Order dated 28.04.2022, the State Government took a decision to enhance the *honorarium* by a further amount of Rs.500/- to Rs.2,000/- per month, to be paid for a period of 10 months in a calendar year. Apart from the said amount of *honorarium*, a provision was made to pay the amount of Rs.500/- towards the dress allowance twice a year.

12. Contention of learned counsel for the petitioner is that while the petitioner are performing the job of Mid Day Meal,a semi skilled job, the *honorarium* paid to them is highly inadequate and also not even in consonance with the minimum wages which are being paid to similar persons who are performing semi skilled jobs.

13. To press the said submission, learned counsel for the petitioner places reliance on the Government Order dated 28.01.2014 wherein the State Government in exercise of powers under Section 3(1)(b) read with Section 3(2) of the Minimum Wages Act and in exercise of powers under Section 5(1)(b) of Minimum Wages Act after considering the various representations and after consulting the board re-evaluated the minimum wages in respect of the employement within various sectors and with a view to crystallize minimum wages across various sectors had taken a decision, categorizing the industries in groups from serial no 1 to 58 of the said order and rates of minimum wages payable to unskilled labour, semi skilled labour and skilled labour in respect of each of industries mentioned at Serial No.1 to 58 at the rate specified was provided for in the said Government Order.

14. He also draws my attention to entry at Serial No.22 of the said list, which includes Madarsas run by the Muslim Community where no fees is being taken, the private institutions run by religious institutions where no fees or minimum fees

is being charged private coaching centres, private schools etc are clubbed together.

15. In respect of institutions included at Serial No.22, the Cooks have been placed as "semi skilled labourers", Specified institutions at entry no. 22 and the categorization of workers is quoted herein under:

परिशिष्ट - 1	**परिशिष्ट - 1 के (क्रमांक 22) के सम्मुख उल्लिखित नियोजन के सम्बन्ध में श्रेणीकरण -**
22 - (क) मुस्लिम सम्प्रदाय द्वारा संचालित किसी मदरसा, जहाँ विद्यार्थियों से कोई फीस नहीं ली जा रही है या नाममात्र की फीस ली जा रही है; (ख) किसी धार्मिक या पूर्त संस्था द्वारा संचालित किसी प्राइवेट विद्यालय, जहाँ विद्यार्थियों से फीस नहीं ली जा रही है या नाममात्र की फीस ली जा रही है; (ग) उ०प्र० बाल कल्याण परिषद द्वारा संचालित बाल वाड़ियों; और (घ) मान्यता प्राप्त किसी प्राइवेट विद्यालय, जिसे सरकार से सहायता मिल रही है, से भिन्न प्राइवेट कोचिंग कक्षाओं, प्राइवेट विद्यालयों, जिनमें नर्सरी स्कूल और निजी प्राविधिक संस्थाएं भी सम्मिलित हैं, में नियोजन ।	**अकुशल** - चपरासी, चौकीदार, रिक्शाचालक, माली, क्लीनर, बेलदार, मसालची. आया, बेयरा, केयर टेकर और इसी प्रकार का कार्य करने वाला कोई अन्य कर्मचारी चाहे उसे किसी भी नाम से पुकारा जाये। **अर्द्धकुशल** -दफ्तरी, राजगीर (मैसन) रसोईया और इसी प्रकार का कार्य करने वाला कोई अन्य कर्मचारी चाहे उसे किसी भी नाम से पुकारा जाये। **कुशल**- बस / ट्रक ड्राईवर, बढ़ई, प्लम्बर, इलेक्ट्रीशियन, लैब असिस्टेन्ट, टेलर, नर्स, कम्पाउण्डर, लिपिक/टंकक, लाईब्रेरियन / कॅशियर, कनिष्ठ लेखाकार, ज्येष्ठ लेखाकार, प्रधान लिपिक, हेड कैशियर और इसी प्रकार का कार्य करने वाला कोई अन्य कर्मचारी चाहे उसे किसी भी नाम से पुकारा जाये।

16. In the light of the same, the submission of learned counsel for the petitioner is that for the persons working as Cooks in Madarsas, the institutions managed by various religious institutions and the institutions managed by private bodies, they have been classified as semi skilled and the minimum wages have been fixed at Rs.6,325/- per month vide Governemnt Order dated 28.01.2014.

17. It is further informed that on 20.09.2022, the State Government has revised the minimum wages in respect of various categories specified in Government Order dated 28.01.2014 and the wages for the semi skilled labourers have been increased from Rs.6,325/- per month to Rs.10,483/- per month with a further provision for increase of dearness allowance every six months.

18. In the light of the said, the two-fold submission of learned counsel for the petitioner are firstly, that the charges being paid to the Cooks in pursuance to the scheme of the Union of India and the State Government being Rs.1,000/- per month enhanced to Rs.1,500/- per month and subsequently to Rs.2,000/- per month is nothing but *'another form of forced labour'*, which is prohibited under Article 23 of the Constitution of India and secondly,that the Union and the State are discriminating in paying wages to the petitioners members far less than what have been prescribed by the state for payment to cooks performing the same functions but employed elsewhere.

19. It is contended at the Bar that the Central Government itself in pursuance to the directions given by the Hon'ble Supreme Court has framed rules known as 'Code of Wages (Central) Rules, 2019' wherein certain norms have been prescribed for fixing the minimum wages. It is informed that the said Code of Wages

(Central) Rules, 2019 received the assent and was notified in the Gazette on 08.08.2019. In the light of the said, he argues that non-providing the minimum wages as notified is nothing but *"exploitation'* which is also prohibited under Article 23 of the Constitution of India.

20. He also argues that even the State Government has issued direction for payment of minimum wages to Cooks who are doing similar jobs but are employed by the Madarsas, other religious institutions, private educational institutions etc., and thus, there is no reason why the State Government and the Central Government should not extend the said benefit to the Cooks preparing Mid Day Meals in the government institutions.

21. He further argues that there is no rationale for fixing the limit of *honorarium* only for a period of 10 months in a particular calendar year.

22. He further argues that some of the Cooks making Mid Day Meals are employed on contract for a year and although in most of the cases the contracts are extended on yearly basis but in some cases the contracts are not extended without there being any remedy available to the poor cooks. In some cases the cooks making mid day meals have been employed for as long as 15 years on paltry amount of *honorarium* without any social security benefits being extended to them and the poor cooks,on account of their poverty are unable to make any grievance He argues that the Cooks of the Mid Day Meals are neither being given any financial security nor any social security and the Union and the State are exploiting the said Cooks.

23. He informs that this Court, noticing the plight of mid day meal cooks had passed an order in Writ - A No.9927 of 2020 (Chandrawati Devi v. State of U.P. & Ors.) wherein a similar issue ,with regard to payment of wages at the rate of Rs.1,000/- per month to the Cooks preparing Mid Day meal, was held to be other form of forced labour prohibited under Article 23 of the Constitution of India.The Court placing reliance on the judgment of the Hon'ble Supreme Court in the case of ***People's Union for Democratic Rights and Others v. Union of India and Others; (1982) 3 SCC 235*** had allowed the writ petition and gave directions for payment of minimum wages to the Cooks across the State of Uttar Pradesh vide judgment dated 15.12.2020. He further argues that the said order was set aside in Special Appeal Defective No.123 of 2021 mainly on the ground that the relief granted by the Court was beyond what was prayed for in the said writ petition.

24. The Counsel appearing for respondents tried to justify the payment of *honorarium* at the rates specified by arguing that the Union Government with a view to improve health care in the school going children and with a view to impart education to the less priviledged class of the society, promoted the scheme for providing mid day meals to children, with a view to increase the reach of the scheme, fixed the *honorarium*, keeping in view the paucity of funds and need for maximising and achieving the laudible objective of the scheme.

25. It is further argued that the *honorarium* paid to cooks in terms of the scheme cannot be equated with wages, as is being argued by the petitioners.

26. In the light of rival submissions this court is to decide whether the *honorarium* paid to the cooks employed under the mid day meal scheme is adequate and whether they are facing discrimination vis a vis minimum wages being paid to cooks performing similar functions but in institutions other than government schools.

27. The issue as raised in the present writ petition has to be adjudged by adopting a social context judging technique while interpreting the rights of the members of the petitioner's association who are the disadvantaged section of the society being paid meagre *honorarium* for the jobs which they are performing in terms of the scheme.

28. The word "*honorarium*' as defined in the Shorter Oxford Dictionary is *''an honorary reward, a fee for professional service rendered'* and is used often mistakenly for the remuneration being paid on regular basis which are generally referred as "salary' or "wages'. The word "*honorarium*' is generally a referable to the payments made for a performance which is for compensating some particular act.

29. The Hon'ble Supreme Court in the case of ***Karbhari Bhimaji Rohamare v. Shanker Rao Genuji Kolhe; (1975) 1 SCC 252*** explained that for determining the payments made, it is the substance rendering the form of the essence of payment rather than its nomenclature which should be the guiding factor for determining the nature of payments made irrespective of the use of word "*honorarium*' or "salary' or "allowance'. The Hon'ble Supreme Court recorded in Para - 6 as under:

"6. The whole controversy centres around the honorarium payable to the members of the Wage Board. It is contended on behalf of the appellant that Item 11 specifically lays down that the compensatory allowance shall mean the travelling allowance, the daily allowance or such other allowance which is paid to the holder of the office for the purpose of meeting the personal expenditure in attending the meeting of the committee or body or in performing any other function as the holder of the said office, and honorarium which is not mentioned there cannot be brought within the meaning of the words "such other allowance" found in that item as it is not an allowance. Reference is made to the dictionary meaning of the word "honorarium" and it is said that while the daily allowance is expected to meet the expenses of the member concerned while attending the meeting of the Board, the honorarium is in the form of a fee for performing his duties on those days. The Shorter Oxford Dictionary gives the meaning of the word "honorarium" as an honorary reward, a fee for professional service rendered, while one of the meanings of the word "salary" is, fixed payment made periodically to a person as compensation for regular work, remuneration for services rendered, fee, honorarium. Thus, in one aspect honorarium and fee are used almost as though they are interchangeable terms Even so, what was paid to the first respondent cannot be said to be a salary. It was not a fixed payment made periodically as compensation for regular work. We do not think that the dictionary meaning is of much help here. ***We are of opinion that the matter must be considered as a matter of substance rather than of form, of the essence of payment rather than its nomenclature. Even so, it is urged on behalf of the appellant that the payment of honorarium in this case could not have***

been for any purpose other than payment for services rendered on particular days on which the meetings of the Wage Board were held. We are not able to accept this contention."

30. The Code on Wages, 2019 defines the "wages' in Section 2(y) as under:

"2. In this Code, unless the context otherwise requires.-

(y) "wages" means all remuneration whether by way of salaries, allowances or otherwise, expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes,--

(i) basic pay;

(ii) dearness allowance; and

(iii) retaining allowance, if any, but does not include--

(a) any bonus payable under any law for the time being in force, which does not form part of the remuneration payable under the terms of employment;

(b) the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the appropriate Government;

(c) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon;

(d) any conveyance allowance or the value of any travelling concession;

(e) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment;

(f) house rent allowance;

(g) remuneration payable under any award or settlement between the parties or order of a court or Tribunal;

(h) any overtime allowance;

(i) any commission payable to the employee;

(j) any gratuity payable on the termination of employment;

(k) any retrenchment compensation or other retirement benefit payable to the employee or any ex gratia payment made to him on the termination of employment:

Provided that, for calculating the wages under this clause, if payments made by the employer to the employee under clauses (a) to (i) exceeds one-half, or such other per cent. as may be notified by the Central Government, of the all remuneration calculated under this clause, the amount which exceeds such one-half, or the per cent. so notified, shall be deemed as remuneration and shall be accordingly added in wages under this clause:

Provided further that for the purpose of equal wages to all genders and for the purpose of payment of wages, the emoluments specified in clauses (d), (f), (g) and (h) shall be taken for computation of wage.

Explanation.--Where an employee is given in lieu of the whole or part of the wages payable to him, any remuneration in kind by his employer, the value of such remuneration in kind which does not exceed fifteen per cent. of the total wages payable to him, shall be deemed to form part of the wages of such employee;"

31. Considering the fact that the amount called as "*honorarium*' is paid to the Cooks on a regular basis for a regular work being done, it is nothing but wages as defined under Section 2(y) of the Code on Wages, 2019.

32. The Central Government in exercise of powers conferred by Section 67 of the Code on Wages, 2019 read with Section 24 of the General Clauses Act has notified the rules known as the Code on Wages (Central) Rules, 2019 and have been made applicable to the whole of India.

33. To test the other argument of learned counsel for the petitioner that the *honorarium* as being paid is nothing but other form of forced labour, it is relevant to notice the judgment of the Supreme Court in the case of ***People's Union for Democratic Rights (supra)*** wherein the Hon'ble Supreme Court has held as under:

12. Article 23 enacts a very important fundamental right in the following terms:

"23.Prohibition of traffic in human beings and forced labour.--(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."

Now many of the fundamental rights enacted in Part III operate as limitations on the power of the State and impose negative obligations on the State not to encroach on individual liberty and they are enforceable only against the State. But there are certain fundamental rights conferred by the Constitution which are enforceable against the whole world and they are to be found inter alia in Articles 17, 23 and 24. We have already discussed the true scope and ambit of Article 24 in an earlier portion of this judgment and hence we do not propose to say anything more about it. So also we need not expatiate on the proper meaning and effect of the fundamental right enshrined in Article 17 since we are not concerned with that article in the present writ petition. It is Article 23 with which we are concerned and that article is clearly designed to protect the individual not only against the State but also against other private citizens. Article 23 is not limited in its application against the State but it prohibits "traffic in human being and begar and other similar forms of forced labour" practised by anyone else. The sweep of Article 23 is wide and unlimited and it strikes at "traffic in human beings and begar and other similar forms of forced labour" wherever they are found. The reason for enacting this provision in the Chapter on Fundamental Rights is to be found in the socio-economic condition of the people at the time when the Constitution came to be enacted. The Constitution-makers, when they set out to frame the Constitution, found that they had the enormous task before them of changing the socio-economic structure of the country and bringing about socio-economic regeneration with a view to reaching social and economic justice to the common man. Large masses of people, bled white by wellnigh two centuries of foreign rule, were living in abject poverty and destitution, with ignorance and illiteracy accentuating their helplessness and despair. The society had degenerated into a status-oriented hierarchical society with little respect for the dignity of the individual who was in the lower rungs of the social ladder or in an economically impoverished condition. The political revolution was completed and it had succeeded in bringing freedom to the country but freedom was not an end in

itself, it was only a means to an end, the end being the raising of the people to higher levels of achievement and bringing about their total advancement and welfare. Political freedom had no meaning unless it was accompanied by social and economic freedom and it was therefore necessary to carry forward the social and economic revolution with a view to creating socio-economic conditions in which every one would be able to enjoy basic human rights and participate in the fruits of freedom and liberty in an egalitarian social and economic framework. It was with this end in view that the Constitution-makers enacted the directive principles of state policy in Part IV of the Constitution setting out the constitutional goal of a new socio-economic order. Now there was one feature of our national life which was ugly and shameful and which cried for urgent attention and that was the existence of bonded or forced labour in large parts of the country. This evil was the relic of a feudal exploitative society and it was totally incompatible with the new egalitarian socio-economic order which "we the people of India" were determined to build and constituted a gross and most revolting denial of basic human dignity. It was therefore necessary to eradicate this pernicious practice and wipe it out altogether from the national scene and this had to be done immediately because with the advent of freedom, such practice could not be allowed to continue to blight the national life any longer. Obviously, it would not have been enough merely to include abolition of forced labour in the directive principles of state policy, because then the outlawing of this practice would not have been legally enforceable and it would have continued to plague our national life in violation of the basic constitutional norms and values until some appropriate legislation could be brought by the legislature forbidding such practice. The Constitution-makers therefore decided to give teeth to their resolve to obliterate and wipe out this evil practice by enacting constitutional prohibition against it in the Chapter on Fundamental Rights, so that the abolition of such practice may become enforceable and effective as soon as the Constitution came into force. This is the reason why the provision enacted in Article 23 was included in the Chapter on Fundamental Rights. The prohibition against "traffic in human beings and begar and other similar forms of forced labour" is clearly intended to be a general prohibition, total in its effect and all pervasive in its range and it is enforceable not only against the State but also against any other person indulging in any such practice.

13. The question then is as to what is the true scope and meaning of the expression "traffic in human beings and begar and other similar forms of forced labour" in Article 23? What are the forms of "forced labour" prohibited by that article and what kind of labour provided by a person can be regarded as "forced labour" so as to fall within this prohibition? When the Constitution-makers enacted Article 23 they had before them Article 4 of the Universal Declaration of Human Rights but they deliberately departed from its language and employed words which would make the reach and content of Article 23 much wider than that of Article 4 of the Universal Declaration of Human Rights. They banned "traffic in human beings" which is an expression of much larger amplitude than "slave trade" and they also interdicted "begar and other similar forms of forced labour". The question is what is the scope and ambit of the expression "begar" and other similar forms of forced

labour'? Is this expression wide enough to include every conceivable form of forced labour and what is the true scope and meaning of the words "forced labour"? The word "begar" in this article is not a word of common use in English language. It is a word of Indian origin which like many other words has found its way in the English vocabulary. It is very difficult to formulate a precise definition of the word "begar", but there can be no doubt that it is a form of forced labour under which a person is compelled to work without receiving any remuneration. Molesworth describes "begar' as "labour or service exacted by a Government or person in power without giving remuneration for it". Wilson's Glossary of Judicial and Revenue Terms gives the following meaning of the word "begar":"a forced labourer, one pressed to carry burthens for individuals or the public. Under the old system, when pressed for public service, no pay was given. The begari, though still liable to be pressed for public objects, now receives pay. Forced labour for private service is, prohibited." "Begar" may therefore be loosely described as labour or service which a person is forced to give without receiving any remuneration for it. That was the meaning of the word "begar" accepted by a Division Bench of the Bombay High Court in S. Vasudevan v. S.D. Mital [AIR 1962 Bom 53 : 63 Bom LR 774 : (1961-62) 21 FJR 441] . "Begar" is thus clearly a form of forced labour. Now it is not merely "begar" which is unconstitutionally (sic) prohibited by Article 23 but also all other similar forms of forced labour. This Article strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values. The practice of forced labour is condemned in almost every international instrument dealing with human rights. It is interesting to find that as far back as 1930 long before the Universal Declaration of Human Rights came into being, International Labour Organisation adopted Convention No. 29 laying down that every member of the International Labour Organisation which ratifies this convention shall "suppress the use of forced or compulsory labour in all its forms" and this prohibition was elaborated in Convention No. 105 adopted by the International Labour Organisation in 1957. The words "forced or compulsory labour" in Convention No. 29 had of course a limited meaning but that was so on account of the restricted definition of these words given in Article 2 of the Convention. Article 4 of the European Convention of Human Rights and Article 8 of the International Covenant on Civil and Political Rights also prohibit forced or compulsory labour. Article 23 is in the same strain and it enacts a prohibition against forced labour in whatever form it may be found. The learned counsel appearing on behalf of the respondents laid some emphasis on the word "similar" and contended that it is not every form of forced labour which is prohibited by Article 23 but only such form of forced labour as is similar to "begar" and since "begar" means labour or service which a person is forced to give without receiving any remuneration for it, the interdict of Article 23 is limited only to those forms of forced labour where labour or service is exacted from a person without paying any remuneration at all and if some remuneration is paid, though it be inadequate, it would not fall within the words "other similar forms of forced labour". This contention seeks to unduly restrict the amplitude of the prohibition against forced labour enacted in Article 23 and is in our opinion not well founded. It does not accord with the principle

enunciated by this Court in Maneka Gandhi v. Union of India [(1978) 1 SCC 248 : AIR 1978 SC 597 : (1978) 2 SCR 621] that when interpreting the provisions of the Constitution conferring fundamental rights, the attempt of the court should be to expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content. It is difficult to imagine that the Constitution-makers should have intended to strike only at certain forms of forced labour leaving it open to the socially or economically powerful sections of the community to exploit the poor and weaker sections by resorting to other forms of forced labour. Could there be any logic or reason in enacting that if a person is forced to give labour or service to another without receiving any remuneration at all, it should be regarded as a pernicious practice sufficient to attract the condemnation of Article 23, but if some remuneration is paid for it, then it should be outside the inhibition of that article? If this were the true interpretation, Article 23 would be reduced to a mere rope of sand, for it would then be the easiest thing in an exploitative society for a person belonging to a socially or economically dominant class to exact labour or service from a person belonging to the deprived and vulnerable section of the community by paying a negligible amount of remuneration and thus escape the rigour of Article 23. We do not think it would be right to place on the language of Article 23 an interpretation which would emasculate its beneficent provisions and defeat the very purpose of enacting them. We are clearly of the view that Article 23 is intended to abolish every form of forced labour. The words "other similar forms of forced labour" are used in Article 23 not with a view to importing the particular characteristic of "begar" that labour or service should be exacted without payment of any remuneration but with a view to bringing within the scope and ambit of that article all other forms of forced labour and since "begar" is one form of forced labour, the Constitution-makers used the words "other similar forms of forced labour". If the requirement that labour or work should be exacted without any remuneration were imported in other forms of forced labour, they would straightaway come within the meaning of the word "begar" and in that event there would be no need to have the additional words "other similar forms of forced labour". These words would be rendered futile and meaningless and it is a well-recognised rule of interpretation that the court should avoid a construction which has the effect of rendering any words used by the legislature superfluous or redundant. The object of adding these words was clearly to expand the reach and content of Article 23 by including, in addition to "begar", other forms of forced labour within the prohibition of that article. Every form of forced labour, "begar" or otherwise, is within the inhibition of Article 23 and it makes no difference whether the person who is forced to give his labour or service to another is remunerated or not. Even if remuneration is paid, labour supplied by a person would be hit by this article if it is forced labour, that is, labour supplied not willingly but as a result of force or compulsion. Take for example a case where a person has entered into a contract of service with another for a period of three years and he wishes to discontinue serving such other person before the expiration of the period of three years. If a law were to provide that in such a case the contract shall be specifically enforced and he shall be compelled to serve for the full period of three years, it would clearly amount to forced labour and such a

law would be void as offending Article 23. That is why specific performance of a contract of service cannot be enforced against an employee and the employee cannot be forced by compulsion of law to continue to serve the employer. Of course, if there is a breach of the contract of service, the employee would be liable to pay damages to the employer but he cannot be forced to continue to serve the employer without breaching the injunction of Article 23. This was precisely the view taken by the Supreme Court of United States in Baily v. Alabama [219 US 219 : 55 L Ed 191] while dealing with a similar provision in the Thirteenth Amendment. There, a legislation enacted by the Alabama State providing that when a person with intent to injure or defraud his employer enters into a contract in writing for the purpose of any service and obtains money or other property from the employer and without refunding the money or the property refuses or fails to perform such service, he will be punished with a fine. The constitutional validity of this legislation was challenged on the ground that it violated the Thirteenth Amendment which inter alia provides:"Neither slavery nor involuntary servitude ..... shall exist within the United States or any place subject to their jurisdiction." This challenge was upheld by a majority of the Court and Mr Justice Hughes delivering the majority opinion said:

"We cannot escape the conclusion that although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and judging its purpose by its effect that it seeks in this way to provide the means of compulsion through which performance of such service may be secured. The question is whether such a statute is constitutional."

The learned Judge proceeded to explain the scope and ambit of the expression "involuntary servitude" in the following words:

"The plain intention was to abolish slavery of whatever name and form and all its badges and incidents, to render impossible any state of bondage; to make labour free by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude."

Then, dealing with the contention that the employee in that case had voluntarily contracted to perform the service which was sought to be compelled and there was therefore no violation of the provisions of the Thirteenth Amendment, the learned Judge observed:

"The fact that the debtor contracted to perform the labour which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service that the statute inhibits, for when that occurs, the condition of servitude is created which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforce labour."

and proceeded to elaborate this thesis by pointing out:

"Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin,

but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labour or rendering of services in payment of a debt. In the latter case the debtor though contracting to pay his indebtedness by labour or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service."

It is therefore clear that even if a person has contracted with another to perform service and there is consideration for such service in the shape of liquidation of debt or even remuneration he cannot be forced, by compulsion of law or otherwise, to continue to perform such service, as that would be forced labour within the inhibition of Article 23. This article strikes at every form of forced labour even if it has its origin in a contract voluntarily entered into by the person obligated to provide labour or service (vide Pollock v. Williams [322 US 4 : 88 L Ed 1095]). The reason is that it offends against human dignity to compel a person to provide labour or service to another if he does not wish to do so, even though it be in breach of the contract entered into by him. There should be no serfdom or involuntary servitude in a free democratic India which respects the dignity of the individual and the worth of the human person. Moreover, in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, a contract of service may appear on its face voluntary but it may, in reality, be involuntary, because while entering into the contract, the employee, by reason of his economically helpless condition, may have been faced with Hobson's choice, either to starve or to submit to the exploitative terms dictated by the powerful employer. It would be a travesty of justice to hold the employee in such a case to the terms of the contract and to compel him to serve the employer even though he may not wish to do so. That would aggravate the inequality and injustice from which the employee even otherwise suffers on account of his economically disadvantaged position and lend the authority of law to the exploitation of the poor helpless employee by the economically powerful employer. Article 23 therefore says that no one shall be forced to provide labour or service against his will, even though it be under a contract of service.

14. Now the next question that arises for consideration is whether there is any breach of Article 23 when a person provides labour or service to the State or to any other person and is paid less than the minimum wage for it. *It is obvious that ordinarily no one would willingly supply labour or service to another for less than the minimum wage, when he knows that under the law he is entitled to get minimum wage for the labour or service provided by him. It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration which is less than the minimum wage, he is acting under the force of some compulsion which drives him to work though he is paid less than what he is entitled under law to receive. What Article 23 prohibits is "forced labour" that is labour or service which a person is forced*

to provide and "force" which would make such labour or service "forced labour" may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as "force" and if labour or service is compelled as a result of such "force", it would be "forced labour". Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly "forced labour". There is no reason why the word "forced" should be read in a narrow and restricted manner so as to be confined only to physical or legal "force" particularly when the national charter, its fundamental document has promised to build a new socialist republic where there will be socio-economic justice for all and everyone shall have the right to work, to education and to adequate means of livelihood. The Constitution-makers have given us one of the most remarkable documents in history for ushering in a new socio-economic order and the Constitution which they have forged for us has a social purpose and an economic mission and therefore every word or phrase in the Constitution must be interpreted in a manner which would advance the socio-economic objective of the Constitution. It is not unoften that in a capitalist society economic circumstances exert much greater pressure on an individual in driving him to a particular course of action than physical compulsion or force of legislative provision. The word "force" must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. Of course, if a person provides labour or service to another against receipt of the minimum wage, it would not be possible to say that the labour or service provided by him is "forced labour" because he gets what he is entitled under law to receive. No inference can reasonably be drawn in such a case that he is forced to provide labour or service for the simple reason that he would be providing labour or service against receipt of what is lawfully payable to him just like any other person who is not under the force of any compulsion. ***We are therefore of the view that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour" under Article 23. Such a person would be entitled to come***

to the court for enforcement of his fundamental right under Article 23 by asking the court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be "forced labour" and the breach of Article 23 is remedied. It is therefore clear that when the petitioners alleged that minimum wage was not paid to the workmen employed by the contractors, the complaint was really in effect and substance a complaint against violation of the fundamental right of the workmen under Article 23.

34. In the light of what has been held by the Hon'ble Supreme Court, it is clear that the payment of Rs.1,000/- per month subsequent enhanced to Rs.1,500/- per month and then Rs.2,000/- per month is far below the minimum wages and is nothing but another form of forced labour.

35. In the affidavit filed by the respondents, there is no justification provided with regard to the quantum of amounts fixed by the Union of India except in Para - 12 of the counter affidavit it has been stated that the Programme Approval Board - Mid Day Meal Scheme has sanctioned the payment of *honorarium* at the rate of Rs.1,000/- per Cook cum Helper only in order to implement the Mid Day Meal Scheme, which is to be shared in the ratio as prescribed in between the Central Government and the State Government.

36. The said stand of the respondents, without there being any justification, clearly makes the same exploitative in nature. It is well settled that the State while framing a scheme/providing for beneficial measures has to take within its sweep that the method in achieving laudable objective of the schemes should also be within the framework of law and cannot be such so as to be exploitative in nature. The plight of the Cooks cum Helpers can be gazed from the fact that they are pursuing the litigation since the year 2015 and are fighting with the might of the State for a claim which is guaranteed to them under law by virtue of Article 23 & 24 of the Constitution of India.

37. Owing to their position in the society, they have done a commendable job in approaching this Court for agitating for their rights against the exploitation as guaranteed by the Constitution of India. Thus, I have no hesitation in holding that the payment of *honorarium* at rates far below minimum wages, to the Cooks cum Helpers who are engaged in providing Mid Day Meal is another form of forced labour and clearly prohibited under Article 23 and 24 of the Constitution of India.

38. Coming to the question of discrimination; it has been already recorded above that the State Government itself has classified various industries/establishments on the basis of the nature of the work being done by them and has further classified the workers in the category of skilled, semi skilled and unskilled and has kept the Cooks making Mid Day Meal in the institutions classified at Serial No.22 as semi skilled workers and has prescribed minimum wages for them at the rate of Rs.6,325/- per month through Government Order dated 28.01.2014 and which has been subsequently enhanced to Rs.10,483/- in terms of the Government Order dated 20.09.2022, there is no reason why the petitioners who are performing the same job but employed with the Government should not be extended the benefit of minimum wages as has been extended to the persons performing similar jobs but

engaged by different employers. Thus, on that count also, the petitioners have been discriminated.

39. This Court cannot lose sight of the fact that the State has to act fairly being a welfare State and cannot take any decision which has the tendency to violate the fundamental values of our democracy which has to ensure dignity and equality of all human beings and good governance. In the present case by providing the *honorarium* of Rs.1,000/- per month, the Central and the State both have failed in ensuring the dignity of these Cooks cum Helpers and the said action certainly cannot be termed as good governance.

40. Thus, for all the reasons recorded above, the writ petition deserves to be allowed and ordered accordingly.

41. A mandamus is issued to the Central Government and the State Government to make necessary amendments in their circulars and to ensure payment of minimum wages to the Cooks cum Helpers employed and preparing the Mid Day Meal across the State of Uttar Pradesh in terms of the various circulars issued from time to time and the mandate of the Code of Wages (Central) Rules, 2019.

42. Although, there is no prayer made in the writ petition with regard to payment of arrears, this Court deems it fit and feels that it is the duty of the Court to extend the relief even if the same is not prayed for, particularly in respect of disadvantage section of the society namely Cooks who are working in pitiable conditions and for paltry amounts, as such, this Court deems it appropriate to issue directions to the respondents Union of India and the State Government to ensure payment of minimum wages fixed from time to time to the persons employed as Cooks cum Helpers for preparation of Mid Day Meals from the year 2014, the date on which a decision was taken by the State Government to hold that the Cooks preparing the meals in the institution would be classified as semi skilled and would be entitled to minimum wages w.e.f. 28.01.2014. The arrears of wages shall be paid to all the persons employed as cook cum helper individually after deducting the *honorarium* already paid to them within a period of four months from today. The Central Government and the State Government shall bear the burden in the ratio in which the *honorarium*s were being paid by them. It is clarified that with effect from the date of delivery of this judgment, the Cooks cum helpers shall be paid remuneration at the rate of minimum wages fixed and modified from time to time,the burden shall be shared by the Central Government and the State Government in the Ratio in which they are bearing the financial burden under the scheme.

(2023) 2 ILRA 78
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.02.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ A No. 8968 of 2022
along with
Writ A No. 6343 of 2020
and other connected cases

Dr. Shyam Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Vivek Sirswal, B.N. Sirswal

Counsel for the Respondents:
C.S.C.

A. Civil Law - U.P. Qualifying Service for Pension and Validation Act, 2021 - Section 2 - qualifying service for pension - interpretation & application of Section 2 of the Act of 2021 for counting qualifying service for the purpose of pension with regard to work charge employees, daily wager employees, adhoc appointees against the post as well as Seasonal Collection Amin – Held - 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 - same would be an exploitative device and labour malpractice, as by this, the St. Government is 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. - to save Section 2 of the Act of 2021 from the vice/arbitrariness, 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 10, 21)

B. U.P. Qualifying Service for Pension and Validation Act, 2021, S. 2 - *Daily-wager* - pensionary benefits - regularisation after the old pension scheme was abolished - It is well settled 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 - Daily wagers entitled for counting of their services rendered as daily wagers for pensionary benefits (Para 17)

C. U.P. Qualifying Service for Pension and Validation Act, 2021 - Section 2 - *Adhoc Employees* - pensionary benefits - Employees appointed against substantive posts on adhoc basis - such employees are entitled for counting of services rendered by them as ad-hoc employees for pensionary purposes (Para 18)

D. U.P. Qualifying Service for Pension and Validation Act, 2021 - Section 2 - Pension - *Seasonal Collection Peon/Collection Amin* - since, appointment of Seasonal Collection Peon/Collection Amin, is against a post, hence, they are entitled for pension by counting in services rendered by them as non-regular employees. (Para 21)

Allowed. (E-5)

List of Cases cited:

1. Prem Singh Vs St. of U.P. & ors., (2019) 10 SCC 516

2. St. of U.P. & ors. Vs Mahendra Singh (S.A.D. No.1003 of 2020), dt 4.2.2021

3. St. of U.P. & ors. Vs Bhanu Pratap Sharma (S.A. No.97 of 2021) dt 9.6.2021

4. St. of U.P. & ors. Vs Bhanu Pratap (S.A. No. 152 of 2021) dt 14.7.2021

5. St. of U.P. & ors. Vs Bhanu Pratap (Special Leave to Appeal (c) No.10381 of 2022, dt 11.7.2022

6. Ram Das Yadav Vs St. of U.P. & ors. (W.P. No.25955 of 2017)

7. Jang Pal Vs St. of U.P. & ors. (S.A. No.240 of 2021) dt 16.5.2022

8. St. of U.P. & ors. Vs Gulam Sarver (Special Appeal No.165 of 2022)

9. St. of U.P. & ors. Vs Raj Bahadur Pastor, 2022(3) ADJ 5 (DB)

10. Kishun Dev Ram Vs St. of U.P. & ors. (Writ-A No.38221 of 2011)

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard learned counsel for the petitioners Sri Vivek Sirswal, Sri Rakesh Kumar Singh, Sri Angrej Nath Shukla, Km. Pratima Devi, Sri Vivek Kumar Rai, Sri Jitendra Kumar Pandey, Sri Lalji Yadav, Sri Manendra Nath Rai, Sri Fahmid Ahmad,

Sri Mohd. Ateeq Khan, Sri Suneel Kumar Singh Kalhans, Sri Shobh Nath Pandey, Sri Sudeep Kumar, Sri Ramesh Kumar Srivastava, Sri Mohd. Tauseef Siddiqui, Sri Pradeep Kumar Shukla, Sri Yogesh Chandra Srivastava, Sri Jai Bahadur Singh, Sri Mrinal Tripathi, Sri Nirankar Singh, Sri Ashok Kumar Mishra, Sri Vimal Kumar, Km. Vishwa Mohini, Sri Ashwani Kumar, Sri Arvind Pratap Singh, Sri V.K. Shukla, Sri Aditya Vikram Shahi, Sri Vinod Kumar Singh, Sri Mukesh Kumar, Sri Digvijay Singh Yadav, Sri Pradip Kumar Srivastava, Sri Lalendra Pratap Singh, Sri A.P. Singh, Sri Satish Kumar Sharma and Sri Praful Yadav, learned Standing Counsel for the State.

2. This Bunch of writ petitions relates to interpretation and application of Section 2 of the Act of 2021 for counting qualifying service for the purpose of pension with regard to work charge employees, daily wager employees, adhoc appointees against the post as well as Seasonal Collection Amin. Since common issue is involved in all the writ petitions with regard to interpretation of Section 2 of Section 2021, therefore, the same are being decided by this common judgment.

Work-Charge Employees:

3. The petitioners are work charge employees appointed between 1979 to 1988 and regularized in different departments between 1994 to 2013. All the petitioners are now retired. They claim entitlement of pension after taking into account the services rendered by them as work charge employee.

In ***Writ-A No.6343 of 2020,*** claim of the petitioner was rejected by impugned order dated 28.1.2020 on the ground that judgment in case of ***Prem Singh vs. State of U.P. and others, (2019) 10 SCC 516*** has not attained finality;

In ***Writ-A No.7877 of 2022***, the petitioner has challenged the order passed in the year 2022 without any specific date, rejecting his claim on the ground that as per the Ordinance issued on 5.3.2021, case of the petitioner is not covered;

In ***Writ-A No.9 of 2023***, under challenge is the impugned order dated 11.11.2022 whereby claim of the petitioner was rejected on the ground that his initial appointment was on work charge post;

In ***Writ-A No.18054 of 2021***, challenge is made to the impugned order dated 29.12.2020 by means of which claim of the petitioners was rejected on the ground that they are not a party to the case of ***Prem Singh*** (supra); and

In ***Writ-A No.3662 of 2019,*** petitioners have challenged the order dated 10.7.2018 whereby claim of the petitioners was rejected on the ground that their services were regularized on 21.1.2013 i.e. after old pension scheme was abolished.

4. Learned counsels for the petitioners have relied upon the case of ***Prem Singh*** (supra) as well as judgment of this Court in the cases of ***State of U.P. and others vs. Mahendra Singh (Special Appeal Defective No.1003 of 2020),*** decided on 4.2.2021; ***State of U.P. and others vs. Bhanu Pratap Sharma (Special Appeal No.97 of 2021)*** decided on 9.6.2021; ***State of U.P. and others vs. Bhanu Pratap (Special Appeal No.152 of 2021)*** decided on 14.7.2021 and the order dated 11.7.2022 passed in the case of ***State of U.P. and others vs. Bhanu Pratap (Special Leave to Appeal (c) No.10381 of 2022***, which is rejected by the Supreme Court.

5. On the other hand, learned Standing Counsel opposing the same,

submits that the judgment in case of ***Prem Singh*** (supra) is passed on the basis of Civil Services Regulations (CSR Regulations) as existed at that time. The same stand superseded by the U.P. Ordinance No.19 of 2020 (The U.P. Qualifying Services for Pension and Validation Ordinance, 2020) published in extraordinary gazette of Government of U.P. on 21.10.2020 followed by the U.P. Qualifying Service for Pension and Validation Act, 2021 (for short 'the Act of 2021'). As per Section 2 of the Act of 2021, the term 'qualifying service' means services rendered by an officer appointed on temporary or permanent post in accordance with the service Rules prescribed for the post. Since the petitioners were not appointed on any post, but were work charge employees, hence, the said services cannot be counted and, thus, they are not entitled for pensionary benefits. Learned Standing Counsel has placed reliance upon a judgment and order dated 8.11.2021 passed by a Full Bench of this Court in the case of ***Ram Das Yadav vs. State of U.P. and others (Writ Petition No.25955 of 2017)***; as well as judgment of this Court in case of ***Jang Pal vs. State of U.P. and others (Specia Appeal No.240 of 2021)*** decided on 16.5.2022; interim order dated 26.4.2022 in case of ***State of U.P. and others vs. Gulam Sarver (Special Appeal No.165 of 2022)***; ***State of U.P. and others vs. Raj Bahadur Pastor, 2022(3) ADJ 5 (DB)***; and judgment and order dated 7.5.2022 passed in case of ***Kishun Dev Ram vs. State of U.P. and others (Writ-A No.38221 of 2011).***

6. The Supreme Court in ***Prem Singh*** case (supra) considered the applicability and validity of U.P. Retirement Benefit Rules, 1961 and CSR Regulations, which barred payment of pension to persons working in work charge establishment and held:

"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."

Thus, the Supreme Court held that since the State Government has proceeded to take work on long term basis from the work charge employees, without there being a rational classification between the work performed by such work charge employees and the regular employees of the State Government, the Rules are required to be read down, as otherwise they would be arbitrary and, thus, gave benefit of the services rendered as work charge employees in counting the period of qualifying service for pensionary benefits.

7. Now, by the Act of 2021, the effect of the aforesaid judgment of the Supreme Court is attempted to be undone by the State Government. It has come up with Section 2, which provides:

"2. Notwithstanding anything contained in any rule, regulation or Government order for the purposes of entitlement of pension to all officer, "Qualifying Service" means the services rendered by an officer appointed on a temporary or permanent post in

accordance with the provisions of the service rules prescribed by the Government for the post."

Thus, as per section 2 of the Act of 2021, if a person was not appointed on a temporary or permanent post as per service Rules, his services would not be qualifying service for the purposes of pension. Law with regard to the manner in which the Legislature can nullify or modify the impact of a judgment is settled since long. Suffice is to refer to the case of ***Indian Aluminium Co. and others vs. State of Kerala and others (1996) 7 SCC 637.*** In the said case, after considering the entire law on subject, the Supreme Court in Para 56 of the judgment enumerates the principles, which read:

"56. From a resume of the above decisions the following principles would emerge:

(1) The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the court to give effect to them;

(2) The Constitution delineated delicate balance in the exercise of the sovereign power by the legislature, executive and judiciary;

(3) In a democracy governed by rule of law, the legislature exercises the power under Articles 245 and 246 and other companion articles read with the entries in the respective lists in the Seventh Schedule to make the law which includes power to amend the law.

(4) Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free play in their joints so that the march of social progress and order remains unimpeded. The smooth balance built with delicacy must always be maintained;

(5) In its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;

(6) The court, therefore, needs to carefully scan the law to find out: (a) whether the vice pointed out by the court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

(7) The court does not have the power to validate an invalid law or to legalise impost oftax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the legislature. Therefore, they are not encroachment on judicial power.

(8) In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give

effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof.

(9) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same."

8. The law long settled is that the Legislature can render judicial decision ineffective by enacting valid law on the topic within its legislative field by fundamentally altering or changing its character retrospectively. The changed or altered conditions should be such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid.

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'.

11. The other case laws cited by learned counsel for the petitioners as well as by learned Standing Counsel, as noted above, are not applicable in the facts and circumstances of the present cases, as in none of the above cited cases, interpretation of Section 2 of the Act of 2021 is considered.

12. In the light of aforesaid, since Section 2 of the Act of 2021 also suffers from the vice pointed out by the Supreme Court in the case of ***Prem Singh*** (supra), hence, to be brought out of arbitrariness, it is read down and services rendered on temporary or permanent post is read as services rendered by a government employee, be it of temporary or permanent nature. Therefore, it is held that the petitioners are also entitled for the benefit of the judgment of ***Prem Singh*** (supra). All the impugned orders are set aside.

Daily-wager:

13. The petitioners are appointed between 1978 to 1992 as daily wagers in different departments in State of U.P. They all were later regularized between 2005 to 2012 on different posts.

In ***Writ-A No.32317 of 2019,*** the petitioner has challenged the order dated 30.9.2019 by means of which claim of the petitioner was rejected on the ground that since his regularisation is after the old pension scheme was abolished, therefore, he is not entitled for any post-retiral benefits;

In ***Writ-A Nos.5274 of 2019, 493 of 2023, 14750 of 2021 and 1020 of 2023***,

the petitioners have prayed for mandamus commanding the opposite parties to grant them retiral benefits by counting their services as a daily wager prior to their regularization;

In ***Writ-A No.126 of 2023***, the petitioner has challenged the order dated 1.12.2022 by means of which claim of the petitioner was rejected on the ground that since his regularisation is after the old pension scheme was abolished, therefore, he is not entitled for any post-retiral benefits;

In ***Writ-A No.21878 of 2020,*** the petitioner has challenged the order dated 12.5.2020 by means of which claim of the petitioner was rejected on the ground that since his regularisation is after the old pension scheme was abolished, therefore, he is not entitled for any post-retiral benefits;

In ***Writ-A No.2122 of 2022,*** learned counsel for petitioner prays to withdraw the writ petition on behalf of petitioners no.8, 10, 12, 13 and 14 with liberty to file fresh writ petition on their behalf.

The permission is granted.

The writ petition is dismissed as not pressed with regard to petitioner nos. 8, 10, 12, 13 and 14 only with the liberty as prayed aforesaid.

Now the writ petition survives only on behalf of petitioners no.1 to7, 9 and 11, who have challenged the impugned order dated 17.12.2019 on the ground that since the petitioners were initially appointed as daily wagers, therefore, their past services before regularization cannot be counted for the purpose of post retiral benefits;

In ***Writ-A No.5685 of 2022***, is filed by the petitioner challenging the impugned order dated 18.01.2016, by means of which petitioner was regularized with immediate effect, while he claimed that he may be regularized form the date of his initial appointment.

In ***Writ-A No.8059 of 2019,*** the petitioner has challenged the order dated 28.2.2019 by means of which claim of the petitioner was rejected on the ground that since his regularisation is after the old pension scheme was abolished, therefore, he is not entitled for any post-retiral benefits;

In ***Writ-A No.1592 of 2021***, claim of the petitioner was rejected by impugned order dated 27.5.2020 on the ground that judgment in case of ***Prem Singh vs. State of U.P. and others,*** (2019) 10 SCC 516 has not attained finality; and

In ***Writ-A No.25891 of 2021,*** the petitioner has challenged the order dated 23.9.2021 by means of which claim of the petitioner was rejected on the ground that since his regularisation is after the old pension scheme was abolished, therefore, he is not entitled for any post-retiral benefits.

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.

Adhoc Employees:

18. In ***Writ-A Nos.8968 of 2022, 1127 of 2023, 816 of 2023, 2740 of 2022, 4859 of 2022, 6074 of 2020, 2581 of 2022, 5071 of 2022, 93 of 2023 and 1931 of 2022,*** petitioner has prayed for mandamus commanding the opposite parties to grant him retiral benefits by counting his services rendered on adhoc basis prior to his regularisation;

In ***Writ-A Nos.3234 of 2022, 24316 of 2021, 22080 of 2021, 27977 of 2021, 26309 of 2021, 19227 of 2021, 29184 of 2019, 10079 of 2021, 26130 of 2021, 23027 of 2021, 43 of 2023, 20 of 2023, 6421 of 2020, 1360 of 2022, 20119 of 2021, 19931 of 2021, 27 of 2023 and 30 of 2023,*** petitioners have challenged the impugned orders as in all of them, claims of the petitioners were rejected on the ground that their appointment is on adhoc basis, therefore, they are not entitled for any post-retiral benefits;

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.

Seasonal Collection Peon/ Amin.

20. The petitioners are appointed between 1978 to 1988 against substantive posts of seasonal collection peon and seasonal collection amin . They all were later regularized between 2007 to 2019 on the posts of Collection Peons and Collection Amins.

In ***Writ-A No.9665 of 2019,*** Learned counsel for the petitioner submits that petitioner no.2 is not retired as yet. Hence, his case is different from the present bunch. Learned counsel for petitioner prays to withdraw the present writ petition on

behalf of petitioner no.2 with liberty to file fresh petition, as and when if required. The prayer is allowed. The writ petition is dismissed as not pressed on behalf of petitioner no.2 with the aforesaid liberty. Now the writ petition survives only on behalf of petitioner no.1.

Claim of the petitioner no. 1 was rejected by impugned order dated 11.02.2019 on the ground that his appointment was for seasonal work therefore he can not claim post retiral benefits as being provided to regular employees;

In ***Writ-A No.23115 of 2020 and 394 of 2023,*** the petitioner has prayed for mandamus commanding the opposite parties to grant him retiral benefits by counting his services prior to his regularisation on the post of seasonal collection peon;

In ***Writ-A No.17032 of 2020,*** challenge is made to the impugned order dated 29.06.2020 by means of which claim of the petitioners was rejected on the ground that since his regularisation is after the old pension scheme was abolished, therefore, he is not entitled for any post-retiral benefits; and

In ***Writ-A No.1089 of 2022,*** petitioners have challenged the order dated 18.01.2022 whereby claim of the petitioners was rejected on the ground that their appointment was for seasonal work and not on a substantive regular post.

In ***Writ-A No. 945 of 2023,*** Claim of the petitioner is rejected by impugned order dated 26.11.2022 on the ground that since his regularisation he has worked for less than 10 years therefore he is not entitled for any retiral benefits.

21. Law regarding counting of the period of services rendered earlier as Seasonal Collection Peon/Collection Amin for calculation of post-retiral benefits is long settled by a large number of judgments. Suffice would be to refer to the judgment a Division Bench judgment of this Court in the case of **Board of Revenue through its Chairman: The District Magistrate and UP-Zila Adhikari vs. Prasidh Narain Upadhyay, 2006 (5) AWC 5194 (DB).** The said judgment is followed till date. Furthermore, Fundamental Rule 56 as it stood amended by the U.P. Amendment Act No. 24 of 1975 allows for retirement of a temporary employee and in clause (e) of the Fundamental Rule 56 it is provided that retiral benefits shall be made available to every employee who retires under this Rule. Even after the coming into force of the Act of 2021, since, their appointment is against a post, hence, they are squarely covered even by the original Section 2 of the Act of 2021. Further, in view of interpretation as given above to Section 2 of the Act of 2021 where it is held that the work on temporary or permanent post needs to be read as work taken from a person on a position, be it temporary or permanent, 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 they are entitled for pension by counting in services rendered by them as non-regular employees.

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***.

(2023) 2 ILRA 90
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.02.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
HON'BLE SUBHASH VIDYARTHI, J.

Writ A No. 15770 of 2019

Rajendra Prasad Bharti ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Varadraj Shreedutt Ojha, Mohd. Anas Khan

Counsel for the Respondents:
C.S.C., Gaurav Mehrotra

A. Constitution of India, 1950 - Article 226 - Scope of Judicial review while examining the validity of decision of departmental authorities - If the Enquiry Officer has arrived at a finding by relying upon inadmissible, extraneous and hearsay evidence and by ignoring relevant and admissible evidence, then the High Court is not only within its right to interfere with such a finding, but is under a duty to interfere so as to prevent a miscarriage of justice - a departmental proceeding is a quasi-judicial proceeding - enquiry officer performs a quasi-judicial function - enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties - the enquiry officer is neither permitted to collect any material from outside sources during the conduct of the enquiry nor is permitted to travel beyond the charges and any punishment imposed on the basis of a finding which was not the subject-matter of the charges is wholly illegal - He cannot enquire into the allegations with which the delinquent officer had not been charged with - In a domestic enquiry fairness in the procedure is a part of the principles of natural justice (Para 45, 57)

B. Disciplinary Proceedings - Against Judicial Officer - merely because the order is wrong or the action taken could have been different does not warrant initiation of disciplinary proceedings against the judicial officer - there is a possibility on a given set of facts to arrive at a different conclusion but it is no ground to indict a judicial officer for taking one view - If in every case where an order of a subordinate court is found to be faulty a disciplinary action were to be initiated, the confidence of the subordinate judiciary will be shaken and the officers will be in constant fear of writing a judgment so as not to face a disciplinary enquiry and thus judicial officers cannot act independently or fearlessly. (Para 58)

C. Disciplinary Proceedings - Removal from Service - Judicial Officer - complainant filed a complaint against the petitioner, Civil Judge (Junior Division), stating that his junior's client, had told him that he had got the application allowed by fulfilling the illegal demand of the petitioner – another charge against the petitioner was that he was running two concurrent order sheets in a case and passing different orders in different files as per his whim, however there was no charge that the petitioner had passed contradictory orders for some extraneous consideration - Held - complainant statement was merely hearsay evidence, full of material contradictions, but the Enquiry Officer accepted the hearsay evidence as gospel truth and ignored the contradictions in the same - Enquiry Officer totally ignored the statements of the other relevant witnesses - Enquiry Officer held the petitioner guilty of having passed contradictory orders without dealing with the petitioner's explanation - punishment order passed, taking into consideration orders passed by the petitioner in other cases, for which neither any charge was leveled nor was any

opportunity given to the petitioner to submit his explanation - While it is possible to arrive at a different conclusion on a given set of facts, it is not grounds to indict a judicial officer for taking one view - petitioner should not have been penalized by removing him from service merely for having passed wrong orders - Explanation given by the petitioner in respect of charge no. 1 was sufficient for disproving charge no. 1 - punishment order passed on the basis of material which was extraneous, vitiating the punishment order - order removing the petitioner from the post of Civil Judge (Junior Division) quashed, and the petitioner reinstated in service - Except for back wages, petitioner entitled to get all the other benefits consequent to the quashing of the removal order, including seniority, etc. (62, 62, 62, 65)

Allowed. (E-5)

List of Cases cited:

1.Muzaffar Husain Vs St. of U.P., 2022 SCC OnLine SC 567

2.Union of India Vs K.K. Dhawan (1993) 2 SCC 56

3.Rajasthan High Court Vs Ved Priya, 2020 SCC OnLine SC 337

4.Union of India Vs P. Gunasekaran, (2015) 2 SCC 610

5.Sadhna Chaudhary Vs St. of U.P., (2020) 11 SCC 760

6.P.C. Joshi Vs St. of U.P., (2001) 6 SCC 491

7.Roop Singh Negi Vs Punjab National Bank, (2009) 2 SCC 570

8.M.V. Bijlani Vs U.O.I., (2006) 5 SCC 88

9.Narinder Mohan Arya VS United India Insurance Co. Ltd., (2006) 4 SCC 713

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri Sandeep Dixit, the learned Senior Advocate assisted by Sri Varadraj Shreedutt Ojha Advocate, the learned counsel for the petitioner and Sri Gaurav Mehrotra Advocate assisted by Sri Utsav Misra and Ms. Rani Singh Advocates for the opposite party no. 2 High Court of Judicature at Allahabad.

2. By means of the present Writ Petition, the petitioner has challenged the order dated 02.04.2019 whereby he has been removed from the post of Civil Judge (Junior Division). He has also challenged the annual confidential report for the year 2011-12, the order dated 29.01.2013 passed by the Administrative Judge rejecting the petitioner's representation against the adverse remarks in his annual confidential report for the year 2011-12 whereby it was proposed that a departmental enquiry be conducted against the petitioner and the recommendations dated 07.12.2016 of a Committee of three Hon'ble Judges of this Court rejecting the petitioner's representation dated 05.11.2015 against the adverse remarks, as also the resolutions dated 11.01.2017 passed by the Hon'ble Administrative Committee accepting the recommendations of the three member committee and the resolution dated 12.11.2017 passed by the Hon'ble Administrative Committee directing the matter to be placed before the Full Court.

3. Briefly stated, facts of the case are that the petitioner was appointed as a Civil Judge (Junior Division) on 26.05.2006. The petitioner remained posted as Additional Civil Judge (Junior Division) in the outlying Court at Sambhal in District Moradabad and thereafter he was transferred to Mirzapur.

4. On 25.11.2011, while the petitioner was posted as Civil Judge (Junior Division) Sambhal, one Sri. Mahesh Pal Singh Yadav

Advocate gave a complaint to the District Judge Moradabad, leveling the following allegations against the petitioner: -

"माननीय *जनपद न्यायाधीश महोदय,*
जनपद– मुरादाबाद।

विषय *:– न्यायिक अधिकारी सम्भल श्री राजेन्द्र प्रसाद भारती जी की* ***दोषपूर्ण*** *कार्यप्राणी के सम्बन्ध में –*

महोदय,

सविनय निवेदन है कि न्यायिक अधिकारी श्री राजेन्द्र प्रसाद भारती महोदय की कार्य प्रणाली के सम्बन्ध में निम्नलिखित निवेदन करना है –

1– यह कि श्री राजेन्द्र प्रसाद भारती न्यायिक अधिकारी महोदय न्यायालय में प्रतिदिन दो बजे दिन बैठते है और केवल अर्जेन्ट मामले जैसे– बेल रिमांड व दावे को जो उसी दिन दायर होते है, पर ही सुनवाई होती है और कोई फाइल पर न तो कोई सुनवाई होती है, ना ही कोई आदेश होता है।

2– यह कि उक्त सभी अजमानतीय व गम्भीर प्रकृति के अपराधो में उक्त महोदय संबधित पक्ष से हमसाज होकर उसी दिन जमानत का आदेश दे दते है। मिलने पर खारिज कर देते है।

3– यह कि उक्त अधिकारी महोदय नये दावो में धनराशि लेकर ही स्थगनादेश देते है अन्यथा सिर्फ नोटिस ही जारी करते है।

4– यह कि 156 (3) सी0आर0पी0सी0 के प्रा0पत्र को स्वीकार करने हेतु 2000/रूपये न देने पर खारिज कर देते है। ऐसे ही कोर्ट न01 में पीठासीन रहते हुये उक्त अधिकारी महोदय ने प्रकीर्ण वाद सं0 58/11 रामकिशोर बनाम रामनिवास प्रार्थी द्वारा पैसे ना देने पर प्रा0पत्र 15.4.11 को खारिज कर दिया वादहू वादी द्वारा उक्त अधिकारी की अनुचित मांग पूरी करने पर उसकी फर्देहकाम निकाल कर दूसरी फर्देहकाम लगाकर प्रा0 पत्र उसी दिन 15.4.11 को स्वीकार कर दिया गया। प्रमाण स्वरूप छायाप्रति संलग्न है।

5– यह कि उक्त श्री राजेन्द्र प्रसाद भारती द्वारा न्यायालय के सभी न्यायिक व्यवस्था खराब कर रही है। कोई भी कार्य बगैर पैसे लिये उक्त अधिकारी महोदय नही कर रहे है। वादकारियो का उक्त कार्यप्रणाली से विश्वास समाप्त होता जा रहा है। उक्त अधिकारी महोदय की कार्यप्रणाली से वादकारियो का अहित हो रहा है। और न्यायालय की गरिमा ***धूमिल*** *हो रही है और ईमानदार वादकारी न्याय से वंचित हो रहे है।*

6– यह कि श्री राजेन्द्र प्रसाद भारती महोदय जब से सम्भल से स्थानान्तरित आये है, भ्रष्टाचार को बढ़ावा दिया है। इनके कार्यकाल को किसी भी माह की फौजदारी रिमाण्ड पत्रावली थाना– हयातनगर व सम्भल गढ़ी को तलब कर ली जाय तथा नये दीवानी वादी वाद भी तलब कर लिये जाय। श्रीमान जी के समक्ष उक्त सभी तथ्यों की सच्चाई सामने जायेगी।

न्यायालय की साफ सुथरी व गरिमा बनाये रखने के लिये आप से करबद्ध प्रार्थना है कि उक्त श्री राजेन्द्र प्रसाद भारती न्यायिक अधिकारी महोदय सम्भल दोषपूर्ण कार्यो की जांच कर उनके खिलाफ कार्यवाही की जाये।

श्रीमान जी की अति कृपा होगी।

25/11/11

प्रार्थी
महेश पाल सिंह यादव एड0
सिविल कोर्ट, सम्भल।"

5. In the order dated 01.12.2011 passed in Writ B No. 69275 of 2011, this Court had observed that in Suit No. 1426 of 2011 the petitioner had passed an interim order dated 19.11.2011 directing the parties to maintain status quo whereas he passed an order dated 26.11.2011 in Suit No. 1478 of 2011 issuing an interim mandate to implement an award, which ran contrary to the earlier order dated 19.11.2011. This Court directed the Registrar General to call for an explanation from the petitioner. On 02.01.2012, the petitioner submitted an explanation stating that in the subsequent suit, different pleadings were made and different evidence had been produced, which had led to passing of the order dated 26.11.2011.

6. On 15.12.2011 Sri. Mahesh Pal Singh Yadav Advocate sent a complaint to the Hon'ble Chief Justice, leveling the following allegations against the petitioner: -

"माननीय *मुख्य न्यायाधीश महोदय,*
उच्च न्यायालय इलाहाबाद

विषय *:– न्यायिक अधिकारी सम्भल श्री राजेन्द्र प्रसाद भारती जी की दोषपूर्ण कार्यप्राणी के सम्बन्ध में –*

महोदय,

सविनय निवेदन है कि न्यायिक अधिकारी श्री राजेन्द्र प्रसाद भारती महोदय की कार्यप्रणाली के सम्बन्ध में निम्नलिखित निवेदन करना है –

1– यह कि श्री राजेन्द्र प्रसाद भारती न्यायिक अधिकारी महोदय न्यायालय में प्रतिदिन 2 बजे दिन में बैठते है और केवल अर्जेन्ट मामले जैसे– बेल रिमांड व दावे को जो उसी दिन दायर होते है, पर ही सुनवाई होती है और कोई रेगुलर फाइल पर न तो कोई सुनवाई होती है, ना ही कोई आदेश होता है।

2– यह कि सभी अजमानतीय व गम्भीर प्रकृति के अपराधो में उक्त महोदय सम्बन्धित पक्ष से अवैध धनराशि लेकर उसी दिन जमानत का आदेश देते है न मिलने पर खारिज कर देते है।

3– यह कि उक्त अधिकारी महोदय नये दावो में धनराशि लेकर भी स्थगन आदेश देते है अन्यथा सिर्फ नोटिस ही जारी करते है।

4– यह कि 156 (3) सी0आर0पी0सी0 के प्रा0पत्र को स्वीकार करने हेतु 2000/रूपये लेते है न देने पर खारिज कर देते है। ऐसे ही कोर्ट न01 में पीठासीन रहते हुये उत्तराधिकारी महोदय ने प्रकीर्ण वाद सं0 58/11 रामकिशोर बनाम रामनिवास प्रार्थी द्वारा पैसे ना देने पर प्रा0पत्र 15.4.11 को खारिज कर दिया वादहू वादी द्वारा उक्त अधिकारी की अनुचित से सीधे सम्पर्क करने व उक्त अधिकारी अनुचित मांग पूरी करने पर उक्त प्रकीर्ण वाद की फर्द काम निकाल कर दूसरी फर्दहकाम लगाकर प्रा0 पत्र उसी दिन 15.4.11 को स्वीकार कर दिया गया। प्रमाण स्वरूप छायाप्रति संलग्न है।

5– यह कि उक्त श्री राजेन्द्र प्रसाद भारती द्वारा न्यायालय के सभी न्यायिक व्यवस्था खराब कर रखी है कोई भी कार्य बगैर सुविधा शुल्क लिये उक्त अधिकारी महोदय नही कर रहे है। वादकारियो का उक्त कार्यप्रणाली से विश्वास समाप्त होता जा रहा है। उक्त अधिकारी महोदय की कार्यप्रणाली से वादकारियों का अहित हो रहा है। और न्यायालय की गरिमा धूमिल हो रहा है और ईमानदार वादकारी न्याय से वंचित हो रहे है।

6– यह कि पीठासीन महोदय जब से सम्भल में स्थानान्तरित होकर कार्यभार सम्भाला है भ्रष्टाचार को बढ़ावा दिया है। इनके कार्यकाल की किसी भी माह की फौजदारी रिमांड पत्रावली थाना हयातनगर व सम्भल, व थाना हजरत नगर ग

8– यह कि अभियुक्त पुनीत त्यागी की न्यायालय में उपस्थिति के बगैर ही उक्त अधिकारी द्वारा जमानत का आदेश पारित कर दिया गया और न्यायालय के आदेश का पालन न करने के बावजूद अभियुक्त की रिहाई आदेश दे दिया गया। अभियुक्त के निजी बन्धपत्र पर हस्ताक्षर नही कराये गये मु0अ0सं0 119/11 है।

न्यायालय की साफ सुथरी छवि व गरिमा बनाये रखने के लिये आप से करबद्ध प्रार्थना है कि उक्त श्री राजेन्द्र प्रसाद भारती न्यायिक अधिकारी महोदय सम्भल दोषपूर्ण कार्यो की जांच कर उनके खिलाफ कार्यवाही की जाये। श्रीमान् जी की अति कृपा होगी।

15/12/2011

प्रार्थी

महेश पाल सिंह यादव एडवोकेट

सिविल कोर्ट, सम्भल।"

7. The District Judge had awarded adverse entries in the annual confidential report of the petitioner for the year 2011-12 withholding his integrity on the basis of allegations leveled in the aforesaid complaint.

8. A representation given by the petitioner against the adverse entries awarded to him was rejected by the Hon'ble Administrative Judge by means of an order dated 29.01.2013. The Petitioner gave a representation dated 05.11.2015, which was rejected by a Committee comprising of three Hon'ble Judges.

9. On 21.01.2012, the petitioner gave a reply to the District Judge stating that the allegations were absolutely false. Regarding Case No. 58/2011, he stated that the application had been rejected for want of prosecution but thereafter the Advocate appeared and made a request, whereupon the application was accepted, and a direction was issued to register a case and investigate. The petitioner stated that the order was not passed due to any vested interest, but in the interest of the litigant after his Advocate appeared and made an oral request.

10. In furtherance of the complaint dated 15.12.2011 that had been sent to the Hon'ble Chief Justice, the Administrative Judge called for a report from the District

Judge. The District Judge got an enquiry conducted through the Enquiry Officer Sri. Sanjay Kumar Verma, H.J.S., who submitted a report on 02.07.2016 stating that he had conducted an enquiry and had recorded the statement of the complainant Sri. Mahesh Pal Singh Yadav Advocate, who, besides leveling some general and vague allegations, had stated that the petitioner had dismissed Misc. Case No. 58/2011 titled Ram Kishore versus Ram Nivas, under Section 156 (3) Cr.P.C. as he did not get any money but the application was subsequently accepted when the applicant contacted the petitioner directly and fulfilled his illegal demand. The complainant further stated that the petitioner had granted bail to accused Puneet Tyagi in Case Crime No. 119/2011 under Sections 498 A, 452, 323, 324, 504 & 506 I.P.C. and Sections 3/4 of the Dowry Prohibition Act in spite of time having been sought by the A.P.O., without the accused being present in the Court.

11. The Enquiry Officer recorded that apart from the statement of the complainant, there was no other evidence in support of the allegations. The Enquiry Officer had recorded the statement of Sri. Parvez Alam Advocate, who had stated that he was the Counsel in Misc. Case No. 58/ 2011 and he had not given any illegal amount to the petitioner. He further stated that the complainant Sri. Mahesh Pal Singh Yadav was not a Counsel in Misc. Case No. 58/ 2011.

12. The Enquiry Officer had recorded the statement of Sri. Ram Kishore, the applicant of Misc. Case No. 58/ 2011, who stated that he had not given any illegal amount to the petitioner. He further stated that he did not know the complainant Sri. Mahesh Pal Singh Yadav Advocate and he was not a Counsel in Misc. Case No. 58/ 2011.

13. The Enquiry Officer held that earlier the aforesaid application had been dismissed in default of appearance and no order had been passed on the merits of the case, but subsequently after hearing, the application was allowed and although the petitioner had committed a procedural error in restoring the case without any application, as the applicant of the case and his Counsel Sri. Parvez Alam Advocate had stated that no illegal payment had been made and as Sri. Mahesh pal Singh Yadav Advocate was not a Counsel in the case, it could not be said that the petitioner had accepted any illegal gratification.

14. Regarding the allegation of the complainant that bail was granted to Puneet Tyagi without his appearance, the Enquiry Officer recorded the statement of the then Court Moharrir Sri. Laksham Singh, who had stated that the Court had passed an order for taking the accused in custody, he had taken the accused in custody and he had sent the *"Robkar Haziri*' of the accused Puneet to Police Station Asmoli, which had been produced before the Enquiry Officer. The Enquiry Officer further recorded that the bail application had signature of the accused Puneet and there was no material available to establish that the accused Puneet Tyagi had been granted bail without his appearance and after taking illegal gratification.

15. The District Judge sent a report dated 11.07.2016 to the High Court, stating that he was in agreement with the aforesaid enquiry report and on 22.11.2018, the Administrative Judge passed an order after perusal of the enquiry report, that no further action was required in the matter.

16. Another complaint was given to the District Judge by one Amjadi Begum on 24.12.2011 stating that she had filed Suit No. 633/2011, in which the petitioner had passed an order dated 25.07.2011 directing the parties to maintain status quo and not to raise any construction. Subsequently, one Shafiq Ahmad filed Suit no. 925/2011 for restraining Amjadi Begum from interfering in constructions, Amjadi Begum appeared and opposed the prayer and no interim order could be passed. Concealing the fact of pendency of the aforesaid two suits, Shafiq Ahmad filed another Suit No. 1066/2011 and by misleading the Court, he obtained permission to lay a lintel. The complainant also alleged that the order had been passed after taking some undue benefit.

17. The Administrative Judge had sought a report from the District Judge on the aforesaid complaint of Amjadi Begum. The District Judge got an enquiry conducted by Sri. Sanjay Kumar Verma, H.J.S. The petitioner had submitted his reply stating that he had passed the interim order in Suit No. 1066/2011 on the basis of the material available before him and the application under Order XXXIX Rule 4 could not be disposed off as the record of the case had been summoned by the Revisional Court.

18. The Enquiry Officer had sent a notice to the complainant Amjadi Begum, but it was reported that she had died and none of his heirs came forward.

19. In his report dated 06.01.2017, the Enquiry Officer concluded that at the time of granting the interim order in Suit No. 1066/2011, there was nothing on record mentioning about pendency of the earlier suits. There was nothing to establish that the order had been passed after taking any illegal benefit and the complaint was baseless.

20. On 21.02.2017, the Administrative Judge passed an order after perusal of the enquiry report, consigning the complaint to record.

21. Thereafter a charge sheet was prepared against the petitioner, which was approved by the Hon'ble Chief Justice on 22.03.2017, leveling the following two charges: -

"1. That while you were posted as Civil Judge (Junior Division) Sambhal, Moradabad since 17.12.2009 to 16.04.2012 you passed judicial order violating the procedure established by law. You passed two contradictory orders U/s 39 (2) CPC in O.S. No. 1478/2011 and 1426//2011. Both the suits were relating in Award dated 01.08.2007.

2. That you were running two concurrent order sheets of Criminal Miscellaneous No. 58/2011, Ram Kishore Vs. Ram Nivas and others application U/s 156 (3) Cr.P.C. and were passing different orders in different files as per your whim by violating the legal norms and procedures established by law and the orders passed by you adversely reflect upon your integrity and reputation."

22. The charge-sheet mentions the following documentary evidences to be adduced in support of the charges: -

(i) complaint dated 25.11.2011 of Sri Mahesh Pal Singh, Advocate.

(ii) inquiry report dated 23.03.2011 of Sri A. K. Upadhyay, Additional District Judge, Court No. 1, Moradabad.

(iii) both the order sheets maintained to run on the record of Criminal Misc. Application No. 58 of 2011, under Section 156(3) Cr.P.C. moved by Ram Kishore on 08.03.2011.

(iv) copy of complaint and order sheets of O.S. Nos. 1426 of 2011 Mohd. Ishtiyak v. Mohd. Irfan & Ors. and 1478 of 2011, Mohd. Musharraf & Ors. v. Mohd. Ishtiyak & Ors.

23. In furtherance of the charge sheet, an inquiry was conducted. The inquiry report contains a narration that the inquiry emanates from the annual confidential remarks recorded by the District Judge on 28.09.2012, for the year 2011-12, on the basis whereof a vigilance bureau inquiry had been initiated vide order dated 20.06.2013 passed by the Hon'ble Chief Justice. The petitioner submitted his written statement dated 19.04.2017 denying the charges. Regarding passing contradictory orders in two suits, the petitioner submitted that the cause of action of both the suits was quite different and the documents filed in both the suits were also different and neither of the parties to any of the two suits made any objections or protest against any of the orders passed by him.

24. Regarding charge no. 2 that he was running two concurrent order sheets in one case, the petitioner submitted that the allegation was false and it originated from a complaint dated 25.11.2011 filed by Sri Mahesh Pal Singh Yadav, Advocate, who was not a counsel in the case, as was apparent from the statements of Sri Mahesh Pal Singh Yadav, Sri Parvej Alam and the applicant Ram Kishore recorded during an earlier inquiry. In the inquiry report dated 23.04.2016, the inquiry officer had found the allegations to be false.

25. The Inquiry Officer noted the submissions of the petitioner regarding charge no. 1 that he had passed orders in Suits No. 1478 of 2011 and 1426 of 2011 on the basis of material placed before him in the aforesaid suits. He further submitted that in the subsequent Suit No. 1478 of 2011, there was no mention of the previous Suit No. 1426 of 2011 and of the interim order passed in it. The inquiry report mentions that the petitioner 'had adduced his defence evidences through presentation of certain documentary evidences', but the particulars of the defence evidences adduced by the petitioner has not been disclosed in the enquiry report and there is no discussion regarding the same.

26. The inquiry report contains a narration of certain orders passed by the petitioner in as many as 9 cases having been collected by the inquiry officer. These orders were not mentioned in the charge sheet and there is nothing on record to indicate that this material relied upon by the inquiry officer was provided to the petitioner.

27. The Inquiry Officer concluded that "a study of the orders passed by the petitioner makes it amply clear that the petitioner was habitual in granting interim injunction on regular basis; that the settled principle of law on this point is that granting ex-parte interim injunction is an exception whereas issuing of notice to hear both the parties is the general rule. The act of the Charged Officer seems violating this settled principles of law.'

28. The Inquiry Officer came to a conclusion that the petitioner had passed contradictory orders in two suits originating from the same award and he was guilty of charge no. 1. However, the Inquiry Officer further recorded that no opinion could be formed on this point, as the matter was sub-

judice in Hon'ble High Court in Civil Misc. Writ Petition No. 69275 of 2011.

29. Regarding charge no. 2, the Investigating Officer relied upon the statements of the complainant Sri Mahesh Pal Singh Yadav, Sri Parvej Alam, Advocate and Sri Ram Kishore.

30. Sri. Mahesh Pal Singh had stated that the petitioner used to sit late in his Court, at about 02:00 p.m.; that he used not to hear regular matters, but he used to take up only urgent matters like bail and fresh suits; that his reputation was not good and there was a general perception that he used to take bribes; that he used to pass defective orders. However, the said witness had further stated that the petitioner did not ever demand bribe from him. He said that Misc. Case No. 58 of 2011 under Section 156 (3) Cr.P.C. titled Ram Kishore versus Ram Nivas was filed by his junior and his junior's client had told him that he had got the application allowed by fulfilling the illegal demand of the petitioner, but the witness did not know as to what was the alleged illegal demand. Sri. Mahesh Pal Singh stated that he had made a complaint against the petitioner on the basis of the order passed by him and on the basis of the general perception. He stated that he had three junior associates - Sri. Prashant Gupta, Sri. Monu Gupta and 1-2 more Advocates used to sit on his seat but he did not know their names. He did not know Ram Kishore prior to 15.04.2011 and he did not know as to how Ram Kishore came to his seat.

31. Upon being cross-examined by the petitioner, Sri. Mahesh Pal Singh Yadav stated that he did not know as to how many cases had been decided by the petitioner on merits during the year 2011-12 and that the petitioner had performed 189.95% of the quota of the work assigned to him. He admitted that he was not an Advocate in the matter of Ram Kishore and he had not argued the matter. Earlier his junior and Ram Kishore had told him that the application had been rejected and later on Ram Kishore told that the application had been allowed.

32. The second witness Sri. Parvez Alam Advocate stated that on 15.04.2011 he had filed the application Ram Kishore versus Ram Nivas under Section 156 (3) Cr.P.C. and the petitioner had told him that the application had been dismissed in default; that he made an oral prayer to the petitioner that he had gone to drink water and his application be decided on merits, whereupon the petitioner heard his submissions and passed order thereon. His client Ram Kishore had not come to the Court on that date. Ram Kishore had paid him merely Rs.250/- to 300/- as fee for the application. He further stated that the wife of Sri. Mahesh Pal Singh Yadav was a Member of Zila Panchayat and he seldom used to come to the Court and that he was habitual of filing false complaints for gaining cheap popularity. He categorically stated that the petitioner was famous as an honest officer.

33. The Enquiry Officer had examined the applicant Ram Kishore also, who stated that he had given an application under Section 156 (3) Cr.P.C. on 08.03.2011 through Sri. Parvez Alam Advocate but he did not go to the Court to do pairvi of the application after that date. He categorically stated that he did not go to the Court on 15.04.2011; that he did not pay any bribe and that he did not tell to Sri. Mahesh Pal Singh Yadav or to any other person that he had paid bribe.

34. The Enquiry Officer noted the submission of the petitioner that the charge emanates from a complaint dated 25.11.2011 filed by Sri. Mahesh Pal Singh Yadav Advocate in relation to the order passed by the petitioner in Cr. Case No. 58/2011 under Section 156 (3) Cr.P.C. An enquiry had been initiated and the Enquiry Officer had submitted a report holding the petitioner not guilty. The District Judge Moradabad had submitted the Report to the High Court.

35. However, the Enquiry Officer held that *"a report dated 23.03.12 submitted by Addl. District and Sessions Judge has clearly mentioned that I asked learned Civil Judge (Jr. Division) Sanbhal about the said facts and he admitted that the signatures of both the order sheets (one photo state copy) belong to him and he very well admitted the signatures of both the order sheets but surprisingly the previous order sheet of the said file on which the application under section 156 (3) Cr.P.C. had been rejected has been misplaced by the Presiding Officer. Thus, Presumption goes against the presiding Officer that he has deliberately misplaced the order sheet because of the complaint and as the file was kept in his judgment box, then also the presumption goes against him. Thus the contents of the complaint are proved against the Presiding Officer that he was running two parallel order sheets in the same file and on one order sheet he has rejected the application moved under Section 156 (3) Cr.P.C. whereas on another order sheet he has allowed the application under Section 156 (3) Cr.P.C. for the reasons best known to him."*

36. The petitioner submitted his explanation against the enquiry report wherein he stated that the Enquiry Officer had made a verbatim reproduction of the statement of the complainant Mahesh Pal Singh Yadav that was recorded by the Special Vigilance Enquiry Officer on 26.07.2014 and he had merely changed its date to 28.06.2017 and the statements of Sri. Parvez Alam and Sri. Ram Kishore were also verbatim copies of their previous statements recorded by the Special Vigilance Enquiry Officer, indicating that the Enquiry Officer did not hold any independent enquiry. The Enquiry Officer did not take into consideration the categorical statement of Sri. Mahesh Pal Singh Yadav that the petitioner did not demand bribe from him and that he had been told about the application by his junior Monu Gupta, but Monu Gupta was not examined. The petitioner had further submitted that the conclusion of the Enquiry Officer, which has been quoted above, was also a verbatim reproduction from the earlier report of Special Vigilance Officer A. K. Upadhyay.

37. However, on 22.11.2017 the Administrative Committee of the High Court resolved to accept the Enquiry Report dated 29.08.2017 and to place the matter before the Hon'ble Full Court. In its meeting held on 26.05.2018, the Full Court resolved to punish the petitioner with removal from service. Accordingly, the Government issued an Office Memorandum dated 02.04.2019 removing the petitioner from service.

38. Sri. Sandeep Dixit Senior Advocate appearing for the petitioner has submitted that the petitioner has been punished for the charges for which earlier an adverse entry had been awarded to him and an enquiry had been held in which the petitioner was not found guilty and after taking into consideration the enquiry

report, the Administrative Judge had closed the matter. He has submitted that the petitioner has subsequently been punished for the same charges, which is impermissible in law. He has next submitted that the punishment order has been passed after taking into consideration orders passed by the petitioner in 9 other cases, regarding which neither any charge was leveled not was any opportunity was given to the petitioner to submit his explanation and the punishment order has been passed on the basis of material which was extraneous, which vitiates the punishment order.

39. Sri. Dixit has relied upon the judgments in the cases of Narinder Mohan Arya v. United India Insurance Co. Ltd., (2006) 4 SCC 713, M. V. Bijlani v. Union of India, (2006) 5 SCC 88, State of Uttaranchal v. Kharak Singh, (2008) 8 SCC 236, Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570, P.C. Joshi v. State of U.P., (2001) 6 SCC 491 and some other judgments and we will consider the same in the following paragraphs.

40. Per Contra, Sri. Gaurav Mehrotra, the learned Counsel for the High Court has submitted that the petitioner being a judicial officer, the charge of misconduct alone was sufficient to support the punishment order of removal and it was not necessary that the allegation of extraneous consideration ought to have been proved against the petitioner. He has submitted that the adverse entry given in the annual report for the year 2011-12 was not given by way of punishment and, therefore, the principle of double jeopardy is not attracted to the present case and the earlier adverse entry was no bar for passing the punishment order. He further submitted that earlier, the Administrative Judge had ordered closure of the complaint merely after a preliminary enquiry and no detailed enquiry had been held in the matter and, therefore, the closure of the complaint by the Administrative Judge would not bar the subsequent detailed enquiry and the consequent order of removal.

41. Sri. Mehrotra has relied upon the decisions in the cases of **Muzaffar Husain v. State of U.P**., 2022 SCC OnLine SC 567, Union of India v. K.K. Dhawan (1993) 2 SCC 56, Rajasthan High Court v. Ved Priya, 2020 SCC OnLine SC 337 and *Union of India v. P. Gunasekaran*, (2015) 2 SCC 610 and has submitted that while exercising the power of judicial review, this Court should not re-examine the evidence led before the Enquiry Officer and this Court is not exercising the power of appeal.

42. It is true that the scope of judicial review while examining the validity of any decision under Article 226 of the Constitution of India is limited to examining errors in the decision making process. In **Muzaffar Husain v. State of U.P**., 2022 SCC OnLine SC 567, the Hon'ble Supreme Court held that: -

"8. It is trite to say that the power of judicial review conferred on the constitutional Court is not that of an appellate authority but is confined only to the decision-making process. Interference with the decision of departmental authorities is permissible only if the proceedings were conducted in violation of the principles of natural justice or in contravention of statutory regulations regulating such proceedings or if the decision on the face of it is found to be arbitrary or capricious. The Courts would and should not act as an appellate Court and reassess the evidence led in the

domestic enquiry, nor should interfere on the ground that another view is possible on the material on record. If the inquiry has been fairly and properly conducted, and the findings are based on evidence, the adequacy of the evidence or reliability of evidence would not be a ground to interfere with the findings recorded in the departmental enquiries."

43. In **Union of India v. P. Gunasekaran** (2015) 2 SCC 610, the Hon'ble Supreme Court held that: -

"12. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, reappreciating even the evidence before the enquiry officer. The finding on Charge I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Articles 226/227 of the Constitution of India, shall not venture into reappreciation of the evidence. The High Court can only see whether:

(a) the enquiry is held by a competent authority;

(b) the enquiry is held according to the procedure prescribed in that behalf;

(c) there is violation of the principles of natural justice in conducting the proceedings;

(d) the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;

(e) the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

(f) the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

(g) the disciplinary authority had erroneously failed to admit the admissible and material evidence;

(h) the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

(i) the finding of fact is based on no evidence."

44. Sri. Gaurav Mehrotra has lastly submitted that the Full Court has recommended removal of the petitioner from service and this Division Bench should not doubt the collective wisdom of the Full Court. He has relied upon a judgment of the Hon'ble Supreme Court in **Rajasthan High Court v. Ved Priya**, 2020 SCC OnLine SC 337, wherein the Hon'ble Supreme Court held that: -

"13. At the outset, we may observe that both the appellant as well as the impugned judgment have elucidated the correct statement of law regarding the width and sweep of judicial review by a High Court over the decisions taken by its Full Court on administrative side. Although it would be a futile task to exhaustively delineate the scope of writ jurisdiction in such matters but a High Court under Article 226 has limited scope and it ought to interfere cautiously. The amplitude of such jurisdiction cannot be enlarged to sit as an ''appellate authority', and hence care must be taken to not hold another possible interpretation on the same set of material or substitute the Court's opinion for that of the disciplinary authority. This is especially true given the responsibility and powers bestowed upon the High Court under Article 235 of the Constitution. The

collective wisdom of the Full Court deserves due respect, weightage and consideration in the process of judicial review.

45. As has already been noticed in the preceding paragraphs, in the present case the Enquiry Officer has relied upon the orders passed in 9 other cases, regarding which no charge had been framed against the petitioner, the petitioner was not given an opportunity to give his explanation regarding those 9 orders, the Enquiry Officer had ignored the contradictions in the statement of Sri. Mahesh Pal Singh Yadav and he had ignored that his evidence was merely hearsay evidence and the Enquiry Officer totally ignored the statements of the other witnesses Sri. Parvez Alam Advocate and Sri. Ram Kishore - the applicant in the application under Section 156 (3) Cr.P.C. The findings recorded by the Enquiry Officer in such a manner by relying upon inadmissible extraneous and hearsay evidence and by ignoring relevant and admissible evidence, can only be said to be perverse and this Court is not only within its right to interfere with such a finding, but is under a duty to interfere so as to prevent a miscarriage of justice. Our view finds support by the view expressed by the Hon'ble Supreme Court in **Narinder Mohan Arya v. United India Insurance Co. Ltd.**, (2006) 4 SCC 713, wherein it was held that: -

"26..... In a suit filed by a delinquent employee in a civil court as also a writ court, in the event the findings arrived at in the departmental proceedings are questioned before it, it should keep in mind the following:

(1) ***the enquiry officer is not permitted to collect any material from outside sources during the conduct of the enquiry.***

(2) ***In a domestic enquiry fairness in the procedure is a part of the principles of natural justice.***

(3) Exercise of discretionary power involves two elements--(i) objective, and (ii) subjective and existence of the exercise of an objective element is a condition precedent for exercise of the subjective element.

(4) It is not possible to lay down any rigid rules of the principles of natural justice which depend on the facts and circumstances of each case but the concept of fair play in action is the basis.

(5) The enquiry officer is not permitted to travel beyond the charges and any punishment imposed on the basis of a finding which was not the subject-matter of the charges is wholly illegal.

(6) Suspicion or presumption cannot take the place of proof even in a domestic enquiry. The writ court is entitled to interfere with the findings of the fact of any tribunal or authority in certain circumstances."

46. Again, in **M.V. Bijlani v. Union of India,** (2006) 5 SCC 88, the Hon'ble Supreme Court reiterated that: -

"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."***

47. When we scrutinize the facts of the present case in light of the law laid down by the Hon'ble Supreme Court in the above mentioned cases, we find that the only charges leveled against the petitioner were that he had passed two contradictory orders U/s 39 (2) CPC in O.S. No. 1478/2011 and 1426//2011 and that he was running two concurrent order sheets of Criminal Miscellaneous No. 58/2011, Ram Kishore Vs. Ram Nivas and others application U/s 156 (3) Cr.P.C. and was passing different orders in different files as per his whim by violating the legal norms and procedures established by law and the orders passed by him adversely reflected upon his integrity and reputation. The evidence to be relied upon in support of the charges mentioned in the charge-sheet were (i) complaint dated 25.11.2011 of Sri Mahesh Pal Singh, Advocate, (ii) inquiry report dated 23.03.2011 of Sri A. K. Upadhyay, Additional District Judge, Court No. 1, Moradabad, (iii) both the order sheets maintained to run on the record of Criminal Misc. Application No. 58 of 2011, under Section 156(3) Cr.P.C. moved by Ram Kishore on 08.03.2011 and (iv) copy of complaint and order sheets of O.S. Nos. 1426 of 2011 Mohd. Ishtiyak v. Mohd. Irfan & Ors. and 1478 of 2011, Mohd. Musharraf & Ors. v. Mohd. Ishtiyak & Ors.

48. No charge had been leveled against the petitioner regarding any other order passed by the petitioner in any other case and the order passed in any other case was mentioned in the charge-sheet as the material which would be taken into consideration in support of the charges. However, the Enquiry Officer has recorded in his report that in course of inquiry, he had collected the orders passed by the petitioner in 9 cases and had been collected by him. The Inquiry Officer concluded that "a study of the orders passed by the petitioner makes it amply clear that the petitioner was habitual in granting interim injunction on regular basis; that the settled principle of law on this point is that granting ex-parte interim injunction is an exception whereas issuing of notice to hear both the parties is the general rule. The act of the Charged Officer seems violating this settled principles of law.'

49. There is nothing on record to indicate that the enquiry office had put the petitioner to notice that the orders passed in 9 other cases will also be taken into consideration against him so as to enable him to give an explanation regarding those orders. Thus it is apparent on the face of the record that the enquiry officer has taken into consideration extraneous material, which is clearly in violation of the law laid down by the Hon'ble Supreme Court in **Narinder Mohan Arya** (Supra), that the enquiry officer is not permitted to travel beyond the charges and he is not permitted to collect any material from outside sources during the conduct of the enquiry.

50. The charge no. 1 against the petitioner is that he had passed contradictory orders in Suits No. 1426 of 2011 and 1478 of 2011. The Inquiry Officer noted the submission of the petitioner regarding charge no. 1 that he had passed orders in Suits No. 1478 of 2011 and 1426 of 2011 on the basis of material placed before him in the aforesaid suits. He further submitted that in the subsequent Suit No.

1478 of 2011, there was no mention of the previous Suit No. 1426 of 2011 and of the interim order passed in it. The inquiry report mentions that the petitioner "had adduced his defence evidences through presentation of certain documentary evidences', but the particulars of the defence evidences adduced by the petitioner have not been disclosed in the enquiry report and there is no discussion regarding the same. Without discussing the defence evidence, the Inquiry Officer reached a conclusion that the petitioner had passed contradictory orders in two suits originating from the same award and he was guilty of charge no. 1. However, the Inquiry Officer further recorded that no opinion could be formed on this point, as the matter was sub-judice in Hon'ble High Court in Civil Misc. Writ Petition No. 69275 of 2011.

51. The Enquiry Officer has held the petitioner guilty of having passed contradictory orders without dealing with the petitioner's explanation that he had passed the orders as per the pleadings of the respective suits and on the basis of the material placed before him in both the suits and that in the subsequent suit, there was no mention of the earlier suit and the order passed in it. Thus the enquiry officer has recorded his finding in respect of charge no. 1 without taking into consideration the petitioner's explanation, which renders the finding perverse.

52. The second charge against the petitioner was that he maintained two concurrent order sheets of Criminal Miscellaneous No. 58/2011, Ram Kishore Vs. Ram Nivas and others, application U/s 156 (3) Cr.P.C. and was passing different orders in different files as per his whim by violating the legal norms and procedures established by law and the orders passed by him adversely reflected upon his integrity and reputation. This charge emanated from the complaint of Sri. Mahesh Pal Singh Yadav Advocate. The Enquiry Officer claims to have recorded the statement of the complaint of Sri. Mahesh Pal Singh Yadav Advocate on 28.06.2017 and the petitioner has contended that this statement was a verbatim reproduction of the statement of the complainant Mahesh Pal Singh Yadav that was recorded by the Special Vigilance Enquiry Officer on 26.07.2014 and he had merely changed its date to 28.06.2017, indicating that the Enquiry Officer has merely acted on the material that had been collected in the earlier vigilance enquiry.

53. Sri. Mahesh Pal Singh Yadav had stated that he was not an Advocate in Misc. Case No. 58 of 2011 under Section 156 (3) Cr.P.C. titled Ram Kishore versus Ram Nivas and the petitioner had not demanded any bribe from him. He said that the application was filed by his junior and his junior's client Sri. Ram Kishore had told him that he had got the application allowed by fulfilling the illegal demand of the petitioner and, therefore, his evidence was merely hearsay evidence and was not admissible. This witness did not know as to what was the alleged illegal demand. The witness Ram Kishore categorically stated that the petitioner had not demanded any money from him and he had not told Sri. Mahesh Pal Singh Yadav or to any other person that the petitioner had demanded bribe from him.

54. Sri. Mahesh Pal Singh Yadav had stated that he had three junior associates - Sri. Prashant Gupta, Sri. Monu Gupta and 1-2 more Advocates used to sit on his seat but he did not know their names and he did

not state that Sri. Parvez Alam Advocate, Counsel for Ram Kishore, was his junior. Sri. Mahesh Pal Singh further stated that he had made a complaint against the petitioner on the basis of the order passed by him and on the basis of the general perception. Thus his statement was merely hearsay evidence, which was full of material contradictions, but the Enquiry Officer accepted the hearsay evidence as gospel truth and he ignored the contradictions in the same.

55. The second witness Sri. Parvez Alam Advocate stated that on 15.04.2011 he had filed the application Ram Kishore versus Ram Nivas under Section 156 (3) Cr.P.C. and the petitioner had told him that the application had been dismissed in default; that he made an oral prayer to the petitioner that he had gone to drink water and his application be decided on merits, whereupon the petitioner heard his submissions and passed order thereon. His client Ram Kishore had not come to the Court on that date. Ram Kishore had paid him merely Rs.250/- to 300/- as fee for the application. He further stated that the wife of Sri. Mahesh Pal Singh Yadav was a Member of Zila Panchayat and he seldom used to come to the Court and that he was habitual of filing false complaints for gaining cheap popularity. He categorically stated that the petitioner was famous as an honest officer. However, the Enquiry Officer totally ignored the statement of Parvez Alam Advocate without assigning any reason for doing the same and he recorded his findings against the petitioner.

56. The Enquiry Officer had examined the applicant Ram Kishore also, who had stated that he had given an application under Section 156 (3) Cr.P.C. on 08.03.2011 through Sri. Parvez Alam Advocate but he did not go to the Court to do pairvi of the application after that date. He categorically stated that he did not go to the Court on 15.04.2011; that he did not pay any bribe and that he did not tell to Sri. Mahesh Pal Singh Yadav or to any other person that he had paid bribe. However, the Enquiry Officer totally ignored the statement of the Applicant Ram Kishore while recording his findings against the petitioner, without assigning any reason of ignoring this relevant evidence.

57. In **Roop Singh Negi v. Punjab National Bank**, (2009) 2 SCC 570, the Hon'ble Supreme Court held that *"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 finding recorded by the Enquiry Officer, by relying upon the hearsay evidence of Sri. Mahesh Pal Singh Yadav and without dealing with the explanation given by the petitioner in respect of both the charges, has not been arrived at without taking into consideration the relevant material in the shape of the petitioner's explanation and the statements of the witnesses Sri. Parvez Alam Advocate and Sri. Ram Kishore, and the same is perverse and is vitiated.

58. Further, there was no charge that the petitioner had passed the contradictory orders in the suits for some extraneous consideration. In **P.C. Joshi v. State of U.P.**, (2001) 6 SCC 491, the Hon'ble Supreme Court has held that: -

"7. In the present case, though elaborate enquiry has been conducted by

the enquiry officer, there is hardly any material worth the name forthcoming except to scrutinize each one of the orders made by the appellant on the judicial side to arrive at a different conclusion. That there was possibility on a given set of facts to arrive at a different conclusion is no ground to indict a judicial officer for taking one view and that too for alleged misconduct for that reason alone. The enquiry officer has not found any other material, which would reflect on his reputation or integrity or good faith or devotion to duty or that he has been actuated by any corrupt motive. At best, he may say that the view taken by the appellant is not proper or correct and not attribute any motive to him which is for extraneous consideration that he had acted in that manner. ***If in every case where an order of a subordinate court is found to be faulty a disciplinary action were to be initiated, the confidence of the subordinate judiciary will be shaken and the officers will be in constant fear of writing a judgment so as not to face a disciplinary enquiry and thus judicial officers cannot act independently or fearlessly.*** *Indeed the words of caution are given in K.K. Dhawan case (1993) 2 SCC 56 and A.N. Saxena case (1992) 3 SCC 124 that merely because the order is wrong or the action taken could have been different does not warrant initiation of disciplinary proceedings against the judicial officer. In spite of such caution, it is unfortunate that the High Court has chosen to initiate disciplinary proceedings against the appellant in this case."*

59. The witness Mahesh Pal Singh Yadav had stated that the petitioner had dismissed Misc. Case No. 58/2011 titled Ram Kishore versus Ram Nivas, under Section 156 (3) Cr.P.C. but the application was subsequently accepted on the same day, which at the most alleged passing of two different orders on one date. However, merely on this statement, the charge that the Enquiry Officer found proved was that the petitioner *"maintained two concurrent order sheets of Criminal Miscellaneous No. 58/2011, Ram Kishore Vs. Ram Nivas and others, application U/s 156 (3) Cr.P.C. and was passing different orders in different files"* as if this continued for plural dates. This indicates that the approach of the Enquiry Officer was to exaggerate the allegations against the petitioner while at the same ignoring the material that favoured him. Such an approach by the Enquiry Officer cannot be appreciated as he was performing a quasi-judicial function and he was expected to act in a fair and just manner.

60. In **Sadhna Chaudhary v. State of U.P.**, (2020) 11 SCC 760, the Hon'ble Supreme Court has cautioned that *"one cannot overlook the reality of ours being a country, wherein countless complainants are readily available without hesitation to tarnish the image of the judiciary, often for mere pennies or even cheap momentary popularity. Sometimes, a few disgruntled members of the Bar also join hands with them, and the officers of the subordinate judiciary are usually the easiest target. It is, therefore, the duty of the High Courts to extend their protective umbrella and ensure that the upright and straightforward judicial officers are not subjected to unmerited onslaught."*

61. In **K. K. Dhawan** (1993) 2 SCC 56 the Hon'ble Supreme Court had listed the following six instances when such action could be taken: -

"(i) where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;

(ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;

(iii) if he has acted in a manner which is unbecoming of a government servant;

(iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

(v) if he had acted in order to unduly favour a party;

(vi) if he had been actuated by corrupt motive, however small the bribe may be because Lord Coke said long ago "though the bribe may be small, yet the fault is great'."

62. From the material placed before and examined by the Enquiry Officer, merely this much was proved that the petitioner had passed two contradictory orders in two different suits on two different dates and that although he had dismissed an application under Section 156 (3) Cr.P.C. in default of appearance, after the Counsel appearing and making an oral prayer for being heard, he was heard and the application was allowed. There was no allegation against the petitioner that he had passed the orders for some extraneous reasons. There was nothing more so as to make out any of the instances mentioned by the Hon'ble Supreme Court in K. K. Dhawan (Supra) justifying disciplinary action against the petitioner and his punishment therein by removing him from service. In light of the law laid down by the Hon'ble Supreme Court in P. C. Joshi, Ramesh Chander Singh and Krishna Prasad Verma, the petitioner should not have been penalized by removing him from service merely for having passed wrong orders.

63. As we have already held that the findings recorded by the Enquiry Officer, by relying upon the hearsay evidence of Sri. Mahesh Pal Singh Yadav and without dealing with the explanation given by the petitioner in respect of both the charges, has not been arrived at without taking into consideration the relevant material in the shape of the petitioner's explanation and the statements of the witnesses Sri. Parvez Alam Advocate and Sri. Ram Kishore, is perverse and is vitiated, the punishment order based on such an Enquiry Report also cannot withstand the scrutiny of law and it has to be quashed. The explanation given by the petitioner in respect of charge no. 1 appears to be sufficient for disproving charge no. 1 and statements of the witnesses Sri. Parvez Alam Advocate and Sri. Ram Kishore disproved the charge no. 2 against the petitioner. That is the reason that after the earlier enquiry held against the petitioner, the Administrative Judge had closed the complaints against the petitioner.

64. In view of the aforesaid discussion, the Writ Petition is ***allowed in part.*** The order dated 02.04.2019 passed by the State Government removing the petitioner from the post of Civil Judge (Junior Division) is **quashed**. Consequently, the petitioner stands reinstated in service on the post of Civil Judge (Junior Division).

65. Although the petitioner has claimed payment of back wages and other consequential benefits, neither any material has been placed on record to support the aforesaid prayer by establishing that the petitioner was not gainfully employed during the period he had to remain out of service, nor has any submission been made by the learned Counsel for the petitioner to press this prayer. Therefore, the prayer for grant of back-wages to the petitioner is rejected. However, it is provided that

except for the back wages, the petitioner shall be entitled to get all the other benefits consequent to quashing of the removal order, including seniority etc.

66. So far as the petitioner's challenge to the adverse remarks awarded for the year 2011-12 is concerned, the same had not been awarded by way of punishment and the same are based on the appraisal of the petitioner's work by the District Judge and the Administrative Judge had rejected the petitioner's representation against the adverse remarks. We do not find any good ground to interfere with the adverse remarks and the prayer made by the petitioner in this regard is rejected.

(2023) 2 ILRA 107
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.01.2023

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 22586 of 2019
&
other connected cases

Sajeevan Lal & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Subhas Chandra Pandey

Counsel for the Respondents:
C.S.C.

Civil Law - Pension - Part time Tube well operators - Irrigation Department Tube Well Operators Service Rules 1953 - UP Irrigation department regularization of part time tube well operators on the posts of tube well operators rules, 1996 - computation of "qualifying service' for grant of pensionary benefits - Petitioners appointed as "Part time Tube well operators" during the year 1987 to 1994 - their services were regularized during the year 2008 to 2009 - Petitioners prayed to *reckon the services from the date of their initial appointment* as "Part time tube well operators" for the purposes of consequential services benefits including pensionary benefits i.e. all the service benefits be reckoned from their date of respective appointment and not from their date of regularization - *Held* - "Part time tube well operators" were initially appointed under 'executive instructions', without following the procedure prescribed under 1953 Rules - part time tube well operators neither held nor were appointed on a temporary or a permanent post prior to their regularization - They came to be appointed on a substantive post only after their regularization and as such there service cannot be reckoned from the date of their appointment as part time tube well operators, but it has to be from their respective date of regularization - "qualifying service" for the purpose of pension shall be reckoned from the date, when they had been regularized in the regular post as Tube well operator – Even, the services of the petitioners cannot be reckoned from the date of 17.12.1996 i.e. the date of promulgation of "U.P Irrigation Department Regularization of Part-time Tube well operators on the posts of Tube well operators Rules, 1996" as the rules of regularization clearly postulates that the said rules applied to only those part time tube well operators who were appointed prior to 01.10.1986 - regularisation can be prospective and not retrospective – As, petitioners were appointed after 01.10.1986 & came to be regularized only in 2008-2009, when the new pension scheme was in vogue in view of the "U.P. Retirement Benefits (Amendment) Rules, 2005" w.e.f 01.04.2005, therefore writ petitioners not entitled to the Old pension scheme (Para 75, 80, 81)

Allowed. (E-5)

List of Cases cited:

1. Suresh Chandra Tiwari & ors. Vs St. of U.P. & ors. W.P. No. 3558 of 1992

2. Prem Singh Vs St. of U.P., 2019 (10) SCC 516

3. Dukh Haran Singh Vs St. of U.P. (SLP No. 27713 of 2009)

4. St. of U.P. & ors. Vs Dukh Haran Singh & ors. (special Appeal No. 240 of 2009),

5. C.N. Rudramurthy Vs K. Barkathulla Khan & ors. (1998) 8 SCC 275

6. Namo Narayan Rai Vs St. of U.P (Writ Petition No. 13626 of 2017)

7. Subhash Chandra Mishra & ors. Vs St. of U. P. & ors. Writ Petition No.- A 52397/2009

8. Shitala Prasad Shukla Vs St. of U.P. AIR 1986 SC 1859

9. U.P. Panchayat Adhikari Sangh & ors. Vs Daya Ram Saroj & ors., (2007) 2 SCC 138

10. Murari Lal Vs St. of U.P. (Writ A No. 35425/1997)

11. Direct Recruits Direct Recruit Class-II Engineering Officers' Association Vs St. of Mah. AIR 1990 SC 1607

12. Sichai Majdoor Sangh Vs St. of U.P. & ors.: 1996 (1) UPLBEC 9

13. St. of Bihar Vs Rajmati Devi

14. The St. of U.P. & ors. Vs Uttam Singh Civil Appeal No. 4575/2021

15. St. of Orissa Vs Sudhansu Sekhar Misra, (1968) 2 SCR 154

16. Registrar General of India & anr. Vs V. Thippa Setty & ors. 1998 Vol. 8 SCC 690

17. U.O.I. & ors. Vs Sheela Rani (2007) 15 SCC 230)

18. St. of Har. Vs Jasmer Singh (1996) 11 SCC 77

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

1. The conundrum relating to the reckoning of dates for the purpose of computation of "qualifying service' for grant of pensionary benefits to an employee having being regularized to a post has been a subject matter of adjudication in several judgments in the past and although this court has in several precedents has carved a niche leading to the development of service jurisprudence on the said issue, but unfortunately the controversy has refused to die down and yet, the present bunch of matters have come for consideration before this court.

2. Since, common issue is raised in all these writ petitions, the bunch is being taken for final disposal together.

3. Apparently, there are two class of petitioners in these bunch of petitions, the first being those petitioners who had as per the direction of this court given a detailed representation to the authority and their representation having been decided unfavourably against them vide various orders including order dated 05.11.2020, 10.07.2018 etc., have again approached this court challenging the said impugned orders and the second class of petitioner belonging to those category, who have approached this court for the first time highlighting the self-same issue, which had been raised by the first set of petitioners in the earlier round of litigation. The similarity, however, lies in the entry in service, therefore, the above classification in the pursuit of an identical right is immaterial. Suffice it to say that entry in service at par with a member of service is either by regular appointment according to service rules or by regularization according to regularization rules.

4. Heard Shri Sudeep Seth, learned Senior Advocate assisted by Shri Kunj Bihari Pandey, Advocate for the petitioner and Additional Advocate General Shri Ramesh Kumar Singh, Senior Advocate assisted by Shri Sanjay Sarin, Shri Pratyush Tripathi, learned Additional Chief Standing Counsel's for the State and Shri Tushar Verma, learned Special Counsel for the opposite parties.

5. It is the common case of the petitioners that, they had been appointed as "Part time Tube well operators" during the year 1987 to 1994 and their services were regularized during the year 2008 to 2009. It is their case that although they had been regularized in the year 2008-2009, however in view of the judgment of this court passed in writ petition No. 3558 of 1992 **(Suresh Chandra Tiwari and others Vs. State of U.P. and others)** by a Single Bench on 18.05.1994, which was subsequently upheld by the Hon'ble Apex Court vide order dated 22.03.1995, wherein these "Part time tube well operators" have been granted the same emoluments i.e. in the same scale of pay which were given to the regular Tube well operators, they have now claimed pensionary benefits etc. by including past services from initial engagement for the purpose.

6. Rule of law is the hall mark of a democractic society. In the pursuit of this object public services play a vital role. The appoitment of personnel to public services play a vital role. The appointment of personnel to public services at the grassroot level has throughout posed vexatious problems in the matter of appointment and regulation of service condition. Article 14 of the Constitution of India has withstood the temperts of classification and discrimination but the emerging disparity to regulate the condition of pension as an end result of service ought not to obliterate the object of equality in a level playing field. In other words, the application of pension rules knows of no exception or discrimintion once it is a firmly provided that the marriage of resentment with the post (temporary or permanent) ought to be qualified with the appointment of personnel by strict application of service rules for recognising a person to be a member of service. It is for this reason that a backdoor entry in service does not confer membership in service till an incumbent is duly regularised and the date of regularization in this manner assumes the decisive basis for determination of seniority.

7. Thus, these "Part time tube well operators" have claimed that as and from 18.05.1994, since the government had given them the same scale of pay as that of the regular tube well operators, however the other service benefits like calculation of ACP, pension, GPF, Gratuity etc. has not been given from the said date and thus they are entitled for the same. There is also a further relief being claimed, wherein some of the petitioners have sought the same relief of calculation of ACP, Pension, GPF, gratuity from the date of their appointment in view of the judgment passed by the Hon'ble Apex Court in **Prem Singh V. State of Uttar Pradesh, 2019 (10) SCC 516.** Further, some petitioners have also prayed to relate back the date of regularization to 17.12.1996 i.e the date of issuance of the government order whereby the cadre of part-time tube well operators/ tube well assistants was abolished under the UP irrigation department regularization of part time tube well operators on the posts of tube well operators rules, 1996.

Contention of the Petitioners:

8. Mr. Sudeep Seth, Ld. Senior Counsel led the argument along with Mr. Kunj Bihari Pandey, learned Advocate from the side of the petitioners. Mr. Seth also field his written submission and in his crisp manner, distilled the issue to the point that the judgment of the Hon'ble Apex Court passed in **Prem Singh Vs State of Uttar Pradesh, 2019 (10) SCC 516,** is squarely applicable to the facts of the present case. According to him, the Hon'ble Apex Court while holding that services rendered in work charge establishment be treated as qualifying services for pensions, has not only read down rule 3(8) of Pension Rules, 1961 but has also struck down regulation 370 of the Civil Services Regulations. Mr. Seth has authoritatively argued that the services in regular establishment like the "Part time tube well operators" are on better footing as compared to services in the work charge establishment, which are essentially temporary in nature. He submits that the work charge employees are engaged on a temporary basis and their appointments are made for the execution of a specified work and their services automatically come to an end on completion of work. However, regular establishment is permanent in nature and hence regular establishment is on a much better footing as compared to work charge establishment. As to the notification dated 07.04.2005 relating to applicability of 1961 rules to only those persons, who were appointed/regularized prior to 01.04.2005, the Ld. Sr. Counsel submits that said notification losses significance the moment past services of the petitioners, for the date of their respective appointments, are reckoned for the purposes of pensionary benefits in terms of the judgment passed by the Hon'ble Apex Court in *Prem Singh's case.*

9. Further, as to the U.P qualifying service for pension & Validation Act, 2021 applicable since 05.03.2021 is concerned, the Ld. Sr. Counsel submits that the said amendment Act has been dealt by a Division bench of this court in (i) Judgment dated 04.02.2021 passed in Special Appeal Defective No. 1003 of 2020, (ii) Judgment dated 09.06.2021 passed in Special Appeal No. 97 of 2021 and (iii) Judgment dated 14.07.2021 passed in Special Appeal No. 152 of 2021, wherein the Division bench has held that the said Act enures to the benefit of the petitioners and not to the State and according to him each time the division bench had granted the benefit of past services of temporary post/ in work charge establishments for the purposes of pensioner benefits in terms of the *Prem Singh case*. He further submits that even the SLP filed by the state against one of the order's of the Division Bench has been dismissed by the Hon'be Apex Court.

10. The Ld. Sr. Counsel also drew attention of this court to a Government Order dated 11.08.2020 passed by the state of Uttarakhand, granting benefit of the Prem Singh's case to "Part time tube well operators" in the state of Uttrakhand. According to him, since in the bunch of matters decided by the Hon'ble Apex Court, one of the petitions was that of a "Part time tube well operators" from the state of Uttarakhand, the issue relating to the part time tube well operator in the state of Uttar Pradesh has to be decided in similar manner. Further, he sought to draw an analogy with the matter of seasonal collection amin, who have been granted benefit of the judgment of Prem Singh case by a division bench of this court in Special Appeal No. 438 of 2017 (Brahamanand Singh V/s State of U.P). He has also referred to observation made by the

Hon'ble Supreme Court in a compassionate appointment of a dependent of deceased "Part time tube well operators," to buttress his point that the petitioner in that case was treated as regular employee by the conduct of the state government even though they were labelled as a "Part time tube well operators". (State of Uttar Pradesh V/s Uttam Singh vide Civil Appeal No. 4575 of 2021).

11. The Ld. Senior Counsel to further bolster his argument, submits that the issue relating to admissibility of regular pay scales being applicable to "Part time tube well operators" were a subject matter of confusion, wherein the Hon'ble Apex Court had to intervene and vide its judgment dated 04.01.2016 passed in Rakesh Kumar V/s State of UP (SLP (civil) No. 34861/2015) had made it clear that the part time tube well operators would be entitled to regular pay scale in the light of the decision of High Court in *Suresh Chandra Tiwari Case* (mentioned supra). He further explained that the judgment dated 25.09.2013 being relied upon by the state government passed in the case of **Dukh Haran Singh V/s State of U.P (SLP No. 27713 of 2009)** by the Hon'ble Apex Court was neither considering the issue of reckoning past services as "Part time tube well operators" for computation of pensionary benefits nor such an issue was raised in the said petition and thus according to him the judgment passed by the Division Bench of the supreme court in the said case was impliedly overruled and was in *per incuriam* to the judgment passed by three judge bench of the supreme court in *Prem Singh Case.*

12. In any case, he argues that although there are several judgments relied upon by the state government in the two compilation filed by them, but according to him most of these conflicting judgment of coordinate benches of the Single bench or the Division Bench of this court relating to computation of past services as "Part time tube well operators" for the purposes of pensionary benefits are either based on the judgment of Division Bench passed in *Dukh Haran Singh Case* or are prior to the date of judgment in the case of *Prem Singh Case.* Thus, it has been argued by the ld. Senior counsel that with the delivery of the judgment dated 02.09.2019 in the Prem Singh Case by the Hon'ble apex court, all the earlier judgments relating to the issue of computation of past services, stands impliedly overruled. In order to fortify the said proposition of law, the Ld. Sr. counsel relied on the judgment passed by the Hon'ble Apex Court in the case of **C.N. Rudramurthy V/s K. Barkathulla Khan & Others (1998) 8 SCC 275**. Further, as relating to the reliance of the state government on the full bench judgment dated 26.11.2021 passed in the case of **Namo Narayan Rai V/s State of U.P** (Writ Petition No. 13626 of 2017) is concerned, the ld. Counsel has emphatically tried to drive home the point that the said judgment does not have a binding effect upon the entire cadre of "Part time tube well operators", since the said judgment was based upon a compromise affected between the parties to the said case. According to him, the reference made by the Single Bench of the court has not been answered by the full bench and as such the judgment is not binding and the same theory apply for the order of review dated 22.04.2022 passed by the full bench in that said matter.

13. Thus, it has been submitted by the ld. Sr. counsel that directions may be issued to the state government to reckon the services of the petitioners from the date of their initial

appointment as "Part time tube well operators" till their regularization, for the purposes of consequential services benefits including pensionary benefits. The other argument relating to reckoning the date for service benefits to these "Part time tube well operators" from the date of 18.05.1994 i.e when they were granted pay-parity with regular tube well operator, or from the date of 17.12.1996 i.e the date of promulgation of "U.P Irrigation Department Regularization of Part-time Tube well operators on the posts of Tube well operators Rules, 1996 had been either not been argued or has been impliedly waived. Thus, the crux of the issue raised and argued by the counsel for the parties is that all the service benefits given by the state to the petitioners ought to have been reckoned from their date of respective appointment and not from their date of regularization. The Ld. Sr. Counsel in a very emphatical manner tried to drive home his argument by submitting that once the service of these "Part time tube well operators" are reckoned from their date of appointment as is being prayed for, the other consequential relief of other service benefit, including applicability of old pension scheme would follow, as then these "Part time tube well operators" would not be termed as new entrant after 01.04.2005, so as to fall within the mischief of the New Pension scheme.

Contention of the Respondents:

14. On the other hand, the arguments for the state of Uttar Pradesh has been ably led by Sr. Advocate Ramesh Kumar Singh, Ld. Addl. Advocate General, assisted by Shri Sanjay Sarin, Pratyush Tripathi, Ld. Addl. Chief Standing Counsels and Tushar Verma, Ld. Special Counsel.

15. The Ld. Addl. Advocate General has taken this court to the history & background of appointment of these "Part time tube well operators" and has submitted that although the state of Uttar Pradesh had framed the Irrigation Department Tube Well Operators Service Rules 1953 in view of powers conferred by proviso to Article 309 of the Constitution of India, which was notified on 5.10.1953, however, these "Part time tube well operators" were appointed under "executive instructions' vide order dated 22.12.1981 issued by *Sinchai Anubhag*, Government of U.P, wherein it was provided that 2300 regular posts of Full Time Tube Well Operators cum Mechanics are being created in the pay scale of Rs. 354-514 to run Tube Wells of State of Uttar Pradesh. A mention was also made in the said executive order that another 2147 posts of Part Time Tube Well Operators are being created at a fixed pay of Rs. 150/- per months till 20.02.1982 in case they are not abolished before such date. Thus, the first point being made by the Ld. AAG is that these "Part time tube well operators" were not appointed as per scheme of the Rules and apparently the appointment was made by virtue of Government Orders and without following the procedure prescribed under 1953 Rules. Mr. Singh argued that the petitioners since the very date of their appointment knew that they were part time appointees and no service benefits would accrue to them. In order to vindicate this stand, the Ld. Sr. Counsel has relied on an office memorandum issued by the Engineer -in-Chief, Irrigation Department on 18.2.1982, by which the conditions governing the appointment and services of such posts of Part Time Tube Well Operators were prescribed.

16. The Ld. Sr. Counsel thereafter developed the second limb of his argument by stating that, the state of U.P 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 550 per month. The said G.O provided that appointment letter may be issued to all working Part Time Tube Well Operator and they may also be provided the appreciation allowance, on the basis of their performances. The Ld. Sr. counsel submits that pursuant to the aforesaid G.O all the working Part Time Tube Well Operators were issued appointment letters. However, in the intervening period, two cases being Case No. 256/1988 and case no. 20/1989 came to be filed by eight and fifty "Part time tube well operators" respectively, before the Labour court claiming pay parity with regular Tube Well operators under the provisions of U.P. Industrial Disputes Act 1947. Both the 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 are entitled to pay parity with Regular Tube Well Operators. Obviously, the state of Uttar Pradesh was not happy with the said award of the labour court and as such they challenged the said award vide a Writ Petition. No. 1502 of 1992. Simultaneously, another writ petition No. 3558 of 1992 (Suresh Chandra Tiwari and others Vs. State of U.P. and others) was filed before this court challenging the aforesaid G.O dated 20.2.1992. The Ld. Sr. Counsel to give a glimpse of the said matter sought to rely on the prayer/ relief sought by the petitioners in the said petition, and thus argued that the relief sought in the said writ petition was relating to direction to regularize the petitioners in service on the post of Tube Well Operators and to pay regular pay scale to them as is admissible to the Full Time Tube Well Operators.

17. The Ld. Sr. Counsel submits that both the appeal filed by the state of Uttar Pradesh against the labour court award as well as the writ filed by Suresh Chand Tewari & others were decided by a common judgment dated 18.5.1994, wherein a Single Bench of this court found the claim of pay parity of "Part time tube well operators" just and therefore granted the relief of same emoluments to them as that of a regular Tube well operators. Further, a special leave petition filed by the State of U. P. against the said judgment was also dismissed by the Hon'ble Supreme Court on 22.3.1995 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. Thus, the Hon'ble Apex court held the "Part time tube well operators" to be entitled for payment of salary (prospectively) as was being drawn by the regular Tube Well Operators. The Ld. Sr. Counsel in order to complete the complete chain of events submits that even the Review Petition filed by the state was dismissed on 18.10.1995. Thus, in compliance of the order of the Hon'ble Apex Court, the State issued an order on 27.10.1995, followed by an order dated 10.11.1995 providing the same emoluments of pay, which were given to the regular Tube well operators to "Part time tube well operators," who were covered by the said judgment dated 18.5.1994 and other similarly situated petitioners.

18. After narrating the events, the ld. Sr. Counsel submitted that in terms of the aforesaid judgment of *Suresh Chand Tewari case*, the only issue decided by this Court or the Hon'ble Apex Court was

relating to the pay-parity between the part time tube well operator and the full time tube well operator, which was decided on the Principal of equal pay for equal work and no other issue was decided and as such reading or interpreting the said judgement to hold that since pay-parity was granted to the part time tube well operator, they ought to be also given other service benefits like pensions etc. would be overreaching the judgment and not as per law.

19. The Sr. Counsel in order to further fortify his stand that, the "Part time tube well operators" cannot be equated to full time tube well operator on the strength of *Suresh Chandra Tewari case*, took this court to the third limb of his argument relating to the regularization of these "Part time tube well operators". The Ld. AAG submitted that the State enacted the *"U.P. Irrigation Department Part Time Tube Well Operators Regularization Rules 1996"* for regularization of "Part time tube well operators" and as per the rules made it applicable only to those candidates whose appointment were made prior to 1.10.1986 and who worked continuously till 16.12.1996. The rules also mentioned that there was no distinction between candidates appointed as "Part time tube well operators" or Tube Well Assistant and the said rules were equally applicable to them, provided they met the cut-off dates. The state also issued G.O dated 17.12.1996 whereby the Cadre of "Part time tube well operators" was abolished and further provided that against the vacant posts of Tube Well Operators the proceedings for regularization shall be initiated under the provisions of aforesaid Regulation Rules 1996 only. Hence, the process of regularization of "Part time tube well operators" started and vacant posts were filled up based on seniority and as per the Ld. Sr. Counsel, about 6735 Part Time Tube Well operators were regularized during the period 1997 till 2001 and given the benefit of the Old Pension Scheme as was applicable prior at the time of their regularization.

20. It was further submitted that the state, in order to give full effect to the principles of *"equal pay for equal work'* propounded in the judgment passed by the Hon'ble Apex Court as well as this court in *Suresh Chand Tewari case*, issued G.O dated 3.3.1998 directing all "Part time tube well operators" to be entitled for increment and allowance like the regular Tube Well Operators along with rural house rent allowances, bonus etc. However, the said G.O was subsequently clarified & modified by another G.O dated 28.5.2003, whereby the phrase "other service benefits" mentioned in G.O order dated 03.03.1998 was deleted, however by the subsequent G.O dated 28.5.2003, the benefits of pay increment, rural house rent and bonus continued in the light of the judgment in the *Suresh Chandra Tiwari case*.

21. Thus, the Ld. Sr. counsel has submitted that the status of the "Part time tube well operators" was not of a temporary government servant but remained as of "Part time tube well operators" and the terms and conditions of the "Part time tube well operators" were governed by the government order dated 18.2.1982 which remained same till their regularization, except for the fact that they were granted the benefit of *"equal pay for equal work'* in terms of the judgment and order dated 18.5.1994 passed in the *Suresh Chandra Tiwari case*. Thus, it has been argued that the mere grant of pay parity to the part time tube well operators cannot confer them a status of a temporary government servant

or else he vehemently argues that a situation would be created whereby, "every contractual, daily wager / ad-hoc / temporary / part time engagement would result into a status of regular government servant.

22. The Ld. Sr. Counsel has tried to draw a distinction between a conscious decision and a wrong decision. According to him, the argument of some of the counsel that GPF have been deducted from their account after the government order dated 03.03.1998 and as such they are entitled for the old pension scheme would not be correct and not as per law as the said deduction of funds was made under some misconception. He submits that the petitioners were not legally entitled to subscribe to the fund and the nature of their appointment was contractual and they would only acquire the status of Government servant only after their due regularization. Thus, according to him, the nature of appointment of "Part time tube well operators" cannot vary in reference to different service benefits i.e., for achieving pension their services prior to regularization cannot be held to be substantive or permanent or even temporary.

23. Continuing further, the Ld. Sr. Counsel addressing this court on the regularization of the petitioners, next submitted that for the purposes of regularization of services of "Part time tube well operators", whose services were not covered by Regularization Rules 1996, the State enacted the U.P. Irrigation Department Regularization of Part Time Tube Well Operators on the Post of Tube Well Operators (First Amendment) Rules 2008, which were made applicable to those candidates who were appointed prior to 30.6.1998 and worked continuously till 05.05.2008. Thus, it has been contended by the Ld. Sr. counsel that the present writ petitioners have been regularized in view of this amendment and thus these petitioners having taken the benefit of regularization are now trying to rake the issue of reckoning the date for grant of service benefits from their respective date of appointment cannot be permitted as per law, in view of the scheme of regularization and a series of consistent judgments passed by this court as well as the Hon'ble Apex Court.

24. The first judgement relied by the state is the case of State of **U.P. and others Vs. Dukh Haran Singh and others** (special Appeal No. 240 of 2009), wherein large number of incumbents similarly placed as the present writ petitioners, whose cases were covered under the Service Rules 1996 and Amended Rules 2008, challenged the validity of the said Rules before a single bench of this Court and were granted relief, in as much as the "Part time tube well operators" were granted pensionary benefits by reckoning their date of appointment. However, interestingly, the said order of the Single Bench was overruled vide judgment dated 21.7.2009 of a Division Bench of this court, which held that service rendered prior to regularisation does not qualify for grant of pension in terms of Regulations 361 and 370 of the Regulations as services rendered, prior to that are neither substantive, permanent nor temporary. Further, in the SLP filed in the said Dukh haran Singh (Special Leave Petition (C) no. 27713 of 2009, Dukh Haran Singh vs. State of U.P & Ors), the Hon'ble Apex Court vide its judgment dated 25.09.20113 dismissed the said SLP of the petitioner ("Part time tube well operators") by

reiterating the judgment of the Division Bench of this court and further observing that since as per the relevant rules minimum qualifying service for pension is 10 years, the petitioner having not fulfilled that minimum requirement, they could not be held to be eligible for pension though he would be entitled to gratuity and other benefits subject to applicable rules.

25. The Ld. AAG also referred to a judgment dated 10.05.2011, passed in Writ Petition No.- A 52397/2009, **Subhash Chandra Mishra and others V/s State of U. P. and others,** of this court to show that mere providing parity in the matter of pay scale, other conditions of service of part time Tube Well Operators does not become suo moto at par with regularly appointed Tube Well Operators from the date of initial appointment. According to the State, the two sets constitute two different streams and they were not interchangeable and they were engaged with different concepts, different status, conditions of service etc. Thus, it is their submission that any attempts to treat the persons like petitioners and regularly appointed Tube Well Operators at par in all respects would amount to treating unequals as equal.

26. Further, Judgment dated 30.07.2014 passed by a Division Bench of this court in Special Appeal No. 146 of 2008, (State of U.P. and others Vs. Ram Niwas) and connected appeal, was referred wherein the Division Bench after recording the various clauses of the 1953 rules relating to appointment of tube well operators in UP, repelled the plea of the "Part time tube well operators" for grant of arrears of salary for the period from their date of appointment to the date of passing of the Suresh Chandra Tewari Case on the ground that none of the procedure, as indicated as per Rules, 1953, has been followed in the appointment of these "Part time tube well operators".

27. The Ld. Sr. Counsel referred to various judgments to show that similar petitions in sum & substance have been rejected earlier by this court, wherein the regularization from the date of initial engagement has been rejected by this court of these "Part time tube well operators". These judgments being:

(i) Judgment dated 08.11.2012, passed in Writ Petition No. 8722 of 2009, (Istgar Ahamad V/s State of U.P. and others), wherein the court repelled the contention of the petitioners to count their services from the date of their initial engagements as "Part time tube well operators" for other service benefits and accordingly found the other prayer regarding deduction of GPF as also not tenable as regularization of services of the petitioners was made on 7.1.2009 and they were covered by the notification dated 21.3.2005.

(ii) Order dated 13.06.2013 passed by this court in Writ A No. 55344 of 2013, (Madan Gopal Pandey Vs. State of U.P. and others)

(iii) Order dated 31.03.2014 passed by a Division Bench of this court in Special Appeal No. 227 of 2014, (State of U.P. and others Vs. Tube Well Operators Welfare Association and others) and other connected Appeals, wherein the Division Bench did not find any substance in the contention that "Part time tube well operators" are entitled to all benefits of service, which is applicable to employee either temporary or permanent employees appointed on any substantive post prior to the date of their regularization.

(iv) Judgment dated 21.11.2014 passed by this court in Writ A-35425 of 1997, (Murari Lal Vs. State of U.P. and others) and other connected petition,

wherein this court did not find any valid ground for declaring the regularization Rules as Ultra vires of Articles 14 and 16 of the constitution for not providing for regularization w.e.f. initial date of appointment.

(v) Judgment dated 19.9.2016 passed by a Single Bench of this court in Writ Petition No. 22375 of 2016, (Brij Pal Singh and others v/s State of U.P and others), wherein this court repelled the assertions of the petitioners that they were entitled to get the benefit of Old Pension Scheme as they were engaged sometimes between 1987 and 1993. The court in that case thus held that there was no substance in the said argument of the petitioners, as the date on which they were regularised in the regular establishment was to be taken into account for the purposes of the pension and not the year when they were engaged as "Part time tube well operators" and thus dismissed the writ petition as being devoid of any merits. Even, the appeal filed against the said single Bench order was rejected by the Division Bench of this court vide order dated 15.02.2017 passed in Special Appeal No. 70 of 2017, (Manmohan Satwal and others Vs. State of U.P. and others) connected with Special Appeal No. 65 of 2017, Rajesh Kumar Tiwari and others Vs. State of U.P. and other.

(vi) Judgment dated 17.01.2017 passed in Writ Petition No. 122 of 2012, (Shiv Shankar Lal and others Vs. State of U.P. and others) and other connected writ petitions, wherein identical issue stood decided, wherein the Single Bench refused to give similar reliefs to "Part time tube well operators", who were engaged sometime between 1987 to 1993 and their services were regularized sometime in the year 2008. The said judgment of the single Bench was upheld vide order dated 15.02.2017 passed in Special Appeal No. 65 of 2017, Rajesh Kumar Tiwari and others Vs. State of U.P. and other connected appeals, wherein the Division Bench refused to accept the contention of the "Part time tube well operators" that the word "New Recruits' does not include those who were appointed earlier even though they have not been regularized later on. The Hon'ble Division bench in that case observed that if such an interpretation is given then any form of engagement or appointment prior to 28.3.2005 would obviously be recruitment, but at the same time such recruits not being regular, the said engagement would not be entitled to the pensionary scheme either old or new unless they are regularized in their services. A new recruit in this context would mean a regular substantive appointee and not a part-time or ad- hoc etc. appointee.

28. The Ld. AAG elaborating further has drawn the attention of this court to the fact that G.P.F. of certain "Part time tube well operators" have wrongly been deducted under old pension scheme due to which they were also claiming the pensionary benefits etc. whereas the regularization of services of said "Part time tube well operators" were made after 01.04.2005 under new pension scheme. In this regard, the Ld. AAG submitted that although Government Order dated 15.9.2011 provides that in case due to wrong deduction of G.P.F. has been made under old pension scheme, the deducted amount will be returned to the incumbents, some 2152 "Part time tube well operators", who were regularized after 01.04.2005 filed writ petitions before this Court praying that their GPF deductions maybe continued to be done as before and in pursuance of the aforesaid deductions they may be granted the benefit of Old Pension Scheme and may be paid the pension accordingly after their

superannuation. The Ld. AAG submitted that in the aforesaid bunch of writ petition in which the leading Writ Petition no. 13626 of 2017 **(Namo Narain Rai & Others Versus State of U.P. & Others** and Other connected Writ Petition) this Court has referred the controversy vide order dated 08.09.2017 by framing a question (in relation to GPF deductions) which stands decided by the larger bench, wherein the larger bench has vide its order dated 26.11.2021 has specifically directed (i) in case of all "Part time tube well operators" regularized after 1 April, 2005 and who are still in service and whose GPF have been deducted after the date of their regularization till date, the amount accumulated along with interest accrued thereon as per the GPF Rules shall be transferred to the pension fund and the state shall also transfer its contribution in the pension fund from the date of regularization in lump-sum as per the applicable rules (ii) in case where neither GPF was deducted nor account was opened under the new pension scheme, though their service were regularized from different dates after April 1, 2005, in that case, the employees who are still in service would fill up their forms for becoming members of the new pension scheme and in future deduction from their salary shall be made as per the pension scheme, (iii) as far as amount lying in the GPF account of the employees, who have already retired from the service, the Hon'ble larger bench recorded that the same has been already returned to the employees along with interest and in case it is not so done, the same shall be returned to them along with interest from the date it fell due up to the date of payment as per the GPF rules within a period of three months and (iv) in case of employees, who have been regularized after April 1, 2005, if any amount was lying in the GPF account to their credit before the date of their regularization, the same would be transferred in the pension fund account. There would not be any requirement of the state to contribute to the pension fund for any period prior to their regularization.

29. The Ld. Sr. Counsel has also contended that even a review filed against the said order has been dismissed by the larger bench vide its order dated 22.04.2022. Further, the order dated 26.11.2021 and the review order dated 22.04.2022 passed by the larger bench of this court had been a subject matter of challenge before the Hon'ble Apex Court in a bunch of SLP's including the lead SLP being SLP No. 9180-9185/2022(Mahanth Singh & Os. V/s State of Uttar Pradesh), wherein the Hon'ble Supreme Court vide its order dated 25.07.2022 had been pleased to dismiss the said SLP's. Thus, it has been argued that the order of the larger bench stands confirmed and as such the same is binding on all the parties.

30. The Ld. Sr. Counsel thereafter tried to bring out the meaning of who could be termed as Government servant and as to who is a temporary Government servant to buttress his argument that under the service jurisprudence there can be two types of temporary arrangement; namely those temporary employees who have been substantively appointed in regular manner, while following the due process as prescribed under relevant service Rules and the other category being whose appointment had been on need-based. He submits that for substantive appointment there must be a substantive post. Substantive post, it is trite in law that means the posts which have been created under statutory Constitutional Rules,

forming a cadre, as defined under Rule 9(4) of U.P. Fundamental Rules made under Government of India Act 1935, according to which the cadre means strength of service or a part of service sanctioned as a separate unit. The Ld. Counsel also referred to the U.P. Temporary Government Servant (Termination of Service) Rules, 1975 in that regard. Thus, according to him the petitioners having been not appointed in a substantive post, cannot claim to be appointed on a temporary post.

31. The Ld. AAG, thereafter referred to clause (b) of Article 361 of the Civil Service Regulation to show that part-time services cannot be treated as substantive and permanent for qualifying for pension and Article 368 of the Civil Service Regulation, to show that service does not qualify unless the officer holds a substantive post on a permanent establishment. The Ld. Sr. Counsel has also relied upon Rule 3 (8) of Uttar Pradesh Retirement Benefits Rules 1961 and argued that "Qualifying Service" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Service Regulation which means the employment must be substantive and permanent for qualifying service and the period of appointment can't be counter for grant of pensionary benefits, unless it is substantive and permanent, hence part-time services can't be treated as qualifying service.

32. According to the Ld. Counsel, both Civil Service Regulations and Uttar Pradesh Retirement Benefits Rules 1961, refers only to temporary or officiating service and do not at all mentions part-time service. Thus, according to him, temporary and Officiating appointments are different from part- time appointments and not interchangeable and only Temporary or officiating services followed by confirmation, under the provisions of The Uttar Pradesh Government Servant Confirmation Rules- 1991, can be treated as substantive service/qualifying service for pensionary benefits but part-time service cannot be treated/counted as qualifying service for grant of pensionary benefits. Further, different in nature and no parity/benefit can be claimed by any part time employee under any rule which specifically is framed for ad-hoc employees. Further, the Ld. Counsel has submitted that Rule 2 of the aforesaid Rules, 1961 was amended vide U.P. Retirement Benefit (Amendment) Rules, 2005 by which after sub-rule (2) a new sub-rule (3) has been added. By the aforesaid sub-rule (3) it has been clarified that any employee entering into the services and post of the State after 1st April, 2005 on such employees the U.P. Retirement Benefit Rules, 1961 shall not be applicable.

33. Thus, it has been argued that the petitioners were Part time tube well operators" and their status has been declared by the Division Bench in the case of *Dukh Haran case* and once it has been settled that they were not temporary employees, the petitioners cannot seek regularization from any anterior date and they could not have subscribed to the fund and even if they were provided to subscribe to the fund, the same was a mistake which stands corrected in the case of the petitioners as well as other "Part time tube well operators". The Ld. Counsel also referred to the definition of qualifying service as defined in clause 2 of The Uttar Pradesh Qualifying Service for Pension and Validation Act (applicable/in force w.e.f. 1 April 1961), which says "Notwithstanding anything contained in any rule, regulation

or Government order for the purpose of entitlement of pension to an officer, "Qualifying Service" means the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the government for the post." According to the Ld. AAG, the petitioners are not entitled for pension and other service benefits, as they are not appointed in accordance with the provisions of aforesaid service rules of 1953 and in any case none of the petitioners have challenged the Uttar Pradesh Qualifying Service for. Pension and Validation Act by which the "Qualifying Service" has been defined and without putting this Act into challenge the petitioner cannot claim the benefit of grant of pension after their superannuation.

34. The Ld. Sr. Counsel, thereafter taking the argument further submitted that there is another ancillary issue which though is not directly involved in the instant case but is impliedly connected with the instant case, in as much as according to the Ld. Sr. Counsel, these "Part time tube well operators" by seeking backdating of regularization are in fact eyeing to achieve benefit of old pension scheme which was in vogue prior to 1.4.2005 which is not permissible in law. The issue as to whether the "Part time tube well operators" were entitled to subscribe to the fund is no more res-integra in light of judgment and order dated 31.3.2014 passed by the Hon'ble Division Bench of this Hon'ble Court in a bunch of two Special Appeals leading being Special Appeal Defective No. 227 of 2014, (State of U.P. and others Vs. Tube Well Operators Association), wherein it was held by the Hon'ble Division Bench that the Tube Well Operators for whose benefit the writ petition is filed will be entitled to benefits of service including G.P.F. and other benefit like pension etc. from the date they were regularized and not from any date prior to that.

35. The Ld. Sr. Counsel in his endeavour to distinguish the judgment passed by the Apex Court in *Prem Singh case*, submitted that the working of the petitioner as "Part time tube well operators" cannot be equated with the persons, who are/were working in work charged establishment, as both are entirely distinct and different categories of employment and nature of work. The provision of engagement under the work charged establishment is provided under paragraph 667, 678 and 669 of the Financial Hand Book, Volume 6 part 1 and the expenses of the same was based/charged on the said particular work, whereas the part time engagement of the petitioners (and like-wise other persons) were made under an "executive instruction' of the government issued vide order dated 22.12.1981 and under subsequent office Memorandum dated 18.2.1982, issued by the Engineer-in-Chief, Irrigation Department by which the conditions governing the appointment and services of such temporary posts of Part Time Tube Well Operators were prescribed. In view of the above the services of "Part time tube well operators" cannot be equated with the persons, who are/were working in work charged establishment, as both are entirely distinct and different, and the petitioner is not entitled to get the benefit of the said judgment passed by the Hon'ble Apex Court in *Prem Singh case.*

Analysis & Discussion:

36. Having given a thoughtful reasoning to the entire gamut of controversy in these bunch of petitions and

the scores of judgments referred by either of the parties, some of which have been also referred by this court, the issue before this court has become clear like a bright daylight. Apparently, it seems the issue has become verbose as numerous petitions were filed and decided by this court at different point of time. However, a closer look to these bunch of matters would reveal that the real issue is encircled around the applicability of the judgment passed in Prem Singh case to these "Part time tube well operators" juxtaposed to the series of judgments already passed relating to the service benefit accrued to them by this court before and after the passing of *Prem Singh case.* There is also a second aspect to the matter, in as much as in case the Prem Singh case is held to be applicable to the present bunch of writ petitioners, whether the benefit of the Old Pension scheme can be given to these writ petitioners, who have been regularized after 01.04.2005 i.e when the new pension scheme came into force as admittedly in Prem Singh Case, although decided in 2019, the issue relating to the new pension scheme coming into force on 01.04.2005, was not an issue, most probably because the fact narrated was that of a person having been regularized on 13.03.2002 i.e much before the new pension scheme came into existence.

37. The common thread running through the present bunch of matter as far as the facts are concerned lies in a narrow compass, in as much as all the writ petitioners claim to have been engaged as "Part time tube well operators" sometime between 1987 to 1994. They were admittedly not regularly appointed Tube well Operators and their services were regularized sometime in the year 2008-2009. The New Pension Scheme came into force w.e.f. 1.4.2005, meaning thereby Government Servant, who have been appointed/engaged on regular basis on or after 1.4.2005, would come under contributory scheme and not under Old Pension Scheme. However, the petitioners are claiming the benefit of Old Pension Scheme and in their pursuit to get the relief of old pension scheme has sought a declaratory relief from this court to reckon their respective date of appointment as the date for entitlement of service benefits, including pension etc.

Appointment of Petitioners:

38. This court finds that, it is not in dispute that the appointment and service condition of regular Tube well Operators are governed by U.P. Irrigation Department Tube Well Operators Service Rules, 1953, according to which, for the appointment of regular Tube well Operators, a selection committee is to be constituted by the Superintending Engineer under Rule 3 (b) and this selection committee includes two Executive Engineers and the senior most Executive Engineer as convenor. Rule 12 of Rules, 1953 provides that the Convenor of the Committee would inform to the concerned Superintending Engineer about the selected candidates. Rule 13 provides for apprentice training for three months and successful candidates will be granted certificate. Rule 14 provides for list of selected candidates including their name and date of birth. Rule 15 provides for appointment from amongst the list prepared under Rule 14 subject to availability of vacancies. However, in the instant case, none of the procedure as prescribed was followed by the concerned Executive Engineer viz. no advertisement was issued; no requisition was made to the Employment Exchange; no selection committee was constituted; and no select

list as required under Rule 12 of the Rules, 1953 was published.

Government Order Dated 22.12.1981 & OM Dated 15.02.1982

39. Admittedly, although the state had framed the aforesaid U.P Irrigation Department Tube Well Operators Service Rules 1953, however, the present writ petitioners were not appointed under the said Service Rules, 1953 but under an "executive instructions' issued vide order dated 22.12.1981 by the *Sinchai Anubhag*, Government of U.P, wherein it was provided that 2300 regular posts of Full Time Tube Well Operators cum Mechanics are being created in the pay scale of Rs. 354-514 to run Tube Wells of State of Uttar Pradesh. A mention was also made in the said executive order that another 2147 posts of "Part Time Tube Well Operators" are being created at a fixed pay of Rs. 150/- per months till 20.02.1982 in case they are not abolished before such date. Thus, apparently it seems to this court that the appointment of the petitioners as "Part Time Tube Well Operators" was a stop-gap arrangement and made by virtue of Government Orders and without following the due procedure prescribed under 1953 Rules. Further, it is an undisputed fact that the Engineer -in-Chief, Irrigation Department on 18.2.1982, issued certain conditions governing the appointment and services of such posts of "Part time tube well operators", which inter-alia prescribed, relevant to the context:

- As per clause 6, the part time tube well operators would work from 09:30 AM till 12:00PM and they shall be free to do their private work in the rest/remaining period of the day.

- As per clause 11, the part time tube well operators shall be temporary which can be terminated after giving one month notice, if their work is not satisfactory.

- As per clause-12, the part time tube well operators will not be entitled for pension, provident fund, and gratuity etc.

40. The aforesaid memorandum dated 18.02.1982 was amended vide office memorandum dated 19.04.1983, wherein clause 11 was amended to also include a term that their service as part time tube well operators shall be for a period of three years and after the lapse of the said three years, they can again be re-appointed as "Part time tube well operators", in case there work was found to be satisfactory. The fixed pay of these part time tube well operators were further increased to Rs. 299 per month vide memorandum dated 24.08.1989 issued by the irrigation department, wherein certain further conditions were mentioned like the services of these part time tube well operators can be terminated at any time without notice as per the U.P. Temporary Government Servant (Termination of Service) Rules, 1975 and that they would not be entitled to any pension, gratuity, and other regular service benefits.

41. Therefore, it is required to be noted that the writ petitioners were working as "Part time tube well operators" (working for less than three hours a day). The appointment was for a stop-gap arrangement. They were not appointed on any substantive post. Further, it is not in dispute and cannot be disputed that they were not appointed in any sanctioned posts of tube well operators regular or temporary. Even it is not the case on behalf of the writ petitioners that their appointment was done after following due procedure of selection. Neither any documents nor any submission

have been made by the parties contradicting the aforesaid analogy drawn by this court. Thus, there appointment remained always irregular.

Pay-Parity with Tubewell Operators

42. The services of these "Part time tube well operators" seemed to be mired with controversy since the very inception as it is reported that some of these "Part time tube well operators" approached the labour court under the provisions of the Industrial Dispute Act, 1947, wherein an Award was passed in their favour in the year 1989, thereby directing that these "Part time tube well operators" to be treated equally like a regular tube well operator as far as admissibility of salary and allowances was concerned, however, interestingly, the labour court as far as regularization of their service is concerned, held & merely recorded that these "Part time tube well operators" shall be given priority in case the department had any available vacant post. Thus, the labour court although granted pay-parity but left regularization to the government, which no doubt was also as per the dictum of Constitution Bench of the Supreme Court in **Uma Devi's case [(2006) 4 SCC 1]**, which authoritatively held that there is no vested right of regularisation. Coming back to the present case, the state was obviously not happy with the said Award of the labour court and challenged the same before this court. In the interregnum, the state also changed the nomenclature of "Part time tube well operators" to Tube well assistants and enhanced their honorarium vide a G.O dated 20.02.1992, however the said honorarium was not equivalent to those being paid to a regular tube well operator. Thus, on the heels of the said Government order, several petitions came to be filed in this court by the "Part time tube well operators" seeking direction to regularize the petitioners in service on the post of Tube Well Operators and to pay regular pay scale to them as is admissible to the Full Time Tube Well Operators.

43. Both the category of writ petitions came to be decided by this court in the lead matter of **"Suresh Chandra Tewari & Ors. V/s State of U.P & Ors**. (Writ Petition No. 3558(S/S) of 1992 & 49 other similar connected writ petition). Apparently, this court vide its order dated 18.05.1994 decided these writ petitions, thereby directing the state to pay all the writ petitioners the same emoluments i.e in the same scale of pay in which others regularly appointed tube well operators were being paid. Pursuant to the said direction of this court, the state approached the Hon'ble Apex Court vide SLP No. 16219/ 1994 along with other connected matters, wherein the Supreme Court vide an order dated 23.09.1995 dismissed the SLP of the state finding no grounds to interfere with the concurrent findings of the two courts, which had granted the relief to the petitioners based on the principal of "equal pay for equal work". Even the review was dismissed by the Supreme Court vide order dated 18.10.1995, clarifying that the issue in the said proceedings were not related to regularization, but were concerned to the question of grant of pay-parity to the part time tube well operators equal to the regular operators on the principle of equal pay for equal work. Pertinently, the state government issued G.O dated 27.10.1995, thereby issuing directions for making admissible same pay scale to "Part time tube well operators" as admissible to regular tube well operators from the date of judgment of this court i.e 18.05.1994.

Further, it is stand of some of the petitioners that there had been conflicting judgments of this court relating to admissibility of regular pay scale to "Part time tube well operators" even after the said government order and as such vide a judgment dated 04.01.2016 passed in SLP No. 34861/2015 by the Hon'ble Apex court, the issue stood settled and clear that the "Part time tube well operators" would be entitled to regular pay scale w.e.f 18.05.1994 in the light of the decision of this court in *Suresh Chandra Tiwari case*.

44. In the meantime, in view of the direction of this court, the *"U.P Irrigation Department Regularization of Part-time Tube well operators on the posts of Tube well operators Rules, 1996"* came into formalized, thereby offering to regularize those part time tube well operators, who were appointed prior to 01.10.1986 and continued to work in the said capacity as on the date of promulgation of the said rules. The said regularization rules had its own fate of litigation as the same was also a subject matter of challenge before this court, however the same would be dealt in detail in the subsequent part of the judgment.

45. Coming back to the issue of pay-parity, this court finds that some of the part-time tube well operators armed with the aforesaid judgment of *Suresh Chandra Tiwari case* and on the principle of equal pay for equal had also approached this court seeking all service benefits like a regular tube well operator from the date of their appointment and not from the date of their respective regularization. This court vide an order dated 10.05.2011 in the case of **Subhash Chandra Mishra vs state of Uttar Pradesh** (Writ A No. 52397/2009) had repelled the argument of these part time tube well operators by holding that mere providing parity in the matter of pay scale, the other conditions of service of "Part time Tube Well Operators" does not become suo moto at par with regularly appointed Tube Well Operators from the date of initial appointment as "Part time Tube Well Operators". This court in the said judgment held that the two sets constitute two different streams and were not interchangeable as they were engaged with different concepts, different status, conditions of service etc. and as such any attempts to treat the persons like writ petitioners with regularly appointed Tube Well Operators at par would amount to treating unequals as equal. This court in that said judgment also held that the concept of "equal pay for equal work" if followed in a case as such, would not make the person of two different set up at par in all other respects, viz. if a temporary employee is granted salary at par with regularly appointed permanent employee, it would not give security of tenure to a temporary employee in the same manner as it is available to a regularly appointed permanent employee. This court after referring to the Apex Court's observation in **Shitala Prasad Shukla v. State of U.P. AIR 1986 SC 1859** wherein the Apex Court had observed that persons having some difference amongst themselves belong to different streams cannot be placed at par in all respects particularly seniority etc. as that would amount to treating unequals as equal, passed the aforesaid judgment. This court finds that the judgment in *Subhash Chandra Mishra case* squarely applies to the present writ petitioners on all four corner as far as their argument to provide them pensionary benefit from the date of granting them pay parity with regular tube well operators is concerned.

46. This court also finds that mere providing parity in the matter of pay scale, does not enure the part time Tube Well Operators, other benefits like a regular tube well operator. As already discussed herein above, the appointments of these "Part time tube well operators" were not made as per the service rules but under an executive order and was intended to be a stop-gap arrangement. The memorandum issued from time to time also clearly mentioned that pension and the like benefits would not accrue in favour of these "Part time tube well operators". They were predominantly engaged with different purposes, mechanism and conditions of service. Any attempts to treat the persons like petitioners as regularly appointed Tube Well Operators at par in all respects would amount to treating unequals as equal and would be discriminatory. Further, even the Hon'ble Apex Court in the review petition decided in the *Suresh Chand case* clarified that the issue decided by the Apex court was relating to pay parity only and not relating to regularization etc. Thus, to now argue that the service of these petitioners be treated & reckoned from the date, they were given the benefits of pay-parity i.e 18.05.1994 would be not only over reaching the clarification given by the Apex Court but would also be not as per law. Thus, the contention of the writ petitioners that the service should be reckoned from the date, they were granted pay-parity with regular tube well operators cannot be accepted. Interestingly, even in *Suresh Chand Case*, the petitioners could have claimed regular appointment or regularisation of services from their initial date of appointment but they did not do so, nor was any such relief granted as was clarified by the Apex Court and thus even pay parity has not been granted from the initial date of appointment, but was only granted only from the date of passing of the judgment in the case of *Suresh Chand Case* by this court. Thus, this court holds that pensionary benefit from the date of granting "part time tube well operators" pay parity with regular tube well operators cannot be granted and as such the same ***stands rejected.***

Regularization of Part-time Tubewell Operators:

47. That brings this court to consider the aspect as to whether the service of these part time tube well operators can be reckoned from the date of 17.12.1996 i.e the date of promulgation of *"U.P Irrigation Department Regularization of Part-time Tube well operators on the posts of Tube well operators Rules, 1996"*. It is to be noted that the said rules were framed and made applicable to those part time tube well operators who were appointed prior to 01.10.1986 and continued to work in the said capacity as on the date of promulgation of the said rules. The cut of date mentioned above was amended in the year 2008 and the same was made 13.06.1998. It is the case of the writ petitioners that in the intervening period the state issued the G.O dated 03.03.1998, emphasising payment of same benefits to "Part time tube well operators" as payable to regular tube well operators and for compliance of order of this court as well as Apex Court judgment passed in Suresh Chandra Tewari case. In the said G.O, the state also resolved to make payments of annual increment, village house allowance, bonus and other service benefits. However, subsequently, the state deleted the phrase "other service benefits" vide their another G.O dated 28.05.2003 and thus it has been argued that, although they did not challenge the said amendment GO of the state as it

did not come into their notice, but the state is obliged to grant them all service benefits as contemplated by them in the GO dated 03.03.1998 or at any rate these benefits ought to be extended to them on and from 17.12.1996 i.e the date when the "UP Irrigation Department Regularization of Part-time Tube well operators on the post of Tube Well operators rules, 1996", came into being as pursuant to the said promulgation, although the post of part time Tube well operators was abolished, however the petitioners continued to work even after the said promulgation, thus it has been submitted that there services ought to be reckoned from the said date of promulgation of the 1996 rules.

48. This court finds the argument of the writ petitioners very attractive in the first instance. However, a closer look would reveal that the entire GO relating to extension of service benefit, dealt with the issue relating to pay parity and is concerning the judgment passed by this court as well as the Apex Court in the case of Suresh Chandra Tewari case, which was based on the principle of equal pay for equal work. The Hon'ble Apex Court itself clarified in the review order that the said judgment concerns only the pay parity. The GO dated 03.03.1998 issued by the state was concerning the pay parity and the allowances to be given. The phrase, other service benefits, mentioned in the said GO cannot be stretched to mean pension or similar other benefits as these benefits are to be found in the rules and not in government orders. In any case, the state having understood the confusion being created by the said GO has already amended/ deleted the said phrase on 28.05.2003. Thus, the said argument of the writ petitioners does not take their case any further as far as the relief of service benefits like pension is concerned, especially when this court is of the view that the appointment of these part time tube well operators were irregular and not as per the rules of 1953. The next limb of argument of the writ petitioners that there services may be reckoned from the date of promulgation of the " UP Irrigation Department Regularization of Part-time Tube well operators on the post of Tube Well operators rules, 1996" is concerned, this court finds that, no doubt vide G.O dated 17.12.1996, the cadre of part time tube well operator was abolished with the direction to regularize the services of the eligible persons under the said regularization rules of 1996, however Rule 7 of the said rules of 1996 is of great importance, which inter-alia states:

"7. The services of a person appointed on the post of part time tube well operator who is not found suitable, or whose case is not covered under sub rule (1) of rule 4 of these rules, shall be terminated forthwith and, at the time of such termination, he shall be entitled to one month's pay compensation which shall be equal to fifteen days average pay for every completed year of service or any part thereof in excess of six months."

The state has contended that the petitioners have themselves annexed a judgment and order dated 01.08.2000, passed in a bunch of 277 writ petitions, wherein it is very much clear that after promulgation of regularization rules of 1996 in December 1996, these 277 writ petition came to be filed by the part time tube well operators being aggrieved with the cut-off date, provided in the said rules as 01.10.1986 for regularization of the services of part time tube well operators and in these writ petitions an interim order was passed in favour of part time tube well

operators on the basis of which they were continuing in service, hence it is the contention of the State that this ground of the writ petitioners is completely misconceived, as they are trying to take advantage of their own wrong. Thus, any arguments on behalf of the petitioner that their part time services should have been terminated in year 1996 itself, pursuant to the provision of Rule 7 of the said Rules of 1996 if they were not eligible for regularization under the said rules of 1996 and the same having been not done they are entitled for regularization from the said date, falls flat as these "Part time tube well operators" were continuing in service based on an interim order of this court in the abovementioned writ petitions. In the opinion of this court, merely because the part time tube well operators were allowed to work under the court of an interim order by this court, does not make them entitled for other benefits from the said date as it is these part time tube well operators, who have filed the litigation. Thus, continuity by litigation cannot come to the rescue of the petitioners, while determining their pensionerary benefits. Another collateral submission, made on behalf of the writ petitioners is that they were transferred in year 1999 from Irrigation Department to Gram Panchayat Department where they were working as Multipurpose Worker along with other Regular Tube well Operators and again came back in Irrigation department in year 2005. Since, transfer is an incidence of a permanent reemployment, they may be construed to be on permanent employment since 1999. In this regard, this court finds that, vide G.O dated 01.07.1999, the employees of eight departments were shifted under the control of Gram Panchayat with the nomenclature of Multipurpose Worker for performing the work of their respective departments. These Part Time Tube well Operators were also shifted from Irrigation department to the Department of Gram Panchayat for performing the work of their respective Tube wells but their lien was always with the parental department. Thereafter again vide G.O dated 19.07.2005 these Part Time Tube well Operators were again taken back under the control of Irrigation Department in the same capacity of Part Time Tube well Operators. Here the question was that whether it is a transfer of the employees from the Department of Irrigation to Gram Panchayat Department and again from Gram Panchayat Department to Irrigation Department or it was a deputation from Irrigation Department to Gram Panchayat department and after taking back under the control of Irrigation Department in year 2005, whether the status of these persons was Part Time Tube well Operators or permanent employee. It is reported that after series of litigations, this aspect of the matter was considered thread-bare by the Hon'ble Apex Court in the case of **U.P. Panchayat Adhikari Sangh and others Vs Daya Ram Saroj and others, (2007) 2 SCC 138**, in which it was held that this was not a transfer but was only a deputation and these Part Time Tube well Operators were not permanent employee. In this judgment, the Government order dated 19.07.2005 (by which these persons were taken back under the control of irrigation Department from Gram Panchayat Department in the same capacity of Part Time Tube well Operators) was restored by the Hon'ble Apex Court with all consequential orders, meaning thereby the status of these persons remained as Part Time Tube well Operators after returning back in the Irrigation Department from the department of Gram Panchayat vide Government order dated 19.07.2005. The relevant part/paragraphs of the abovementioned judgment and order

dated 11.12.2006 passed by the Hon'ble apex court in case of U.P. Panchayat Adhikari Sangh and others Vs Daya Ram Saroj and other is as under:

"35. The High Court has also directed that the part-time Tube-well Operators shall be treated as permanent employees under the same service conditions as the Tube-well Operators as far as practicable. This direction runs in the teeth and the guidelines of the Constitution Bench Judgment in Secretary, State of Karnataka & Ors. v. Uma Devi (3) & Ors. (2006) 4 SCC 1. In fact, on this score alone the decision of the Division Bench of the High Court deserves to be set aside."

49. In any case, this court finds that the vires of the *"U.P Irrigation Department Regularization of Part-time Tube well operators on the posts of Tube well operators Rules, 1996"* was also challenged before this court by some of the part time tube well operators in the case of **Murari Lal V/s State of Uttar Pradesh** (Writ A No. 35425/1997), wherein this court vide an order dated 21.11.2014, while repelling the challenge, has held that the writ petitioners were not entitled for a right of regularisation with retrospective effect from the date of initial appointment. This court specifically held:

"....In view of the judgement of the Constitution Bench of the Supreme Court in Uma Devi's case [(2006) 4 SCC 1], there is no vested right of regularisation. The nature of initial appointment is relevant factor to be considered in this regard. The Constitution Bench has categorically held that a person who is temporarily appointed knows fully well about the nature and fate of his appointment and also that the same is terminable on the expiry of such period as mentioned in the appointment letter itself or as per the conditions mentioned therein. No vested right of regularisation accrues in his favour on a subsequent stage also merely on account of having put in long years of service. It has also been held that regularisation is not and cannot be a mode of recruitment.

A Fortiori, there cannot be a right of regularisation with retrospective effect from the date of initial appointment.

Temporary, adhoc, contractual appointments can also be made for carrying out regular work but this does not entitle such appointees to the status of regular employees. A reference may again be made in this context to the pronouncement of the Supreme Court in Umadevi's case (supra) as also to the case of Official liquidator vs. Dayanand (2010 Vol 10 SCC 1)"

50. This court finds that in pursuance of directions of this Court, Rules for regularisation of services of part time tube well operators were framed by the State Government in exercise of powers under the proviso to Article 309 of the Constitution of India and were circulated vide Government Order dated 17.12.96, which clearly mentioned that for such regularisation additional posts were being created/sanctioned. As per Rule 3 (d), 'Part-time Tube-well Operator' included a person who was designated or appointed as Tube-well Assistant by Government Order dated 20.02.92. As per Rule 4 (I) any person who was appointed on the post of part time tube-well operator before 1.10.86 and was continuing in service, as such, on the date of commencement of these Rules, possessed requisite qualifications prescribed for regular appointment to the

post of Tube-well Operator at the time of such part time appointment shall be considered for regular appointment to the post of Tube-well Operator before any regular appointment is made on such post in accordance with the service Rules. Rule 6 (I) provided that a person appointed under these Rules shall be entitled to seniority only from the date of the order of appointment after selection in accordance with these Rules, which means from the date of their regularization and shall in all cases be placed below the persons appointed on the post of Tube-well Operators in accordance with the service Rules prior to the appointment of such persons under these Rules.

51. It is pertinent to mention herein that even while making provisions of regularisation, the Rules framing authority have always taken due care that for the purpose of seniority, the reckoning point would be the date of order of regularization and the earlier service shall not qualify for the same. This Concept being consistent with Constitution Bench decision of Apex Court in ***Direct Recruits Direct Recruit Class-II Engineering Officers' Association v. State of Maharashtra AIR 1990 SC 1607.*** Thus, in the opinion of this court, the writ petitioners, therefore, constitute a different cadre then regularly appointed Tube Well Operators, to whom statutory provisions extending benefit in respect to pension, gratuity, leave encashment etc. are not applicable since initial date of appointment but from the date they were absorbed in regular services as per the regularization policy. It would be profitable to note that the principal laid down in Direct Recruits Case was subsequently followed by the Apex Court in Keshav Chandra Joshi v. Union of India 1992 Supp (1) SCC 272, Rashi Mani Mishra v. State of Uttar Pradesh 2021 SCC OnLine SCC 509 and Malook Singh V. State of Punjab, wherein on each occasion, the Apex Court observed that the services rendered by ad hoc employees prior to their regularization cannot be counted for the purpose of seniority. As a matter of fact, the Apex Court in the case of Rashi Mani Mishra v. State of Uttar Pradesh, while interpreting the Uttar Pradesh Regularization of Ad Hoc Appointment Rules held that services rendered by ad hoc employees prior to regularization cannot be counted for the purpose of seniority and specifically noted that under the applicable Rules, "substantive appointment" does not include ad hoc appointment and thus seniority which has to be counted from "substantive appointment" would not include ad hoc service. The Apex Court also clarified that the judgement in Direct Recruits (supra) cannot be relied upon to confer the benefit of seniority based on ad hoc service since it clearly states that ad hoc appointments made as stop gap arrangements do not render the ad hoc service eligible for determining seniority. The Apex Court made the following observations in the said judgment:

"36. The sum and substance of the above discussion would be that on a fair reading of the 1979 Rules, extended from time to time; initial appointment orders in the year 1985 and the subsequent order of regularization in the year 1989 of the ad hoc appointees and on a fair reading of the relevant Service Rules, namely Service Rules, 1993 and the Seniority Rules, 1991, our conclusion would be that the services rendered by the ad hoc appointees prior to their regularization as per the 1979 Rules shall not be counted for the purpose of seniority, vis-à-vis, the direct recruits who were appointed prior to 1989

and they are not entitled to seniority from the date of their initial appointment in the year 1985. The resultant effect would be that the subsequent re- determination of the seniority in the year 2016 cannot be sustained which was considering the services rendered by ad hoc appointees prior to 1989, i.e., from the date of their initial appointment in 1985. This cannot be sustained and the same deserves to be quashed and set aside and the seniority list of 2001 counting the services rendered by ad hoc appointees from the date of their regularization in the year 1989 is to be restored."

52. This court cannot be oblivious to the fact that any appointment with retrospective effect, as is being sought to be urged in the present bunch of matters, is normally not permissible. One of the reasons being it will adversely affect others, who have been appointed in the interregnum, in matters of seniority, promotion etc. In a case of regularisation of service also retrospectively will adversely affect such rights of others who have already been regularly appointed in the regular cadre as per the service Rules and are better placed. It is with this object that Rule 6 of the Regularisation Rules of 1996 contains a stipulation that those regularised under these Rules will be placed below those appointed in accordance with service Rules prior to them. The Rule makes a valid distinction between two different classes of employees, one which is regular and other not so. The Supreme Court in the case of Registrar General of India & another vs. V. Thippa Setty & others (1998 Vol. 8 SCC 690) has held that the regularisation should be prospective and not retrospective so that seniority of those, who are already in service, is not affected. This judgement has been followed in the case of Union of India and others vs. Sheela Rani (2007) 15 SCC 230) and State of Haryana vs. Jasmer Singh (1996) 11 SCC 77). Thus, in the opinion of this court, in view of the authoritative judgment passed by the Apex Court in Uma Devi case, the writ petitioners do not have a right to regularization, which as a corollary follow that the writ petitioners did not had any vested interest to be regularized with the promulgation of the *"U.P Irrigation Department Regularization of Part-time Tube well operators on the posts of Tube well operators Rules, 1996"*, which initially prescribed a cut-off date of 01.10.1986 and was amended in the year 2008 to 13.06.1998.

53. That brings this court to the last and pertinent question to be answered, as to from which date, the service of the writ petitioners can be reckoned, to make them eligible for pensionary and other benefits. This court finds that in a bunch of writ petition, leading case being Writ-A No. 3483 of 2003 (Tube well Operator Welfare Association Vs. State of U.P. and others), a Single Bench of this court issued direction to the state to consider the claim of the members of the petitioner's association in terms of the judgment of **Suresh Chandra Tiwari Vs. State of U.P. and others** (writ petition No. 3558 of 1992) and **Sichai Majdoor Sangh Vs. State of U.P. and others: 1996 (1) UPLBEC 9.** However, the State authorities filed Special Appeal Defective Nos. 227 of 2014 and 226 of 2014, wherein the Division Bench of this Court, vide judgment and order dated 31.03.2014, disposed of the special appeals as under:

"The Special appeals are consequently disposed of with clarification that all the writ petitioners for whose

benefit the writ petition is filed will be entitled to benefits of service including GPF, promotional and selection grade and the pension treating their services with effect from the date they were regularized and not from any date, prior to that."

54. The aforesaid judgment and order dated 31.3.2014 has been challenged in Review Application No. 406577 of 2014, which was rejected vide judgment and order dated 15.5.2015. Thus, judgment and order dated 31.3.2014 has attained finality as no subsequent development has been brought to the notice of this Court. Moreover, a Division Bench of this Court in Special Appeal No.240 of 2009 (State of U.P. vs. Dukh Haran Singh) examined the question as to whether services of such "Part time tube well operators", prior to their regularization, be counted towards qualifying service for payment of pension or not. After examining the issue extensively, this Court proceeded to hold as under: -

"Here, in the present case, I have already observed that the service rendered by the writ petitioner prior to his regularization by order dated 25.9.1997 does not qualify for grant of pension as in terms of Regulations 361 and 370 of the Regulations, services rendered prior to that are neither substantive, permanent nor temporary. In my opinion, the service rendered by the writ petition subsequent to his regularization on 25.9.1997 only qualifies for pension and he having retired before rendering 10 years continuous service, is not entitled to get pension.

In view of the aforesaid, the conclusion arrived at by the learned Judge that the writ petitioner had rendered 32 years' service and was entitled for pension cannot be sustained.

In the result, the appeal succeeds and is allowed. The judgment and order dated 228.8.2008 passed by the learned Judge in Writ Petition No.1378 (SS) of 2008 is set aside but without any order as to costs."

55. The judgment in State of U.P. vs. Dukh Haran Singh (supra) was challenged before the Apex Court in SLP (C) No.27713 of 2009, which came to be dismissed vide order dated 25.09.2013, with the following observation: -

"Heard Mr. Subramonium Prasad learned counsel for the petitioner in support of this petition and Mr. Ratnakar Dash learned senior counsel appearing on behalf of the respondents.

(2) The petitioner's claim for pensionary benefits was rejected by the High Court by impugned order dated 21.7.2009 and that is why the present special leave petition has been filed.

(3) The petitioner's services came to be regularized on 28th September, 1997 in consequence of the Rules for regularization which was framed in the year 1996. The petitioner was retired on 30th November, 2005 and demanded the retiral benefits including pensionary benefits. Since as per the relevant rules minimum qualifying service for pension is 10 years, the petitioner had not fulfilled that minimum requirement. That being so, the petitioner could not be held to be eligible for pension though be would be entitled to gratuity and other benefits subject to applicable rules. In view of the above, we see no reason to interfere with the impugned order of the High Court.

(4) The special leave petition is dismissed accordingly."

56. Further, in a bunch of petition, leading case being Namo Narain Rai Vs

state of Uttar Pradesh (Writ No. 1326 of 2017), a Single Bench of this court vide an order dated 08/09/2017, while referring the matter of applicability of GPF on part time tube well operators regularised after 01.04.2005 in a very succinct manner enumerated the issue in those bunch of petitions as follows:

"4. In view of the authoritative pronouncement on the issue by the Apex Court, it is by now well settled that services rendered by the parttime tubewell operators, prior to their regularization, would not be counted for payment of pension. Since petitioners have been regularized after 1.4.2005, as such, they would be covered under the new pension scheme. The government order dated 24.5.2017 as well as consequential order dated 27.5.2017 insofar as directions are contained in para 2(1), requiring deduction to be made under new pension scheme for those getting regularized after 1.4.2005, and requiring them to fill up requisite forms under the new pension scheme, is thus affirmed. Realizing the legal position, petitioners have also not pressed their claim in that regard during the course of hearing of the writ petitions. It is, therefore, clarified that all petitioners, who have been regularized after 1.4.2005, would be governed by the new pension scheme, introduced on 28.3.2005, and challenge made to that extent in these petitions, accordingly fails.

5. The challenge in these petitions is restricted to the part of the government order alone whereby a direction is issued not to deduct GPF from petitioners' salary, after 1.4.2005, and the writ petitions are pressed to that extent alone."

57. Although it is reported that the larger bench has passed a Judgment dated 12/11/2021 and review order dated 26/11/2021 based on certain affidavits filed by the state Government and in that sense the Ld. Counsel for the writ petitioners have argued that the judgment having been passed on the basis of compromise between the parties in that matter cannot be a precedent and cannot be binding on other similarly situated part time tube well operators, however the fact of the matter remains that the issue being dealt by the larger bench was relating to the GPF, which were either wrongly deducted from these part time tube well operators or had not been deducted at all. The larger bench categorizing this part time tube well operators into four category held & directed the treatment of GPF for all these categories in a different matter, although the crux of the issue remained that these part time tube well operators were given pensionerary benefit from the date they were regularized and accordingly the benefit of new pension scheme was extended to these petitioner as they were regularized after 01.04.2005.

58. Thus taking a cue from the aforesaid authoritative pronouncement, it is by now well settled that those services rendered by the "Part time tube well operators" prior to their regularization, would not be counted for payment of pension and the pensionary benefit would be given only from the date of their respective regularization.

59. However, it is the argument of the Ld. Counsel for the writ petitioners that the aforesaid *Dukh Haran case* was neither considering the issue of reckoning past services as "Part time tube well operators" for computation of pensionary benefits nor such an issue was raised in the said petition and thus according to him the judgment

passed by the Division Bench of the supreme court in the said case was impliedly overruled and was in *per incuriam* to the judgment passed by three judge bench of the supreme court in *Prem Singh Case.* However, on fact this court finds that Dukh Haran was a case wherein service benefit of pension was sought by a part time tube well operator, who was regularized on 28.09.1997. Since, in that case the petitioner retired on 30.11.2005 i.e before the mandatory 10 years of service being rendered on a regularized post, so as to make him eligible for pensionary benefits, the petitioner in that case was denied the said benefit. Thus, *Dukh Haran case* was a case wherein pensionary benefit was sought by reckoning service benefit from the date of appointment, which was repelled by this court as well as the Apex Court, wherein the courts recorded that 32 years of service would not entail pensionary benefits to the petitioner.

Prem Singh Case:

60. However, according to the Ld. Counsel for the writ petitioners, the law being changed after the pronouncement of the Prem Singh Case, the issue in hand ought to be decided in the light of the said judgment of the Hon'ble Apex Court. However, a perusal of the facts of the Prem Sigh Case makes it clear that the facts in issue for consideration before the Hon'ble Apex Court with regard to the dispute in question were quite different as to the facts in the present bunch of writ petitions. A perusal of these facts reveals that the facts in issue before the Hon'ble Apex court was about the controversy of adjudicating the "qualifying services" with regard to the services rendered under a work charge establishment prior to the regularisation, whether could be accountable for the purposes of pension considering Regulation 370 of the Civil Service Regulations. Para 3 of the said judgement have also quoted the facts of the case in which the most relevant issue was that the services of the appellant i.e. Prem Singh was as a welder in the year 1965 engaged in the work charge establishment. He was transferred from one place to another and thereafter ultimately the Selection Committee recommended for regularisation and his services came to be regularised on 13/03/2002. Further the appellant superannuated on 31/01/2007. After his superannuation the appellant filed writ petition in High Court to count the period spent in work charge establishment as qualifying service under the Rules of 1961.

61. This court finds that the present writ petitioners had been working as Part time tube well operators and as such cannot be equated with the persons, who are/were working in work charged establishment as both are distinct and different, apparently as also recorded by the Hon'ble Apex Court, the provision of engagement under the work charged establishment (before 01.01.2000) is provided under paragraph 867,678 and 669 of the Financial Hand Book, Volume 6 part 1 and the expenses of the same was based/charged on the said particular work, whereas the part time engagement of the petitioners (and like-wise other persons) was in terms of executive order dated 22.12.1981 and terms and conditions were prescribed under subsequent Office Memorandum dated 18.2.1982, issued by the Engineer-in-Chief, Irrigation Department which covered the appointment and services of such part-time posts of Part Time Tube Well Operators. Thus, the service of work charged establishment can be found in the rules, whereas the service of the part time tube

well operators came to existence by an executive order. In view of the above the services conditions of part- time tube well operators cannot be equated with the persons, who are/were working in work charged establishment, as both are entirely distinct and different.

New Pension Scheme

62. Further, there is another point of distinction, in as much as both *Dukh Haran Singh case* and Prem Singh case was decided for all those persons who were regularized prior to 01.04.2005, however vide Notification dated 28.3.2005, amendment has been introduced in U.P. Retirement Benefit Rules 1961 known as "U.P. Retirement Benefits (Amendment) Rules, 2005", by the Governor in exercise of power conferred by the proviso to Article 309 of Constitution of India. The said Rules have been made applicable w.e.f. 1.4.2005, and it has been clarified therein that Rules shall not apply to employees whether temporary or permanent entering into services on or after 1st April, 2005 in relation to the affairs of State pensionable establishment. Not only this, General Provident Fund (U.P.) Rules 1985 have also been amended by the Governor, in exercise of power conferred by the proviso to Article 309 of the Constitution of India, by means of General Provident Fund (U.P.) (Amendment) Rules, 2005, and these Rules have also been made applicable w.e.f. 1.4.2005. While dealing with conditions of eligibility in Rule-4, a proviso has been appended mentioning therein that no government servant entering into on or after 1st April, 2005 shall subscribe to the fund from the date of joining of service.

63. It is necessary to note that the petitioners do not assail the New Pension Scheme as being arbitrary or unreasonable. The entitlement to the post-retirement benefits, including pension, is a matter pertaining to the terms and conditions of the services. This is a matter between the employer and the employee. Subject to the governing laws, an employer is entitled to fix the emoluments on which it offers employment. The employee can accept the employment on the terms as offered or prior to his joining, negotiate for better terms. In any view, once an employer and employee agree to the terms, it is not open for either of them to thereafter question the same. This is, obviously, subject to the exception that the terms and conditions do not conform to any statute or applicable law.

64. As noted above, in the present case, the petitioners do not question the validity of the New Pension Scheme. It is not their case that the said scheme is contrary to any statute or law in force. They essentially, seek coverage of the Old Pension Scheme as the same is perceived as more beneficial. Once it is accepted that the New Pension Scheme is not invalid and the writ petitioners have accepted their respective regularization without any demur, cannot question the same at this later stage after 15 years of their legalization, except on the ground that the same is contrary to any provisions of law. It may be relevant to mention that right to pension is not a fundamental right guaranteed by any Article of Part III of the Constitution of India. It is a mere condition of service. Whether or not an employee of the Government or a Statutory Corporation is entitled to pension, is determined by the terms and conditions of his or her employment. These terms and conditions may be contractual or statutory in nature. No employee of the Government or of any Public or Private Corporation can claim

retirement pension de hors the rules and regulations governing conditions of his service. True it is that under the U.P Civil Service Regulations, a Government employee, who was in position till issuance of "U.P. Retirement Benefits (Amendment) Rules, 2005" was entitled to Old Pension Scheme. Even the Government employees who have been recruited/appointed after cut-off date mentioned in "U.P. Retirement Benefits (Amendment) Rules, 2005" are not entitled to pension which clearly means that even the Government employees who are appointed after a particular date are now not entitled to pension. It is true that pension is paid to a retiring employee in recognition of his long services rendered to the employer as also to take care of his post retirement needs. Such assistance to retiring employee could be in different forms. Some employers make provisions for payment of annuity, some for monthly payment in the shape of pension and some by payment of a lump sum amount. Such amount could be in the shape of accumulated employees provident fund or retirement gratuity or some other form of ex gratia payments. It is thus not mandatory for an employer to necessarily make a provision for payment of monthly amount by way of pension to its retiring employees, for, no such right inherits in an employee.

65. As such it is abundantly clear that the services of the appellant in the case of Prem Singh was regularized within the period on which the Old Pension Scheme was prevalent and further regulation 370 has been struck down and rule 3(8) has been read down only for the limited purposes of counting the past services rendered in a work charge establishment of an employee whose regularization has been done when the Old Pension Scheme was prevalent and not otherwise. However, the present bunch of writ petition has been admittedly filed by the writ petitioners, who have been regularized sometime in the year 2008-2009. Once a policy decision has been taken to enforce new pension scheme, contribution pension system w.e.f. 1st April, 2005 with no exception accorded to new entrants to service and the only exception that has been carved out is in reference of candidates whose service would be of less than ten years on 1st of April, 2005, then option has been given to them to voluntarily opt for the new pension system in place of the existing pension scheme. Thus, it is imminently clear that new entrants in service have necessarily to opt for new pension scheme, and have no escape route.

66. This court also cannot be oblivious to the fact that Supreme Court in the Prem Singh Case was examining the question of inclusion of services rendered by a work charged employee towards qualifying service under Rule 3(8) of the U.P. Retirement Benefit Rules, 1961, in light of the previous judgment of the Court in Habib Khan Vs. State of Uttarakhand and others, (2019) 10 SCC 542, wherein the petitioners were regularized before the period of 01.04.2005. The Hon'ble Apex Court after recording rule 3(8) of the Uttar Pradesh Retirement Benefits Rules 1961 (for short, "the 1961 Rules") went to read down the note appended to the said rule to bring the service rendered in a work charged establishment prior to regularization for the purposes of pensionary benefit. The Hon'ble Apex court also quoted regulations 361, 368 and 370 of Uttar Pradesh Civil Services Regulations to arrive at a just decision. The Supreme Court also took note of paragraphs 667, 668 and 669 of the Financial Handbook, Volume (VI) relating to engagement of

employees in the work charge establishment. The Court noticed the submission of the State in opposition to the plea for inclusion of services rendered as work charge employee, towards the qualifying service and proceeded to observe as under in paragraphs 35 & 37 as herein under:

"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."

"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."

67. However, as already observed herein above, the facts of Prem Singh Case and the present bunch of matters are at stark difference, both in terms of the subject and its applicability. This court finds that while the Apex Court in Prem Singh Case read down the provisions of the Note appended to rule 3(8) and also struck down Regulation 370 of the Civil Services Rules, the proviso to rule 3(8) was not touched, for the simple reason that the proviso was essentially a statutory measure which reinforced the foundation of Prem Singh case, as any denial of the fruits for considerable period of service rendered by a work charged employee would be exploitative and wholly arbitrary. Thus, turning to the Note appended to Rule 3(8), the same was read down by the Supreme Court in Prem Singh case by holding that service rendered even prior to regularisation would be liable to be counted for the purposes of computing qualifying service. In Prem Singh case, the Supreme Court essentially found no justification for not including the service rendered in a work-charged establishment prior to regularisation or for the aforesaid service being restricted only to a situation where it was found that such service was rendered between two spells of temporary or temporary and permanent service. However, it may be noted that provisions similar to those enshrined in Regulation 370 remain preserved and untouched in the proviso to Rule 3(8). That proviso has neither been amended nor deleted. In this regard, it would be profitable to mention that it is well settled and recognised function of a proviso is to carve out an exception to what otherwise would stand governed in the principal provision. The Supreme Court in Durgabai Deshmukh Memorial Sr. Sec. School v. J.A.J. Vasu Sena (2019) 17 SCC 157 has held as herein under:-

"35. It is a settled position of law that the objective of a proviso is to carve out from the main section a class or category to which the main section does not apply. A proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment."

68. It is relevant to mention here that a Division Bench of this court in Special Appeal No. 2114 of 2011 (Ram Ashrey Yadav V/s State of Uttar Pradesh, decided on 13.04.2017), while considering

regulation 361, 368 and 370 of the civil service regulations has also been pleased to consider Regulation 352 which specifically deals with the case of wherein claims to pension are inadmissible. The perusal of the aforesaid Regulation 352 makes it quite clear that the person who is not retained for the public service for whole time but he is merely paid for the work done for the State, a months' notice of discharge should be given to such a person and his wages must be paid for any period by which such notice falls short of the month and an officer who served under the covenant which contains no stipulation regarding pension, unless the State Government specially authorizes an officer to count such service towards pension, no pension will be admissible for such services. The said division bench went on to hold that once the petitioner's claim has been considered under relevant service rules for extending the benefit of regularization, he ought to be deemed to have been appointed in the service as per the rules in question and his appointment in question has to be treated as a fresh/regular appointment under the relevant service rules and, accordingly, whatever conditions were applicable on the said date, the same has to be only pressed in to service. The Division Bench thus concluded by holding that once the petitioner has been offered fresh/regular appointment, then petitioner cannot claim that he should be covered by the old pension scheme and other benefits should be made available to him. Although it is reported that a SLP is pending against the said judgment of the Division Bench, however the same is being referred for humble guidance as there is no stay against the said order by the Hon'ble Apex Court.

69. As far as the present case is concerned, a perusal of the government order dated 22/12/1981 and office memorandum dated 15/02/1982 clearly stipulates that the writ petitioners have been engaged only on part time basis and not to work as fulltime regular employee and only had to perform a specified duty i.e. operating tube wells whereas on the contrary a regular tube well operators has also to perform the duty to maintain and repair of the tube wells. Moreover, Condition no. 12 specifically stipulated that the part-time tube well operators will not be provided any provident fund, pension or gratuity. As such in view of regulation 352 since the inception of coming into the services, the services rendered by the petitioners has been inadmissible for the purposes of pension as such now after the regularisation the petitioners cannot claim the past services rendered as part-time tube well operators before the date of their regularisation to be counted for the purposes of treating the services as "qualifying services" and since the regularisation of the petitioners have been done on or after 2008 which is an interior date to the coming of the New Pension Scheme wef. 01/04/2005 as such the services of the petitioners being regularised after the aforesaid date would only be accountable for the purpose of getting the New Pension Scheme which is being provided to the other State Government Employees.

70. Thus, in the opinion of this court, the judgement rendered by the Hon'ble Apex Court in the Prem Singh case is not applicable to the facts of the present case as the facts in issue in the aforesaid case as discussed above are absolutely different as compared to the facts in issue in the present bunch of writ petitions filed by the writ petitioners and is distinguishable on the basis of the facts involved. It is a settled principle of law that no decision is binding

as a precedent in another case if the material facts or the issues in the latter are not identical as a decision is only an authority for what it actually decides. In any case, the law stands settled that the rules applicable to a government employee on being regularized would be the rules in vogue at the time of regularization as has also been held in the case of **State of Bihar V/s Rajmati Devi,** wherein the Apex Court vide a judgment dated 20/05/2022 at paragraph 6 held as herein under:

"6. At the outset, it is required to be noted that the husband of respondent No. 1 came to be absorbed in the government service in the year 2014 w.e.f. 02.03.2009. Till 02.03.2009, he remained the employee of the Bihar Research Society, of which he was an employee and working. The Old Pension Rules, 1950 came to be abolished and the New Contributory Pension Scheme came to be introduced w.e.f. 01.09.2005. Under the New Contributory Pension Scheme, there is no provision for pension/family pension. As per the Scheme, all those who are appointed after 31.08.2005 shall be governed by the New Contributory Pension Scheme. Therefore, at the time when the husband of respondent No. 1, who died in the year 2013, was absorbed, the Old Pension Rules were abolished and the New Contributory Pension Scheme was in existence. As per the corrigendum issued in the appointment order and as per clause 6, the prior service rendered by the concerned employee prior to his absorption shall not be treated as a government service. Therefore, the husband of respondent No. 1 can be said to be a government servant and in government service w.e.f. 02.03.2009 only. Therefore, the husband of respondent No. 1 was governed by the New Contributory Pension Scheme under which there is no provision for the pension/family pension. Therefore, the High Court has committed a grave error in directing the appellant to pay the family pension to respondent No. 1 applying the Old Pension Rules, which were appliable prior to 31.08.2005.

The aforesaid aspect has not been considered by the High Court at all and the learned Single Judge simply considered that on the death of the husband of respondent No. 1, who died in harness while in service, respondent No. 1 is entitled to the family pension under family pension scheme. However, the High Court has not at all considered that on coming into force the New Contributory Pension Scheme, no government employee appointed after 31.08.2005 shall be entitled to any other benefit except under the New Contributory Pension Scheme. In that view of the matter, respondent No. 1 shall not be entitled to the family pension under the Old Pension Rules, which were not appliable at the time when the husband of respondent No. 1 came to be absorbed in the government service w.e.f. 02.03.2009"

Uttar Pradesh Qualifying Service for Pension & Validation Act, 2021

71. Further, in Prem Singh case (supra) the services of work charged employees were directed to be included for the purpose of qualifying service for pension. However, subsequently Government of U.P. has proclaimed Ordinance No. 19 of 2020 which has now become U.P. Act No. 1 of 2021 after it was notified in U.P. Gazette (Extraordinary) dated 21.10.2020. The effect of Prem Singh (supra) and U.P. Act No. 1 of 2021 has been considered in detail by a Division Bench of this Court in State of U.P. and others vs. Raj Bahadur Pastor, 2022(3) ADJ

5. This court also cannot be oblivious to the fact that Supreme Court in the case of Prem Singh (supra) was examining the question of inclusion of services rendered by a work charge employee towards qualifying service under Rule 3(8) of the U.P. Retirement Benefit Rules, 1961, in light of the previous judgment of the Court in Habib Khan Vs. State of Uttarakhand and others, (2019) 10 SCC 542, wherein the petitioners were regularized before the period of 01.04.2005. However, after the aforesaid judgment was delivered by the Supreme Court, the State has promulgated U.P. Ordinance No. 19 of 2020 specifying the 'qualifying service' to mean the services rendered by an officer appointed on a temporary or permanent post, in accordance with the provisions of service rules prescribed by the government for the post. Clause 3 of the Ordinance also amended sub-rule (8) of Rule 3 of the U.P. Retirement Benefit Rules, 1961 retrospectively w.e.f. 1st April, 1961. Clauses 2 & 3 of the Ordinance are reproduced hereinafter: -

"2. Notwithstanding anything contained in any rule, regulation or Government order for the purposes of entitlement of pension to an officer, "Qualifying Service" means the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post.

3. Notwithstanding any judgment, decree or order of any Court, anything done or purporting to have been done and may action taken or purporting to have been taken under or in relation to sub-rule (8) of rule 3 of the Uttar Pradesh Retirement Benefit Rules, 1961 before the commencement of this Ordinance, shall be deemed to be and always to have been done or taken under the provisions of this Ordinance and to be and always to have been valid as if the provisions of this Ordinance were in force at all material times with effect from April 1,1961."

72. The above ordinance was followed with the promulgation of the Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021 (U.P. Act No. 1 of 2021). Thus, on account of the above amendment in the U.P. Retirement Benefit Rules, 1961, the definition of 'qualifying service' hitherto contained in Rule 3(8) of 1961 Rules, stands retrospectively modified in terms of the Sections 2 & 3 of the U.P. Act No. 1 of 2021. This amendment has been made applicable w.e.f. 1st April, 1961, notwithstanding any judgment, decree or order of any court.

73. This court note that the Ordinance of 2020 substituted by U.P. Act No. 1 of 2021 is not under challenge in this bunch of writ petitions. Once the statute has been amended retrospectively, the writ court would not be justified in ignoring the provisions of the statute, particularly when they are not under challenge and have otherwise not been read down by having recourse to any of the principles of interpretation of statute. In any case, since the legislative enactment binds us to proceed on the basis that the aforesaid definition of qualifying service existed and held the field since 1 April 1961, all pensioanry claims would have to be necessarily evaluated and examined accordingly. This conclusion would necessarily be subject to any challenge that may be laid to the provisions of the Validating Act.

74. Thus, this court is of the view that the expression "qualifying service" would now have to be interpreted in accordance with the provisions made in the Validating

Act notwithstanding anything to the contrary that may be contained in any other act, rule or regulation. The Validating Act introduces provisions with retrospective effect from 1 April 1961. As per Clause 2 of the validating Act, "Qualifying Service" means the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post. Thus, the right to claim pensionary benefits has now to be interpreted in terms of the said qualifying service, which entails three things (i) officer appointed on a temporary or (ii) permanent post and (iii) in accordance with the provisions of the service rules prescribed by the government for the post.

75. Admittedly, the writ petitioners were appointed and continued to be part time tube well operators before their respective regularization. They neither held nor were appointed on a temporary or a permanent post prior to their regularization. They came to be appointed on a substantive post only after their regularization and as such there service cannot be reckoned from the date of their appointment as part time tube well operators, but it has to be from their respective date of regularization. Moreover, the validating act significantly mentions that it is not necessary that the officer should be merely appointed on a temporary or a permanent post, but it also ensues that the said temporary or permanent appointment should be in accordance with the provisions of the service rules. As far as the present writ petitioners are concerned, although the Irrigation Department Tube Well Operators Service Rules 1953 existed and regular tube well operators were appointed under the said service rules, however these "Part time tube well operators" were appointed under "executive instructions' vide order dated 22.12.1981 issued by *Sinchai Anubhag*, Government of U.P. Thus, these part time tube well operators not having been appointed as per the service rules, came to be only recognized and being appointed as per the service rules when their services were regularized. Thus, the qualifying service for pensionary benefits cannot be reckoned from a date, when these writ petitioners were not even appointed as per the service rules.

76. So far as the judgment of the Division Bench in the case of Bhanu Pratap Sharma is concerned argued by Ld. Sr. counsel for the writ petitioners are concerned, it may be noted that the judgment of the Court was on the facts of the case, inasmuch as, the petitioner therein was regularized from work charge basis to regular establishment and it was not the case of the State that his appointment was not in accordance with the provisions of service rules. However, in the present case, this court finds on fact that neither engagement of petitioners are in a work charge establishment, nor is it admitted anywhere that engagement/appointment of petitioner was in accordance with the service rules. In any case, this court finds on the other hand that the state has relied on two judgments of the Division bench passed vide (i) Order dated 22.04.2022 in Special Appeal No. 398 of 2021(Shri Chandra Singh's case) and (ii) Order dated 16.05.2022 in Special Appeal No. 240 of 2021(Jangpal's case), wherein the Hon'ble Division Bench of Lucknow and Allahabad respectively after framing question relating to entitlement of the benefit of the judgment of the Prem Singh in view of the UP qualifying service for pension and validation Act, 2019 was negated.

77. The writ petitioners have also relied upon the judgment dated 03.08.2021 passed by the Apex Court in **Civil Appeal No. 4575/2021 (The State of Uttar Pradesh & Ors. Vs Uttam Singh)**. First & foremost, the said judgment is relating to extending benefit of compassionate appointment under the UP recruitment of dependents of government servant dying in harness rules, 1974 on account of demise of the father, who had been working as a part time tube well operator. Secondly, the said judgment does not address any of the issues, which is engaging the attention of this court in these bunch of matters. The Apex Court was examining the said compassionate appointment in the peculiar facts of the said case observed that at least two persons had been granted employment in a similar scenario although the person had been discriminated in the said case, possibly due to previous litigation between the state and the deceased father. Thus, on the facts of the case, the Apex Court did not find the explanation of the state to be satisfactory and did not permit the state to perpetuate the harassment and dismissed the appeal of the state-department. A decision is only an authority for what it actually decides. The essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence, here and there from a judgment and to build upon it. **State of Orissa v. Sudhansu Sekhar Misra, *(1968) 2 SCR 154.***

Conclusion

78. In view of the above discussion, there is no doubt to hold that the appointment of the petitioners remained irregular in view of the Executive order dated 22/12/1981 & OM dated 15/02/1982. Although, they were granted pay-parity with regular appointed tube well operators in view of the judgment of this court and upheld by the Hon'ble Apex Court, however the Apex Court itself clarified in review order dated 18.10.1995 that the issue in Suresh Chandra Tewari case was not related to regularization, but were concerned to the question of grant of pay-parity based on the principal of "equal pay for equal work".

79. Further, the services of the petitioners cannot be reckoned from the date of 17.12.1996 i.e the date of promulgation of *"U.P Irrigation Department Regularization of Part-time Tube well operators on the posts of Tube well operators Rules, 1996"* as the rules of regularization clearly postulates that the said rules applied to only those part time tube well operators who were appointed prior to 01.10.1986. Admittedly, the petitioners in the present bunch of matters were appointed after 01.10.1986. Even the challenge to the said rules stands repelled by this court in the light of judgment of the Hon'ble Apex Court in **Uma Devi's case [(2006) 4 SCC 1]**. Moreover, this court has already held supra that in view of the judgment of the Supreme Court in the case of Registrar General of India & another vs. V. Thippa Setty & others (1998 Vol. 8 SCC 690) and Union of India and others vs. Sheela Rani (2007) 15 SCC 230) and State of Haryana vs. Jasmer Singh (1996) 11 SCC 77), the regularisation can be prospective and not retrospective.

80. This court has also held that service of work charged establishment can be found in the rules, whereas the service of the part time tube well operators came to existence by an executive order and due to various other reasons as mentioned supra,

the services conditions of part- time tube well operators cannot be equated with the persons, who are/were working in work charged establishment, as both are entirely distinct and different. Further, the authoritative pronouncement of the Hon'ble Apex Court in Prem Singh Case was related to regularization in the Old Pension scheme era, whereas the present petitioner came to be regularized only in 2008-2009, when the new pension scheme was in vogue in view of the "U.P. Retirement Benefits (Amendment) Rules, 2005" w.e.f 01.04.2005. Thus, in view of the judgment of the Hon'ble Apex Court in State of Bihar Vs Rajmati Devi, the new pension scheme would be made applicable to the petitioners after they were regularized. Further, the Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021 also does not come to the rescue of the petitioners as they neither held nor were appointed on a temporary or a permanent post prior to their regularization. They came to be appointed on a substantive post only after their regularization and for all intents and purposes there services can be reckoned only from their respective date of regularization.

81. Having considered this bunch of writ petition, this court gives the following directions:

A. The "qualifying service" for the purpose of pension shall be reckoned of the writ petitioners' from the date, when they had been regularized in the regular post as Tube well operator.

B. The writ petitioners shall not be entitled to the Old pension scheme as the pension scheme vogue at the time of their respective regularization was the New Pension Scheme.

C. The state shall take all steps as per the rules for granting all service benefits as may be applicable to the writ petitioners on being regularized, taking cue from the judgment passed by the larger bench vide order dated 12.11.2021 in Namo Narain case. This court holds that as far as the return and/or consideration of GPF is concerned, the present writ petitioners are granted the same relief as has been granted by the larger bench in the said judgment.

D. The exercise of reconsideration may be concluded with expedition and preferably within a period of 3 months of the date of presentation of a certified copy of this order.

E. It is made clear that all the other prayers of the writ petitioners relating to quashing of the impugned orders or providing other service benefit is being rejected & dismissed.

All the writ petitions are **DISPOSED OF** in the aforesaid terms. There shall be no order as to cost.

(2023) 2 ILRA 142
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2023

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PRAKASH PADIA, J.

Civil Misc. Review Application No. 40 of 2019
In
Writ C No. 16532 of 2017

Awadhesh Kumar Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri M.D. Singh Shekhar, Sri J. Nagar (Sr. Advocate), Sri R.N. Mishra, Sri Vaibhav

Goswami, Sri Prateek J. Nagar, Supriya Pratik Nagar

Counsel for the Respondents:
Sri Ajit Kumar Singh (Additional Advocate General), Sri Sudhanshu Srivastava (Additional Chief Standing Counsel), Sri Vivek Saran

The Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement Act, 2013 - Section 73 - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 161 - Exchange - Petitioner purchased a plot through a sale-deed in 2010 - Petitioner claimed that his plot was surrounded by the land acquired by the UPSIDCL & there was no egress or ingress to the said plot - Petitioner prayed either his land may be taken & compensation be paid or sale deed be executed - State opposed the claim on ground that land acquisition proceedings were held in the year 1988, and the petitioner was aware of this when purchasing the plot in 2010 - Held - State Authorities cannot be directed to provide ingress and egress to the petitioner over the land acquired by the State Government in the year 1988 - However, in the interest of justice, the petitioner was compensated by awarding amount of investment along with interest @ 9% (Para 24) (E-5)

(Delivered by Hon'ble Prakash Padia, J.)

Order on C.M. Review Application No.40 of 2019

1. The present review application has been filed with a prayer to review/recall the order dated 5.11.2019, by restoring the writ petition to its original number, with a further prayer to allow the writ petition by granting relief prayed for in the writ petition or with any other relief, which this Court deem fit and proper in the interest of the justice.

2. The facts of the case are that the petitioner in the writ petition, claimed that he is owner of plot no. 38/302, area 2300 square meter in village Daulatpur, Tehsil Firozabad, District Firozabad. The said plot was purchased by the petitioner by a registered sale deed in the year 2010. It is further stated in the writ petition that 101.01 acre of land of same village, surrounding the plot of the petitioner was acquired by the U.P. State Industrial Development Corporation Limited (hereinafter referred to "UPSIDC'). Out of the aforesaid area, 95.60 acre land was entered in name of UPSIDC and remaining 06.41 acre was recorded in name of Collector, Firozabad. The said acquisition was made in the year 1988.

3. It is further stated in the writ petition that the land purchased by the petitioner was not acquired, whereas the surrounding plots were acquired. Thus, the petitioner had no ingress and egress to his plot.

4. The petitioner applied for exchange of his land with other land as contemplated under section 161 of U.P.Z.A. & L.R. Act. The said application was not decided, as such, the petitioner filed Writ Petition No.43249 of 2013, praying for a direction to the State Authority to decide the application with regard to exchange of his plot. The said writ petition was disposed of with a direction to the authorities to consider the claim of the petitioner and pass appropriate order within the time bound period. The application of the petitioner for exchange was rejected by the Authority concerned by an order dated 23.9.2013. The appeal filed by the petitioner challenging the order was also rejected by the Commissioner, Agra Division, Agra. The said order was

challenged by the petitioner by filing a revision before the Board of Revenue. The revision of the petitioner was allowed ex-parte. Thereafter, the State Authority filed a review application before the Board of Revenue and the Board of Revenue stayed its earlier order. The petitioner filed Writ Petition No. 111 of 2017 for a direction to the Board of Revenue to decide the review application filed by the State Authority. Ultimately, the review application of the State Authority was allowed and the revision filed by the petitioner was dismissed by order dated 19.1.2018. The order dated 19.1.2018 passed by the Board of Revenue was subject matter of challenge by the petitioner in Writ Petition No.2976 of 2018. The said writ petition was also dismissed on 19.3.2018.

5. The petitioner in the present writ petition has stated that the land of the petitioner is surrounded by the land acquired by the State Government. Thus, there is no ingress and egress to the plot of the petitioner. It is further stated in the writ petition that the land of the petitioner is within the boundary wall of the Government Medical College being constructed over the acquired land.

6. This Court by an order dated 5.11.2019 dismissed the writ petition on the ground that the State Government had denied its possession over the land of the petitioner and has also denied to be interested in acquiring the land of the petitioner. So far as ingress and egress to the plot of the petitioner is concerned, this Court kept it open to the petitioner to avail the remedy under Common Law.

7. The petitioner has argued that the statement of Additional Advocate General regarding the possession over the land in dispute is contrary to record.

8. Elaborating the said argument, the learned counsel for the petitioner has relied upon the document, i.e. counter affidavit filed by Sri Kamal Kumar, Assistant Resident Engineer, Mainpurl, U.P. Rajkiya Nirman Nigam Limited, Mainpuri and the progress report submitted by the Nirman Nigam pointing out that the plot of the petitioner is within the boundary wall of the Government Medical College.

9. It is further argued that the Board of Revenue in its order dated 19.1.2018 has further recorded a finding that the land of the petitioner is situated in middle of the acquired land. It is further argued that the Board of Revenue has recorded a finding that the disputed land is situated in middle of the land allotted for construction of the Government Medical College.

10. Based on the aforesaid two documents, it is argued that the findings recorded in the order dated 5.11.2019 are contrary to record, as such, the judgment is worthy to be reviewed.

11. After hearing the counsel for the petitioner it appears that the findings of the Board of Revenue that the land of the petitioner is situated in middle of the land acquired by the State Government and subsequently, allotted for construction of the Government Medical College has not been considered by this Court, while passing the order dated 5.11.2019, as such, the review application is worthy to be allowed and is hereby allowed and the order dated 5.11.2019 is recalled and writ petition is restored.

Order on the Writ Petition

1. After recalling the order dated 5.11.2019, a fresh opportunity of hearing has been provided to the counsel for the petitioner and writ petition is being decided with the consent of counsel for the parties. It is argued by the counsel for the petitioner that since the plot of the petitioner is situated in middle of the land acquired by the State Government and allotted for construction of Government Medical College, the petitioner is being deprived of for using his land, as there is no ingress and egress for the land of the petitioner. It is further argued that the right to property has guaranteed under Article 300A of the Constitution of India is being violated by the State Authority. It is further argued that the State Government must acquire the land and pay the compensation to the petitioner in accordance with the provisions contained in the new Act of 2013.

2. The facts as stated in the writ petition are that the petitioner is Bhumidhar of plot no. 38 of 302, situated in Village Daulatpur, Tehsil & District Firozabad, measuring 0.230 Hectare and his name is duly recorded in the revenue record. Copy of the sale deed executed in favour of the petitioner on 16.8.2010 had been annexed along with the supplementary counter affidavit filed on behalf of the respondent no. 1. The said sale deed contains the fact that the sale consideration of ₹4,50,000/- was paid by the petitioner and for the purposes of payment of stamp duty and registration fee the value of the property was made at ₹4,55,000/-. The said valuation for the purposes of the payment of stamp duty was made on the basis of the circle rate fixed by the Collector in its list effective from 1.8.2010. The stamp duty of ₹31,850/was paid by the petitioner.

3. On the basis of the aforesaid sale deed, the name of the petitioner was recorded in the revenue record as Bhumidhar.

4. The case of the petitioner is that the land so purchased by the petitioner was surrounded by acquired land. Thus, the petitioner has no way to approach his land and it become impossible for the petitioner to enter in his land accordingly. The petitioner moved an application for exchange of his land under section 161 of U.P.Z.A. & L.R. Act which is pending before the Competent Authority, as such, the petitioner filed writ petition no. 43249 of 2013, praying for a direction to decide the application of the petitioner for exchange of his land no. 38/302, area 0.230 Hectare with some other land. The aforesaid writ petition was disposed off by this Court, with a direction to the Competent Authority to examine the request of the petitioner for exchange of his land within a period of six months.

5. In compliance of the aforesaid order dated 7.8.2013 passed by this Court in writ petition no. 43249 of 2013, the Assistant Collector (1st Class)/Deputy Collector, Sadar, Firozabad passed an order dated 23.9.2013, rejecting the application of the petitioner for exchange of his land.

6. Being aggrieved with the aforesaid order dated 23.9.2013, the petitioner preferred Appeal No. 47 of 2012-13 under section 331 of the U.P.Z.A. & L.R. Act before the Commissioner, Agra Division, Agra. The aforesaid appeal of the petitioner was also rejected by an order dated 30.1.2014 passed by the Additional Commissioner (Judicial), Firozabad.

7. Being aggrieved with the aforesaid order dated 30.1.2014, the petitioner filed

Revision No. 26 of 2014 before the Board of Revenue. The Judicial Member of Board of Revenue by ex-parte order dated 27.5.2017 allowed the revision filed by the petitioner and set aside the order dated 23.9.2013 passed by the Deputy Collector and the order dated 30.1.2014 passed by the Additional Commissioner. The Board of Revenue further passed an order for exchange of land of the petitioner with gata no. 53 with similar area. The State Government through Collector, Firozabad filed review application in revision no. 26 of 2014 before the Board of Revenue. The Board of Revenue by its order dated 29.3.2016 stayed the effect and operation of the order dated 27.5.2015 passed in revision no. 26 of 2014. The petitioner thereafter filed his objection to review application and the matter remained pending before the Board of Revenue.

8. The petitioner thereafter filed Writ-B No.111 of 2017 (Awadesh Kumar Sharma Vs. State of U.P. & others), challenging the order dated 29.3.2016 passed by the Board of Revenue in review application. This Court disposed off the writ petition with a direction to the Board of Revenue to decide the review application within a period of six weeks from the date of production of certified copy of the order before the Board of Revenue by an order dated 4.1.2017.

9. Thereafter the Petitioner fied Writ-B No. 20986 of 2017 (Awadesh Kumar Sharma vs, State of U.P. & others), challenging the communication of Registrar Board of Revenue, communicating the order of Chairman Board of Revenue, Lucknow dated 2.2.2017, whereby the review application filed by the State in Revision No. 26 of 2014 was directed to be heard by Dr. Lalit Verma, Member Judicial at Lucknow. Certain allegation of malafides were levelled against Dr. Lalit Verma, Judicial Member of Board of Revenue.

10. This Court, by an order dated 26.5.2017 disposed off the said writ petition with following order:

"Having due regard to the facts and circumstances of the case and without entering into the rival contentions, allegations and counter allegations, it is provided that the record of the case along with the note of the sixth respondent shall be placed before the Chairman Board of Revenue, Lucknow, who shall himself hear the review petition sitting singly or in Division Bench, after putting notice to the parties. Learned counsel for the petitioner undertakes that the petitioner shall cooperate with the proceedings without seeking unnecessary adjournments.

With the aforementioned observations/directions, the writ petition is finally disposed of."

11. Thereafter another Misc. Single No. 22033 of 2017 (petition under 227 of the Constitution of India) was filed, seeking an order or direction directing the Chairman, Board of Revenue, Lucknow to transfer the proceedings of Revision No. 26 of 2014 from Lucknow to Allahabad and prohibiting the Chairman Board of Revenue, Lucknow from hearing the matter. The aforesaid petition was finally dismissed by this Court with the following direction:-

"In view of the above, this writ petition is dismissed. The Chairman, Board of Revenue, Lucknow shall decide the review application in terms of the Judgment passed by this Court at Allahabad."

Copy of the order in this regard shall be sent to the Chairman, Board of Revenue, Lucknow.

At this stage, Shri Nagar submits that it may be left open for the petitioner to seek clarification from this Court at Allahabad, which has decided earlier writ petition. If such application is permissible and maintainable, no direction is required from this Court."

12. A perusal of the order dated 19.1.2018 passed by the Board of Revenue, Lucknow also reveals that the direction was issued by the Board of Revenue, Lucknow to the District Magistrate, Firozabad and Director Land Acquisition, U.P. Lucknow to conduct and enquiry as to how, and in what circumstance the land of plot no. 38/302 was not acquired. Though it is surrounded by the acquired land.

13. The petitioner by filing writ petition no. 2976 of 2018, challenged the order dated 19.1.2018. The said writ petition was also dismissed by this Court by an order dated 19.3.2018.

14. The petitioner has filed the present writ petition with the following prayer:

(i) That by a suitable order or direction issued in the nature of mandamus, the Hon'ble Court be pleased to restrain the respondent to encroach upon petitioner's Plot Nos. 38/302 and 53, situate in Village - Daulatpur, District - Firozabad without acquiring the land of the petitioner and without paying compensation to him.

(ii) That by a suitable writ, order or direction issued in the nature of mandamus, the Hon'ble Court be pleased to direct the respondents to pay actual value of the land to the petitioner, according to new land acquisition policy along with interest and damages from 01.03.2015.

(iii) That by a suitable writ, order or direction issued in the nature of mandamus, the Hon'ble Court be pleased to direct the respondents to return the land of the petitioner after removing the constructions raised thereon, within the time specified by the Hon'ble Court.

(iv) Costs of the Writ Petition be awarded to the petitioner, as against the respondents;

*(v) Any other suitable order or direction which the Hon'ble Court deems fit and proper in the ends of justice and in the circumstances of the case may kindly be issued in the matter in favour of the petitio*ner and against the respondents in addition to or substitution for the reliefs claimed."

15. Initially the writ petition was filed only with the prayer that the respondents be restrained from encroaching the plot no. 38/302 and 53 in Village Daulatpur, District Firozabad without acquiring the land of the petitioner and without paying the compensation to him.

16. Subsequently by amendment, a prayer for payment of compensation of actual value to the petitioner according to the new land acquisition Policy along with interest and damages as well as with a prayer for return of the land to the petitioner after removing the construction had been made.

17. It is admitted that a notification under section 4 with regard to the acquisition of surrounding the land measuring 101.01 acre of land was issued. Out of the aforesaid 101.01 acre land, 95.60 acre of the land was recorded in name of U.P.S.I.D.C. and remaining 06.41

acre was recorded in name of the Collector, Firozabad.

18. The construction of Government Medical College over the land recorded in the name of the Collector, Firozabad, started in the year 2016.

There is no document on record to establish that the land of the petitioner had been encroached by raising construction of any building of Medical College over the land of the petitioner. In pursuance of the interim order passed by this Court, an effort was made by the District Magistrate, Firozabad and its Subordinate Officer to settle the dispute with the petitioner by taking the land with the consent of the petitioner. The meeting between the petitioner and the State Authorities were held and the State Authorities offered a sum of ₹1,65,60,000/- to the petitioner as sale consideration for the land of the petitioner.

19. The report of District Magistrate dated 15.5.2019 has been filed as Annexure 6 to the Supplementary Counter Affidavit, which make it clear that the compensation/sale consideration was offered to the petitioner as per new Act of 2015, treating the land of the petitioner as agricultural land, as the land is till date recorded in the revenue record as agricultural land, but the petitioner claimed that he should be paid compensation at the rate fixed for super commercial area.

20. After failure of negotiation/settlement carried on in pursuance of the order of this Court, the State Authorities decided not to purchase/acquire the land of the petitioner.

21. None of the report filed by the petitioner or the respondents make it clear that the State Authorities or the U.P. Rajkiya Nirman Nigam has raised any construction over the land of the petitioner. The map annexed along with the supplementary counter affidavit make it clear that the land of the petitioner is still vacant.

22. The petitioner has purchased the land by registered sale deed dated 16.8.2010 by paying sale consideration of ₹4,50,000/and has valued the land at ₹4,55,000/- for purposes of the stamp duty. The petitioner has further make payment of ₹31,850/- as stamp duty. At the time of purchasing the land, the petitioner was well aware that the land is surrounded with the acquired land and there is no ingress and egress over the land. All his efforts made for exchange of the land had failed, as he was not entitled for exchange of the land as per the provisions contained under Act and Rules framed thereunder.

23. The petitioner has taken a chance having full knowledge that the purchased land is surrounded by acquired land. The State Authorities have declined to take the land of the petitioner, as it is not useful for them and they have also not raised any construction over the land in dispute.

24. The petitioner is claiming that his land is surrounded by acquired land and it is not useful for him. Knowing all facts and topography of the land, the petitioner has purchased the land at ₹4,50,000/- and paid stamp duty of ₹31,850/-. The petitioner has taken risk and has made investment of ₹4,81,850/-. The case of the petitioner is that the land is not useful for him as there is no ingress and egress. The State Authorities cannot be directed to provide ingress and egress to the petitioner over the land acquired by the State Government in the

year 1988. However, in the interest of justice, the petitioner may be compensated by awarding amount of investment along with interest @ 9% as contemplated under section 73 of the Act of 2013.

25. In view of the facts stated above, the writ petition is finally disposed off with a direction to the respondent no. 1 to pay consideration of ₹4,50,000/+ stamp duty of ₹31,850/- along with interest from the date of sale deed, i.e., on 16.8.2010 till the date the payment is made and the petitioner is directed to execute sale deed on receipt of aforesaid amount in favour of the respondent no.1.

(2023) 2 ILRA 149
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.02.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ C No. 900 of 2023

Smt. Lali Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Dinesh Kumar Mishra

Counsel for the Respondents:
C.S.C., Anilesh Tewari, Bina Kishore, Uma Shankar Sahai

(A) Election - The Uttar Pradesh Panchayat Raj Act, 1947 - Sections 12-C & 12 C (6) - Application for questioning the elections - The Uttar Pradesh Panchayat Raj (Election of Members, Pradhan and Up-Pradhans Rules, 1994 - Rule 4 - Nirvachan Adhikari (Returning Officer) - it is the Returning Officer who is appointed by the District Magistrate for every election to perform the function required to be performed under Chapter II of the Rules, 1997 - to do all acts and things as may be necessary for effectually conducting the election in the manner provided in the act and the rules.(Para - 27)

Election for post of Gram Pradhan - in question - challenged by petitioner on various grounds - Matgarna Paryavekshak only recounted two bundles of votes - against direction issued by the Returning Officer - Election Tribunal directed for recounting of votes - disposed of election petition - petitioner filed a writ petition - Court relegated him to remedy of revision - revisional Court allowed revision - set aside order of Election Tribunal - restoring election petition to its original number - disposing of it in accordance with law. (Para -18)

(B) Election - Rule 4 of the Rules 1994 - under control of Returning Officer - duty of Matgarna Paryavekshak to do all acts and things for effectual conduct of the election - on direction of Returning Officer - Matgarna Paryavekshak was required to carry out directions of Returning Officer - all votes should have been counted as per directions of Returning Officer - same not having been done - specific ground taken in election petition - Election Tribunal was correct in directing for re-counting of all votes by means of the impugned orders.**(Para -28)**

HELD:-No illegality or infirmity with the reasons recorded by Election Tribunal or the revisional Court while directing for a re-counting. Grounds taken by the petitioner rejected. No case for interference made out. **(Para - 34,35)**

Writ Petition dismissed. (E-7)

List of Cases cited:-

1. Uday Chand Vs Surat Singh & anr. , (2009) 10 SCC 170,

2. Arikala Narasa Reddy Vs Venkata Ram Reddy Reddygari & anr. , (2014) 5 SCC 312

3. Amit Narain Rai Vs St. of U.P & ors. , Writ-C No. 63380 of 2011

4. Ram Adhar Singh Vs D.J., Ghazipur & ors. , 1985 SCC OnLine All 246

5. Prem Sheela Vs P.A./S.D.M. & ors , 2019 SCC OnLine All 5564

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Sri H.G.S.Parihar, learned Senior Advocate assisted by Sri Dinesh Kumar Mishra, learned counsel appearing for the petitioner, Dr. Udai Veer Singh, learned Additional Chief Standing counsel appearing for the respondents no. 1 to 3 and Sri U.S.Sahai, learned counsel appearing for the respondent no. 5.

2. Instant writ petition has been filed praying for the following main reliefs:-

(i) Issue a writ order or direction in the nature of certiorari quashing the order dated 03.01.2023 passed by the learned Additional District Judge Court No. 2/Special Judge E.C.Act, Sitapur in Civil Revision No. 47 of 2022 Smt. Lali Devi Vs. S.D.:M.Maholi and Ors contained as Annexure No. 1 only to the extent denial of quashing the order of the re-counting to this petition in the interest of justice.

(ii) Issue a writ order or direction in the nature of certiorari quashing the order dated 02.09.2022 passed by the Sub Divisional Magistrate Maholi/ Prescribed Authority District Sitapur in Case No. 1678/2021 (Election Petition No. 19/23) Mahaveer Vs. Smt. Lali Devi and Ors U/S 12 (C) of the Uttar Pradesh Panchayat Raj Act, 1947 contained as Annexure No. 2 to this petition in the interest of justice.

(iii) Issue a writ order or direction in the nature of certiorari quashing the order dated 23.01.2022-23 by means which again the order of the re-counting has been passed by the prescribe authority contained as Annexure No. 3 to this petition in the interest of justice.

3. The case set forth by the petitioner is that an election of Gram Pradhan took place in the year 2021. The petitioner was declared elected as Gram Pradhan of Village Peerpur, Gram Panchayat Dadabad, Post Office- Hathiya Kasimpur, Nyaypanchayat Urdauli, Vikash Khand Maholi, Tehsil- Maholi District- Sitapur. The respondent no. 5 herein namely Sri Mahaveer filed an election petition under Section 12-C of the Uttar Pradesh Panchayat Raj Act, 1947 (hereinafter referred to as "Act, 1947") before the learned Election Tribunal challenging the election of the petition. A copy of the election petition has been filed as annexure 4 to the writ petition. The learned Election Tribunal vide order dated 02.09.2022, a copy of which is annexure 2 to the petition after framing various issues directed for re-counting of the votes and disposed of the election petition.

4. Being aggrieved, the petitioner filed a writ petition namely Writ-C No. 6140 of 2022 Inre; Smt. Lali Devi Vs. State of U.P and Ors and this Court vide order dated 08.09.2022, a copy of which is annexure 6 to the writ petition disposed of the writ petition with liberty to the petitioner to approach the statutory forum by filing of a revision under the provisions of Section 12-C (6) of the Act, 1947.

5. In pursuance thereof, the petitioner filed a revision bearing Revision No. 47 of 2022 Inre; Lali Devi Vs. S.D.M Maholi and ors before the Court of the learned Additional District Judge/Special Judge, Sitapur. The revisional Court vide order dated 22.09.2022, a copy of which is

annexure 8 to the writ petition dismissed the revision.

6. The petitioner being aggrieved filed a writ petition bearing Writ-C No. 7328 of 2022 Inre; Lali Devi Vs. State of U.P and Ors and this Court vide order judgment and order dated 22.10.2022, a copy of which is annexure 9 to the writ petition set aside the order passed by the revisional Court dated 22.09.2022 and required the revisional Court to decide the matter expeditiously.

7. In pursuance thereof, the revisional Court vide order impugned dated 03.01.2023, a copy of which is annexure 1 to the writ petition has partly allowed the revision filed by petitioner and has set aside the order of the learned Election Tribunal so far as it had directed that the records of election petition be consigned to record. Further, the revisional Court has restored the election petition to its original number and has directed the learned Election Tribunal to dispose of the election petition as per law expeditiously.

8. Subsequently, the learned Election Tribunal vide order dated 23.01.2023 (wrongly typed as 23.01.2022), a copy of which is annexure 3 to the writ petition has directed for a re-counting to be held on 07.02.2023 for which purpose adequate security etc has also been required. The order dated 23.01.2023 has also been directed to form part of the earlier order dated 02.09.2022.

9. Being aggrieved with the orders dated 23.01.2023, 22.09.2022 and 03.01.2023, the instant writ petition has been filed.

10. Raising challenge to the aforesaid orders, learned Senior Advocate has primarily raised the following grounds namely (a) no reasons have been recorded by the learned Election Tribunal as to why re-counting has been directed (b) in the order dated 23.01.2023, the earlier order dated 02.09.2022 has been indicated to form part of the order. It is contended that doctrine of merger would be applicable and as such, once the revisional Court vide order dated 03.01.2023 had partly allowed the revision consequently, the order dated 02.09.2022 stood merged with the order of the revisional Court dated 03.01.2023 and consequently, there cannot be any occasion for the learned Election Tribunal to have directed in the order impugned dated 23.01.2023 that the order dated 02.09.2022 shall form part of the order (c) for the purpose of re-counting which has been directed by the learned Election Tribunal, the pleadings should have been made by the persons challenging the election indicating the irregularities while filing the petition under Section 12-C of the Act, 1947 and in the absence of pleadings such a casual order could not have been passed by the learned Election Tribunal and partly upheld by the revisional Court. In this regard, reliance has been placed on the judgments of the Apex Court in the case of **Uday Chand Vs. Surat Singh and Anr** reported in **(2009) 10 SCC 170, Arikala Narasa Reddy Vs. Venkata Ram Reddy Reddygari and Anr reported in (2014) 5 SCC 312** as well as the judgment of this Court in the case of **Amit Narain Rai Vs. State of U.P and Ors passed in Writ-C No. 63380 of 2011 decided on 09.04.2012** (d) the revisional Court in one part of the order impugned dated 03.01.2023 has recorded that the revision against the order dated 02.09.2022 is not maintainable it being an interlocutory order and in the other part of the order, it has been indicated that the revision would be maintainable

which thus indicates that the revisional Court was itself not sure as to whether the revision was maintainable or not (e) none of the grounds in the memo of the revision have been considered by the revisional Court while deciding the revision and (f) the judgments which were indicated in the written argument have also not been considered by the revisional Court.

11. No other ground has been urged.

12. On the other hand, Sri U.S.Sahai, learned counsel appearing for the respondent no. 5 argues that after the election had taken place and the counting was done, it was noticed that there were certain irregularities in the counting which compelled the respondent no. 5 herein to move an application for the purpose of re-counting. The application for re-counting was allowed by the Returning Officer yet the Matgarna Paryavekshak only re-counted two bundles of votes and not the other votes. Thus once it is the Returning Officer who is the overall In-charge and was required to pass the order on the application of the respondent no. 5 and in fact did pass an order for the purpose of re-counting as such, the Matgarna Paryavekshak patently exceeded his jurisdiction in only re-counting two bundles of votes instead of the entire votes that had been cast. It is also contended that no objection was raised to the application filed by the respondent no. 5 for the purpose of re-counting of the votes by the petitioner herein.

13. As the re-counting was only done with respect to two bundles consequently, the petitioner was declared elected as a Gram Pradhan on the basis of one vote. Considering the aforesaid application that had been moved by the respondent no. 5 for the purpose of re-counting and which in fact has been allowed by the Returning Officer but not fully implemented by the Matgarna Paryavekshak consequently, this compelled the respondent no. 5 to file an election petition before the learned Election Tribunal. Placing reliance on paragraphs 5 & 6 of the aforesaid petition it is contended that this ground was specifically taken in the election petition which had been filed by the respondent no. 5 and which found favour with the learned Election Tribunal which has directed for re-counting of all votes.

14. On the ground urged by the learned counsel for the petitioner that the counting of votes should not be done casually reliance has been placed on a Full Bench judgment of this Court in the case of **Ram Adhar Singh Vs. District Judge, Ghazipur and Ors reported in 1985 SCC OnLine All 246** as well as the judgment of this Court in the case of **Prem Sheela Vs. Prescribed Authority/Sub Divisional Magistrate and ors** reported in **2019 SCC OnLine All 5564** to contend that the situation in which re-counting can be directed, has been considered threadbare by the Full Bench of this Court after placing reliance on various judgments of the Apex Court and it has been held that where the Court trying the election petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties, then the re-counting can be directed.

15. So far as the argument of the learned counsel for the petitioner that the revisional Court has not considered the grounds as were raised in the revision and that in one part of the order passed by the revisional Court it has been indicated that

the revision is not maintainable while in the other part of the order it has been indicated that the revision is maintainable, it is submitted that where the issue was indicated by the revisional Court as to whether the revision is maintainable or not, the revisional Court has categorically come to the finding that the revision in fact is maintainable and has thereafter proceeded to partially allowed the revision and thus mere fact that while considering the ground (b) that had been taken in the revision that the Court may have cursorily observed that that the revision is not maintainable will not take away the jurisdiction of the revisional Court to have entertained and decided the issue.

16. So far as the ground of merger is concerned, it is contended that the revisional Court has only partly allowed the revision filed by the revisionist and only set aside the part of the order dated 02.09.2022 whereby the election petition had been finally disposed of/consigned to records meaning thereby that the rest of the order is still intact which has correctly been required to be part of the order dated 23.01.2023 by the learned Election Tribunal. Hence, there is no illegality or infirmity in the orders impugned and the writ petition deserves to be dismissed.

17. Heard the learned counsel appearing for the contesting parties and perused the records.

18. From the arguments as raised by the learned counsels appearing for the contesting parties and from a perusal of records, it emerges that an election for the post of Gram Pradhan had taken place in the village in question. After the counting of votes had taken place, respondent no. 5 gave an application to the Returning Officer for re-counting of votes indicating certain irregularities in the counting of votes. Admittedly, no objections to the said application were given by the petitioner. The Returning Officer directed for recounting of the votes that had been polled. The Matgarna Paryavekshak, however, only counted two bundles of votes. Subsequent thereto, the petitioner was declared as elected to the post of Gram Pradhan. The respondent no. 5 filed an election petition challenging the election of the petitioner on various grounds including the ground as finds place in the election petition that when the Returning Officer had directed for recounting of votes, the Matgarna Paryavekshak only recounted two bundles which was against the direction issued by the Returning Officer and thus, the recounting of votes was vitiated on this ground alone. Interpolation in records has also been observed. The said ground found favour with the learned Election Tribunal who vide order dated 02.9.2022 directed for recounting of votes and disposed of the election petition. Being aggrieved, the petitioner filed a writ petition but this Court vide order dated 8.9.2022 relegated the petitioner to the remedy of revision as available under the provisions of the Act, 1947. The petitioner filed a revision and the revisional Court vide order dated 22.9.2022 dismissed the revision which entailed the petitioner to file another writ petition before this Court and this Court vide judgment and order dated 22.10.2022 set aside the order passed by the revisional Court and required the revisional Court to decide the matter a fresh expeditiously. In pursuance thereof, the revisional Court vide order impugned dated 3.1.2023 partly allowed the revision filed by the petitioner and set aside the order of the learned Election Tribunal so far as it directed that the records of the election

petition be consigned to records. The revisional Court also restored the election petition to its original number and the revisional Court has further been directed to dispose of the election petition in accordance with law. In pursuance thereof, the learned Election Tribunal vide order impugned dated 23.01.2023 has directed for re-counting to be held on 07.02.2023 and the order dated 02.09.2022 has also been directed to form part of the order dated 23.01.2023.

19. The challenge to the orders impugned have been raised on various grounds as have been indicated above.

20. The first ground of challenge is that no reasons have been recorded by the learned Election Tribunal as to why the re-counting has been directed.

21. The said ground is patently fallacious inasmuch as a perusal of the orders impugned dated 22.09.2022 and 23.01.2023 would indicate that the learned Election Tribunal has considered the fact that the application moved by the respondent no. 5 for the purpose of re-counting of votes had found favour with the Election Officer upon no objection being filed by the petitioner and thereafter directed for a re-counting of votes. The Matgarna Paryavekshak being bound by the order passed by the Returning Officer and for re-counting of votes, only restricted himself to counting of two bundles of votes which thus entailed the petitioner being declared as Gram Pradhan. The reasons which have prevailed on the learned Election Tribunal for directing of re-counting of votes is that when the order of the Returning Officer was for re-counting of the votes as such, the Matgarna Paryavekshak could not have confined himself to counting of only two bundles of votes rather all the votes should have been counted more particularly when no objections were filed by the petitioner to the said application filed by the respondent no. 5. In this view of the matter, this Court does not find the ground of challenge to be valid and accordingly the said ground is rejected.

22. The next ground of challenge is that the doctrine of merger would be applicable and when the revisional Court vide order dated 03.01.2023 had partly allowed the revision consequently, the order dated 02.09.2022 stood merged with the order of the revisional Court dated 03.01.2023 and there would not be any occasion for the learned Election Tribunal to have directed in the order impugned dated 23.01.2023 that the order dated 02.09.2022 shall form part of the order dated 23.01.2023.

23. In this regard, a perusal of the order passed by the revisional Court dated 23.01.2023 would indicate that the revisional Court has not set aside the entire order passed by the learned Election Tribunal dated 02.09.2022 rather only the order by which the learned Election Tribunal had consigned the matter to records had been set aside meaning thereby that it is only part of the order which was set aside and the rest of the order was affirmed. Thus, the doctrine of merger would not be applicable to the entire order of learned Election Tribunal dated 02.09.2022. Accordingly, this ground as raised by the learned counsel for the petitioner is also rejected.

24. Next ground for raising challenge to the orders impugned is that the pleadings in the election petition were casual

pertaining to re-counting and on the basis of such casual pleadings, the order of re-counting could not have been passed.

25. A perusal of the election petition that had been filed by the respondent no. 5 would indicate that the specific ground had been taken by the respondent no. 5 as to why the re-counting was required inasmuch as it was specifically averred that the Returning Officer upon the application filed by the respondent no. 5 had allowed the said application for re-counting but the Matgarna Paryavekshak had only confined himself to re-counting of two bundles of votes. As already indicated above, the Matgarna Paryavekshak was bound by the orders of Returning Officer keeping in view Rule 4 of the Uttar Pradesh Panchayat Raj (Election of Members, Pradhan and Up-Pradhans Rules, 1994 (hereinafter referred to as "Rules, 1994). In this, regard Rule 4 of the Rules, 1994 would be relevant to be considered regarding the powers of the Returning Officer.

26. For the sake of convenience, Rule 4 of the Rules, 1994 is reproduced as under:-

"4. Nirvachan Adhikari- (1) For every Panchayat area, for every election to fill a seat or seats in the Gram Panchayat the District Magistrate shall appoint a Nirvachan Adhikari (Returning Officer) who shall be an officer of the State Government.

Provided that nothing in this rule shall prevent the District Magistrate from appointing the same person to be the Nirvachan Adhikari for more than one Panchayat area.

(2) The Nirvachan Adhikari shall perform the functions required to be performed under this Chapter and it shall be his general duty at any election to do all such acts and things as may be necessary for effectually conducting the election in the manner provided by the Act and these rules.

(3) Without prejudice to the generality of the provisions of sub- rule (2) the State Election Commission may if it so considers expedient, by order direct that such of the powers, duties and functions of the Nirvachan Adhikari under these rules as may be specified by it in general instructions shall be exercised or discharged by the Matdan Adhyaksh at the polling place subject to such restrictions and conditions as may be specified in the order."

27. Considering Rule 4 of the Rules, 1994 it is apparent that it is the Returning Officer who is appointed by the District Magistrate for every election to perform the function required to be performed under Chapter II of the Rules, 1997 and to do all acts and things as may be necessary for effectually conducting the election in the manner provided in the act and the rules.

28. Keeping in view Rule 4 of the Rules 1994, it is thus apparent that being under the control of the Returning Officer it was the duty of the Matgarna Paryavekshak to do all acts and things for effectual conduct of the election as was directed by the Returning Officer and as such, the Matgarna Paryavekshak was required to carry out the directions of the Returning Officer and thus all votes should have been counted as per the directions of the Returning Officer and the same not having been done and a specific ground having been taken in the election petition as such, the learned Election Tribunal was perfectly correct in the eyes of law for having

directed for re-counting of all votes by means of the impugned orders.

29. In this regard, the judgments of the **Uday Chand (supra), Arikala Narasa Reddy (supra) & Amit Narain Rai (supra)** over which reliance have been placed by the learned counsel for the petitioner all indicate that a direction for re-counting of votes can be done and the Court would be justified in ordering a re-count of the ballot papers where the Court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.

30. In this regard, it would be apt to reproduce as to what has been held by the Apex Court in the case of **Uday Chand (supra) :-**

11. Before adverting to the merits of the issue raised by the parties with reference to the statutory provisions, it would be appropriate to bear in mind the salutary principle laid down in the election law that since an order for inspection and re-count of the ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course. Undoubtedly, in the entire election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting are made out.

12. The importance of maintenance of secrecy of ballot papers and the circumstances under which that secrecy can be breached, has been considered by this Court in several cases. ***It would be trite to state that before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements viz.***

(i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and

ii) ***on the basis of evidence adduced in support of the allegations, the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied.***

(Emphasis by the Court)

31. Likewise, the Apex Court in the case of **Arikala Narasa Reddy (supra)** has held as under:-

13. It is a settled legal proposition that the statutory requirements relating to election law have to be strictly adhered to for the reason that an election dispute is a statutory proceeding unknown to the common law and thus, the doctrine of equity, etc. does not apply in such dispute. All the technicalities prescribed/mandated in election law have been provided to safeguard the purity of the election process and courts have a duty to enforce the same with all rigours and not to minimize their operation. A right to be elected is neither a fundamental right nor a common law right, though it may be very fundamental to a democratic set-up of governance. Therefore, answer to every question raised in election dispute is to be solved within the four corners of the statute. The result announced by the Returning Officer leads to formation of a government which requires the stability and continuity as an essential feature in election process and therefore, the counting of ballots is not to be interfered with frequently. More so, secrecy of ballot which is sacrosanct gets

exposed if recounting of votes is made easy. The court has to be more careful when the margin between the contesting candidates is very narrow. "Looking for numerical good fortune or windfall of chance discovery of illegal rejection or reception of ballots must be avoided, as it may tend to a dangerous disorientation which invades the democratic order by providing scope for reopening of declared results". However, a genuine apprehension of mis- count or illegality and other compulsions of justice may require the recourse to a drastic step.

14. Before the court permits the recounting, the following conditions must be satisfied:

(i) The court must be satisfied that a prima facie case is established;

(ii) The material facts and full particulars have been pleaded stating the irregularities in counting of votes;

(iii) A roving and fishing inquiry should not be directed by way of an order to re-count the votes;

(iv) An opportunity should be given to file objection; and

(v) Secrecy of the ballot should be guarded."

(Emphasis by the Court)

32. The Full Bench of this Court in the case of **Ram Adhar Singh (supra)** has held as under:-

"11. In the case of Ram Sewak Yudav v. Hussain Kamil Kidwai AIR 1964 SC 1249, the Supreme Court while dealing with a similar question arising under the Representation of the People Act held that before an authority or court dealing with an election petition is not to look into or direct inspection of ballot papers unless following two conditions co- exist:

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the Petitioner relied in support of his case (the petition meets the requirement of Section 83(1) of the Representation of the People Act regarding contents of the election petition), and

(ii) The Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary."

12. In this connection, the learned Judges of the Supreme Court went on to observe thus:

"But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the Petitioner must be set out with provision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interest of justice require, be granted. But a mere allegation that the Petitioner suspects or believes that there has been an Jim proper reception, refusal or rejection of votes will not be sufficient to support an order for inspection."

13. In the case of Bhabhi v. Sheo Govind AIR 1975 SC 2117, the Supreme Court approved the principles for inspection of ballot papers laid down in Ram Sewak's case (supra) and after noticing its decisions in the cases of Dr. Jagjit Singh v. Giani Kartar Singh : AIR 1966 SC 773, Jitendra Bahadur Singh v. Krishna Behari AIR 1970 SC 276, Shashi Bhusan v. Prof. Balraj Madhok: AIR 1972 SC 1251, Sumitra Devi v. Shri Sheo Shanker Prasad Yadav AIR 1973 SC 215, Beliram Bhalaik v. Jai Behari Lal Kachi AIR SC 283, Baldeo Singh v. Teja Singh : AIR 1975 SC 693 and Suresh Prasad Yedav

v. Jai Prakash Misra : AIR 1975 SC 376, the Court observed thus:

Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a Court can grant inspection, or for that matter sample inspection, of the ballot papers;

(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satis action of the Court regarding the truth of the allegations made for a re-count, and not for the purpose of fishing out materials.

14. The principles laid down in Bhabhi's case (supra) have again been applied and followed by that Court in the case of N. Narayanan v. S. Semalai : AIR 1980 SC 206 wherein it observed thus:

Finally, the entire case law on the subject regarding the circumstances under which recount could be ordered was fully summarised and catelogued by this Court in the case of Bhabhi v. Sheo Govind : 1975 SCR 202 to which one of us (Fazal Ali, J.) was a party and which may be extracted thus:

The Court would be justified in ordering a recount of the ballot papers only where;

(1) the election petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(2) On the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting, and

(3) The court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.

15. This Court has consistently applied aforementioned principles enunciated by the Supreme Court, for looking into and permitting inspection of ballot papers in cases arising under the Representation of the Peoples Act, to similar cases arising under the U.P. Panchyayat Raj Act as well. See Dhanai Prasad v. Sub-Divisional Magistrate, Chunar, District Mirzapur 1974 ALJ 371, Charon Singh v. Sub-Divisional Officer 1974 ALJ 748, Kali Prasad v. Prescribed Authority (SDO), Pratapgarh 1980 ALJ 378 and Mohammad Husain v. S.D.O. Shahabad 1983 AWC 430.

16.....

17.....

18. Applying the principle with regard to inspection of ballot papers enunciated by the Supreme Court in cases arising under the Representation of the People Act to an election petition dealt with under the provisions of the U.P. Panchayat Raj Act, there is no escape from the conclusion that before an authority hearing the election petition under the said Act can be permitted to look into or to direct inspection of the ballot papers, following two conditions must co-exist:

(1) that the petition for setting aside an election contains the grounds on which the election of the Respondent is being questioned as also the summary of the circumstances alleged to justify the election being questioned on such ground; and

(2) the authority is, prima facie, satisfied on the basis of the materials produced before it that there is ground for believing the existence of such ground and that making of such an inspection is imperatively necessary for deciding the dispute and for doing complete justice between the parties."

33. As regards the ground that the revisional Court in one part of the order impugned dated 03.01.2023 has recorded that the revision against the order dated 02.09.2022 is maintainable and in the other part of the order it has been indicated that it is not maintainable, suffice it to say that a perusal of the order passed by the revisional Court would indicate that three points of determination arose before the revisional Court of which ground (a) was that as to whether a revision was maintainable. The finding of this ground has explicitly been given by the revisional Court that the revision against the impugned order was maintainable. The revisional Court while considering the second point for consideration namely the reasonablity of the order of re-counting and as to whether the same could be looked into in the revision only recorded for the purpose of argument that in case the said argument is accepted, the same would tantamount to colourable exercise of revisional jurisdiction which the revisional Court was not vested with. The fact of the matter remains that the revisional Court has held that the revision against the order of the learned Election Tribunal dated 02.09.2022 was maintainable. Accordingly, the said ground is also rejected.

34. So far as the grounds (e) and (f) that the ground in the memo of revision and the judgments which were indicated in the written statement have not been considered by the revisional Court, suffice to say that the issue before the revisional Court was as to whether the ground raised in the election petition made out a case for re-counting of votes as has been directed by the learned Election Tribunal vide order dated 02.09.2022. The grounds as raised in the petition have specifically been considered by the revisional Court as would be apparent from the points of determination framed by it. Thereafter, the revisional Court concluded that the re-counting of votes are means to arrive at the just and proper decision for disposal of election petition on merit. The grounds taken by the learned Election Tribunal in its order impugned for directing for re-counting of votes found favour with the revisional Court. Moreover, the point in issue before the revisional Court was only a short point which already stands settled by the decisions as have been cited above. Sufficient reasons emerge from the order passed by the learned Election Tribunal in the orders dated 02.09.2022 & 23.01.2023

as to why the re-counting has been directed. Thus, this Court does not find any illegality or infirmity with the reasons recorded by the learned Election Tribunal or the revisional Court while directing for a re-counting. Accordingly, the said grounds as taken by the petitioner are also rejected.

35. Keeping in view the aforesaid discussion, no case for interference is made out. The writ petition is dismissed.

36. Learned Standing counsel shall inform about this order to the authorities without waiting for a certified copy of this order.

(2023) 2 ILRA 160
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.01.2023

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE MANISH KUMAR, J.

Writ C No. 6210 of 2022
along with
Writ C No. 6534 of 2022

M/S Rhetoric Technologies Pvt. Ltd. & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Aakash Prasad, Amitav Singh

Counsel for the Respondents:
C.S.C., Ajai Kumar, Ayush Chaudhary, Rakesh Kumar Chaudhary, Vivek Kumar Rai

(A) Constitution of India - Article 226 - Scope of judicial review in contractual matters - process of interpretation of tender document - State government tender - R.F.B. (Request for bid) - clause 13 and 15 of Section 2 - Instructions to bidders, Section 12 - General Conditions of Contract , Section 12(1)(iii) - R.F.B. to be filed along with other technical documents specified in the technical conditions of the Contract , clause-iii - "Bidders Document" , clause 2 (f) - bid document had to be stamped and signed by person duly authorized by Company through its Board resolution - Clause 23 - representation and warranties of the bidders - Clause 8 (f) - documents that have to be submitted along with Technical bid of bidder.

(B) Scope of judicial review in Government tenders - limited - authority which floats the contract or tender and has authored the tender documents is the best judge as to how the documents have to be interpreted - If two interpretations are possible then the interpretation of the author must be accepted - *Principles of equity and natural justice stay at a distance* - interpretation should not be second guessed by a Court in judicial review proceedings - Interference with judgement of expert consultants - issue of technical qualifications of bidder - High Court should not independently evaluate technical bids and financial bids of parties as an Appellate Authority for coming to its own conclusion - unless thresholds of malafide intention to favour someone or bias, arbitrariness, irrationality or perversity are met - if decision taken purely in public interest - Courts ordinarily should exercise judicial restraint. (Para -15, 28, 29)

Transport Department issued a Request for Bid (R.F.B.) - two-stage process - technical evaluation and financial bids - Award of tender - work related to Inspection and Certification (I&C) - commercial vehicles - purpose of certification of road worthiness - challenge - minutes of the meeting - publication of results - R.F.B. prohibited any improvement, correction or alteration of documents - no power of review given to Procuring Authority. (Para -1 to 7)

HELD:- Instructions to bidders (Section 2) clearly stated that bid documents had to be stamped and signed by authorized representatives, and that the Transport Department, Government of U.P. was the Competent Authority. Transport Commissioner was only an Agent of the Government of U.P. . Court limited in its ability to evaluate the Technical qualifications of bidders, as it has already been done by two Experts' Committees constituted by the Competent Authority and the Procuring Authority. (Para -31,36)

Writ Petitions dismissed. (E-7)

List of Cases cited:-

1. Kanhaiyalal Agarwal Vs U.O.I. & ors. , AIR 2002 Supreme Court 2766

2. G. J. Fernandez Vs St. of Karn. & ors. ,1990 (1) SCR 229

3. W.B. St. Electricity Board Vs Patel Engineering Company Ltd & ors., 2001 Vol. 2 SCC page 451

4. M.C.U. & anr. Vs B.V.G. India Ltd & ors. ,2018 Vol. 5 SCC 462

5. N.G. Projects Ltd Vs Vinod Kumar Jain & ors. ,2022 (6) SCC 127

6. Poddar Steel Corp. Vs Ganesh Engineering Works & ors., 1991 (3) SCC 273

7. Agmatel India Pvt. Ltd. Vs Resoursys Telecom & ors. ,2022 (5) SCC 362

8. Galaxy Transport Agencies Vs New J.K. Roadways, Fleet Owners & Transport Contractors, (2021) 16 SCC 808

9. Afcons Infrastructure Ltd Vs Nagpur Metro Rail Corp. Ltd. ,(2016) 16 SCC 818

10. Silppi Constructions Contractors Vs U.O.I.,(2020) 16 SCC 489

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J. &
Hon'ble Manish Kumar, J.)

1. Writ-C No. 6210 of 2022 (M/S M/S Rhetoric Technologies Pvt. Ltd Thru. Authorised Representative And Another vs.State Of U.P. Thru.Prin.Secy.Transport Sectt. And 6 Others is taken along with Writ- C No. 6534 of 2022 (M/S Rosmerta Technologies Ltd. Lucknow Thru. Its Authorized Signatory vs. State Of U.P. Thru. Prin. Secy. Transport Secrt.) as both the writ petitions challenge the same decision taken by the State Government on almost same grounds.

2. The challenge in the writ petitions is to the minutes of the meeting dated 23.06.2022 and also to the publication of results dated 27.07.2022/28.07.2022 to the extent that it qualifies and includes the name of the Consortium of respondent nos. 5, 6 & 7. A further prayer has been made for a direction to the respondent nos. 1 to 4 to proceed with the tender in terms of the recommendations of the Bid Evaluation Committee which was constituted by the Transport Commissioner, copy of whose recommendations were sent by the Transport Commissioner to the State Government for approval.

3. When the Writ- C No. 6210 of 2022 was filed, this Court was pleased to pass a detailed interim order on 12.09.2022 which is being quoted hereinbelow:-

"Sri Vivek Kumar Rai, Advocate has put in appearance on behalf of respondent Nos. 5, 6 and 7.

The instant matter pertains to award of tender for work related to Inspection and Certification (I&C) of the commercial vehicles for the purpose of certification of their road worthiness.

Learned Senior Advocate, Sri Jaideep Narain Mathur, assisted by Sri Aakash Prasad, Shantanoo Saxena and Sri

Amitav Singh, learned counsel representing the petitioners has submitted that the respondent No.5, who is the lead member of consortion selected as the lowest bidder, had not submitted RFB with the bid documents though "bid documents", as defined in Clause 1(iii) of the definition clause of the General Conditions of Contract, means certain documents to be prepared by the bidder under the contract "in addition to the RFB". He has further drawn our attention to the minutes of the Technical Bid Evaluation Committee which after evaluation of the technical bid of participating the bidders had clearly found respondent No.5 not to be technically qualified whereas the said Committee has found the petitioners to be qualified. It is also the argument of the Sri Mathur that as per the terms and conditions any recommendation made by the Technical Committee ought to have been considered by the Commissioner, Transport, U.P. and not by the State Government. He has also drawn our attention to the minutes of the meeting held under the Chairmanship of the Principal Secretary, Transport, a perusal of which reveals that after the recommendation of the Technical Bid Evaluation Committee regarding technical bid of all the participants which was held on 03.06.2022, some representation dated 05.06.2022 was made by the respondent No.5 and it is in the light of the said representation that the matter was considered again by a Committee headed by the Principal Secretary, Transport Department. It has further been argued by Sri Mathur that the recommendation made by the Technical Bid Evaluation Committee, vide its decision taken in the meeting held on 03.06.2022 was yet to be considered by the Transport Commissioner and the said recommendation was never published and thus, it is intriguing as to how this information was leaked to the petitioners which allowed him to make representation dated 05.06.2022. According to the petitioners, the entire bidding process was to be kept confidential and in the instant case the confidentiality has, thus, been breached.

Let instructions on the aforesaid as also on all the issues involved in the writ petition be obtained by the learned State Counsel by tomorrow i.e. 13.09.2022.

List/put up this case tomorrow i.e. 13.09.2022.

We have been informed that pursuant to the completion of the bid process, Letter of Award (LoA) has not yet been received by the respondent No.5. The respondents are accordingly advised not to issue the same or to act upon the same till tomorrow i.e. 13.09.2022."

Thereafter, the matter was taken up on past few occasions but could not be heard on merits and the stay vacation applications filed by the respondents remained pending while interim order was extended from time to time. The State respondents have prayed that the matter to be heard and disposed of expeditiously and it has been heard for the past three days by us.

4. The case as set up by the petitioners is that the Transport Department, Government of U.P. issued a Request for Bid (hereinafter referred to as 'the R.F.B.') for the operation of Inspection and Certification Centre (hereinafter referred to as 'the I & C') in respect of vehicles, at Lucknow, Uttar Pradesh for a period of five years. The R.F.B. prescribes the mode, manner and method of bid submission and the necessary qualifications required for such bidders. The bidding process was to be a two stage process. At the first stage, a technical evaluation had to

be done of all the bidders. Those bidders who were found technically qualified were to be considered for their financial bids. The R.F.B. disabled any improvement, correction or alteration of documents once submitted. All documents had to be on notorized affidavits, there was no power of review given to the Procuring Authority.

5. It has been submitted by learned Senior Advocate, Sri J.N. Mathur assisted by Sri Amitav Singh and Sri Shantanu Saxena, for the petitioner - M/S Rhetoric Technologies Pvt. Ltd that a pre-bid meeting was held on 17.01.2022 which resulted in 49 suggestions being made and clarifications were issued thereafter by the Department. The date of submission of bid was extended after issuance of such corrigendum/addendum. On the last day of submission of bids determined to be 19.04.2022, only six bids were received including that of the Consortium of the petitioner and the Consortium of respondent nos. 5, 6 & 7. A six member Technical Committee was constituted by the Transport Commissioner to evaluate the bids, at the technical stage. The Technical Evaluation Committee met on three dates and the combined minutes of the meeting of the Technical Evaluation Committee were published on 01.06.2022 where the Committee found only three bidders to be qualified including the petitioner- M/S Rhetoric Technologies Pvt. Ltd. It disqualified three bidders including Consortium led by respondent no. 5. On 05.06.2022, the Consortium led by respondent no. 5 sent a representation through e-mail to the Principal Secretary/Additional Chief Secretary, Govt. of U.P. explaining its deficiency and asking for a review of the decision of the Technical Evaluation Committee constituted by the Transport Commissioner.

6. It has been argued by the learned counsel for the petitioner that strict confidentiality had to be maintained by all the bidders not only at the time of submission of their Technical and Financial bids but also all throughout the process of evaluation of the bids and therefore it is incomprehensible as to how the respondent nos. 5 to 7 came to know the reason for rejection of their Technical bids and sent an e-mail to the respondent no. 1. The Principal Secretary, Transport on 23.06.2022 called a meeting of a fresh Technical Evaluation Committee constituted by him, containing two members of the earlier Technical Evaluation Committee and the fresh Committee considered the representation of the Consortium led by respondent no. 5. It has been argued that the Committee so constituted was completely illegal and the process adopted by it was arbitrary as there was no power vested with the State Government to interfere in the tender process at any stage. In excess of the jurisdiction vested in him, the respondent no. 1 constituted the Committee for re-evaluation of Technical bids and against the clear provisions of the R.F.B., it declared the Consortium led by respondent no. 5 as successful along with another bidder who had earlier been declared unsuccessful by the Technical Evaluation Committee constituted by the Transport Commissioner. The results of the technical evaluation of the Committee consituted by the respondent no. 1 was declared on 27.07.2022 and on the same date, the financial bids were opened and the Consortium of respondent no. 5 was declared as L1 even though, it had quoted an abnormally low price for running the I & C.

7. It is the case of the writ petitioner-M/S Rhetoric Technologies Pvt. Ltd. that after the enquiries were made, it came to know of colourable exercise of power by the respondent no. 1 causing undue favour

in respect of respondent nos. 5 to 7. The petitioner wrote a letter to the Chief Minister complaining of such illegalities but no heed was paid and therefore the petitioner approached this Court in this writ petition.

8. It has been submitted by the learned counsel for the petitioner that on the basis of R.F.B., issued by the respondent, copy of which has been filed as Annexure no. 2 to the writ petition, that under Section 2 i.e. Instructions to bidders, clause 2 (f) clearly provided that the bid document had to be stamped and signed by the person duly authorized by the Company through its Board resolution. Any bid not complying with the terms and conditions as set out in the R.F.B. and/or not signed by the authorized person shall be rejected.

9. Learned counsel for the petitioner states that bid documents have not been defined but "Bidders Documents" has been defined. He has referred to General Conditions of Contract contained in Section 12 where in the definitions clause, sub-clause-iii, the "Bidders Document" has been described as meaning, in addition to R.F.B., those documents to be prepared by the bidder under the contract including without limitation, such technical documents specified in the technical conditions of the contract and such data, drawings, designs, information, calculation etc. and all other information and documents including legible data relating to execution of works or otherwise relating to the performance of the Contract.

10. Learned counsel for the petitioner has submitted that since the "Bidders Documents" as defined under Section 12(1)(iii) refers to the R.F.B. to be filed along with other technical documents specified in the technical conditions of the Contract, such R.F.B. was to be stamped and signed and submitted along with the Technical bid and a correct interpretation of such condition was made by the Technical Evaluation Committee of the Transport Commissioner when it disqualified the Consortium led by the respondent no. 5 on the ground that the R.F.B. document was neither signed nor stamped nor submitted along with the Technical documents/Technical bid of the contesting respondents.

11. Learned counsel for the petitioner has also argued that the State Government was not competent to review the minutes of the meeting of the Technical Evaluation Committee constituted by the Transport Commissioner as the 'Competent Authority' has been defined under Section 12 as the Transport Commissioner. It has been submitted that the contract had to be entered between the successful bidder and the Transport Commissioner and the execution of the agreement between successful bidder and the Transport department was to be through the Transport Commissioner as is mentioned in Section 1 i.e. the Introduction to the R.F.B., where the Transport Commissioner has been defined as the 'Procuring Authority' who shall invite the e-tenders for execution from bidders in the prescribed proforma, who shall thereafter constitute a Technical Evaluation Committee on terms and conditions as contained in the R.F.B.

12. Learned counsel for the petitioner has also referred to Clause 23 of the tender document where the representation and warranties of the bidders have been given which relate to the undertaking given by the bidder to the Transport Department, Govt. of U.P. and has argued that since all

the undertakings were to be given in terms and on the conditions as mentioned in the R.F.B., the R.F.B. document itself had to be signed, stamped and submitted by the bidder. He has referred to various conditions regarding payment schedule etc. and also statutory liabilities mentioned in the R.F.B. to argue that unless the bidder signed the R.F.B. and submitted it along with the Technical bid, it could not be taken by the Procuring Authority that he agrees with all the conditions mentioned in the R.F.B. and was ready to be bound by them in case of dispute.

13. Learned counsel for the petitioner has placed reliance upon judgement rendered by the Supreme Court in *Kanhaiyalal Agarwal Vs. Union of India and others* AIR 2002 Supreme Court 2766 (paragraph 6), wherein the Supreme Court has observed that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be essential part of the tender, otherwise it is only a collateral term while placing reliance upon judgement rendered by it in *G. J. Fernandez Vs. State of Karnataka and others* 1990 (1) SCR 229.

14. It has also been argued by learned counsel appearing for the writ petitioner in Writ-C No. 6534 of 2022 that M/S Rosmerta Technologies Ltd. Lucknow has challenged the technical evaluation not only of the petitioner- M/S Rhetoric Technologies Pvt. Ltd but also the respondent nos. 5 to 7, the Consortium led by Hari Filling Centre on merits. Shri Rakesh Kumar Chaudhary, learned counsel appearing for the petitioner in Rosmerta Technologies Limited has pointed out that both the petitioner and respondent nos. 5 lack the technical qualification and the experience that was required to run the I & C and Rosmerta Technologies Limited having already qualified and being found competent to run the I & C on earlier occasion, had necessary experience and competence to do so. He has referred to the abnormally low price quoted by the Consortium led by respondent no. 5 in the financial bid to say that even the Procuring Authority, the Transport Commissioner had expressed a doubt regarding the capability of the respondent no. 5 to stick to its undertaking regarding the low price for running the I & C. He has on the question of competence of the State Government and also on the question of submission of R.F.B. alongwith Technical bid documents adopted the arguments made by Shri J.N. Mathur, learned Senior Advocate on behalf of the Rhetoric Technologies Ltd.

15. Shri Rakesh Chaudhary has placed reliance upon two judgements of the Supreme Court, which are namely:-

i) West Bengal State Electricity Board Vs. Patel Engineering Company Ltd and Others, 2001 Vol. 2 SCC page 451 (Paragraphs 24, 25, 27, 28, 31, 33, 34)

ii) Municipal Corporation Ujjain and Another V. B.V.G. India Ltd and others 2018 Vol. 5 SCC 462 (paragraphs 42,43)

In West Bengal State Electricity Board (supra), the Supreme Court observed that negligent mistakes in bid documents cannot be permitted to be corrected on the basis of equity where the facts indicated that it was not beyond the control of the bidder to correct the error before submission of the bid; and that he was not

vigilant, and that he did not seek to make corrections at the earliest opportunity. Strict adherence to instructions to bidders is essential and cannot be branded as a pedantic approach. The scope of judicial review in Government tenders is limited but it cannot mean permitting the bidder to correct the errors in the bid documents which were not merely clerical or mechanical, when such corrections were not permissible under the Rules governing the process of tender. Also, it was observed that there is no obligation to award the contract to the lowest bidder and it is always open to the Government or its agency to negotiate with the next lowest bidder and to try to reach an economically viable and mutually acceptable price.

In *Municipal Corporation Ujjain* (supra), the Supreme Court had observed that the High Court should not ordinarily interfere with the judgement of expert consultants on the issue of technical qualifications of a bidder when the consultant had taken into consideration various factors including basis of non-performance of the bidder. It is not open to the Court to independently evaluate technical bids and financial bids of the parties as an Appellate Authority for coming to its own conclusion in as much as unless thresholds of malafide intention to favour someone or bias, arbitrariness, irrationality or perversity are met. The Court observed that if the decision is taken purely in public interest, the Courts ordinarily should exercise judicial restraint.

16. Learned counsel appearing for the State-respondents, Shri Rajesh Tiwari, learned Additional Chief Standing Counsel assisted by Shri Nishant Shukla, learned Standing Counsel have argued that both the submissions made by the learned counsel for the petitioner in Rhetoric Technologies regarding the 'Competent Authority' and the technical disqualification regarding requirement of submitting the R.F.B. are untenable on the ground that R.F.B. is only an Invitation to Offer. He has referred to the power of the State Government which has been reserved in the tender document given in Clause 13 and 15 of Section 2 i.e. the Instructions to Bidders. He has referred to Clause 13 (d) and (e) where the Transport Department, Government of U.P. could call for clarification from bidders and the Transport Department, Government of U.P. reserved the right to finalize the technical evaluation by seeking such clarifications and conducting an evaluation before the time of opening of the financial bid. He has also referred to Clause 15 of Section 2 where the Transport Department, Government of U.P. had reserved the right to accept or reject any bid and to annul the tender process and reject all bids, at any time prior to the award of the contract, without assigning any reasons for such acceptance/rejection, without incurring any liability to the affected bidder/bidders or any obligations to inform the affected bidder/bidders of the grounds for the Transport Department, Government of U.P.'s action. Such residual and supervisory right once exercised by the Government of U.P. would not give any cause of action to any of the bidders to claim any compensation for rejection of their bids by the Transport Department, Government of U.P.

17. The learned Counsel appearing for the State respondents has also referred to the definition of Competent Authority as given under the General Conditions of the Contract Section 12, where Competent Authority has been defined as the Transport Department, Government of U.P. and not the Transport Commissioner.

18. Learned Standing Counsel has also referred to definition of R.F.B. as given under Section 12 (1) (XXIX) where R.F.B. has been defined to mean request for bid issued by the Transport Department, Government of U.P. through e-Tender for operation of vehicle, inspection and Certification Centre at Lucknow, and includes the bid document alongwith its annexures, enclosures, schedules, Sections, Forms, Addendum/Corrigendum and clarification etc issued from time to time during the bid process.

19. Learned counsel for the State-respondents has pointed out that it is not the bid document that would include the R.F.B. but it is the other way round i.e. the R.F.B. would include the bid document, and only the bid document had to be submitted by the bidders at the time of technical evaluation and this fact was clarified in the meeting of the Committee that was constituted by the Competent Authority i.e. the State Government, whose minutes have been challenged before this Court.

20. The learned counsel for the State-respondents has led this Court through the Sections which are relevant relating to submission of technical documents. He has referred to Clause 8 (f) which refers to the documents that have to be submitted alongwith Technical bid of bidder. The Table 2 contained under Clause 8 (f) does not call for the R.F.B. to be submitted alongwith the Technical bid.

21. It has been argued by the learned counsel for the State respondent that had it not been required under the tender document to submit the Evaluation Committee's report to the respondent no. 1, for its approval, the Transport Commissioner would not have submitted the recommendations of the Technical Evaluation Committee for the approval of the State Government at all. The result published on 01.06.2022 was only a recommendation of the Technical Evaluation Committee and not a decision taken by the Technical Evaluation Committee and therefore, it was submitted to the Competent Authority for its approval.

22. Replying to the arguments made by Shri Rakesh Kumar Chaudhary, learned counsel for the petitioner-Rosemerta Technologies Ltd. regarding the incompetence of Rhetoric Technologies or respondent no. 5 to 7 in terms of experience, it has been argued that the recommendations of the Technical Evaluation Committee constituted by the Transport Commissioner have not been challenged by the petitioner-Rosmerta Technologies Ltd. and therefore, taking of any other ground to challenge the competence of respondent nos. 5 to 7 to run the I & C, would mean unraveling the entire tender process without the challenge being made to it in the first place.

23. The learned Standing Counsel appearing on behalf of the State Respondents has placed reliance upon judgement rendered by the Supreme Court in *N.G. Projects Ltd versus Vinod Kumar Jain and others* 2022 (6) SCC 127; and paragraphs 13, 14, 15 and 23 thereof. The Supreme Court observed that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. With regard to the interpretation of terms of the contract and the question as to whether a term of the contract is essential or not is to be viewed from the perspective of the employer and

by the employer. The Courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the Courts must give "fair play in the joints" to the Government and Public Sector Undertakings in matters of contract. The Courts must also not interfere where such interference would cause unnecessary loss to the public exchequer and while entertaining the writ petition and/or granting the stay which may ultimately delay the execution of public projects, it must be remembered that it might seriously impede the execution of the projects and disable the State and or its agencies/instrumentalities from discharging their Constitutional and legal obligation towards the citizens. It was observed by the Supreme Court that the High Court should be extremely careful and circumspect in exercise of the discretion while entertaining such petitions and/or while granting stay in such matters. The Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tender. The Court does not have the expertise to examine the terms and conditions of the present economic activities of the State and this limitation should be kept in view. The Courts should be even more reluctant in interfering with the contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The Court should only examine as to whether the decision making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is a total arbitrariness or that the tender has been granted in a malafide manner, the Court should relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional cost on the State and is also against public interest. Any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for the larger public good.

24. Shri Prashant Chandra, learned Senior Advocate assisted by Ms. Radhika Singh, learned Advocate for the respondent nos. 5 to 7 has placed before this Court the Tender document and the requirement therein of a pre-bid Bid Meeting to be held between the prospective bidders and the Officials of the Transport Department. It was in the pre-bid Meeting that clarification was sought by the respondent nos. 5 to 7 whether R.F.B. was to be submitted alongwith the Technical bid and it had come out during the deliberations that only Bid documents had to be submitted duly signed and stamped by the authorized representative of the bidder, and not the R.F.B, and therefore once the Technical Evaluation Committee constituted by the Transport Commissioner made a recommendation against the respondent nos. 5 to 7, the respondent nos. 5 to 7 made a calculated guess that because the R.F.B. had not been submitted perhaps they had been disqualified on this ground alone. He has referred to paragraph 11 of the counter affidavit filed on behalf of the respondent nos. 5 to 7 in the writ petition No. 6210 of 2022 to which no reply has been given by the petitioners- Rhetoric Technologies Pvt. Ltd. He has referred to Clause 7 (b) of the Tender documents and also Clause 8 (f) of Section 2, which is Instructions to bidders. Clause 7 (b) refers to Technical bid submission and it says that the documents shall be filled as per the formats provided in the R.F.B. with

required supporting documents. Technical Bid should be duly signed by the authorized signatory and scanned and uploaded on the E-Tender portal. The only requirement for Technical bid submission as given in Clause 7 (b) was for the bidder to fill in all information in the formats provided in the R.F.B. There was no requirement to submit a signed and stamped copy of the R.F.B also alongwith the Technical bids.

25. Shri Prashant Chandra, learned Senior Advocate has also reiterated the arguments regarding Clause 8 (f) which have been advanced by the learned Standing Counsel appearing for the State respondents, where the documents that had to be filed alongwith the Technical bid have been mentioned in the Form of a Table namely, Table 2, which only requires notorized copies of the original certificates and notorized undertakings to be given by the bidder and notorized affidavits etc., including the letter of undertaking as given in the Format/Form (B) duly signed by the authorized signatory of the bidder concerned. It has been argued that there is no requirement in Table 2 of submission of R.F.B. Twelve documents have been mentioned therein and all such twelve requirements were fulfilled by the respondent nos. 5 to 7.

26. With regard to the competence of the State Government, learned Senior Advocate has adopted the arguments made by the learned Standing Counsel on behalf of the State respondents and has referred to Clause 9 (c) which makes it amply clear that it is the Transport Department, Government of U.P. which had the right reserved to it without limitation, and without incurring any obligation or liability vis-a-vis any bidder, to independently verify and disqualify, reject/accept any or all of the bids.

27. It has also been argued by learned Senior Counsel appearing for the respondent nos. 5 to 7 that the arguments regarding abnormally low priced Financial bid submitted by it has been appropriately answered in the reply submitted by them on 08.08.2022 to the Transport Commissioner as is evident from the recommendation of the Transport Commissioner made in favour of the successful bidder i.e. respondent nos. 5 to 7. It has been argued that in the letter dated 08.08.2022, the respondent nos. 5 to 7 have clarified that they have sufficient experience in various States for running I & C and they wish to enter the State of U.P. also. They have, therefore, quoted a price which is attractive and possibly the lowest, and they have sufficient financial capability to run the I & C as per the requirements of the Transport Department. The respondent nos. 5 to 7 had also clarified that since they were running I & C in various States, they had the technical knowhow and qualification. Moreover, they were also aware of the risk of being blacklisted in one State i.e. the State of U.P. in case they could not fulfill their undertaking to run the I & C successfully for the period as required under the R.F.B and that they would not abandon the running of the Contract mid way and thus, mar their prospects in other States as well. The respondent nos. 5 to 7 had given the Performance Bank Guarantee for running the I & C, and were also aware that such Performance Bank Guarantee may be forfeited in case of failure to run the I & C as per the conditions given under the R.F.B. It is only on the basis of representation/clarifications given by the respondent nos. 5 to 7 through their letter dated 08.08.2022 that the Transport

Commissioner by his letter dated 16.08.2022 had recommended giving of the contract to the Consortium of respondent nos. 5 to 7, it being also the lowest bidder/L-1 as found in the Financial bid.

28. The learned Senior Counsel appearing on behalf of the respondent nos. 5 to 7 has placed reliance upon two judgements of the Supreme Court namely: -

i) *Poddar Steel Corporation versus Ganesh Engineering Works and others* 1991 (3) SCC 273 (paragraph 6);

ii) *Agmatel India Private Limited versus Resoursys Telecom and others* 2022 (5) SCC 362 (Paragraphs 2, 24, 25, 28, 30)

In *Poddar Steel Corporation* (supra), the Supreme Court had observed that it cannot be held as a matter of general proposition that an Authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and he is not entitled to waive even a technical irregularity of little or no significance. The requirements in the tender notice can be classified into two categories - those which lay down the essential conditions of eligibility, and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the Authority issuing the tender may be required to enforce them rigidly. In the other cases, it must be open to the Authority to deviate from and not to insist upon the strict literal compliance of the conditions in appropriate cases.

In *Agmatel* (Supra) the Supreme Court was considering the issue as to whether the High Court was justified in interfering with the view taken by the tender inviting authority. The Supreme Court made observations in paragraphs cited before us to the effect that the scope of judicial review in contractual matters, and particularly in relation to the process of interpretation of tender document, has been considered in various earlier judgements of the Court and it referred to the three Judges Bench decision of the Supreme Court in *Galaxy Transport Agencies Vs. New J.K. Roadways, Fleet Owners and Transport Contractors (2021) 16 SCC 808; and the decision in Afcons Infrastructure Ltd versus Nagpur Metro Rail Corporation Limited* (2016) 16 SCC 818; to say that interference by the High Court in interpretation given by the tender inviting authority of the eligibility terms relating to the requirements to be fulfilled by the bidders should not be lightly interfered with. Supreme Court observed that in a series of judgements it had held that the authority that authors the tender document is the best person to understand and appreciate its requirements and thus its interpretation should not be second guessed by a Court in judicial review proceedings. The Constitutional Courts must defer to the understanding and appreciation of the tender documents by the owner of the project unless there is malafide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or the employer of a tender may give an interpretation to the tender documents that is not acceptable to the Constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

29. The Supreme Court also referred to the judgement in *Silppi Constructions Contractors Vs. Union of India* (2020) 16 SCC 489; and observations made in paragraph 20 thereof to the effect that the authority which floats the contract or tender and has authored the tender documents is

the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The Courts will only interfere to prevent arbitrariness, rationality, bias, Malafides or perversity. *The Court further observed that evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to Award of Contract is bonafide and is in public interest, Courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a Civil Court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review should be resisted. Such interference either interim or final may hold up public works for years, or the relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a Court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:*

(i) whether the process adopted or decision made by the authorities is malafide and intended to favour someone;

Or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say "the decision is such that no responsible authority acting reasonably and in accordance with the relevant law could have reached";

(ii) whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. ..,"

30. This Court has been led through various judgments of Hon'ble Supreme Court by learned counsel appearing for all the parties mention of which has been made only for the purpose of record as this Court is not satisfied on the factual aspect of the matter as argued by the petitioners of Writ-C No. 6210 of 2022 & Writ-C No. 6534 of 2022.

31. This Court on due consideration of the arguments raised by learned counsel for the parties finds also from perusal of the Tender documents that the Instructions to bidders (Section 2) clearly states that only bid documents had to be stamped and signed by duly authorized representative of the Company/bidder and the bid documents did not include the R.F.B. but the R.F.B. included the bid document. Moreover the Transport Department, Government of U.P. is the Competent Authority as defined under the Tender document and the Transport Department, Government of U.P. had reserved the right to independently verify, disqualify/reject or accept any or all of the bids. The Transport Commissioner may have been the Procuring Authority, but the contract had to be entered into by the Transport Commissioner in the name of the Government of U.P. It was only an Agent of the Government of U.P. and when the Principal decides to act in a particular manner on the basis of Tender documents

as interpreted by it, it cannot be said that it exceeded its jurisdiction by constituting a Committee for review of decision taken by the Transport Commissioner.

32. This Court has also gone through the submissions made by the respondent nos. 5 to 7 in their counter affidavit regarding the Pre Bid Meeting that was held amongst the bidders and the State respondents and the specific contentions raised by learned counsel for the respondent nos. 5 to 7 that it had been clarified therein that the R.F.B was not to be submitted along with the bid documents which has not been controverted by either of petitioners i.e. the M/S Rhetoric Technologies Pvt. Ltd and the M/S Rosmerta Technologies Ltd. Lucknow and has to be taken as closure of the issue regarding confidentiality being raised by the petitioners herein.

33. This Court finds that both the arguments raised by the petitioners M/S Rhetoric Technologies Pvt. Ltd being found untenable by this court, its Writ C No. 6210 of 2022 deserves to be dismissed.

34. Since, M/S Rosmerta Technologies Ltd. Lucknow has adopted the arguments of learned counsel for the M/S Rhetoric Technologies Pvt. Ltd with regard to the competence of the State Government to interfere in the matter of evaluation of Technical bids and with regard to the requirement of the R.F.B. to be submitted alongwith the Technical bid documents. Both such arguments having been found untenable, the challenge of M/S Rosmerta Technologies Ltd. Lucknow to the decision taken by the Government on these grounds, also deserves to be rejected.

35. Since, M/S Rosmerta Technologies Ltd. Lucknow has not challenged the recommendation of Technical Evaluation Committee dated 01.06.2022 regarding the experience and other technical qualifications of the respondent nos. 5 to 7, this Court does not find it necessary to make any observations regarding the competence or otherwise of the respondent nos. 5 to 7 in terms of experience.

36. This Court finds itself even otherwise to be limited in its capabilities of evaluating the Technical qualifications of each of the bidders as that has been evaluated already by two Experts' Committees constituted by the Competent Authority and the Procuring Authority.

37. In view of the discussion made hereinabove, both the writ petitions are dismissed.

(2023) 2 ILRA 172
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.01.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ C No. 7616 of 2020

Bharat Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mohan Singh

Counsel for the Respondents:
C.S.C.

(A) Civil Law - The Indian Stamp Act, 1899 - Section 47 A - Assessment - Section 56 - Appeal ,The Uttar Pradesh (Valuation of Property) Rules, 1997 - Rule 7(3)(c) - Prior notice , Uttar Pradesh Revenue Code, 2006 (pari materia Section 143 of U.P.

Zamindari Abolition and Land Reforms Act) - section 80 - Use of holding for Industrial, Commercial or Residential purposes - mere fortuitous circumstance of an assessee being present at the time of spot inspection would be completely irrelevant. (Para -9,10)

Two plots purchased by petitioner - by deed of transfer - treated to be residential in nature - indicated as agriculture in instrument of transfer - Additional stamp duty imposed upon petitioner - spot inspection report by Deputy Registrar - no prior notice - spot inspection conducted after execution of deed – permanent construction on property - portion of properties which was subject matter of sale deed - declared to be non-agricultural by means of order - spot inspection taken place belatedly - opposing parties not denied objection in the writ petition. **(Para -1to12)**

HELD:-Orders impugned are in violation of both Rule 7(3)(c) of the Rules 1997 and dictum of the Court in the case of Ram Khelawan and the Supreme Court in the case of Ambrish Tandaon. Therefore, the orders dated 28th March, 2018 and 11th December, 2019 passed by opposite parties 3 and 2 respectively are set aside. (Para-13 to16)

Writ Petition allowed. (E-7)

List of Cases cited:-

1. Ram Khelawan @ Bachchha Vs St. of U.P. & ors. , 2005 (23) Lucknow Civil Decisions 1681

2. Ganga Ram Vs St. of U.P. & ors. , 2020 (38) LCD 1991

3. Ambrish Tandon & anr. , (2012) 5 SCC 566

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

1. Heard learned counsel for petitioner and learned State Counsel appearing on behalf of opposite parties.

2. Petition has been filed challenging the order dated 28th March, 2018 passed under Section 47-A of Stamp Act 1899 as well as order dated 11th December, 2019 passed under Section 56 of the Act in appeal whereby additional stamp duty has been imposed upon petitioner with regard to two of the plots purchased by him by means of deed of transfer dated 22nd August 2015, which has been treated to be residential in nature although it has been indicated as agriculture in instrument of transfer.

3. Learned counsel for petitioner submits that by means of sale deed dated 22nd August, 2015, portions of four properties indicated in gata Nos. 495 Ka, 818, 819 and 820 in the village in question were purchased by petitioner. It is submitted that since the properties at the time of purchase were being used for agriculture purpose, stamp duty in accordance therewith was paid but thereafter reference under Section 47-A of the Act was made for treating the properties to be residential in nature. It is submitted that reference has been made in view of spot inspection report by Deputy Registrar dated 18th January 2016.

4. Learned counsel for petitioner submits that the authorities have erred in placing reliance on the ex parte spot inspection report dated 18th January, 2016 as well as the subsequent spot inspection report dated 27th September, 2017. Two pronged arguments have been raised against aforesaid spot inspection reports to the effect that aforesaid spot inspection was conducted very much after execution of deed of transfer whereas the same was required to be conducted and nature of property purchased was also required to be considered at the time of execution of deed not thereafter. Another ground taken is with regard to violation of Rule 7(3)(c) of the

U.P. Stamp (Valuation of Property) Rules, 1997 (hereinafter referred to as 'Rules 1997')inasmuch as no prior notice whatsoever was given to petitioner prior to conducting the spot inspection. It is thus submitted that spot inspection having been conducted quite some time after execution of deed, could not have formed the basis of orders impugned since they indicated situation of properties quite subsequent to the purchase of properties and not as on the date of
execution of deed.

5. Learned counsel has also submitted that specific objections had been taken by the petitioner to the spot inspection report to submit that there was no construction on the property as on the date of execution of deed but the said objections have not been adverted to in the impugned order and burden of proof has been incorrectly placed upon the petitioner. Learned counsel also submits that even otherwise spot inspection having not been conducted by the Collector himself in terms of aforesaid Rules, can not be the sole basis of passing of impugned order. On that score, petitioner has placed reliance on the judgment of this court in the case of Ram Khelawan alias Bachchha versus State of U.P. and others reported in 2005 (23) Lucknow Civil Decisions 1681.

6. It is submitted that even the appellate authority has not adverted to pleadings raised in appeal and has also rejected the same only on the basis of spot inspection report.

7. Learned State Counsel has refuted submissions advanced by learned counsel for petitioner with submission that perusal of subsequent inspection report clearly indicates presence of petitioner at the time of spot inspection and therefore submits that due compliance of Rule 7(3)(c) of Rules 1997 was made and due to his presence, there was no occasion to have issued notice for his presence. It is submitted that there is no dichotomy in spot inspection report which clearly indicates permanent construction having been made on the properties which are subject matter of instrument of transfer and therefore no error has been made by the authorities concerned for placing reliance on the aforesaid reports.

8. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it transpires that instrument of transfer is dated 22nd August, 2015 but the first spot inspection report was made only on 18th January, 2016 by the Deputy Registrar whereafter matter was referred under Section 47-A (3) of the Act. A perusal of the said spot inspection report does not indicate presence of petitioner at the time of inspection while indicating permanent constructions having been raised on the property in question. It is also on record that a portion of the properties which was subject matter of sale deed were declared to be non agricultural by means of order passed subsequently on 17th March, 2016 under section 80 of Revenue Code 2006 (pari materia Section 143 of U.P. Zamindari Abolition and Land Reforms Act). It appears that another spot inspection report was submitted on 27th September, 2017; a perusal of which also does not indicate any prior notice to the petitioner before conducting the spot inspection. A specific plea has been raised in paragraph 14 of the writ petition regarding violation of Rule 7 (3)(c) of Rules 1997. Reply to the aforesaid paragraph has been indicated in paragraph 14 of counter affidavit which does not dispute the said fact but only indicates that

since the petitioner was already present at the time of inspection, therefore no notice was required. Learned State counsel has also submitted the same.

9. So far as the aspect of dispensing with provisions of Rule 7 (3) (c) of Rules 1997 is concerned on the ground that assessee was already present at the spot, in the considered opinion of the Court would be inconsequential since the fortuitous circumstance of the assessee being present at time of spot inspection has no relevance with regard to mandatory provisions of Rule 7(3)(c) of Rules 1997 as indicated in the judgment of this Court rendered in the case of Ganga Ram versus State of U.P. and others reported in 2020 (38) LCD 1991.

10. Primary purpose of giving prior notice to an assessee under Rule 7(3)(c) is for his prior intimation that such an inspection would be taking place and that he should be available to object to the actual situation of purchased property when the spot inspection is taking place. As such prior notice is an essential ingredient of mandatory provisions of Rule 7(3)(c) of Rules 1997 and mere fortuitous circumstance of an assessee being present at the time of spot inspection would be completely irrelevant.

11. In the present case, it is clearly indicated not only in objections taken by petitioner but as well as in the petition itself that no prior notice whatsoever was given to petitioner prior to conduct of spot inspection, the said objection remains unattended in the impugned orders and even the specific plea thereto taken in the writ petition has not been specifically denied by the opposite parties. In such circumstance, by opposite parties with regard to violation of Rule 7(3)(c) of Rules, 1997 is writ large.

12. Another aspect of matter requiring consideration is that the impugned orders are based completely only on two spot inspection reports. First aspect of the matter is that spot inspection whether by means of inspection dated 18th January, 2016 or 27th September, 2017 have taken place quite belatedly and were not required to be taken into cognizance for the purposes of indicating actual possession of property in question at the time of execution of sale deed. Hon'ble supreme Court in the case of Ambrish Tandon and another reported in (2012) 5 SCC 566 has held as follows:-

"15. The impugned order of the High Court shows that it was not seriously disputed about the nature of user of the building, namely, residential purpose on the date of the purchase. Merely because the property is being used for commercial purpose at the later point of time may not be a relevant criterion for assessing the value for the purpose of stamp duty. The nature of user is relatable to the date of purchase and it is relevant for the purpose of calculation of stamp duty. Though the matter could have been considered by the appellate authority in view of our reasoning that there was no serious objection and in fact the said alternative remedy was not agitated seriously and in view of the factual details based on which the High Court has quashed the order dated 27-9-2004 passed by the Additional District Collector, we are not inclined to interfere at this juncture."

13. In view of aforesaid, spot inspections taking place extremely belatedly as in the present case, can not be considered a good ground for consideration of actual situation of the property at the time of execution of sale deed.

14. The orders impugned in present petition are clearly in violation of not only Rule 7(3)(c)of the Rules 1997 but are also against the dictum of this Court in the case of Ram Khelawan (supra) as well as that of Hon'ble supreme Court in the case of Ambrish Tandaon (supra).

15. In view of discussions made herein above, impugned orders dated 28th March, 2018 as well as order dated 11th December, 2019 passed by opposite parties 3 and 2 respectively being against law are hereby set aside.

16. Consequently, the writ petition succeeds and is allowed with consequences. Parties to bear their own costs.

(2023) 2 ILRA 176
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.02.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ C No. 16298 of 2021

Manoj Kumar Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shantanu Sharma, Anshuman Sharma, Athar Ali

Counsel for the Respondents:
C.S.C.

(A) Civil Law - Indian Arms Act, 1959 - Section 3 - Licence for acquisition and possession of firearms and ammunition - Section 4 - Licence for acquisition and possession of arms of specified description in certain cases - Section 5 - Licence for manufacture, sale, etc., of arms and ammunition - Section 13 - Grant of licences, Section14- Refusal of licences - grant of firearms license is not a largesse and a person is entitled for grant of said license on his own right - undue restrain on keeping and bearing arms ought not be based on unfounded fear and license is normally to be granted unless there is something adverse. (Para - 7,19)

(B) The Constitution of India - Article 21 - right to life and liberty, which includes its right of security and safety, is a fundamental right of every person - Keeping a fire arm licence for the purpose of personal safety and security is a mode and manner of protection of oneself and enjoyment of this right - Statutory power of authority should be applied in the context of purpose and objective of statute, and should not be whimsical. (Para - 18)

Petitioner (practicing Advocate) applied for Application for Grant Arms License - purpose - personal safety and security of property - no criminal record - application was initially pending with District Magistrate - Court disposed of petition with a direction to consider and decide application - application rejected - appeal filed by petitioner was rejected – hence petition. **(Para - 3,10)**

HELD:-The order impugned dated 07.09.2020, which rejected the application of the petitioner for a firearms license, is against the provisions of Section 14 of the Act, 1959. Reasons contained in the order are beyond the reasons enumerated under Section 14 of the Act, 1959. Orders impugned dated 12.04.2021 and 07.09.2020 quashed. Matter remitted to District Magistrate, to pass an order on the application of the petitioner for grant of firearms license within six weeks. **(Para - 21)**

Writ Petition allowed. (E-7)

List of Cases cited:-

1. Dinesh Kumar Pandey Vs St. of U.P. & ors., Writ-C No.16565 of 2012

2. St. of U.P. & ors. Vs Jaswant Singh Sarna , AIR 1968 All 383

3. Abdul Kafi Vs D.M., Alld. , 2002 (45) ACC 1121

4. Brij Nandan Singh Vs St. of U.P. & anr., 2011 (9) ADJ 135

5. Pawan Kumar Jha Vs St. of U.P. & ors. , 2010 (10) ADJ 782

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. Instant petition has been filed praying for the following main reliefs:-

"1.) Issue a writ, order, direction in the nature of Certiorari to quash the illegal, impugned order dated 12.04.2021 passed by Divisional Commissioner, Prayagraj Division, Prayagraj i.e., opposite party no.2 in Appeal No.01052/2020 in re: Manoj Kumar Yadav Vs. State under section 18, Indian Arms Act, 1959 and illegal, impugned order dated 07.09.2020 passed by District Magistrate, Pratapgarh Le opposite party no.3 regarding Grant of Arms License to Petitioner the illegal impugned order dated 07.09.2020 passed by District Magistrate, Pratapgarh i.e. opposite party no.2 regarding Grant of Arms License Application of Petitioner i.e., Annexure no.1 & 2 respectively, in the interest of justice.

2.) Issue a writ, order, direction in the nature of mandamus commanding Opposite parties to consider the Application for Grant Arms License of the Petitioner and to decide the issue of grant of arms license in accordance with law within a stipulated period in the interest of justice."

3. The case set forth by the petitioner is that he is a practicing lawyer at District Pratapgarh and is a law abiding citizen without any criminal record. He applied for grant of a firearms license for the purpose of personal safety and security of his property. The application of the petitioner initially remained pending with the District Magistrate, Pratapgarh, which required the petitioner to file Writ Petition No.27645 (MS) of 2016 in re: Manoj Kumar vs. State of U.P. and others before this Court. This Court vide order dated 22.01.2020 disposed of the petition with a direction to the District Magistrate to consider and decide the application of the petitioner. In pursuance thereof, vide order impugned dated 07.09.2020, the application of the petitioner for grant of firearms license has been rejected. The appeal filed by the petitioner has also been rejected vide order dated 12.04.2019 and hence the petition.

4. Learned counsel for the petitioner while seeking to challenge the impugned order dated 07.09.2020 whereby the application of the petitioner for grant of firearms license has been rejected contends that a perusal of the order impugned would indicate that the District Magistrate has indicated three reasons while rejecting the application of the petitioner namely (a) no reasons have been assigned by the petitioner as to why he requires the firearms license (b) there is no report of actual requirement of arms license from the authorities, and (c) there is no threat perception to the petitioner.

5. Learned counsel for the petitioner contends that a perusal of the order impugned would indicate that the Inspector Incharge of the Kowali Nagar Pratapgarh as well as the Tehsil authorities have both submitted their reports, as finds place in the

order impugned, whereby it has been indicated that the petitioner is a fit person for being granted an arms license. It is contended that the grounds taken by the District Magistrate while rejecting the application of the petitioner for grant of firearms license are totally alien to the provisions contained in Section 14 of the Arms Act, 1959 (hereinafter referred to as the 'Act, 1959').

6. Elaborating the same, the contention of learned counsel for the petitioner is that Section 14 of the Act, 1959 is couched in negative terms i.e. the circumstances in which refusal of license can be made. He contends that none of the grounds, as have been indicated by the District Magistrate while rejecting the application of the petitioner for grant of firearms license, fall within the ambit of Section 14 of the Act, 1959 and as such on this ground alone the order impugned merits to be quashed.

7. In this regard, reliance has been placed on a judgment of this Court in the case of **Dinesh Kumar Pandey vs. State of U.P. and others** passed in Writ-C No.16565 of 2012 decided on 25.07.2012 to argue that in similar circumstances this Court has categorically held that grant of firearms license is not a largesse and a person is entitled for grant of said license on his own right.

8. On the other hand, learned Standing Counsel on the basis of averments contained in the counter affidavit argues that a perusal of the order impugned would indicate that the competent authority has not found the petitioner to be a fit person for grant of firearms license inasmuch as there is no threat perception against the petitioner which has come up in any of the reports that were called for prior to considering the application of the petitioner for grant of firearms license. It is also contended that various Government Orders have been issued which detail the method on which firearms license is to be granted to a person applying for the same. Thus, it is contended that there is no infirmity or illegality in the order impugned and the writ petition deserves to be dismissed.

9. Heard and perused the records.

10. From perusal of the records it emerges that the petitioner, a practicing Advocate of District Pratapgarh, had applied for grant of firearms license before the competent authority. The same remained pending before the competent authority and the orders have only been passed after a direction issued by the writ Court. Be that as it may, the order impugned dated 07.09.2020 whereby the application for grant of firearms license has been rejected on the grounds namely (a) no reasons have been assigned by the petitioner as to why he requires the firearms license (b) there is no report of actual requirement of arms license from the authorities, and (c) there is no threat perception to the petitioner.

11. The procedure for grant of firearms license and its refusal is contained in the Act, 1959. Section 13 of the Act, 1959 pertains to grant of licenses whereas Section 14 of the Act, 1959 pertains to refusal of licenses. For the sake of convenience, Sections 13 and 14 of the Act, 1959 are reproduced below:-

"13. Grant of licences.—*(1) An application for the grant of a licence under Chapter II shall be made to the licensing authority and shall be in such form, contain*

such particulars and be accompanied by such fee, if any, as may be prescribed.

[(2) On receipt of an application, the licensing authority shall call for the report of the officer in charge of the nearest police station on that application, and such officer shall send his report within the prescribed time.

(2A) The licensing authority, after such inquiry, if any, as it may consider necessary, and after considering the report received under sub-section (2), shall, subject to the other provisions of this Chapter, by order in writing either grant the licence or refuse to grant the same:

Provided that where the officer in charge of the nearest police station does not send his report on the application within the prescribed time, the licensing authority may, if it deems fit, make such order, after the expiry of the prescribed time, without further waiting for that report.]

(3) The licensing authority shall grant--

(a) a licence under section 3 where the licence is required—

(i) by a citizen of India in respect of a smooth bore gun having a barrel of not less than twenty inches in length to be used for protection or sport or in respect of a muzzle loading gun to be used for bona fide crop protection:

Provided that where having regard to the circumstances of any case, the licensing authority is satisfied that a muzzle loading gun will not be sufficient for crop protection, the licensing authority may grant a licence in respect of any other smooth bore gun as aforesaid for such protection, or

(ii) in respect of a point 22 bore rifle or an air rifle to be used for target practice by a member of a rifle club or rifle association licensed or recognised by the Central Government;

(b) a licence under section 3 in any other case or a licence under section 4, section 5, section 6, section 10 or section 12, if the licensing authority is satisfied that the person by whom the licence is required has a good reason for obtaining the same.

14. ***Refusal of licences.—****(1) Notwithstanding anything in section 13, the licensing authority shall refuse to grant—*

(a) a licence under section 3, section 4 or section 5 where such licence is required in respect of any prohibited arms or prohibited ammunition;

(b) a licence in any other case under Chapter II,—

(i) where such licence is required by a person whom the licensing authority has reason to believe--

(1) to be prohibited by this Act or by any other law for the time being in force from acquiring, having in his possession or carrying any arms or ammunition, or

(2) to be of unsound mind, or

(3) to be for any reason unfit for a licence under this Act; or

(ii) where the licensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant such licence.

(2) The licensing authority shall not refuse to grant any licence to any person merely on the ground that such person does not own or possess sufficient property.

(3) Where the licensing authority refuses to grant a licence to any person it shall record in writing the reasons for such refusal and furnish to that person on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement."

12. From perusal of Section 13 of the Act, 1959, it emerges that an application

application for the grant of a license under Chapter II shall be made to the licensing authority and to be in such form, contain such particulars and to be accompanied by a fee. On receipt of the said application, the licensing authority has to call for a report from the officer in charge of the nearest police station and may after inquiry, if any, as it may consider necessary and after considering the report shall, subject to the other provisions of the Act, by order in writing either grant the license or refuse to grant the same.

13. Perusal of Section 14 of the Act, 1959 indicates that notwithstanding anything contained in Section 13 of the Act, 1959, the licensing authority shall refuse to grant a license under Section 3, Section 4 or Section 5 where such license is required in respect of any prohibited arms or prohibited ammunition; where a license is required by a person whom the licensing authority has reason to believe (i) to be prohibited by the Act or any other law from having in his possession or carrying any arms or ammunition (ii) to be of unsound mind or (iii) to be for any reason unfit for a license under the Act; where the licensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant such license. However, the license shall not be refused on the ground that such person does not own or possess sufficient property. Further the licensing authority refusing to grant a license to any person has to record reasons for such refusal.

14. From a perusal of the aforesaid provision, it emerges that though the authority has got power to refuse or grant license yet such refusal would only be confined to the conditions as contained in sub-section (1) of Section 14 of the Act, 1959, as already indicated above. Obviously the reasons as are required to be indicated by the authority as provided in sub-section (3) of Section 14 of the Act, 1959 would have to adhere to the reasons on which refusal can be made i.e. the reasons as indicated in sub-section (1) of Section 14 of the Act, 1959.

15. The reasons contained in the order impugned dated 07.09.2020 do not indicate that any of the reasons on which the refusal of license can be made, as provided under Section 14 of the Act, 1959 are the reasons which have prevailed on the District Magistrate, Pratapgarh while refusing the license rather it is apparent that the reasons which have prevailed on the District Magistrate, Pratapgarh, while refusing to grant of firearms license to the petitioner, are totally alien to the provisions of the Act, 1959. Even if certain Government Orders as have been indicated in the impugned order are to be seen, it goes without saying that the said Government Orders or circulars issued from time to time can not go against the mandatory provisions of Section 14 of the Act, 1959.

16. In this regard provisions of Section 13 and 14 of the Act 1959 were considered by a Division Bench of this Court in the case of **State of U.P. and others vs Jaswant Singh Sarna** reported in **AIR 1968 All 383** wherein it was held as under:

"It is clear that section 13 recognises a right to a licence. Apart from cases where the fire arm is required for protection or sport or crop protection or for target practice in a Rifle Club or Rifle Association, any one is entitled to it if he has good reason for obtaining it. There must be good reason for obtaining the

licence, and that condition regulates the grant of a licence. The requirement has been imposed to prevent an abuse of the right by members of the public. Nonetheless, as soon as the condition is satisfied the grant is obligatory and it is not open to a licensing authority to refuse a licence arbitrarily." (para 8) (emphasis added)"

17. This Court in the case of **Abdul Kafi vs District Magistrate, Allabahad reported in 2002 (45) ACC 1121** has held that the scheme of Act 1959 does not contemplate that licence of firearm shall be granted only if somebody has apprehension to his life from someone and rejection of firearm licence on such ground means an order passed on wholly irrelevant consideration.

18. This Court in the case of **Brij Nandan Singh vs State of U.P. and another reported in 2011 (9) ADJ 135** has held as under:

"A fire arm licence cannot be denied only on conjectures and surmises and without appreciating the objective of statute under which the power is being exercised. Right to life and liberty which includes within its ambit right of security and safety of a person and taking, adopting and pursuing such means as are necessary for such safety and security, is a fundamental right of every person. Keeping a fire arm for the purpose of personal safety and security is a mode and manner of protection of oneself and enjoyment of fundamental right of life and liberty under Article 21 of the Constitution. In the interest of maintenance of law and order certain reasonable restrictions have been imposed on such right but that would not make the fundamental right itself to be dependant on the vagaries of executive authorities. It is not a kind of privilege being granted by Government to individual but only to the extent where grant of fire arm licence to an individual would demonstratively prejudice or adversely affect the maintenance of law and order including peace and tranquility in the society, ordinarily such right shall not be denied....." (Para 7)

"The authorities empowered to grant licence under the Act ought not to behave as if they are part of the old British sovereignty and the applicant is a pity subject whose every demand deserved to be crushed on one or the other pretext. The requirement of an Indian citizen governed by rule of law under the Indian Constitution deserved to be considered with greater respect and honour. The authorities thus shall have considered the requirement of applicant with more pragmatic and practical approach. Unless they find that in the garb of safety and security, applicant in fact intend to use the weapon by obtaining a licence for a purpose other than self defence, it ought not to have been denied such licence. I am not putting the statutory power of authority concerned in a compartment since there may be more than one reasons for exercising statutory discretion against applicant but then that must justify in the context of purpose and objective of statute and necessarily ought not be whimsical."

19. Again this Court in the case of **Pawan Kumar Jha vs State of U.P. and others reported in 2010 (10) ADJ 782** has held that undue restrain on keeping and bearing arms ought not be based on unfounded fear and license is normally to be granted unless there is something adverse.

20. Considering the aforesaid judgements, this Court in the case of **Dinesh Kumar Pandey (supra)** while also

considering the discretion of the licensing authority to grant a firearms license and the various government orders and circulars issued in this regard has held as under:-

"62. I have no hesitation thus in observing that a cumulative and harmonious reading of Sections 13 and 14 leave no manner of doubt that an objective consideration is mandated on the part of licensing authority. He cannot deny grant of license to a person on his sheer whims, caprices, imagination etc. Here it answers the requirement of reasonableness also. The procedure is consistent with the requirement of principle of natural justice. To some extent, it brings into consideration Article 14 of the Constitution. One cannot say that under the garb of the words, "any reason", "unfit for grant of licence", or the absence of a "good reason" for obtaining license, a licensing authority is empowered to deny licence on sheer flimsy grounds, namely, he will grant it only to those who have white hair or blue eyes or having a particular height and like. Similarly, the licensing authority cannot discover within "good reasons" for obtaining licence certain ex facie absurd reasons, namely, if a person belongs to a particular political party, or, that a person if belongs to a particular class or caste, and so on. These considerations are impermissible and cannot be construed a "good reason". In the garb of "good reason" for obtaining licence, one also cannot stretch to a situation which would be virtually impossible to be performed or placed on record.

69. Now the question comes, whether grant of licence by competent authority is like a grant of privilege at par with distribution of State's largess or an indiscreet permission resulting in no interest of the applicant. Whether its grant by an authority depends on sheer whims and caprice, totally unguided and unbridled discretion of such authority or he is bound to act reasonably, fairly, impartially and in accordance with certain norms applicable to all equally, treating all the persons applying for grant of such licence without any discrimination, favour etc.

70. The Court's observations that nobody has a right to possess a firearm but it is a privilege which can be granted in the discretion of licensing authority has been construed and interpreted by licensing authorities as if it is their totally unbridled, uncontrolled and absolute discretion to which they are not answerable to anyone. In this context, the orders are being passed frequently day-after-day resulting in a spate of litigation in the Courts throughout the country. This has necissitated to find out whether the right of equality and fairness under Article 14 would be attracted to judge the correctness of an order of licensing authority when he considers application for licence or in the matter of suspension or cancellation of a firearm licence, already granted.

89. Be that as it may, what discerns from the above discussion in the context of Sections 13, 14 and 17 of Act 1959 and right to possess and carry a firearm may be summarized as under:

(i) No person has a right, fundamental or otherwise, to carry or possess a firearm unless he is permitted to do so under a licence granted by a competent authority under the Act 1959.

(ii) It is a personal privilege of the person who obtains it. The licensing authority cannot treat it as its own privilege to indiscreetly grant or refuse it.

(iii) Considerations on which licence of firearm would be granted or refused is governed strictly by Sections 13 and 14 of Act 1959.

(iv) The factors relevant for grant or refusal of firearm licence travel in a distinct field. Hence the principle of audi alteram partem is inapplicable. But once licence is granted, any power to take away such a right would depend on distinct considerations and would attract the said principle.

(v) An order refusing to grant firearm licence can be reviewed by Courts if passed arbitrarily, capriciously, by non-application of mind, on irrelevant considerations or due to mala fide etc.

(vi) Considerations relevant for cancellation or revocation of firearm licence are governed by Section 17 of Act 1959.

(vii) If the licensing authority is satisfied prima facie, that grounds enumerated in sub section (3) (a) to (e) of Section 17 exist, he can suspend or revoke firearm licence immediately. Such an order however would be "a provisional order".

(viii) Having passed the provisional order the licensing authority is obliged to give an opportunity of show cause to the licence holder i.e. a post decisional hearing and he (licensee) will have a right to submit his objection(s) against such provisional order.

(ix) The licence holder also has option of filing appeal against provisional order as above under Section 18 instead of filing objection before licensing authority.

(x) Where the licence holder submits his objection, licensing authority shall consider the same and pass a reasoned order. Such an order may be either for revocation of licence or suspension. In case final order passed is that of suspension, it shall be for a specified period.

(xi) If against provisional order, licence holder straightaway avails remedy of appeal, question of final order to be passed by licensing authority may not arise since thereafter it is the appellate order which shall hold the field.

(xii) Where the licensing authority has any doubt about the existence of grounds referred in Section 17(3)(a) to (e) of Act 1959 and proceed to make inquiry into existence of such grounds, during this interregnum period of inquiry, he can neither exercise power of suspension of firearm licence nor that of revocation. This view has been reiterated by Larger Bench in Rana Pratap Singh (Supra) after overruling otherwise observations in Balram Singh (Supra).

106. Licensing and appellate authority both have held that the applicant could not show as to what is the special threat which may justify a firearm licence for their personal safety and security. Learned Chief Standing Counsel could not show any provision under the Act which contemplates that firearm licence can be granted only when a person has special kind of threat perception to his life. The term "special threat" is extremely vague and even the learned Chief Standing Counsel could not explain it. This Court required him to tell as to how a person can predict when, where and at what time and from whom his person and property can be or shall be put in peril. Such a forecast is almost impossible. If one would have known a definite threat and plan, as a prudent citizen, he would immediately approach the police making a complaint and thereafter it shall be responsibility of the State to take appropriate action so that such person or planner may not achieve his vicious goal by committing crime but when the firearm licence is required for personal safety in general, the individual's perception of threat to their life and property has to be considered taking into account general law and order situation in

the area, nature of his job and various other factors. It is only a kind of keeping oneself in the State of readiness in case such an exigency of assault etc. on a person and property arises and not otherwise.

107. I specifically required the learned Chief Standing Counsel to explain as to what particulars an applicant must disclose along with his reason of personal safety and security so as to constitute a "good reason" but he failed to give even a single instance in this regard. Very fairly he said that even the concerned officers were not able to tell anything.

108. In my view, the phrase "good reasons" cannot be re-termed to make it "extraordinary reasons", "very good reasons", "outstanding reasons", "extra reasons", etc. When legislature has used certain words, the same must be read, interpreted and applied in their ordinary sense unless such an application renders the provision ambiguous, impracticable or results in wholly unwarranted consequences. It is not the case of respondents that the term "good reason", if read in its ordinary meaning any of such thing is likely to occur. Therefore, the circumstances which would be covered by phrase "good reasons", cannot be excluded in any manner by restricting the aforesaid phrase to a different kind of situation, and that too, either on volition and arbitrary discretion of individual officials or in the hands of Government by issuing an executive order.

109. At this stage, learned Chief Standing Counsel instead of replying to the specific query of the Court directly referred the Government Circulars/orders issued from time to time, filed as Anenxure CA-1 CA-4 to counter affidavit sworn by Sri Hrishikesh Bhaskar Yashod, presently, District Magistrate, Deoria, to contend that it is in the light of guidelines provided therein that licences are not granted to possess or carry a firearm licence unless the licensing authority finds with certainty an imminent apprehension of danger to one's life and liberty.

110. My reading of the above Government Orders (hereinafter referred to as "G.O.") of the Central and State Government shows something different than what has been contended. The earliest G.O. is dated 03.06.1998 issued by the Secretary, Home Department, Government of U.P. to all Commissioners and District Magistrates in the State of U.P. It lays down guidelines as to within what time proceedings shall be completed whenever an application is given under Section 13 for grant of firearm licence. A police report is required to be submitted maximum within twenty days. The aforesaid period can be reduced by District Magistrates in their discretion. The police is required to collect all information as provided in Schedule III of the Arms Rules read with Rule 51. It shall also find out whether the applicant has a criminal history or not. The police station in charge shall submit report through Senior Superintendent of Police or Circle Officer to the District Magistrate. In this regard, necessary instructions shall be issued by the Senior Superintendent of Police/Superintendent of Police and the District Magistrate shall be apprised of the same within a week and till no such instructions are received from the SSP/SP; the Station In Charge shall submit report through seniormost police officer to the District Magistrate. The applications sent to Tehsil from the office of District Magistrate shall proceed through Sub Divisional Magistrate who will also call for a report from Naib Tehsildar and submit his recommendation to District Magistrate latest within one month. Reports by police and Tehsil shall not be forwarded through

special messengers. Firearm applications shall be disposed of as far as possible within three months. Members of Legislative Assembly/ Council and Members of Parliament who have no criminal record and have faced an incident of heinous crime and the Government officials, who require firearm licence for discharge of their duties shall be issued licence by licensing authority after following the procedure prescribed in the statute. Persons engaged in large scale business and apprehend their kidnapping, loot, robbery etc., but possess no firearm licence, shall be considered for grant of firearm licence as per the Government policy. Generally, suitability of the applicants shall be examined after obtaining certificates of income tax and trade tax or other documents from them and after assessing threat perception to them and also the factum that they have no other weapon or method or source of security for protection of their lives. Applications founded on succession due to old age of licence holder shall be examined and appropriate order shall be passed within one month after considering the eligibility of the successor/heir applicant.

111. Evidently, this G.O. has not been complied by the respondents in passing the impugned orders, ex facie, for the reason that while three months' period is prescribed for disposal of firearm application, but in the present case, the licensing authority has taken twelve years period in one case and more than two years' period in the other in taking decision without giving any justification for such extraordinary delay.

112. The second G.O. dated 05.06.1999 of the State Government only draws attention of District Magistrates to Section 13(3)(b) of Act 1959 stating that licensing authority shall ensure that firearm licence is not issued to such persons who do not actually require it. The licence has to be issued only when the licensing authority is satisfied that the applicant has a "good reason" for obtaining the same. It also says that after declaration of election, no new licence shall be issued till the election process is complete.

113. Then comes Government of India's Order dated 18/20.03.2009, which is said to have been circulated by the State Government vide Secretary, Home's letter dated 19.05.2009. The said G.O. also says that firearm licence should be granted to those persons who are found to have a genuine need therefor. Para 3 (i) to (iii) requires that application shall be considered only when it complies with requisite formalities under the statute, i.e., the Act and Rules framed thereunder.

114. However, para 3 (iii)(b) of G.O. (Central) dated 18/20.03.2009 requires the licensing authority not to invoke sub-section (2A) of Section 13 since it is under review. This part of direction is wholly misconceived inasmuch as, so long as the statute is actually not amended, a licensing authority cannot be required to ignore any part thereof on the pretext of 'review' of the statute. Executive orders cannot compel a statutory authority from considering relevant provisions of statute and to that extent the direction in an executive order, would be wholly without jurisdiction and authority.

115. Even otherwise, mere factum of mention of "under review" in a G.O. would not result in amendment of statute itself unless actual amendment is made.

116. Para 3 (v) of the said G.O. says, where the application is given for grant of licence on threat perception basis, the licensing authority may ensure that there is in fact, "imminent and grave

threat" to the life of the applicant. In my view, this applies to a case where an application is submitted by an individual giving reason of threat perception for applying firearm licence. In such a case, he must give details of threat perception. But where the licence is sought on the ground of "personal safety and security", the situation would be different and this part of Central G.O. dated 18/20.03.2009 would have no application at all. There is no other direction in the remaining part of G.O. which may throw any light on the question, up for consideration in the judgment, and rest of the G.O. is of no assistance to the respondents.

117. Then comes the last G.O. (Central) dated 31.3.2010 which contains certain guidelines on various aspects of grant of firearm licence for acquisition/ possession of arms. It is said to have been issued in view to curb proliferation of arms in the country and in supersession of all existing instructions. Para (i) says that Government of India has decided that application for grant of prohibited bore weapons may be considered for the following category of persons:

a) Those persons who face grave and imminent threat to their lives by mere reason of being residents of a geographical area (or areas) where terrorists are most active and/or are held to be prime 'targets' in the eyes of terrorists and/or are known to be inimical to the aims and objects of the terrorists and as such face danger to their lives.

b) Those Government officials who by virtue of the office occupied by them and/or the nature of duties performed by them and/or in due discharge of their official duty have made themselves targets in the eyes of terrorists and are vulnerable to terrorist attack.

c) Those MPs and MLAs including non-officials/private persons who by virtue of having been closely and/ or actively associated with anti-terrorist programmes and policies of the Government or by mere reason of their holding views, political or otherwise, not to the liking of the terrorists, have rendered themselves open to attack by the terrorists.

d) The family members/kith and kin of those who by the very nature of their duties or performance (past or present) or positions occupied in the Government (past or present) or even otherwise for known/unknown reasons have been rendered vulnerable and have come to be regarded by the terrorists as fit targets for elimination."

118. Obviously, the above direction is for grant of "Prohibited Bore Weapons" to certain category of applicants. This Court is not concerned with this part of the G.O. in the present set of cases. Here we are concerned with "Non Prohibited Bore Weapons" for which a licence is required. Here also the G.O. says that a person who may face or perceive grave and imminent threat to his life, may be considered for grant of Non Prohibited Bore arms licence after obtaining assessment of threat faced by the persons, from police authorities. Here again it refers to such cases where an individual specifically complains about apprehension of grave and imminent threat to his life but it does not talk of a situation where somebody has applied only for safety and security from an unanticipated, likely threat or assault to his life and property at any point of time for various reasons including general crime conditions of the area concerned. There is no other part of the above G.O. referred by the learned Chief Standing Counsel which may have application to the cases in hand.

119. ***Thus at the pain of repetition, I may say that my reading of***

the aforesaid Government Orders shows that if an applicant of firearm licence is able to show the existence of factors as enumerated above, he must be granted a firearm licence and should not be denied unless there are other relevant factors regarding his conduct etc. *The aforesaid Government Orders however, nowhere prohibit that in cases which are otherwise within the domain of Section 13 of the Act and fulfil all requisites therein, still they shall not be granted licence unless what has been stated in the aforesaid Government Order(s) is found to exist.* ***I am constrained to observe further that any other view of the matter would render the aforesaid Government Orders ultra vires of Act 1959 for the reason that even the Government by issuing an executive order cannot add or diminish the power of licensing authority which has to be exercised in accordance with Sections 13 and 14 of the Act 1959. Moreover, there is no provision, at least, none has been shown to this Court under Act 1959 which empowers the Government to issue such an executive order so as to control statutory consideration of licensing authority. The efficacy of a statute cannot be expanded or restricted by an executive order.***

120. Now there is a last submission. Learned Chief Standing Counsel apprehended that grant of firearm licence on the mere ground of personal safety and security, if allowed, may flood the entire society with firearms causing great danger to the very society itself. He says that hundreds of applications are received in every district every month for grant of firearm licence and almost all these applications contain one and the same reason, i.e., personal safety and security. He contended that the State has to take care of general law and order and in furtherance thereof grant of firearm licence on mere asking would be against the interest of entire society besides endangering the law and order condition in the State.

121. At first flush, the argument in the nature of apprehending a threat to very sustenance of society appears to be quite attractive, but on deeper consideration, I find it shallow and more in the nature of a threat than substance. It pre-supposes as if everybody is very eager to obtain firearm licence. Though there is no restriction but the ground reality cannot be ignored. If I confine myself to the ground level conditions of State of U.P., population is almost 20 crores whereagainst less than 2.5 lacs of cops are available to look after safety and security of entire State. More than 5% out of this strength is already deployed in the personal service of the class called VIPs who are provided external/extra security in the form of Shadow, Gunner, Escorts, etc. People's representatives no sooner they are elected becomes so vulnerable to the society that immediately they demand and are provided extra security from their own people who have elected them. The strength of Indian Administrative Service and Indian Police Service of U.P. Cadre is more than 1500. Almost every member of these services is provided a personal security officer. Similarly there are officials including Judicial Officers having extra/external security. In majority of these cases there is no study, no investigation, no inquiry about any perception of threat level justifying extra security. Many a times it is provided for political or other considerations. In very rare cases threat perceptions from criminals, unsocial elements, terrorists etc. actually exist where extra security would be justified but for majority of people belonging to this category, it has become

more a status symbol than a mode of safety and security. Law and order situation in the State cannot boast good or satisfactory. The number of crimes committed but remained unearthed are much large in number than those which are investigated and worked out. The control of unauthorised and illicit arms is almost negligible in the State. In the recent past even protectors have proved to be serious offenders and violators of law. A common man has all perceptions of fear and fright to his person and property. The apprehension about safety cannot be said unfounded in general. However, that itself may or may not justify grant of firearm licence to all such persons who may apply but one thing is very clear that a large majority of the State is living in such a pathetic financial conditions that they find it difficult to meet two square meals. The desire for possessing a firearm licence or purchasing a firearm for these persons is a daydream. They cannot even think of it.

122. The above observations made by this Court are fortified from what has been said by a Division Bench of this Court in Gayur Hasan Vs. State of U.P. and others, 2008(10) ADJ 575 decided on 2011.2008 in paragraphs no.14, 15 and 16 which which would be useful to reproduce as under:

"14. Before parting, however, we find it obligatory on our part to record our dissatisfaction and anguish on the system of providing gunners/security personnels to individuals in the manner it has been implemented while the entire State is reeling under a very difficult law and order situation, not of ordinary kind but of high risk due to large scale terrorist and other activists movement and operations. The State is under a constitutional obligation to provide adequate security to each and every individual resident irrespective of his caste, creed, religion, status, position etc. Life of the most ordinary person is equally important as that of a person holding a high position in the State. We cannot treat ordinary people like ginny pigs whose death only results in number but it is a loss to the nation. Every individual, howsoever ordinary man he is, is an asset to the State. It is the most pious and solemn obligation of the State to take all possible steps to protect him. The State must inspire and instil full confidence in every individual that his life and liberty is secured from all kinds of scrupulous activities and he can enjoy his constitutional right enshrined under Article 21 without any extra risk, fear etc. The population of the State of U.P. when is already exceeding 20 crores, the number of people employed in security forces namely Police Force is extremely inadequate. As we are informed the entire police force in the State of U.P. has less than 2 lacs of people. Meaning thereby on every 1000 and more persons only one police personnel is available to take care of their security. In such circumstances, if the State withdraw a high number of security personnels for the purpose of providing individual security cover that would be like putting the common and ordinary man at enhanced risk to his life and liberty at the cost of individual security. This can neither be appreciated nor is consistent with the constitutional scheme which treats every individual equal so far as the question of his life and liberty is concerned. Even a little Indian, as said by Hon'ble Krishna Iyer, J. is entitled to be treated at par with the mightiest one. The individual security may be necessary in a very few exceptional cases but it cannot be at the cost of collective security of the common man.."

21. Keeping in view the aforesaid discussion as well as the judgments of this

Court in the case of **Dinesh Kumar Pandey (supra), Jaswant Singh Sarna (supra), Abdul Kafi (supra), Brij Nandan Singh (supra) and Pawan Kumar Jha (supra)** it is apparent that the order impugned dated 07.09.2020, whereby the competent authority has rejected the application of the petitioner for grant of firearms license, is clearly against the provisions of Section 14 of the Act, 1959. The reasons contained in the order impugned are also beyond the reasons as have been enumerated under Section 14 of the Act, 1959. This aspect of the matter has also not been considered by the appellate authority while rejecting the appeal of the petitioner vide his order dated 12.04.2021. Consequently, the writ petition deserves to be allowed and is **allowed.** The orders impugned dated 12.04.2021 and 07.09.2020, copies of which are Annexures 1 and 2 respectively to the writ petition, are quashed. The matter is remitted to the District Magistrate, Pratapgarh, to pass an order on the application of the petitioner for grant of firearms license within a period of six weeks from the date of receipt of a certified copy of this order, keeping in view the observations made above.

(2023) 2 ILRA 189
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ C No. 25066 of 2022
Connected With
Writ C No. 25115 of 2022

Meena Pandey ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Tarun Agrawal, Sri Ravi Kant (Sr. Advocate)

Counsel for the Respondents:
A.S.G.I., Sri Sanjay Kumar Om

(A) Civil Law - The Indian Easements Act, 1882 - Section 60 - License when revocable - The Government of India Act, 1833 - Section 43 - Title in the land continues to vest in Union of India - Grantee only enjoys the occupancy rights under the license - permitted to raise permanent structure, which alone can be transferred by him and not the land - The Union of India retains unfettered right of resumption any time by giving one month notice - Determination of the amount or value of building is a ministerial act and payment thereof is the resultant consequence - not a condition precedent for serving a valid notice of resumption. (Para - 8,14,)

Petitioner raised permanent structure over land - which was granted license - effect - Resumption notice upon petitioner - to resume land in question - constructions existing over it - possession of land - Old Grant terms - contained in Governor General-in-Council Order (G.G.O.).**(Para - 1 to 9)**

HELD:-GGO No.179 was a statutory exercise and an existing law. Entitled to build permanent structure .Determination of value of the construction and its payment was not a condition precedent for resuming the land and consequently the resumption notices cannot be said to be invalid. (Para -15,17)

Petition dismissed. (E-7)

List of Cases cited:-

1. Usha Kapoor & ors. Vs G.O.I. & ors., (2014) 16 SCC 481

2. Ganga Sahai Vs Badrul Islam, AIR (29) 1942 AllD 330

3. Senior Superintendent, R.M.S. Cochin & Anr. Vs K.V. Gopinath, Sorter, (1973) 3 SCC 867

4. Chotey Lal Vs Mt. Durga Bai, AIR 1950 Alld. 661

5. U.O.I. Vs Harish Chand Anand, AIR 1996 (SC) 203

6. U.O.I. Vs Tek Chand, (1999) 3 SCC 565

7. Raj Singh Vs U.O.I., AIR 1973 Del 169

8. C.E.O. Vs Surendra Kumar Vakil & ors. , 1993 (3) SCC 555

9. Mirza Mohd. Hasan Vs Buddhu, AIR 1932 AII.32

10. Nabi Mahomed Vs Bhagwat Prasad Shukul, 1931 ALJ 649

11. Chotey Lal Vs Mt. Durga Bai, AIR 1950 AII 661

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. These petitions call in question the resumption notices dated 1.7.2022, issued by the Director General, Defence Estate, Ministry of Defence, Government of India, New Delhi (respondent no. 1) acting on behalf of the President of India. Thereby, the possession of the land held by the petitioners on Old Grant terms was sought to be resumed upon expiry of one month from the date of notice, along with the structures built over it. As the petitions involve similar issues of facts and law, therefore both the petitions were heard together and are being decided by this common judgment.

Writ - C No. 25066 of 2022 :

2. Ganga Prasad, the predecessor-in-interest of the petitioner, enjoyed a grant in pursuance of an Agreement dated 27.10.1892 under the Old Grant terms, contained in Governor General-in-Council Order No. 179 dated 12.09.1836 (for short, referred to as "GGO No. 179'). He raised pukka constructions over the said land. It bears Bungalow No. 8, Ponappa Road, General Land Register (GLR) Survey No. 122, New Cantt., Allahabad (Prayagraj) and is situated within the limits of the Military Cantonment. It is alleged that Ganga Prasad executed a will dated 12.11.1953 in favour of his wife Rajwanti Devi, bequeathing a limited interest. On her death on 18.5.1994, her interest in the property devolved on her nephew Krishna Dwivedi. The petitioner is daughter-in-law of Krishna Dwivedi. Krishna Dwivedi, during his lifetime, inducted Defence Estate Officer as a tenant in the property in question. It is alleged that SCC Suit No. 34 of 2004 is pending at the behest of the petitioner against respondent no. 3 for eviction and recovery of arrears of rent. It is also alleged that getting annoyed thereby, respondent no. 2 served the impugned resumption notice upon the petitioner, seeking to resume the land in question and the constructions existing over it, in exercise of power under GGO No. 179 dated 12.9.1836.

Writ - C No. 25115 of 2022 :

3. The property in dispute in the instant case is Bungalow No. 1, Ashoka Road, General Land Register (GLR) Survey No. 122, New Cantt., Allahabad (Prayagraj). It was also settled with Ganga Prasad under the Old Grant terms contained in Governor General-in-Council order No. 179 dated 12.09.1836 (GGO No. 179). It devolved upon Krishna Dwivedi in the same manner. In the said property, Krishna Dwivedi inducted Accounts Officer, Allahabad Circle, Ministry of Defence, as

tenant. SCC Suit No. 79 of 2004 was filed by the petitioner, who is son of Krishna Dwivedi for recovery of arrears of rent and eviction. It was decreed on 1.8.2009 and thereafter a revision filed against the said judgment and decree of JSCC was also dismissed. The matter is pending in Writ - C No. 46076 of 2011, under Article 227 of the Constitution, before this court and an interim order is in operation in favour of the respondents. During pendency of the said writ petition, the impugned resumption notice dated 1.7.2022 was served upon the petitioner.

Submissions

4. Sri Ravi Kant, learned Senior Counsel, appearing for the petitioners in both the cases, submitted that: -

(a) The status of the grantees, i.e. the petitioners, is that of licensee and not tenant. The predecessor-in-interest of the petitioners have executed work of permanent character and incurred expenses in its execution and therefore, the license had become irrevocable under Section 60 of the Indian Easements Act, 1882 (for short "the Act'). The notice seeking to resume the land in dispute is therefore void in the eyes of law. In support of his submission, he has placed reliance on the judgment of Supreme Court in **Usha Kapoor and Others v. Government of India and Others1** and that of this Court in **Ganga Sahai v. Badrul Islam2.**

(b) Under Clause 6 of GGO No. 179, the power of resumption can be exercised upon payment of the value of building, as may have been erected. The compensation amount has to be offered along with the notice of resumption, while in the instant case, it has not been done. Only an assurance was given that as and when the Committee, specified in the notice, determines the amount of compensation, it will be paid. Consequently, the notice is invalid. In support of his contention, he has placed reliance on the judgment of the Supreme Court in **Senior Superintendent, R.M.S. Cochin and Another vs. K.V. Gopinath, Sorter3.**

(c) A large number of other similarly situated lands in close proximity of the land in dispute, have not been resumed and further some of the properties resumed in the past had not been utilized for the purpose for which resumption was made and this clearly reveals that the resumption of the land in dispute was a result of arbitrary exercise of power, violative of Articles 13, 14 and 21 of the Constitution of India.

Per contra, Sri Sanjay Kumar Om, learned counsel appearing for the respondents, submitted that: -

(a) Under GGO No. 179 dated 12.9.1836, only limited rights were conferred in favour of the predecessor-in-interest of the petitioner. It was specifically provided that the power of resumption of the land in dispute would remain with the grantor and therefore, Section 60 of the Indian Easement Act. 1882 will have no application. In support of his submission, he has placed reliance on the judgments of this Court in **Chotey Lal vs. Mt. Durga Bai4** and **Ganga Sahai vs. Badrul Islam** (supra).

(b) The determination of compensation of the value of building erected on the land in question and its payment is permissible after the notice of resumption is given, being ministerial acts, as held by the Supreme Court in **Union of India vs. Harish Chand Anand5.**

(c) The possession of the land in dispute was taken on 31.8.2022 and is

being presently used by the Union of India for running of its offices. The allegation that there has been discrimination, is not correct, as resumption of any particular land is based on several factors, taking into account public purpose and there is no violation of any constitutional or statutory provision while resuming the land. The allegation that some other land, resumed in the past, have not been utilized for any public purpose, is incorrect and further, it will not have any effect on the validity of the resumption notices, impugned herein.

(d) The payment of compensation will be made as soon as the amount is determined by the Committee, after hearing the petitioners.

ANALYSIS

Old Grant - Nature of Rights

5. We first proceed to examine the nature of rights conferred to the grantee under the grant. Admittedly, the grant was "old grant' regulated by Order No. 179 issued by the Governor General-in-Council dated 12.9.1836. In **Union of India vs. Tek Chand6**, the Supreme Court had approved the view taken by the Delhi High Court in **Raj Singh vs. Union of India7**, wherein GGO No. 179 was held to be a statutory exercise made under Section 43 of the Government of India Act, 1833. The relevant part of GGO No. 179 dated 12.9.1836 is extracted below: -

6. Conditions of occupancy : No ground will be granted except on the following conditions, which are to be subscribed by every grantee as well as by those to whom his grant may subsequently be transferred:-

1. Resumption of land. The Government to retain the power of resumption at any time on giving one months' notice and paying the value of such buildings as may have been authorised to be erected.

2. Land belongs to Government. Land cannot be sold by grantee.

Transfer of houses between military officers.

The ground, being in every case the property of Government, cannot be sold by the grantee; but houses or other property thereon situated may be transferred by one military or Medical Officer to another without restriction except in the case of reliefs, when, if required, the terms of sale or transfer are to be adjusted by a Committee of Arbitration.

3. Arbitration in case of transfer on relief. Transfer of houses to civilian. If the ground has been built upon, the buildings are not to be disposed of to any person, of whatever description, who does not belong to the army, until the consent of the Officer Commanding the Station shall have been previously obtained under his hand.

4. Transfer to native. When it is proposed, with the consent of the General Officer, to transfer possession to a native, should the value of the house, buildings or property to be so transferred exceed Rs. 5000, the sale must not be effected until the sanction of Government shall have been obtained through His Excellency the Commander-in-Chief.

7. Houses claimable for purchase or hire at option of owner. Committee of Arbitration. All houses in a military cantonment being the property of persons not belonging to the army, which may be deemed by the Commanding Officer of the station suitable, from their locality, for the accommodation of Officers, shall be claimable for purchase or for hire at the option of the owner, in the former case at a valuation, and in the latter at a rent, to be fixed, in case of the parties disagreeing by a

Committee of Arbitration constituted as follows:

Note :- In this clause the following words were substituted by G.. by the President of the council of India in Council No. 700 dated 3rd July 1855 for the words "being the property of persons not belonging to the army".

"not being occupied by a person belonging to the army on duty, at the station, or whose residence therein may be authorised by Government".

"7. Power to require owner to let house to Military Officer. The owner of any house in a military cantonment not occupied by person belonging of his agent shall not be resident within the cantonment or in its vicinity, shall be taken to mean an official notification dated 14 day before the day on which the committee is to assemble, it will be duty of the commanding officer to nominate a member of the committee shall thereupon proceed to arbitration".

Note - "One month" was substituted for "14 days in paragraph 2 above, by G.O. By the G..-in-c., No. 174, dated 5th August, 1840."

6. The nature of rights which were conferred to a grantee under GGO No. 179 was considered by the Supreme Court in **Chief Executive Officer vs. Surendra Kumar Vakil & Others8.** It has been held that thereunder, the ownership remains with the Government and the land cannot be sold by a grantee. The original grantee is given right to build permanent structure over the land and which only can be transferred by him. Where the transfer is to a military personnel, there was no restriction, but in case of a transfer to a civilian, a prior permission was required from the Officer Commanding the Station. The Supreme Court also referred to the book *Cantonment Laws* by J.P. Mittal, dealing with the subject. It has been noted that the "Old Grant', was a species of land tenure. The primary object of the grant was to meet the need of residential accommodation of the military officers near their place of duty. In due course of time, the civilians were also encouraged to build bungalows over government lands, subject to restriction that they will not have any right in the land and it would be subject to resumption anytime.

7. In **Usha Kapoor and others** (supra), the Supreme Court had held that the grantee of rights under GGO No. 179 enjoys only possessory or occupancy rights in respect of the structure built by him. The terms of the grant is statutory in nature. The title in the land continues to vest in the Union of India and therefore, it continues to enjoy the power of resumption. The observations are as follows: -

"13. The decision of this Court in *Chief Executive Officer vs. Surendra Kumar Vakil* also considered the legal effect of the entries in the G.L.R. which Register is required to be maintained by the Military Estates Officer of the Cantonment under the provisions of the Cantonment Land Administrative Rules framed in exercise of power under Section 280 of the Cantonment Act, 1924. The General Land Register maintained by the Cantonment Board under the Cantonment Act and the Rules framed thereunder is a public document and the entries therein are conclusive evidence of title. This is the view expressed by this Court in two other decisions, namely, *Union of India vs. Ibrahim Uddin & Anr. and Union of India & Ors. vs. Kamla Verma*, apart from the decision *in Chief Executive Officer v. Surendra Kumar Vakil*. The reference to the nature of the holding i.e. old grant and the

nature of rights of the holder i.e. occupancy rights, in the G.L.R. extracted above, in our considered view, is conclusive of the fact that the land is covered by an old grant and the rights enjoyed by the appellants were mere possessory or occupancy rights in respect of the structures thereon. The terms of such grants being statutory and the same having vested title of the land in the UOI with the power of resumption, the impugned notices dated 14th December, 2001 and 5th February, 2002 must be acknowledged to be legal and valid."

8. The consistent opinion of the Supreme Court while interpreting GGO No. 179 is that title in the land continues to vest in Union of India. The grantee only enjoys the occupancy rights under the license. He is permitted to raise permanent structure, which alone can be transferred by him and not the land. The Union of India retains unfettered right of resumption any time by giving one month notice.

Effect of Section 60 of the Easement Act

9. We now proceed to examine the second aspect, i.e. what would be the effect of the petitioner having raised permanent structure over land in respect of which license was granted. Indisputably the structure built was a permanent structure. Section 60 of the Easement Act reads as follows: -

"60. License when revocable.-- A license may be revoked by the grantor, unless--

(a) it is coupled with a transfer of property and such transfer is in force;

(b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution."

10. We have already adverted to the relevant Clause of GGO No. 179 and we have noted that the grantor while granting right to the grantee to raise permanent structure, had retained with itself the right of resumption. The grantee had specifically agreed to the aforesaid term of the Grant while accepting the grant. It had brought into existence a binding contract between the parties, apart from the statutory force that inheres in the GGO No. 179. In **Mirza Mohammad Hasan vs. Buddhu9**, it was held that there is no bar under any law which precludes a party from surrendering land, although there may be a structure standing thereon. This principle has been relied upon by this Court in **Ganga Sahai** (supra). In that case, the defendant had executed a *kirayanama* under which he was entitled to raise constructions. He had, however, specifically agreed that whenever the landlord would require the land, he would vacate it. The question relating to extension of benefit of Section 60 of the Act to the defendant was decided by holding that he having agreed to a term contrary to the provisions of Section 60 of the Easement Act cannot claim benefit of the same. While taking the said view, the learned Judge has placed reliance on two previous decisions of this Court in **Mirza Mohammad Hasan** (supra) and **Nabi Mahomed vs. Bhagwat Prasad Shukul10**.The relevant paragraph from the judgment is extracted below: -

"Section 60, Easements Act, was pleaded by the defendant throughout, and I may concede for the defendant that the construction which has been built upon the premises is a work of a permanent character within the meaning of that expression in Section 60, Easement Act. I agree, however, with Mohammad Ismail, J. in what he said in AIR 1938 All. 32 at page 34:

"Again, I have not been referred to any provision of law which precludes a party from binding itself to surrender land, although there may be a construction of a permanent character standing thereon."

In 1931 A.L.J. 649 a Bench of this Court, of which I was a member said :

"In the absence of any express term to the contrary, the case would come under Section 60, Easements Act, under which a license cannot be revoked when the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution."

It was clearly recognized in this case that a contract to the contrary would disentitle the licensee from deriving advantage conferred by section 60, Easements Act, and in the present case, the defendant has, in terms expressed in unambiguous language, given out that the landlord would have the right to get the site vacated whenever he so chose."

11. Again, in **Chotey Lal vs. Mt. Durga Bai11**, wherein somewhat similar situation arose, it was held by this Court that the benefit of Section 60 of the Easement Act would not be available to a grantee who has entered the grant knowing well that after her death her heirs would not be left with any right. In the said case, one Mussamat Kallo was the maid servant of the plaintiff. She was permitted to construct a house on the disputed site on the condition that the right of possession was for her lifetime only and upon her death the plaintiff would be entitled to the possession of the site. After the death of Mussamat Kallo, her heirs resisted handing over of possession to the plaintiff, compelling him to file a suit for ejectment. In the aforesaid backdrop, the law as noted above was laid down. The decree of eviction passed by the trial court was upheld. It has been held that the grantee would be bound by the undertaking given by him at the time of accepting the license and her heirs would be precluded from claiming benefit of Section 60 of the Easement Act.

12. We have already noted the terms of the grant in favour of the predecessor in title of the petitioner. Clause 6 thereof specifically provided that the Government would retain the power of resumption and the said power could be exercised any time on giving one month notice. The power of resumption would not get diluted in any manner by the fact that the grantee was given right to raise permanent structure. The petitioner therefore is bound by the stipulations contained in this behalf in GGO No. 179 and cannot derive any advantage out of Section 60 of the Easement Act. The argument is devoid of substance and hence rejected.

Whether payment of compensation alongwith notice necessary

13. Coming to the issue as to whether the resumption notice would be rendered illegal as the respondents have not offered compensation along with the impugned notice, the reliance placed by learned counsel for the petitioner on the judgment in case of **Senior Superintendent, R.M.S. Cochin** (supra), would be of no help. In the said case, the Supreme Court was interpreting a statutory provision relating to termination of service of a government servant. Thereunder, the Government was given power to terminate service at any time by giving one month notice. In case the Government decides to terminate the service forthwith it had to pay a sum equivalent to one month pay plus allowances in lieu of the notice. While interpreting the said clause, it was held that

payment of one month pay plus allowances, was a condition for termination of service forthwith and the said requirement could not be dispensed with. In the said judgment itself, another statutory provision, although covering a similar situation but differently worded, was also considered. It was held that having regard to the language of the said statutory provision, payment in lieu of notice was not a condition precedent for valid termination of the service although the government servant would be entitled to the same in due course.

14. In fact, we may not have to take assistance of the precedents rendered by the Supreme Court on service jurisprudence, as the issue in hand is directly covered by judgment of Supreme Court in **Union of India vs. Harish Chand Anand** (supra) wherein the Supreme Court had decided exactly the same issue in context of GGO No. 179 dated 12.9.1836. It has been held that the determination of the amount or value of building is a ministerial act and payment thereof is the resultant consequence. It is not a condition precedent for serving a valid notice of resumption. The law laid down in this regard in paragraph 6 of the Law Report is extracted below: -

"6. It would appear that detailed instructions in that behalf were made in the Standing Order No.241 which was produced before the Division Bench of the High Court of Allahabad in which Military Engineer was instructed to evaluate the value of the building which was resumed by the Government for payment of the amount to the erstwhile licensee. We are not concerned in this appeal as to the method of valuation. Suffice it to state that the Order No.241 though does not contemplate of issuing prior notice to erstwhile licensee whose licence has been determined under Clause I of the Grant, before determination of the actual amount, the erstwhile grantee is entitled to a notice, so that the grantee would be at liberty to place before the competent authority all relevant material for determining the value of the building and for payment of the amount thereof. It is seen that it is not a condition precedent to determine, at the first instance, the compensation after giving an opportunity; make payment thereof and then to resume the property. What is a condition precedent is issuance of one month's notice and on expiry thereof the Government is entitled to resume the land. The amount is to be determined as required under the relevant provisions after giving opportunity and which could be done thereafter. After all, the property would be resumed for public use and determination of value of the building erected is a ministerial act and payment thereof is the resultant consequence. This process would take some time and if the reasoning of the High Court of Allahabad is given effect to, it would defeat the public purpose. The view of the Delhi High Court is consistent with the scheme and appears to be pragmatic and realistic. The High Court, therefore, was not right in its conclusion that it is a condition precedent to determine the amount of the value of the building in the first instance and payment thereof before resumption of the property."

(emphasis supplied by us)

15. It is thus clear that the determination of value of the construction and its payment was not a condition precedent for resuming the land and consequently the resumption notices cannot be said to be invalid on the aforesaid ground.

Plea of misuse of power of resumption

16. It was urged that the respondents had, in like manner, got vacated several lands, but which are still lying unutilized.

However, we find no force in the contention. So far as the disputed lands are concerned, it is an admitted fact that Government offices are already being run therefrom. It is also not disputed that the respondents had taken possession of the lands in pursuance of impugned notices of resumption and that they continue to run their offices.

Conclusion

17. GGO No.179 was a statutory exercise and an existing law. The rights conferred thereunder to a grantee was a species of land tenure where the grantee was only conferred with possessory rights over the land. He was entitled to build permanent structure, which he could also transfer subject to certain restrictions, but title in the land continued to vest in the Union of India, with unfettered right to resume any time for public purpose by serving a month's notice. The payment of compensation was not a condition precedent for valid resumption of land. It was a ministerial act and payment, a resultant consequence.

18. As a result of the aforesaid discussion, there is no merit in the petitions. The same are accordingly dismissed, but without any order as to costs.

(2023) 2 ILRA 197
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ C No. 41628 of 2011

Smt. Kalawati Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri V.B. Khare, Sri A.K. Shukla

Counsel for the Respondents:
C.S.C., Sri Ashish Kumar Srivastava

(A) Land Law - The Urban Land (Ceiling and Regulation) Act, 1976 - Section 6 - Persons holding vacant land in excess of ceiling limit to file statement, Section 8 - Preparation of draft statement as regards vacant land held in excess of ceiling limit , Section 10 - Acquisition of vacant land in excess of ceiling limit - Section 10(1)/10(3) - notification i.e. land vesting in the State - rationale behind Sections 10(5) and 10(6) of the Act - Section 10(5) prescribes 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) - a grievance cannot be raised long after an alleged violation of Section 10(5), as the erstwhile owner can still be evicted by the State if they fail to deliver possession - Urban Land Ceiling and Regulation (Repeal Act, 1999). (Para - 15,11,18)

Possession of surplus land - taken by State - question - whether petitioner have right to retain possession of the surplus land - transferred to him by the erstwhile owner - after vesting of the land in the State under Section 10(3) of the Act.**(Para - 20)**

HELD:-Petitioner lacks locus. The surplus land vested with the State upon notification under Section 10(3) followed by dispossession of the erstwhile owner of the land (Khelai) under Section 10(5) way back in 1981. Owner never protested or agitated his dispossession before any authority or Court. The subsequent buyer (Petitioner) cannot raise challenge to the procedure of dispossession at belated stage on the strength of a sale deed being void ab-initio. **(Para -23)**

Writ Petition dismissed. (E-7)

List of Cases cited:-

1. Shiv Ram Singh Vs St. of U.P. & ors. , Writ C No. 37964 of 2009

2. St. of U.P. Vs Hari Ram , (2013) 4 SCC 280

3. St. of Assam Vs Bhaskar Jyoti Sarma , (2015) 5 SCC 321

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

1. Heard learned counsel for the parties.

2. The petitioner claims to be the subsequent purchaser of a portion of the surplus land declared under the Urban Land (Ceiling and Regulation) Act, 1976 (for Short "the Act") from the land holder, vide sale deed dated 25.01.1994.

3. By the instant writ petition, petitioner seeks a direction to the respondents not to dispossess the petitioner from Plot No. 12633 situated in Village Basaratpur Tappa, Qasba, Pargana Haveli, Tehsil Sadar, District Gorakhpur, i.e. the land which came to be declared surplus on 23.09.1978. Further, direction has also been sought to quash the order dated 27.04.2011, passed by the second respondent District Magistrate, Gorakhpur, rejecting the representation of the petitioner.

4. The facts, inter se, the parties are not in dispute that the land holder Khelai, son of, late Ganpat, submitted a return no. 254 under Section 6(1) of the Act, in respect of Plots No. 1263, 1538 and a residential house. The competent authority upon survey prepared a draft statement and the returnee was subjected to notice to file objection under Section 8(3) of the Act. Khelai filed objections on 15.07.1978, the competent authority declared 1475.67 sq. meter land as excess land, vide order dated 23.09.1978, under Section 8(4) of the Act, from the afore-noted plots. No objection was filed against the order, consequently, notification under Section 10(1) of the Act was duly published in the official gazette on 26.12.1978, followed by, notification under Section 10(3) of the Act, duly notified on 29.08.1980. Thereafter, followed by notice under Section 10(5) of the Act on 17.10.1981. Pursuant, thereof, Circle Lekhpal took possession on 14.12.1983. The name of the State came to be recorded in the revenue record in 1399 - 1404 Fasali, in respect of the excess land, after expunging the name of tenure holder Khelai.

5. In the afore-noted factual backdrop, it is submitted by the petitioner that the original land owner i.e. Khelai vide sale deed dated 25.01.1994, transferred 275 sq. meter of the excess declared land of plot no. 1263, in favour of the petitioner. Thereafter, the name of the petitioner came to be mutated by the Tehsildar in the revenue record on 15.04.1994 (1401 Fasali). It is submitted that since State had not taken possession, from the erstwhile owner, petitioner is entitled to retain possession in view of Urban Land Ceiling and Regulation (Repeal Act, 1999) (for short "Repeal Act"), which came into force on 18.03.1999.

6. It is submitted that the Repeal Act mandated that all proceedings relating to any order made under the principal Act pending immediately, before the commencement of the Repeal Act, before any Court, Tribunal or Authority shall abate provided that the section shall not apply to such proceedings relatable to the land,

possession of which has been taken over by the State Government or by any Authority duly authorized by the State in this behalf.

7. Learned Standing Counsel in rebuttal submits that against the proceedings under the Act, the original land holder did not file any objection or appeal. The proceedings came to be concluded on 19.08.1981, with the surplus land vesting in the State, and thereafter, possession was taken under Section 10(5) of the Act on 14.12.1983, thereafter, the name of the State was duly entered in the revenue record. Further, it is submitted that the petitioner would have no locus being a subsequent purchaser after the notification i.e. land vesting in the State (Section 10(1) / 10(3)), and therefore, it is urged that the transfer is a nullity i.e. void ab-initio .

8. Rival submissions fall for consideration.

9. The question posed before the Division Bench of this Court in **Shiv Ram Singh Versus State of U.P. and others1** is extracted:

"The issue which has been raised before the Court is whether, as a result of the repeal of the principal Act with effect from 18 March 1999, the petitioner would be entitled to the benefit of the Repeal Act. That, in turn, would depend on whether possession of the land was taken over by the State or by any person duly authorised prior to 18 March 1999."

10. The Court speaking through D.Y. Chandrachud, C.J. (as My Lord then was) noted the submission made on behalf of the petitioner:

"On behalf of the petitioner, it has been submitted that the issuance of a notice under Section 10(5) as well as a notice under Section 10(6) is mandatory having regard to the judgment of the Supreme Court in ***State of Uttar Pradesh Vs*** **Hari Ram*2***. *In the present case, it has been sought to be urged that the State has not been able to establish that a notice either under Section 10(5) or under Section 10(6) was duly served upon the petitioner. Secondly, it has been submitted that under the Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 19833 issued under Section 35 of the principal Act, a detailed procedure has been prescribed for taking possession of vacant land in excess of the ceiling limit and unless that procedure has been duly followed, it cannot be held that possession was validly taken in the eyes of law."*

11. The stand of the State before the Court was noted as follows:

"On behalf of the State, the learned Chief Standing Counsel has submitted, firstly, that the decision of the Supreme Court in **Hari Ram*'s case (supra)*** *has since been considered by the Supreme Court in a subsequent judgment in* ***State of Assam Vs Bhaskar Jyoti Sarma4*** *in which it has been clarified that the earlier decision did not deal with the question whether a breach of Section 10(5) of the principal Act and possible dispossession without notice would vitiate the act of dispossession itself or render it non est in the eyes of law."*

12. The Court considered the rival contentions on the following question :

"The basic issue which falls for consideration in these proceedings is whether possession of land declared surplus had been taken over from the petitioner prior to 18 March 1999. Section 3(1)(a) of the Repeal Act provides that repeal of the principal Act shall not affect the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over by the State Government or by any person duly authorised by the State Government in this behalf or by the competent authority."

13. The relevant provisions for taking over possession are to be found in sub-sections (5) and (6) of Section 10 of the principal Act. Sub-sections (5) and (6) reads as follows:

"(5) Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorised by the State Government in this behalf within thirty days of the service of the notice.

(6) If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary.

Explanation.-In this section, in sub-section (1) of section 11 and in Sections 14 and 23, "State Government", in relation to -

(a) any vacant land owned by the Central Government, means the Central Government;

(b) any vacant land owned by any State Government and situated in the Union territory or within the local limits of a cantonment declared as such under Section 3 of the Cantonments Act, 1924 (2 of 1924), means that State Government."

14. The Court in **Shiv Ram Singh** (supra) considered the earlier decision of the Supreme Court in **Hari Ram** (supra) followed by the subsequent decision rendered in **Bhaskar Jyoti Sharma** (supra) with regard to the failure of the Government / Authorized person / Competent Authority, to issue notice to the land owners under Section 10(5) of the Act. The Division Bench in **Shiv Ram Singh** (supra) discussed the impact of lack of notice under Section 10(5) and its consequence in view of the Repeal Act in the following terms.

"Under sub-section (5) of Section 10 of the principal Act, where any vacant land is vested in the State Government under sub-section (3), the competent authority is empowered, by notice in writing, to order any person who may be in possession, to surrender or deliver possession of the land to the government or to the duly authorised person within thirty days of the service of notice. Under sub-section (6), if any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land and may for that purpose use such force as may be necessary. These provisions came up for consideration before the Supreme Court in ***Hari Ram*** *(supra). The Supreme Court observed that sub-section (5) of Section 10 visualizes a situation of a peaceful surrender and delivery of possession, while sub-section (6) of Section 10 contemplates a situation of forceful dispossession. Forceful dispossession, it was held, would result where a person had failed to*

peacefully surrender or give delivery of possession under Section 10(5). Though Section 10(5) uses the expression 'may' in regard to the issuance of a notice, the Supreme Court held that the provision must be understood as 'shall'. In other words, the issuance of a notice under sub-section (5) of Section 10 would be mandatory. This decision has since been considered in ***Bhaskar Jyoti Sarma*** *(supra).* ***In the subsequent decision, the Supreme Court observed that the issue which needed examination was whether the failure of the Government or the authorised officer or the competent authority to issue notice to the land owners under Section 10 (5) would result in an inference or conclusion that such a dispossession is no dispossession in the eyes of law and would hence attract the provisions of Section 3 of the Repeal Act. The answer to that question was held to be in the negative."***

15. In **Shiv Ram Singh** (supra) the Court after noticing the provision of Section 10(3), 10(5) and 10(6), was of the firm view that the grievance cannot be raised long after an alleged violation of Section 10(5). Assuming that the alleged dispossession was not proceeded by any notice under Section 10(5) of the Act, the erstwhile owner could have made a grievance based on Section 10(5), and even sought restoration. In that event upon such restoration of the land, the erstwhile owner can still be evicted by the State resorting to Section 10(5) / 10(6) of the Act upon failure to deliver possession. A person, therefore, who had his land upon being declared surplus under Section 10(3) may not consider it worthwhile to agitate the violation of Section 10(5) for want of due procedure, in that event the owner can be dispossessed by the State authorities the very next day by following the procedure and taking possession under Section 10(5). In that view of the matter, it would be an academic exercise for the owner in possession to find fault with his dispossession on that ground that no notice under Section 10(5) was served upon him. It is in this view of the matter the owner after notification under Section 10(3) has not protested or agitated with regard to his dispossession.

16. Further, any grievance based on Section 10(5) of the Act ought to have been made by the owner within a reasonable time of such dispossession. In any such situation, the owner or a person in possession must be deemed to have waived his right under Section 10(5) of the Act. Any other view would give a license to a litigant to make a grievance not because he has suffered any real prejudice that needs to be redressed but only to reap the fortiutions circumstance of a Repeal Act.

17. **Shiv Ram Singh** (supra), thereafter explained and spelled out the law pertaining to dispossession of the land owner without notice under Section 10(5) of the Act.

"Hence, the law which has been laid down is that dispossession of the land owner without a notice under Section 10(5) would entitle the land owner to complain of the act of dispossession without notice, in which event the State can issue a fresh notice before dispossessing the land owner but unless there is something inherently wrong so as to affect the very process of taking over possession, such as the identity of the land or the boundaries thereof, a person who had lost his land by reason of the land being declared surplus under Section 10 (3) may not make a grievance since he would be conscious of the fact that

the State can take over possession by a simple act of giving a notice. In the view of the Supreme Court, such a grievance cannot be raised long after an alleged violation of Section 10(5). We extract, herein below, the observations of the Supreme Court in the judgment:

"...what needs examination is whether the failure of the Government or the authorised officer or the competent authority to issue a notice to the land owners in terms of Section 10(5) would by itself mean that such dispossession is no dispossession in the eye of law and hence insufficient to attract Section 3 of the Repeal Act. Our answer to that question is in the negative. We say so because in the ordinary course actual physical possession can be taken from the person in occupation only after notice under Section 10(5) is issued to him to surrender such possession to the State Government, or the authorised officer or the competent authority. There is enough good sense in that procedure inasmuch as the need for using force to dispossess a person in possession should ordinarily arise only if the person concerned refuses to cooperate and surrender or deliver possession of the lands in question. That is the rationale behind Sections 10(5) and 10(6) of the Act. But what would be the position if for any reason the competent authority or the Government or the authorised officer resorts to forcible dispossession of the erstwhile owner even without exploring the possibility of a voluntary surrender or delivery of such possession on demand. Could such use of force vitiate the dispossession itself or would it only amount to an irregularity that would give rise to a cause of action for the aggrieved owner or the person in possession to seek restoration only to be dispossessed again after issuing a notice to him. It is this aspect that has to an extent bothered us. The High Court has held that the alleged dispossession was not preceded by any notice under Section 10(5) of the Act. Assuming that to be the case all that it would mean is that on 7th December, 1991 when the erstwhile owner was dispossessed from the land in question, he could have made a grievance based on Section 10(5) and even sought restoration of possession to him no matter he would upon such restoration once again be liable to be evicted under Sections 10(5) and 10(6) of the Act upon his failure to deliver or surrender such possession. ***In reality therefore unless there was something that was inherently wrong so as to affect the very process of taking over such as the identity of the land or the boundaries thereof or any other circumstance of a similar nature going to the root of the matter hence requiring an adjudication, a person who had lost his land by reason of the same being declared surplus under Section 10(3) would not consider it worthwhile to agitate the violation of Section 10(5) for he can well understand that even when the Court may uphold his contention that the procedure ought to be followed as prescribed, it may still be not enough for him to retain the land for the authorities could the very next day dispossess him from the same by simply serving a notice under Section 10(5). It would, in that view, be an academic exercise for any owner or person in possession to find fault with his dispossession on the ground that no notice under Section 10(5) had been served upon him."***

Again, the Supreme Court has observed:

"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."***

18. The earlier decision in **Hari Ram** (supra) has been distinguished in the following observations:

"....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."***

19. The Division Bench in **Shiv Ram Singh** (supra) made the following observation on raising the grievance by the land owner or any person belatedly and not at the relevant time:

"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 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."

20. In the afore-noted legal proposition with regard to possession of the surplus land which finally came to be taken by the State, the question that arises, in the given facts, is as to whether the petitioner would have right to retain possession of the surplus land transferred to him by the erstwhile owner after vesting of the land in the State under Section 10(3) of the Act.

21. The relevant provision of Section 10(4) is extracted :

"10(4) During the period commencing on the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made under sub-section (3)-

(i) no person shall transfer by way of sale, mortgage, gift, lease or otherwise any excess vacant land (including any part thereof) specified in the notification aforesaid and any ***such transfer made in contravention of this provision shall be deemed to be null and void; and***

(ii) no person shall alter or cause to be altered the use of such excess vacant land."

22. The question of issuing notice under Section 10(5) to the petitioner after 16 years from the date of notice under Section 10(1) of the Act does not arise. The State had taken possession from the land owner way back in 1981. The subsequent transfer of the land in 1994, followed by mutation of the name of the petitioner, would have no bearing on the right of the petitioner. The transfer of the surplus land by the erstwhile owner, in the eye of law being nullity i.e. void ab-initio would not confer any right or title upon the petitioner. The possession of the petitioner after the proceedings concluding under the Act, upon the State taking possession, would merely be a case of encroachment of State land. The Repeal Act would not come to the assistance of the petitioner, rather, the case of the petitioner would not fall within the ambit and scope of the Repeal Act being subsequent purchaser of the surplus land after notification under Section 10(1) / 10(3) of the Act.

23. Having regard to the facts and circumstances of the case, petitioner lacks locus, and any case, the proceedings came to be set up belatedly by the petitioner in 2006 by approaching this Court and filing a petition, being Writ Petition No. 14698 of 2006, which came to be disposed of directing the Collector to take a decision. Pursuant thereof, the impugned order came to be passed on 27.04.2011, whereby, the second respondent after recording the facts arrived at a conclusion that the transfer of the land by the erstwhile owner, declared surplus, vesting in the State, is a void document and does not confer any right and title upon the petitioner. The erstwhile tenure holder (Khelai), had no title or ownership to transfer the land, the petitioner on the strength of alleged possession on State land cannot agitate his dispossession in view of Repeal Act. The surplus land vested with the State upon notification under Section 10(3) followed by dispossession of the erstwhile owner of the land (Khelai) under Section 10(5) way back in 1981. The owner never protested or agitated his dispossession before any authority or Court. In the circumstances, the subsequent buyer (Petitioner) cannot raise challenge to the procedure of dispossession at belated stage on the strength of a sale deed being void ab-initio.

24. The writ petition being devoid of merit, is accordingly, **dismissed.**

25. No order as to costs.

(2023) 2 ILRA 204
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Civil Misc. Review Application No. 1 of 2021
In

Writ C No. 58005 of 2009

Parmanand ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Arun Srivastava, Sri Gauri Shanker Mishra

Counsel for the Respondents:
C.S.C.

Constitution of India, 1950 - Article 226 - Writ Petition - Review Application - petitioner's licence of a fair price shop was cancelled on the ground that it was found to be closed on most of the days - petitioner contended that he was unwell and on account of his medical treatment the shop had remained closed for a period of 4 or 5 months - Writ Court held that if the petitioner was unwell he should have informed the authorities but he did not do so when he was under obligation under the agreement to inform to the authorities about the closure so that the authorities could made alternative arrangement – Writ court held that the authorities were justified in cancelling the licence of the petitioner - Writ petition decided on merit on 05.09.2023 - Petitioner did not challenged the writ court order - Instead after about 7 years filed review application - Impugned orders were passed after granting full opportunity of hearing to the petitioner - petitioner, although only a licensee, but he intends to be licensee for indefinite period as a legal right - No merit in review application (Para 20, 21, 22)

Dismissed. (E-5)

List of Cases cited:

1. Meena Devi Vs State of U.P. Writ C No. 58035 of 2017

2. Puran Singh Vs State of U.P. 2010(3) ADJ 659

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

1. आवेदक के विद्वान अधिवक्ता श्री गौरी शंकर मिश्रा एवं विपक्षी/राज्य के विद्वान अधिवक्ता श्री सतीश मोहन तिवारी को सुना एवं पत्रावली का सम्यक रूप से परिशीलन किया।

2. याची परमानन्द ने कमिश्नर झांसी के आदेश दिनांकित 31.07.2009 तथा उप जिलाधिकारी महरौनी, ललितपुर के आदेश दिनांकित 05.03.2008 को खण्डित करने के लिए याचिका प्रस्तुत किया कि वह नियमित रूप से आवश्यक वस्तुओं का वितरण करता था। वह दिनाँक 15.10.2007 से 25.02.2008 तक बीमार रहा एवं चिकित्सा में रहा तथा उक्त कारणोंवश वह वस्तुओं को न तो ले सका न ही बाँट सका। उसका चिकित्सीय प्रमाण- पत्र संलग्नक-1 के रूप में याचिका के साथ संलग्न है तथापि उसकी अनुज्ञप्ति निलम्बित कर दी गई। उसे एक सप्ताह के अन्तर्गत उत्तर देना था परन्तु बीमारी के कारण वह आरोपों का उत्तर नहीं दे सका। गाँव की पार्टीबन्दी के का रण ग्राम प्रधान एवं ग्राम पंचायत के सदस्यों ने फर्जी एवं झूठे आधारों पर शिकायत किया जिसकी जाँच वितरण निरीक्षक महरौनी द्वारा किया गया। ग्राम प्रधान के दबाव में एक पक्षीय रूप से उसके विरुद्ध प्रश्नगत आदेश पारित किया गया। उत्तरदाता संख्या-2 ने तथ्यों एवं परिस्थितियों पर विचार किये बिना तथा सुनवाई का उचित अवसर प्रदान किये बगैर उचित दर के गले की दुकान की अनुज्ञप्ति को अपने आदेश दिनांकित 05.03.2008 संलग्रक-2 के द्वारा खारिज कर दिया जिससे क्षुब्ध होकर याची ने अपील संख्या 27/2007 एक पक्षीय आदेश है तथा याची को : सुनवाई का उचित अवसर प्रदान नहीं किया गया है। अनुज्ञप्ति निरस्त करने के पूर्व उस पर सूचना की तामीला नहीं हुई थी। उक्त दोनों आदेश अतार्किक एवं विस्तृत आदेश से पारित नहीं किये गये हैं तथा प्राधिकारियों द्वारा पारित आदेश विकृत एवं अनुमानों पर आधारित है, प्रश्नगत आदेश निरस्त किये जाएं।

3. याची ने याचिका में सन्दर्भित सभी आदेशों की छायाप्रतियाँ संलग्न किया है। आदेश दिनांकित 05.03.2008 में स्पष्ट रूप से वर्णित है कि दिनाँक

25.10.2007 के आदेश द्वारा याची के दुकान की अनुज्ञप्ति निलम्बित कर दी गई थी तथा उससे एक सप्ताह के अन्दर स्पष्टीकरण माँगा गया था। उक्त के अतिरिक्त उसके बारे में राशन वितरण की शिकायतें प्राप्त हुई थी जिनकी जाँच कराई गई। जाँच के दौरान गम्भीर अनियमितताएं पाई गई। अतः उसे दिनांकित 25.10.2007 को कारण बताओ नोटिस जारी कर स्पष्टीकरण माँगा गया तथा तीन माहों के वितरण अभिलेख साक्ष्य सहित एक सप्ताह में प्रस्तुत करने के लिए निर्देशित किया गया परन्तु उसके द्वारा न तो कोई स्पष्टीकरण प्रस्तुत किया गया न ही कोई बांछित अभिलेख प्रस्तुत किये गए। अतः याची के दुकान का अनुबन्ध पत्र तत्काल प्रभाव से निरस्त किया गया।

4. उक्त आदेश के विरुद्ध याची ने अपील संख्या 2008-09 प्रस्तुत धारा 11 उत्तर प्रदेश कंट्रोल आदेश 1990 के अधीन प्रस्तुत किया गया जिस पर सुनवाई के उपरान्त उक्त अपील को दिनांक 31.07.2009 को आयुक्त झांसी मण्डल, झांसी द्वारा खण्डित कर दिया गया तथा यह आधार दिया गया कि अपीलार्थी याची द्वारा निर्धारित रोस्टर के अनुसार धनराशि जमा नहीं की गई जिसके प्रश्नानुसार कार्डधारकों को वस्तु वितरण नहीं हो सका न ही उसके द्वारा बीमार रहने सम्बन्धी जानकारी ही अवर न्यायालय को दी गई न ही अवर न्यायालय से कोई अवकाश स्वीकृत कराया गया जिसके परिणामस्वरूप आवश्यक वस्तुओं का वितरण नहीं हो सका। अतः अपीलार्थी याची द्वारा अनुबन्ध शर्तों का उल्लेख किया गया है।

5. अपीलीय न्यायालय ने इस तथ्य का भी संज्ञान लिया कि पूर्ति निरीक्षक द्वारा जाँच करते समय कार्डधारकों ग्रामवासियों मलखान, खिलावन सिंह, लालता प्रसाद, इंदल सिंह, जगना, गरईबहू श्रीमती रामकली आदि ने संयुक्त रूप से आवेदन पत्र प्रस्तुत किया कि उन्हें मिट्टी का तेल नहीं मिला. है तथा याची राशन बाँटने की कोई सूचना नहीं देता है। उपरोक्त के अतिरिक्त कीरत, राजन सिंह, करन सिंह, रतिराम, ग्यासी, मझली बहू, अट्टू एवं बिजई ने यह लिखित बयान दिया है कि गेहूँ चावल चीनी एवं मिट्टी का तेल नहीं मिलता है तथा कम मात्रा में दिया जाता है, वस्तु वितरण में अनियमितताएं की गई हैं जो कार्डधारकों के बयानों से स्पष्ट है। खाद्य वितरण का अनुबन्ध पत्र सम्बन्धित व्यक्ति अपीलकर्ता को इसलिए दिया जाता है कि ग्राम के गरीबी रेखा (बी०पी०एल०) एवं गरीबी रेखा से ऊपर (ए०पी०एल०), अंत्योदय कार्डधारकों को राशन वितरित करे। अपीलकर्ता कई महीनों से बीमार रहने के कारण वितरण कार्य नहीं किया न ही आवश्यक वस्तुओं का उठान किया। इससे स्पष्ट है कि अपीलकर्ता दुष्ट एवं लापरवाह है। खाद्यान्न वितरण की व्यवस्था इसलिए की जाती है कि ग्रामवासियों के लिए नियमित रूप से खाद्यान्न प्राप्त हो सके परन्तु अपीलकर्ता द्वारा खाद्यान्न का उठान नहीं किये जाने के कारण कार्डधारकों को परेशानी हुई। इसके अतिरिक्त अपीलकर्ता द्वारा वितरण में गम्भीर अनियमितताएं की गई हैं। अतएव अपील बलहीन है एवं निरस्त किया जाता है।

6. याचिका की सुनवाई के दौरान इस न्यायालय की एकल पीठ कक्ष संख्या-2 ने उभयपक्षों को सुनकर दिनाँक 05.09.2013 को यह निष्कर्ष दिया कि याची की दुकान काफी समय से बन्द थी, यह तथ्य विवादित नहीं है। यह अत्यन्त चिन्ताजनक है कि यदि याचिकाकर्ता अस्वस्थ था तो उसे अधिकारियों को सूचित करना चाहिए था परन्तु उसने ऐसा नहीं किया। जबकि अनुबन्ध पत्र के अनुसार दुकान बन्द करने के सम्बन्ध में भी अधिकारियों को सूचित करने के लिए वह बाध्य था तथापि उसने ऐसा नहीं किया ताकि अधिकारी वैकल्पिक व्यवस्था करें, चूँकि ऐसा नहीं किया गया था, अतः अधिकारियों का याचिकाकर्ता का लाइसेंस रद्द करना उचित था। आक्षेपित आदेश में किसी प्रकार के हस्तक्षेप की आवश्यकता नहीं है। याचिका विफल होती है एवं खारिज की जाती है।

7. उक्त आदेश के विरुद्ध खण्डपीठ एवं अन्य उच्चतर न्यायालय में कोई याचिका अथवा कोई अपील प्रस्तुत नहीं की गयी। याची द्वारा पुनर्विलोकन याचिका संख्या 01/2021 अतिविलम्ब से प्रस्तुत की गई। विलम्ब क्षमा प्रार्थना पत्र 03/2021 अन्तर्गत धारा 5 परिसीमा अधिनियम में यह कथन किया गया कि उसे दिनाँक 06.01.2021 के पूर्व उक्त आदेश की जानकारी नहीं थी, अतः विलम्ब को क्षमा कर पुनर्विलोकन प्रार्थना पत्र स्वीकार किया जाए। इस न्यायालय के मतानुसार दिनाँक 05.09.2013 को

पारित आदेश से ही यह स्पष्ट है कि उक्त तिथि को याची के विद्वान अधिवक्ता एवं शासकीय अधिवक्ता को सुनकर आदेश पारित किया गया था, ऐसी दशा में याची यह आधार नहीं ले सकता कि उसे प्रश्नगत आदेश दिनाँकित 05.09.2013 की सूचना दिनाँक 06.01.2021 के पूर्व नहीं थी इस प्रकार यह निष्कर्ष निकलता है कि वास्तव में बाद में सोच-समझकर विधिक राय एवं मशविरा से याची ने यह पुनर्विलोकन प्रार्थना पत्र प्रस्तुत किया है।

8. याची ने पुनर्विलोकन प्रार्थना पत्र 01/2021 में याचिका के तथ्यों को ही दुहराया है तथा यह कथन किया है कि बीमारी के कारण तथा अपरिहार्य कारणोंवश दुकान के बन्द होने की सूचना प्राधिकारियों को नहीं दे सका। प्रश्नगत आदेश दिनांकित 05.09.2013 उप जिलाधिकारी महरौनी एकपक्षीय तथा प्राकृतिक न्याय के सिद्धांतों के विरुद्ध है। अपीलीय न्यायालय ने अपने समक्ष विद्यमान समस्त सामग्री एवं अभिलेखों का तथा अपील के आधारों को विचार में नहीं लिया तथा आम तौर पर अनुमानों के आधार पर आदेश पारित किया है। ग्राम प्रधान एवं सदस्यों ने पृथक प्रस्ताव एवं प्रमाण पत्र याची के पक्ष में उसके ईमानदार एवं कर्तव्यनिष्ठ तथा सतर्क एवं सावधान होने तथा वैधानिक कर्तव्य को निर्वाह करने वाला जारी किया है। इस न्यायालय के समक्ष निस्तारण के समय इन तथ्यों पर उचित तरीके से बल नहीं दिया गया था तथा गुण-दोष पर आदेश पारित करने के बजाय सरसरी तौर पर याचिका को खारिज कर दिया गया। बाद में एक दूसरे अधिवक्ता श्री गौरीशंकर मिश्रा ने 29.08.2013 को प्रतिउत्तर शपथपत्र एवं वकालतनामा प्रस्तुत किया था। याचिका को मात्र इस आधार पर खारिज कर दिया गया कि दुकान 4-5 महीने के लिए बिना किसी कारण बन्द रही है तथा याची ने प्राधिकारियों को अपने बीमारी की सूचना नहीं दिया ताकि वैकल्पिक व्यवस्था की जा सके। अतः आदेश दिनांकित 05.09.2013 को निलम्बित किया जाए तथा याचिका को स्वीकार कर दिनाँक 05 मार्च, 2008 एवं 31 जनवरी, 2009 के आदेश को खण्डित किया।

[23/03, 11:00 am] Atul RO HC: जाए।

9. सुना एवं पत्रावली का अवलोकन किया।

10. याची की तरफ से दिनाँक 29.07.2004 के प्रमुख सूचना खाद्य तथा रसद अनुभाग-6 लखनऊ के शासनादेश पर बल दिया गया तथा सहायक मुख्य शासकीय अधिवक्ता द्वारा **रिट याचिका-सी संख्या 15420/2020, नजाकत अली बनाम उत्तर प्रदेश राज्य एवं 4 अन्य जिसके साथ 10 अन्य** जिसके साथ इसी प्रकार की अन्य याचिकाओं को निस्तारित किया गया था के निर्णय दिनांकित 22.10.2021 पर बल दिया गया जिसमें प्रारम्भ से अब तक की उचित गना राशन की दुकानों के सम्बन्ध में विधिक व्यवस्था की विवेचना की गई है। उक्त याचिका में इस न्यायालय की एकल पीठ द्वारा यह अवधारित किया गया है कि भारतीय संविधान के अनुच्छेद 47 तथा अनुच्छेद 21 को ध्यान में रखते हुए केन्द्र सरकार ने राष्ट्रीय खाद्य सुरक्षा अधिनियम, 2013 पारित किया ताकि गरीबी रेखा के नीचे तथा गरीबी रेखा के ऊपर के व्यक्तियों तथा अन्त्योदय अन्न योजना के अन्तर्गत व्यक्तियों को धारा 2(23) अधिनियम 2013 के अन्तर्गत आवश्यक वस्तुओं को राशन कार्ड धारकों को उचित गल्ले की दुकान के द्वारा आवश्यक वस्तुओं को प्रदान किया जा सके। इसी के अन्तर्गत उत्तर प्रदेश राज्य खाद्य सुरक्षा नियम 2015 बनाया गया। आधार अधिनियम 2016 की उच्चतम न्यायालय ने के०एस० पुट्टास्वामी (सेवानिवृत्त) एवं एक अन्य (आधार) बनाम भारत संघ एवं एक अन्य (2019) 1 एस०सी०सी० 1 में वैधता को सही ठहराया है। पूर्व में आवश्यक वस्तु अधिनियम 1955 के क्रियान्वयन हेतु समय- समय पर राज्य सरकारों द्वारा विभिन्न जी०ओ० जारी किये गए। उक्त अधिनियम की धारा 3 में राज्य सरकारों को आवश्यक वस्तुओं के नियंत्रण एवं विनियमन के लिए आदेश निर्गत करने की शक्ति प्रदान की गई है। तदुपरान्त उत्तर प्रदेश अधिसूचित वस्तु वितरण आदेश 1990 जारी किया गया तथा पूर्व के 1977 तथा 1989 के आदेशों को निरस्त किया गया। 2004 के आदेश में प्रथम बार गरीबी रेखा के नीचे (बी०पी०एल०) तथा गरीबी रेखा के ऊपर (ए०पी०एल०) के सम्बन्ध में विभाजन किया गया तथा उसके धारा उपधारा 2 (सी) के अन्तर्गत अभिकर्ता (एजेन्ट) को परिभाषित किया गया। उप-धारा (1) में उचित दर की दुकान (फेयर प्राइज शॉप) को परिभाषित किया गया तथा उप-धारा 2(4) के अन्तर्गत यह वर्जित किया गया कि उचित दर की दुकान चलाने वाला व्यक्ति राज्य का अभिकर्ता होगा

तथा वह एक अनुबन्ध पत्र निष्पादित करेगा । उपधारा 21 उसके निगरानी तथा उपधारा 27 किसी उल्लंघन की दशा में दण्ड का प्रावधान करता है तथा उप-धारा 28 में अपील की व्यवस्था की गई है।

11. **पूरन सिंह एवं उत्तर प्रदेश राज्य एवं अन्य, 2010 (3) ए०डी०जे० 659** में अवधारित किया गया कि दुकान के निलम्बन एवं अनुबन्ध पत्र के निरस्तीकरण के आदेश स्पीकिंग आदेश से पारित किया जाना चाहिए, तदुपरान्त राज्य सरकार ने दिनांक 16.10.2014 को जी०ओ० जारी किया, जिसमें ग्राम स्तर पर सतर्कता समिति एवं पर्यवेक्षक अधिकारी नियुक्त किये गए। 2013-16 के अधिनियमों के उपरान्त राज्य सरकार ने 2015 के नियम पहले ही बनाकर उत्तर प्रदेश आवश्यक वस्तु (विक्रय एवं वितरण नियंत्रण का विनियमन) आदेश 2016 जारी किया तथा 20.12.2004 के जी०ओ० को अधिक्रमित कर दिया।

12. खण्ड 8 के उपखण्ड (7) में उचित मूल्य की दुकान के मालिक द्वारा वितरण में अनियमितता के जाँच का प्रावधान है तथा यदि लाइसेंस निलम्बित किया जाता है तो जांच के उपरान्त सक्षम प्राधिकारी द्वारा कारण बताओ नोटिस जारी किया जाना चाहिए तथा डीलर द्वारा उत्तर / स्पष्टीकरण दिये जाने के बाद ही उसकी जांच सम्बन्धित अधिकारी द्वारा किये जाने एवं आदेश जारी किये जाने का प्रावधान निर्गत किया गया। उपधारा 9 में खाद्य "आयुक्त द्वारा निगरानी का प्रावधान किया गया तथा नियंत्रण आदेश 2016 के खण्ड 13 में अधिकारियों द्वारा कृत कार्यवाही के विरुद्ध अपील करने का प्रावधान बनाया गया।

13. राज्य सरकार ने दिनाँक 05.08.2019 को एक और शासनादेश जारी किया गया जिसमें निलम्बन/निरस्तीकरण की पूरी प्रक्रिया निर्धारित की गई तथा पूर्व के शासनादेश को निरस्त कर दिया गया। उक्त सरकारी आदेश शिकायतकर्ता/कार्डधारकों के बयान दर्ज करने तथा लाइसेंस धारक को जिरह का अवसर प्रदान करने, सक्षम प्राधिकारी के समक्ष उपस्थित होने का प्रावधान करता है। उक्त निर्णय में लॉ लेक्सीकन के तृतीय संस्करण का उल्लेख करते हुए न्यायालय ने अवधारित किया कि लाइसेंस का तात्पर्य ऐसा करने का अधिकार है जो अन्यथा, निष्क्रिय, गलत या अवैध होगा जब तक कि एक गठित प्राधिकरण से औपचारिक अनुमति प्राप्त न की गयी हो। लाइसेंसधारी का अर्थ है वह व्यक्ति जो कब्जे में है तथा जिसके साथ एक समझौता विद्यामान है। इस प्रकार, एक डीलर / अभिकर्ता का पूरा दावा उसके द्वारा राज्य के साथ किये गये समझौते पर निर्भर करता है। यह भी अवधारित किया गया कि एक बार नोटिस जारी होने के उपरान्त आडि अल्टरम प्राटेम के सिद्धांत का अनुपालन किया जाता है तथा डीलर / अभिकर्ता को अपना उत्तर प्रस्तुत करने का अवसर प्रदान किया जाता है तथा अधिकारियों द्वारा उस पर विचार किया जाता है। यह दावा कि प्राधिकारियों द्वारा डीलर के पक्ष में प्रस्तुत किये गए साक्षीकरण, अभिलेखों की प्रति, शिकायत और वाद के शपथ पत्रों पर विचार करने का अवसर प्रदान करते हुए एक पूर्ण जाँच की जा सकती है, स्वीकार नहीं किया जा सकता है क्योंकि यह विभागीय जाँच नहीं है न ही भारत के संविधान के अनुच्छेद 311 के अन्तर्गत नियमित जाँच है वरन् संक्षिप्त प्रकृति जाँच है जहाँ लाइसेंस की शर्तों के उल्लंघन के मामले में कार्यवाही प्रारम्भ की जाती है तथा अन्तरिम आदेश 2016 के अन्तर्गत अवसर प्रदान किया जाता है।

14. इसी निर्णय में **मीना देवी बनाम उत्तर प्रदेश राज्य, रिट सी० संख्या 58035 वर्ष 2017** के निर्णय दिनांकित 30.07.2018 का उल्लेख किया गया जिसके पैरा 51 में निम्न अवधारणा किया गया।

"इस न्यायालय का सुविचारित मत है कि उचित मूल्य की दुकान का अनुज्ञप्तिधारी मात्र सार्वजनिक वितरण प्रणाली के अन्तर्गत निश्चित वस्तुओं के वितरण के लिए एक अभिकर्ता है। वह एक अभिकर्ता होने के कारण कार्यकर्ता है अर्थात सरकार एक निश्चत दर के साथ आवश्यक वस्तुओं के आबंटन की राशि पर कमीशन और उनके वजन के बराबर वितरण प्रणाली की परिकल्पना सरकार द्वारा गरीबों एवं जरूरतमंदो की मदद के लिए की गई है। यह ईमानदार कर दाता का पैसा है जो ऐसी आवश्यक वस्तुओं की कीमत को सब्सिडी देने के लिए उपयोग में लाया जाता है ताकि ये वस्तुएं उनके पहुँच में आ सकें तथा वह अपना पेट भरने में सक्षम हो सकें एवं उनका परिवार सम्मानजनक ढंग से

भरण-पोषण कर सकें और यह व्यवस्था उन्हें भिक्षावृत्ति की ओर नहीं ले जाता है। वितरण में अनियमितता होने पर सरकार इस अनुज्ञप्ति को वापस लेने की अधिकारी है यद्यपि ऐसी अनुज्ञप्ति को वापस लेने की प्रथा होनी चाहिए तथा शिकायत प्राप्त होने की स्थिति में सुनवाई का कुछ अवसर दिया जाना आवश्यक है यद्यपि भारत के संविधान के अनुच्छेद 311 के समान ऐसे अनुज्ञप्तिधारी के लिए न तो कोई मौलिक अधिकार हैं न ही कोई संवैधानिक अधिकार विद्यमान हैं।

15. खण्ड 8 के उपखण्ड 7 में आडि अल्टरम प्राटेम के सिद्धांत का पालन किया गया है। एक डीलर के अधिकार के रूप में इसे स्वीकार नहीं किया जा सकता क्योंकि डीलर लाइसेंस के नियमों एवं शर्तों से बंधा होता है तथा किसी शर्त के उल्लंघन के परिणामस्वरूप ऐसे अनुज्ञप्ति निलम्बन के निरसन की कार्यवाही की जा सकती है।

16. सरकार के दिनाँक 05.08.2019 के आदेश का खण्ड 1 (2) (ख) मात्र कार्डधारक द्वारा शिकायत के सम्बन्ध में प्रारम्भिक जाँच का विधान करता है। जाँच के दौरान, डीलर द्वारा किये गए वितरण के पोर्टल को देखा एवं सत्यापित किया जा सकता है तथा वैकल्पिक रूप से कार्डधारकों के कार्ड से इसका सत्यापन किया जा सकता है। यह सरकारी आदेश नियंत्रण आदेश 2016 के वैधानिक प्रावधानों एवं खण्ड 8 के उपखण्ड 7 को कम नहीं करता है वरन् मात्र जाँच के दौरान सावधानी बरतने का प्रावधान करता है। लाइसेंस अधिकार नहीं है परन्तु व्यक्ति और घर को भोजन उपलब्ध कराने के अपने उद्देश्य को प्राप्त करने के लिए एक डीलर को राज्य द्वारा रोपित किया गया है तथा इस प्रकार सौंपे गए कर्तव्य में डीलर का अधिकार शामिल नहीं है क्योंकि वह कर्तव्य से बँधा होता है। अनुज्ञप्ति के शर्तों का कोई भी उल्लंघन राज्य के दण्डात्मक कार्यवाही को आमंत्रित करेगा। इस कर्तव्य का लाइसेंसी द्वारा सख्ती से पालन करना होता है तथा वह निष्पादित समझौते से परे नहीं जा सकता। यह समझौता उस पर विभिन्न प्रतिबन्ध आरोपित करता है। एक बार कार्यवाही हो जाने के बाद किसी भी उल्लंघन पर डीलर पलट नहीं सकता है।

17. न्यायालय समाज के गरीब दयनीय वर्ग की दुर्दशा की ओर आँख नहीं मूंद सकता है और जाँच रिपोर्ट की आपूर्ति को प्रदान नहीं करने को प्रतिपरीक्षा का अवसर तथा बाद में जमा किये गए शपथ पत्रों आदि की तकनीकी आड में लाइसेंस बहाल करने का लाभ प्रदान नहीं कर सकता। डीलर/अभिकर्ता के पास नियंत्रण आदेश 2016 के खण्ड 13 के तहत एक अपील का उपाय है जिसमें वह सभी आधार ले सकता है। एक बार आधार ले लिये जाने के उपरान्त और अपीलीय प्राधिकारी के निष्कर्ष निकलने के उपरान्त अनुच्छेद 226 के अन्तर्गत शक्ति का प्रयोग करने पर विचार करने के लिए कुछ भी शेष नहीं रहता। यह न्यायालय तभी अनुग्रह प्रदान कर सकता है। जब नियंत्रण आदेश 2016 के नियंत्रण प्रक्रिया का अनुपालन नहीं किया गया हो अथवा खण्ड 8 के उपखण्ड 7 के अन्तर्गत परिकल्पित अवसर प्रदान नहीं किया गया हो। जब एजेंट/अभिकर्ता द्वारा एक बार कवायद पूरी कर ली जाती है तथा उपलब्ध सभी आधारों के साथ अपील तैयार कर दी जाती है तो अपीलीय प्राधिकारी द्वारा निष्कर्ष दिये जाने के उपरान्त अनुच्छेद 226 के अन्तर्गत असाधारण अधिकार क्षेत्र का प्रयोग करते हुए कुछ भी देखने और विचार करने के लिए शेष नहीं रहता है।

18. प्रस्तुत मामले में उप जिलाधिकारी द्वारा पारित आदेश दिनांकित 05.03.2008 से स्पष्ट है कि याची को सुनवाई का पूर्ण अवसर प्रदान किया गया। उसे वितरण अभिलेख एवं साक्ष्य प्रदान करने का अवसर प्रदान किया गया परन्तु उसने कोई साक्ष्य प्रस्तुत नहीं किये तथा बिना सूचना कई माह तक दुकान को बन्द रखा।

19. याची को अपील में भी सुनवाई का पूर्ण अवसर प्रदान किया गया तथा उप- जिलाधिकारी द्वारा जिन सामग्रियों पर विचार किया गया था उनके अतिरिक्त अन्य विभिन्न व्यक्तियों द्वारा प्रस्तुत शिकायतों को भी विचार में लिया गया एवं उसके उपरान्त अपीलीय न्यायालय इस निष्कर्ष पर पहुँचा कि याची सस्ते गल्ले की दुकान का अनुज्ञतिधारी रहने योग्य नहीं है तथा अपील निरस्त कर दिया।

20. तदुपरान्त याची ने इस न्यायालय में याचिका प्रस्तुत किया जिसे सुनवाई के उपरान्त दिनांक 05.09.2013 को गुण-दोष पर निरस्त कर दिया गया तथा प्रश्नगत आदेशों को उचित एवं वैध माना गया। याची ने उक्त एकल न्यायाधीश के आदेश के विरुद्ध अन्य कोई उपचार प्राप्त करने के बजाय लगभग सवा सात वर्ष के उपरान्त पुनर्विलोकन याचिका प्रस्तुत किया है। दोनों अधीनस्थ न्यायालयों द्वारा तथा इस न्यायालय द्वारा पूर्व में याची को सुनवाई का पूर्ण अवसर प्रदान किया जा चुका है। घटना वर्ष 2007 की है. तथा उस समय विद्यमान नियम एवं विधि के अनुसार याची को सम्यक सुनवाई का अवसर प्रदान किया गया था। अतएव प्रश्नगत आदेशों को पारित करते समय मूल उप-जिलाधिकारी द्वारा एवं अपीलीय न्यायालय द्वारा तत्समय विद्यमान नियमों के अनुसार आदेश पारित किये गए थे। याची मात्र एक अनुज्ञप्तिधारी है परन्तु वह अधिकार के रूप में अनन्तकाल तक अनुज्ञप्तिधारी के रूप में अधिकारपूर्वक सस्ते गल्ले की दुकान का अनुज्ञप्तिधारी बना रहना चाहता है।

21. उपरोक्त दशाओं में इस न्यायालय का यह अभिमत है कि यह पुनर्विलोकन प्रार्थना पत्र एवं याचिका निराधार है एवं निरस्त किये जाने योग्य है।

आदेश

22. यह पुनर्विलोकन प्रार्थना पत्र एवं याचिका उपरोक्तानुसार निरस्त की जाती है।

(2023) 2 ILRA 210
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.01.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ C No. 1002014 of 2003

Anil Kumar Agrawal ...Petitioner
Versus
Commissioner Faizabad & Anr. ...Respondents

Counsel for the Petitioner:
Rakesh Pathak, I.D. Shukla, S.K. Mehrotra

Counsel for the Respondents:
C.S.C.

(A) Civil Law - The Indian Stamp Act, 1899 - Section 47-A - Under-Valuation of the instrument , Section 56 - Appeal - stamp duty is leviable only on the area indicated in the instrument of transfer since petitioner would not derive any title or ownership over any property beyond the area indicated in the instrument. (Para - 3,6,7)

Proceedings under section 47-A of the Act were initiated - on basis of spot inspection report - Additional stamp duty along with penalty imposed upon petitioner - ground - possession of excess area than is indicated over plot in question in the sale deed. **(Para -1 to 6)**

HELD:-Petitioner may be a trespasser or in illegal occupation over area in excess of the sale deed, but stamp duty is levied only on the area indicated in the instrument of transfer. Impugned orders and appellate order not in consonance with judgments pronounced by this Court and the Supreme Court, hence set aside. Petitioner granted liberty to claim a refund of the amount deposited with the authorities, which will be refunded within three months and with interest @ 6% per annum.**(Para -6 to 8)**

Writ Petition allowed. (E-7)

List of Cases cited:-

1. Mohd. Mustafa Ali Khan Vs Raj Rajeshwari Devi , 1959 A.I.R. Allahabad 583

2. Smt. Bindu Singh Vs St. of U.P. & ors. , 2008 (26) Lucknow Civil Decisions 1158

3. The Madras Refineries Ltd. Vs The C.C.R. A., B.O.R, Madras , (1977) 2 SCC 308

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

1. Heard learned counsel for petitioner and learned State Counsel appearing on behalf of opposite parties.

2. Petition has been filed assailing order dated 23rd August, 2002 passed under Section 47-A of Indian Stamp Act 1899 as well as appellate order dated 12th June, 2003 passed in Appeal under Section 56 of the Act whereunder additional stamp duty along with penalty has been imposed upon petitioner primarily on the ground that he is in possession of excess area than is indicated over plot in question in the sale deed dated 25th June, 2002.

3. Learned counsel for petitioner submits that by means of instrument of transfer dated 25th June, 2002, he had purchased a portion of gata No. 438 situate in village Janora, Paragana Haveli Awadh, Tehsil and District Faizabad whereafter on the basis of an ex parte spot inspection conducted by Tehsildar dated 28th July, 2002, proceedings under Section 47-A of the Act were initiated against petitioner. It is submitted that petitioner had filed his objections to the spot inspection report which however were not considered and the order has been passed by the assessing authority primarily on the spot inspection report on the ground that as per measurement of the property purchased, excess land is in possession of the petitioner than is indicated in the sale deed. The aforesaid finding has thereafter been affirmed by appellate authority under Section 56 of the Act without considering the aspect that stamp duty is leviable only on the area indicated in the instrument of transfer since petitioner would not derive any title or ownership over any property beyond the area indicated in the instrument. As such it is submitted that authorities fell in error in allowing reference under Section 47-A of the Act. Learned counsel further submits that even otherwise the spot inspection report was ex parte and no prior notice thereto was ever provided to petitioner. He has also placed reliance on the judgment of this Court rendered in the case of Mohd. Mustafa Ali Khan versus Raj Rajeshwari Devi reported in 1959 A.I.R. Allahabad 583 and Smt. Bindu Singh versus State of U.P. and others reported in 2008 (26) Lucknow Civil Decisions 1158 to buttress his submissions.

4. Learned State Counsel has refuted submissions advanced by learned counsel for petitioner with submission that a perusal of the spot inspection report will reveal that measurement of the actual area purchased by the petitioner was done by Naib Tehsildar and the petitioner was found to be in possession of excess area that is indicated in the sale deed. It is submitted that there was major discrepancy in the area indicated in the sale deed and actual measurement of the area purchased by the petitioner.

5. Considering submissions advanced by learned counsel for parties and upon perusal of material on record, it appears that proceedings under section 47-A of the Act were initiated on the basis of spot inspection report which indicated excess area of the property at the time of measurement in the spot inspection than is indicated in the sale deed. It is on that basis that order under section 47-A has also been passed as also on the basis of objection filed by petitioner that he would demolish the existing shops and would execute a sale deed with regard to remaining area of the property purchased. The same reasoning has been adopted by appellate authority in proceedings under Section 56 of the Act.

6. Upon perusal of aforesaid orders, it is apparent that they are based on the spot inspection report dated 28th July, 2002 indicating petitioner to be in possession of over excess area than is indicated in the instrument of transfer. It is quite apparent that petitioner would not derive title or ownership over area which is not included in the sale deed. At best it can be safely inferred that petitioner may be a trespasser or in illegal occupation over area which is in excess of the sale deed but the Act does not provide for imposition of stamp duty as per actual possession over the property sought to be purchased but is instead leviable only on the area indicated in the instrument of transfer.

7. Aforesaid view is also buttressed by the Full Bench decision of this court in the case of Mohd. Mustafa Ali Khan and Smt. Bindu Singh(supra) as well as by judgment rendered by Hon'ble Supreme Court in the case of The Madras Refineries Ltd. Versus The Chief Controlling Revenue Authority, Board of revenue, Madras reported in (1977) 2 Supreme Court Cases 308 in which it has been clearly held that stamp duty is leviable only in accordance with contents of the instrument of transfer to the following effect:-

Mohd. Mustafa Ali Khan (supra)

"4. The stamp duty on any instrument is to be determined with reference to the terms of the instrument. In Gatty v. Fry, (1877) 2 Ex D 265, the question was whether a post dated cheque payable to bearer and stamped as a bill of exchange payable on demand was admissible in evidence after the date of the cheque. Cleasby, B., delivering the judgment of the Court said :

"The question therefore is whether, if upon the face of the instrument the stamp is sufficient, as was the case here, since the cheque, at the time of the trial, was payable on demand, it cannot be used in evidence, because, in fact, when it was given, being post dated, it was not then payable. We think this case is concluded by authority, and that in considering whether the stamp is sufficient we must look at the instrument itself alone. The authorities are Williams v. Jarett, (1833) 5-B and Ad 32; Whistler v. Forester, (1863) 14 CB (N. S.) 248; Austin v. Bunyard, (1865) 6 B and Section 687,

.....What the Act requires is that a particular instrument which means the paper with certain things written upon it, shall have a particular stamp applicable to that instrument, not to that instrument coupled with other circumstances." (1877) 2 Ex D 265 was approved by the Court of Appeal in Royal Bank or Scotland v. Tottenham, (1894) 2 QB 715, and the law so laid down has been consistently followed in India : See Ramen Chetty v. Mahomed Ghouse, ILR 16 Cal 432; Sakharam Shankar v. Ramchandra Babu, ILR 27 Bom 279; In re C R. M. M. L. A. Chettiar Firm, ILR 13 Rang 613 : (AIR 1935 Rang 243) (SB).

Smt. Bindu Singh(supra)

Under law, the stamp duty is leviable only for value of the portion for which the deed is executed. If any additional area is occupied, legally or illegally by the petitioner, the concerned authority or person may take appropriate action for getting back possession of such portion which has not been purchased by the petitioner. However, the stamp duty on such portion, which has not been purchased by the petitioner. However, the stamp duty on such portion, which has not been purchased by the petitioner through the sale deed, can not be levied. The petitioner, having paid the stamp duty on

the sale deed for the area which had been purchased by him, cannot now be subjected to additional stamp duty for any such area which has neither been purchased by him nor any deed having been executed for such area in his favour. As such the orders passed by the authorities below imposing additional stamp duty, penalty and interest on the petitioner for allegedly making illegal constructions beyond the area of land purchased by him, deserves to be quashed."

Madras Refineries Ltd.(supra)

" 5. In Limmer Asphalte Paving Co. v. IRC [(1872) LR 7 Exch. 211] it was stated:

"In order to determine whether any, and if any, what stamp duty is chargeable upon an instrument the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial, even although they may have believed that its effect and operation was to create a security mentioned in the Stamp Act, and they so declared."

xxx xxx xx

11. .....It is the real and true meaning of the Deed of Trust and Mortgage and the Guarantee Agreement which has to be ascertained, and this leaves no room for doubt that the view taken by the High Court in this respect is correct and does not call for interference. Mr Ram Reddy relied on some decisions to support his argument that the guarantee Agreement was the security for the loan and was the principal or the primary document, but these cases were decided on different facts and have no real bearing on the controversy before us."

8. In view of the fact that impugned orders dated 23rd August, 2002 passed by opposite party No.2 as well as appellate order dated 12th June, 2003 passed by opposite party No.1 are not in consonance with judgments pronounced by this Court as well as the Supreme Court, are being erroneous are therefore set aside. Consequently the writ petition succeeds and is allowed. Parties to bear their own costs.

9. Learned counsel for petitioner submits that in pursuance to impugned orders, the petitioner has already deposited certain amount with the authorities. Liberty is granted to petitioner to claim refund of the aforesaid amount which shall be refunded within a period of three months from the date an application along with a copy of this order is submitted before the concerned authority along with interest @ 6% per annum from date of deposit till date of actual payment.

(2023) 2 ILRA 213
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.01.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ C No. 1003352 of 2006

State of U.P. & Ors. ...Petitioners
Versus
Chief Controlling Revenue Authority U.P. & Anr. ...Respondents

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
Anoop Kumar, Ramji Das

(A) Civil Law - The Indian Stamp Act, 1899 - Section 47 A - Assessment - Section 47A (3) - reference - Section 56 - Appeal , The Uttar Pradesh (Valuation of Property)

Rules, 1997 - Rule 5(a) - assessment, Rule 5(b) - mode of calculation of stamp duty - While Determining stamp duty pertaining to trees situate in a grove etc. - exemplers are to be adverted to by authority concerned while considering matter under Section 47A of the Act of 1899 - valuation is required to be taken with regard to exempler for similar trees in the locality on the date of instrument - a circle rate applied with effect from a particular date cannot be taken to be an exempler for all times to come - would be contrary to the provisions of Rule 5(b) of the Rules of 1997.(Para -11,13)

Property in question - nature of a grove - no dispute with regard to stamp duty payable on the immovable portion - circle rate notified - accordance with Rule 5(b) of the Rules of 1997 - Controversy - valuation of trees over immovable property - subject matter of instrument of transfer - whether required to be taken as per circle rate or as per the Rules of 1997 - valuation as per circle rate - whether in consonance with the Rules? **(Para - 8,9)**

HELD:- Although the assessment by either of the authorities is not in consonance with Rule 5(b) of the Rules of 1997 but since the appellate order appears to be in consonance with Government Order dated 07.07.2000, this Court does not see any reason to interfere with the order under challenge.**(Para - 17)**

Petition dismissed. (E-7)

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

(01.) Heard Mr. Devendar Mohan Shukla, learned counsel State counsel appearing on behalf of petitioners and Mr. Ramji Das and Mr. Anoop Kumar, learned counsel appearing for opposite party no.2.

(02.) In view of order being proposed to be passed, notices to opposite party no.1 stand dispensed with.

(03.) Petition has been filed assailing order dated 28.02.2005 passed under Section 56 of Indian Stamp Act, 1899 whereby appeal preferred by opposite party no.2 against assessment under section 47 A of the Act was allowed.

(04.) Learned counsel for petitioner submits that with regard to property in question, an instrument of sale dated 20.12.2003 was presented for registration in which apart from the immoveable property, various trees were also indicated and the property itself was in the nature of a grove. It is further submitted that although there was no dispute with regard to stamp duty paid on the immoveable property but deficient stamp duty was indicated with regard to trees situate on the property and therefore reference was made under Section 47A (3) of the Act and by means of order dated 03.01.2005, assessment of deficient stamp duty on such tree was indicated and penalty imposed alongwith interest. Appeal filed by the opposite party no.2 under section 56 was thereafter allowed by means of impugned order only on the basis of self assessment of opposite party no.2.

(05.) Learned counsel submits that the order passed under Section 47A was in fact the correct assessment and was based on the circle rate issued on 04.08.2003 by the Collector whereas the impugned order places reliance on the subsequent circle rate issued on 16.06.2004, which was after the execution of instrument of transfer and as such it is submitted could not have found the basis of the appellate order since it was not retrospective in effect. It is further submitted that even otherwise, appeal has been allowed only on the basis of self-assessment of the opposite party no.2 @ of Rs.1.50 per tree which was incorrect since

the circle rate dated 04.08.2003 was clearly applicable upon the instrument as per which the trees were required to be assessed @ Rs.1000/- per unit for trees upto the age of 10 years whereafter assessment was required to be made @ Rs.2000/- for trees upto the age of 20 years or more.

(06.) As such, it is submitted that impugned order is bad on two counts that firstly, it places reliance on circle rate which was issued subsequent to execution of instrument of transfer and secondly that it is based only on self-assessment of opposite party no.2.

(07.) Learned counsel appearing on behalf of answering opposite party while refuting submissions advanced by learned counsel for petitioner submits that there is no dispute with regard to stamp duty payable on the immovable property and reference has been made only with regard to trees situate on the aforesaid immovable property which is subject matter of instrument of transfer and calculation of minimum value of land, grove, garden and trees situated thereon is required to be made in terms of Rule 5(b) of the Uttar Pradesh (Valuation of Property) Rules, 1997 (hereinafter referred to as the Rules of 1997) which prescribed the mode of assessment to revenue as the assessment as per Rule 5(a) of the Rules of 1997 plus the value of the trees standing thereon worked out on the basis of average price of the trees of similar nature prevailing in the locality on the date of execution of the instrument. As such, it is submitted that exempler was required to be taken into account by authorities for assessing stamp duty on the valuation of trees. Learned counsel has also drawn attention to Government Order dated 07.07.2000 brought on record as Annexure CA-1 to counter affidavit to submit that the State Government itself has issued directions that reference should not be made with regard to dispute only pertaining to trees over immovable property and that appropriate market value of such trees is required to be self-assessed by the assessee. It is also submitted that the impugned order has not placed reliance on the circle rate issued on 16.06.2004 and it is in fact based on the self-assessment of the answering opposite party, which is in consonance with Government Order dated 07.07.2000 and as such no exception thereto can be taken.

(08.) Upon consideration of submissions advanced by learned counsel for the parties, it is apparent that the short controversy involved is whether valuation of trees over immovable property which is subject matter of instrument of transfer is required to be taken as per circle rate or as per the Rules of 1997 and whether the valuation as per circle rate can be said to be in consonance with the Rules?

(09.) Learned counsel for parties admit that the property in question was in the nature of a grove and there was no dispute with regard to stamp duty payable on the immovable portion of the property and reference was in fact made under Section 47A of the Act of 1899 only with regard to dispute of stamp duty pertaining to trees situate thereon. It is also submitted that the mode of calculation of stamp duty is clearly prescribed in Rule 5(b) of the Rules of 1997. However, while learned State Counsel submits that the circle rate as notified on 04.08.2003 is in consonance with Rule 5(b) of the Rules of 1997, learned counsel for opposite party no.2 disputes the same.

(10.) For proper appreciation of the controversy, it is necessary to evaluate the Rules of 1997, Rule 5(a) & (b) of the Rules which are as follows:-

"5. Calculation of minimum value of land, grove, garden and building:-

For the purposes of payment of stamp duty, the minimum value of immovable property forming the subject of an instrument shall be deemed to be such as may be arrived at as follows :-

(a)	In case of land	Minimum value
	Where agricultural or non-agricultural	Area of land multiplied by minimum value fixed by Collector of the district under Rule 4.
(b)	In case of grove or garden-	
	(i) if assessed to revenue	Minimum value of the land as worked out in the manner laid down in Clause (a) plus the value of the trees standing thereon worked out on the basis of the average price of the trees of the same nature, size and age prevailing" in the locality on the date of the instrument;
	(ii) if not assessed to revenue or is exempted from it and is rented.	Twenty times the annual rent plus the premium, if any, plus the value of trees standing thereon determined in accordance with sub-clause (i);
	(iii) if not assessed to revenue or is exempted from it, and profit has arisen during three years immediately proceeding the date of the instrument.	Twenty times the average annual profit plus the value of the trees standing thereon determined in accordance with sub-clause (i);
	(iv) if not assessed to revenue or exempted from it and no profit has arisen during the three years immediately proceeding the date of the instrument.	Twenty times the assumed annual profit plus the value of the trees standing thereon determined in accordance with sub-clause (i).

(11.) From a perusal of aforesaid Rule 5(b) of the Rules of 1997, it is apparent that while determining stamp duty with regard to trees situate over immovable property, the value of trees is required to be worked out on the basis of exempler regarding average price of trees of the same nature, size and age prevailing in the locality on the date of the instrument. Therefore, it is evident that while determining stamp duty pertaining to trees situate in a grove etc., exemplers are to be adverted to by authority concerned while considering matter under Section 47A of the Act of 1899.

(12.) So far as the question whether circle rate as notified by the Collector of the District can be said to be in consonance with Rule 5(b) of the Rules of 1997 is concerned, it is evident from Circular dated 04.08.2003 that it only indicates the date with effect from it would be effected which is 04.08.2003 and there is no indication with regard to time period for which it would remain applicable. Although, subsequently another circle rate was issued on 16.06.2004 to be effective from 16.06.2004 itself but there again the time period of its operation is not indicated anywhere in the notification.

(13.) Upon consideration of provisions of Rule 5(b) of the Rules of 1997, it is evident that valuation is required to be taken with regard to exempler for similar trees in the locality on the date of instrument. A circle rate applied with effect from a particular date without any time period of its operation cannot be said to be in consonance with the provisions of Rule 5(b) of the Rules of 1997 since it could operate for a few months, years or even interminably and therefore it cannot be taken to be an exempler for all times to

come and in the considered opinion of this Court would be contrary to the provisions of Rule 5(b) of the Rules of 1997.

(14.) Learned State Counsel has adverted to Rule 4(2) of the Rules of 1997 to submit that such circle rates are required to be issued every two years and, therefore, the said circle rates would be applicable only for a period of two years and not beyond. It has been informed that subsequently by means of an amendment, the operation of circle rates has been made applicable only for a period of one year. Nonetheless, the practical aspect of aforesaid circle rates also can be discounted in terms of specific statutory provisions under Rule 5(b) of the Rules of 1997 which specifically provide for exemplers in the same locality as on the date of execution of instrument. The practical aspect which is required to be considered is that prices of trees situated on an immovable property may differ from time to time and price as in one year may not be the same in another year or even in other months of the same year. As such, Rule 5(b) of the Rules of 1997 clearly indicate that exempler is to be taken with regard to date of execution of a document. The primary purpose of insertion of such a condition in the Rules would take into account the changes in prices of similar trees in the same locality from time to time. As such, a single circle rates for all the localities in a particular district for a specified time period cannot be taken to be an exempler and would, in the considered opinion of this Court, be contrary to the provisions of Rule 5(b) of the Rules of 1997.

(15.) In the present case, it is evident that the order passed under Section 47A of the Act of 1899 is clearly based on the circle rates notified on 04.08.2003. No exempler whatsoever has been indicated in the aforesaid order in terms of Rule 5(b) of the Rules of 1997. The appellate authority as well while noticing the subsequent notification of circle rates on 16.06.2004 has thereafter indicated calculation of stamp duty as per self-assessment of opposite party no.2. Such an assessment appears to be in consonance with Government Order dated 07.07.2000. It is clear that in neither of the two orders has any adherence been made to Rule 5(b) of the Rules of 1997. However, in view of fact that seventeen years have passed, this Court does not see any occasion to remand the matter for consideration afresh since after passing of so many years, exemplers may not be available for fresh adjudication of the matter particularly when the impugned order appears to be passed in terms of Government Order dated 07.07.2000 which predates the instrument of transfer and appears to be applicable as on the date of execution of instrument of transfer.

(16.) The aforesaid Government Order dated 07.07.2000 has been brought on record alongwith the counter affidavit and clearly provides that stamp duty is being levied at different rates in different District therefore to obviate this problem, it had been decided that the valuation indicated by the assessee regarding such fees as per self-assessment should be taken as the actual valuation and such matter should not be referred to the Collector indicating any deficiency in stamp duty particularly since there is no great effect on revenue generated by such deficiency.

(17.) In view of the fact that although the assessment by either of the authorities is not in consonance with Rule 5(b) of the Rules of 1997 but since the appellate order appears to be in consonance with

Government Order dated 07.07.2000, this Court does not see any reason to interfere with the order under challenge.

(18.) The writ petition as such being devoid of merit is **dismissed.** The parties to bear their own costs.

(2023) 2 ILRA 218
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.11.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Capital Case No. 2 of 2020
With
Reference No. 02 of 2020

Murari Lal & Anr. ...Appellants (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellants:
Sri V.P. Srivastava (Sr. Advocate), Sri Rajeev Nayan Singh, Sri Lav Srivastava, Sri Vijendra Pal

Counsel for the Opposite Parties:
Sri J.K. Upadhyay, A.G.A.

A. Criminal Law - Indian Penal Code, 1860 - Section 302 - Murder - Sentence of Death - Evidence Act,1872 – Section 24 - Extra judicial confession - Reliability - Extra judicial confession is a weak piece of evidence as it can be easily procured whenever direct evidence is not available - An extrajudicial confession, if voluntary, true & inspire confidence and made in a fit state of mind, can be relied upon by the court - conviction can be based on a voluntarily confession but the rule of prudence requires that wherever possible it should be corroborated by independent material evidence (Para 25)

Criminal Law - Indian Penal Code,1860 - Section 302 - Murder - Extra judicial confession - extra judicial confession was made by the accused before the P.W. 6, who used to work as a ear cleaner - that witness held to be unreliable because the accused appellants were not known to him - they would not have made such extra judicial confession before a person who was alien to them - extra judicial confession made by the accused appellants before doctor wholly unreliable because the same have been recorded in similar language and at the relevant time the accused appellants were in police custody - how and in what circumstance extra judicial confession has been recorded, the prosecution utterly failed to do so - Recovery - on the basis of confessional statement made by accused, one 'Salwar' allegedly belonging to the deceased was seized from the sugarcane field - the prosecution failed to prove the recovery in accordance with law - neither the memorandum of the accused was recorded nor the recovery was supported by any independent witness - recovery made from an open space, which is accessible to everyone - prosecution failed to prove the charges beyond reasonable doubt - reference for affirmation of the death sentence, rejected (Para 24)

Allowed. (E-5)

List of Cases cited:

Ramanand @ Nandlal Bharti Vs St. of U.P. Criminal Appeal Nos. 64-65 of 2022 13.10.2022

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

1. Sri V.P. Srivastava, learned Senior Advocate assisted by Sri Rajeev Nayan Singh, appearing for the appellants and Sri J.K. Upadhyay, learned AGA for the State.

2. This death reference was made to this Court under Section 366 of the Criminal Procedure Code, 1973 (in short 'Cr.P.C.') for confirmation of death

sentence awarded to the appellants. The death reference and capital case are heard together and this judgement will govern both the capital case as well as the death reference.

3. This death reference and the capital case arise out of the judgement and order dated 10.1.2020 passed by the Additional Sessions Judge/Special Judge, POCSO Act, Court No. 9, Bareilly in Criminal Case No. 753 of 2019 (C.I.S. No. 1500286/2018) (State vs. Murari Lal & another), arising out of Case Crime No. 50 of 2016 under Section 302/34, 201, 376D of I.P.C., Section 6 of POCSO Act and Section 3(2)(v) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, P.S. Nawabganj, District - Bareilly and sentencing them to death sentence with fine of Rs.50,000/- under Section 302 I.P.C., in default of payment of fine, one year additional imprisonment, 7 years imprisonment with fine of Rs.10000/- under Section 201 I.P.C., in default of payment of fine, three months additional imprisonment, life imprisonment with fine of Rs.50000/- under Section 376D I.P.C., in default of payment of fine, one year additional imprisonment, life imprisonment with fine of Rs.50000/- under Section 3(2)(v) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, in default of payment of fine, one year additional imprisonment, and life imprisonment with fine of Rs.50000/- under Section 6 of the POCSO Act, in default of payment of fine, one year additional imprisonment.

4. As per the prosecution case, on 29.1.2016 at about 12 in the Noon the deceased, who was a minor girl aged 12 years, left for the field and thereafter, she did not return. She was searched initially in the village itself by her family members and the information about her missing was also communicated to her father Hemraj (P.W. 1), who at the relevant point of time had gone to another village namely Idgaon. At about 4 p.m., some children informed P.W. 1 that one dead body is lying in a 'Lahi' field and when P.W. 1 and other villagers reached at the spot, they found the naked body of the deceased and they also noticed injuries on her private part.

5. Information was given to the police and based on written report (Ex.Ka-1), first information report (Ex.Ka-2) was registered against unknown persons under Section 302, 201, 376 I.P.C. read with Section 4 of POCSO Act. Inquest on the dead body was conducted on 29.1.2016 at 5.30 p.m. vide Ex.Ka-4 and the body was sent for postmortem, which was conducted on 30.1.2016 by Dr. Neelam Arya (P.W. 5) vide Ex.Ka-5. The Autopsy Surgeon has found following injuries :

"1. Contusion 1.0 x 1.0 cm. over right side neck, 4.00 cm. below right ear.

2. Contusion 5.0 x 4.0 cm. over the front & left side neck upper part over Thyroid Cartilage.

3. Abrasion 1.0 x 0.1 cm. over the left side neck, 3.0 cm. below left sides angel of Mandible.

4. Abrasion 0.3 x 0.3 cm. over the left side face - cheek area 4.0 cm. away from angle of mouth.

5. Contusion 2.0 x 0.6 cm. over nostril upper lip with swelling.

6. Contusion 3.0 x 1.0 cm. over lower lip with swelling.

7. Blood stained discharge tickle down from Vulva & Vagina with blood stained present on Vulva.

8. Hymen lacerated at 7 O'clock position edges of Hymen are swelling bleeding present.

9. Abrasion 14.0 x 5 cm. cm. On the back of left forearm & hand involving wrist joint 7.0 cm. below elbow.

10. Abrasion 1.0 x 0.3 cm. over back of left forearm 3.0 cm. below elbow."

6. While framing charge, the trial Judge has framed the charge against the accused appellants under Section 302/34, 201, 376D of I.P.C., Section 6 of POCSO Act and Section 3(2)(v) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act.

7. So as to hold the accused appellants guilty, prosecution has examined 11 witnesses. Whereas one defence witness namely, Mahendra Lal has also been examined. Statement of accused appellants were recorded under Section 313 Cr.P.C. wherein they pleaded their innocence and false implication and claimed trial.

8. By the impugned judgement and order, the trial Judge has convicted the appellants under Section 302/34, 201, 376D of I.P.C., Section 6 of POCSO Act and Section 3(2)(v) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act. Hence, this appeal.

9. Counsel for the appellants submits :

(i) that there is no eyewitness account to the incident and the appellants have been convicted solely on the basis of weak circumstantial evidence;

(ii) that on the basis of confessional statement made by Murari Lal, one 'Salwar' allegedly belongs to the deceased was seized on 31.1.2016 from the sugarcane field. However, the prosecution has failed to prove this recovery in accordance with law because neither the memorandum of the accused was recorded nor the recovery has been supported by any independent witness. Moreover, this recovery has been made from an open space, which is accessible to everyone;

(iii) that on the disclosure statement of the accused Umakant Gangwar on 1.2.2016, one 'Chadar' (bed sheet) was allegedly seized vide Ex.Ka-13 from the wheat field. But here also the memorandum was not recorded nor the recovery has been supported by any independent witness and most importantly it had been made from the open agricultural field accessible to everyone;

(iv) that in the medical examination of the accused appellants, no injury was found on their body whereas as per the allegation, the prosecutrix was 12 years old girl and in such eventuality, accused appellants ought to have suffered some injuries;

(v) that in the bed sheet, no blood was found whereas in the 'Salwar' allegedly belonging to deceased, human blood was found but origin of the same has not been proved as the group testing of the blood has not been done;

(vi) that vaginal slide was prepared but there is no FSL report on record;

(vii) that as per the prosecution case, extra judicial confession was made by the accused appellants before the P.W. 6/Ram Chandra, who used to work as a ear cleaner but this witness is wholly unreliable because the accused appellants were not known to him and why would they make such extra judicial confession before a person who was alien to them and there was absolutely no occasion or reason for the appellants to make said extra judicial confession before the respondent no. 6. Moreover, the alleged extra judicial confession was made on 30.1.2016 at 10 a.m. and till that time the complicity of the accused appellants in commission of offence was not known to the prosecution;

(viii) that likewise, the so called extra judicial confession made by the

accused appellants before the P.W. 7/Dr. Jagveer Singh vide Ex.Ka-6 & Ex.Ka-8 are wholly unreliable because the same have been recorded in similar language and at the relevant time the accused appellants were in police custody. There was absolutely no occasion for the accused appellants to make the so called extra judicial confession as recorded by the Doctor. Furthermore, the extra judicial confession is recorded in a column where the description of the incident is to be given and as to how and in what circumstance extra judicial confession has been recorded, the prosecution has utterly failed to do so;

(ix) that according to P.W. 2/Smt. Moti, mother of the deceased, she saw the accused Murari Lal walking fast from the place of occurrence whereas the said statement has not been supported by the P.W. 3/Smt. Ramkali, who was accompanying the P.W. 2;

(x) that the appellants have been convicted solely on the basis of surmises and conjectures; and

(xi) that if the entire prosecution evidence is considered as it is, the present becomes a case of no evidence, yet not only the appellants have been convicted under Section 302 of I.P.C., but most surprisingly they have been awarded death sentence.

10. On the other hand, supporting the impugned judgement, it has been argued by the State counsel:

(i) that conviction of the appellants is in accordance with law and there is no infirmity in the same;

(ii) that a minor girl aged about 12 years had been first subjected to rape and then murdered and importantly the evidence clearly indicates that it is the appellants who committed the said crime; and

(iii) that at times from the evidence inference has to be drawn and due appreciation has to be given to the evidence collected by the prosecution and considering this legal position, the conviction of the appellants is in accordance with law and there is no infirmity in the same.

11. We have heard learned counsel for the parties and perused the record.

12. P.W.1/Hemraj is the father of the deceased and the informant. Firstly, he has stated that his daughter went missing, and during search a dead body was found in the 'lahi' field wearing a 'kurta' and he had apprehension that his daughter was subjected to rape and murder by some unknown person. He said that it is he who lodged the FIR. In cross-examination, he has stated that nothing was recovered in his presence nor any formality in writing to this effect was done. His thumb impressions were taken by the police on a plain paper.

13. P.W.2/Smt. Mori is the wife of P.W.1 and mother of the deceased. She has stated that on the date of occurrence, she and her daughter had gone to the agricultural field to collect sugarcane leaves and thereafter, she had sent the deceased to home with a bundle of leaves and asked her to return back. However, when she did not return, she was being searched and later, her dead body was found in the field. She has further stated that she saw the accused appellant Murari Lal coming out from the place of occurrence walking very fast. P.W.3/Smt. Rajkali is the grand mother of the deceased and has turned hostile.

14. P.W.4/Anil Kumar is the police constable and has assisted the prosecution.

15. P.W.5/Dr. Neelam Arya is one of the member of the panel of Doctors, who conducted the post-mortem of the dead body and she proved the postmortem examination report vide Ex.Ka-5.

16. P.W.6/Ram Chandra is a ear cleaner of the village before whom the alleged extra judicial confession is said to have been made by the accused persons. He has stated that the accused appellants, with folded hands, made a request to him for helping them and they also stated that they had committed a big mistake by raping the prosecutrix and then murdering her.

17. In cross- examination P.W. 6 has stated that the accused persons were not known to him previously. He further admitted that he was hard of hearing and because the police personnel are known to him, he assured the accused appellants that he would get the matter resolved with the police.

18. P.W.7/Dr. Jagveer Singh is a radiologist before whom the alleged extra judicial confession were made by both the accused vide Ex.Ka-6 and Ex.Ka-8. It is relevant to note here that the so called extra judicial confession written by this witness are same in nature and language is almost identical.

19. P.W.8/Inspector R.K.Singh is the Investigating Officer and has duly supported the prosecution case.

20. P.W.9/Dr. Sanjay Kumar was a member of the panel of Doctors, who conducted the post mortem on the person of the deceased, has given the details of the injuries found on the body of the deceased vide his report Ex.Ka-5. P.W.10/S.S.I. Mukesh Kumar conducted inquest and initial investigation. P.W.11/C.O. Naresh Kumar is the second Investigating Officer, who after concluding the investigation filed the charge sheet.

21. D.W.1/Mahendra Pal, the owner of the land where the dead body of the deceased was found, has shown his ignorance about seizer of the dead body from his field.

22. The law in respect of conviction based on circumstantial evidence is very clear. Reliance can be placed upon the judgment of the Supreme Court in ***Ramanand alias Nandlal Bharti v. State of U.P. Criminal Appeal Nos. 64-65 of 2022*** decided on October 13, 2022, wherein it has been held:

"47. ...It is settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt the complete chain of events and circumstances which definitely points towards the involvement and guilty of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye witness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of the expected principles in that regard.

48. A three Judge Bench of this Court in Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, held as under:

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and

basic decision of this Court is Hanumant v. State of Madhya Pradesh [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions uptodate, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :

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

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should' and not "may be' established. There is not only a grammatical but a legal distinction between "may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the following observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047] Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be' and "must be' is long and divides vague conjectures from sure conclusions." (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

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

23. Now if the above principle of law is applied in the present case, the position comes out in the following manner:

24. The present case is based upon circumstantial evidence, however, circumstance put forth by the prosecution does not indicate that only one conclusion can be drawn in favour of the prosecution, rather it is contrary where circumstances indicate towards innocence of the accused. As per evidence, prosecution has failed to

prove its case completely in its favour and the evidence is inconsistent only with the hypothesis of the guilt of the accused. The evidence is not conclusive in nature and does not indicate the possible hypothesis except the one to be proved. From the evidence, it is apparent that the chain of evidence is not complete governing the basic principles of the cases based on circumstantial evidence. The recovery of articles has not been proved as per the requirement of law and likewise the medical report. In the present case, based on extra judicial confession of the accused before PW-7, it cannot be said that the prosecution has succeeded in proving its case beyond all reasonable doubts.

25. Further the law in respect of extra judicial confession is also very clear and reliance can be placed upon the case of **Ramanand** (supra) wherein it has been held:

"82. Extra judicial confession is a weak piece of evidence and the court must ensure that the same inspires confidence and is corroborated by other prosecution evidence. It is considered to be a weak piece of evidence as it can be easily procured whenever direct evidence is not available. In order to accept extra judicial confession, it must be voluntary and must inspire confidence. If the court is satisfied that the extra judicial confession is voluntary, it can be acted upon to base the conviction.

83. Considering the admissibility and evidentiary value of extra judicial confession, after referring to various judgments, in Sahadevan and Another v. State of Tamil Nadu, (2012) 6 SCC 403, this Court held as under: "15.1. In Balwinder Singh v. State of Punjab [1995 Supp (4) SCC 259 : 1996 SCC (Cri) 59] this Court stated the principle that: (SCC p. 265, para 10) "10. An extrajudicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance." x x x x 15.4. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extrajudicial confession, this Court in State of Rajasthan v. Raja Ram [(2003) 8 SCC 180 : 2003 SCC (Cri) 1965] stated the principle that: (SCC p. 192, para 19)

"19. An extrajudicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made." The Court further expressed the view that: (SCC p. 192, para 19)

"19. ... Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused...."

x x x xxx xxx

15.6. Accepting the admissibility of the extrajudicial confession, the Court in Sansar Chand v. State of Rajasthan [(2010) 10 SCC 604 : (2011) 1 SCC (Cri) 79] held that: (SCC p. 611, paras 2930) "29. There is no absolute rule that an extrajudicial confession can never be the basis of a conviction, although ordinarily an extra

judicial confession should be corroborated by some other material. [Vide Thimma and Thimma Raju v. State of Mysore [(1970) 2 SCC 105 : 1970 SCC (Cri) 320] , Mulk Raj v. State of U.P. [AIR 1959 SC 902 : 1959 Cri LJ 1219] , Sivakumar v. State [(2006) 1 SCC 714 : (2006) 1 SCC (Cri) 470] (SCC paras 40 and 41 : AIR paras 41 and 42), Shiva Karam Payaswami Tewari v. State of Maharashtra [(2009) 11 SCC 262 : (2009) 3 SCC (Cri) 1320] and Mohd. Azad v. State of W.B. [(2008) 15 SCC 449 : (2009) 3 SCC (Cri) 1082]]""

84. It is well settled that conviction can be based on a voluntarily confession but the rule of prudence requires that wherever possible it should be corroborated by independent evidence. Extra judicial confession of accused need not in all cases be corroborated. In Madan Gopal Kakkad v. Naval Dubey and Another, (1992) 3 SCC 204, this Court after referring to Piara Singh and Others v. State of Punjab, (1977) 4 SCC 452, held that the law does not require that the evidence of an extra judicial confession should in all cases be corroborated. The rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated.

85. The sum and substance of the aforesaid is that an extra judicial confession by its very nature is rather a weak type of evidence and requires appreciation with great deal of care and caution. Where an extra judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance like the case in hand. The Courts generally look for an independent reliable corroboration before placing any reliance upon an extra judicial confession."

26. From the facts of the present case and the law laid down by various Courts, it is apparent that in the present case there is hardly any legally admissible evidence against the appellants and we have no hesitation in holding that the prosecution has failed to prove the charges beyond reasonable doubt for which the accused-appellants were tried and therefore, the appellants are entitled to the benefit of doubt.

27. We, therefore, have no hesitation in rejecting the reference for affirmation of the death sentence and in allowing the appeal of the appellants against the order of their conviction and sentence. The appeal of the appellants is allowed. The reference sent by the trial court to confirm the death penalty is rejected. The judgment and order of the trial court dated 10.1.2020 is set aside. The appellants are acquitted of all the charges for which they have been tried and convicted. The appellants shall be released from jail forthwith, unless wanted in any other case, subject to compliance of the provisions of Section 437-A Cr.P.C. to the satisfaction of the trial court.

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

(2023) 2 ILRA 225
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2023

BEFORE

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

FAFO No. 637 of 2005
And
FAFO No. 643 of 2005

The Oriental Insurance Company Ltd. ...Appellant

Versus

Smt. Kallo & Ors. ...Respondents

Counsel for the Appellant:
Sri Mithilesh Kumar Tiwari

Counsel for the Respondents:
Sri Achintya Kumar

A. Accident Claim-Workmen's Compensation Act,1923-Section 30-just compensation-fatal accident-substantial question of law-whether the person of 61 years of age could be appointed as driver or not-age factor is nowhere described in the Act that person above 60 years could not have employed as driver-driving licence having been expired has not been proved cogently by Insurance company-the High Court cannot enter into the arena of facts unless they are proved to be perverse-the rate of interest after amendment in Act,1923 is 12%-both the issue raised is answered against the insurance company.(Para 1 to 12)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Oriental Ins. Co. Vs Siby Geoge& ors. (2012) 4 T.A.C. 4 SC

2. New India Assr. Co. Ltd. Vs Kamla & ors..

3. Oriental Ins.Co. Ltd. Vs Poonam Kesarwani & ors. (2008) LawSuit (All) 1557

4. National Ins. Co. Ltd. Vs Jugal Kishore & ors. (1988) AIR SC 719

5. Mayan Vs Mustafa & anr. (2022) ACJ 524

6. Salim Vs New India Assr. Co. Ltd. & anr. (2022) ACJ 526

7. North East Karnataka Road Trans. Corpn Vs Smt. Sujatha Civil Appeal No. 7470 of 2009

8. Golla Rajanna Etc Vs Div.Mgr. & anr. (2017) 1 TAC 259

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

1. Heard Shri Mithilesh Kumar Tiwari, learned counsel appearing for the appellant and Shri Achintya Kumar, learned counsel for the respondents-original claimants. None appeared for the owner.

2. Both these appeals arise out of same incident in which one person had died and one person sustained injuries. First Appeal From Order No. 637 of 2005 arises from claim petition filed by the claimant/heir of the deceased whereas First Appeal From Order No. 643 of 2005 arises from claim petition filed by the injured-claimant.

3. It is submitted that the deceased was aged about 61 years at the time of accident and was being paid about Rs. 4,000/- per month. It is submitted by the learned counsel for the appellant that it was urged before the learned Commissioner that the person of 61 years of age could not have been employed as a driver. Moreover, his driving license had expired on 26.01.2002 and, therefore, also the Insurance Company could not have been saddled with liability. The Commissioner awarded Rs. 2,27,540/- to the heir of the deceased and Rs.3,18,772.80 to injured-claimant, whereas, the claim petitions were for Rs. 2,00,000/- each. It is further submitted that the rate of interest would be 5% to 6% and the Commissioner has ignored the said fact. It is submitted that there is no independent witnesses who had deposed whether the accident occurred due to the rash and negligence driving of the other vehicle. Lastly, it is submitted that the learned Commissioner has ignored the fact that the claimants had failed to prove that the deceased was under the employment of opposite party no.1.

4. The substantial questions of law raised by the Insurance Company are as follows:

"1. Whether, the Learned Commissioner has jurisdiction to award the

compensation Rs. 2,27,540/- against the appellant though the claimants have claimed the amount of compensation only Rs. 2,00,000/- in their claim petition?

2. Whether, without giving notice under Section 10 of the Workmen's Compensation Act, 1923 to the opp. parties before filing of the claim petition the interest of 12% per year can be awarded against the appellant, Oriental Insurance Company.

3. Whether, the driver of 61 years old is workman under the Workmen's Compensation Act, 1923.

4. Whether, the grant of the amount of compensation of Rs. 2,27,540/- is sustainable under the law, without giving findings of calculation."

5. While admitting these appeals, the Division Bench did not formulate any questions of law as required under Section 30 of the Workmen's Compensation Act, 1923 (hereinafter referred to as 'Act, 1923'). Be that as it may, it would be fruitful for this Court to deal with the questions of law as raised by the Insurance Company.

6. Before this Court deals with any other issue Question No. 2 which is raised is answered against the Insurance Company in view of the decision of the Apex Court in **Oriental Insurance Company Vs. Siby George and Others, 2012 (4) T.A.C. 4 (S.C.).** The rate of interest after amendment in Act, 1923, is 12%.

7. As far as Question No.1 is concerned, it has been held by the Apex Court that as far as beneficial piece of legislation are concerned, the Courts can grant what is known as just compensation, if the same works out as per the formula under the Act, 1923 which in this case has been applied properly by the Commissioner. As far as the penalty is concerned, it was what is known as subjective penalty and, therefore also, it does not need any interference of this Court.

8. This takes this Court to the last question whether the person of 61 years of age could be appointed as driver or not. Just because the Investigating Officer has put in investigating report as he was aged about 61 years 47 days, will not make him a non-employee as the age factor is nowhere described in the Workmen's Compensation Act that person above 60 years of age could not have employed as a driver. Nothing has been brought by the Insurance Company to rebut this factual data that he was employed by the owner.

9. This takes this Court to the fact that the license had expired much prior to the date of accident. The driving license having been expired has not been proved cogently by the Insurance Company. In the light of the judgment in **Oriental Insurance Company Limited Vs. Poonam Kesarwani and others, 2008 LawSuit (All) 1557,** when it was not proved by the Insurance Company that there was breach of policy conditions, the appeal cannot succeed. On the contrary, the Insurance Company has not produced the policy, hence, an adverse inference is drawn against the Insurance Company as in view of the the decision of the Apex Court in **National Insurance Company Ltd. Vs. Jugal Kishore and others, AIR 1988 SC 719,** it was bounden duty of the Insurance Company to produce insurance policy.

10. In **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** also, 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 the Court cannot interfere 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.

11. In view of the above, both these appeals fail and stand dismissed.

12. The amount kept in fixed deposit be disbursed to the claimants forthwith.

(2023) 2 ILRA 228
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2023

BEFORE

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

FAFO No. 1111 of 2019
With
FAFO No. 2886 of 2011

Preetam Singh ...Defendant/Appellant
Versus
Smt. Urmila Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Ram Singh

Counsel for the Respondents:
Deepali Srivastava Sinha, Sri Amit Kumar Sinha, Sri Siddharth Jaiswal, Sri Vidya Kant Shukla

A. Civil Law - Motor Vehicles Act, 1988-Section 168-Compensation-determination of income of deceased-deceased was aged about 25 years and he had tea shop-documented records of his income cannot be expected-For a person whose age below 40 years, Rule 220-A(3) prescribes 50% to be added to his income towards future prospects-the tribunal considered her income Rs. 4500 per month but has not granted future loss of income-the deceased was survived by four dependents-Total compensation would be Rs. 11,22,000/- and rate of interest would be 7% per annum.(Para 1 to 36)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Smt. Dulara & ors. Vs U.P.S.R.T.C thru Reg. Mgr. & anr.. F.A.F.O. No. 2887 of 2011

2. OIC Ltd. Vs Smt. Shashi Devi & ors. (2015) SCC Online All 8594

3. Sarla Verma (Smt.) Vs DTC & anr. (2009) 6 SCC 121

4. NIC Vs Pranay Sethi & ors.(2017) 16 SCC 680

5. New India Assr. Co. Ltd. Vs Urmila Shukla & ors. (2021) SCC OnLine SC 822

6. Sushil Kumar & ors. Vs M/s Sampark logistic Pvt Ltd & ors. (2017) 35 LCD 1311

7. Magma Gen. Ins. Co. Ltd. Vs Nanu Ram @Chuhru Ram & ors.(2018) 18 SCC 130

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

1. This judgement will dispose of FAFO No. 1111 of 2019 and FAFO No. 2886 of 2011.

2. Both the appeals relate to the same accident and arise out of the same impugned judgment and award dated 24.02.2011 passed by the Motor Accident Claims Tribunal / Additional District Judge, Court No. 14, Allahabad rendered in MACP No. 657 of 2008. Accordingly, both

the appeals are being decided by this common judgment .

3. FAFO No. 1111 of 2019 shall be treated as the leading case and facts noticed from the said appeal. It must be mentioned at the outset that the leading appeal is by the owner upon whom liability to satisfy the impugned award has been fastened. The appeal seeks to absolve the owner and shift liability upon the Insurance Company. The connected appeal, that is to say, FAFO No. 2886 of 2011 has been preferred by the claimants seeking enhancement of the compensation awarded.

4. Heard Mr. Ram Singh on behalf of the appellant-owner, Mr. Siddharth Jaiswal, learned Advocate appearing on behalf of the respondent No. 4, the Insurance Company and Mr. Amit Kumar Sinha, learned Counsel appearing for the claimant-respondents.

5. Hereinafter, the appellant-owner shall be called "the owner', the Insurance Company, "the insurers', and the claimant-respondents, "the claimants'.

6. In the connected appeal, Mr. Amit Kumar Sinha, learned Counsel has been heard on behalf of the claimants in support of the appeal, Mr. Siddharth Jaiswal, Advocate, on behalf of the insurers and Mr. Ram Singh, learned Counsel for the owner.

7. The facts giving rise to the appeal are these: On August, the 22nd, 2008 at 1.30 P.M., one Ram Chandra alias Babu Lal Yadav, a man of 25 years, was riding a Honda motorcycle bearing No. UP70AL/4090. Rajesh Yadav was on the pillion. The two were proceeding from Mansurabad to Lal Gopal Ganj on the Allahabad-Lucknow Highway. As the two reached Khuda Baksh ka Pura (Shringverpur), a roadways bus approached from the Lucknow end of the highway. It was a vehicle held on contract, bearing registration No. UP53T/7042. It was driven rashly and negligently. The bus struck the motorcycle, leading the rider and the pillion to sustain injuries. Both the injured were carried to the Swaroop Rani Nehru, Hospital, Allahabad, where they were admitted for necessary medical attention. Ram Chandra succumbed to his injuries, whereas the pillion rider, Rajesh Yadav was in a critical condition, whose right leg was fractured and grievous injuries sustained to his head. About this incident, the deceased Ram Chandra's father lodged a First Information Report with P.S. Nawabganj, Allahabad, that was registered as Crime No. 28 of 2008, under Sections 279, 337, 338, 304A IPC. At the time of his demise, the deceased was aged about 25 years and had established a shop selling sweets and tea. It is the claimants' case that the deceased by his exertions would earn about Rs. 7,000/- per mensem. The claimants are the deceased's widow, father, mother and a child born posthumously. The claimants petitioned the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short, "the "Act') seeking compensation in the sum of Rs. 10 lacs with interest.

8. The opposite party No. 1 to the claim petition, "the owner' of the vehicle, who is the appellant here, put in a written statement and denied the allegations in the petition. It is averred in the additional plea that the offending vehicle was insured with the insurers,vide Cover Note No.343637 valid and effective from 23.7.2008 to 22.7.2009. The insurers have been asserted to be answerable regarding any claim that may be decreed against the owner relating

to the accident caused by the offending vehicle. It was asserted that on the date and time of the accident, the vehicle was being driven by Mohd. Saleem son of Sri Sabir Ali, who held a valid driving licence to drive the vehicle. The licence held by the driver bears No. M08621/LKW/2005 issued on 10.9.1979. It was valid from 11.6.2007 to 10.6.2010. The fitness certificate relating to the offending vehicle was valid from 3.8.2008 to 2.8.2009. On the date and time of the accident, the offending vehicle's route permit, registration certificate were all valid, besides the fact that all requisite taxes were paid up therefor. It is then pleaded on behalf of the owner that the offending vehicle never caused the accident nor the driver thereof committed any negligence in the alleged accident. No one sustained any injury nor died in consequence of injury received. The claimants were blamed for instituting the claim petition on twisted facts and suppressing the correct ones, rendering the petition one fit to be rejected. The offending vehicle was being operated in accordance with the terms and conditions of the insurance policy, and that, in the event, the Court was of opinion that the claimants are entitled to receive compensation, the burden thereof would rest on the Insurers' shoulders.

9. A separate written statement was filed on behalf of the Insurers, who too generally denied the allegations in the claim petition. It was averred in the written statement that the deceased met his fate on the date and time of the accident on account of his own negligence. There was no negligence of the bus driver. It is the Insurers' case that there was no evidence of the deceased sustaining fatal injuries in the accident on the date and time of the accident alleged. It is also averred that the claimants have not produced documentary evidence to establish the deceased's age, profession and income. The deceased was an unemployed youth, who had no income of his own. The claimants, before instituting the petition and after the accident, never demanded compensation from the Insurers. In case, demand had been raised, the Insurers would have got facts investigated soon after the accident and proceeded in accordance with law. It is also the Insurers' case that the accident did not involve the offending vehicle, but some other motor vehicle.

10. On the pleadings of parties, the Tribunal framed the following Issues:-

"1. Whether on 22.8.2008 at about 1.30 in the afternoon, the driver of Bus No.UP-53T/7042, driving it negligently and at a high speed, on the Allahabad-Lucknow Highways, within the limits of village Khudabaksh Ka Pura (Shringverpur), falling under Police Station Nawabganj, hit Motorcycle No.UP-70A.L./4090, that was proceeding on its side at a slow speed, in consequence whereof the rider of the motorcycle, Ram Chandra Yadav @ Guddu son of Sri Babu Lal Yadav died?

2. Whether on the date and time of the accident, the driver of aforesaid Bus No.UP-53T/7042 held a valid and effective driving licence?

3. Whether on the date and time of the accident, Bus No.UP-53T/7042 was insured with the Oriental Insurance Company?

4. Whether the rider of Motorcycle No.UP-70A.L./4090 too had contributory negligence in the accident in question? If yes, its effect?

5. Whether the claimants, who are the dependents of the deceased, are

entitled to compensation? If yes, how much and from which opposite party?"

11. On behalf of the claimants, Smt. Sarita Yadav, the deceased's wife, was examined as PW-1, Munnu Lal Yadav was examined as PW-2 and Rajesh Kumar Yadav as PW-3. The claimants produced documentary evidence as well, which includes a xerox copy of the First Information Report and a list of documents, paper No.18-C, photostat copies of documents relating to the offending vehicle, including the driver's driving licence, fitness certificate and registration certificate. Through another list, paper No.23-Ga, a copy of the FIR, a copy of the charge sheet filed against the driver of the offending vehicle, the technical inspection report relating to the offending vehicle, site plan and a certified copy of deceased's autopsy report have been filed.

12. On behalf of the owner and the Insurers, no witness was examined nor any document produced.

13. The Tribunal held on Issue No.1 in favour of the claimants recording a finding that the accident occurred on account of negligent driving by the driver of the offending vehicle. On Issue No.4, the finding was that the accident happened solely on account of negligence of the driver of the offending vehicle with no contributory negligence by the deceased. On Issue Nos. 2 and 3, there are findings that the driver of offending vehicle held a valid and effective driving licence on the date and time of the accident, and likewise, the offending vehicle was covered by a valid insurance policy on the fateful day and time. The Tribunal while deciding Issue No.5 has recorded a very brief finding tucked away somewhere between words, validating all other documents for the offending vehicle but the fitness certificate that was valid from 3.8.2005 to 2.8.2007. Since the accident occurred on 22.8.2008, it was held that there was no valid fitness certificate on the date of accident. The Tribunal held that there was a breach of the insurance policy and held the owner liable to make good the compensation. There is a remark during the course of discussion on Issue No. 5 that on the date of accident, the driver of the offending vehicle did not hold a valid and effective driving licence and, therefore, the owner is liable. The said remark appears to be the result of an apparent mistake because the finding returned on Issue No. 2 is categorical and clear that on the date and time of the accident the driver of the offending vehicle held a valid and effective driving licence. Read together with the finding in the earlier part of discussion on Issue No. 5, the Tribunal appears to have confounded the invalid fitness certificate for the driving licence.

14. This Court, therefore, proceeds on the basis that the Tribunal has exonerated the Insurers for the lack of a fitness certificate. Before this Court, the owner moved an application under Order XLI Rule 27 of the Code of Civil Procedure, or on principles analogous to that provision, seeking to bring on record additional evidence. This includes a certified copy of the judgment and award dated 27.8.2015 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.13, Allahabad in MACP No.415 of 2011, holding the Insurers liable. This award has been brought on record, because it relates to the same accident as the one involved here and arises out of the claim preferred by the injured-victim of the accident, Rajesh Kumar Yadav. In that

case, all the documents relating to the offending vehicle, including the fitness certificate, were held to be there and no breach of policy by the Insurers was found. In addition, a xerox copy of the fitness certificate relating to the offending vehicle has also been brought on record. The certified copy of the award and a xerox copy of the fitness certificate relating to the offending vehicle, showing it to be on certified fitness from 3.8.2008 to 2.8.2009, issued by the Regional Inspector (Technical), have been annexed to the application for additional evidence. The application was allowed vide order dated 11.7.2022 and the two documents were admitted without objection. Those documents have been marked as Exhibit-1 and Exhibit-2, respectively, and made part of the record.

15. In view of the fact that Exhibit-2 shows that the offending vehicle had a valid fitness certificate for the period 03.08.2008 to 02.08.2009, there is absolutely no basis to exonerate the insurers of their liability on the Insurance Policy for the breach of its terms.

16. This Court, accordingly, finds that the appeal by the owner ought to succeed and the insurers held liable to satisfy the award.

17. Now, this Court may take up FAFO No. 2886 of 2011, preferred on behalf of the claimants.

18. In this appeal, there is no other Issue involved, except the one relating to the quantum.

19. The claimants are the widow, father and the mother of the deceased, Ram Chandra alias Guddu. The first relevant fact to be determined is the deceased's monthly income. About the deceased's income, there is on record the testimony of his widow, P.W. 1, Smt. Sarita Yadav. In her examination-in-chief, P.W. 1 has said that at the time of his demise, her husband was aged 25 years. He had a shop vending tea, betel and sweets. The shop was located in the Mansurabad Bazar. The shop was housed in a rented premises. The shop was running for a time period of 4-5 years ante-dating the accident. According to the witness, the deceased would earn about Rs. 5,000/- to Rs. 6,000/- per month.

20. The untimely demise of the witness's husband has left the widow without financial support. It has figured in her evidence that the deceased's father and mother were also dependent upon his income. There is a mention about a posthumous child being also born to parties, but for whatever reasons, there is no claim on his behalf. The insurers have cross-examined this witness, who had knowledge about the deceased's income and said in her cross-examination that he would save Rs. 6,000/- to Rs. 7,000/- per month. This Witness has also said that there were no accounts kept and what she was saying, was on the basis of estimation. The Tribunal has disbelieved the claimants' case about the deceased's income, being Rs 5,000/- - 6,000/- or Rs. 7,000/-. Despite the testimony of his widow, the Tribunal has opined that given the entire circumstances of the deceased, the deceased can be credited with a monthly income of Rs. 2,000/-.

21. This Court must remark that the Tribunal's opinion about the deceased's income being a humble sum of Rs. 2,000/- is way off the mark. It is no fair estimation of the deceased's income contemporaneous

in time, when the accident happened. The Tribunal's assessment about the deceased's income is based on a long-standing notion in society that it is only the State borne salaries earned by Government employees that can offer a dependable source of income.

22. These opinions are generally held because much income that is generated in the unorganized sector does not get recorded the way it is in Government services or more organised employments, but, that does not mean that for self-employed persons working in the unorganized sector, the Court should adopt a pessimistic view about their contributions to the nation's GDP. The deceased was running a shop vending tea, betel and sweets in Mansurabad market. There is evidence on record, unimpeached that the shop was running there for 4-5 years ante-dating his demise in the fateful accident. The deceased was supporting a family of three, besides himself. Going by the contemporary price index prevalent at the time, the income found for the deceased by the Tribunal cannot be countenanced.

23. It has also to be noted that for a self-employed person like the deceased, at the scale that he was working, it is difficult to expect documented records about his income. I had occasion to consider this question in **Smt. Dulara and others v. U.P.S.R.T.C. though Regional Manager and another, F.A.F.O. No. 2887 of 2011, decided on 17.11.2022,** where I held:

"17. A safe benchmark to assess a person's income, where there is no proof aliunde or corroborative about the figure is by reference to the income of an unskilled casual labourer obtaining in time contemporary to the event. In an accident, which took place on 16th May, 2009, a Division Bench of this Court in ***The Oriental Insurance Company Ltd. v. Smt. Shashi Devi & others, 2015 SCC OnLine All 8594,*** *approved the Tribunal's approach in inferring an income of Rs. 150/- per day, assessing it for an ordinary labourer and adding 30% towards future prospect to determine a figure of Rs. 240/- per day. In* ***Shashi Devi*** *(supra), it was held by their Lordships of the Division Bench thus:*

"9. So far as the compensation awarded by the Tribunal is concerned, the Tribunal has noted the age of the deceased as 44 years and having regard to the age of the deceased as mentioned in the post-mortem report and also the evidence on record, the Tribunal af ter taking the income of the deceased as Rs. 4500 per month (Rs. 150 per day) applied the multiplier of 14. Even for a person of an ordinary labourer/coolie the income would be, more than Rs. 240/- per day. At that rate, the annual income would be Rs. 86,400/-. In the present case, the deceased was aged 44-45 years, at the time of his death, (i.e. in the year 2009) and the Tribunal has assessed his income as Rs. 150 per day and at that rate his annual income was assessed as 54,000/- and also looking to the future pros pects of the deceased the Tribunal has in creased 30 % in the total income of the de ceased by applying the ratio of the case of Santosh Devi v. National Insurance Company Ltd., reported in 2012 ACJ 1428 : ((2012) 6 SCC 421 : AIR 2012 SC 2185). It is not necessary that there should be fixed income or the deceased was self employed for the purpose of calculating the future prospects. The Tribunal has rightly applied the multiplier and awarded the compensation and the same does not call for any interference by this Court."

24. For the reasons indicated in **Smt. Dulara and others** (*supra*) and the daily income of an unskilled daily rated labourer at the relevant time, it would be safe to hold the deceased's income to be a sum of Rs. 150/- per day. But, unlike **Dulara Devi,** the deceased here was not a casual labourer and was in self-employment, where he had a shop. If there would be any deductions, which are often made in cases of casual labourers, there is no reason to do that in the deceased's case. His income, therefore, is to be worked out for the entire month at the rate of Rs. 150/-. This would lead to a monthly income for the deceased in the sum of Rs. 4500/-.

25. The annual income of the deceased would, therefore, be a sum of Rs. 54,000/-. The deceased left behind three heirs as the claim petition would indicate. They are Smt. Sarita Devi (widow), Smt. Urmila Devi (his mother) and Babu lal Yadav (his father). Going by paragraph No. 30 of the judgement in **Sarla Verma (Smt) v. Delhi Transport Corporation and another, (2009) 6 SCC 121,** where the number of dependent family members is 2-3, deduction towards personal and living expenses of the deceased is one-third. The Tribunal has directed likewise. Again, so far as the issue of the multiplier goes according to the Schedule set out in paragraph No. 40 of the report in Sarla Verma (*supra*), 18 would be the appropriate multiplier to adopt, the deceased being in the age bracket of 21-25 years.

26. The next question that falls for our consideration is about the future prospects, if any, to which the claimants may be entitled. The issue about the future prospects has been authoritatively pronounced upon by the Constitution Bench decision of the Supreme Court in **National Insurance Company v. Pranay Sethi and others (2017) 16 SCC 680. Pranay Sethi** (*supra*) has extended the benefit of future prospects to the self-employed or persons employed on fixed salaries. In **Pranay Sethi**, it has been held:

"56. The seminal Issue is the fixation of future prospects in cases of deceased who are self-employed or on a fixed salary. Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

57. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardisation, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of

distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardisation on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable."

27. Another Issue that arises for consideration is whether future prospects are to be awarded according to the law laid down in **Pranay Sethi** (*supra*) or Rule 220-A(3) of the U.P. Motor Vehicles Rules, 1998 (for short the "Rules of 1998'). In **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822,** it was held:

"9. It is to be noted that the validity of the Rules was not, in any way, questioned in the instant matter and thus the only question that we are called upon to consider is whether in its application, sub-Rule 3(iii) of Rule 220A of the Rules must be given restricted scope or it must be allowed to operate fully.

10. The discussion on the point in Pranay Sethi was from the standpoint of arriving at "just compensation" in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in Pranay Sethicannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was

not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in Pranay Sethicannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs."

28. The principle applicable, therefore, is that Rule 220-A(3) of the Rules of 1998 would apply in order to determine future prospects and not the law in **Pranay Sethi**, so far as the State of U.P. is concerned, where these rules are in force.

29. The question further to be answered is whether Rule 220-A(3) of the Rules of 1998 that was introduced by Notification No. 777/XXX-4-2011-4(3)-2010 dated 26 September, 2011 i.e. The Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011, apply retrospectively to an accident that happened much before the introduction of Rule 220-A of the Rules of 1998. This question was considered by a Division Bench of this Court in **Sushil Kumar and others v. M/s. Sampark Lojastic Private Limited and others, 2017 (35) LCD 1311.** In **Sushil Kumar** (*supra*), it was held by their Lordships of the Division Bench:

"31. Rule 220-A was inserted in the Uttar Pradesh Motor Vehicles Rules, 1998 in view of the various decisions of the law courts for providing benefit on account of future prospects of the injured/deceased. It provides for addition of certain percentage of the income of the injured/deceased in his actual income depending upon the age of the injured/deceased for the purposes of determination of the compensation. The aforesaid Rule came into effect on 26.09.2011 after the decision of the claim petition but before filing of the appeal though the accident took place on 08.05.2010 much before the enforcement of the above Rule.

32. It is in view of the above that an argument is being raised that Rule 220-A of the Rules which came into effect on 26.09.2011 would not apply to the accident which had taken place on 08.05.2010.

33. In Ram Sarup Vs. Munshi AIR 1963 SC 553 it was laid down that a change in law during the pendency of an appeal has to be taken into account and will cover the rights of the parties.

34. The view expressed above was followed by the Supreme Court in Mula Vs. Godhu AIR 1971 SC 89.

35. In Dayawati Vs. Inderjit AIR 1966 SC 1423 the court had observed as under:-If the new law speaks in language, which expressly or by clear intendment, takes in even pending matters, the court of trial as well as the court of appeal must have regard to an intention so expressed, and the court of appeal may give effect to such a law even after the judgment of the court of first instance.

36. In Amarjit Kaur Vs. Pritam Singh AIR 1974 SC 2068 effect was given to the change in law during the pendency of an appeal as the hearing of an appeal under the procedural law of this country is in the nature of rehearing of the suit by superior court.

37. It was in the light of the above decisions that in Lakshmi Narayan Guin and others Vs. Niranjan Modak AIR 1985 SC 111 it was held that a change in law during the pendency of an appeal has to be taken into account and will cover the right of the parties.

38. The aforesaid decision was followed by a Division Bench of this court in U.P. State Road Transport Corporation Vs. Smt. Madhu Sharma and others, 2003 (4) AWC 2620 which was a case in relation to the provisions of the Motor Vehicles Act and it was observed that it is apparent that the change in law during the pendency of the original proceedings has to be taken into account so as to cover the rights of the parties.

39. In view of above decision the view expressed by the Division Bench of this court in ICICI Lombard (Supra) is not of good law as it does not takes into account the decisions referred to above in holding that the Rule 220-A of the Rules which came into effect on 26.09.2011 would not apply to the accident that took place prior to the said date only for the reason that the Rule was not specifically stated to be retrospective in nature."

30. The law laid down by the Division Bench in **Sushil Kumar** (*supra*) is binding precedent. The award for future prospects is required to be made in accordance with the Rule 220-A(3) of Rules, 1998. For a person of the deceased's age, which was decisively below 40 years, Rule 220-A(3) prescribes 50% to be added to his income towards future prospects.

31. There is still another Issue which requires consideration and, that is, compensation payable to the claimants under the conventional heads. In this regard, the decision in **Pranay Sethi** (*supra*) again becomes relevant where, it is observed;

"48. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule to the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra [UP SRTC v. Trilok Chandra, (1996) 4 SCC 362] . Recently, in Puttamma v. K.L. Narayana Reddy [Puttamma v.K.L. Narayana Reddy, (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574] it has been reiterated by stating : (SCC p. 80, para 54)

"54. ... we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

49. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for general damages in case of death. It is as follows:

"3. General damages (in case of death):

The following general damages shall be payable in addition to compensation outlined above:

(i)	Funeral expenses	Rs 2000
(ii)	Loss of consortium, if beneficiary is the spouse	Rs 5000
(iii)	Loss of estate	Rs 2500
(iv)	Medical expenses -- actual expenses incurred before death supported by	Rs 15,000"

	bills/vouchers but not exceeding	

50. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in *Trilok Chandra [UP SRTC v.Trilok Chandra,* (1996) 4 SCC 362] and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs 1,00,000 was granted towards consortium in *Rajesh [Rajesh v. Rajbir Singh,* (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . The justification for grant of consortium, as we find from *Rajesh [Rajesh v. Rajbir Singh,* (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] , is founded on the observation as we have reproduced hereinbefore.

51. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in *Rajesh[Rajesh v. Rajbir Singh,* (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . It has granted Rs 25,000 towards funeral expenses, Rs 1,00,000 towards loss of consortium and Rs 1,00,000 towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though *Rajesh [Rajesh v. Rajbir Singh,* (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] refers to *Santosh Devi [Santosh Devi v. National Insurance Co. Ltd.,* (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] , it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads."

(emphasis by Court)

32. So far, award of compensation under the head of the loss of consortium is concerned, the same was considered by the supreme Court in **Magma General Insurance Company Ltd. v. Nanu Ram alias Chuhru Ram and others, (2018) 18**

SCC 130. In **Magma General Insurance Company Ltd.** (*supra*), it has been held:

"21. A Constitution Bench of this Court in *Pranay Sethi[National Insurance Co. Ltd. v. Pranay Sethi*, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance, "consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse : *[Rajesh v. Rajbir Singh*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149]

21.1. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation". [Black's Law Dictionary(5th Edn., 1979).]

21.2. Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training"

21.3. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

(emphasis by Court)

33. In view of what this Court has found, compensation payable to the claimants in this appeal would have to be revised in the following manner:

(i)	Monthly Income (of the deceased)	=	**4500/-**
(ii)	Monthly Income+Future Prospects (monthly income x 50%) = 4500+2250	=	**6750/-**
(iii)	Annual Income (of the deceased) = 6750x12	=	**81,000/-**
(iv)	Annual Dependency = Annual Income - one-third deduction towards personal expenses of the deceased = 81000-27000	=	**54,000/-**
(v)	Total Dependency = Annual Dependency x Applied Multiplier = 54000x18	=	**9,72,000/-**
(vi)	Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium =15000+15000+40000x3	=	**1,50,000/-**
The total compensation would therefore, work out to a figure of Rs.		=	**11,22,000/-**

9,72,000/- + Rs. 1,50,000/-

34. In the result FAFO No. 1111 of 2019 **succeeds** and is **allowed**.

35. It is ordered that the compensation awarded by this judgment and award shall be payable by the insurer and not the owner.

36. FAFO No. 2886 of 2011 **succeeds** and is **allowed**. The impugned award passed by the Tribunal is **modified** and the compensation awarded is enhanced to Rs. 11,22,000/-. The aforesaid sum of money shall carry simple interest at the rate of 7% per annum from the date of institution of the claim petition until realisation. Any sum of money already deposited with the Tribunal pursuant to the impugned award, or the interim orders of this Court shall be adjusted against the award. The other directions made by the Tribunal shall remain intact.

37. Costs easy in both appeals.

38. The sum of statutory deposit made by the owner shall be refunded to him.

39. Let the lower court record be sent to the Tribunal at once.

(2023) 2 ILRA 240
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2022

BEFORE

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

FAFO No. 1843 of 2002

Smt. Vidyawati (Deceased) & Ors. ...Appellants

Versus

The New India Assurance Company Ltd. & Ors. ...Respondents

Counsel for the Appellants:
Sri Rishi Bhushan Jauhari, Sri Ashok Kumar Pandey

Counsel for the Respondents:
Sri Arvind Kumar

A. Civil Law-Motor Vehicle Act, 1988-Section 173-challenge to-claim-deceased was a primary teacher the tribunal considered her income Rs. 58,968/- p.a. but has not granted future loss of income-the deceased was survived by three dependents-Total compensation would be Rs. 5,74,584/- and rate of interest would be 7% from the date of the institution of claim petition. (Para 1 to 27)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. NIC Vs Pranay Sethi & ors. (2017) 16 SCC 680

2. Sarla Verma (Smt.) & ors. Vs DTC & anr. (2009) 6 SCC 121

3. New India Assr. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC Online SC 822

4. Sushil Kumar & ors. Vs M/s. SamparkLojestic Pvt. Ltd. & ors. (2017) 35 LCD 1311

5. Jiuti Devi & ors.. Vs Manoj (2022) SCC OnLine All 46

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

1. This is a claimant's appeal under Section 173 of the Motor Vehicles Act, 1988 (for short, 'the Act'), seeking enhancement of compensation awarded by the Motor Accident Claims Tribunal/ 4th Additional District Judge, Shahjahanpur *vide* judgment and award dated 26.03.2002 passed in MACP No. 38 of 1999.

2. The claim petition was instituted by the deceased's widow, Smt. Vidyawati with a case that on 31.12.1998 at about 4:30 in the evening hours, Ram Krishna Kushwaha was proceeding on a bicycle from Kanari Bankey after teaching there to the school in Village Thingri, within the local limits of Police Station Alhaganj, District Shahjahanpur. He was a teacher in the primary school at Village Thingri, *Tehsil* Jalalabad, District Shahjahanpur. He was proceeding on the left hand side of the road. At the fateful moment, a DCM Truck, bearing registration No. DBL-9399, green in colour, approached from the Jalalabad side. It was driven by its driver, Dhain Singh (for short, 'the driver') at a high speed and negligently. The driver proceeded without sounding a horn and struck Ram Krishna's bicycle, crushing it under its wheels. Ram Krishna was thrown off and fell to the ground, sustaining grievous injuries. He died on the spot.

3. At the time of his demise, Ram Krishna Singh was aged 55 years. His employment as a teacher with the primary school pro*vide*d him a monthly income of Rs. 6500/-. His exertions in the fields would yield a further income of Rs. 4000/-, making it a sum of Rs.10,500/- per month. The deceased's dependents are his widow, Vidyawati, aged 52 years and two sons, Haripal, aged 29 years and Sripal, aged 27 years. The registered owner of the offending vehicle is one Raj Singh son of Amar Singh, a resident of Shergarhi, P.S. Shastri Nagar, District Meerut (for short, 'the owner'). The offending vehicle was insured with the New India Assurance Company Limited, District Shahjahanpur, which shall hereinafter be called 'the Insurers'. The claim petition was instituted, seeking a total compensation in the sum of Rs.19,50,000/-.

4. A written statement was filed on behalf of the Insurers generally denying the allegations in the claim petition. It was averred that no cause of action arose to the claimants to institute the present petition, which is not signed and verified in accordance with law. The petition was barred, according to the Insurers, by Section 64 of the Insurance Act, 1938. It was also pleaded that all necessary parties have not been impleaded, rendering the petition bad for non-joinder. The deceased was not employed and had no source of income. The offending vehicle was not involved in the accident, that led to the victim's death nor did the accident result in injuries to him. The deceased's bicycle collided with some unknown vehicle on account of his rashness and negligence and the offending vehicle has been involved deliberately after ascertaining its number in order to institute the present claim petition.

5. On the date of the accident, the offending vehicle did not have a valid Insurance Policy. Upon verification of the Insurance Policy, it has not been found in order and the compensation demanded is beyond the worth of the policy. The compensation is much on the higher side. In order to prove the accident, documentary evidence, such as copies of the First Information Report, Autopsy Report, Release Order of the vehicle and other documents relating to the offending vehicle have not been filed. It is also the Insurers' case that the driver did not possess a valid driving licence. The offending vehicle did not have a fitness certificate or a route permit, where it was operating. The owner and the driver have committed violation of the policy, entitling the Insurers to relief from their liability. There is a collusion between the owner and the claimant, disentitling the claimant to relief.

6. A separate written statement was filed on behalf of the owner, who generally denied the case in the claim petition. It is the owner's case that the claim petition does not comply with the provisions of the Act. It is bad for non-joinder of necessary parties. No cause of action arises to the claimant. The compensation demanded is not in accordance with the provisions of the Act. It is pleaded that on the date of the accident i.e. 31.12.1998, the owner's vehicle, bearing registration No. DBL-9399 had all valid papers to ply, including the Registration Certificate, Insurance Policy, Route Permit, Goods Tax Payment receipt and was driven by a driver, who held a valid and effective driving licence. The offending vehicle is insured with the Insurers *vide* Cover Note No. 0326, valid from 01.06.1998 to 30.05.1999. The Insurers have been paid the due premium. The driver's driving licence No. T-239/MRT193 was issued on 17.03.1993 by the Licensing Authority at Meerut. It was valid and effective from 15.06.1996 to 25.05.1999. The claimant inherited the deceased's property and is, therefore, not entitled to compensation. The claim petition is barred by limitation.

7. A separate written statement was filed by the driver, denying the allegations in the claim petition. It is averred that the driver held a valid driving licence, bearing No. T-239/MRT193, issued on 17.03.1993 by the Regional Transport Officer's Office at Meerut. It was valid up to 24.05.1999. The accident described in the claim petition happened on account of the deceased's negligence. The claimant is not entitled to any compensation, which in any case is not payable by the driver. Whatever liability may be ascertained on account of the accident, the same ought to fall on the owner's or the Insurers' shoulders.

8. On the pleadings of parties, the following issues were framed:

"1. Whether Ram Krishan Singh died in the accident on 31.12.98 on account of rash and negligent driving by the driver of vehicle No. DBL-9399 in the manner alleged in the petition?

2. Whether the petition is bad for non-joinder of necessary parties?

3. Whether the driver of the offending vehicle was holding a valid driving licence or not on the alleged date and time? In either case, its effect?

4. Relief?"

9. The Tribunal answered Issues Nos. 1, 2 and 3 in favour of the claimant and against the Insurers, owner and the driver. There is no cavil about the findings on Issues Nos. 1, 2 and 3. The cause in this appeal is limited to the quantum of compensation, to which the claimant or the other two dependents of the deceased, his sons, are entitled.

10. It must be recorded that pending this appeal, the claimant, Smt. Vidyawati passed away and so did Haripal Singh, one of the two sons of the deceased. The other son, Sripal Singh, who was arrayed as respondent No.5 to the appeal, was transposed as appellant No. 1/3, after the claimant's demise. The interest of Haripal Singh and that of the claimant, is also represented by Utkarsh Singh son of late Haripal Singh, a minor represented through his next friend, Sripal Singh and Smt. Reeta Singh wife of Brahm Singh, daughter of Haripal Singh. Utkarsh Singh, Smt. Reeta Singh and Sripal Singh now figure in the array of the appellants as appellants Nos.1/1, 1/2 and 1/3, due to developments pending appeal. All of them together shall also be referred to as the claimant (unless

the context requires an individual reference).

11. Heard Mr. Rishi Bhushan Jauhari, learned Counsel for the claimant and Mr. Arvind Kumar, learned Counsel appearing for the Insurers. No one appears on behalf of the owner and the driver.

12. It is argued by the learned Counsel for the claimant that the compensation awarded is grossly inadequate, inasmuch as a wrong multiplier has been applied and nothing has been awarded towards future prospects. It is also argued that the claimant is also entitled to compensation under the conventional heads in accordance with the law laid down by the Constitution Bench of the Supreme Court in **National Insurance Company v. Pranay Sethi and others, (2017) 16 SCC 680.**

13. The learned Counsel for the Insurers has supported the the impugned award and says that it is a just award, which does not call for any interference.

14. The basis to work out the dependency is the deceased's monthly income. A perusal of the record and the findings of the Tribunal, that are not in issue, show that the deceased Ram Krishna was a Headmaster in the primary school, where his basic salary, last drawn on 31.12.1998, was Rs. 1600/- with a D.A. of Rs. 2822/-. He was in receipt of interim relief in the figures of Rs. 100/-, 166/- and 166/- per month, leading to a total monthly emoluments of Rs. 4914/-. It is the aforesaid monthly income of the deceased, on the basis of which the claimant's dependency has to be worked out. The income from agriculture, claimed as the other source on behalf of the claimant, has not been accepted by the Tribunal, though there is not much discussion about it. This Court also, on going through the evidence on record, is not inclined to accept any income for the deceased, claimed to accrue from his agricultural exploits. There is not much convincing evidence about it. The annual income of the deceased, worked out on a monthly salary of Rs.4914/-, would be a figure of Rs.58,968/-.

15. The deceased left behind three dependents. Going by the law laid down by the Supreme Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** the Tribunal is, therefore, right in deducting one-third towards personal expenses of the deceased.

16. In order to determine the total loss of dependency, the Tribunal has applied a multiplier of '8'. The deceased on the date of his death was aged fifty-seven and a half years. In accordance with the law laid down in Paragraph No. 40 of the report in **Sarla Verma** for the age group 56-60 years, the applicable multiplier is '9'. It is not '8'. The Tribunal has, therefore, adopted a lower multiplier than that applicable.

17. The Tribunal has not awarded anything towards future prospects. The deceased was a salaried man. And, future prospects for salaried men are conventionally regarded in our country as the highest. It must be remarked that it is the other classes of persons, may be earning much more in their avocations or business, who have traditionally been suspect about their future prospects; but, never the venerable class of servicemen. In **Pranay Sethi** (*supra*), which firmly established that the self-employed too had future prospects, may be a little lesser than

the service class, provides for future prospects for those employed on salaries in the following terms:

"58. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] thinks it appropriate not to add any amount and the same has been approved inReshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] . Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self-employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts."

18. The next issue that arises for consideration is whether future prospects to which the claimant is entitled would be governed by the law laid down in **Pranay Sethi** or Rule 220-A (3) of the U.P. Motor Vehicles Rules, 1998 (for short, the Rules of 1998). This issue fell for consideration of their Lordships of the Supreme Court in **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822,** where it has been observed:

"9. It is to be noted that the validity of the Rules was not, in any way, questioned in the instant matter and thus the only question that we are called upon to consider is whether in its application, sub-Rule 3(iii) of Rule 220A of the Rules must be given restricted scope or it must be allowed to operate fully.

10.T he discussion on the point inPranay Sethiwas from the standpoint of arriving at "just compensation" in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision inPranay Sethicannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated inPranay Sethicannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs."

19. It is, thus, settled that the future prospects in the State of Uttar Pradesh have to be determined in accordance Rule 220-A(3) of the Rules of 1998 and not the decision in **Pranay Sethi**.

20. The other issue which arises for consideration is: whether Rule 220-A(3) of the Rules of 1998, that was introduced by Notification No. 777/XXX-4-2011-4(3)-2010 dated 26 September, 2011 i.e. The Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011, would apply retrospectively to an accident that took place much before the amendment? This question was considered by a Division Bench of this Court in **Sushil Kumar and others v. M/s. Sampark Lojastic Private Limited and others, 2017 (35) LCD 1311,** where it has been held:

"31. Rule 220-A was inserted in the Uttar Pradesh Motor Vehicles Rules, 1998 in view of the various decisions of the law courts for providing benefit on account of future prospects of the injured/deceased. It provides for addition of certain percentage of the income of the injured/deceased in his actual income depending upon the age of the injured/deceased for the purposes of determination of the compensation. The aforesaid Rule came into effect on 26.09.2011 after the decision of the claim petition but before filing of the appeal though the accident took place on 08.05.2010 much before the enforcement of the above Rule.

32. It is in view of the above that an argument is being raised that Rule 220-A of the Rules which came into effect on 26.09.2011 would not apply to the accident which had taken place on 08.05.2010.

33. In Ram Sarup Vs. Munshi AIR 1963 SC 553 it was laid down that a change in law during the pendency of an appeal has to be taken into account and will cover the rights of the parties.

34. The view expressed above was followed by the Supreme Court in Mula Vs. Godhu AIR 1971 SC 89.

35. In Dayawati Vs. Inderjit AIR 1966 SC 1423 the court had observed as under:-If the new law speaks in language, which expressly or by clear intendment, takes in even pending matters, the court of trial as well as the court of appeal must have regard to an intention so expressed, and the court of appeal may give effect to such a law even after the judgment of the court of first instance.

36. In Amarjit Kaur Vs. Pritam Singh AIR 1974 SC 2068 effect was given to the change in law during the pendency of an appeal as the hearing of an appeal under the procedural law of this country is in the nature of rehearing of the suit by superior court.

37. It was in the light of the above decisions that in Lakshmi Narayan Guin and others Vs. Niranjan Modak AIR 1985 SC 111 it was held that a change in law during the pendency of an appeal has to be taken into account and will cover the right of the parties.

38. The aforesaid decision was followed by a Division Bench of this court in U.P. State Road Transport Corporation Vs. Smt. Madhu Sharma and others, 2003 (4) AWC 2620 which was a case in relation to the provisions of the Motor Vehicles Act and it was observed that it is apparent that the change in law during the pendency of the original proceedings has to be taken into account so as to cover the rights of the parties.

39. In view of above decision the view expressed by the Division Bench of this court in ICICI Lombard (*Supra*) is not of good law as it does not takes into account the decisions referred to above in holding that the Rule 220-A of the Rules which came into effect on 26.09.2011 would not apply to the accident that took place prior to the said date only for the reason that the Rule was not specifically stated to be retrospective in nature."

21. As per the law laid down by the Division Bench in **Sushil Kumar** (*supra*), which apparently binds this Court, the award of future prospects is to be made in accordance with Rule 220-A(3) of the Rules of 1998, notwithstanding the fact that accident happened prior to the amendment. Now, going by Rule 220-A(3), considering the age of the deceased, which is more than 50 years, 20% is to be added to his income towards future prospects.

22. Still another matter which requires consideration is that about the claimant's entitlement under the conventional heads. Here again, the principle in **Pranay Sethi** is relevant, where it has been held:

"48. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule to the Act. The said Schedule has been found to be defective as stated by the Court in *Trilok Chandra [UP SRTC v. Trilok Chandra,* (1996) 4 SCC 362] . Recently, in *Puttamma v. K.L. Narayana Reddy [Puttamma v.K.L. Narayana Reddy,* (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574] it has been reiterated by stating : (SCC p. 80, para 54)

"54. ... we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

49. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for general damages in case of death. It is as follows:

"3. General damages (in case of death):

The following general damages shall be payable in addition to compensation outlined above:

(i)	Funeral expenses	Rs 2000
(ii)	Loss of consortium, if beneficiary is the spouse	Rs 5000
(iii)	Loss of estate	Rs 2500
(iv)	Medical expenses -- actual expenses incurred before death supported by bills/vouchers but not exceeding	Rs 15,000"

50. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in *Trilok Chandra [UP SRTC v.Trilok Chandra,* (1996) 4 SCC 362] and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs 1,00,000 was granted towards consortium in *Rajesh [Rajesh v. Rajbir Singh,* (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . The justification for grant of consortium, as we find from *Rajesh [Rajesh v. Rajbir Singh,* (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] , is founded on the observation as we have reproduced hereinbefore.

51. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in *Rajesh[Rajesh v. Rajbir Singh,* (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . It has granted Rs 25,000 towards funeral expenses, Rs 1,00,000 towards loss

of consortium and Rs 1,00,000 towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though *Rajesh [Rajesh v. Rajbir Singh*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] refers to *Santosh Devi [Santosh Devi v. National Insurance Co. Ltd.*, (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] , it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads."

(emphasis by Court)

23. So far as entitlement to compensation for the loss of parental consortium to the children of the deceased is concerned, there is a distinction to be made between children who are minors and those adults. I dealt with the question in **Jiuti Devi and others v. Manoj, 2022 SCC OnLine All 46** and held:

"39. Loss of consortium, that includes parental consortium, unlike dependency, is not some tangible economic loss. It is an emotional loss to the next of kin of the deceased-victim of a motor accident. In case of parental loss, it causes a particular deprivation to minors and young children, about whom it is said by the Supreme Court in United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur, to borrow the words of their Lordships, "Parental Consortium is awarded to the children who lose the care and protection of their parents in motor vehicle accidents".

40. To the understanding of this Court, the impact of loss of parental consortium upon the deceased's children, in the very nature of that loss, is dependent upon the children's age. The loss of parent is a disheartening and emotional event for the child at any age of his maturity, but by the nature of the principle governing award of compensation under the head of parental consortium, the deprivation, that is suffered by a child or a minor, appears to be the determinative and entitling fact. A child, who has advanced into matured adulthood, is married or otherwise in the mainstream of life, would not be entitled to compensation under that head."

24. In the present case, both the children being adults, compensation for the loss of parental consortium would not be payable. The claimant would, however, be entitled to compensation for the loss of spousal consortium.

25. However, so far as the loss of estate and financial expenses are concerned, that has to be awarded in one set, according to the rule in **Pranay Sethi.** Thus, the awarded compensation under the conventional heads, as determined by the Tribunal, is erroneous and the same too has to be modified.

26. In view of the principles applicable for the determination of compensation payable to the claimant and the other dependents, this Court proceeds to work out the same as follows :

(i)	Monthly Income (of the deceased)	=	**4914/-**
(ii)	Monthly Income+Future Prospects (monthly income x 20%) = 4914+983	=	**5897/-**
(iii)	Annual Income (of the deceased) = 5897x12	=	**70,764/-**
(iv)	Annual Dependency = Annual Income - one-third deduction towards personal expenses of the deceased = 70764-23588	=	**47,176/-**
(v)	Total Dependency = Annual Dependency x Applied Multiplier = 47,176x9	=	**4,24,584/-**
(vi)	Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium =15000+15000+40000	=	**70,000/-**
The total compensation would therefore, work out to a figure of Rs. 4,24,584+ Rs. 70,000		=	**5,74,584/-**

27. In the result, this appeal is **allowed in part.** The impugned award passed by the Tribunal is **modified** and the compensation awarded enhanced to **Rs. 5,74,584/-.** The aforesaid sum of money shall carry simple interest at the rate of 7% per *annum* from the date of institution of the claim petition, until realization. Any sum of money already deposited with the Tribunal by the Insurers, pursuant to the impugned award or the interim orders passed by this Court, shall be adjusted against the award. The other directions of the Tribunal in the award shall remain intact. Costs easy.

(2023) 2 ILRA 248
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.01.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Government Appeal No. 967 of 1992

State of U.P. ...Appellant

Versus

Devraj ...Opposite Party

Counsel for the Appellant:

A.G.A.

Counsel for the Opposite Party:
Sri D.N. Wali, Sri Bhuvanesh Kumar Singh

(A) Criminal Law - The Code of criminal procedure, 1973 - Sections 313 & 378 - Appeal in case of acquittal, Indian Penal Code, 1860 - Section 376 - Rape - Powers of the appellate Court against an order of acquittal - while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court - in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper.(Para -11,12,13,14,18)
(B) Criminal Law - The Code of criminal procedure, 1973 - Section 378 - Appeal in case of acquittal - appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court - judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view. (Para -22)

Accused-respondent tried for commission of offence of rape - Chain incomplete - medical evidence does not support prosecution - particularly injury report and supplementary report – acquittal - hence appeal . **(Para - 23)**

HELD:-Judgment does not require any interference. Provisions of Section 375 read with 375(5) I.P.C permit court to concur with Session judge. Record and proceedings sent back to the Court below. **(Para -23,24,25)**

Appeal dismissed. (E-7)

List of Cases cited:-

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr, (2006) 6 S.C.C. 39 Vs

2. Chandrappa Vs St. of Karn., (2007) 4 S.C.C. 415

3. St. of Goa Vs Sanjay Thakran & anr., (2007) 3 S.C.C. 75

4. St. of U.P. Vs Ram Veer Singh & ors, 2007 A.I.R.S.C.W. 5553

5. Girja Prasad (dead) by l.R.S Vs St. of M.P., 2007 A.I.R.S.C.W. 5589

6. luna Ram Vs Bhupat Singh & ors., (2009) SCC 749

7. Mookkiah & anr. Vs St., Rep. by the Inspector of Police, Tamil Nadu, AIR 2013 SC 321

8. St. of Karn. Vs Hemareddy, AIR 1981, sc 1417

9. Shivasharanappa & ors. Vs St. of Karn., JT 2013 (7) sc 66

10. St. of Punj. Vs Madan Mohan Lal Verma, (2013) 14 SCC 153

11. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219

12. Shailendra Rajdev Pasvan Vs St. of Guj., (2020) 14 SC 750

13. Samsul Haque Vs St. of Assam, (2019) 18 SCC 161

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. Heard Sri Patanjali Mishra, learned A.G.A. for the State. None present for the original accused. This is a Government Appeal of the year 1992 listed time and again.

2. This appeal under Section 378 of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), at the behest of the State, has been preferred against the judgment and order dated 28.2.1992 passed by learned Special Judge, Bijnor acquitting accused-respondent who was tried for commission of offence under Sections 376 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

3. Brief facts as culled out from the record are that on 1/2.07.1990 at about midnight accused who was sleeping outstairs told the prosecutrix-Manju that her sister Anneta wife of deceased was suffering from Cholera and was taken to Bijnor and she too had to follow them to Bijnor but when prosecutrix came down the stairs accused Devraj flashed a knife and forcibly pulled the prosecutrix inside the room and committed rape on her.

4. The F.I.R culminated into charge-sheet and accused were committed to Sessions.

5. On being summoned, the accused-person pleaded not guilty and wanted to be tried. The offence for which accused was charged was triable by the Court of Sessions, hence, the accused-respondents were committed to the Court of Sessions. The learned Sessions Judge framed charge for commission of offence punishable under Section 376 of the Indian Penal Code (IPC).

6. The Trial started and the prosecution examined 4 witnesses enumerated as below:

1	Deposition of Manju	PW1
2	" Anita	PW 2
3	" Dr.	PW3
	Smt. Jebunisa Khan	
4	" Gulzar	PW4

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

1	Written Report	Ex.Ka.1
2	Recovery Memo of "Peticot' and Injury report	Ex.Ka.2
3	Supplementary Report	Ex.Ka.3
4	Site Plan with Index	Ex.Ka.4
5	Recovery Memo of "Kaccha'	Ex.Ka.5
6	F.I.R	Ex.Ka.7
7	Report of Vidhi Vigyan Prayogshala	Ex.Ka.10

8. At the end of the trial and after recording the statement of the accused persons under section 313 Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge acquitted the respondents as mentioned above.

9. Learned A.G.A. for the State has submitted that the order of acquittal is not justified in the eye of law as the prosecution had very well established the case against the accused. It is further submitted by learned A.G.A. that the learned Sessions Judge has misread the evidence. Learned A.G.A. has lastly submitted the judgment impugned is erroneous and liable to be set aside.

10. Before we embark on testimony and the judgment of the Court below, the contours for interfering in criminal appeals where accused has been held to be non guilty would require to be discussed.

11. The principles which would govern and regulate the hearing of an

appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of **"M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39**, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

12. Further, in the case of **"CHANDRAPPA Vs. STATE OF KARNATAKA", reported in (2007) 4 S.C.C. 415**, the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

13. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

14. In the case titled **"STATE OF GOA Vs. SANJAY THAKRAN & ANR.", reported in (2007) 3 S.C.C. 75,**

the Apex Court has reiterated the powers of the High Court in appeals against acquital. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

15. Similar principle has been laid down by the Apex Court in cases titled **"STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553** and in **"GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP", 2007 A.I.R. S.C.W. 5589.** Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

16. In the case **of "LUNA RAM VS. BHUPAT SINGH AND ORS.",** reported in **(2009) SCC 749,** the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

17. In a recent decision of the Apex Court in the case titled **"MOOKKIAH AND ANR. VS. STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU",** reported in **AIR 2013 SC 321,** the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the

scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

18. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of **"STATE OF KARNATAKA VS. HEMAREDDY", AIR 1981, SC 1417,** wherein it is held as under:

"...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

19. The Apex Court in **"SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA", JT 2013 (7) SC 66** has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

20. Further, in the case of **"STATE OF PUNJAB VS. MADAN MOHAN LAL VERMA", (2013) 14 SCC 153,** the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt.

However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

21. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219,*** has laid down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10.It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

22. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750,*** has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the

presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

23. We have perused the depositions of prosecution witnesses, documentary evidence supporting ocular versions, arguments advanced by learned counsel for the parties. We have been taken through the record. We are unable to accept the submissions of the State counsel for the following reasons and the judgments of the Apex Court which lay down the criteria for consideration of appeals against acquittal. The chain has been found to be incomplete. While going through the judgment and the evidence of the witnesses we are very clear that the medical evidence does not support the case of prosecution more particularly evidence at Ex. 2 and Ex. 3 which is injury report and supplementary report, therefore, we are of the considered opinion that the judgment does not require any interference. The decisions on which reliance has been placed by the learned Judge would also apply in full force to the facts of this case. The provisions of Section 375 read with 375(5) I.P.C will also permit us to concur with the court below. Thus we concur the findings of the court below.

24. Hence, in view of the matter & on the contours of the judgment of the Apex Court, we concur with the learned Sessions Judge.

25. The appeal sans merits and is dismissed. The record and proceedings be sent back to the Court below. The bail and bail bonds, if any, stands cancelled.

26. We are thankful to learned A.G.A. for ably assisting the Court.

(2023) 2 ILRA 255
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Government Appeal No. 1581 of 1986

State of U.P. ...Appellant
Versus
Radhey Shyam & Ors. ...Accused Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Sri S.A.N. Shah, Sri Akshay Kumar Shukla, Sri Ravindra Pal Singh Kashy

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 313 & 378 - Appeal in case of acquittal, Indian Penal Code, 1860 - Section 302/34 - Murder - Powers of the appellate Court against an order of acquittal - while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court - in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. (Para -9, 10, 11, 14)

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 378 - Appeal in case of acquittal - appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court - judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view. (Para -18)

Four accused persons - three accused died - appeal decided against surviving accused - PW4 was inimical to PW1 - both involved in litigation before incident - FIR story that accused demanded dowry from PW4 is false - trial court has not believed the statements of PW1, PW2, PW3 and even PW4 - conclusion of trial - prosecution had failed to prove its case against accused-respondents - acquittal - hence appeal. **(Para - 3,7,20)**

HELD:-Evidence contradicts oral and medical evidence. No overt act perpetrated on any of the other accused. Concluding with the Apex Court's judgment of acquittal. Record and proceedings sent back to the Court below. (Para -20,22,23)

Appeal dismissed. (E-7)

List of Cases cited:-

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr., (2006) 6 S.C.C. 39

2. Chandrappa Vs St. of Karn., (2007) 4 S.C.C. 415

3. St. of Goa Vs Sanjay Thakran & anr.. (2007) 3 S.C.C. 75

4. St. of U.P. Vs Ram Veer Singh & ors., 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (DEAD) By L.R.S Vs St. of M.P., 2007 A.I.R. S.C.W. 5589

6. Luna Ram Vs Bhupat Singh & ors. (2009) Scc 749

7. Mookkiah & anr.. Vs St., Rep. By The Inspector Of Police, T. N. , Air 2013 Sc 321

8. St. of Karn. Vs. Hemareddy, Air 1981 Sc 1417

9. Shivasharanappa & ors. Vs St. of Karn., Jt 2013 (7) Sc 66

10. St. of Punj. Vs Madan Mohan Lal Verma, (2013) 14 Scc 153

11. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219

12. Shailendra Rajdev Pasvan Vs St. of Guj., (2020) 14 SC 750

13. Samsul Haque Vs St. of Assam, (2019) 18 SCC 161

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

1. Heard learned A.G.A. for the State.

2. This appeal has been preferred by the State against the judgment and order dated 22.02.1986 passed Addl. Sessions Judge, Badauna in Session Trial No. 1 of 1984 (State vs. Radhey Shiam and Others), whereby the accused-respondents Radehy Shiam, Lalta Prasad, Poshabi Lal and Smt. Mada Devi have been acquitted of charges under section 302/34 I.P.C.

3. In this appeal there are four accused persons namely, Radhey Shiam, Lalta Prasad, Poshabi Lal and Smt. Maya Devi, Out of four accused persons, three accused namely, Lalta Prasad, Poshabi Lal and Smt. Maya Devi have died in view of the office report dated 06.12.2022. Hence, the appeal against accused Lalta Prasad,

Poshabi Lal and Smt. Maya Devi stands abated. The appeal is being decided against the surviving accused Radhey Shiam.

4. Briefly stated the facts of this case are that Smt. Premwati daughter of Dori Lal (P.W.1) was married to accused-respondent no.1 Radhey Shyam I in April 1982. Accused-respondent no.3 is the father and accused-respondent no. 4 Smt. Maya Devi is the mother and accused-respondent no. 2 Lalta Prasad is the brother of Radhey Shyam. P.W.4 Roopram the complainant in this case is the nephew of Dori Lal and it is said that negotiation regarding the marriage between Radhey Shyam and Premwati was carried by Roopram and marriage itself took place at the house of Roopram. After marriage, there was regular demand of dowry i.e. a Bullet motorcycle and a double bed by the accused persons. Assurance was also given by Dori Lal that their demand would be fulfilled during his visit to Badaun on 15.4.1983 but he could not fulfil that promise. On account of non-fulfillment of demand, the accused persons got annoyed and consequently Radhey Shyam went to the hotel of Roopram on 16.4.1983 and showed his displeasure before Roopram and Jhajhanlal. On 17.4.1983 it was found that Premwati was in a serious condition after vomiting and she was actually struggling for life. She had made an oral dying declaration also before Shyam Sunder PW-2 and stated that she had been poisoned by the accused persons. When Roopram and others reached the residence of Radhey Shyam, it was found that Premwati has been taken to the District Hospital, Badaun and when they reached the hospital, they found Premwati dead. First information report was lodged at 6.10 p.m. on the same day.

5. After registration of the case, the investigation was entrusted to C.O. Bisauli on 17.4.1983. Thereafter, the inquest report was prepared by Sri Om Prakash Tyagi, S.I. (PW7). He received information as to the death of Premwati at police station, Civil Lines, Budaun at 5.05 p.m. on the same day. On 18.4.1983 at about 7.00 A.M. he visited the hospital and dead body was sealed by him. The dead body was sent by two constables for post-mortem. On the completion of investigation, charge sheet was submitted against the accused persons which has been proved by him. On the receipt of the charge sheet, the case was registered in the court of learned C.J.M who committed the case to the court of Sessions and ultimately it was received in the court of II Additional and Session Judge, Budaun by way of transfer where the accused persons had faced trial. On their appearance, they stood charged for the offence punishable under section 302/34 of the IPC. to which they pleaded not guilty and claimed to be tried.

6. The prosecution in support of its case has examined the witnesses of facts namely, Dori Lal, father of the deceased (PW-1), Shiam Sunder, Phupera brother of the deceased (PW-2), Jhanjan Lal and Roop Ram (PW-3) and (PW-4) cousin brothers of the deceased. The accused-respondents in their examination under Section 313 Cr.P.C. have denied the prosecution case and stated that they have been falsely implicated. However, they admitted their interse relationship.

7. The learned II Addl. District and Sessions Judge, Budaun after considering the submissions made by learned counsel for the parties before him and examining the evidence on record including the statements of the PW-1 an PW-2 recorded during the trial came to the conclusion that the prosecution had failed to prove its case

against the accused-respondents and acquitted them.

8. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

9. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of **"M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39,** the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

7. Further, in the case of **"CHANDRAPPA Vs. STATE OF KARNATAKA", reported in (2007) 4 S.C.C. 415,** the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

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finding of acquittal recorded by the trial Court.

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"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

18. The Apex Court recently in **Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750,** has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in **Samsul Haque v. State of Assam, (2019) 18 SCC 161** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

19. We have perused the depositions of prosecution witnesses, documentary evidence supporting ocular versions, arguments advanced by learned counsel for the parties. We have also perused the findings recorded by the learned Sessions Judge.

20. From the perusal of the entire evidence on record, it transpires that there are serious contradiction in the oral and medical evidence and the medical evidence is not in conformity with the oral evidence adduced by the prosecution. There is no overt act perpetrated on any of the other accused and, therefore, we cannot agree with the submission of learned A.G.A. for the State that the judgment is perverse and requires to be upturned.

21. While going through the finding of facts it appears that PW4 Roop Ram was very much inimical to PW1 Dori Lal and both were entangled in litigation before this incident and which settled after this incident. It seems that PW4 might have lodged false FIR in this matter as the deceased and her family were not in talking terms with the informant and the trial court has opined that the relations between PW1 and PW4 were very much strained and even PW4 did not accept to be himself as the nephew of PW1 Dori Lal in his written statement submitted in the litigation which was pending between them. The story mentioned in the FIR that the accused persons demanded dowry from PW4 seems to be completely false and the trial court has not believed the statements of PW1, PW2, PW3 and even PW4. The dying declaration given to PW2 by the deceased does not inspire any confidence. There is no overt act perpetrated on any of the other accused and, therefore, we cannot agree with the submission of learned A.G.A. for the State that the judgment is perverse and requires to be upturned.

22. After considering the facts and circumstances of the present case and appraisal of the evidence available on record and on the contours of the judgment of the Apex Court, we have no other option but to concur with the judgment of acquittal by the the learned Sessions Judge.

23. The appeal sans merits and is dismissed. The record and proceedings be sent back to the Court below.

(2023) 2 ILRA 262
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE RAHUL CHATURVEDI, J.

Government Appeal No. 1818 of 2004

State of U.P. ...Appellant
Versus
Laxmi Baniya & Anr.
...Accused-Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:
Sri Vinay Kumar Singh, Sri Aya Prasad Tewari, Sri Ajay Kumar Singh, Sri Prakash Chandra Srivastava, Sri Sheo Shankar Tripathi, Sri Siddharth Shukla

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 161,313 & 378 - Appeal in case of acquittal, Indian Penal Code, 1860 - Section 302 - Murder - power and jurisdiction of High Court while interfering in an appeal against acquittal - High Court should not reappreciated the evidence in its entirety, especially when there existed no grave infirmity in the findings of the trial Court - evidentiary value of and sustenance of conviction solely based on dying declaration - presence of Judicial or Executive Magistrate to record the dying declaration is not compulsory and it is only needed as a rule of prudence so as to muster additional strength to the prosecution case - double presumption of innocence operates in favour of the accused respondents. (Para -11,17,18)

Witnesses of fact turned hostile – contradictory statements - Statement recorded under Section 161 CrPC - claimed as a dying declaration - but no corroborative evidence - no other evidence to connect accused persons with crime - gap of two days from date of recording of such statement and time of death of deceased - prosecution could not prove case beyond doubt - accused person was given benefit of doubt - Court below passed judgement of acquittal - hence appeal.**(Para - 6,18)**

HELD:- Court below has taken a plausible and possible view of the matter on appreciation of entire evidence on record, which cannot be substituted by this Court by taking a different view. **(Para -19)**

Appeal dismissed. (E-7)

List of Cases cited:-

1. Bannareddy & ors. Vs St. of Karn. & ors., (2018) 5 SCC 790

2. Jayamma Vs St. of Karn., 2021 (6) SCC 213

3. Virendra Singh Vs St. of U.P. & ors., 2022 (3) ADJ 354 DB

4. Rajesh Prasad Vs St. of Bihar & anr., (2022) 3 SCC 471

5. Padmaben Shamalbhai Patel Vs St. of Guj., (1991) 1 SCC 744

6. K. Ramachandra Reddy & anr. Vs The Public Prosecutor, AIR 1976 SC 1994

7. Laxman Vs St. of Mah., (2002) 6 SCC 710

8. Jagbir Singh Vs St. (NCT of Delhi), (2019) 8 SCC 779

9. Jayamma & anr. Vs St. of Karn., (2021) 6 SCC 213

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

1. Heard Sri Ratan Singh, learned AGA appearing for the appellant-State of UP and Sri Prakash Chandra Srivastava, learned counsel for the accused respondent-Lakshmi Baniya and Sri Vinay Kumar Singh, learned counsel for the accused respondent-Chandrabhan Kurmi and perused the record.

2. Present government appeal has been preferred against the judgement and order dated 31.10.2003 passed by the Additional Sessions Judge, Court No. 3 in Session Trial No. 338 of 2002 (State vs. Lakshmi Baniya) and and in Session Trial No. 420 of 2002 (State vs. Chandrabhan Kurmi) arising out of Case Crime No. 33/89, under Section 302 IPC, P.S. Khajni, District Gorakhpur whereby both the

accused have been acquitted from the charges under Section 302 IPC.

3. Prosecution story, as per FIR, in brief is that the informant Bhajuram s/o Purnavashi Baniya, resident of village Bhiuri, Thana-Khajani, District Gorakhpur had purchased a piece of land on the paved road from Bansgaon to Khajani alongwith his brother Baijnath from Kanhaiya Tripathi, who is residing in village Unwal. On the said piece of land the informant constructed a house. Laxhmi and others, relatives of said Kanhaiya Tripathi were also constructed a house over some part of the said land and residing in the said house. Regarding some part of land a civil suit was also pending before the court below. On 05.05.1989 at around 11:00 pm when his brother Baijnath, niece Kotwal and his daughter-in-law Smt. Fekna Devi laying in front of his house talking and he slept far to the West and was in awake condition then suddenly he heard his brother's noise 'Bachao Bachao'. After lighting a torch, he ran towards his brother. One Hari Koiri also reached to the spot where the lantern was burning. They saw that Baijnath was caught hold by Lakhmi Baniya and two others and Chandrabhan who armed with knife stabbed his brother Baijnath and ran towards West. They witnessed and recognized the accused in the light of the lantern. The informant and others admitted to his brother- Baijnath in the Sadar Hospital due to excessive bleeding where he is being treated. He left his brother in the care of family members and guests and came to inform about the incident. On the said written Tehrir, a first information was registered in the Police Station Khajani on 06.05.1989 at 9:15 am against the accused Lakhmi Baniya, Chandrabhan Kurmi and two others and a case crime no.33 of 1989, under Section 307 IPC was registered.

4. The Investigating Officer was nominated and he conducted investigation. Statements of prosecution witnesses were also recorded and thereafter a charge-sheet was submitted against the accused. The case was committed to the Court of Sessions and charges were framed against the accused who pleaded his innocence and not guilty.

5. In support of prosecution case, PW-1 Kotwal, PW-2 Bhujram, PW-3 Fekna Sakshi, PW-4 Hari, PW-5 Shivram, were produced and examined before the Court below.

6. The judgement of acquittal was passed by the Court below on the ground that except PW-1 Kotwal (son of the deceased), all other witnesses of fact have turned hostile. It was found that PW-2 Bhajuram (real brother of the deceased), PW-3 Fekna Sakshi (wife of the deceased), PW-4 Hari who is stated to be independent witness of fact, PW-5 Shiv Ram have turned hostile and nothing came out in their cross-examination. It was further found that the prosecution has taken the stand that the statement recorded under Section 161 CrPC of the deceased who was in an injured condition is liable to be treated as dying declaration as the death had taken place after two days from the date of incident, however, the court below found that neither the doctor nor the Investigating Officer (IO) was produced to prove that the statement of the deceased so recorded by the IO cannot be treated as a dying declaration in absence of the production of the vital prosecution witness, namely, the Doctor and the IO who had allegedly recorded the statement of the deceased when he was in an injured condition. It was further found that PW-1 Kotwal was a child of about 13 years and his statement was

recorded after a gap of about 14 years and the narration of the incident was not worth belief in the light of the statement made by the other witnesses of fact who turned hostile. It was also found that PW-2 Bhujram who is real brother of the deceased and was stated to have been sleeping about five paces away from the place of incident had also turned hostile and had stated in categorical terms that he had not seen the incident. PW-3 Fekna Sakshi (wife of the deceased) had stated that she was sleeping somewhere else and therefore, had also not supported the stand taken by the PW-1. Under such circumstances, the Court below found that the prosecution could not prove his case beyond doubt and the accused person was given benefit of doubt and judgement of acquittal was passed.

7. Challenging the impugned judgment, Mr. Ratan Singh, learned AGA submits that there was cogent evidence to convict the accused persons herein. He next submits that it is a case of direct evidence where the incident was seen by at least four witnesses and one witness i.e. PW-1 Kotwal (son of the deceased) had categorically supported the prosecution version and nothing came out in his cross-examination against prosecution. It is submitted that merely because some other witnesses have turned hostile, this by itself cannot grant benefit to the defence and therefore, statements of the witnesses are liable to be considered. It is further submitted that the last statement of the deceased when it was recorded by the IO in the shape of statement under Section 161 CrPC is liable to be treated as a dying declaration and this itself is sufficient to reverse the judgement. Submission, therefore, is that the judgement and order of acquittal passed by the trial Court requires serious consideration and reversal and the accused persons herein are liable to be convicted.

8. Per contra, Sri Prakash Chandra Srivastava and Sri Vinay Kumar Singh, learned counsel for the accused respondents, have submitted that the statement of PW-1 Kotwal (son of the deceased) who is 13 years at the time of incident and whose statement was recorded after a gap of 14 years is not worth belief particularly in view of the contradictory stand taken by the other witnesses of fact who are also directly related to the deceased. They submitted that PW-2, PW-3, PW-4 and PW-5 have turned hostile and nothing came out in their cross-examination. They further submitted that the statement of the deceased recorded by the IO under Section 161 CrPC cannot be treated as dying declaration as there was a long gap between the recording of the statement and the time of death that had taken place and therefore, no interference is warranted in the judgement and order impugned herein.

9. We have considered the submissions and have perused the record.

10. Before proceeding further, it would be appropriate to take note of law on the appeal against acquittal.

11. In the case of ***Bannareddy and others vs. State of Karnataka and others, (2018) 5 SCC 790***, in paragraph 10, the Hon'ble Apex Court has considered the power and jurisdiction of the High Court while interfering in an appeal against acquittal and in paragraph 26 it has been held that *"the High Court should not have reappreciated the evidence in its entirety, especially when there existed no grave*

infirmity in the findings of the trial Court. There exists no justification behind setting aside the order of acquittal passed by the trial Court, especially when the prosecution case suffers from several contradictions and infirmities"

12. In **Jayamma vs. State of Karnataka**, 2021 (6) SCC 213, the Hon'ble Supreme Court has been pleased to explain the limitations of exercise of power of scrutiny by the High Court in an appeal against an order of acquittal passed by a Trial Court.

13. In a recent judgement of this Court in **Virendra Singh vs. State of UP and others**, 2022 (3) ADJ 354 DB, the law on the issue involved has been considered.

14. Similar view has been reiterated by Hon'ble Apex Court in **Rajesh Prasad vs. State of Bihar and another,** (2022) 3 SCC 471.

15. On perusal of record, we find that out of four witnesses of fact, three witnesses are closely related to the deceased; one being son of the deceased, other being the wife and third being the real brother, out of which two have not supported the prosecution case although they were claimed to be eyewitnesses and even the independent eyewitness has also not supported the prosecution case and except PW-1 Kotwal (son of the deceased), all turned hostile and contradictory stand is more than apparent on the face of the present case. Presence of the PW-2 and PW-3 is also doubtful, inasmuch as they have also stated in categorical terms that they were not present on the spot, which clearly reflects that they have not supported the stand taken by the PW-1 Kotwal.

16. Insofar as the question of treating the statement of the deceased recorded under Section 161 CrPC by the IO being treated as dying declaration is concerned, it would be relevant to refer to the judgements of Hon'ble Apex Court in ***Padmaben Shamalbhai Patel vs. State of Gujarat***, (1991) 1 SCC 744; ***K. Ramachandra Reddy and another vs. The Public Prosecutor***, AIR 1976 SC 1994; ***Laxman vs. State of Maharashtra***, (2002) 6 SCC 710; ***Jagbir Singh vs. State (NCT of Delhi)***, (2019) 8 SCC 779; and ***Jayamma and another vs. State of Karnataka,*** (2021) 6 SCC 213.

17. Insofar as the facts of the present case are concerned, it is suffice to refer to the judgement of ***Jayamma*** (supra) wherein evidentiary value of and sustenance of conviction solely based on dying declaration was extensively considered and principles were summarised. It was held that presence of Judicial or Executive Magistrate to record the dying declaration is not compulsory and it is only needed as a rule of prudence so as to muster additional strength to the prosecution case. In the aforesaid case, the trial Court found that dying declaration (Ext. P-5) was not worth belief as there was no corroborative evidence to the statement (Ext. P-5) and no other evidence was led by the prosecution to connect the accused persons with the crime except the statement (Ext. P-5) which was held to be unsafe to convict the accused persons solely on the basis of the dying declaration. The High Court reversed the judgement of acquittal of the accused persons relying upon the dying declaration in exercise of appellate powers. While discussing the powers of the appellate and after summerising the principles in this regard, the Hon'ble Apex Court held that reliance placed on dying declaration was

not sustainable and affirmed and endorsed the view taken by the trial court acquitting the accused persons. Paragraphs 26 and 27 of ***Jayamma*** (supra) are quoted as under:

"26. The Additional Sessions Judge, Chitradurga in his judgement dated 30-11-2001 formulated Point No. 1 as to whether the prosecution was able to prove beyond all reasonable doubt that the accused persons with an intention to kill Jayamma went to her hourse and picked up a quarrel in connection with a previous dispute and then doused her with kerosene and set her ablaze. The Additional Sessions Judge extensively examined the entire evidence and after reaching to the conclusion that all the witnesses of the motive or the occurrence have resiled and declared hostile, he was left with the residuary question to decide as to whether the death was suicidal or homicidal. He, thereafter, considered the dying declaration (Ext. P-5) threadbare and critically analysed the statements of the police officer (PW 11) and the doctor (PW 16). The factors like: (i) interpolation in the dying declaration Ext. P-5, (ii) contradiction in the statements of PW 11 and PW 16 regarding injuries on the palm, (iii) the victim with 80% injuries was apparently not in a situation to talk or give statement, (iv) PW 2, son of the deceased himself has stated that his mother committed suicide as she could not bear that her another son had been sent to jail, (v) there being no corroborative evidence to the statement Ext. P-5, and (vi) there is no other evidence led by the prosecution to connect the appellants with the crime except the statement Ext. P-5, he held it unsafe to convict the appellants on the solitary basis of the dying declaration (Ext. P-5).

27. We fully endorse the view taken by the learned trial court. The reasons which we have assigned in para 22 of this order are sufficient to cast clouds on the genuineness of the prosecution case. We find it difficult to uphold the conviction only on the basis of the dying declaration Ext. P-5."

(Emphasis supplied)

18. In the present case, it is apparent on the record that neither the doctor was produced who has stated that the deceased who was in fit state of mind to make the statement; and even the IO was also not produced to prove such statement. We further find that there was a gap of about two days from the date of recording of such statement and the time of death of the deceased. In the present case also, we find that there was no corroborative evidence to the statement recorded under Section 161 CrPC which is being claimed as a dying declaration for the reasons stated above and there was absolutely no other evidence led by the prosecution to connect the accused persons with the crime except the statement. As such, under such circumstances, unless such statement is proved beyond doubt, the same cannot be treated as a dying declaration for making the sole basis for convicting the accused respondents or in any case, even if treated as dying declaration, it would, under no circumstances, be safe for convicting the accused-respondents solely on its basis, that too by reversing the judgement of acquittal, when as per settled law double presumption of innocence operates in favour of the accused respondents.

19. In view of the aforesaid, as reflected from perusal of the evidence, we find that the court below has taken a plausible and possible view of the matter

on appreciation of entire evidence on record, which cannot be substituted by this Court by taking a different view as per the law discussed above.

20. From the discussion made hereinabove, the government appeal stands dismissed.

(2023) 2 ILRA 268
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.01.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Government Appeal No. 2103 of 1992

State of U.P. ...Appellant
Versus
Mool Chandra & Ors. ...Accused-Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Sri Rajeev Sharma

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 313 & 378(3) - Appeal in case of acquittal, Indian Penal Code, 1860 - Section 302/34 - Murder - Powers of the appellate Court against an order of acquittal - while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court - in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. (Para -12,17)

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 378(93) - Appeal in case of acquittal - appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court - judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view. (Para -21)

Four accused persons - three accused died - appeal decided against surviving accused - Trial-Court rightly appreciated evidence on record - Case against accused under Section 34 of I.P.C. made out - chain incomplete - finding of Court below - scanty evidence - accused cannot be punished and or convicted for the offences for which they are charged - acquittal - hence appeal.**(Para - 22,23)**

HELD:- Factual scenario in the present case will not permit court to take a different view then that taken by the court below. Concur the findings of the court below. Record and proceedings sent back to Court below. **(Para-24,25)**

Appeal dismissed. (E-7)

List of Cases cited:-

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr., (2006) 6 S.C.C. 39

2. Chandrappa Vs St. of Karn., (2007) 4 S.C.C. 415

3. St. of Goa Vs Sanjay Thakran & anr., (2007) 3 S.C.C. 75

4. St. of U.P. Vs Ram Veer Singh & ors., 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (Dead) by L.R.s Vs St. of MP, 2007 A.I.R. S.C.W. 5589

6. Luna Ram Vs Bhupat Singh & ors., (2009) SCC 749

7. Mookkiah & anr. Vs St. Representatives by the Inspector of Police, Tamil Nadu, AIR 2013 SC 321

8. St. of Karn. Vs Hemareddy, AIR 1981, SC 1417

9. hivasharanappa & ors. Vs St. of Karn., JT 2013 (7) SC 66

10. St. of Punj. Vs Madan Mohan Lal Verma, (2013) 14 SCC 153

11. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219

12. Shailendra Rajdev Pasvan Vs St. of Guj., (2020) 14 SC 750

13. Samsul Haque Vs St. of Assam, (2019) 18 SCC 161

(Delivered by Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. This appeal under Section 378 (3) of Criminal Procedure Code (in short 'Cr.P.C.'), at the behest of the State, has been preferred against the judgment and order dated 24.8.1992, passed by learned Additional Sessions Judge, Court No.4, Etah, in Session Trial No.205 of 1990 *(State of Uttar Pradesh vs. Moolchandra and others)*, under Sections 302/34 of IPC, Police Station-Malavan, District Etah, whereby the learned trial-court acquitted the accused-respondent. Accused respondent nos. 1, 2 and 4 have died and the counsel for accused - respondents has also given abatement application which is taken on record. Appeal qua respondent Nos 1, 2 & 4 stands abated.

2. The brief facts of this case are that complainant Lakshman Singh and his son Tara Singh, r/o village Dalelpur Police station Malawan, District Etah used to water their fields from Government Gool. On 22.4.90, Lakshman Singh and his son Tara Singh (deceased) reached at Government Gool to fetch water for their field and at around 2:00 p.m while they were fetching water for their field, accused-Moolchandra who is cousin(son of real brother of complainant's father) of complainant Lakshman Singh arrived there and said that he shall not allow them to fetch water from this Gool as he takes water from it for his engine and threatened them with dire consequences if they(complainant and deceased) chose to remain there. Out of fear, Lakshman Singh and his son deceased-Tara Singh proceeded towards their house. Thereafter, accused Moolchandra called his sons, namely, Bharat Singh and Ramveer Singh as well as his wife Lado. On being called, Bharat Singh, Smt. Lado and Ramveer Singh arrived there armed with knife, lathi as well as stick and grabbed deceased-Tara Singh. All the accused surrounded the deceased and accused-Bharat Singh stabbed him with knife on his chest due to which injured Tara Singh collapsed on the road near Babool tree. On hearing cries, Anganlal, Sumer Singh and Badan along with numerous other individuals saved complainant Lakshman Singh after reaching there and witnessed the aforesaid incident. Tara Singh died on the spot. The accused namely Bharat Singh, Ramveer and Moolchandra fled from the spot on seeing the villagers and Smt Lado was caught there itself. The complaint of this incident was got written by Phool Singh and the same was submitted at Malwan police station on that very day itself ie. on 22-4-90 by complainant of the case and the case was registered against the accused in the evening at 5.10 on the basis of the

written complaint information exhibit Ka-1. Its chik/FIR is marked as exhibit Ka-11 and entry of the case was made in the General Diary (G.D.), the carbon copy of which is exhibit Ka-(sic.). The investigation of this case was taken up by Sri C.R. Malik, the Police Sub Inspector. On getting the information he recorded the statements of the complainant of the case Lakshman Singh and prepared the inquest report exhibit Ka-3 at the place of occurrence. The site-map exhibit Ka-4 was prepared by him after carrying out the spot inspection. The dead body of the deceased Tara Singh was sealed and then it was sent for post mortem examination and all the necessary papers were prepared in this regard. The statements of the witnesses were recorded and thereafter the investigation was taken over by Sri Baburam Verma S.O. and he submitted charge-sheet in the court against the accused on 11-5-1990.

3. On the basis of this written report, a case was registered against all the accused including Mool Chandra. After registration of the case, the investigation followed. The Investigating Officer recorded the statements of the complainant and other witnesses, visited the site and prepared the site-plan. After investigation, the Investigating Officer of the case submitted charge-sheet against the accused-Mool Chandra.

4. Accused-Mool Chandra and others were charged under Sections 302/34 of the IPC. The case being exclusively triable by court of session was committed for trial to the court of session by competent Magistrate. Accused person denied charges and claimed to be tried.

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

1	Laxman Singh	PW 1
2	Summer Singh	PW 2
3	Dr.V.K. Gupta	PW 3
4	Babu Ram Verma	PW 4

6. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1	Written Report	Ex.ka 1
2	Postmortum Report	Ex.ka 2
3	Panchayatnama	Ex.ka 3
4	Site plan	Ex.ka 4
5	Photographs of dead body	Ex.ka 8
6	G.D. Report	Ex.ka 12

7. After prosecution evidence, the accused person was examined under Section 313 Cr.P.C. in which he told that false evidence has been led against him.

8. We have heard Vikas Goswami, learned AGA for the State-appellant, Sri Rajeev Sharma, learned counsel for accused- respondent no.3 and perused the record.

9. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

10. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***M.S. Narayana Menon @ Mani vs. State of Kerala and another,*** *(2006) 6 S.C.C. 39*, the Apex Court has narrated the powers of the High Court in appeal against the order

of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

11. Further, in the case of ***Chandrappa vs. State of Karnataka,*** *reported in (2007) 4 S.C.C. 415,* the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

12. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

13. Even in the case of ***State of Goa vs. Sanjay Thakran and another****, reported in (2007) 3 S.C.C. 75,* the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of

the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

14. Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others,*** *2007 A.I.R. S.C.W. 5553* and *in* ***Girja Prasad (Dead) by L.R.s vs. State of MP,*** *2007 A.I.R. S.C.W. 5589.* Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

15. In the case of ***Luna Ram vs. Bhupat Singh and others****, reported in (2009) SCC 749,* the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

16. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives by the Inspector of Police, Tamil Nadu,*** reported in AIR 2013 SC 321, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis

of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

17. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Karnataka vs. Hemareddy***, *AIR 1981, SC 1417*, wherein it is held as under:

" ... This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

18. In a recent decision, the Hon'ble Apex Court in ***Shivasharanappa and others vs. State of Karnataka,*** *JT 2013 (7) SC 66* has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

19. Further, in the case of ***State of Punjab vs. Madan Mohan Lal Verma***, *(2013) 14 SCC 153*, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

20. The Apex Court recently in ***Jayaswamy vs. State of Karnataka***, *(2018) 7 SCC 219*, has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

21. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat***, *(2020) 14 SC 750*, has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam***, *(2019) 18 SCC 161* held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

22. Learned trial-court rightly appreciated the evidence on record. The evidence produced by prosecution does not inspire confidence as held by learned trial Judge and sifting oral testimony, we have come to the conclusion that the case against accused under Section 34 of I.P.C. made out.

23. We have perused the depositions of prosecution witnesses, documentary evidence supporting ocular versions, arguments advanced by learned counsel for the parties. We have been taken through the record. We are unable to accept the submissions of the State counsel for the following reasons and the judgments of the Apex Court which lay down the criteria for consideration of appeals against acquittal. The chain has been found to be incomplete. While going through the judgment it is very clear that the court below has given a categorical finding that the evidence is so scanty that the accused cannot be punished and or convicted for the offences for which they are charged. The factual scenario in the present case will not permit us to take a different view then that taken by the court below. In that view of the matter we are unable to satisfy ourselves. Thus we concur the findings of the court below.

24. After considering the facts and circumstances of the present case and appraisal of the evidence available on record and on the contours laid down by the judgment of the Apex Court, we have no other option but to concur with the reasoning of acquittal recorded by the learned Sessions Judge for the aforesaid reasons.

25. The appeal sans merits and is dismissed. The record and proceedings be sent back to the Court below. The bail and bail bonds are cancelled.

(2023) 2 ILRA 275
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.02.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-C No. 3034 of 2022

Smt. Sabira Begum ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Abhay Pratap Yadav, Shiv Kumar Yadav

Counsel for the Respondents:
C.S.C.

A. Civil Law - Indian Forest Act, 1927 – Sections 52, 52-A & 52-B – Confiscation of vehicle – Power to seize property, when can be exercised – No order is there indicating that the vehicle, in question, was being used in committing of forest offence – Effect – Held, the officer seizing the property under the provisions of the Act 1927, more particularly Section 52(1) of the Act read with Section 52A of the Act 1927 can seize such forest produce alongwith the tools including the vehicles that have been used in committing of a forest offence. Thus, at the time of seizure, it would have to be recorded that the vehicle and other tools which have been seized, were being used in committing the forest offence – High Court held seizure of vehicle was against the provisions of the Act, 1927. (Para 23 and 24)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Assistant Forest Conservator & ors. Vs Sharad Ramchandra Kale; (1998) 1 SCC 48

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and Dr. Uday Veer Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. In pursuance to the order dated 24.01.2023 original records have been produced by learned Additional Chief Standing Counsel and who has himself gone through the records.

3. After perusal of the record learned Additional Chief Standing Counsel states that there is no order or document on record per which the authority has recorded that the motorcycle recovered from the spot was used in committing the forest offence.

4. The aforesaid statement is recorded.

5. Instant petition has been filed praying for the following main reliefs:-

"(i) Issue a writ, order or direction in the nature of certiorari to set-aside the order dated 02.12.2021 in Appeal No.03/81-2-2021-13G/2021 and order dated 04.03.2020 in Range Case No.22/2019-2020 read with Confiscation Case No.05/2019-2020 passed by opposite party no.2 & 3 respectively which is annexed as Annexure No.1 & 2 to this writ petition.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to release the Motorcycle Royal Enfield UP-46-H-2760, Chasis No. ME3U3S5C1HLC216071 and Engine No.U3S5C1HL216071 in favour of the petitioner."

6. The case set forth by the learned counsel for the petitioner is that the petitioner is the registered owner of Motorcycle Royal Enfield No. UP-46-H-2760 (hereinafter referred to as the 'vehicle'). On 26.12.2019, a relative of the petitioner namely Saddam had requested the petitioner to lend him the vehicle for a day for his personal urgent work. The petitioner being the resident of the village and it being a usual practice of helping the neighbours/relatives in their hour of need, the vehicle was given by the petitioner to Saddam.

7. It is contended that on 27.12.2019 at about 04:00 PM the petitioner received information from a villager that at about 05:00 AM on 27.12.2019 Saddam has been arrested by the police from the forest area on the ground of being involved in an illegal felling of trees from the reserved forest area and that the petitioner's vehicle has also been recovered by the authorities from the spot in question.

8. It is contended that the Regional Forest Officer vide his order dated 27.12.2019, a copy of which has been filed as Annexure CA-3 to the counter affidavit, recommended for confiscation of the vehicle. In pursuance thereto, a notice dated 18.01.2020 was issued to the petitioner under Section 52-A of the Indian Forest Act, 1927 (hereinafter referred to as the 'Act, 1927') asking her as to why the vehicle be not confiscated. The petitioner claims to have submitted her reply on 19.02.2020, a copy of which is Annexure CA-4 to the counter affidavit indicating that (a) her relative Saddam had taken the vehicle on 26.12.2019, and (b) the petitioner has never indulged in any criminal activities or has violated any of the provisions of the Act, 1927.

9. Placing reliance on both the grounds as taken by the petitioner in her

reply it was prayed that the vehicle be released.

10. The competent authority vide order dated 04.03.2020, a copy of which is Annexure-2 to the petition, did not agree with the reply submitted by the petitioner and thus passed an order under Section 52-A(1) of the Act, 1927 confiscating the vehicle.

11. Being aggrieved, the petitioner filed an appeal under Section 52-B of the Act, 1927 which has been rejected vide order dated 02.12.2021, a copy of which is Annexure-1 to the petition, primarily reiterating the grounds which had been taken by the authority while passing the impugned order dated 04.03.2020.

12. Being aggrieved against both the orders instant petition has been filed.

13. The argument of learned counsel for the petitioner is that Section 52(1) of the Act, 1927 read with Section 52A(1) and (2) of the Act 1927 categorically give the power of seizure of the property, which is believed to have been used in committing of any forest offence but that the officer concerned has to record that the property being sought to be seized has been used in committing the forest offence. It is contended that the authorities have failed to record in their orders that the vehicle in question was being used or had been used in committing of any forest offence and as such the seizure and subsequent confiscation of the vehicle is against the provisions of the Act, 1927.

14. It is further contended that the order impugned dated 04.03.2020 would indicate that despite the petitioner in her reply dated 19.02.2020 having categorically stated that her relative Saddam had taken away the vehicle for some urgent personal work and that the petitioner has never been involved in any criminal activities as such the natural corollary to it is that the vehicle was used in illegal activities by Saddam without her knowledge yet the competent authority in his order impugned dated 04.03.2020 has failed to hold that as the vehicle was used with the knowledge of the petitioner for a forest offence as such the vehicle is liable for confiscation.

15. Elaborating the same, the argument of learned counsel for the petitioner is that when a duty is cast upon the authority concerned in terms of sub-section (5) of Section 52-A of the Act, 1927 of giving a finding with regard to the provisions of sub-section (5) of Section 52-A of the Act, 1927 then without any such finding of the vehicle having been used with the active connivance or knowledge of the vehicle owner for committing a forest offence, the order of confiscation dated 04.03.2020 will not be legally valid in the eyes of law. It is also contended that even the appellate authority has failed to consider this aspect of the matter and as such both the orders impugned merit to be quashed.

16. On the other hand, learned Standing Counsel on the basis of averments contained in the counter affidavit argues that in the counter affidavit the criminal cases which have been lodged against Saddam have been brought on record by means of Annexure CA-2, a perusal of which would indicate that there are 12 cases lodged against Saddam under the provisions of the Act, 1927. Placing reliance on the criminal history of Saddam, it is argued that when the relative of the

petitioner namely Saddam was a known violator of the provisions of the Act, 1927 as such the petitioner, while giving her vehicle to Saddam for use, should have been more careful about the same. It is also contended that this aspect of the matter has been considered threadbare by the competent authority while passing the order impugned dated 04.03.2020 and the said order has been affirmed with the dismissal of the appeal vide order dated 02.12.2021 and as such there is no infirmity or illegality in the said orders and the writ petition deserves to be dismissed.

17. Heard learned counsel for the parties and perused the record.

18. As already indicated above the records had been summoned by the Court which have been produced by learned Additional Chief Standing Counsel. The learned Additional Chief Standing Counsel has also perused the records for the purpose to ascertain as to whether there is any order regarding recording of reasons as provided under Section 52(1) of the Act 1927 that the vehicle seized was being used for committing a forest offence and has indicated that there is no order on record either recording or stating that the vehicle recovered from the spot was being used in forest offence.

19. From a perusal of the records, it emerges that the petitioner is the owner of the vehicle in dispute. She is resident of a village. Her relative namely Saddam had requested the petitioner for use of the vehicle on 26.12.2019 for some urgent personal work and the petitioner had lent him the vehicle. On 27.12.2019, the petitioner claims to have come to know about Saddam having been caught with another person in illegal felling of trees in a reserved forest area and the petitioner's vehicle was also recovered from the spot. A notice was issued to the petitioner by the competent authority for the purpose of confiscation of the vehicle to which the petitioner submitted her reply on 19.02.2020 categorically taking the pleas that (a) her relative Saddam had taken the vehicle on 26.12.2019, and (b) the petitioner has never indulged in any criminal activities or has violated any of the provisions of the Act, 1927. Her reply did not find favour with the authority and the order impugned dated 04.03.2020 was passed whereby the vehicle of the petitioner has been confiscated. The appeal filed against the said order has also been rejected by the appellate authority vide order dated 02.12.2021. Being aggrieved against both the orders, instant petition has been filed.

20. The main argument of learned counsel for the petitioner is that in terms of Section 52(1) and Section 52A(1) of the Act 1927, for the purpose of seizure of a vehicle, the authorities have to record that the vehicle was being used in committing forest offence.

21. In order to consider the argument, the provisions of Section 52 and 52A (amendment for Uttar Pradesh) of the Act 1927 are to be considered, which, for the sake of convenience, are reproduced below:

" 52. Seizure of property liable to confiscation.--

(1) When there is reason to believe that a forest-offence has been committed in respect of any forest-produce, such produce, together with all tools, boats, carts or cattle used in committing any such offence, may be seized by any Forest-officer or Police- officer.

(2) Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized, and shall, as soon as may be, make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made:

Provided that, when the forest-produce with respect to which such offence is believed to have been committed is the property of Government, and the offender is unknown, it shall be sufficient if the officer makes, as soon as may be, a report of the circumstances to his official superior.

Uttar Pradesh

(i) Same as in Gujarat (1) and (2)

(Vide Uttar Pradesh Act 21 of 1960, sec. 7 (w.e.f. 2-11-1960)

Gujarat.-

(1) for the word "carts", substitute the word "vehicles".

(Vide Gujarat Act 15 of 1960, secs. 3 and 4(2) (w.e.f 8-12-1960)

(2) after sub-section (1), insert the following sub-section, namely:--

"(1A) Any Forest-officer or Police Officer may, if he has reason to believe that a vehicle has been or is being used for the transport of forest produce in respect of which there is reason to believe that a forest offence has been or is being committed, require the driver or other person in charge of such vehicle to stop the vehicle and cause it to remain stationary as long as may reasonably be necessary for examination of the contents in the vehicle and inspection of all records relating to the forest produce and in possession of such driver or other person in charge of the vehicle or any other person in the vehicle."

[Vide Gujarat Act 19 of 1983, sec. 2 (w.e.f. 24-5-1983).

Uttar Pradesh

(i) in sub-section (1), for the words "vehicles or cattle", substitute the words "vehicles, cattle, ropes, chains or other articles":

(ii) for sub-section (2), substitute the following sub-section, namely:-

(2) Any Forest Officer or Police Officer may, if he has reason to believe that a boat or vehicle has been, or is being, used for the transport of any forest produce in respect of which a forest offence has been, or is being, committed, require the driver or other person in charge of such boat or vehicle to stop it, and he may detain such boat or vehicle for such reasonable time as is necessary to examine the contents in such boat or vehicle and to inspect the records relating to the goods transported so as to ascertain the claims, if any, of the driver or other person in charge of such boat or vehicle regarding the ownership and legal origin of the forest produce in question.

(3) Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized and shall, as soon as may be, make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made, and if the seizure is in respect of forest produce which is the property of the State Government, shall also make a report to the authorised officer.

(Vide Uttar Pradesh Act 1 of 2001, sec. 6)

***"52A. Procedure on seizure.** (1) Notwithstanding anything contained in this Act or any other law for the time being in force where a forest-offence is believed to have been committed in respect of any forest-produce, which is the property of the State Government, the officer seizing the property under sub-section (1) of section 52 shall without unreasonable delay,*

produce it together with all the tools, boats, vehicles, cattle, ropes, chains and other articles used in committing the offence, before an officer, not below the rank of a Divisional Forest Officer, authorized by the State Government in this behalf, who may, for reasons to be recorded, make an order in writing with regard to custody, possession, delivery, disposal or distribution of such property, and in case of tools, boats, vehicles, cattle, ropes, chains and other articles, may also confiscate them.

(2) The authorized officer shall, without any undue delay, forward a copy of the order made under sub-section (1) to his official superior.

(3) Where the authorized officer passing an order under sub-section (1) is of the opinion that the property is subject to speedy and natural decay he may order the property or any part thereof to be sold by public auction and may deal with the proceeds as he would have dealt with such property if it had not been sold and shall report about every such sale to his official superior.

(4) No order under sub-section (1) shall be made without giving notice, in writing, to the person from whom the property is seized, and to any other person who may appear to the authorized officer to have some interest in such property: Provided that in an order confiscating a vehicle, when the offender is not traceable, a notice in writing to the registered owner thereof and considering his objections if any will suffice.

(5) No order of confiscation of any tool, boat, vehicle, cattle, rope, chain or other article shall be made if any person referred to in sub-section (4) proves to the satisfaction of the authorized officer that any such tool, boat, vehicle, cattle, rope, chain or other article was used without his knowledge or connivance or without the knowledge or connivance of his servant or agent, as the case may be, and that all reasonable precautions had been taken against use of the objects aforesaid for the commission of the forest offence."

22. From a perusal of Section 52(1) of the Act, 1927 it emerges that where there is a reason to believe that forest offence has been committed in respect of any forest produce, such produce together with all tools, boats, vehicles, cattle, ropes, chains or other articles **used in committing any such offence,** may be seized by any Forest-officer or Police-officer. As per the State amendment, the forest officer or police officer if he has reason to believe that a vehicle has been or is being used for transport of forest produce in respect of which there is reason to believe that a forest offence has been or is being committed then such vehicle can be stopped for the purpose of examination of contents. Likewise Section 52A(1) of the Act 1927 provides that where a forest offence is believed to have been committed in respect of forest produce, the officer seizing the property under Section 52(1) of the Act, 1927 shall produce it together with the tools boats, vehicles and other articles **used in committing the offence** before an officer not below the rank of District Forest Officer who may for reasons to be recorded make an order in writing with regard to custody possession, delivery, disposal or distribution of such property and in respect of tools, boats vehicles etc, may also confiscate them.

23. From the aforesaid it is apparent that the officer seizing the property under the provisions of the Act 1927, more particularly Section 52(1) of the Act read with Section 52A of the Act 1927 can seize

such forest produce alongwith the tools including the vehicles that have been used in committing of a forest offence. Thus, at the time of seizure, it would have to be recorded that the vehicle and other tools which have been seized, were being used in committing the forest offence.

24. In the instant case, from a perusal of records, it clearly emerge that there is no order on record of the respondents to indicate that the vehicle in question had been recorded as a vehicle which was being used in committing of forest offence. Incidentally, in the notice dated 27.12.2019, a copy of which is annexure CA 3 to the counter affidavit, the authority has only recorded about the vehicle being recovered from the spot in question but has failed to record that the vehicle was being used for the purpose of committing of forest offence. Accordingly, considering the mandatory provisions of Section 52 read with Section 52A of the Act, 1927 it is apparent that the seizure of the vehicle of the petitioner is against the provisions of the Act, 1927.

25. Another argument of learned counsel for the petitioner that under sub-section (5) of Section 52-A of the Act, 1927, the onus is cast on the authority that the vehicle has been used without the knowledge or connivance of the vehicle owner also has merit as in the impugned order, the authority has failed to discharge the onus while passing the order impugned and this aspect of the matter has also not been considered by the appellate authority while rejecting the appeal and as such the orders impugned merit to be set-aside on this ground also. From a perusal of Section 52-A of the Act, 1927, it emerges that the said section pertains to the procedure to be adopted by the authorities for the purpose of seizure. The said provision requires a notice to be issued to the vehicle owner prior to any confiscation and sub-section (5) of Section 52-A of the Act, 1927 provides that no order of confiscation of any vehicle shall be made if any person proves to the satisfaction of the authorized officer that such vehicle was used without the knowledge or connivance of the vehicle owner.

26. A perusal of the reply as given by the petitioner dated 19.02.2020 would indicate that the vehicle of the petitioner had been given to her relative for some urgent personal work. The petitioner has also specifically indicated in her reply that at no stretch of time has she ever been involved in any criminal activities under the Act, 1927. Thus, the crux of the reply of the petitioner was that the vehicle had been used by Saddam who had been caught in the illegal felling of trees from the reserved forest along with the vehicle without the knowledge of the petitioner that the vehicle would be used for any alleged criminal activities. Thus, the competent authority, while passing an order under sub-section (5) of Section 52-A of the Act, 1927, was required to record a finding that the vehicle had been used with the knowledge and connivance of the petitioner for commission of the forest offence prior to passing an order for confiscation of the vehicle of the petitioner but a perusal of the order would indicate that said finding has not been given by the authority concerned while passing the order dated 04.03.2020 and thus on this ground the order impugned dated 04.03.2020 merits to be quashed being against the mandatory provisions of sub-section (5) of Section 52 of the Act, 1927. As this aspect of the matter has also not been considered by the appellate authority while passing the order dated

02.12.2021 as such the said order also merits to be quashed.

27. This aspect of the matter has also been considered by the Apex Court in the case of **Assistant Forest Conservator and Ors Vs. Sharad Ramchandra Kale** reported in **(1998) 1 SCC 48** wherein the Apex Court has held as under:-

"The truck of the respondent was ordered to be confiscated by the Assistant Conservator of Forest, as it was found involved in commission of a forest offence. The order was confirmed by the Conservator of Forest. Against this order, the respondent preferred an appeal to the Session Court but it was dismissed. Therefore, he approached the High Court with a petition under Article 227 of the Constitution. ***The High Court set aside the order of confiscation on the ground that the authorities had failed to establish that the owner of the truck had any knowledge that his truck was likely to be used for carrying forest produce in contravention of the provision of the Forest Act. This finding was based upon the evidence on the record. Therefore, we do not consider it proper interfere with such finding."***

28. Accordingly, keeping in view the aforesaid discussion, the Writ Petition is **allowed**. The impugned orders dated 02.12.2021 and 04.03.2020, copies of which are annexures 1 & 2 respectively to the petition, are quashed. The authority is directed to release the vehicle of the petitioner in accordance with law within a period of six weeks from the date of receipt of certified copy of this order provided there is no legal impediment.

(2023) 2 ILRA 282

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.01.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-C No. 5636 of 2022

M/S Alpine Recourses L.L.P., M.P. ...Appellant

Versus

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

Counsel for the Appellant:
Rahul Srivastava

Counsel for the Respondents:
C.S.C.

A. Civil Law - UP Minor Minerals (Concession) Rules, 1963 – Ch. IV – Grant of mining lease – Auction finalized – Certain mining activities was found to be taken place on the allocated area – Reassessment of estimated quantity of minerals claimed – However, security amount forfeited on refusal of executing lease deed – Legality challenged – Held, the area, as was allotted to the petitioner, was found overlapping with the area of another person to whom a lease deed had already been executed approximately two months prior. Considering this the petitioner requested for reassessment of the estimated minerals which was not acceded to by the authorities rather the insistence was for execution of the lease deed which the petitioner refused to execute – Held further, Insistence on the part of the respondents for execution of the lease deed by the petitioner and upon refusal of the petitioner, the forfeiture of the security deposit and the royalty amount, cannot be said to be legally sustainable in the eyes of law. (Para 24)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Special Leave to Appeal (C) Nos. 19619-19620 of 2017; in re: M/s Planet Steel Pvt Ltd Vs The St. of Har. & ors decided on 10.04.2018.

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Shri Rahul Srivastava, learned counsel for the petitioner and Dr. Uday Veer Singh, learned Additional Chief Standing Counsel for the respondents no. 1 to 4.

2. The instant petition has been filed praying for the following main reliefs:

"1. Issue a writ, order or direction in the nature of certiorari quashing the order dated 29.06.2022 passed by the Respondent no. 1 / State Government in revision No. 36 (R) / S.M of 2022 "M/S Alpine Resources LLP vs Commissioner Chitrakoot Dham Mandal Banda & others" contained as Annexure no. 1.

2. Issue a writ, order or direction in the nature of certiorari quashing the order dated 30.04.2022 passed by the Commissioner Chitrakoot Dham Mandal Banda in appeal no. 00132 / 2020, order dated 08.01.2020 passed by the District Magistrate, Hamirpur, contained as Annexure No. 2 & 3 respectively.

3. Direct the respondents to refund the security amount + first quarterly installment of lease amount deposited by the revisionist along with the 18% of interest from the date of the deposit to the date of the refund.

or

Direct the respondents to execute the mining lease in favour of the revisionist for the area in question at the present available and assessed quantity of the mineral i.e. 2,59,104 cubic meter / year and accordingly issue amended letter of intent to the revisionist."

3. The case set forth by the petitioner is that on 14.08.2017 a Government Order had been issued by the State Government providing that henceforth mining leases were to be granted by e-tender-cum-e-auction under Chapter IV of the U.P. Minor Minerals (Concession) Rules, 1963 (hereinafter referred to as the Rules 1963). In pursuance to the said government order a notice / advertisement dated 09.05.2018, a copy of which is annexure 5 to the petition, was issued by the District Magistrate, Hamirpur for settlement of mining leases of sand / mourram under the Rules 1963 in District Hamirpur for several mining blocks by e-tendering. As per the Condition no. 13(6) of the Government Order the applicants had to deposit Rs 15,000/- as application fee and 25% of the bid amount as earnest money for each area separately.

4. In pursuance to the said advertisement the petitioner claims to have participated in the auction proceedings for grant of the mining lease situated in the area in Tehsil Sarila, Village Bheri Kharka, Khand No. 23/21 total area 24.291 hectares for the assessed quantity of mineral of 3,88,608/- cubic meter per year. In the second round of bidding the bid of the petitioner @ Rs 302 per cubic meter was declared highest and an e-mail to the said effect had been sent to the petitioner by the auctioning authority. The petitioner claims to have completed the formalities and on 07.06.2018 a letter of intent had also been issued to the petitioner requiring him to deposit the amount of Rs 2,93,44,704/- i.e. security deposit equal to one quarterly installment of lease amount for first year and Rs 2,93,44,704/- for the first quarterly installment of lease amount of first year totaling Rs 5,86,89,408. The aforesaid amount was deposited by the petitioner. Subsequent thereto an environment

clearance certificate was also issued to petitioner on 31.01.2019, a copy of which is annexure 7 to the petition.

5. When the petitioner visited the allotted mining site he found certain mining activities taking place on his allocated area. This fact was also admitted as per the letter dated 21.02.2019 sent by the District Magistrate, Hamirpur to the Director, Geology and Mining of the U.P. Government, a copy of which is annexure 8 to the petition. In the said letter various areas were mentioned but so far as the area of the petitioner was concerned, which was 23/21, it was indicated that a person to whom an area namely 23/12 had been allocated namely M/s Yadav and Sons and to whom a lease deed has been executed on 11.12.2018, was found to be working in the area of the petitioner. The letter also stated that the demarcation which had been carried out by the authorities has not been correctly done. Consequently, the District Magistrate required a fresh demarcation to be carried out for all the areas as indicated in the said letter including the area of the petitioner and the area allocated to M/s Yadav and Sons namely areas numbers 23/21 and 23/12 respectively. Through a letter dated 09.03.2019, a copy of which annexure 9 to the petition, which is a letter issued to all the leaseholders, it was indicated that the demarcation work has been carried out.

6. As the case of the petitioner was that in terms of the letter issued by the District Magistrate dated 21.02.2019 the area allocated to the petitioner was also overlapping with the area allotted to M/s Yadav and Sons and as the lease deed had been executed on 11.12.2018 to M/s Yadav and Sons as such certain extractions must have taken place, consequently, the petitioner through his letter dated 23.12.2019, a copy of which is annexure 11 to the petition, approached the District Magistrate for reassessment of the quantity of minerals.

7. No heed was paid to the said letter rather a notice was issued to the petitioner by the District Magistrate on 26.12.2019, a copy of which is annexure 14 to the petition, contending that as per the notification, a particular quantity of the mineral had been indicated and on the basis of the bid of the petitioner, the letter of intent had been issued as such the petitioner was required to have the lease deed executed failing which the letter of intent shall be cancelled and the amount deposited shall be forfeited.

8. Considering the aforesaid peculiar situation that had arisen, the lease deed was not executed by the petitioner which resulted in the amount deposited by the petitioner of Rs 5,86,89,408/- being forfeited vide impugned order dated 08.01.2020.

9. Being aggrieved the petitioner filed an appeal which was rejected vide the impugned order dated 30.04.2022, a copy of which is annexure 2 to the petition. Still being aggrieved the petitioner filed a revision before the State government which has also been rejected by the order dated 29.06.2022, a copy of which is annexure 1 to the petition. Still being aggrieved the instant petition has been filed.

10. The contention of learned counsel for the petitioner is that when the respondents had issued the bid inviting applications and the estimated quantity of mineral was specified in the said notice as 3,88,608 cubic meter per year so far as it

pertained to the area of the petitioner and as per the letter dated 21.02.2019 issued by the District Magistrate to the Director, Geology and mining it emerged that the area of the petitioner namely the area no. 23/21 was overlapping with the area of M/s Yadav and Sons whose area was 23/12 to whom the lease deed had already been executed on 11.12.2018 i.e. two months earlier to the said letter as such certain extractions must have already been made by M/s Yadav and Sons which thus reduced the quantity of mineral for which the petitioner had bid and had also deposited the royalty amount which fact should have been considered by the authorities while compelling the petitioner to execute the lease deed.

11. Elaborating the same, learned counsel for the petitioner contends that the initial e-bid had been issued on 09.05.2018 in which the petitioner had participated per which the estimated mineral quantity of area namely 23/21 was 3,88,604 cubic meter per year. Subsequent thereto the respondents have issued an e-bid on 21.04.2022, a copy of which is annexure 16 to the petition, per which, so far as the area of the petitioner namely 23/21 is concerned, the estimated quantity of mineral had been indicated as 2,59,104 cubic meter per year which itself is indicative of the fact that the estimated quantity of mineral has reduced.

12. He also contends that it is amply clear from the fact that once the petitioner did not execute any lease deed and the said area namely 23/21 was never put to e-bid or e-auction and there was no other person who mined the said area barring M/s Yadav & Sons whose area was overlapping with the area of the petitioner as such the reduction of quantity from 3,88,604 cubic meter per year to 2,59,104 cubic meter per year over a period of almost 4 years is indicative of the fact that mining activity had taken place clandestinely or otherwise which has resulted in reduction of the estimated quantity of mineral which fact has not been considered by the authorities while passing the impugned orders and as such on this ground alone the impugned orders merit to be quashed and the respondents be directed to return the amount forfeited by the authorities alongwith interest to the petitioner.

13. In this regard reliance has been placed on the judgment of Hon'ble the Apex Court passed in **Special Leave to Appeal (C) Nos. 19619-19620 of 2017 in re: M/s Planet Steel Pvt Ltd vs The State of Haryana & ors** decided on 10.04.2018.

14. On the other hand, Dr. Uday Veer Singh, learned Additional Chief Standing Counsel appearing for the respondents, on the basis of the averments contained in the counter affidavit, argues that the terms and conditions of the auction itself stipulated that the petitioner was required to deposit the security amount as well as the first quarterly installment of the yearly royalty based on the estimate of mineral as was specified in the notice which in fact was deposited by the petitioner. However, subsequently it is the petitioner who refused to have the lease deed executed which entailed forfeiture of the deposited amount in order to prevent loss of revenue to the State and consequently the petitioner is not entitled for refund of the security amount and royalty amount which has been deposited as it is on account of his lapse that the aforesaid area allocated to the petitioner could not be put to another auction and the State Government having suffered a loss, the authority has correctly

proceed to forfeit the amount through the impugned orders and which also conforms to Rule 59 of the Rules 1963.

15. So far as the overlapping of the area of the petitioner vis a vis M/s Yadav and Sons is concerned, placing reliance on the averments contained in paragraphs 12 and 13 of the counter affidavit learned Additional Chief Standing Counsel argues that the directorate has done the demarcation subsequently and all the lease holders have been put in their respective allocated areas.

16. So far as substantial reduction in quantity of mineral is concerned, reliance has been placed on the averments made in paragraph 26 of the counter affidavit to argue that the estimated quantity of minerals got reduced on account of heavy rain.

17. Heard learned counsel for the parties and perused the record.

18. From a perusal of the record it emerges that bids were invited by the State Government through notice dated 09.05.2018 for the purpose of mining for various areas. So far as the present controversy is concerned it pertains to area no. 23/21 situated in Tehsil Sarila, Village Bheri Kharka. As per the notice dated 09.05.2018 the estimated quantity of mineral was specified as 3,88,604 cubic meter per year. The security deposit and the first quarterly installment of yearly royalty was to be paid by the successful bidders, in this case the petitioner, which the petitioner deposited for a total amount of Rs 5,86,89,408/-. The petitioner also got an environment clearance certificate for mining the said area. The controversy arose when the District Magistrate sent a letter to the Directorate, Geology and Mining on 21.02.2019 indicating that there was overlapping in various allotted areas. So far as the present controversy is concerned, the area of the petitioner namely area no 23/21 was found to be overlapping with area allocated to one M/s Yadav and Sons whose area was 23/12. The said letter also indicated that the lease deed with respect to M/s Yadav and Sons has been executed on 11th December 2018. The letter having been sent on 21.02.2019 meaning thereby that substantial period of time had already lapsed as lease deed of M/s Yadav & Sons had already been executed and there was overlapping of areas so far as it pertained to M/s Yadav and Sons and as such the natural assumption was that M/s Yadav and Sons must have mined the area of the petitioner which was overlapping with their own area. Though the respondents have carried out a demarcation of the respective areas, as was required in the order of the District Magistrate dated 21.02.2019 and as would be apparent from the perusal of the letter dated 09.03.2019, a copy of which is annexure 9 to the petition yet the controversy which remained was that once the area of the petitioner was overlapping with the area for which the lease deed had been executed to M/s Yadav and Sons much earlier as such the estimated quantity of minerals, as found place in the notice dated 09.05.2018 and for which the petitioner had bid and had also deposited the security amount and installment of royalty would have reduced. Keeping this into consideration the petitioner made various requests for reassessment of the estimated quantity of minerals but to no avail. The respondents compelled the petitioner to execute the lease deed which, taking into consideration the aforesaid facts, the petitioner refused to do so. After sending of a notice to the petitioner by the

District Magistrate on 26.12.2019 and the petitioner having refused to have the lease deed executed, the impugned order dated 08.09.2020 was passed by the District Magistrate forfeiting the amount of security deposit and the quarterly installment of the royalty amounting to Rs 5,86,89,408/-. The appeal and the revision filed by the petitioner indicating the aforesaid facts and grounds were also rejected by means of the orders dated 30.04.2022 and 29.06.2022 and hence the instant petition.

19. The crux of the issue is that when the respondents through the e-bid dated 09.05.2018 had invited applications for various areas including the area of the petitioner and the estimated quantity of mineral was indicated as 3,88,604 cubic meter per year and admittedly the said area of the petitioner namely area no. 23/21 was found overlapping with the area allotted to M/s Yadav and Sons which was area no. 23/12 and admittedly M/s Yadav and Sons was already having lease deed in their favour and this fact was discovered after a period of almost two months as would be apparent from the letter of the District Magistrate dated 21.02.2019 consequently whether the estimated quantity of minerals should have been re-estimated by the respondents prior to compelling the petitioner to execute the lease deed?

20. The amount of mineral having reduced substantially would be apparent from the fact that the date of earlier application inviting e-bid was 09.05.2018 so far as it pertained to area of the petitioner namely area no. 23/21 and when the respondents have invited the fresh e bids as would be apparent from perusal of notice dated 21.04.2022, it is apparent that the estimated quantity of minerals stood reduced from 3,88,604 cubic meter per year to 2,59,104 cubic meter per year which is a reduction of approximately 33%. Admittedly the said area had not been put to auction subsequent to the notice dated 09.05.2018 rather it was only sought to be done on 21.04.2022. Admittedly, the lease of the area of the petitioner was overlapping with the area of M/s Yadav & Sons for the period from 11.12.2018 till the re-demarcation of the areas was done on 01.03.2019 as would be apparent from a perusal of letters issued by the District Magistrate, Hamirpur and Mining Officer dated 28.02.2019 and 09.03.2019 respectively. It is not that the petitioner was not willing to have the lease deed executed rather all along he was calling upon the respondents to re-estimate the quantity of mineral so as to have the lease deed executed as the petitioner was already having an environment clearance certificate in his favour. However the insistence on the part of the respondents was for execution of the lease deed (despite the estimated mineral deposits having reduced substantially, in this case, by approximately 33% as emerged subsequently). Thus, by no stretch of imagination or law the order dated 08.01.2020 issued by the District Magistrate, a copy of which is annexure 3 to the petition, forfeiting the amount under deposit by the petitioner can be appreciated. On the same analogy the orders impugned dated 30.04.2022 whereby the appeal has been rejected and the order dated 29.06.2022 whereby the revision of the petitioner are also not legally sustainable in the eyes of law.

21. In this regard, the Court may refer to judgment of Hon'ble the Apex Court in the case of **M/s Planet Steel (Supra)** wherein the Apex Court, considering similar circumstances, was of the view that the entire amount merits to be refunded

alongwith 9% interest from the date of deposit till the date of payment.

22. For the sake of convenience, the judgement of Hon'ble the Apex Court in the case of **M/s Planet Steel (Supra)** is reproduced below:

"It is submitted by learned counsel appearing on behalf of the State of Haryana that the area auctioned for mining purposes was 558.53 hectares. Actually, what was available for mining was 141.76 hectares. He says that on the basis of instructions given to him by Mr. R.K. Sharma, Mining Engineer of the Government of Haryana.

This submission is also confirmed from the response given to an application made under the Right to Information Act, which appears on pages 531 to 535 of the paper book.

It is under these circumstances that the petitioner refused to take possession of the area sought to be auctioned.

Learned counsel for the State of Haryana refers to Clause 5 of the terms and conditions of the auction and submits that it was the duty of the petitioner to ascertain whether the land was actually 558.53 hectares or not. Clause 5 of the terms and conditions reads as follows:

"5. All prospective bidders are expected and presumed to have surveyed the areas to make their own assessment for the potential of the areas for which bids are to be offered. The State Government shall not be responsible for any kind of loss to the bidders/contractors at any point of time (before or after grant of contract). Further the bidders are also expected to have gone through the terms and conditions of auction notice and also the applicable Acts and Rules for undertaking mining."

On a plain reading of Clause 5, it is quite clear that there is no requirement on the prospective bidder to survey the area for the purpose of measurement. The prospective bidder can make an assessment for the potential of the area for which bids are to be offered.

It is the duty and responsibility of the State to ensure that the area sought to be auctioned for mining purposes is as per the advertisement.

This view has also been taken by the Punjab and Haryana High Court in the case of M/s. Haryana Royalty Company Vs. State of Haryana & Anr. [CWP No.15431 of 2014] decided on 15th January, 2015. The admitted position is that this decision of the Punjab and Haryana High Court has attained finality.

It is, therefore, incorrect to contend by the State that the sole responsibility for measuring the area sought to be auctioned for mining purposes was that of the petitioner.

Consequently, we are of the view that the decision of the High Court is required to be set aside and the petitioner is entitled to the refund of the deposited amount. This amount may be refunded to the petitioner within a period of four weeks from today along with interest at 9% per annum from the date of deposit till the date of payment in view of the vast discrepancy of the area of the land mentioned in the advertisement and the area made available.

The special leave petitions are disposed of. Pending application, if any, stands disposed of."

(emphasis by the Court)

23. A perusal of the judgement of Hon'ble the Apex Court in the case of **M/s Planet Steel Pvt Ltd (Supra)** would indicate that Hon'ble the Supreme Court in

the aforesaid case was seized of a matter wherein the area auctioned for mining purpose was at variance to the actual area which was made available for mining i.e. the area had reduced substantially. The successful bidder refused to take possession of the area sought to be auctioned which resulted in forfeiture of the amount deposited by the successful bitter. The Apex Court held that the refusal by the successful bidder to take possession of the area sought to be auctioned was valid as the area had reduced and thus the successful bidder was entitled to refund of the deposited amount alongwith interest.

24. In the instant case also the area, as was allotted to the petitioner, was found overlapping with the area of another person to whom a lease deed had already been executed approximately two months prior. Considering this the petitioner requested for reassessment of the estimated minerals which was not acceded to by the authorities rather the insistence was for execution of the lease deed which the petitioner refused to execute. The stand of the petitioner for reassessment of the estimated mineral quantity on account of rejection stands fortified by the orders issued by the respondents themselves as would be apparent from the two e-bids dated 09.05.2018 vis a vis 21.04.2022 whereby the estimated quantity of mineral stood reduced by approximately 33%. Thus the insistence on the part of the respondents for execution of the lease deed by the petitioner and upon refusal of the petitioner, the forfeiture of the security deposit and the royalty amount, cannot be said to be legally sustainable in the eyes of law.

25. Taking into consideration the aforesaid discussion the writ petition is **allowed**. The orders impugned dated 29.06.2022, 30.04.2022 and 08.01.2022, copies of which are annexures 1, 2 & 3 respectively to the petition, are quashed. The respondents are directed to refund the amount of Rs.5,86,89,408/- alongwith interest @9% per annum from the date of deposit till the date of actual payment. While awarding interest @ 9% this Court is following the judgement of Hon'ble the Apex Court in the case **M/s Planet Steel Pvt Ltd (Supra).** Let the amount be refunded within a period of three months from the date of receipt of a certified copy of this order.

26. Before parting with the matter the Court may take judicial notice of the fact that the estimated mineral deposit for the area in question reduced by almost 33% from 2018 till 2022. Admittedly no mining activity took place over the said area as the petitioner failed to execute the lease deed and the said area was not allocated to any third person in the interregnum except for the period when the area of the petitioner overlapped with the area of M/s Yadav & Sons. The plea taken in the counter affidavit, more particularly, in paragraph 26 of the estimated mineral deposit having got reduced on account of heavy rains does not inspire confidence rather is laughable.

26. Be that as it may, the fact of the matter remains that valuable mineral deposits of the State have been allowed to be frittered away prima facie on account of inaction / connivance / collusion / carelessness of the authorities concerned vis a vis the persons who might have carried out the illegal mining over the aforesaid area. This being an important public issue, the Court requires the Chief Secretary of the State of U.P. to hold an inquiry into the matter as to how the

valuable mineral deposits have frittered away and have reduced substantially over the aforesaid area over a period of four years. For the said purpose it is open for the Chief Secretary to either conduct the inquiry himself or form a three member committee of responsible senior officers of which one should be of the rank of Principal Secretary to hold the said inquiry.

27. Let an inquiry report be submitted to the Senior Registrar of this Court within three months from today.

28. This case shall be listed for the said purpose alone on 25.04.2023 before the appropriate Court.

29. Let a copy of the order be sent by the Office to the Chief Secretary of the State within 10 days.

(2023) 2 ILRA 290
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2023

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 16538 of 2018

Shyam Narayan Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan (Sr. Advocate), Sri Udyaan Nandan, Sri Kamlesh Kumar Tripathi

Counsel for the Respondents:
Sri M.C. Chaturvedi, Addl. Advocate General, Sri Vineet Pandey, Chief Standing Counsel, Sri Sudhanshu Srivastava, Addl. Chief Standing Counsel, Sri Saiful Islam Siddiqui

A. Local body – Constitution of India – Article 243-B – U.P. (Kshetra Panchayats and Zila Panchayats) Adhiniyam 1961 – Section 15 – Kshettra Panchayat – No Confidence Motion – Oath of office could not be taken by the members – Effect on membership – Held, such an elected member will not cease to be elected member nor his seat would be deemed to be vacant – The elected members do not cease to hold their office for not subscribing to the oath of office. (Para 23 and 31)

B. Local body – U.P. (Kshetra Panchayats and Zila Panchayats) Adhiniyam 1961 – Elected members – Meaning – Elected members are those who are chosen by direct election from territorial constituencies in the Panchayat area. (Para 31)

C. Local body – U.P. (Kshetra Panchayats and Zila Panchayats) Adhiniyam 1961 – Section 15 – Kshettra Panchayat – No subscription of oath of office by the members – Entitlement of such members to sign no confidence motion and vote in the meeting for no confidence motion – Held, A meeting held for considering motion of no confidence is a special meeting with specific purpose and is distinct from a meeting of a Kshettra Panchayat held for transacting its ordinary business. An elected member even if has not subscribed to oath is entitled to participate in a meeting of no confidence, although would not be entitled to participate in the meeting held for transacting the ordinary business of the Kshettra Panchayat. (Para 40 and 42)

D. Lacuna in legislation – How to be dealt with – The legislative casus omissus cannot be supplied by process of judicial interpretation – High Court hoped that necessary corrective steps will be taken without further delay. (Para 26 and 30)

E. Interpretation of statute – Statutory Interpretation – Maxim '*ut res magis valeat quam pereat*' – A statute or any enacting provision therein must be so construed as to make it effective and operative. (Para 41)

Reference decided. (E-1)

List of Cases cited :-

1. Shyam Narayan Ram Vs St. of U.P. & ors.; 2019 (2) ADJ 21

2. Ram Pal Singh Vs St. of U.P. & ors.; (2018) 6 SCC 692

3. Smt. Kamla Devi Vs St. of U.P. & ors.; 2004 (8) ADJ 525

4. Alka Devi Vs St. of U.P. & ors.; 2014 (10) ADJ 179

5. K.C. Chandy Vs R. Balakrishna Pillai; AIR 1986 KER 116

6. M/s Unique Butyle Tube Industries Pvt. Ltd. Vs U.P. Financial Corporation & ors.; AIR 2003 SC 2103

7. D.R Venkatchalam & ors. etc. Vs Dy. Transport Commissioner & ors. etc.; AIR 1977 SC 842

8. Commissioner of Sales Tax, U.P. Lucknow Vs M/s Parson Tools & Plants, Kanpur; (1975) 4 SCC 22

9. Manchester Ship Canal Co. Vs Manchester Racecourse Co.; (1904) 2 Ch 352. pp. 360, 361

10. Whitney v. IRC, (1926) AC 37, p. 52

11. CIT v. S. Teja Singh, AIR 1959 SC 352, p. 356 : 1959 Supp (1) SCR 394

12. Gursahai v. CIT, AIR 1963 SC 1062, p. 1065: (1963) 3 SCR 893

13. Sodhi Transport Co. v. St. of U.P., (1986) 2 SCC 486, p. 492: AIR 1986 SC 1099

14. Tinsukhia Electric Supply Co. Ltd. v. St. of Assam

(Delivered by Hon'ble Rajesh Bindal, C.J.,
Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Jayant Banerji, J.)

1. The present Reference to Larger Bench emanates from an order dated 7.12.2018 passed by a Division Bench in **Shyam Narayan Ram Vs. State of U.P. and others** having its genesis in the divided opinion of their Lordships of Supreme Court in **Ram Pal Singh Vs. State of U.P. and others.** The question referred to the Larger Bench is-

"whether the elected members of the Kshettra Panchayat, who have not taken or subscribed to the oath of office as member before taking their seats in the house are entitled to sign the notice of intention to bring a 'no confidence motion' against the Pramukh and to participate and vote in the meeting held for the consideration of such a no confidence motion."

INTRODUCTION

2. The background facts in which the aforesaid issue had arisen before the Division Bench was that the petitioner therein was an elected Pramukh of a Kshettra Panchayat, which had a total strength of 120 members. A motion of no confidence was moved against him by 81 members. It was successfully passed in the meeting of Kshettra Panchayat held for the purpose. In the meeting, 79 members participated, out of which, 74 voted in favour of the motion. The no confidence motion passed against the petitioner was subject matter of challenge in the writ petition before this Court on the ground that out of total elected members, only 69 had subscribed to oath of office and the remaining 51 had not taken oath. Large number of those members (13 members), who had not taken oath, were signatory to

the notice of intention to bring no confidence motion and had also participated in the meeting in which the no confidence motion was passed. It was contended that the elected members who had not subscribed to oath, were not entitled to sign the notice and/or participate in the meeting. If these elected members are excluded, the no confidence motion was not signed by more than half of the total number of elected members. Thus, the no-confidence motion was not validly passed.

3. Before we proceed further, it would be useful to advert to the facts of **Ram Pal Singh's** case (supra) and the divergence of opinion noted by the Division Bench of this Court in **Shyam Narayan Ram's** case (supra) resulting in Reference to Larger Bench.

FACTS OF THE CASE OF RAM PAL SINGH

4. Kshettra Panchayat, Jasrana, District Firozabad comprised of 63 elected members. The first meeting of the Kshettra Panchayat took place on 18.03.2016, in which the petitioner therein - Ram Pal Singh was elected as Pramukh. He subscribed to oath of office in the said meeting. He thereafter administered oath of office to the elected members except 17 who were not present. Contrary to it, the version of the private respondents (elected members) was that all 63 elected members took oath of office. In due course of time, a no confidence motion was moved against Ram Pal Singh by 39 elected members, including 13 members, who had allegedly not taken oath of office. The no confidence motion was challenged on the ground that 13 elected members, who had not subscribed to oath, were not entitled to sign the notice of intention to bring no confidence motion and if they are excluded, the motion was signed by only 26 elected members, which is less than half of the total number of 63 elected members and would thus fail.

5. The judgement in **Ram Pal Singh's** case (supra) is by Hon. Madan B. Lokur, J and Hon. Deepak Gupta, J. Their Lordships of the Supreme Court were unanimous in holding that great degree of sanctity is to be attached to the oath of office and also in holding that in the absence of any disqualification prescribed, omission to take oath of allegiance, does not *ipso facto* result in any ineligibility or disqualification or vacation of seat of an elected member. However, there is conflict of opinion on the following aspects:-

(a) Hon. Madan B. Lokur, J. has held that there is no prohibition for an elected member from being signatory to a no confidence motion, while Hon. Deepak Gupta, J. has held that such an elected member cannot sign a no confidence motion.

(b) Whereas Hon. Madan B. Lokur, J. has left undecided the issue as to whether the proceedings of no confidence motion is legislative function or non-legislative function of an elected member of a Kshettra Panchayat except for observing that in absence of such members, the motion might get defeated, Hon. Deepak Gupta, J. has held that it is part of the proceedings of a Panchayat and therefore such members cannot participate or vote in the meeting held for considering motion of no-confidence.

(c) Albeit Hon. Madan B. Lokur, J. had relied on the law laid down by a Division Bench of this Court in **Smt. Kamla Devi Vs. State of U.P. and others** in a case deciding similar issues in holding

that there is no bar in an elected member signing the No Confidence Motion, but Hon. Deepak Gupta, J. has held that the said judgement does not lay down the correct position of law. In **Kamla Devi's** case (supra), it has been held that (i) no disqualification is attached to an elected member not subscribing to oath of office (ii) such a member is entitled to sign the notice of intention to bring no confidence motion, and (iii) entitled to participate in the meeting of no confidence.

6. Barring the points on which there is conflict in opinion, the law laid down by Supreme Court in **Ram Pal Singh's** case (supra) is binding on this Court.

SUBMISSIONS

7. Sri Shashi Nandan, learned Senior Counsel appearing for the petitioner submitted that the procedure relating to no confidence motion as provided under Section 15 of the U.P. (Kshetra Panchayats and Zila Panchayats) Adhiniyam 1961 (hereinafter referred to as 'the Act') cannot be split in holding that an elected member who has not subscribed to oath, is not entitled to participate in the meeting of no confidence but can sign the notice of intention to make the motion. In other words, his submission is that an elected member, who has not subscribed to oath of office, if cannot participate in the meeting of no confidence, he or she also cannot sign the notice. He further submitted that under Section 15(13) notice of motion of no confidence could not be given within one year of the assumption of office by a Pramukh. The period of one year under Section 15 commences w.e.f. the date of assumption of office and not from the date of election. The date of assumption of office means the date on which the Pramukh takes oath of office and not the date on which he is declared elected. In support of his submission, he has placed reliance on a Division Bench judgement of this Court in **Alka Devi Vs. State of U.P. and others.** It is thus contended that an elected member who has not subscribed to oath of office cannot be treated to have assumed office as elected member and is consequently dis-entitled to bring a motion of no confidence or to participate in such proceedings. He took aid of Section 79 of the Act to buttress his submission. He also emphasized on the sanctity of oath of affirmation to office by placing reliance on a Full Bench judgment of **Kerala High Court in K.C. Chandy Vs. R. Balakrishna Pillai.**

8. On the other hand, Sri M.C. Chaturvedi, learned Additional Advocate General appearing for the State tried to draw distinction between a Kshettra Panchayat and an elected member of a Kshettra Panchayat. He submitted that a Kshettra Panchayat is constituted under Section 6 and consists of a Pramukh, all Pradhans of Gram Panchayat in the Khand, elected members, members of the house of people and members of legislative assembly of the State representing the constituencies which comprise wholly or partially the Khand and the members of the Council of State and the Members of the State Legislative Council who are registered as electors within the Khand. Section 6(2) of the Act permits only elected members to participate in a motion of no confidence against the Pramukh and it goes to show that a motion of no confidence is not a proceeding of Kshettra Panchayat, therefore, in such proceedings even those elected members, who had not subscribed to oath of office, can participate. He has also referred to Sections 62 and 65 of the

Act to support his contention. Elaborating his submission, he points out that a meeting for considering motion of no confidence is convened by Collector, whereas the meeting for transacting business of the Kshettra Panchayat is convened by Pramukh. The meeting of no confidence motion is to be held at the office of the Kshettra Panchayat and wherein only the motion of no confidence is put up for debate and there could be no other agenda, whereas in ordinary meeting of Kshettra Panchayat convened for transacting its business, the meeting could be held at a place other than the office of Kshettra Panchayat and in such meeting there is no restriction relating to the number of items on the agenda. He has placed reliance on the judgement of the Supreme Court in **Pashupati Nath Sukul** (supra) and the judgement of this Court in **Smt. Kamla Devi** (supra).

RELEVANT PROVISIONS OF THE CONSTITUTION AND THE ACT

9. Before we proceed to analyse the issues involved, a bird's eye view of the relevant enactments is essential. By the Constitution (Seventy-Third Amendment) Act, 1992, Part IX was inserted dealing with the Panchayats. Article 243 defines Panchayat as an institution of self government constituted under Article 243-B for the rural areas. The word 'Panchayat' is an umbrella term which takes within its ambit Panchayats at (a) village level (b) intermediate level and (c) district level. Article 243-C provides for composition of Panchayats and states that subject to the provisions of Part IX, the Legislature of a State may, by law, make provisions with respect to the composition of Panchayats. Clause (2) of Article 243-C provides that all seats in a Panchayat shall be filled by persons chosen by direct election from territorial constituencies in the Panchayat area and for this purpose, each Panchayat shall be divided into territorial constituencies. Clause (5) enjoins that the Chairperson of a Panchayat at the intermediate level shall be elected by, and from amongst, the elected members thereof. Article 243-E provides for the duration of Panchayat etc. and it stipulates that every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer. The powers, authority and responsibility of Panchayats is taken care of by Article 243-G. These are endowed upon the Panchayats by law made by Legislature of State to enable them to function as institutions of self government. It may authorize them to levy, collect and appropriate such taxes, duties, tolls and fees as prescribed by law made by Legislature of a State. Article 243-K provides for superintendence, direction and control of the preparation of electoral rolls and the conduct of all elections to the Panchayat by a State Election Commission. No election to any Panchayat can be called in question except by an election petition in view of the bar imposed by Article 243-O.

10. Kshettra Panchayat is a Panchayat at the Intermediate level as contemplated under Article 243-B of the Constitution. The U.P. (Kshettra Panchayats and Zila Panchayats) Adhiniyam, 1961 is a complete code relating to incorporation, constitution and source of powers and functions and conduct of business of a Kshettra Panchayat. The provisions of the Act were extensively amended by U.P. Act No.21 of 1995 to bring the same in line with the Constitution (Seventy-Third Amendment) Act, 1992.

11. Under Section 5 of the Act, there shall be a Kshettra Panchayat for every Khand bearing the name of that Khand. It is a body corporate. The composition of Kshettra Panchayat is provided under Section 6 of the Act, which is as follows:-

"6. Composition of Kshettra Panchayat- (1) A Kshettra Panchayat shall consist of a Pramukh, who shall be its Chairperson and -

(a) all the Pradhans of the Gram Panchayats in the Khand;

(b) elected members, who shall be chosen by direct election from the territorial constituencies in the Panchayat area and for this purpose the Panchayat area shall be divided into territorial constituencies in such manner that, so far as practicable, each territorial constituency shall have a population of two thousand:

Provided that in the hill Districts of Nainital, Almora, Pithoragarh, Tehri, Pauri, Dehradun, Chamoli or Uttarkashi, the State Government may declare an area within a radius of one kilometer (diameter of two kilometers) from the center of the village specified by it in this behalf, to be a territorial constituency though such area may have a population of less than two thousand:

Provided further that in the territorial constituency of a Kshettra Panchayat, no territorial constituency of a constituent Gram Panchayat shall be included in part.

(c) the members of the House of the people and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the Khand;

(d) the members of the Council of States and the members of the State Legislative Council who are registered as electors within the Khand.

(2) The members of Kshettra Panchayat mentioned in clauses (a), (c) and (d) of sub-section (1) shall be entitled to take part in the proceedings and vote at the meetings of the Kshettra Panchayat except in matters of election of, and on a motion of no confidence against, the Pramukh or the [***].

(3) Each territorial constituency referred to in clause (b) of sub-section (1) shall be represented by one member.

(4) Every elected member of the Zila Panchayat representing, constituency which comprises, wholly or partly, and Kshettra Panchayat, shall be entitled to take part and express his views in the meetings of such Kshettra Panchayat as a special invitee but shall have no right to vote in such meetings."

12. Section 7 provides that in every Kshettra Panchayat, there shall be a Pramukh to be elected by the elected members of the Kshettra Panchayat from amongst themselves. The term of the Kshettra Panchayat and its members is provided under Section 8. It states that every Kshettra Panchayat shall unless sooner dissolved under this Act, continue for five years from the date appointed for its first meeting and no longer. Under Section 9, the term of Pramukh shall commence upon his election and shall extend upto the term of the Kshettra Panchayat. Section 11 deals with the resignation of Pramukh and a member and Section 13 deals with disqualifications from membership of Kshettra Panchayat. Section 15 deals with motion of no confidence in Pramukh and is reproduced below:-

"15. Motion of non-confidence in Pramukh or [***]- (1) A motion expressing want of confidence in the

Pramukh or any [***] of a Kshettra Panchayat may be made and proceeded with in accordance with the procedure laid down in the following sub-sections.

(2) A written notice of intention to make the motion in such form as may be prescribed, signed by at least half of the total number of elected members of the Kshettra Panchayat for the time being together with a copy of the proposed motion, shall be delivered in person, by any one of the members signing the notice, to the Collector having jurisdiction over the Kshettra Panchayat.

(3) The collector shall thereupon:-

(i) convene a meeting of the Kshettra Panchayat for the consideration of the motion at the office of the Kshettra Panchayat on a date appointed by him, which shall not be later than thirty days from the date on which the notice under sub-section (2) was delivered to him; and

(ii) give to the elected member of the Kshettra Panchayat notice of not less than fifteen days of such meeting in such

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manner as may be prescribed.

Explanation.- In computing the period of thirty days specified in this sub-section, the period during which a stay order, if any, issued by a Competent Court on a petition filed against the motion made under this section is in force plus such further time as may be required in the issue of fresh notices of the meeting to the members, shall be excluded.

(4) The sub-divisional officer of the sub-division in which the Kshettra Panchayat exercises jurisdiction shall preside at such meeting:

Provided that if the Kshettra Panchayat exercises jurisdiction in more than one sub-division or the sub-divisional officer cannot for any reason preside, any stipendiary additional or assistant collector named by the Collector shall preside at the meeting:

(4-A) If within an hour from the time appointed for the meeting such officer is not present to preside at the meeting, the meeting shall stand adjourned to the date and time to be appointed by him under sub-section(4-B).

(4-B) If the officer mentioned in sub-section (4) is unable to preside at the meeting, he may, after recording his reasons, adjourn the meeting to such other date and time as he may appoint, but not later than 25 days from the date appointed for the meeting under sub-section (3). He shall without delay inform the Collector in writing of the adjournment of the meeting. The Collector shall give to the members at least ten days notice of the next meeting in the manner prescribed under sub-section (3).

(5) Save as provided in sub-sections (4-A) and (4-B), a meeting convened for the purpose of considering a motion under this section, shall not be adjourned.

(6) As soon as the meeting convened under this section commences, the Presiding Officer shall read to the Kshettra Panchayat the motion for the consideration of which the meeting has been convened and declare it to be open for debate.

(7) No debate on the motion under this section shall be adjourned.

(8) Such debate shall automatically terminate on the expiration of two hours from the time appointed for the commencement of the meeting, if it is not concluded earlier. On the conclusion of the debate or on the expiration of the said period of two hours, whichever is earlier,

the motion shall be put to vote which shall be held in the prescribed manner by secret ballot.

(9) The Presiding Officer shall not speak on the merits of the motion and he shall not be entitled to vote thereon.

(10) A copy of the minutes of the meeting, together with a copy of the motion and the result of the voting thereon, shall be forwarded forthwith on the termination of the meeting by the Presiding Officer to the State Government and to the Zila Panchayat having jurisdiction.

(11) If the motion is carried with the support of [more than half] of the total number of elected members of the Kshettra Panchayat for the time being-

(a) the Presiding Officer shall cause the fact to be published by affixing a notice thereof on the notice board of the office of the Kshettra Panchayat and also by notifying the same in the Gazette; and

(b) the Pramukh or [***], as the case may be, shall cease to hold office as such and vacate the same on and from the date next following that on which the said notice is fixed on the notice board of the office of the Kshettra Panchayat.

(12) If the motion is not carried as aforesaid or if the meeting could not be held for want of quorum, no notice of any subsequent motion expressing want of confidence in the same Pramukh or [***] shall be received until after the expiration of one year from the date of such meeting.

(13) No notice of a motion under this section shall be received within [one year] of the assumption of office by a Pramukh or [***], as the case may be."

13. Section 16 deals with removal of Pramukh by the State Government and is as follows:-

"16. Removal of Pramukh or [***].- (1) If in the opinion of the State Government the Pramukh or any [***] of a Kshettra Panchayat willfully omits or refuses to perform his duties and functions under this Act, or abuses the powers vested in him or is found to be guilty of misconduct in the discharge of his duties or becomes physically or mentally incapacitated for performing his duties, the State Government may, after giving the Pramukh or such [***] as the case may be, a reasonable opportunity for explanation and after consulting the Adhyaksha of the Zila Panchayat concerned in the matter and taking into consideration his opinion, if received within thirty days from the date of the dispatch of the communication for such consultation, by order, remove such Pramukh or [***], as the case may be, from office, and such order shall be final and not open to be questioned in a Court of law:

Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pramukh or [***] is prima facie found to have committed financial and other irregularities, such Pramukh or [***] shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a committee consisting of three elected members of the Kshettra Panchayat appointed in this behalf by the State Government.

(2) A Pramukh or [***], removed from his officer under this section, shall not be eligible for re-election as Pramukh or [***] for a period of three years from the date of his removal."

14. Section 84 deals with the manner in which meetings of Kshettra Panchayat

are convened and held and it reads as follows:-

"84. Meetings of Kshettra Panchayat.- (1) A Kshettra Panchayat shall meet for the transaction of business at least once in every two months:

Provided that the date to be appointed for the first meeting of a Kshettra Panchayat, shall be within thirty days from the date of its constitution.

(2) The Pramukh, [***], may convene a meeting of the Kshettra Panchayat whenever he thinks fit and shall, upon a requisition made in writing by not less than one-fifth of the members of the Kshettra Panchayat and served on the Pramukh or sent by registered post acknowledgment due addressed to the Kshettra Panchayat at its office, convene a meeting of the Kshettra Panchayat within a period of one month from the date of the service or receipt of such requisition.

(3) A meeting may be adjourned until the next or any subsequent day and adjourned meeting may be further adjourned in the like manner.

(4) Every meeting shall be held at the office of the Kshettra Panchayat or at some other convenient place of which notice has been duly given."

15. Section 85 deals with the procedure etc. of meetings of Kshettra Panchayat which shall be same as specified under Section 62 in case of meetings of Zila Panchayat and reads thus:-

"62. Procedure of meetings, etc.- The following matters relating to meetings of Zila Panchayat shall be governed by rules-

(a) transaction of business at the meeting;

(b) quorum for transaction of business;

(c) presiding over the meeting in the absence of Adhyaksha and the [***];

(d) asking of questions by members;

(e) publicity of meeting;

(f) maintaining of order at the meeting;

(g) decision by vote;

(h) minute book and resolutions;

(i) right of Government servants, persons authorized by the State Government and other persons to attend and take part in discussions;

(j) right of Zila Panchayat to require attendance of servants of the State Government to attend in the meetings;

(k) right of officers of the Zila Panchayat in regard to meetings;

(l) right of the Zila Panchayat to require reports, returns; etc. from the Mukhya Adhikari; and

(m) other incidental matters which need or ought to be prescribed."

16. Section 15 of the Act, which deals with motion of no confidence envisages (i) bringing of a motion of no confidence by giving a written notice of intention in the prescribed form signed by at least half of the total number of **elected members** of the Kshettra Panchayat for the time being, and (ii) the motion being carried with the support of more than half of the total number of **elected members** of the Kshettra Panchayat for the time being.

ISSUES

17. For better analysis, the main issue referred to the larger Bench can be further subdivided into following four issues:

(i) who are elected members?

(ii) what is the effect of an elected member not subscribing to oath of office?

(iii) whether an elected member, who has not subscribed to oath of office, can sign no confidence motion,

(iv) whether an elected member, who had not subscribed to oath of office can participate and vote in the meeting convened for consideration of no confidence motion.

ISSUES (i) & (ii):

18. The expression 'elected member' is not defined in the Act. However, we get clue from Section 6 as to whom the expression 'elected members' refers to. According to it, elected members are those who are chosen by direct election from the territorial constituencies in the Panchayat area. Section 6 of the Act draws a clear distinction between members who are directly elected on basis of adult suffrage and those who become members of Kshettra Panchayat by virtue of their office viz, all the Pradhans of the Gram Panchayats in the Khand; members of the House of People; the members of Legislative Assembly of the State representing constituencies which comprise wholly or partly the Khand; the members of the Council of States and the members of the State Legislative Council who are registered as electors within the Khand. However, these ex-officio members are debarred from participating in matters of election of, and or a motion of no confidence, of the Pramukh.

19. The State Government in exercise of its rule making power under Section 237 of the Act has framed Rules governing oath of office of Adhyaksha or Pramukh etc. called 'the Uttar Pradesh Kshettra Panchayats and Zila Panchayats (Oath of Office of Adhyaksha or Pramukh etc.) Rules, 1994 (hereinafter referred to as 'the Rules'). Rule 2 (2) defines members to mean in case of Kshettra Panchayat, Members elected under clause (b) of sub-section (1) of Section 6 of the Act.

20. Rule 3 of the said Rules, which is relevant for our purpose, is extracted below:-

"3. **Manner of taking oath or affirmation.-** (1) An Adhyaksha of a Zila Panchayat before taking his seat for the first time as Adhyaksha shall make or subscribe oath or affirmation before the District Magistrate in the form set out for the purpose in the Appendix.

(2) A Pramukh of a Kshettra Panchayat before taking his seat for the first time as Pramukh shall make or subscribe oath or affirmation before the Sub-Divisional Officer or such other officer appointed by the District Magistrate in this behalf in the form set out for the purpose in the Appendix.

(3) The members of Zila Panchayat and Kshettra Panchayat before taking their seats for the first time as such members shall make or subscribe oath or affirmation, in the case of member of Zila Panchayat before the Adhyaksha and in his absence before the Mukhya Adhikari and in the case of members of the Kshettra Panchayat before the Pramukh and in his absence before the Khand Vikas Adhikari, in the form set out in the Appendix."

21. Rule 3 prescribes that members of Kshettra Panchayat before taking their seats for the first time as such members shall make or subscribe to oath or affirmation before the Pramukh and in his absence, before the Khand Vikas Adhikari in the

form set out in the Appendix. An elected member, who does not subscribe to oath or affirmation, cannot take a seat in the Kshettra Panchayat and, therefore, cannot participate in the proceedings of the House. However, no other adverse consequence is provided under the Act or the Rules for not subscribing to the oath or affirmation. Such a member does not cease to be an elected member for not subscribing to oath of office. The definition of 'members' is not restricted to those who subscribe to oath, but simply refers to those elected under Clause (b) of sub-section (1) of Section 6 of the Act, whether they have taken oath or not.

22. The conclusion is consistent with the unanimous view of Supreme Court in **Ram Pal Singh's** case (supra). The relevant part of the observations made in this regard are as follows:-

Hon. Madan B. Lokur, J. while dealing with the said aspect held as follows:-

"2. The Adhiniyam does not define the expression "elected member'. For the purposes of the present petition we are proceeding on the basis that an "elected member' is a person who has been duly elected. The "elected member' might or might not have taken the oath of office in terms of the Uttar Pradesh Kshettra Panchayats and Zila Panchayats (Oath of Office of Adhyaksha or Pramukh Etc.) Rules, 1994 (hereinafter referred to as the Rules). We say this even though there is some sanctity attached to taking the oath of office, which we will advert to later.

6. In other words, a person duly elected to a Kshettra Panchayat under Section 6(1)(b) of the Adhiniyam is described as and remains an "elected member' and if that "elected member' does not take the oath of office, he or she does not cease to be an "elected member'. The only consequence is that the "elected member' cannot take a seat in the Kshettra Panchayat and therefore cannot participate in the proceedings of the Panchayat. The significance of this discussion will be apparent hereafter."

(emphasis supplied by us)

Hon. Deepak Gupta, J. taking the same view observed as follows:-

"2. ..... Rule 2(2) of the U.P. Kshettra Panchayats and Zila Panchayats (Oath of Office of Adhyaksha or Pramukh Etc.) Rules, 1994 (hereinafter referred to as "the Rules') defines "Members'. In case of Kshettra Panchayat, "Members' means those persons elected under clause (b) of sub-section (1) of Section 6 of the U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam,1961 (for short "the Adhiniyam"). The Adhiniyam provides that a Kshettra Panchayat shall consist of a Pramukh, who shall be its Chairperson and elected members, who shall be chosen by direct election from territorial constituencies in the Panchayat areas. It is out of these elected members that a Pramukh is elected in terms of Section 6(1)(b) of the Adhiniyam. According to Rule 3(3) of the Rules, which has been set out in the judgment of my learned brother, a member of the Kshettra Panchayat, before taking his seat for the first time as such member, shall make or subscribe oath or affirmation before the Pramukh and in his absence before the Khand Vikas Adhikari in the form set out in the appendix to the Adhiniyam. Rule 3(3), therefore, envisages that before taking seat for the first time the member must make or subscribe oath or affirmation (emphasis supplied). The words "first sitting' have to be given some significance and the significance is that these elected members can vote without

taking oath only while electing the Pramukh from amongst themselves because thereafter, the Pramukh administers oath to them and then, the sitting of the House takes place.

3. The language of Rule 3 indicates that a member must subscribe to the oath before he can take part in the sitting of the Panchayat. No doubt, an elected member continues to be member because no disqualification has been provided for not taking oath, but the seminal issue is whether such member can take part in the proceedings of the Panchayat. Reference in this regard has been made to the judgment of this Court in the case of Pashupati Nath Sukul v. Nem Chandra Jain and others, (1984) 2 SCC 404, judgment of the Calcutta High Court in the case of Bhupendra Nath Basi vs. Ranjit Singh, AIR 194 Cal. 152 and the judgment of the Allahabad High Court in the case of Kamla Devi v. State of U.P. and others, 2014 (8) ADJ 525."

(emphasis supplied by us)

23. In taking the above view, it has been noted by the Supreme Court that the only consequence provided in the Statue for not taking oath by an elected member is that he cannot take seat in the House. No other adverse consequence is provided in the statute and consequently, it has been held that such an elected member will not cease to be elected member nor his seat would be deemed to be vacant.

POSITION IN OTHER ANALOGOUS STATUTES

24. In contrast, in some of the cognate legislations, it is specifically provided that such a member or office bearer will be deemed to have vacated his seat. In this context, we may note Section 12-E of the U.P. Panchayat Raj Act, 1947 wherein the above consequence is provided:-

"12-E. Oath of office.- (1) Every person shall, before entering upon any office referred to in Sections 11-A, 12, 43 or 44, make and subscribe before such authority as may be prescribed on oath or affirmation in the form to be prescribed.

(2) Any member who declines or otherwise refuses to make and subscribe such oath or affirmation as aforesaid shall be deemed to have vacated the office forthwith."

25. Likewise, under Section 85(2) of the U.P. Municipal Corporation Act, 1959, similar prohibition is contained and the said provision is extracted below:-

"85. Oath of allegiance to be taken by the Mayor and Members.- (2) Any person who having been elected a Corporator or Mayor [***]6 or co-opted a Member of the Development Committee fails to make within three months of the date on which his term of office commences or at one of the first three meetings of the Corporation held after the said date, whichever is later, the oath or affirmation laid down in and required to be taken by sub-section (1) shall cease to hold his office and his seat shall be deemed to have become vacant."

26. The legislative *casus omissus* cannot be supplied by process of judicial interpretation. In **M/s Unique Butyle Tube Industries Pvt. Ltd. Vs. U.P. Financial Corporation and others,** the Supreme Court while dealing with plea of *casus omissus* has observed as follows:-

"11. It is well settled principle in law that the Court cannot read anything

into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the Legislation must be found in the words used by the Legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed not as theorems of Euclid". Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See Lenigh Valley Coal Co. v. Yensavage 218 FR 547). The view was re-iterated in Union of India and others Vs. Filip Tiago De Gama of Vedem Vasco De Gama (AIR 1990 SC 981)."

27. In **D.R Venkatchalam and others etc. vs. Dy. Transport Commissioner and others etc.** it was observed that Courts must avoid the danger of apriori determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

28. It is noteworthy that the present enactment was amended recently by U.P. Act No.14 of 2022, but the Legislature has not provided for any other adverse consequence as prescribed in cognate legislations in case an elected member does not subscribe to the oath of office. His seat shall not be deemed to have become vacant.

29. In **Commissioner of Sales Tax, U.P. Lucknow Vs. M/s Parson Tools and Plants, Kanpur** the Supreme Court has held that where the legislature willfully omits to incorporate something of an analogous law in a subsequent statute, the Court cannot supply the omission. The observations of the Supreme Court in this behalf is extracted below:-

"16. If the Legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation, by analogy or implication, something what it thinks to be a general principle of justice and equity. To do so "would be entrenching upon the preserves of Legislature" (At p 65 in Prem Nath L Ganesh v. Prem Nath, L. Ram Nath, AIR 1963 Punj 62, Per Tek Chand, J.), the primary function of a court of law being jus dicere and not jus dare."

30. The Supreme Court in respect of the present legislation in its judgement rendered in **Ram Pal Singh's** case (supra) has noticed the above lacuna in the legislation and had also sounded a note of advice to the Legislature to make suitable amendments in the Statute. However, the issue has not been addressed. It continues to give rise to controversies which are otherwise avoidable. We hope and trust that necessary corrective steps will be taken without further delay.

31. Thus, our answer to issues (i) and (ii) is as follows:-

Issue (i): Elected members are those who are chosen by direct election from territorial constituencies in the Panchayat area.

Issue (ii): The elected members do not cease to hold their office for not subscribing to the oath of office.

ISSUES (iii) & (iv):

32. These issues are inter-related, hence, being dealt with together.

33. As we have noted above, it is only the elected members of the Kshettra Panchayat who have been conferred with right to bring the motion of no confidence and to vote in the meeting held for such purpose. All other members mentioned under clause (a), (c) and (d) of sub-section (1) of Section 6 are expressly prohibited from participating in all matters of election and no confidence motion.

34. Section 15 of the Act which deals with the entire procedure relating to no confidence motion stipulates that the intention to make the motion has to be signed by at least one-half of the total number of elected members of the Kshettra Panchayat. Again the motion is treated to be carried successfully if more than half of the "total number of elected members of the Kshettra Panchayat for the time being" vote in its favour. We have already discussed above that an elected member does not cease from being an elected member merely because he has not subscribed to the oath of office. The phrase 'for the time being' has limited connotation to exclude those who had ceased to be elected members by reason of death or resignation (Section 11) or on account of incurring ineligibility specified under Section 13. It is not at all intended that an elected member, who has not subscribed to oath of office, would also be excluded in matters of election of, and on a motion of no confidence against, the Pramukh. While quantifying the figures for such purpose, it is clear that the total strength of the elected members has to be considered as otherwise it would lead to irreconcilable and fallacious results. This aspect has been noted succinctly by Hon. Madan B. Lokur, J. in **Ram Pal Singh's** case in following words:-

"21. The fallacy and dichotomy arises in this manner: either the 13 elected members continue to be elected members of the Kshettra Panchayat, despite their not having taken the oath of office or they cease to be elected members of the Kshettra Panchayat. If they are not elected members for the purposes of signing the No Confidence Motion, then the number of signatories to the No Confidence Motion would drop from 39 to 26. Correspondingly, the number of elected members of the Kshettra Panchayat would also get reduced from 63 to 50. Consequently, it would have to be concluded that since 26 out of 50 elected members of the Kshettra Panchayat have signed the No Confidence Motion, more than 50% of the elected members. Therefore, the No Confidence Motion would be maintainable under the provisions of Section 15 of the Adhiniyam.

22. In other words, it is not correct on the part of learned counsel for the petitioner to contend that for the purposes of signing the No Confidence Motion, the 13 elected members are not elected members but for the purposes of the composition of the Kshettra Panchayat they are elected members thereby maintaining the strength of the Kshettra Panchayat at 63. If the 13 elected members are not elected members for one purpose, they cannot have a different status for another purpose. Their status must remain the same as that of an elected member (or not an

elected member) both at the time of signing the No Confidence Motion and for the composition of the Kshettra Panchayat."

(emphasis supplied by us)

35. The scheme of the Act makes a clear distinction in the procedure to be followed for holding a meeting of no confidence and meetings of Kshettra Panchayat for transacting its routine business. A meeting of no confidence can be convened only by a written notice of intention to make the motion signed by at least half of the total number of elected members of the Kshettra Panchayat for the time being. The Collector convenes the meeting of the Kshettra Panchayat for consideration of motion at the office of Kshettra Panchayat on a day appointed by him which shall not be later than 30 days from the date on which notice of motion is delivered to him and not before expiry of 15 days from the date of its intimation to the elected members. On the other hand, meetings of Kshettra Panchayat for transaction of its business is to be held at least once in every two months. The meeting is convened by the Pramukh. Only 1/5th of the members of the Kshettra Panchayat are competent to make requisition for convening such a meeting. The meeting can be held at the office of Kshettra Panchayat or any other convenient place. The Sub Divisional Officer of the sub-division in which the Kshettra Panchayat exercises jurisdiction is obliged to preside over a meeting of no confidence, whereas an ordinary meeting for transacting the business of Kshettra Panchayat is held under the Chairmanship of the Pramukh by virtue of Sections 81, 82 and 83 of the Act. In a meeting of no confidence, only elected members of the Kshettra Panchayat are entitled to participate in view of the restriction contained under Section 6(2) of the Act. While in meeting of Kshettra Panchayat for transacting its business, even members of Kshettra Panchayat mentioned in clauses (a), (c) and (d) of sub-section (1) of Section 6 are entitled to participate and vote. In a meeting of no confidence, the sole agenda is the motion of no confidence, while there may be several items in the agenda in an ordinary meeting of a Kshettra Panchayat held for transaction of its business. The Presiding Officer is precluded from speaking on the merits of the motion of no confidence and is also not entitled to vote, whereas there is no such prohibition for the person presiding a meeting held for transacting the business of Kshettra Panchayat. A meeting of no confidence cannot be adjourned even for want of quorum, while it is permissible in case of a meeting held for transacting the business of Kshettra Panchayat. If a no confidence motion is not carried out for want of quorum or otherwise fails for want of requisite support, a fresh motion cannot be brought until after expiration of two years but there is no such impediment in case of normal business of the Kshettra Panchayat.

36. Section 79 of the Act provides that powers, duties and functions specified in second column of Schedule VI, with the exception of those against which an entry is shown in the third column of the Schedule may be exercised and shall be performed by a Kshettra Panchayat by resolution passed at a meeting and not otherwise. Some of important powers and functions of Kshettra Panchayat as specified in Schedule VI are :-

Section	**Power or function**	**Remarks**
1	**2**	**3**
11(1)-	X X X X	X X X X

(35(1)		
38(a)	To decide whether to unite with any other Kshettra Panchayat or other local authority in works or undertakings which benefit all the areas controlled by the Kshettra Panchayat.	.....
38(b)	To decide whether to contribute towards any work or institution from which the Khand benefits, although such work or institution is undertaken or maintained outside the Khand or is included in any [Municipal Corporation], municipality, cantonment, notified area or town area.	.....
86	To consider and approve the draft plan of the Khand.	.....
87(1) and (2)	To appoint Committee.	.....
87(3)	To appoint advisory	.....

	Committees.	
115(4)	To consider the recommendations of the Niyojan Samiti as regards the budget.	.....
142	To charge fees for the use or occupation of immovable property vested in, or entrusted to the management of the Kshettra Panchayat and levy or recover charges.	.....
143	To charge fees for licences, sanctions and permissions.	.....
144	To fix and levy certain other fees and tolls described in this section.	.....
145	To impose fees or tolls in markets established, maintained or managed by the Kshettra Panchayats.	.....
184(3)	To declare a private street in a controlled rural area to be a public street.	.....
190	To declare a private street as a public street.	.....
196	To permit	.....

	erection of a building, wall or other structure or planting of tree on a public drain or culvert or waterwork vested in the Kshettra Panchayat and to order removal and on default, itself to remove any unauthorised structure or tree and recover the expenses from the person concerned.	
228(2)(read with 236).	To furnish explanation in connection with an order of the prescribed authority prohibiting the execution or further execution of any resolution or order.	.....

37. These business are transacted in meeting of Kshettra Panchayat in the manner provided under Section 84 and Section 85 read with Section 62 of the Act. The members of the Kshettra Panchayat mentioned in clauses (a), (c) and (d) of sub-section (1) of Section 6 are also entitled to participate and vote. This is evidently for the reason that such members together with elected members constitute the Kshettra Panchayat and are collectively responsible for the decisions taken by the Panchayat, a unit of self government at the intermediate level in a rural area. On the other hand, the power to bring a no-confidence motion and remove the Pramukh is vested in the elected members of the Kshettra Panchayat alone as they are the one who elect a Pramukh from amongst themselves.

38. Under Rule 3 (2) of the Rules, before a Pramukh takes his seat for the first time as a Pramukh, he has to take oath before the Sub Divisional Officer in the form set out in the Appendix to the Rules. He thereafter administers oath to the other members. It means that elected members are entitled to vote to elect Pramukh even before they take oath. According to the Legislative scheme, a Pramukh, who is elected by the elected members from amongst themselves, is entitled to hold office till he enjoys confidence of majority of the elected members. If he loses confidence of such number of elected members as specified under the statute (which earlier was "more than half of the total number of elected members" and is now "not less than two-third" vide U.P. Act No.14 of 2022), he could be removed by them by bringing a motion of no confidence. For the said reason, it seems, that the legislature has not debarred elected members from bringing motion of no confidence or to vote for the same merely because he or she has not subscribed to oath of office. Elected members who elect a Pramukh without subscribing to oath of office are disqualified from participating in the meetings held for transacting the normal business of the Kshettra Panchayat but not a meeting held for considering the motion of no confidence.

39. This distinction is clearly discernible from the scheme of the Act and is analogous to the distinction made by the

Supreme Court in **Pashupati Nath Sukul's** case (supra) between the legislative and non-legislative business of a Legislative Assembly. It was held by the Supreme Court in the said case that even a person who had not taken oath as member of the Legislative Assembly, would be entitled to propose name of a person for filling up vacancy in the Rajya Sabha and also vote in the election. While taking the said view, Article 188 of the Constitution, which contains similar inhibition, as Rule 3(2) of the Rules had been considered. The relevant observations made in this behalf are as follows :-

"18 .....Now the question is whether the making of oath or affirmation is a condition precedent for being eligible to act as a proposer of a valid nomination for election to the Rajya Sabha. The rule contained in Article 193 of the Constitution, as stated earlier, is that a member elected to a Legislative Assembly cannot sit and vote in the House before making oath or affirmation. The words "sitting and voting' in Article 193 of the Constitution imply the summoning of the House under Article 174 of the Constitution by the Governor to meet at such time and place as he thinks fit and the holding of the meeting of the House pursuant to the said summons or an adjourned meeting. An elected member incurs the penalty for contravening Article 193 of the Constitution only when he sits and votes at such a meeting of the House. Invariably there is an interval of time between the constitution of a House after a general election as provided by Section 73 of the Act and the summoning of the first meeting of the House. During that interval an elected member of the Assembly whose name appears in the notification issued under Section 73 of the Act is entitled to all the privileges, salaries and allowances of a member of the Legislative Assembly, one of them being the right to function as an elector at an election held for filling a seat in the Rajya Sabha. That is the effect of Section 73 of the Act which says that on the publication of the notification under it the House shall be deemed to have been constituted. The election in question does not form a part of the legislative proceedings of the House carried on at its meeting. Nor the vote cast at such an election is a vote given in the House on any issue arising before the House. The Speaker has no control over the election. The election is held by the Returning Officer appointed for the purpose. ...."

"20. We are of the view that an elected member who has not taken oath but whose name appears in the notification published under Section 73 of the Act can take part in all non-legislative activities of an elected member. The right of voting at an election to the Rajya Sabha can also be exercised by him....."

40. It follows from the above discussions that a meeting held for considering no confidence motion is a special meeting, with specific purpose. The procedure for convening and holding such a meeting is different and distinct from the meeting of a Kshettra Panchayat held for transacting its ordinary business. The persons entitled to participate in the two meetings are not same. The members of the Kshettra Panchayat who are not eligible to elect a Pradhan are also not competent to participate in the meeting held for his/her removal. An elected member while participating in such a meeting is not covered by the inhibition contained in Rule 3(3) of the Rules. If we exclude the elected member from participating in the meeting of no confidence, it leads to several anomalies, which have to be avoided to make the provisions of the Act workable.

41. The Courts strongly lean against a construction which reduces the statute to a

futility. In Principles of Statutory Interpretation (13th Edition), the celebrated author (Justice G.P. Singh) observes in the very first Chapter that 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"*. Lord Dunedin in **Manchester Ship Canal Co. v. Manchester Racecourse Co**. observes that it is our duty to make what we can of statutes, knowing that they are meant to be operative, and not inept, and nothing short of impossibility should in my judgment allow a judge to declare a statute unworkable. The principle was reiterated by him in a later case where he observed: "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."

42. Thus, our answer to issues (iii) and (iv) is as follows:-

Issue (iii): An elected member is not debarred from signing written notice of intention to make the motion even if he/she has failed to subscribe to oath of office.

Issue (iv): A meeting held for considering motion of no confidence is a special meeting with specific purpose and is distinct from a meeting of a Kshettra Panchayat held for transacting its ordinary business. An elected member even if has not subscribed to oath is entitled to participate in a meeting of no confidence, although would not be entitled to participate in the meeting held for transacting the ordinary business of the Kshettra Panchayat.

CONCLUSION

43. Thus, our answer to the issues framed is as follows:-

Issue (i): Elected members are those who are chosen by direct election from territorial constituencies in the Panchayat area.

Issue (ii): The elected members do not cease to hold their office for not subscribing to the oath of office.

Issue:(iii): An elected member is not debarred from signing written notice of intention to make the motion even if he/she has failed to subscribe to oath of office.

Issue: (iv): A meeting held for considering motion of no confidence is a special meeting with specific purpose and is distinct from a meeting of a Kshettra Panchayat held for transacting its ordinary business. An elected member even if has not subscribed to oath is entitled to participate in a meeting of no confidence, although would not be entitled to participate in the meeting held for transacting the ordinary business of the Kshettra Panchayat.

44. The reference is answered accordingly.

45. Let the papers be placed before the Bench having jurisdiction in the matter for further proceedings.

(2023) 2 ILRA 308
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2022

BEFORE

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

Writ-C No. 19800 of 2022

Ram Chandra & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Ms. Pooja Agarwal

Counsel for the Respondents:
Sri A.K. Ray (Addl. C.S.C.), Sri Pramod Singh

A. Acquisition Law – Land Acquisition Act, 1894 – Sections 18 & 28-A – Enhancement of award – Application was rejected on the ground of lack of review power – Validity challenged – Held, petitioners' remedy against the order impugned, would be to make an application to the Collector requiring the matter to be referred to the Court under sub-Section (3) of Section 28-A. Once that reference is made, it goes without saying that the Reference Court will examine the question on the basis of evidence to be adduced by parties – The application is within limitation and ought to have been decided on merits. (Para 16 and 19)

Writ petition disposed of. (E-1)

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

1. This writ petition has been filed challenging the order dated 27.04.2022 passed by the Additional District Magistrate (Land Acquisition)/ (Housing), Kanpur Nagar, rejecting the petitioners' application for enhancement of compensation under Section 28-A of the Land Acquisition Act, 1894 (for short, "the Act of 1894'). A further writ in the nature of mandamus has been sought directing the respondents to pay compensation to the petitioners in terms of the award dated 25.01.2021 passed by the Additional District Judge, Kanpur Nagar in Case No.257/70 of 1993 and in view of the revised award dated 24.09.2009 passed by the Special Land Acquisition Officer (Housing), Kanpur Nagar.

2. The petitioners essentially claim to exercise their right under Section 28-A of the Act of 1894 on the ground that they have not challenged the Collector's award through a reference under Section 18 of the Act of 1894, but sought re-determination of the same under Section 28-A, based on the revised award dated 24.09.2009 relating to the same acquisition for some landholders.

3. As application under Section 28-A of the Act of 1894 preferred by the petitioners was not decided for a long time and they filed Writ - C No.33973 of 2012 for a direction to the Collector to decide the application. The application was directed to be decided *vide* order dated 15.09.2016 passed in the aforesaid writ petition. The order was not complied with, leading to initiation of proceedings for contempt. After contempt proceedings were initiated, the Additional District Magistrate (Land Acquisition) proceeded to reject the application *vide* order dated 20.03.2017 holding that the petitioners' claim for enhancement under Section 28-A of the Act 1894 was not tenable.

4. Aggrieved by that order, the petitioners filed Writ - C No. 17190 of 2017. This Court *vide* order dated 23.10.2019 observed that in the order dated 20.03.2017, there is reference to a report/ letter dated 17.01.2017, which was not supplied to the petitioners. The order of the Additional District Magistrate (Land Acquisition) was, therefore, set aside with a direction to supply the report dated 17.01.2017 to the petitioners within a month and decide afresh. The District Magistrate, Kanpur Nagar *vide* order dated 20/21.10.2020 again rejected the petitioners' claim under Section 28-A of the Act on the ground that he had no jurisdiction to review his earlier dated 20.03.2017. This order dated 20/21.10.2020 was challenged by the petitioners through

Writ - C No.26177 of 2020 before this Court.

5. The order of the District Magistrate dated 20/21.10.2020 was quashed by this Court *vide* judgment and order dated 21.01.2021 passed in Writ - C No. 26177 of 2020 and the matter was remitted back to the District Magistrate, requiring him to pass fresh orders after considering all objections raised by the petitioners. Upon determining the matter remanded by this Court, the District Magistrate, Kanpur Nagar held that the award dated 24.09.2009 passed by the Special Land Acquisition Officer (for short, "the SLAO') was confined to those parties, who had litigated before this Court and the Supreme Court, and not the other land oustees. The writ petitioners were not petitioners in the writ petitions that were earlier filed before this Court challenging the concerned land acquisition notifications. It was also opined that the Act of 1894 makes provision for a reference to be sought by a landholder, if he is aggrieved by the compensation awarded by the Collector, under Section 18 of the Act of 1894. Those landholders, who do not exercise their right under Section 18, upon pronouncement of award by the Reference Court relating to the same notification at the instance of other landholders, can apply within three months under Section 28-A of the Act of 1894. It was held that the petitioners neither applied under Section 18 nor under Section 28-A. The representation, that they preferred on 01.02.2021 in compliance with this Court's order dated 21.01.2021, passed in Writ - C No. 26177 of 2020, was held to be not in conformity with the Act of 1894 and liable to be rejected. The petitioners were, however, left free to pursue their remedies seeking enhancement of the compensation under the Act of 1894, before the Court of competent jurisdiction.

6. It must be remarked at once that the order dated 24.03.2021 passed by the District Magistrate, Kanpur Nagar does not appear to have been challenged by the petitioners by moving this Court or some other competent forum. Instead, an application under Section 28-A of the Act of 1894 was made seeking enhancement of the compensation, on the basis of the revised award dated 24.09.2009 passed by the Land Acquisition Officer, and on the added ground of an award of the Reference Court in L.A.R. No. 257/70 of 1993, Nanku (deceased) through their LRs vs. State of U.P., decided on 25.01.2021 by the Additional District Judge-XII, Kanpur Nagar, that was claimed to be related to the same acquisition. This application of the petitioners under Section 28-A of the Act of 1894 was rejected by means of the impugned order dated 27.04.2022 passed by the Additional District Magistrate, Land Acquisition/ (Housing), Kanpur Nagar.

7. We have heard Ms. Pooja Agarwal, learned Counsel for the writ petitioners, Mr. Pramod Singh, learned Counsel for the Avas and Vikas Parishad and Mr. A.K. Ray, learned Additional Chief Standing Counsel on behalf of the State.

8. As appears from the record that there are two separate limbs, on the basis of which the petitioners have sought revision of compensation under Section 28-A of the Act of 1894. One is based on the revised award passed by the SLAO dated 24.09.2009 and the other on the award of the Reference Court dated 25.01.2021. So far as the exercise of right under Section 28-A of the Act of 1894 is concerned, the same cannot be exercised on the basis of a revised award being passed in relation to certain landholders by the Collector/ SLAO, on any ground. The right to apply

under Section 28-A accrues on the basis of the judgment of the Reference Court in favour of a person, who himself has not preferred a reference under Section 18, but is covered by the same notification, where the Reference Court has enhanced. Therefore, no right can be claimed for enhancement of compensation under Section 28-A of the Act of 1894 on the basis of a revised award, may be relating to the same notification passed by the Collector or the SLAO. This part of the petitioners' case is not tenable.

9. However, there is another aspect of the matter, which Ms. Pooja Agarwal, learned Counsel for the petitioners has been at pains to canvass before us. And, that is that the writ petitioners being covered by the same notification as the other landholders in whose case the revised award dated 24.09.2009 has been passed, there is no reason not to extend the same benefit to the petitioners. If that is not done, according to the learned Counsel, it would be discriminatory. This submission has been opposed by the learned Counsel for the respondents, who say that the revised award dated 24.09.2009 was passed by the SLAO in favour of certain landholders in very distinguishable circumstances. We have perused the record and considered the submission on this point carefully.

10. Upon a perusal of the record and the sequence of events, it transpires that in some cases covered by the notification issued under Section 32 of the Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 (for short, "the Act of 1965'), challenge was mounted by certain landholders before this Court successfully, with the acquisition being quashed *vide* order dated 03.10.1985, passed in Writ Petition No. 4776 of 1984.

11. Upon an Appeal preferred by the U.P. Avas and Vikas Parishad by Special Leave, being Civil Appeal No. 1807 of 1986, the Supreme Court *vide* judgment and order dated 13.02.2002 set aside this Court's order and restored the acquisition. The unsuccessful landholders, who had litigated up to the Supreme Court, moved the Supreme Court *vide* Writ Petition (Civil) No. 452 of 2002. The said Writ Petition was dismissed on 02.09.2002, leaving the parties free to pursue their remedy under the law. Those landholders did not get relief and again petitioned this Court *vide* Writ Petition No. 44131 of 2004, Shrikumar Singh and others vs. State of U.P. and others, which this Court decided *vide* order dated 28.10.2004, directing that the landholders concerned are entitled to claim compensation in accordance with law.

12. It appears that some difficulty arose or it was perceived on account of this Court's earlier judgment dated 03.10.1985, setting aside the acquisition to the extent that it related to the writ petitioners of Writ Petition No. 4776 of 1984. The difficulty that was felt was that the said notification being set aside, all subsequent proceedings for acquisition, including the award dated 23.09.1986 relating to the concerned landholders got nullified. The SLAO sought guidance from the Government, who *vide* a Government Order dated 10.10.2007 clarified matters and gave directions. Acting on those directions, the SLAO passed a fresh award dated 24.09.2009.

13. By this award, the SLAO granted a higher rate of compensation being Rs.45/- per square yard, based on the Court's determination under Section 18 of the Act of 1894, in cases where the landholders

affected by the same notification had applied for a reference. It appears that the present petitioners, though claimed to be affected by the same notification, had not challenged the acquisition and the respondents' case is that the award dated 24.09.2009 is confined to those landholders alone, who had questioned the acquisition and litigated up to the Supreme Court. The petitioners had accepted the award dated 23.09.1986 that was originally passed and never questioned the acquisition. The respondents took a stand, which was accepted by the SLAO *vide* order 20.10.2010, that the award dated 24.09.2009 passed by the SLAO is confined to the writ petitioners of Writ Petition No. 4776 of 1984 and involves 138-19-0 *bighas* of land and nothing more.

14. The award dated 24.09.2009 was held not to apply to the petitioners *vide* order dated 20/21.10.2020 passed by the Collector, Kanpur Nagar. According to the Avas and Vikas Parishad, the petitioners cannot claim rights based on the SLAO's revised award dated 24.09.2009.

15. For reasons that are pellucid in the recount of facts hereinabove, the award dated 24.09.2009 is applicable to a very distinguishable class of land oustees, that is to say, those who were petitioners in Writ Petition No. 4776 of 1984 and had litigated up to the Supreme Court. The petitioners, who are not parties to that litigation, cannot be said to be one discriminated against in the matter of passing of a revised award by the SLAO, granting enhanced rates, different from the original award. This part of the submission is also, therefore, not tenable.

16. Now, this takes us to the other limb of the petitioners' submission that the Reference Court having passed an award dated 25.01.2021 in L.A.R. No. 257/70 of 1993, which relates to the same notification, entitles the petitioners to maintain their application under Section 28-A of the Act of 1894, that has been made on 17.04.2021. The said application is within limitation and ought to have been decided on merits.

17. The Additional District Magistrate, Land Acquisition has rejected the application by a cryptic observation, saying that the objections raised by the Avas and Vikas Parishad are tenable and the applications under Section 28A is contrary to law. Now, the objection, that has been taken by the Executive Engineer of the U.P. Avas and Vikas Parishad is one set out in a letter dated 02.03.2022, addressed to the Additional District Magistrate, Land Acquisition. In the said letter, it is said that the application under Section 28A relates to land affected by the Land Development-cum-Residential Scheme No.3, whereas the award dated 25.01.2021 passed by the Reference Court, on the basis of which jurisdiction is invoked under Section 28-A, relates to Land Development-cum-Residential Scheme No.1.

18. It was further said that the land affected by Land Development-cum-Residential Scheme No.3 was acquired through notifications under Sections 28 and 32 of the Act of 1965, dated 08.03.1980 and 28.08.1982, whereas Land Development-cum-Residential Scheme No.1, that relates to the petitioners' land, comprises land acquired through notifications dated 17.02.1973 and 27.02.1980. In effect, therefore, the Executive Engineer, Avas Evam Vikas Parishad said that the award dated

25.01.2021 passed by the Reference Court related to a different acquisition made through notifications, completely different from ones through which the petitioners' land was acquired. This is a case which would require inquiry on the basis of evidence, at least comparing the plot numbers and the acquisition notifications. It is not something that could be disposed of by a cryptic remark accepting a letter saying all these things, addressed by the Executive Engineer, Avas Evam Vikas Parishad to the Additional District Magistrate, Land Acquisition. Whichever way the matter is looked at, it is after all a matter of evidence, where the land of the petitioners is allegedly one that has been acquired through the same notification i.e. the subject matter of the award dated 25.01.2021 passed in L.A.R. No. 257/70 of 1993. The order of the Additional District Magistrate, L.A., rejecting the said application is one that ultimately declines to redetermine the award on whatever ground. It is, therefore, as much an award as one that adjudicates the claim on merits and determines a figure of compensation payable, upon a revision done in accordance with the Reference Court's judgment.

19. The petitioners' remedy against the order impugned, in our opinion, therefore, would be to make an application to the Collector requiring the matter to be referred to the Court under sub-Section (3) of Section 28-A. Once that reference is made, it goes without saying that the Reference Court will examine the question on the basis of evidence to be adduced by parties, if indeed the petitioners are entitled to claim benefit of the award dated 25.01.2021 passed in L.A.R. No. 257/70 of 1993. The question of the relevant notification, through which the petitioners' land has been acquired and the one that is subject matter of L.A.R. No. 257/70 of 1993 being one or not, would also be examined by the Court, as this issue is a lis which the Court ought to decide.

20. Upon an application being made by the petitioners to the Collector, Kanpur Nagar, reference shall be made under sub-Section (3) of Section 28-A of the Act of 1894. It goes without saying that the Court concerned shall entertain the reference and decide the same after hearing parties, in accordance with law.

21. The petition is disposed of, accordingly.

(2023) 2 ILRA 313
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 21923 of 2019

Sanjay Kumar Tiwari @ Sanjay Tiwari ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Chandra Shekhar Singh, Sri Sanjay Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law - Registration of Births and Deaths Act, 1969 – Sections 13(3) & 15 – Date of death – Correction proceeding – Nature – Opinion, how far relevant – Held, the enquiry contemplated u/s 13 is limited for the purposes of verifying the

authenticity of the information relating to birth or death of the person concerned – An opinion formed in such enquiry is not conclusive determination of the date of birth or death and is therefore not binding on a regular court competent to decide questions relating to living status of a person or other questions of fact. (Para 11)

B. Civil Law - Evidence Act, 1872 – Section 35 – Entry in the Register of births and death – Admissibility – It's relevance as conclusive proof – Held, no doubt, an entry made in the register of births and deaths is admissible as a relevant fact u/s 35 of the Evidence Act and is also admissible as a piece of evidence u/s 17(2) of the Registration of Births and Deaths Act, 1969 to prove the date of death or birth. But, neither section 35 of the Evidence Act nor section 17(2) of the Registration of Births and Deaths Act, 1969 provides that the date of birth or death entered in the register of births and deaths is conclusive proof of the date of death or birth of the person concerned. (Para 10)

Writ petition disposed off. (E-1)

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

1. Heard learned counsel for the petitioner and the learned Standing Counsel for the respondents 1, 2, 3 and 7.

2. The petitioner has assailed the orders dated 10.04.2019 and 26.10.2012 passed by Sub-Divisional Officer, Barhaj, Deoria in Case No. 6, under Section 13 (3) of the Registration of Births and Deaths Act, 1969.

3. Arising out of a property dispute, the petitioner and the private respondents 4 to 6 are in conflict with regard to the date of death of one Jagat Narayan son of Dhanushdhari. According to the petitioner, he died in the year 1970 whereas according to the private respondents he died on 29.08.1971.

4. As per the petitioner Jagat Narayan's year of death was earlier entered in the register as 1970. Later, an application was submitted to make corrections and to enter his date of death as 29.08.1971. On the said application, on the basis of a report submitted by ADO (Panchayat) dated 10.01.2000, by order dated 26.10.2012, the Up Zila Adhikari, Barhaj, Deoria directed that date of his death be entered as 29.08.1971. An application was filed by petitioner on 28.05.2014 for recall of the order dated 26.10.2012 on the ground that Ram Garib Tiwari (predecessor in interest of the petitioner), who was a respondent in that proceedings, had expired and there was therefore no one to challenge the claim set up by the other side, as a result, the order was ex parte. This application of the petitioner has been rejected by order impugned dated 10.04.2019.

5. While rejecting the application of the petitioner to recall the order dated 26.10.2012, the Up Zila Adhikari, Barhaj, Deoria has observed that the proceedings with regard to registration of births and deaths are administrative in nature and he holds no power to recall/review the order passed earlier therefore he has no jurisdiction to entertain such application as made by the petitioner. He also observed in the order that the proceedings which led to the order dated 26.10.2012, on the basis of report dated 10.01.2000, were pending for over a decade and were got adjourned for one reason or the other therefore, it is not a case where no opportunity of hearing was given to the petitioner side.

6. Learned counsel for the petitioner has invited our attention to Section 15 of

the Registration of Births and Deaths Act, 1969 which provides that if it is proved to the satisfaction of the Registrar that any entry of a birth or death in any register kept by him under this Act is erroneous in form or substance, or has been fraudulently or improperly made, he may, subject to such rules as may be made by the State Government with respect to the conditions on which and the circumstances in which such entries may be corrected or cancelled, correct the error or cancel the entry by suitable entry in the margin, without any alteration of the original entry, and shall sign the marginal entry and add thereto the date of the correction or cancellation.

7. On the strength of the aforesaid provision, the learned counsel for the petitioner submits that the application of the petitioner should have been entertained as a correction application and therefore, the same should not have been rejected as being not maintainable.

8. The learned Standing Counsel, who appears for the State-respondents, submits that this is a case where an entry made earlier was applied for correction and, after obtaining report, by order dated 26.10.2012, correction was directed. In such circumstances, the application of the petitioner was not to correct an original entry but was in fact to review the order passed on 26.10.2012. It was urged that since there is no power of review, the Up Zila Adhikari, Barhaj, Deoria was justified in holding the application as not maintainable.

9. Having noticed the rival submissions, on a close scrutiny of the record, we find that the date of death of Jagat Narayan is the bone of contention between the parties in a litigation pending before the Consolidation Court. In those proceedings an issue has arisen whether Jagat Narayan could file a revision in the year 1971 when he had died in the year 1970. In the register of births and deaths there appeared an entry with regard to the death of Jagat Narayan in the year 1970. As to when that entry was made is not disclosed in the petition. What is disclosed in the petition is that the private respondents had applied for correction of that entry in the year 1999. It also appears that on the application a report was submitted by ADO (Panchayat) dated 10.01.2000, which is there on record as Annexure 6. From that report it appears that the name of Jagat Narayan finds mention in the family register. The report recites that as the family register rules were notified in the Gazette in the month of June, 1970, the possibility of Jagat Narayan being alive in 1970 is high inasmuch as the register in all probability would have come into existence only thereafter. The report records that from the date of the application submitted by Jagat Narayan and the family register it appears that Jagat Narayan died on 29.08.1971.

10. No doubt, an entry made in the register of births and deaths is admissible as a relevant fact under Section 35 of the Evidence Act and is also admissible as a piece of evidence under Section 17(2) of the Registration of Births and Deaths Act, 1969 to prove the date of death or birth. But, neither section 35 of the Evidence Act nor section 17(2) of the Registration of Births and Deaths Act, 1969 provides that the date of birth or death entered in the register of births and deaths is conclusive proof of the date of death or birth of the person concerned.

11. To ascertain the nature of the proceedings under the 1969 Act, we scanned through its provisions. Despite our effort we could not find any provision in the Registration of Births and Deaths Act,

1969 enabling the Registrar to summon a person to record his evidence on oath. The counsel for the petitioner also could not show any provision under the said Act enabling the Registrar to exercise powers of a Court to summon witnesses and record their statement on oath and to allow cross examination of those witnesses. The enquiry contemplated under Section 13 is limited for the purposes of verifying the authenticity of the information relating to birth or death of the person concerned brought to the notice of the Registrar or the Magistrate, as the case may be, so as to enable him to form an opinion whether the information provided is to be entered in the register or not and for such purpose it may take an affidavit. An opinion formed in such enquiry is not conclusive determination of the date of birth or death and is therefore not binding on a regular court competent to decide questions relating to living status of a person or other questions of fact. These entries may, however, be taken into consideration as a piece of evidence. As to how much weight is to be attached to such an entry would depend on the facts of each case based on the evidence led by the parties before the court empowered to decide such questions of fact.

12. In such view of the matter, no useful purpose would be served in examining the correctness of the entry in these proceedings when their correctness can be tested in a regular court proceeding on the basis of evidence led therein. We, therefore, decline to interfere with the order impugned in this petition and leave it open to the petitioner to lead such admissible evidence, as they may be advised, in connection with the date of death of Jagat Narayan, before the competent court where the proceedings are pending.

13. Subject to above, the petition is **disposed off.**

14. It is made clear that we have not expressed any opinion with regard to the date of death of Jagat Narayan.

(2023) 2 ILRA 316
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 39549 of 1998

Shiv Kumar ...Petitioner
Versus
Chief Controlling Revenue Authority U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri T.S. Dabas, Sri Arpit Agarwal

Counsel for the Respondents:
C.S.C.

A. Civil Law – Indian Stamp Act, 1899 – Sections 47-A & 56 – UP Stamp Rules, 1942 – R. 341 – Rule of 142 repealed in 1997 – Applicability of Rule of 1942 regarding sale-deed executed in 1992 – Held, It is noteworthy that in the year 1997, the U.P. Stamp Rule 1942 were repealed. Since it is a matter of 1992 and the property in question was purchased on 04.06.1992, therefore the stamp duty would be payable in accordance with the provisions of U.P. Stamp Rule, 1942 – The property in question is a building which has been assessed for the purposes of House Water and other related municipal taxes, therefore, the provisions of Rule 341 (iii) (b) are applicable to the property in question – Respondents has flouted the provisions of U.P. Stamp Rules, 1942, which was prevalent at the time of

execution of the sale-deed. (Para 19, 20 and 32)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Vijay Kumar & anr. Vs Commissioner, Meerut Division & anr.; MANU/0682/2008

2. Mahabir Prasad Vs Collector, Cuttack [1987] 2 SCR 289

3. Ram Khelawan allias Bachchan Vs St. of U.P. through Collector, Hairpur and Anr. 2005 (98) RD 511

4. Prakashwati Vs Chief Controlling Revenue Authority Board of Revenue, Allahabad 1996 (87) R.D 419

5. Collector of Nilgiris at Ootacamund Vs Mahavir Plantations Pvt. Ltd.; MANU/TN/0285/1982

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

1. This writ petition has been filed for quashing the order dated 24.08.1098 Annexure 5 passed by respondent no. 1 - CCRA U.P / Board of Revenue at Allahabad and the order dated 14.06.1994 annexure no. 2 passed by respondent no. 2 i.e. Additional Collector (F&R), District Saharanpur, by which both the authorities have impounded the deed and imposed penalty for Rs.16,325/- directed to make the deficit and complete the deficiency of stamp duty of Rs.16,675/-. Total Rs. 33,000/- and directed to recover the same from the petitioner.

2. In brief, facts of the case are that the petitioner purchased one room on the ground floor of an area 23.24 Sq. Yard situated in Mohalla Railway Saharanpur for the consideration of Rs. 35,000/- and paid the stamp duty accordingly at the time of purchase of shop. After the execution of the sale-deed in question, the Sub Registrar referred the sale deed to respondent no. 2 for correct the valuation for stamp purposes with report that after spot inspection, it appears that the property exists in a posh locality has been purchased for commercial purposes and not for residential purposes. According to him Rs. 500/- per month may be the rent of the property in question. The monthly rent of the property is Rs. 100/- per month, as the petitioner was an old tenant.

3. Notice was issued to the petitioner to file objection (annexure no.1) dated 21.04.1994 before the respondent no. 2 with the allegation/objection that the adequate stamp duty was not paid by him. The property in question was in his tenancy at the time of purchase. The petitioner was not provided an opportunity to file objection against the report of the Sub Registrar and to produce the evidence. The report of the Sub-Registrar does not contains the correct facts and depicts incorrect picture of the spot.

4. The petitioner in support of the version, has filed a copy of the assessment of the year 1991-96, in which the annual rent of the property is shown as Rs.900/-. The respondent no. 2 without going into the depth of the case, rejected the objection and valued the property showing wrongly its monthly rent at Rs.5,00/- per month and valued the property in question at Rs.1,50,000/- showing the deficit of Rs.1,15,000/- on which stamp deficiency was shown Rs.16,675/- and imposed Rs.16,325/- as penalty total Rs. 33,000/- to be paid by the petitioner to the State of U.P. The judgment dated 14.06.1994 has been annexed as annexure no. 2 to this writ petition.

5. In the trial court, the petitioner filed an extract of Nagar Palika Parishad

showing yearly valuation of the house in question. The petitioner was shown as tenant and the annual value was Rs 9,00/- . A copy of the *Khasara* for the year w.e.f. 01.08.1991 to 31st March, 1997 has been filed as annexure no. 3.

6. The petitioner being aggrieved with the order of the respondent no. 2, filed a stamp revision Annexure No. IV under Section 56 of the Indian Stamp Act before the respondent no. 1 on 20th July, 1994.

7. The respondent no. 1 on 24.08.1998 passed the judgment and order (annexure no. 5), and imposed stamp deficiency of Rs.16,675/- but set aside the penalty of Rs.16,325/-. The order of the respondent no. 1 was bad in the eyes of law. He has not applied the judicial mind and has recorded the finding, which is not tenable in law, he has not followed the directions given in Rule 341 of the Indian Stamp Rules and has wrongly assessed the property on his own accord without considering the principles laid down under Rule 341 of the Indian Stamp Rules. Existing a property in commercial area is no ground to say that the property which is purchased is for commercial purposes.

8. Respondent no. 1 has not applied the judicial mind and has not followed the order of the Hon'ble Supreme Court that in this connection only assessment of the house be considered for determining of the stamp duty. The respondent no. 1 has also wrongly fixed the monthly rent Rs.500/- without any evidence, exemplar or any rent receipt filed by the State. In this connection a fixation of property in question of Rs.1,50,000/- of such small area is no basis for fixing the stamp duty to such a high rate. It is the clear case of the petitioner that he was an old tenant of the purchased building since before the time of its purchase and the monthly rent cannot be Rs.5,00/- per month. There is no independent inquiry either from the Tehsil authority, whatsoever has been made by the court below, thereby vitiating the impugned judgment. The judgement is based upon the report of the Sub-Registrar, which is an ex-parte, inadmissible in evidence and could not have been relied upon. Showing the said deficient stamp duty in arbitrarily manner shall cause an irreparable loss and injury to the petitioner, therefore, the Hon'ble Court be pleased to exercise it's power under Article 226 of the Constitution of India and to quash the impugned orders passed by respondent nos. 1 & 2.

9. The relevant orders and photo copy of the extracts of the house and water tax of Nagar Palika Parishad has been annexed, in which Rs.9,00/- yearly rent has been mentioned for the property in question.

10. The respondent has filed a counter affidavit and denied all the allegations of the petition and reiterated the version of the order passed by respondent nos. 1 and 2 and has said that in the said property there is an office of Shiv and Manikkoti Charted Accountant & Company and its Sale is only for commercial purposes. The valuation of the property in question cannot be less then Rs.1,50,000/-. The property is situated near Surya Hotel in first floor of the building. The market value (rent) in the year 1993, is not less then Rs.5,00/- per month and on the said rent the valuation of the property in question cannot be less than Rs.1,50,000/-, hence Rs.16,675/- was computed as stamp duty and penalty for Rs.16,325/- has been imposed.

11. A notice under Section 33/47-A had been issued to the petitioner and the

petitioner has submitted his objection on 21.04.1994. He was provided full opportunity of hearing. Due to ill intention he showed the commercial building as a room in order to evade the stamp duty. He has purchased the said property for commercial purposes, therefore, the valuation of the property should not be less than Rs.1,50,000/- in the year 1993, in the assessment bill of Nagar Paliaka for the year 1991-96, it is mentioned that there is shop and due to *mala fide* intention to evade the stamp duty the said property is shown as room.

12. It is admitted that the petitioner has submitted the assessment bill but the penalty of the deficit stamp fee was imposed after inspecting the said plot. According to the extract of Nagar Palika Parishad, Rs. 9,00/- annual rent had been fixed in the year 1990. The property is situated at the railway station road, which is hot place and commercial area of district Saharapur and it has been sold for commercial purposes. The rent of the shop cannot be less than Rs.500/- per month and in every circumstance the present petition is devoid of merit and is liable to be dismissed with cost.

13. The petitioner has filed rejoinder affidavit, in which he has reiterated the facts of the petition and has denied the contents of the counter affidavit.

14. Heard Sri Arpit Agarwal, learned counsel for the petitioner and Sri Jitendra Narain Rai, learned Additional Chief Standing Counsel for the State-respondent and perused the material available on record.

15. Learned counsel for the petitioner has argued that since the sale deed was executed prior to the enforcement of the U.P. Stamp (Valuation of the Property) Rule, 1997, therefore, the provisions of U.P. Stamp Rule, 1942, are applicable to the present proceedings.

16. The present proceedings were initiated in the year 1994 on the basis of report of the Sub Registrar dated 21.09.1994 and the learned court below without considering the provisions of law has wrongly and illegally computed the amount deficit vide it's order dated 14.06.1994.

17. The provision of the Rule 341 provides the method for computation of the market value of a property for the purpose and determination of the stamp duty of an instrument.

18. Rule 341 is as under:-

For the purposes of payment of stamp duty, the minimum market value of immovable property forming the subject of an instrument of conveyance, exchange, gift, settlement, award or trust, referred to in Section 47-A (1) of the Act, shall be deemed to be not less than that as arrived on the basis of the multiples given below:-

(i) Where the subject is land:-

(a) in case of Bhumidari-800 times the land revenue.

(b) in case of Sirdari land-400 times the land revenue.

(c) where the land is not assessed to revenue but net profits have arisen from it during the three years immediately preceding the date of the instruments 25 times the annual average of such profits.

(d) where the land is not assessed to revenue and no profits have arisen from

it during the three years immediately preceding the date of the instrument 400 times the assumed annual rent.

(e) where the land is non-agricultural and is situate within the limits of any local body referred to in clause (c) of sub-rule (i) of rule 340-equal to the value worked out on the basis of the average price per square meter, prevailing in the locality on the date of the instrument.

(ii) where the subject is grove or garden:

(a) If assessed to revenue the value of the land shall be worked out in the manner laid down in rule 341 (i) (a) and the value of the trees standing thereon shall be worked out according to the average price of the trees of the same size, and age prevailing in the locality on the date of the instruments.

(b) If not assessed to revenue or is exempted from it the value there of shall be determined at 20 times the annual rent plus the premium or 20 times of the annual average of income which has arisen during the three years immediately preceding the date of instrument and the value of the trees thereon shall be determined in accordance with rule 341 (ii) (a)

(iii) Where the subject is Building:

(a) Where the building is assessed to house tax and is occupied by the owner or is wholly or partly let out to tenants-25 times the actual or assessed annual rental value, whichever is higher as the case may be.

(b) Where the building is not assessed to house tax and is occupied by the owner or is wholly or partly let out to tenants-25 times the actual or assumed annual rental value, whichever is higher as the case may be.

19. It is noteworthy that in the year 1997, the U.P. Stamp Rule 1942 were repealed. Since it is a matter of 1992 and the property in question was purchased on 04.06.1992, therefore the stamp duty would be payable in accordance with the provisions of U.P. Stamp Rule, 1942.

20. It is undisputed that the property in question is a building which has been assessed for the purposes of House Water and other related municipal taxes, therefore, the provisions of Rule 341 (iii) (b) are applicable to the property in question.

21. The aforesaid provisions provide that if the market value of the property has been assessed by the municipal board, it can only be computed by multiplying 25 times of the assessed or the actual reasonable value. From the extracts of Municipal Board's Register the valuation of the property in question is Rs. 9,00/- only.

22. Therefore, the valuation of the property as per Rules becomes Rs.22,500/- only. The learned court below assuming the rental value Rs.500/- per month calculated that there is deficiency in payment of stamp duty and also imposed the penalty though the penalty has been removed by the Board of Revenue (C.C.R.A, UP). It is clear from the aforesaid discussions that on the basis of accompanying report of Sub Registrar, A.D.M (F&R) accepted the rental value of the room in question Rs.5,00/- per month. For determining the rate of rent to be Rs.5,00/- the learned Sub Registrar did not collect any DATA from the nearby shop or vicinity. It is also noteworthy that the petitioner was already a tenant of the property in question since before the execution of the sale-deed. If the rental value was wrongly mentioned by the Nagar Palika Parishad, it was the duty of the respondents to raise an objection and to get

it corrected, but instead of adopting the reasonable and sound method in legal way, the Sub Registrar imaginarily opined that the rent of the room in question would not be less than Rs.5,00/- per month.

23. This Court is of the opinion that if the property in question would not have been assessed by the Nagar Palika Parishad, there was an option to Sub Registrar and the respondent to apply the provisions of Section 341 (iii) (b).

24. When the property in question was assessed by the Nagar Palika, which is very much clear from the extract of the concerned Register and the U.P. Stamp Rules, 1942, was into exists, there was no opportunity to the respondents and the Sub Registrar except to act in accordance with the Rule 341 (iii) (a) according to which where the building is assessed to house tax and it is occupied by the owner or is wholly or partly, let out to the tenant, 25 times the actual or assessed annual rental value whichever is higher as the case may be, would be considered for payment of stamp duty.

25. In this case the Nagar Palika has assessed Rs.9,00/- annual rental value of the property in question, therefore as per the existing law in the year 1992, the petitioner was under an obligation to pay the stamp duty in accordance with Rule 341 (iii) (a). If we multiply Rs.9,00/- into 25 times, the value of the property becomes Rs. 22,500/-. The petitioner has purchased the property of Rs. 35,000/- and on this amount, he has paid the stamp duty accordingly, which is more than the market value computed in accordance with the Rule 341 (iii) (a).

26. Since the rules of U.P. Stamp Rules, 1997 had not come into force and the Sub Registrar had not given any DATA regarding rent of the property in question, the respondents had to act upon in accordance with the provisions of U.P. Stamp Rules, 1942.

27. In ***Vijay Kumar and Surendra Kumar Both sons of Shri Daulat Ram Vs. Commissioner, Meerut Division and Additional District Magistrate (Finance and Revenue) MANU/0682/2008*** decided on 27.03.2008, it is held that the burden to prove that the market value more than the minimum as prescribed by Collector under Rule is on Collector. Report of Sub-Registrar or Tehsildar, itself is not sufficient to discharge that burden.

28. In ***Mahabir Prasad Vs. Collector, Cuttack [1987] 2 SCR 289,*** it is held that the "market value' of land means a price at which both buyers and sellers are willing to do business; the market or current price.

29. In ***Ram Khelawan allias Bachchan Vs. State of U.P. through Collector, Hairpur and Anr. 2005 (98) RD 511,*** it has been held that report of Tahsildar may be a relevant factor for initiation of proceedings under Section 47-A of the Act but it cannot be relied upon to pass an order under the aforesaid section. In other words the said report cannot form itself basis of the order passed under Section 47-A of the Act.

30. In ***Prakashwati Vs. Chief Controlling Revenue Authority Board of Revenue, Allahabad 1996 (87)*** R.D 419 "Hon'ble the Apex Court has held that situation of a property in an area close to a decent colony not by it self would make it part thereof and should not be a factor for approach of the authority in determining the market value.

31. In ***Collector of Nilgiris at Ootacamund Vs. Mahavir Plantations Pvt. Ltd.*** MANU/TN/0285/1982, the Madras High Court while dealing with the valuation guidelines has held that the Collector under Section 47-A can not shrink his responsibility of determining the market value by adopting the guidelines nor can he fix the market value without proper materials and evidence to support it. The very idea of an inquiry contemplated by Section 47-A and the detailed procedure prescribed in the relevant rules goes to show that the Collector's finding must be verifiable by evidence. The valuation guidelines prepared by the Revenue officials at the instance of the Board of Revenue were not prepared on the basis of any open hearing of the parties concerned, or of any documents with a view to eliciting the market value of the properties concerned. They were based on data gathered broadly with reference to classification of land, grouping of land and the like. This being so, the Collector acting under Section 47-A cannot regard the guidelines valuation as the last word on the subject of market value.

32. From the aforesaid discussions, it is very much clear that respondents has flouted the provisions of U.P. Stamp Rules, 1942, which was prevalent at the time of execution of the sale-deed.

33. On the basis of aforesaid discussions, this Court is of the opinion that the respondents have not acted properly and in accordance with the existing U.P. Stamp Rules, 1942 and have passed the impugned orders in arbitrary and illegal manner, therefore the writ petition is allowed and the impugned judgement and orders dated 14.06.1994 Annexure No. 2 and the order dated 24.08.1998 Annexure No. 5 to this writ petition are hereby quashed.

(2023) 2 ILRA 322
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-C No. 41347 of 2012

Ulfat & Ors. ...Petitioners
Versus
Additional Commissioner (Judicial), Moradabad & Ors. ...Respondents

Counsel for the Petitioners:
Sri V.C. Srivastava, Sri I.P. Singh, Sri Saiful Islam Siddiqui, Ms. Tahira Kazmi, Vinay Kumar Pathak

Counsel for the Respondents:
C.S.C., Sri Mahesh Narain Singh, Sri Tarun Agarwal, Sri Shashank Bhartiya, Sri Arun Kumar Pandey

A. Civil Law - UP Zamindari Abolition & Land Reforms Act, 1950 – Sections 132 & 198(4) – Review power – How far maintainable before Commissioner – Held, the power of review would lie with the Board of Revenue only. The schedule that prescribes for judicial proceedings is schedule (1) which does not provide for any forum of review. So the forum of review is only the Board of Revenue – Held further, the Court substantively reviewed its order on merit which was certainly not available to it. (Para 13 and 19)

B. Substantive review and Procedural review – Distinction – Power of substantive review is to be exercised by any court or Tribunal or authority if such a power is specifically conferred upon it under the relevant statute but the power

of procedural review which can be held to be a recall in a sense, could be exercised. (Para 18)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Shivraji Vs Deputy Director of Consolidation, Allahabad; 1997 0 Supreme (All) 806

2. Shri Ram Sahu (dead) through LRS & ors. Vs Vinod Kumar Rawat & ors., 2020 LawSuit (SC) 685

3. Indo Gulf Industries Ltd. Vs St. of U.P. & ors., 2016 (2) AWC 1645

4. Sakuntla & Ors Vs St. of U.P. & ors; 2019 (5) AWC 5007

5. Babulal Vs St. of U.P. & ors.; 2012 (12) ADJ 37

6. Grindlays Bank Ltd. Vs Central Industrial Tribunal, AIR 1981 SC 606

7. Kapra Mazdoor Ekta Union Vs Birla Cotton Spinning & Weaving Mills Ltd., 2005 (13) SCC 777

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

1. Heard Sri Saiful Islam Siddiqui and Ms. Tahira Kazmi, learned counsel for the petitioners, Sri Arun Kumar Pandey, learned counsel for the Gaon Sabha and Sri Shashank Bhartiya, learned Advocate holding brief of Sri Tarun Agrawal, learned counsel for the caveator-respondent and Sri Ashok Kumar Kushwaha, learned Standing Counsel.

2. Petitioners before this Court are aggrieved against the orders dated 04.01.2011 and 18.04.2012 passed by the Additional Commissioner (Judicial), Moradabad Division, Moradabad, whereby, in the first instance he reviewed his earlier order dated 13.03.2008 and so consequently restored the revision petition of the petitioners and then dismissing the writ petition on merits upholding the order passed by the Collector dated 28.04.2007.

3. Briefly stated facts of the case are that the petitioners claimed to be the valid lease holders of the land in question by virtue of resolution passed by the Land Management Committee dated 12.04.1997 which stood approved by the Sub Divisional Officer vide order dated 13.05.1997.

4. It appears that on the basis of some report submitted by Sub Divisional Officer, Sahabad dated 24.06.2006 a case came to be registered under Section 198(4) of the U.P.Z.A. & L.R. Act. Notices were stated to have been issued by the lease holders which was seriously objected to, however, the land was held to be covered by Section 132 of the U.P.Z.A. & L.R. Act and thus, the order cancelling the lease was passed on 28.04.2007. Against the said order the petitioners preferred revision before the Additional Commissioner, Moradabad Division, Moradabad who after perusal of records held that the Collector did not correctly and minutely examined the allotment records as the allotment was made to the petitioners in the category of Bhumidhari with non transferable rights and just because paper no. 57-B got a wrongful transcription of Sirdari rights in respect of lease holders, it would not have affected the rights of the petitioners by way of allotment of bhumidhari rights though non transferable. It was held by the Commissioner that the petitioners/ allottees could not be held responsible for such typographical error as there was a resolution for the purposes of bhumidhari lease. The court held that by efflux of time they have acquired bhumidhari rights also and therefore, at such a belated stage, the lease could not have been cancelled. Thus,

the court sitting in revision allowed the revision application of the petitioner and set aside the order passed by the Additional Collector cancelling the lease.

5. It appears that a review petition came to be filed before the Additional Commissioner (Judicial), Moradabad upon which he reviewed his earlier order dated 23.05.2007 by order dated 04.01.2011 and restored the revision petition for the purposes of its disposal again on merits vide the same order. It is after reviewing the revision petition, the Court ordered at the same time for summoning of lower court records but no fresh notices were issued to the present petitioners for final hearing in the matter. The court then finally heard the matter again and this time vide order dated 18.04.2012 dismissed the revision and confirmed the order passed by the Additional Collector, Rampur dated 28.04.2007.

6. Assailing these two orders dated 04.01.2011 and 18.04.2012, learned counsel for the petitioners submitted that in the first instance the Additional Commissioner (Judicial) had no power of review. He submits that the power of review lies only with the Board of Revenue under Section 219 of the U.P. Land Revenue Act, 1901 which had been made applicable vide schedule III of U.P.Z.A. & L.R. Act, 1950. He submits that the power of review is a statutory power and unless the statute confers the power upon a particular judicial authority under the Act creating such authority, no court or Tribunal or the authority exercising quasi judicial power can exercise power of review.

7. Learned counsel for the petitioners in this regard has relied upon a Full Bench authority of this Court in **Shivraji v. Deputy Director of Consolidation, Allahabad, 1997 0 Supreme (All) 806** and that of the Supreme Court in the case of **Shri Ram Sahu (dead) through LRS & Others v. Vinod Kumar Rawat & Others, 2020 LawSuit (SC) 685**. Learned counsel for the petitioners has also relied upon a judgment of a coordinate bench of this Court in the case of **Indo Gulf Industries Ltd. v. State of U.P. & Others, 2016 (2) AWC 1645;** and secondly learned counsel for the petitioners has argued that the order passed by the authority dated 04.01.2011 and 18.04.2012 are both ex parte orders as no notice or opportunity of hearing provided to the petitioners before reviewing the order or before passing fresh order.

8. It is argued that once bhumidhari rights got created in favour of the petitioners, petitioners could not have been treated to be a mere lease holders so as to attract the provisions contained under Section 198(4) of U.P.Z.A. & L.R. Act, 1950. Yet another argument advanced by learned counsel for the petitioners is that there being no finding of fraud returned against the petitioners, in the absence of such forgery or fraud being pleaded, the suo motu exercise of power by the respondent revenue authorities to initiate proceedings under Section 198(4) was absolutely beyond time and hence not maintainable. Learned counsel for the petitioners has relied upon a judgment of this court in **2019 (5) AWC 5007, Sakuntla & Ors v. State of U.P. & Ors and 2012 (12) ADJ 37, Babulal v. State of U.P. & Ors.**

9. It is further argued that the Additional Collector while setting aside the leases, has simply relied upon the report of

Tehsil authorities and not much finding of fact has returned as to how the land was at the time of allotment a land falling under Section 132 of U.P.Z.A. & L.R. Act.

10. Per contra it is argued by learned Standing Counsel for State Sri Kushwaha as well as Sri Arun Kumar Pandey, learned counsel for the Gaon Sabha that the land covered under Section 132 of U.P.Z.A. & L.R. Act could not have been allotted by way of bhumidhari lease and therefore, such a power could have been exercised under Section 198(4).

11. Learned Advocates appearing for the State as well as Gaon Sabha contended that the orders passed by the Additional Collector as well as by the Commissioner subsequently are final orders passed on sound reasoning and if the land itself could not have been subject matter of lease, lease rendered void and merely because Commissioner does not have power of review, the law would even otherwise not recognize the rights of the petitioners upon the land. He therefore, submits that it may be left open for the contesting respondents to re-agitate the matter at the stage of Additional Commissioner in the event court quashes the order of review dated 04.01.2011 and the consequential order dated 18.04.2012.

12. Having heard learned counsel for the respective parties and their arguments raised across the bar and the pleadings raised in the writ petition as well as the orders impugned, I find that the basic legal question that is involved in the present petition would be as to once Additional Commissioner (Judicial) once has come to pass an order on merit allowing the revision petition of the petitioners against the order passed by Additional Collector cancelling the leases, could have reviewed the order. The initial order passed by the Additional Commissioner is of 13.03.2008 and the order of review was passed on 04.01.2011. The only note that is recorded regarding service upon the respondents is that despite service of summons the opposite parties. lease holders have not appeared and then the court has proceeded to review its order on the ground that the land was falling in the category of Section 132 of the U.P.Z.A. & L.R. Act. The sole ground on which the review has been allowed was the contention so advanced by the State that the land fell in the category of Section 132 of U.P.Z.A. & L.R. Act, but not even prima facie satisfaction had been recorded that land did fall in to that category. The Additional Commissioner (Judicial) reviewing his order dated 13.03.2008 has categorically recorded that land fell in the category under Section 117 and merely because sirdari got transcribed in paper no. 57-B, it would not give any bhumidhari lease color to an Assami lease. This finding was required to be reversed in the first instance, if the order was to be reviewed but this I find to be quite wanting in the order of review dated 04.01.2011. However, while on merits this order could not have survived, but I find the arguments raised by learned counsel for the petitioners that the power of review did not lie with the Additional Commissioner (Judicial) appears to be more appealing. The U.P.Z.A. & L.R. Act vide its second schedule makes applicable provisions of U.P. Land Revenue Act which provides for review contained under Section 220 of U.P. Land Revenue Act, 1901. The provision runs as under:

"220. Power of Board to review and alter its order and decrees. - (1) The Board may review, and may rescind, alter

or confirm any order made by itself or by any of its members in the course of [business connected with settlement.

(2) No decree or order passed judicially by it or by any of its members shall be so reviewed except on the application of a party to the case made within a period of ninety days from the passing of tire decree or order, or made after such period if tire applicant satisfies tire Board that he had sufficient cause for not making the application within such period.

(3) Members not empowered to alter each other's orders. - A single member vested with all or any of the powers of tire Board shall not have power to alter or reverse a decree or order passed by tire Board or by any member other than himself."

13. Thus, the power of review as per the above quoted provisions would lie with the Board of Revenue only. The schedule that prescribes for judicial proceedings is schedule (1) which does not provide for any forum of review. So the forum of review is only the Board of Revenue.

14. This being the above legal position, it can be safely concluded that the Additional Commissioner (Judicial) is not vested with the Board of Revenue. A Full Bench of this Court in the case of **Shivraji** (*supra*) considering the power of review, if any vested with the consolidation authorities who exercise judicial function while adjudicating the dispute and title cases under the U.P. Consolidation of Holdings Act, 1953 vide paragraph nos. 33 and 34 the Court held thus:

"33. The aforementioned decisions of this Court, as we read them, do not support the proposition of law that any tribunal exercising judicial or quasi judicial power, which is not vested with power of review under the statute expressly or by necessary implication, has an inherent power of review of its previous order in any circumstances. In our view the decisions only lay down the proposition that a tribunal exercising judicial or quasi judicial power has the inherent power to correct a clerical mistake or arithmetical error in its order and has the power to review an order which has been obtained by practising fraud on the court, provided that injustice has been perpetrated on a party by such order. There fore, these decisions should not be construed as laying down any proposition of law contrary to the well-settled principle of law that any order delivered and signed by a judicial or quasi-judicial authority attains finality subject to appeal or revision as provided under the Act and if the authority passing the order is not specifically vested with power of review under the statute, it cannot re-open the proceeding and review/revise its previous order.

34. Coming to the provisions of the U. P. Consolidation of Holdings Act, it is our considered view that the consolidation authorities, particularly the Deputy Director of Consolidation while deciding a revision petition exercises judicial or quasi judicial power and, therefore, his order is final subject to any power of appeal or revision vested in superior authority under the Act. The consolidation authorities, particularly the Deputy Director of Consolidation, is not vested with any power of review of his order and, therefore, cannot re-open any proceeding and cannot review or revise his earlier order. However, as a judicial or quasi judicial authority he has the power to correct any clerical mistake/arithmetical

error manifest error in his order in exercise of his inherent power as a tribunal."

15. Court considering the power of review of the Board of Revenue and on the point of drawing any power for consolidation authorities by implication, vide paragraph nos. 36, 37 & 39 the Court has held thus:

"36. The question that remains to be considered relates to vesting of power of review in the Deputy Director of Consolidation by application of Section 220 of the U.P Land Revenue Act, 1901. Sri Radhey Shyam, learned counsel for the contesting respondents, strenuously urged that in view of the provisions of Section 41 of the Consolidation Act Page: 691and Section 220 of the U.P Land Revenue Act it should be held that power of review is vested in the Deputy Director of Consolidation who is the final revisional authority under the Consolidation Act. No doubt Section 41 of the Consolidation Act makes provisions of Chapters IX and X of the U.P Land Revenue Act applicable to all proceedings, including appeals and applications under the former Act, Section 220, which is a part of Chapter X, vests power of review in the Board of Revenue subject to certain conditions/restrictions specified in the section. The question is, in the absence of any specific provision of review in the Consolidation Act, can it be said that the power of review vested in the Board of Revenue can be exercised by the consolidation authorities, particularly the Deputy Director of Consolidation? In our considered view, the question has to be answered in the negative. There is no provision in Section 41 or in any other section of the Consolidation Act which empowers modification of any provision of the Land Revenue Act for the purpose of application to consolidation proceedings. Further Section 41, as we read it, merely provides that the procedures prescribed under Chapter IX and X of the Land Revenue Act will be applicable to all proceedings including appeals and applications under the Consolidation Act. Substantive provisions in the aforementioned Chapters of the Land Revenue Act, which have no pari materia provisions in the Consolidation Act, cannot have any application to proceedings under the said Act. If a proceeding cannot be initiated under the Consolidation Act, the question of application of the provisions of Chapters IX and X of the Land Revenue Act to such a proceeding does not arise. In the absence of any specific provision vesting power of review in the authorities under the Consolidation Act, such a proceeding cannot be initiated at all. Therefore, Section 220 of the Land Revenue Act is of no assistance for the purposes of the proceedings under the Consolidation Act. Alternatively, assuming that Section 220 applies to consolidation proceedings and an analogy is drawn between the proceedings under the two Acts, it is the Director of Consolidation, being the highest authority under the Consolidation Act, who can inferentially be said to have a power of review as provided in Section 220 of the Land Revenue Act and not the Deputy Director of Consolidation, who is one of the revisional authorities under the Consolidation Act. This question was considered by a Division Bench of this Court in the case of Badam Singh and another v. Ganga Saran and Ram Saran, 1960 (58) A.L.J. 836 in which this Court, construing Section 41 of the Consolidation Act, made the following observation:

"Chapter X of the Land Revenue Act includes Section 220 which confers upon the Board of Revenue the power to

review its own orders in certain circumstances, and it is contended that in applying this section to proceeding under the U.P Consolidation of Holdings Act a power of review must be deemed to be conferred upon the Deputy Director of Consolidation who corresponds to the Board of Revenue in so far as he is the final court of Revision. In our opinion this argument is not well founded, for Section 41 makes no provision for the modification, alteration or adaptation of any of the sections in Chapters IX and X of the Land Revenue Act in their application to proceedings under the U.P Consolidation of Holdings Act. Section 220 specifically confers the power to review is own decision on the Board of Revenue and on no other authority, and it is not possible for this Court to hold that under that section read with Section 41 of the U.P Consolidation of Holdings Act a power to review its own decision is conferred upon all Deputy Directors of Consolidation."

37. Another Division Bench of this Court considered the same question in the case of Ram Pyare v. Deputy Director of Consolidation,. 1973 RD 79 The Court observed:?

"In our opinion Section 41 of the Act only makes applicable the provisions of Chapters IX and X of the U.P Land Revenue Act to proceedings initiated under the U.P Consolidation of Holdings Act, including proceedings of appeal and revision. Once the proceedings are initiated under this Act, the procedure laid down in Chapters IX and X shall apply. Section 41, however, does not authorise the initiation of proceedings not contemplated or authorised by the Act. The power of review has to be specifically conferred and unless there is a provision in the Act permitting initiation of such proceedings the question of applicability of procedure laid down in Chapters IX and X of the U.P Land Revenue Act does not arise. In the case of Qadam Singh v. Ganga Saran, 1960 RD 347 this Court had taken the view that no review lies. We are also of the same view."

39. On the discussions in the foregoing paragraphs it is our considered view that it is not open for the consolidation authorities to review/recall their final orders passed in proceedings under the U.P Consolidation of Holdings Act in exercise of inherent powers. Thus, the question formulated earlier is answered in the negative. The writ petition will be placed before the appropriate Bench for disposal in the light of this judgment."

16. A coordinate bench of this Court in **Indo Gulf** (*supra*) was dealing with the power of review, if any vested with the Labour Court/ Industrial Tribunal. Vide paragraph 19 the Court held thus:

"19. There is no dispute that under the Act the prescribed authority has no power to review its order which means substantive review on merits. Thus, in the absence of any statutory power to review, the prescribed authority has no authority of law to substantively review any of its order passed earlier in the proceedings. In this view of the matter the prescribed authority has no jurisdiction to touch its earlier orders on merits."

17. In the above decision, the Court further proceeded to distinguish the subject of review and recall and in this regard referred two judgments of Supreme Court in the case of **Grindlays Bank Ltd. v. Central Industrial Tribunal, AIR 1981 SC 606** and **Kapra Mazdoor Ekta Union v. Birla Cotton Spinning and Weaving Mills Ltd., 2005 (13) SCC 777** in its

paragraph nos. 23 and 24 which run as under:

"23. In Grindlays Bank Ltd. it was held that the application for setting aside ex parte order was maintainable in spite of the fact that there was no provision to that effect under the Act. The Supreme Court further held that a Tribunal under the Industrial Disputes Act, 1947 is competent to set aside to its ex parte award if it is satisfied that the party aggrieved was prevented from appearing by sufficient cause. Such setting aside of ex parte award would be in nature of procedural review and not a review on merits. The Tribunal despite becoming functus officio after the pronouncement of award can entertain such an application and they have ancillary or incidental powers to consider recall of an award if ex parte.

24. In Kapra Mazdoor Ekta Union the Three Judges of the Supreme Court considered the distinction between the review and the recall applications and held though the Act do not grant any power of review either expressly or by necessary implication but the procedural power belongs to a different category and if the party is able to establish that the procedure followed by the forum is vitiated and therefore, the order requires to the recalled it has ample power to do so."

18. Thus, the coordinate bench in its ultimate view held that power of substantive review is to be exercised by any court or Tribunal or authority if such a power is specifically conferred upon it under the relevant statute but the power of procedural review which can be held to be a recall in a sense, could be exercised. Vide para 25 the Court has held thus:

"25. In view of the above discussion, it is crystal clear that the power of substantive review is not exercisable by any court, tribunal or authority unless the same is specifically conferred upon it under the relevant statute whereas the power of procedural review is inherent in every court tribunal or authority and could be exercised even if no such power is given to them under the Act but for the exercise of the same the party applying has to establish that he was not served with the notice or that he was prevent for sufficient good reason from attending the proceedings or that the procedure followed by the forum stood vitiated as it was violative of the principles of natural justice."

19. In the present case, the Court while passing the order of review dated 04.01.2011 does not refer to any procedural flaw that occurred in passing the earlier order dated 13.03.2018 so as to enable the State respondents to maintain a review application. Instead I find that the Court substantively reviewed its order on merit which was certainly not available to it.

20. Here I would like to mention that after the order of review was passed and the lower court records were summoned by the Additional Commissioner (Judicial) under his order dated 04.01.2011, he ought to have issued notices to the respondents to contest the matter but the order dated 04.01.2011 is absolutely silent on this aspect and therefore, the consequential order also becomes bad for this very reason.

21. Coming to the other aspect advanced regarding action under Section 198(4) to be barred by time, in the case of **Shakuntla** (*supra*) this Court has extensively dealt with Section 198(6) for the purpose of limitation and relying upon

an earlier judgment of Supreme Court vide paragraph nos. 21 & 22 and has held thus:

"21. The last question is to be considered whether no limitation is applicable where the allegations of fraud exists. I have already held in foregoing paras that the allegations of fraud were not existent. However, even if the allegations of fraud are existent the question to be considered is whether any limitation period is applicable or not. The Hon'ble Supreme Court considered the said question in the case of Joint Collector Ranga Reddy District and another vs. D. Narsing Rao and others, 2015 3 SCC 695 and held as under:

"25. The legal position is fairly well-settled by a long line of decisions of this Court which have laid down that even when there is no period of limitation prescribed for the exercise of any power, revisional or otherwise, such power must be exercised within a reasonable period. This is so even in cases where allegations of fraud have necessitated the exercise of any corrective power. We may briefly refer to some of the decisions only to bring home the point that the absence of a stipulated period of limitation makes little or no difference in so far as the exercise of the power is concerned which ought to be permissible only when the power is invoked within a reasonable period.

31. To sum up, delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it will mean avoidable and endless uncertainty in human affairs, which is not the policy of law. Because, even when there is no period of limitation prescribed for exercise of such powers, the intervening delay, may have led to creation of third party rights, that cannot be trampled by a belated exercise of a discretionary power especially when no cogent explanation for the delay is in sight. Rule of law it is said must run closely with the rule of life. Even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of the discovery of fraud. Simply describing an act or transaction to be fraudulent will not extend the time for its correction to infinity; for otherwise the exercise of revisional power would itself be tantamount to a fraud upon the statute that vests such power in an authority.

32. In the case at hand, while the entry sought to be corrected is described as fraudulent, there is nothing in the notice impugned before the High Court as to when was the alleged fraud discovered by the State. A specific statement in that regard was essential for it was a jurisdictional fact, which ought to be clearly asserted in the notice issued to the respondents. The attempt of the appellant-State to demonstrate that the notice was issued within a reasonable period of the discovery of the alleged fraud is, therefore, futile. At any rate, when the Government allowed the land in question for housing sites to be given to Government employees in the year 1991, it must be presumed to have known about the record and the revenue entries concerning the parcel of land made in the ordinary course of official business. In as much as, the notice was issued as late as on 31st December, 2004, it was delayed by nearly 13 years. No explanation has been offered even for this delay assuming that the same ought to be counted only from the year 1991. Judged from any angle the notice seeking to reverse the entries made half a century ago, was clearly beyond reasonable time and was rightly quashed."

22. Thus even the Supreme Court has held that even in the cases of fraud the action should be taken within a reasonable

time. In the present case, the action has been taken after a period of 12 years which cannot be termed as reasonable time and thus I hold that even in the cases of fraud action has to be taken within the period of limitation. Thus, I summarize the findings in response to the questions framed as under:

"(A) A show cause notice proposing cancellation of the lease on the ground of material irregularity while granting the lease cannot be issued beyond the period of limitation prescribed under Section 198(6) of the Act.

(B) The Revisional Court in exercise of its powers under Section 333 of the Act cannot record findings of fact that too without taking any evidence on record at the revisional stage.

(C) The leases without observing the statutory provisions prescribed for grant of lease cannot be termed as fraudulent and

(D) Even if fraud is alleged the recourse for cancellation should be taken within a reasonable time."

22. Again in recent judgment of **Babulal** (*supra*) relying upon Chhidda and others v. State of U.P. and others; 2019 0 Supreme (All) 1085, the Court considered various aspects of the matter in relation to the power of Collector under Section 198(4) of U.P.Z.A. & L.R. Act, 1950 and the limitations prescribed under Section 198(6) of U.P.Z.A. &L.R. Act, 1950, and vide paragraph 15 has held thus:

"15. The said argument does not merits acceptance for the sole reason that the land in question has to be set apart for public purposes under the U.P. Consolidation of Holdings Act. In the present case there is specific argument and document on record to establish that the consolidation of holdings proceedings pertaining to the land in question were never finalized and were dropped mid away and thus, it cannot be held that any bar as provided under Section 132 of the Act was triggered relating to the land in question. I am also not impressed with the arguments that in the cases which are covered by Section 132 of the Act, no limitation would apply. In this regard, it is relevant to mention that the Hon'ble Supreme Court has categorically held that where no limitation is prescribed action should be taken within a reasonable time, in the present case the proceedings were initiated after about 16 years which can never be termed as a reasonable period. The relevant observation of the Supreme Court in the case of Joint Collector Ranga Reddy District and another Vs. D. Narsing Rao and others, 2015 3 SCC 695 and held as under:

"25. The legal position is fairly well-settled by a long line of decisions of this Court which have laid down that even when there is no period of limitation prescribed for the exercise of any power, revisional or otherwise, such power must be exercised within a reasonable period. This is so even in cases where allegations of fraud have necessitated the exercise of any corrective power. We may briefly refer to some of the decisions only to bring home the point that the absence of a stipulated period of limitation makes little or no difference in so far as the exercise of the power is concerned which ought to be permissible only when the power is invoked within a reasonable period.

31. To sum up, delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it will mean avoidable and endless uncertainty in human affairs, which is not the policy of

law. Because, even when there is no period of limitation prescribed for exercise of such powers, the intervening delay, may have led to creation of third party rights, that cannot be trampled by a belated exercise of a discretionary power especially when no cogent explanation for the delay is in sight. Rule of law it is said must run closely with the rule of life. Even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of the discovery of fraud. Simply describing an act or transaction to be fraudulent will not extend the time for its correction to infinity; for otherwise the exercise of revisional power would itself be tantamount to a fraud upon the statute that vests such power in an authority.

32. In the case at hand, while the entry sought to be corrected is described as fraudulent, there is nothing in the notice impugned before the High Court as to when was the alleged fraud discovered by the State. A specific statement in that regard was essential for it was a jurisdictional fact, which ought to be clearly asserted in the notice issued to the respondents. The attempt of the appellant-State to demonstrate that the notice was issued within a reasonable period of the discovery of the alleged fraud is, therefore, futile. At any rate, when the Government allowed the land in question for housing sites to be given to Government employees in the year 1991, it must be presumed to have known about the record and the revenue entries concerning the parcel of land made in the ordinary course of official business. In as much as, the notice was issued as late as on 31st December, 2004, it was delayed by nearly 13 years. No explanation has been offered even for this delay assuming that the same ought to be counted only from the year 1991. Judged from any angle the notice seeking to reverse the entries made half a century ago, was clearly beyond reasonable time and was rightly quashed."

(emphasis added)"

23. In such above view of the matter, therefore, the order of review passed by the Additional Commissioner (Judicial) dated 04.01.2011 is unsustainable in law and therefore, deserves to be set aside. Once I proceed to set aside the order of review dated 04.01.2011, the consequential order to it dated 18.04.2012 could also needed to be set aside. If these two orders are set aside as I propose to do in this petition, I need not go to other questions with regard to validity of lease etc. as the same in my considered view cannot be permitted to be reopened after a lapse of so many years. Thus the order passed by the Additional Commissioner (Judicial) dated 04.01.2011 allowing the review application of the State respondents and the consequential order dated 18.04.2012 are hereby set aside.

24. In view of the above, this petition stands **allowed**. Orders dated 04.01.2011 and 18.04.2012 passed by respondent nos. 1 & 2 respectively are hereby set aside.

(2023) 2 ILRA 332
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-C No. 66973 of 2012

Arshad & Anr. ...Petitioners
Versus
A.C. (Admin.), Saharanpur & Ors. ...Respondents

Counsel for the Petitioners:
Sri M.A. Khan

Counsel for the Respondents:
C.S.C., Sri D.D. Chauhan, Sri Abhishek Tiwari

A. Civil Law - UP Zamindari Abolition & Land Reforms Act, 1950 – Section 168-A – Transaction of fragmented land – UP ZA & LR (Amendment Act) 2004 – Sections 4 & 11 – Deletion of S. 168-A of the Principle Act – Effect – Benefit of Section 11, how far can be extended – Held, the source of power to declare a particular transaction void was very much taken away, and therefore, the Collector had no jurisdiction as such to exercise any such power – Held further, the benefit got eclipsed for the litigation, But since the transaction had no more remained void for the saving clause being there, the petitioner cannot be made to suffer and to that extent, therefore, the benefit of Section 11 of the Amending Act, 2004 can be extended to the petitioner. (Para 11 and 17)

Writ petition disposed of. (E-1)

List of Cases cited :-

1. Ram Pratap & ors. Vs Gulab (2013) 1LR 2All909

2. Writ C No. 14489 of 2008; Smt. Sumita Devi Vs Sushila Devi & ors.

3. Kolhapur Canesugar Works Ltd. & anr. Vs U.O.I. & ors. (2000) 2 SCC 536

4. Second Appeal No. 2585 of 1974; Smt. Janki & anr. Vs Murari Lal & ors.

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

1. Heard Sri M.A. Khan, learned counsel for the petitioners, Sri Abhishek Tiwari, learned brief holder for the State and Sri D.D. Chauhan, learned counsel appearing for the Gaon Sabha.

2. By means of this petition filed under Article 226 of the Constitution, petitioners have sought a writ of certiorari for quashing the order dated 3.9.2004 passed by the Collector, Saharanpur and the order dated 1.6.2012 passed by the Additional Commissioner (Administration), Saharanpur Mandal, Saharanpur.

3. The argument advanced by the learned counsel for the petitioners is that the vary provision i.e. Section 168A of the U.P. Zamindari Abolition and Land Reforms Act having been deleted from the Statute vide U.P. Zamindari Abolition and Land Reforms (Amendment) Act, 2004 notified w.e.f. 23.8.2004, there existed no more any law under which a transaction of land in fragmentation could be held to be *void*.

4. It is argued that though the amending law has taken immediate effect prospectively but has also saved those transactions which would have been rendered *void* by fiction of law created under the erstwhile Section 168A of the U.P. Zamindari Abolition and Land Reforms Act, 1950. He has drawn the attention of Section 4 and Section 11 of the Amending Act of 2004, which provide in the first instance deletion of Section 168A from the Statute and secondly saving those transactions which were to be held otherwise *void* in view of fiction created by Section 168 of the Act.

5. It is argued that those transactions would now be rendered as *void*able and can be validated by depositing such fee as may be prescribed for by notification of the State Government. It is submitted that both the orders passed by the Collector dated 3.9.2004 admittedly after the amending provision had been brought into existence as per notification issued on 23.8.2004 and so also the order passed by the Additional Commissioner, Saharanpur, and therefore, are not sustainable.

6. *Per contra*, it is argued by Sri Abhishek Tiwari, learned brief holder appearing for the State that provision as contained Section 11 of the Amending Act, 2004 created a prescribed period of one year only for getting such transaction prior to the Amending Act coming into force voidable if condition of deficit is certified with only within a period of one year. It is further argued that another Amending Act came into effect with notification on 29.3.2005 as the U.P. Zamindari Abolition and Land Reforms (Amendment) Act, 2005 whereby Section 11 of the old Amending Act has been completely omitted by sub-section 2 of Section 4. However, Section 4(1) reiterated the position of getting the old transactions validated by making deposit within a period of one year. Learned brief holder further placed before this Court U.P. Zamindari Abolition and Land Reforms (Special Provisions) Act, 2014 and 2015 wherein by Section 2 this benefit to get the transfer validated by necessary deposit, was extended for a further period of two years i.e.upto 2015 and 2016

7. I have heard the learned counsel for the parties and perused the record and the relevant amending provision of the U.P. Zamindari Abolition and Land Reforms Act and the orders impugned herein this petition and I find only two questions arising in this case for consideration : (a) whether the Collector was justified in passing the order on 3.9.2004 holding the transaction in question being in fragment, to be prohibited under Section 168-A on 3.9.2004; and (b) whether the benefit conferred under Section 11 of the Amending Act of 2004 and Section 4(1) of the Amending Act, 2005 would be available to the petitioner?

8. Coming to the first question, I find that the provision Section 168-A was deleted from the Statute book by Amending Act, 2004 with immediate effect saving the old transactions by virtue of Section 11 of the said Act. It would be necessary to go through the relevant provisions of Section 168-A of U.P. Z.A. & L.R. Act, 1950 runs as under:

"168-A. Transfer of fragments.- Notwithstanding the provisions of any law for the time being in force, no person shall transfer whether by sale, gift or exchange any fragment situate in a consolidated area except where the transfer is in favour of tenure- holder who has a plot contiguous to the fragment or where the transfer is not in favour of any such tenure-holder the whole or so much of the plot in which person has bhumidhari rights, which pertains to the fragment is thereby transferred. (2) The transfer of any land contrary to the provisions of sub-section (1) shall be void. (3) When a bhumidhar has made any transfer in contravention of the provisions of sub-section (1) the provisions of Section 167 shall mutatis mutandis apply."

9. Section 4 and Section 11 of the U.P. Zamindari Abolition and Land Reforms (Amendment) Act, 2004 run as follow:-

"Section 4- Section 168-A of the Principal Act shall be omitted."

Section 11- It is hereby declared that any transfer of a fragment which had become void under Section 168-A as it stood before the commencement of this Act shall be deemed to have been voidable any any person may get such transfer validated by depositing such fee and within such time and in such manner as may be notified by the State Government

Provided that the above provisions shall cease to be in force after expiry of one year from the date of commencement of this Act"

10. Upon bare reading of the aforesaid deleted provisions and new provisions of the Amending Act it is clear that while transactions of for fragmented land that were earlier *void*, would no more be *void* as such and further all such transactions that had become *void* before the amendment came vide Section 4-A of the Amending Act stood saved, however, such transactions were placed in the category of voidable contracts and could be validated within a period of one year from the date, the amending provisions were brought into force complying with the provisions as contained under Section 11 of the Amending Act.

11. The transaction in question also stood automatically saved, and therefore, the Collector had run out of its jurisdiction and authority to declare such transaction of fragmented land to be *void* under a deleted provision, namely Section 168A of U.P. Zamindari Abolition and Land Reforms Act. The source of power to declare a particular transaction *void* was very much taken away, and therefore, the Collector had no jurisdiction as such to exercise any such power. Therefore, the order passed by the Collector is not sustainable. Learned Additional Commissioner has also not looked into this legal aspect involved in the matter, and therefore, the order passed by the Additional Commissioner, Saharanpur confirming the order passed by the Collector is also not sustainable.

12. Now the second question is regarding benefit to be conferred upon the petitioner. Section 11 of Amending Act, 2004 which stood repealed in the year 2005 with new provision getting incorporated by virtue of Section 4(1) which only saved those lands from the rigours of the old provision of the Act where the State had not come to be recorded in the revenue records upon such land.

13. I may here refer to the further Amending Acts that came to the rescue of such purchasers who could not be benefited within one year time, even though State had not come to be recorded upon such land. The second Amending Act namely the U.P. Zamindari Abolition and Land Reforms (Amendment) Act, 2005 reiterated Section 11 of the Previous Act, vide Section 4(1) and vide Section 4(2) omitted Section 11. Section 4 (2) run as under:-

"(2) It shall be lawful for the State Government, if it so considers necessary, to issue, from time ta time, the notification referred to in sub-section (1) in respect only of such area or areas as may be specified and all the provisions of subsection (1) shall be applicable to and in the case of every such notification."

14. The aforesaid provisions came to be reiterated vide Section 2 of the U.P. Zamindari Abolition and Land Reforms (Special Provision) Act, 2010. Section 2 runs as under:-

" It is hereby declared that any transfer of such fragment as had become void under Section 168-A of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 as it stood before the commencement of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 2004 (U.P. Act No. 27 of 2004) and had not been entered in revenue records in favour of State Government

shall be deemed to have been divested and any person may get such transfer validated by depositing such fee and within such time and in such manner as may be notified by the State Government;

Provided that, this special provision shall cease to be in force after expiry of two years from the date of commencement of this Act."

15. The Aims, Objects and Reason for bringing Land Reforms (Special Provision) Bill, 2010 have been spelt out thus:-

"With a view to providing opportunity of validation, in any transfer of such fragment as had become void under Section 168-A of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 as it stood before the commencement of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 2004 (U.P. Act No. 27 of 2004) and had not been entered in revenue records in favour of the State Government, it has been decided to make a law to provide for making special provision in relation to the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. 1 of 1951).

The Uttar Pradesh Zamindari Abolition and Land Reforms (Special Provision) Bill, 2010 is introduced accordingly."

16. Now looking to the history of various Amendment Acts and the last one that spelt out Aims, Objects and Reason, the State Legislature intended that if provisions of Section 168 have been deleted, the transaction of such fragmented land already reached be saved. The innocent villagers who were vandees, were required to do certain formalities, provided of course entry in the name of State had not came to be made upon the land for such transactions being *void* earlier.

17. In my considered view, the litigation before the Collector was the cause of petitioner not getting the benefit of Section 11 of the Amending Act of 2004. The benefit got eclipsed for the litigation, But since the transaction had no more remained *void* for the saving clause being there, the petitioner cannot be made to suffer and to that extent, therefore, the benefit of Section 11 of the Amending Act, 2004 can be extended to the petitioner. So far the fact that this provision got further repealed by virtue of Section 4(1) of the Amending Act, 2005 is concerned, and the benefit was available only for those cases where the entries had not been changed in operating the name of State. In the present case, it is an admitted fact to the parties that the entries still stand in the name of the petitioners in respect of land in question.

18. In the case of ***Ram Pratap & others Vs. Gulab (2013) 1LR 2All909***, this Court had occasioned to interrupt the law. The issue in the case what would be position of Amending Act deletes a provision and does not save the pending proceedings and then provides for protection in respect of those transaction that would have otherwise been *void* for the provision that has been deleted. The Court proceeded to examine the matter from the point of view of Aims and Objects with which the particular provision has been deleted and another provision has been inserted in its place.

19. The Court referred to the judgment of ***Smt. Sumita Devi Vs. Sushila Devi & others (Writ-C No. 14489 of 2008),*** wherein it was held as under:-

"Moreover provisions of Section 168-A were quite harsh. The Section has also been deleted. U.P. Act No. 27 of 2004 which deleted Section 168-A made the previous transactions hit by the said section voidable (in stead of void) and curable (capable of being validated) on payment of some nominal fees within a particular period which has now expired (Section 11). Accordingly, for these two reasons the section shall be interpreted (for the sake of past transactions) liberally, in favour of vendor and vendee."

20. The Court referred to the judgment of Hon'ble Supreme Court in ***Kolhapur Canesugar Works Ltd. & another Vs. Union of India & others (2000) 2 SCC 536*** has held thus:-

"The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is] introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision.

In the present case, as noted earlier, Section 6 of the General Clauses Act has no application. There is no saving provision in favour of pending proceeding. Therefore action for realisation of the amount refunded can only be taken under the new provision in accordance with the terms thereof."

21. The Court referred to the judgment in the case of ***Smt. Janki & another Vs. Murari Lal & others (Second Appeal No. 2585 of 1974)*** wherein it has been held thus:-

"In terms of the above said amendments in the present case, the sale deed dated 15.1.1969 executed by Smt. Ganga Devi in favour of Amar Singh and Murari Lal being *void* under Section 168-A as it stood before the commencement of the Act 2004, was deemed to have been voidable in terms of Section 11 of the special provisions and further amended by Act No.27 of 2004 by which Section 11 has also been omitted as it stood and has been replaced by Section 4 of U. P. Act No.13 of 2004, in terms of which the alleged sale deed dated 15.1.1969 alleged to have become *void* stands voidable in the case of transfer of such fragment, provided, it has not been entered in the revenue records in favour of the State Government, on the date of the commencement of the U.P. Act No.27 of 2004 or U.P. Act No.13 of 2005 as the case may be and such transferees may get such transfer validated by depositing such fee and within such time and in such manner as may be notified by the State Government. In view of the above

said findings, the first question is decided accordingly."

22. Considering the aforesaid judgments, the Court allowed the appeal and set aside the judgment and decree of the First Appellate Court and the respondent was directed to execute the sale deed. In my considered view the proposition of law as has been discussed above and laid down are fully attracted to the present case, and therefore, the order passed by the Collector and the order passed by the Commissioner are unsustainable and deserve to be set aside.

23. The order passed by the Collector dated 3.9.2004 and the order passed by the Additional Commissioner, Saharanpur dated 1.6.2012 impugned herein this petition as Annexures 2 and 4 are hereby quashed.

24. The petitioner is at liberty to move an appropriate application for making necessary deposit to validate the transaction that has already taken place in respect of which his name is recorded in the revenue records within a period of three months and if any application as such is made, the petitioner may be required to deposit the amount if any that he would have been required to pay in the year 2004-05 and no interest shall be charged upon such amount. An appropriate order in the above regard shall be passed within two weeks of the received of the application.

25. With the aforesaid observations and directions, this petition stands disposed of.

(2023) 2 ILRA 338
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: LUCKNOW 10.01.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ-C No. 1000019 of 2008

Ajay Agarwal & Ors. ...Petitioners
Versus
Commissioner, Lko. & Ors. ...Respondents

Counsel for the Petitioners:
Sudeep Kumar, A.K. Pandey

Counsel for the Respondents:
C.S.C.

A. Civil Law – UP Stamp Act, 1899 – Section 47-A Clause (1) & (2) – UP Stamp (Valuation of Property) Rules, 1997 – Rule 7 – Applicability of Rule 7 – Held, no distinction whatsoever has been carved out under Rule 7 of the Rules of 1997 with regard to procedure being required to be followed under section 47 A – There being no distinction indicated under provisions of the Act, Rule 7 of Rules of 1997 would be applicable on proceedings under section 47A (1) as well as under Section 47A (3) and are mandatory in nature. (Para 14 and 21)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Ram Khelawan @ Bachcha Vs St. of U.P. & ors. reported in 2005(2) JCLR 610 (Allahabad)

2. Ganga Ram Vs St. of U.P. & ors. reported in 2020(38) LCD 1991

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

1. Heard learned counsel for petitioners and Mr. Devendra Mohan Shukla, learned State counsel appearing for opposite parties.

2. Petition has been filed assailing order dated 29.03.2006 passed under Section 47A(3) of the U.P. Stamp Act, 1899 as well as order dated 04.10.2007 passed in appeal under Section 56 of the said Act.

3. Learned counsel for petitioners has submitted that petitioners purchased a flat having area of 1473 sq. feet situated on third floor of a building constructed on plot no.B-3/122, Vivek Khand, Gomti Nagar by means of sale deed executed on 06.11.2003.

4. It is submitted that upon presentation of the deed of transfer, the same was registered but referred in terms of Section 47A(3) of the Act after spot inspection was conducted and report dated 18.11.2003 submitted indicating the property in question to have commercial value though Stamp Duty was paid in terms of the property having residential value. The proceedings under Section 47A(3) of the Act culminated in imposition of additional stamp duty along with penalty, which was challenged by the petitioners in Appeal No.552 of 2005-2006 under section 56 of the Act which has also been rejected by means of order dated 04.10.2007.

5. Learned counsel for petitioners submits that a perusal of the impugned order dated 29.03.2006 passed under Section 47 of the Act makes it apparent that the proceedings have been decided ex parte against petitioners and is based only on the spot inspection report indicating the property in question to have commercial value. It is submitted that against the order, petitioners filed appeal specifically taking the plea that order passed under Section 47 of the Act was ex parte in which reasonable opportunity of being heard was never provided to him. Further ground which was taken in appeal was that spot inspection was conducted without giving prior notice to the petitioners as is required to be done in terms of Rule 7 (iii)(c) of the U.P. Stamp (Valuation of Property) Rules, 1997 and since it was mandatory on the part of authorities to have given prior notice before spot inspection of property in question, the impugned orders are liable to be set aside on that very ground. Learned counsel has also submitted that even otherwise the authorities are required to record their subjective satisfaction in terms of Section 47(3) of the Act with regard to correctness of the market value of the property which is subject matter of the instrument of transfer. It is submitted that no such subjective satisfaction having been recorded either under section 47 or even other Section 56 of the Act, the orders suffer from the vice of non-application of mind and are also against the mandatory statutory provision of Section 47(3) of the Act. Learned counsel has adverted to judgment of Coordinate Bench in the case of ***Ram Khelawan @ Bachcha versus State of U.P. Ors.*** reported in ***2005(2) JCLR 610 (Allahabad)*** to buttress his submission.

6. Learned State counsel appearing on behalf of opposite party has refuted submissions advanced by learned counsel for petitioners with the submission that there is no error in the orders challenged in present writ petition since the authorities were correct in relying on the spot inspection report for which purpose prior notice as envisaged under Rule 7(3)(c) of the Act was not required to be given to petitioner since the aforesaid provision was inapplicable in present case. It is submitted that there is material difference in provisions pertaining to under valuation of instrument sought to be registered under

section 47A(i)(a) and the provisions of Section 47 A(3) of the Act. It is submitted that while under valuation of an instrument under section 47 A(i) of the Act pertains to inquiry required to be done by the Collector prior to registration of instrument of transfer, Section 47 A (3) of the Act pertains to examination of the instrument of transfer in order to ascertain under valuation after its registration. It is submitted that in terms of procedure provided, reference is made to the Collector upon an initial spot inspection for which purpose no prior notice was required to be given to the petitioners.

7. Learned State counsel has further submitted that provisions of Rule 7(3)(c) would be applicable only in case the petitioners would have submitted their objections to initial spot inspection report and since in the present case no objection by the petitioners was filed to initial spot inspection report, there was no question of Collector inspecting the property under Rule 7(3)(c) of the Rules of 1997. It is further submitted that even otherwise, in terms of Section 47(A)(3) of the Act, under valuation of the instrument of transfer is required to be seen only upon examination of the instrument of transfer and is distinct from an inquiry required to be held by the Collector in terms of Section 47A (1) of the Act. As such, it is submitted that in cases where the Collector embarks upon examination of the instrument of transfer for the purposes of determining under valuation of the instrument, no spot inspection is required to be made and therefore provisions of Rule 7(3)(c) would be inapplicable as in the present case where the instrument was merely examined in terms of Section 47A(3) of the Act. It is also submitted that even under section 47A (3) of the Act, if spot inspection is conducted, the same not being under rule 7(3)(c) of 1997 Rules, any infringement thereof would be immaterial.

8. Upon consideration of submissions advanced by learned counsel for parties and perusal of material available on record, it is evident that proceedings in the present case have been drawn in terms of Section 47A(3) of the Act of 1899 after registration of the instrument of transfer and not under section 47A (1) of the Act. It also appears that proceedings have been drawn in pursuance of the spot inspection report dated 18.11.2003 which does not indicate the presence of or any prior notice being given to the petitioners. While filing appeal under section 56 of the Act, specific plea has been taken by petitioners that the spot inspection report has been relied upon by the prescribed authority but the same being ex parte in nature, was liable to be ignored. Despite the specific pleadings having been taken in the memorandum of appeal, the same does not appear to have been adverted to by the appellate authority.

9. Nonetheless, in view of submissions advanced by learned State counsel, the question arising for determination would be whether compliance of Rule 7(3)(c) is required in proceedings under Section 47(A)(1) as well as under section 47 A(3) of the Act? Here it is also relevant to indicate that both the orders impugned in present writ petition are based only on the aforesaid spot inspection report, which admittedly was ex parte in nature.

10. The provision of Section 47 A of the Act have two distinct components with sub section (1) pertaining to inquiry being held for determination of valuation of an instrument of transfer prior to its

registration and upon its presentation for registration while provisions of sub-section 3 of the said section pertains to examination of an instrument of transfer for the purposes of determination of stamp duty chargeable on the market value of property. In the present case, the proceedings have been held in terms of section 47 A(3) of the Act of 1899 after its registration and upon reference being made.

11. The procedure required to be followed for determination of market value of the property and stamp duty required to be paid on the instrument of transfer have been indicated in sub section (4) of Section 47 A which clearly states that if on **inquiry** under sub-section (2) and **examination** under sub-section (3) the Collector finds the market value of the property to be set forth or not truly set forth, he is required to pass appropriate orders pertaining to same. Thus, it is evident that the Collector is required to embark upon an inquiry under sub-section (2) and an examination of instrument of transfer under sub-section 3 in order to find the correct market value of the property and for determination of stamp duty required to be paid.

12. Learned State counsel in his submission has adverted to the fact that under sub-section (3) of Section 47(A) of the Act, the Collector upon a reference being made or suo motu is required to examine the instrument for the purpose of satisfying himself as to the correctness of the market value. It has been submitted that since the examination is only with regard to examination of the instrument of transfer, it would thus not require any spot inspection to be made by the Collector particularly when no objection to the ex parte spot inspection initially has been made by the petitioner. It is thus submitted that since the Collector was not required to make spot inspection of the property in question, the provisions of Rule 7(3)(c) would be inapplicable.

13. For the purposes of determination of aforesaid question, it is the provisions of Section 47 and Rule 7 which are pertinent and required to be seen, which are as follows:-

***47. Power of payer to stamp bills and promissory notes received by him unstamped**.-When any bill of exchange or promissory note chargeable 1[with the duty not exceeding ten paise] is presented for payment unstamped, the person to whom it is so presented, may affix thereto the necessary adhesive stamp, and, upon cancelling the same in manner hereinbefore provided, may pay the sum payable upon such bill or note, and may charge the duty against the person, who ought to have paid the same, or deduct it from the sum payable as aforesaid, and such bill or note shall, so far as respects the duty, be deemed good and valid:*

Provided that nothing herein contained shall relieve any person from any penalty or proceeding to which he may be liable in relation to such bill or note.

(3) The Collector may, suo motu, or on a reference from any Court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Commissioner of Stamps or any officer authorised by the State Government in that behalf, within four years from the date of registration of any instrument on which duty is chargeable on the market value of the property, not already referred to him under sub-section (1), call for and examine the instrument for the purpose of

satisfying himself as to the correctness of the market value, of the property which is the subject for such instrument, and the duty payable thereon, and if after such examination he has reason to believe that the market value of such property has not been truly set forth in such instrument, he may determine the market value of such property and the duty payable thereon :

Provided that, with the prior permission of the State Government, an action under this sub-section may be taken after a period of four years but before a period of eight years from the date of registration of the instrument on which duty is chargeable on the market value of the property.

*"**7. Procedure on receipt of a reference or when suo motu action is proposed under Section 47-A-**(1) On receipt of a reference or where action is proposed to be taken suo motu under Section 47-A, the Collector shall issue notice to parties to the instrument to show cause within thirty days of the receipt of such notice as to why the market value of the property set forth in the instrument and the duty payable thereon be not determined by him.*

(2) The Collector may admit oral or documentary evidence, if any, produced by the parties to the instrument and call for and examine the original instrument to satisfy himself as to the correctness of the market value of the subject-matter of the instrument and for determining the duty payable thereon.

(3) The Collector may-

(a) call for any information or record from any public office, officer or authority under the Government or a local authority;

(b) examine and record the statement of any public officer or authority under the Government or the local authority; and

(c) inspect the property after due notice to parties to the instrument.

(4) After considering the representation of the parties, if any and examining the records and other evidence, the Collector shall determine the market value of the subject-matter of the instrument and the duty payable thereon.

(5) If, as a result to such inquiry, the market value is found to be fully and truly set forth and the instrument duly stamped according to such value, it shall be returned to the person who made the reference with a certificate to that effect. A copy of such certificate shall also be sent to the Registering Officer concerned.

(6) If, as a result of inquiry, the instrument is found to be undervalued and not duly stamped, necessary action shall be taken in respect of it according to relevant provisions of the Act."

14. It is quite discernible that the starting provision of Rule 7 itself indicates the applicability of the Rule to the extent that on receipt of a reference **or** where action is proposed to be taken suo motu under section 47 A the Collector shall issue notice to parties to the instrument to show-cause. A reading of the aforesaid provision makes it evident that no distinction whatsoever has been carved out under Rule 7 of the Rules of 1997 with regard to procedure being required to be followed under section 47 A. On the contrary, it specifically indicates that the aforesaid Rule is required to be followed even in case suo motu action is taken under section 47 A of the Act, which in effect pertains to Section 47 A(3) of the Act of 1899 with regard to determination of stamp duty after registration of a document of instrument of transfer. As such no such distinction having been carved out under Rule 7, it is not feasible to accede to the submissions of

learned State counsel that Rule 7 (3)(c) of the Rules would not be applicable in case of proceeding under section 47 A(3) of the Act.

15. A reading of the aforesaid provision also does not indicate any such procedure requiring the petitioner to file objection against the initial spot inspection report whereafter only the Collector is required to inspect the property in terms of Rule 7(3)(c) of the Rules. Although it has been submitted that the aforesaid provision is not mandatory in nature but coordinate benches of this Court particularly in the case of ***Ganga Ram versus State of U.P. and others*** reported in ***2020(38) LCD 1991*** has clearly held the provision of Rule 7(3) (c) to be mandatory in nature.

16. The aspect as to whether the Collector is required mandatory to inspect the property in terms of Rule 7(3)(c) upon proceedings being drawn up under section 47(3) of the Act is not required to be considered in the present case particularly when it is admitted that no such inspection whatsoever was undertaken by the Collector which would have required prior and due notice to the parties to the instrument.

17. However upon perusal of Section 47A (3) of the Act, it is evident that the Collector either suo motu or on a reference is required to determine the market value of property for the purposes of satisfying himself as to correctness of the market value of property which is subject of such instrument and the duty payable thereon. The provisions of Section 47A(3) of the Act clearly indicates that while determining market value of the property on the basis of instrument of transfer, the Collector has to satisfy himself with regard to correctness of a market value and if after such examination, he has reason to believe that market value of such property has not been truly set forth in the instrument, he may determine the market value of such property and the duty payable thereon.

18. The provisions of section 47A (3) of the Act clearly prescribed that prior to passing an order in terms of the aforesaid provision, the Collector has to satisfy himself, which in fact would mean that he has to record his subjective satisfaction with regard to the correctness of market value of the property. Furthermore he is also required to record reasons to believe that market value of such property has not been truly set forth in the instrument, whereafter he is also required to determine the market value of his property and duty payable thereon. Clearly the Collector in exercise of power under section 47 A(3) of the Act as such is required not to rely only on the spot inspection report but also to record his subjective satisfaction with regard to under valuation of the instrument of transfer. As such while passing orders under section 47 of the Act, Collector cannot rely only on the post inspection report.

19. A coordinate bench of this Court in the case of ***Ram Khelawan*** (supra) has also adverted to the aforesaid provisions and has enunciated the law that the method of determining market value and factors to be taken into consideration for the said purpose particularly with regard to determining the quantum of compensation under land acquisition laws are also applicable for determining market value while deciding a case by Collector under section 47 A of the Act. The three standard principles of determining market value in land acquisition cases have also been

indicated in paragraphs 9 and 11 of the aforesaid judgement which are as follows;

"9. Entire basis of report of Tahsildar and judgment of A.D.M. is that the land is of residential use/ potential (Awasiya prayojan). Even if it is assumed for the sake of argument that the land in dispute is having Abadi potential, still no basis of determining its valuation has been given. Once sale deed is registered then for determining market value of the land under Section 47-A Stamp Act no reliance can be placed upon Rules of 1997. If a case is instituted under Section 47-A of the Stamp Act after registration of the deed particularly sale-deed then valuation has to be determined on the general principles applicable for determining market value of immovable property. The method of determining market value and the factors to be taken into consideration for the said purpose have been discussed in detail and laid down with precision by the Courts white determining quantum of compensation under Land Acquisition laws. Exactly same principles shall apply for determining market value while deciding a case by Collector under Section 47-A Stamp Act.

11. The three standard principles of determining market value in Land Acquisition cases are; comparable sale method i.e. value of similar adjoining property sold in near past, multiplication by a suitable multiplier of monthly or yearly rent, income or yield; and adding the cost of construction to the value of the land."

20. In view of aforesaid, it is evident that the power to be exercised by Collector under section 47A (3) of the Act is not pedantic in nature but is required to be made on the basis of observations made hereinabove particularly with regard to the fact that he is required to apply his mind and record subjective satisfaction not only with regard to under valuation of the instrument of transfer but also to record a separate satisfaction regarding market value of the property and the duty payable thereupon and cannot place reliance only on the spot inspection report.

21. It is also evident that there being no distinction indicated under provisions of the Act, Rule 7 of Rules of 1997 would be applicable on proceedings under section 47A (1) as well as under Section 47A (3) and are mandatory in nature.

22. Upon applicability of aforesaid in the present case, it is evident from a reading of the impugned orders that the same are based only on the spot inspection report and no subjective satisfaction at all has been recorded by the authority either under section 47 A or under section 56 of the Act as required to be done as per observation is made hereinabove.

23. Considering the aforesaid facts, impugned orders dated 29.03.2006 passed under Section 47A(3) of the U.P. Stamp Act, 1989 and order dated 04.10.2007 passed in appeal under Section 56 of the said Act not being in consonance with the law laid down are set aside.

24. Consequently, the writ petition is ***allowed***. Consequences to follow. Parties to bear their own costs.

(2023) 2 ILRA 345
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.01.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ-C No. 1003921 of 2015

T.R.C. Mahavidyalaya Satrikh, Nawabganj ...Petitioner

Versus

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

Counsel for the Petitioner:
Ram Narain Gupta, M.K. Dixit, Ram Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law – Indian Stamp Act, 1899 – Sections 33 & 47-A – UP Stamp (Valuation of Property) Rules, 1997 – Rule 7(3)(c) – Stamp deficiency – Property in question abuts a Khadanja road, which is not a metalled road – The Circular dated 01.08.2010 has explained the meaning of the term road as a metalled or RCC road – Held, once the authorities themselves in their order u/s 47A of the Act of 1899 indicate location of the property in question not to be abutting a metalled/RCC road, there was no occasion for them to have established market value in terms of non-agricultual property abutting a road – High Court directed the authority to re-determine additional stamp duty taking the property in question to be non-agricultural but not in the vicinity of a road. (Para 11 and 13)

B. Indian Stamp Act, 1899 – Sections 33 & 47-A – Imposition of penalty – Reason, how for necessary – No concealment of fact – Effect – Held, no reasoning whatsoever has been attributed for imposition of such penalty particularly in view of the fact that there was no concealment by the petitioner-institution in the instrument of transfer – Held further, the orders also do not indicate any concealment of fact having been made in the instrument of transfer and therefore in the considered opinion of this Court, there was no occasion for the authorities to have imposed penalty. (Para 12)

Writ petition partly allowed. (E-1)

List of Cases cited :-

1. Ganga Ram Vs St. of U.P. & ors. reported in 2020 (38) LCD 1991

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

1. Heard learned counsel for petitioner and learned State Counsel appearing on behalf of opposite parties.

2. Petition has been filed assailing order dated 12.10.2012 passed under Sections 47-A/33 of the Indian Stamp Act,1899 (hereinafter referred to as the Act of 1899) as well as order dated 16.03.2015 passed under Section 56 of the Act of 1899. A further prayer seeking a direction to opposite parties not to adopt any coercive measure against petitioner in respect of recovery citation dated 29.12.2012 has also been sought.

3. Learned counsel for petitioner submits that the property in question is a part of Gata No.88 having an area of 0.731 hectare situate in the Village concerned which was purchased by one Umesh Chandra Chaturvedi by means of registered sale deed dated 03.01.2005. Since the said property was being utilised for agricultural purposes, the purchaser filed an application dated 09.06.2005 for declaration under Section 143 of U.P. Zamindari Abolition and Land Reforms Act. The said

application was allowed by means of order dated 28.11.2005 but subsequently another application was filed by the said person under Section 144 of U.P. Zamindari Abolition and Land Reforms Act pertaining to a portion of aforesaid property for declaration as agricultural. The said application was also allowed on 26.05.2011 whereafter the petitioner-institution purchased a portion of the said Gata No.88 measuring area of 0.522 hectare by means of instrument of transfer dated 25.06.2011. Upon presentation of the said document for registration, spot inspection was made and reference was initiated under Section 47A(3) after its registration and by means of order impugned under Section 47A of the Act of 1899, additional stamp duty and penalty has been imposed upon petitioner-institution.

4. Learned counsel for petitioner submits that impugned orders have been passed primarily on the ground that a College stands established over the purchased property and as such it cannot be deemed to be agricultural in nature. It is further submitted that additional stamp duty has also been imposed treating the property to be non-agricultural and imposing stamp duty as per the situation of the property abutting a road although additional stamp duty on the instrument has been paid as per actual situation of the property away from the road. It is submitted that the authorities fell in error in not considering the fact that College is not established over the entire 0.522 hectare and even as per the spot inspection report, is situated only over 0.209 hectare while rest of the property is being utilised for agricultural purposes. It is further submitted that even the spot inspection report is in violation of Rule 7(3)(c) of the Uttar Pradesh (Valuation of Property) Rules, 1997 (hereinafter referred to as the Rules of 1997).

5. Learned State Counsel appearing on behalf of opposite parties has refuted the submissions advanced by learned counsel for petitioner with submission that spot inspection report clearly indicates the fact that College stands established over the property purchased by means of the instrument of transfer dated 25.06.2011 and also indicates that no agricultural activity is being undertaken thereupon. It is thus submitted that there is no error in the order particularly when the order also notices the fact that the property in question was converted to non-agricultural barely a month before the execution of the instrument of transfer.

6. Upon consideration of the submissions advanced by learned counsel for the parties, it is evident from record that the property in question earlier was declared to be non-agricultural under Section 143 of U.P. Zamindari Abolition and Land Reforms Act by means of order dated 28.11.2005 but a portion thereof, i.e. 0.522 hectare was thereafter declared to be agricultural with application under Section 144 of U.P. Zamindari Abolition and Land Reforms Act being allowed on 26.05.2011. The instrument of transfer with regard to said property was thereafter executed on 25.06.2011.

7. A perusal of the spot inspection report dated 11.07.2011 indicates that out of total area of 0.522 hectare purchased by petitioner-institution by means of instrument of transfer, the College building stands established on 0.209 hectare on which orders under Section 144 of U.P. Zamindari Abolition and Land Reforms Act were passed on 26.05.2011. The report also indicates that no agricultural activity is ongoing on the said plot.

8. It is also evident that order under Sections 47-A of the Act of 1899 has been passed primarily on the ground that a college building stands established over the property in question and no agricultural activity could be seen on the property at the time of spot inspection. Suspicion has also been cast by the impugned order pertaining to fact that nonagricultural property was changed into agricultural just a month before the execution of instrument of transfer. The same reasoning has been followed by the appellate court while passing orders under Section 56 of the Act of 1899.

9. So far as the question with regard to following of the mandatory provisions of Rule 7(3)(c) of the Rules of 1997 is concerned, this Court in **Ganga Ram v. State of U.P. and others** reported in 2020 (38) LCD 1991 has clearly held the same to be mandatory in nature. In the present case, however although it appears that no prior notice was provided to petitioner-institution but it is also evident from the record that spot inspection report so far as it attributes the building having been constructed over a portion of purchased property is admitted by the petitioner itself, particularly with regard to area of construction. Since the petitioner has already admitted the factual situation with regard to construction of building, in the considered opinion of this Court, no prejudice has been caused to the petitioner-institution for non-compliance of Rule 7(3)(c) of the Rules of 1997. Although the aforesaid rule is mandatory in nature but if the spot inspection report is not being disputed by the assessee, no prejudice would be caused to him and, therefore, the orders of assessment of stamp duty cannot be vitiated only on that ground.

10. In the present case, it is seen from the record and is admitted by petitioner that out of entire Gata No.88 having area of 0.731 hectare, the instrument of transfer in question pertained only to 0.522 hectare on which the College building is constructed over a portion of 0.209 hectare. Although learned counsel for petitioner submits that the building is constructed only over a portion of the property while the rest is under use as agricultural, no provision under the Act could be indicated whereunder different stamp duty can be imposed on the same parcel of land. Once it is admitted by petitioners that a building is constructed over the property in question and spot inspection report clearly indicates that no agricultural activity is being conducted over the non-constructed portion as on the date of instrument of transfer, no exception can be taken to impugned orders with regard to same. As such, in the considered opinion of this Court, the authorities were right in concluding that the property is in use for non-agricultural purposes.

11. So far as submissions of learned counsel for petitioner is concerned regarding imposition of stamp duty on the basis of property abutting a road, it is discernible from circle rate notified with effect from 01.08.2010 that different valuation has been indicated for non-agricultural properties abutting a road and those not abutting a road. In the present case, a reading of order passed under Section 47-A of the Act of 1899 itself indicate that the property in question abuts a Khadanja road, which is not a metalled road. The Circular dated 01.08.2010 has explained the meaning of the term road as a metalled or RCC road. Once the authorities themselves in their order under Section 47A of the Act of 1899 indicate location of the property in question not to be abutting a metalled/RCC

road, there was no occasion for them to have established market value in terms of non-agricultual property abutting a road. To that extent, there is certain error in the orders impugned.

12. It is also noticeable that by means of impugned order, penalty to the tune of Rs.6,42,400/- has been imposed upon the petitioner-institution. However, no reasoning whatsoever has been attributed for imposition of such penalty particularly in view of the fact that there was no concealment by the petitioner-institution in the instrument of transfer which clearly indicated a narration of all the facts including conversion of the property, firstly, into non-agricultural and subsequently into agricultural as well as the fact of the portion of the property purchased by the petitioner-institution through instrument of transfer. The orders also do not indicate any concealment of fact having been made in the instrument of transfer and therefore in the considered opinion of this Court, there was no occasion for the authorities to have imposed penalty.

13. Considering the aforesaid facts, the impugned orders 12.10.2012 and 16.03.2015 are set aside to the extent of imposition of penalty and determination of market rate for the property as abutting a road. The authorities are directed to recalculate additional stamp duty payable by petitioner ignoring the penalty clause and re-determination of additional stamp duty taking the property in question to be non-agricultural but not in the vicinity of a road.

14. Consequently, the writ petition is partly allowed. The parties to bear their own costs.

15. Learned counsel for petitioner submits that in pursuance of impugned orders, additional stamp duty has been deposited by the petitioner. The same shall be adjusted by the authorities with regard to new determination of additional stamp duty, which is to be made.

(2023) 2 ILRA 348
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.01.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ-C No. 1007067 of 2012

Smt. Jitendra Devi Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Bajrangi Verma

Counsel for the Respondents:
C.S.C.

A. Civil Law – Indian Stamp Act, 1899 – Sections 33 & 47-A – Stamp Deficiency – Instrument transferring the lease hold rights, not title – However, the deed of assignment was treated as Sale-deed – Legality challenged – Nomenclature of deed, how far relevant – Held, by means of deed in question, only lease hold rights have been granted to the petitioner, particularly in view of the fact that lessor himself had only lease hold rights and not title over the property in question – Nature of a deed is to be considered only as per substance of the deed and not its nomenclature. Deed was issued granting rights over the immoveable property only for a period of 30 years and therefore the lessor had reserved rights of reversion to himself and as such the deed could have been considered only as lease deed instead of deed of sale. (Para 12 and 13)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Writ Petition No. 3056(MB) of 2003; Ajay Shanker Dixit & anr. Vs St. of U.P. & ors. and other decided on 09.08.2018

2. Resident Welfare Association Noida Vs St. of U.P., (2009) 14 SCC 716

3. Madras Refinery Ltd. C.S.'s case; (1977)2 SCR 564

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

1. Heard learned counsel for petitioner and learned State Counsel appearing on behalf of the opposite parties.

2. Petition has been filed challenging the order dated 13th of September, 2011 passed under Section 47-A of Indian Stamp Act, 1899 as well as the order dated 27th of July, 2012 passed in Appeal under Section 56 of the Act.

3. Learned counsel for petitioner submits that the property in question which is immovable in nature was leased out to one Smt. Neera Khanna W/o Sri Mahendra Singh Khanna by means of registered lease deed dated 10th March, 1995 executed by the Uttar Pradesh Avash and Vikas Parisad, Lucknow for a period of 30 years. She transferred the lease hold rights by means of assignment in favour of one Pradeep Agarwal, who in turn transferred his lease hold rights to the petitioner by means of lease deed dated 15.02.2008 which was presented for registration and stamp duty thereupon was paid in terms of Article 63 of Schedule 1-B of the Act whereafter proceeding under Section 47-A(3) of the Act was referred, whereby the deed of assignment has been treated to be a deed of sale in view of the Clauses contained therein. Appeal filed there against under Section 56 of the Act has also been rejected.

4. Learned counsel for petitioner submits that the authorities have erred in law in treating the deed of assignment of lease to be deed of sale only on the basis that vacant possession of lease hold plot of land was being transferred to the assignee as well as the fact that the assignee was granted rights of mutation and for getting the said property freehold in her favour. It is submitted that the authorities have totally lost sight of the fact that no transfer of title of the property had taken place and only rights of possession over the property in terms of assignment of lease had been provided for a particular consideration and, as such, the authorities have erred in law in treating it as an instrument of transfer of title.

5. Learned counsel has placed reliance on the Division Bench judgment of this Court in the case of **Sri Ajay Shanker Dixit and Another Vs. State of U.P. and Others and other connected matters in Writ Petition No. 3056(MB) of 2003** in which this Court by means of judgment and order dated 09.08.2018 has held that the language of deed will not decide the nature of deed of transfer and if the transferer has been given only lease hold rights, then only lease hold rights can be transferred further and not absolute ownership. It has, therefore, been held that despite the language of deed, it is to be treated as a lease deed and not as a deed of absolute sale and, therefore, stamp duty cannot be directed to be paid as per market value considering such a deed to be deed of sale. Relevant portions of the judgment are as follows:

"The basic concept for deciding the stamp duty is based on principle that a person cannot transfer a better title than what he has.

Now, a person in whose favour lease deed has been executed is only entitled to transfer the lease hold rights and he can not transfer the absolute ownership in the property.

The language of deed will not decide the nature of deed of transfer and even if it has been written in the deed that transferor is having absolute right in regard to the property, it cannot be accepted as such. If transferor was given only lease hold rights, then he is entitled only to transfer the lease hold rights and not the absolute ownership.

Accordingly, the earlier contention of learned Additional Chief Standing Counsel that as per language of deed, it is to be treated as absolute sale or lease deed, cannot be accepted and stamp duty cannot be directed to be paid as per market value. Although, it has come in the evidence that at present, there is no construction on the disputed property and only the land is to be transferred by way of an assignment. Even if construction is there, then so far land is concerned, the transferor is not having absolute right and, accordingly, cannot transfer the land absolutely. So far land is concerned, its lease hold rights can be transferred but if construction is there, then same can be transferred on the basis of absolute ownership and on that stamp duty will be charged on market value. In case any construction is being raised by the lease holders, then construction will be in the ownership of lease holder and in case any deed is executed in reference to the construction, then same can be transferred absolutely, but so far land is concerned, that can only be transferred by instrument of transfer of lease by way of an assignment."

6. Reference has also been made to law propounded by Hon'ble Supreme Court in the case of **Resident Welfare Association Noida vs. State of Uttar Pradesh, (2009) 14 SCC 716.**

7. Learned State Counsel, on the other hand, has submitted that the deed of assignment itself indicates three conditions in Paragraph nos. 2, 6 and 7 that possession over the vacant immovable property has been transferred to the petitioner who has also been granted rights to get her name mutated in the revenue records with further right being granted that the assignee would be entitled to get the freehold of plot executed at her own cost. It is, thus, submitted that by means of the aforesaid instrument, interest in the property has been transferred alongwith possession thereon and, as such, despite the instrument indicating it to be a lease deed, in effect rights and title over the property has been transferred and, therefore, stamp duty has been imposed treating deed to be a deed of sale.

8. Upon consideration of submissions advanced by learned counsel for the parties and perusal of material on record, it appears that orders under Section 47-A(3) of the Act have been passed primarily on account of clauses in deed of assignment whereby possession of lease hold plot has been delivered to the assignee who has also been recorded rights to get her name mutated in revenue records, with further right of entitlement to get the plot freehold at her own cost. The aforesaid three conditions are given on which the deed of assignment has been treated to be a deed of sale and stamp duty in accordance thereof has been imposed.

9. From the Division Bench judgment in the case of **Sri Ajay Shanker Dixit (supra),** it is evident that as per law propounded by Division Bench of this Court, it has been held that basic concept for deciding the stamp duty is based on principle that a person cannot transfer a better title than what he has. As a natural correlate, a person having only lease hold rights, cannot be deemed to have transferred title since he himself does not have title over the property concerned and, as such, can be deemed only to have transferred rights of lease holder. The Division Bench has also held that language of the deed will not decide the nature of deed of transfer even if certain conditions with regard to absolute right with regard to property have been indicated therein primarily on the premise that a person cannot transfer a better title that he has.

10. Hon'ble the Supreme Court in the case of **Resident Welfare Association Noida (supra)** has held as follows:

".....Moreover, the concerned lease deed specifically provides for a lease of 99 years of the land along with its appurtenances thereto with the right of reversion. So it is clear from the above-mentioned provision that the land along with its appurtenants would be reversed back to the lessor after the stipulated period. The alleged documents is therefore a transfer of the assignment of lease and not an outright sale of its appurtenants. ....."

11. The said judgment also refers to the case ***of Madras Refinery Ltd. C.S.*** reported in ***(1977)2 SCR 564;*** in the following manner:

"23. Before we part with this aspect of the matter, that is to say, whether the document/instrument was in fact a deed of assignment or an outright sale, we must also keep in mind that the nomenclature to the document of assignment cannot be said to be determining factor in deciding whether a particular deed or document was a lease or a deed of assignment. In Madras Refinery Ltd. vs. C.S. MANU/ SC/SC/0292/1977:[1977]2 SCR564, it was held that in order to decide whether a particular document is a lease or a deed of assignment, one has to look at the substance of the deed of assignment to the document and not the nomenclature. Therefore, it must be held that no importance can be given to the nomenclature to the document. Although some of the members of the association had termed the document as a deed of sale or transfer cum sale deed instead of as a deed of assignment, it remains as a deed of assignment as has been noted above by us."

12. Upon applicability of the aforesaid judgments, it is apparent that by means of deed in question dated 15th of February, 2008 executed in favour of the petitioner, only lease hold rights have been granted to the petitioner, particularly in view of the fact that lessor himself had only lease hold rights and not title over the property in question.

13. The aforesaid judgments also make it evident that the nature of a deed is to be considered only as per substance of the deed and not its nomenclature. In the present case, it is notice that the deed was issued granting rights over the immoveable property only for a period of 30 years and therefore the lessor had reserved rights of reversion to himself and as such the deed could have been considered only as lease deed instead of deed of sale.

14. In view of aforesaid judgments and law propounded by the Division Bench, it is evident that the impugned orders are contrary to the aforesaid judgments and, therefore, the aforesaid orders dated 13th of September, 2011 passed under Section 47-A of Indian Stamp Act, 1899 as well as the order dated 27th of July, 2012 passed in Appeal under Section 56 of the Act, are set aside.

15. Consequently, the writ petition is ***allowed***. Parties to bear own costs. Consequences to follow.

(2023) 2 ILRA 352
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.02.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. Bail Application No. 32824 of 2020
with
Crl. Misc. Bail Application No. 12486 of 2022

Sandeep Kumar Mishra ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sri Pulak Ganguly, Sri Virendra Kumar Mishra

Counsel for the Respondent:
G.A., Sri Shivam Yadav

(A) Criminal Law - Bail - Indian Penal Code, 1860 - Sections 376-D, 342 & 506 , The Code of criminal procedure, 1973 - Sections 161,162 & 164 , Indian Evidence Act, 1872 - Section 114-A - Presumption as to absence of consent in certain prosecutions for rape - Offence of gang-rape - Victim, informant and applicants were working in the same organization - run in the name of "Janeu Kranti Abhiyan' - delay in lodging the FIR - **HELD -** Inordinate delay in lodging the FIR is to be considered at the time of adjudicating the bail. Trial is at its conclusive end. Applicants have made out a case for bail. **(Para-21,22)**

Bail application allowed. (E-7)

List of Cases cited:-

1. U.O.I. Vs K.A. Najeeb, AIR 2021 SC 712

2. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj. , (1983) 3 SCC 217

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

1. Heard Shri Sudhir Mehrotra, Shri Pulak Ganguly, learned counsels for the applicants and Shri Shivam Yadav, learned counsel for the informant as well as Shri V.K.S. Parmar, learned A.G.A. for the State.

2. Since these bail applications arise out of the same incident, they are being decided by this common order.

3. The present bail applications have been filed by the applicants in Case Crime No.511 of 2019, under Sections 376-D, 342 and 506 I.P.C., Police Station Rohaniya, District Varanasi, with the prayer to enlarge them on bail.

PROSECUTION STORY:

4. As per the prosecution story, a first information report was lodged at P.S. Daurala, District Meerut stating that the informant is a resident of village Machchari, P.S. Daurala and is connected to Param Dham Nyas, Arihantpuram, Valeedpur, Daurala and his wife aged about 24 years alongwith other colleagues is living at Baroranpur, P.S. Rohaniya, Varanasi for the last one year. She travels off and on to Meerut and Varanasi for the works of the organization. At Varanasi, the informant and his wife used to live in a

rental house of one Sushil Patel. On 18.06.2019, the informant had come to Meerut and his wife along with other colleagues of the organization were left behind at Varanasi. On 03.08.2019, the wife of the informant came to Meerut from Varanasi and told him about the incident which happened with her at Varanasi. She told the informant that on 01.07.2019 at about 10:00 AM, Chandan Kumar s/o Ram Narayan and Sandeep s/o of Dev Kumar Mishra had raped her in her room. When she had tried to raise alarm, Sandeep is stated to have closed her mouth with his hand. After sometime one Ankit s/o Satveer is said to have reached there, at which the accused persons had left the room and Ankit is said to have slapped Chandan, but the duo is said to have escaped on their motorcycle. When the informant asked the said perpetrators of crime about the incident, they are said to have threatened him that he alongwith his wife shall be ruined by them. The said application was moved at the police station on 05.08.2019 and it was registered at Case crime No.349 of 2019 under Sections 376-D, 342, 506 I.P.C. at P.S. Daurala, District Meerut.

5. The said FIR was sent to be investigated by the police of P.S. Rohaniya, District Varanasi on a letter sent by S.S.P., Meerut as the matter fell within the jurisdiction of District Varanasi. The F.I.R. was lodged at FIR No. 511 of 2019 at P.S. Rohaniya on 09.09.2019.

RIVAL CONTENTIONS:

For Applicants:

6. Learned counsels for the applicants have stated that the victim was medically examined at District Hospital, Varanasi on 12.09.2019 and no internal or external injury was found on her body to corroborate the prosecution allegations. The statements of the victim recorded under Sections 161 and 164 Cr.P.C. are in verbatim of the allegations levelled in the FIR. Learned counsels have further stated that they have been falsely implicated in the case as they had enquired about the illegal activities being undertaken by the victim and other activists of the Ashram. The story has been cooked up just to harass the applicants and to dissuade them from bringing forward their illegal activities.

7. Learned counsels have further stated that the prosecution had created additional evidence by introducing new witnesses and filed their affidavits before S.S.P., Meerut, which is hit by Section 162 Cr.P.C. and are not admissible in law. Learned counsels have further stated that one of the witness Smt. Sanjana had even filed another affidavit on 23.09.2019, sworn at Meerut, denying the contents of her earlier affidavit. The said affidavit has been annexed as annexure no.7 to the Criminal Misc. Bail Application No.23824 of 2020. Learned counsels have further stated that it is pertinent to mention that prior to 06.08.2019, no other first information report was lodged by any of the followers of the founder "Janeu Kranti Abhiyan' Chandra Mohan. It is the said godman Chandra Mohan who had got the FIRs' lodged against the revolting disciples of "Janeu Kranti Abhiyan'. Learned counsels have brought on record a chart of the FIRs' lodged at the instance of godman Chandra Mohan against his disciples not falling in line with him, which is reproduced as below:-

Case Crim	Under	Police Station	District	Informant	Accused

e No.	Section				
349 of 2019	376. D, 342, 506 IPC	Daurala 26.08.2020	Meerut	Neeraj Kumar	Chandan Kumar Sandeep
352 of 2019	386, 295, 500, 120. B, 504, 506 IPC and 66.A, 67 I.T. Act	Daurala 06.08.2019	Meerut	Smt. Sonia	Chandan Deepak, Akash, Pushpendra, Vishal
456 of 2019	504, 506, 500 IPC and 66, 67 I.T. Act	Nai Mandi 07.08.2019	Muzaffar Nagar	Amit Kumar	Chandan Deepak, Akash, Vishal, Pushpendra
260 of 2019	500, 506 IPC and 66 I.T. Act	Mandi Dhanura 10.08.2019	J.P. Nagar	Rajesh	Deepchand, Karmvir
327 of 2019	386, 504, 506 IPC	Titawi 08.10.2019	Muzaffar Nagar	Vinod Kumar	Rajeev
1028 of 2019	418, 420, 506, 384 IPC and 66.D, 67 I.T. Act	Kotwali Nagar 25.10.2019	Muzaffar Nagar	Smt. Pankaj	Vinod Kumar, Jitendra, Amit, Chintu, Anil, Monu, Jitendra, Devendra
30 of 2020	376. D, 506 IPC and 5/6 POCSO Act	Hasanpur 18.01.2020	J.P. Nagar	Km. Bhanu Priya	Kovind Chauhan, Jaivir Chauhan, Pushpendra Chauhan, one boy unknown
224 of 2020	67 I.T. Act	Khatauli 26.05.2020	Muzaffar Nagar	Sristi	Jugnu Bhartiya
428 of 2020	506 and 67 I.T. Act	Daurala 20.09.2020	Meerut	Smt. Shiromani Monika	Punit
455 of 2020	323, 504, 506 IPC	Cantt 25.08.2021	Varanasi	Neeraj Kumar	Kamal, Arun, Kuldeep,

					One unknown
459 of 2020	147, 323, 504, 506, 392 IPC	Cantt. 26.08.2021	Varanasi	Kamal Verma	Neeraj, Manish, one unknown
44 of 2020	174. A IPC	Rohaniya	Varanasi	Inspector Crime Mohit Yadav	Chandan Kumar, Sandip Kumar Mishra

8. Learned counsels have also filed the photocopies of the entire first information reports mentioned in the aforesaid chart.

9. Learned counsels have further stated that the victim herein was the National President of "Janeu Kranti Abhiyan' and her husband/informant was the treasurer in it. The prime witness Ankit is also a member of the said organization. The applicants were also associated with the godman Chandra Mohan for about 10 years and used to live permanently with him since 2018. The applicant- Chandan Kumar had even married one Sanjana Sharma (who was also a member of the organization) at the instructions of Chandra Mohan. After a period of time, the applicant- Chandan Kumar came to know that he has been cheated by the said godman Chandra Mohan and came to know of his illegal activities and as such, posted several messages in a WhatsApp group "Har Har Mahadev' from 01.08.2019 to 03.08.2019, which was being administered by one Kamal. The said Kamal was also threatened by Chandra Mohan and his followers and he had also sent a latter to the S.S.P., Meerut on 26.08.2019, which is a matter of record. Infuriated, by the said posts on the said WhatsApp group, the present FIR has been instituted after cooking a false story.

10. Learned counsels have also indicated that there are several FIRs' instituted against Chandra Mohan including Case Crime No.317 of 2005, under Sections 302 and 307 I.P.C., P.S. Bhopa, District Muzaffarnagar and Case Crime No.131 of 2019, P.S. Rajpur, District Dehradun, Uttarakhand lodged by Smt. Neeraj.

11. Learned counsels have also stated that the posts on WhatsApp led immense protests against the godman Chandra Mohan and almost all his disciples were divided into two sections and a large section of his disciples rose against him. As a result of the said act, the said godman Chandra Mohan incurred a huge loss in the form of donations as his regular disciples discontinued their contributions leading to the stoppage of various campaigns and schemes. The new recruitment to the Ashram was also brought to a near halt. The present FIR has been foisted just three days after the said WhatsApp messages became viral.

12. It is also argued by the counsels for the applicants that another FIR No.352 of 2019 has also been foisted against the applicants for demanding ransom and also under I.T. Act. The same modus operandi has been followed in another FIR No.30 of 2020 filed at P.S. Hasanpur, District

Amroha, U.P. against one Kovinder and others. Learned counsels have further stated that even the statement of the said eye-witness Ankit stands falsified on the ground that he could have certainly reported the matter as it had come to his knowledge five minutes after the said incident.

13. Learned counsels have further stated that in the present scenario everybody carries mobile and the victim could have narrated the story to her husband on mobile itself and she being an educated lady herself. She could have got the FIR lodged at the Varanasi itself through Ankit or herself, but lodging of the FIR, all the way at a far from place about 800 kilometers from Varanasi at Meerut speaks volume of the malicious intent of the informant to implicate the applicants at the behest of godman Chandra Mohan. Learned counsels have further stated that even their parokars have been threatened and beaten up by the followers of godman Chandra Mohan.

14. Learned counsels have further stated that seven witnesses have been examined at trial and there is no likelihood of any tampering of evidence by the applicants.

15. Learned counsels have further placed much reliance on the judgment of Apex Court passed in the case of **Union of India vs. K.A. Najeeb**1, wherein the Apex Court has observed as under:-

"We are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail."

16. There are two other cases foisted against the applicant- Chandan Kumar at Case Crime No.352 of 2019 at P.S. Daurala, District Meerut and Case Crime No.456 of 2019 at P.S. Nai Mandi, Muzaffarnagar. Learned counsels have further stated that the victim of the present case is an accused in Case Crime No.131 of 2019, in which initially a closure report was submitted, but the said closure report was rejected and further investigation was ordered by the learned court which is still pending. Learned counsels have further stated that during trial, the informant and the victim had even escaped to answer the questions put to them with respect to the registration of Case Crime No.131 of 2019 against them. Several other submissions have been made on behalf of the applicants to demonstrate the falsity of the allegations made against them. The circumstances which, as per counsel, led to the false implication of the applicants have also been touched upon at length. It is also argued that the criminal history assigned to the applicants stands explained. The applicants are in jail since 28.02.2020 and 01.03.2020 respectively. In case, the applicants are released on bail, they will not misuse the liberty of bail. There is no possibility of applicants tampering with evidence at this stage.

For State:

17. Per contra, learned A.G.A. and learned counsel for the informant have vehemently opposed the bail applications

on the ground that the applicants have committed the gruesome act of gang-rape with the victim and it is not possible in the Indian society for a women to foist false allegation of rape. Many such offences of sexual assault go unreported. Learned counsels have further stated that the prosecution witnesses of fact have been examined and they have deposed categorically against the applicants.

18. Learned counsels have further stated that the delay caused in lodging the FIR is but natural as the victim was under acute pressure due to the Indian values to not to reveal the said act committed with her. The victim has been ravished out of the lust by the applicants as she was found alone in her room. Learned counsels have further stated that it is an admitted fact that the victim, informant and the applicants were working in the same organization run in the name of "Janeu Kranti Abhiyan'. Already seven witnesses have been examined and only the statement of doctor remains to be recorded. Learned counsels have further stated that the supplementary affidavit filed on behalf of the informant in Criminal Misc. Bail Application No.32824 of 2020 categorically indicates that the applicants are not co-operating with trial. Even the advocate of one of the applicants was removed and an amicus curiae was provided to him. The applicants have got the trial delayed on one pretext or the other.

19. Learned counsels have further stated that as per the provisions of Section 114-A of the Indian Evidence Act, the statement of the victim needs no corroboration and has to be relied. Learned counsels have further stated that false story of the involvement of godman Chandra Mohan has been foisted by the applicants just to get themselves exonerated with the grave offences committed by them. The offence of gang-rape is of grave nature and the bail applications are liable to be rejected. Although, they could not dispute the fact that there is delay in lodging the FIR.

CONCLUSION:

20. The Apex Court in the judgment of **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat**2, has categorically opined that in the current non permissive Indian society, no girl would foist a false case of sexual assault against any person to avoid being maligned in society.

21. Much water has flown down the ganges since passing of the aforesaid judgment by the Apex Court. The Indian society has undergone a complete change during the said period of about 40 years and now it is more often observed that false implication in sexual offences is on a rise. The inordinate delay in lodging the FIR is to be considered at the time of adjudicating the bail.

22. Considering the facts and circumstances of the case, submissions made by learned counsel for the parties, the evidence on record, taking into consideration the inordinate delay in lodging of the FIR by the informant and also the fact that the trial is at its conclusive end, and without expressing any opinion on the merits of the case, the Court is of the view that the applicants have made out a case for bail. The bail applications are allowed.

23. Let the applicants- **Sandeep Kumar Mishra** and **Chandan Kumar** involved in aforementioned case crime number be released on bail on furnishing a

personal bond and two heavy sureties each in the like amount to the satisfaction of the court concerned subject to following conditions.

(i) The applicants will not tamper with the evidence during the trial.

(ii). The applicants will not pressurize/ intimidate the prosecution witness.

(iii) The applicants will appear before the trial court on the date fixed, unless personal presence is exempted.

(iv) The applicants shall not commit an offence similar to the offence of which he is accused, or suspected of the commission of which they are suspected.

(v) The applicants 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 them from disclosing such facts to the Court or to any police officer or tamper with the evidence.

24. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail. Identity, status and residence proof of the applicants and sureties be verified by the court concerned before the bonds are accepted.

25. It is made clear that observations made in granting bail to the applicants shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

(2023) 2 ILRA 358
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2022

BEFORE

THE HON'BLE MANISH MATHUR, J.

Civil Revision No. 47 of 2022

Khawaja Moinuddin Chisti Language Univ. & Ors. ...Revisionists
Versus
Dr. Arif Abbas & Ors. ...Respondents

Counsel for the Petitioner:
Kumar Ayush, Pritish Kumar

Counsel for the Respondents:
Farooqahmad, Syed Azizul Hasan Rizvi

A. Civil Law -Code of Civil Procedure, 1908-Section 115 - Order XXVI - Rule 9-application for Issuance of commission filed by plaintiff allowed-Evidently, application for issuance of commission to conduct an investigation and examination of documents although not supported by affidavit was even otherwise not maintainable in terms of Order XXVI, Rule 9 CPC-Such applications cannot be allowed merely for purposes of facilitating the case of one or the other party and it is not the business of the Courts to discharge burden of evidence of either party-Impugned order set aside .(Para 1 to 22)

The revision is allowed. (E-6)

List of Cases cited:

1. Shiv Shakti Co. Housing Scy.,Nagpur Vs M/s Swaraj Developers & ors. (2003) AIR SCW 2445

2. Pormusamy Pandaram Vs The Salem Vaiyappamalai Jangamar (1986) AIR Madras 33

3. Lalit Devi & anr. Vs Bindu Bihari Verma & ors., Writ C No. 41940 of 2013

4. Rama Shanker Tiwari Vs Mahadeo & ors. (1968) AWR 103

5. Aligarh Muslim Univ. Vs 7th Addl. CJM Aligarh & anr. (1999) ALR 571

6. Parvej Akhtar & ors. Vs 4th ADJ Agra & anr. (1993) 2 ARC 304

7. H.V. Nagendrappa Vs M.H. Hanumappa & ors. (2000) SCC Online Kar 164

8. Naseeb Deen & anr. Vs Harnek Singh (2019) SCC Online HP 1034

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

1. Heard Mr. Pritish Kumar learned counsel for revisionist and Mr. Viswa Nath Mishra learned counsel for opposite party No.1. In view of order being passed, notices to opposite parties 2,3 and 4 stand dispensed with.

2. Revision under Section 115 of the Code of Civil procedure has been filed against order dated 15th November, 2022 in regular suit No. 2216 of 2022 whereby application for issuance of commission under Order XXVI Rule 9 of the Code filed by the plaintiff-opposite party No.1 has been allowed.

3. At the very outset learned counsel for opposite party No.1 has raised preliminary objection regarding maintainability of revision under Section 115 of the Code with the submission that the order impugned is merely interlocutory in nature and does not amount in case decided as envisaged under Section 115 of the Code and therefore revision would not be maintainable. He has placed reliance on judgment rendered by Hon'ble Supreme Court in the case of Shiv Shakti Cooperative Housing Society, Nagpur versus M/s. Swaraj Developers and others reported in 2003 AIR (SCW) 2445 as well as judgment rendered by High Court of Madras in the case of Pormusamy Pandaram versus The Salem Vaiyappamalai Jangamar reported in A.I.R. 1986 Madras 33.

4. Learned counsel for revisionist in his rebuttal has submitted that neither of the aforesaid judgments relied upon by learned counsel for opposite parties are applicable in the present case since they do not consider the U.P. amendment incorporated in Section 115 of the Code and has in turn placed reliance on judgment rendered by co-ordinate Bench of this Court in the case of Lalti Devi and another versus Bindu Bihari Verma and others, Writ C No. 41940 of 2013 to submit that revision under Section 115 against decision on application under Order XXVI Rule 9 of the Code would be maintainable in terms of section 115(1) (c) and section 115 (3)(ii) of the Code since a jurisdiction has been exercised illegally and with material irregularity ignoring the specific conditions indicated in Order XXVI Rule 9 of the Code.

5. So far as maintainability of revision under Section 115 of the Code from an order passed in an application for issuance of commission under Order XXVI Rule 9 of the code is concerned, this court finds that the judgment rendered by co-ordinate Bench of this Court in Lalti Devi (supra) is to the point as considered the judgement rendered by Full Bench of this Court in the case of Rama Shanker Tiwari versus Mahadeo and others reported in 1968 AWR 103 in which the term 'case decided' has been explained in the following manner:-

"23. I am, therefore, of opinion that every order granting or dismissing an application for amendment of pleading will not give rise to a case decided revisable u/S. 115 of the Code. An order allowing or disallowing an application for amendment of pleading may however, give rise to a case decided revisable under that Section if the amendment sought has or is likely to have a direct bearing on the rights and obligations of the parties and affects or is likely to affect the jurisdiction of the Court.

To this extent the decision in Mst. Suraj Pali's case can, in may opinion, be said to be no longer good law.

24. The opinion of the majority of Judges constituting the Full Bench is that an order passed u/O. VI R.17 of the CPC, either allowing an amendment or refusing to allow an amendment, is a "case decided" within the meaning of that expression in S.115, Code of Civil Procedure."

6. The co-ordinate Bench has thereafter held revision to be maintainable under amended Section 115 as applicable in the State of Uttar Pradesh in the following terms:-

"26. In view of aforesaid discussions, this Court believes that the trial court in not deciding the application under Order 26 Rule 9 of C.P.C. on merit and dismissing the same by taking a pedantic view has exercised its jurisdiction illegally and with material irregularity, therefore, the case being covered under Section 115 (1)(c) and Section 115 (3)(ii) of C.P.C., the revision would lie. In such view of the fact, this Court finds that revision in the instant case is maintainable."

7. So far as judgment cited by learned counsel for opposite parties concerned, it is evident that the same do not consider the U.P. Amendment incorporated in Section 115 of the Code and would therefore be inapplicable in the present facts and circumstances of the case.

8. In the present case, although application under Order XXVI Rule 9 of the Code has been allowed but the proposition of law under Section 115 that even in such a case if jurisdiction has been exercised illegally and with material irregularity, revision would be maintainable finds support from judgment of co-ordinate Bench rendered in the case of Lalti Devi (supra) and in the light thereof, the present revision is held to be maintainable. A similar view has also been taken in a Division Bench judgment of this Court in the case of Aligarh Muslim University versus 7th Additional C.J.M. Aligarh and another reported in 1999 A.L.R. 571.

9. Present revision has been filed against order dated 15th November, 2022 passed by court concerned in regular suit No.2216 of 2022 whereby application for issuance of commission under Order XXVI Rule 9 of the Code has been allowed. Learned counsel for revisionist submits that order for issuance of commission was passed on the very first day of presentation of plaint without affording any opportunity of filing objections to the revisionist/defendants. It is submitted that even otherwise no reasoning whatsoever has been indicated in the impugned order which has been passed in a cursory manner without adverting to the fact whether such application can be allowed within the scope of Order XXVI Rule 9 of the Code particularly since the application pertained to issuance of commission to conduct an investigation and examination of documents relating to executive council meetings and minutes thereof and also pertaining to documents relating to constitution of executive council and building of the Vice Chancellor residence and for expenses incurred and modifications, alterations etc.

10. Learned counsel has further submitted that application for issuance of commission can not be allowed for the purposes of collection of evidence but may be issued only for the purposes of corroboration of evidence led and therefore

already on record. It is submitted that in the application which is not supported by affidavit, no reasoning whatsoever has been indicated for issuance of commission. It is submitted that as such application itself was not maintainable in terms of conditions specified under Order XXVI Rule 9 of the Code. He has placed reliance on the judgment rendered by Hon'ble Supreme court in the case of Padam Sen and another versus State of U.P. reported in A.I.R. 1961 Supreme Court 218 and judgment rendered by this Court in the case of Parvej Akhtar and other versus 4th Additional District Judge Agra and another reported in (1993) 2 ARC 304 as well as H.V. Nagendrappa versus M.H. Hanumappa and others reported in 2000 SCCOnLine Kar 164 and Naseeb Deen and another versus Harnek Singh reported in 2019 SCCOnLine HP 1034.

11. Learned counsel appearing on behalf of opposite parties has refuted submissions advanced by learned counsel for revisionist with submission that application was very well within the four corners of the conditions indicated in Order XXVI Rule 9 of the Code particularly when the aforesaid documents are in possession of the university authorities who are defendants themselves and therefore there was no manner in which the plaintiff-answering opposite party could have access to those documents and therefore commission was required to be issued in order to access aforesaid documents. It is further submitted that in the plaint, specific assertion has been made with regard to utilization of funds by Vice Chancellor of university as well as the fact that the executive council is not in accordance with the first statute of university and for proving of which, the aforesaid documents were necessarily required to be brought on record.

12. Considering submissions advanced by learned counsel for parties and upon perusal of material on record, it appears that application under Order XXVI Rule 9 of the Code dated 15th November, 2022 was filed for issuance of commission to conduct an investigation and examination of documents relating to executive council meetings and minutes held on various dates and documents relating to constitution of executive council and also relating to expenses incurred in modifications, alteration, enhancement made by defendants in the said building amounting to certain amount of money and for building of the Vice Chanellor's residence. The application is not supported by any affidavit and in fact referred to the plaint which was duly supported by affidavit. The said application has been allowed on the same date without inviting any objections from the defendants.

13. A perusal of impugned order, dated 15th November, 2022 makes it evident that no reason whatsoever has been recorded for allowing application for issuance of commission. A simple one line order has been passed 'Heard, application allowed."

14. For proper appreciation of the present dispute, it would be necessary to advert to the provisions of Order XXVI Rule 9 of the Code pertaining to issuance of commission which is in the following terms:-

*" **Commission to make local investigations.**- In any suit in which the Court deems a local investigation to be*

requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

15. A perusal of the aforesaid provision makes it evident that commission to make local investigations can be permitted by the court where it deems local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or ascertaining market value of any property, or amount of any mesne profit or damages or annual net profits. The purpose of issuance of commission as such is evident from the conditions indicated thereunder itself which is only for the purposes of elucidating primarily any matter in dispute. The provisions of Order XXVI Rule 9 of the Code do not make it applicable for the purposes of collection of evidence on behalf of the plaintiff.

16. Hon'ble supreme Court in the case of Remco Industrial Workers House Building Coop. Society v. Lakshmeesha M. and others reported in (2003)11 SCC 666;A.I.R. 2003 Supreme Court 3167 has already held that a plaintiff is liable to succeed on his own footing and not on the weakness of the defendant. As such the pleadings made in the plaint are required to be corroborated or substantiated by evidence which is also required to be placed on record by the plaintiff himself. The only exception in such a case could be where such evidence is beyond reach of the plaintiff or is in such a secured place that he would normally not have access thereto but for the issuance of commission for nature indicated in such a case, it would be necessary and incumbent upon the plaintiff to plead particularly as to why the plaintiff could not have access to such evidence which would therefore require issuance of commission for the purposes of collection of such evidence. Hon'ble Supreme Court in the case of Padam Sen (supra) has clearly held that it is not the business of court to collect evidence for party or even to protect the rival party from evil consequences of making forged entry in the books of accounts. It was held that defendants request which amounted to courts collecting documentary evidence which the defendants considered to be in their favour at that point of time could not be permitted. Relevant paragraph 15 of the judgment are as follows:-

"15. It cannot, however, be lost sight of that the burden to prove title and claim for possession of specific land in Survey No. 132/2 was initially on the plaintiff. Defendant 1 in the written statement contested the claim of the plaintiff and claimed title in itself. The grant of occupancy rights in favour of tenant Muniyappa contained in the order dated 28-5-1965 (Ext. D-3) was produced in the trial court without objection from the plaintiff and allowed to be exhibited and marked as Ext. D-3. When such a document of grant of suit land to the extent of 1 acre 3 guntas in favour of Defendant 1 was before the trial court, it was necessary for it to consider its effect on the subsequent grant dated 9-12-1969 (Ext. P-1) in favour of the erstwhile inamdar. The legal position not in dispute is that if the suit land in

Survey No. 132/2 ? area 1 acre 3 guntas had already been granted by the order dated 28-5-1965 (Ext. D-3) to the tenant Muniyappa, the same land could not have formed part of the grant to the extent of 1/7th share to the erstwhile inamdar in the order dated 9-12-1969 (Ext. P-1). A clear legal issue, based on an earlier grant dated 28-5-1965 (Ext. D-3) and the subsequent grant dated 9-12-1969 (Ext. P-1) with the identity of the land under the two grants did arise before the trial court as well as the appellate court. The said issue has not been answered by any of the two courts below. The plaintiff has to succeed on the strength of its own case and not on the weakness of the case of the defendant. In opposing the prayer for remand, the learned counsel appearing for the plaintiff-respondent has placed strong reliance on the decision of the Privy Council in Kanda v. Waghu [AIR 1950 PC 68 : 77 IA 15] . The contention advanced is that since pleadings based on Ext. D-3 were not raised in the written statement of Defendant 1 and no issue on the basis of Ext. D-3 having been raised in the trial court, this Court should not remit the matter for retrial on the said issue."

17. The same analogy has also been drawn by co-ordinate Bench of this Court in the case of Parvez Akhtar (supra) in the following manner:-

"11. In other words, the object of local investigation is not so much to collect evidence, which maybe taken in the court, but just to facilitate the appreciation of the evidence led or nature of the controversy between the parties or to facilitate appreciation of any point, which is left doubtful in the evidence of the parties before the court. The object of issuance of commission is that some assistance may be derived from those facts found actually after the investigation by the Commissioner on the spot, but that investigation must be in respect of the matter in dispute and not otherwise. The legislature required that the discretion of the court can be exercised following all conditions with a view to obtain certain facts investigated by the Commissioner which promises peculiar facts and which can be had from the spot inspection itself, but that must be directly in respect of any matter in dispute. This is with a view to enable the court to properly and correctly appreciate evidence on record. The report of the Commissioner clarifies and explains any point which might appear to be doubtful after the evidence has been led by the parties. The provision of Order XXVI Rule 9, presuppose evidence on the record and independent evidence, led by the parties, which requires elucidation."

18. Various high courts in the country have also elucidated the provisions of Order XXVI Rule 9 in the same manner as indicated in the judgments rendered by High Court of Himanchal Pradesh in the case of Naseeb Deen (Supra) and H.V. Nangendrappa (supra) by the High Court of Karnataka.

19. Upon applicability of aforesaid judgments in the present facts and circumstances of the case, it is evident that application for issuance of commission to conduct an investigation and examination of documents although not supported by affidavit was even otherwise not maintainable in terms of Order XXVI Rule 9 of the Code as observed herein above particularly when there is no explanation furnished by the plaintiff as to why and how he could not have access the documents required or even importance and relevance of the aforesaid

documents for purposes of elucidating a dispute particularly when even issues have not been framed and even objections were not called for from the defendants.

20. It has already been observed herein above that applications under Order XXVI Rule 9 can not be allowed merely for purposes of facilitating the case of one or the other party and it is not the business of the courts to discharge burden of evidence of either party.

21. In view of aforesaid, the order impugned dated 15th November, 2022 passed by the Court of Civil Judge, Senior Division, Malihabad, Lucknow in regular suit No. 2216 of 2022 being against law is set aside.

22. The revision consequently stands allowed. Parties to bear their own costs.

(2023) 2 ILRA 364
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.02.2023

BEFORE

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

Criminal Appeal No. 1240 of 2021

Rajendra Yadav ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Kailash Pati Singh Yadav, Sri Rajiv Lochan Shukla, Ms. Suman Bharti

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 - Section 302 - Murder - benefit of doubt - In written report, P.W.-1/first informant, stated that in the evening, when his father was returning, the accused, ambushed him at around 7:45 P.M., and repeatedly assaulted him with a brick until he died - *Held* - court found it implausible that P.W.-4 and P.W.-3, aged 66 and 60 respectively, could correctly see the incident from a distance of 15 to 20 paces in the dark and identify the accused, especially with the brief illumination from a passing jeep - weapon of assault i.e. the brick was not sent for forensic examination, which casts a doubt in the prosecution case - there was discrepancy in the site's location - As per the site plan prepared by P.W.-8 (Investigating Officer), the place of occurrence was 700 to 800 meters away from G.T. Road, whereas as per the statement of prosecution witnesses of fact i.e. P.W.-3 and P.W.-4 the place of occurrence was near the village Kateshar Bhusha Mandi Bawan Bigha field (Maidan) - Both the places are far away from each other - From the statements of the P.W.-3 it was clear that the deceased had already died by the time when P.W.-3 reached the place of occurrence and he has not seen the incident when it occurred - These inconsistencies led the court to conclude that the prosecution had not established the guilt of the accused beyond reasonable doubt, entitling the accused-appellant to the benefit of doubt - possibility of the death of the deceased occurring in a road accident also cannot be ruled out (Para 35, 36, 38, 40)

Allowed. (E-5)

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

1. This criminal appeal is directed against the impugned judgment and order dated 10.02.2021, passed by Additional Sessions Judge/ Fast Track Court-II, Chandauli in Session Trial No. 04 of 2013 (State of U.P. Vs. Rajender Yadav), arising out of Case Crime No. 232 of 2012, whereby accused-appellant- Rajendra

Yadav has been convicted and sentenced for life imprisonment for an offence under Section 302 I.P.C. alongwith fine of Rs.15,000/-, in default thereof, to further undergo six months additional imprisonment.

2. We have heard Mr. Rajiv Lochan Shukla, learned Counsel assisted by Ms. Suman Bharti, Advocate appearing for the accused-appellant and Mrs. Archana Singh, learned A.G.A. for the State as also perused the entire materials available on record.

3. As per the prosecution case a written report (Ext. Ka-1) was given on 17.6.2012 to the Police Station Mugalsarai, District Chandauli, by Muse Yadav (P.W.-1/first informant), who happens to be the son of the deceased stating that his father used to sell milk. As usual, on 17.6.2012 in the evening, he had gone to sell milk and when he was returning after supplying milk to Saran Yadav, resident of village Katesara, the accused Rajender Yadav son of Jaganandan Yadav resident of his village, with whom a dispute was going on in respect of passage and open land between them, lay in ambush near Katesar Bhusa Mandi at around 7:45 P.M., and assaulted the deceased by brick repeatedly until he died and that his father's body is lying on the spot. On the basis of the above written report a first information report dated 17.6.2012 (Ex.Ka.6) came to be lodged and registered as Case Crime No. 232 of 2012, under Section 302 I.P.C. against the accused-appellant.

4. After registration of the first information report, P.W.-8, namely Sanjay Singh, Investigating Officer reached the place of occurrence on the same day i.e. 17.6.2012 at about 7:30 - 8:00 P.M. The inquest proceedings however commenced at 06:00 A.M. on the next day and concluded at about 7:30 A.M. The Investigating Officer of this case P.W.-8 recovered Cycle and milk bucket (Balta) (Ex. Ka-3), blood stained piece of brick (Ex.Ka-4), blood stained and plain earth (Ex. Ka-5) and prepared recovery memos in that regard.

5. The post-mortem has been conducted on 18.06.2012 in which cause of death has been found to be Coma as a result of following ante mortem head injuries:-

"1. Lacerated injury .8 cm x 2 cm over Rt. Side of frontal bone and part of left side parietal bone

2. Contused swelling 10 cm x 6 cm just above the lacerated wound

3. Contused injury over scalp except occipital region

4. Contused swelling over face 4 cm x 8 cm including nasal area and part of both cheek . Both side of maxilla fractured."

6. The Investigation ultimately concluded with submission of charge-sheet against the accused-appellant on 30.07.2012 (Exhibit-Ka-8). The concerned Magistrate took cognizance and committed the case to the Court of Sessions, wherein charges have been framed under Section 302 I.P.C. against the accused-appellant on 28.06.2014. Charges were read out to the accused-appellant, who denied the accusation and demanded trial.

7. The prosecution in order to establish the charge levelled against the accused-appellant, has relied upon following documentary evidences, which were duly proved and consequently marked as Exhibits:

"Written report dated 17.6.2012 has been marked as Exhibit-Ka-1; F.I.R dated 17.6.2012 has been marked as Exhibit-Ka-6; Recovery memo of Cycle & Bucket

dated 18.6.2012 has been marked as Exhibit-Ka-3; recovery memo of piece of bricks dated 18.6.2012 has been marked as Exhibit-Ka-4; Recovery Memo of blood stained and plain earth dated 18.06.2012 has been marked as Exhibit-Ka-5; Post mortem report dated 18.06.2012 has been marked as Exhibit-Ka-15; Panchayatnama dated 18.06.2012 has been marked as Ex. Ka.-10; Site Plan with Index dated 18.06.2012 has been marked as Ex. Ka-9; and Charge Sheet dated 30.07.2012 has been marked as Ex. Ka.-8."

8. The prosecution has also adduced oral testimony of following witnesses:-

"P.W.-1/ informant, namely, Muse Yadav, son of the deceased; P.W.-2, namely Boder Yadav, son of the deceased; P.W.-3, namely Nakhadu Yadav; P.W.-4, namely, Shankar Yadav, P.W.-5, namely, Pintoo Yadav, witness of Panchayatnama, P.W.-6, Sub Inspector Ram Kumar Singh,, who has lodged the F.I.R., P.W.-7 Second Investigation Officer, Ram Prakat Yadav, P.W.-8 First Investigating Officer Sanjay Singh, P.W.-9 S.I. Praveen Kumar Singh, P.W.-10, namely Dr. Ashok Kumar, who conducted the post-mortem of the deceased.

9. On the basis of material produced by the prosecution during trial, incriminating materials were put to the accused-appellant for recording his statement under Section 313 Cr.P.C. The accused-appellant has stated that he has been falsely implicated in the present case due to enmity and the statements of prosecution witnesses are incorrect. He further stated that the deceased died due to injuries sustained in a road accident for which the wife of the deceased namely, Jokhni Devi received a Cheque of Rs. 5 lakhs on 3.9.2013 under a State scheme, namely, U.P. Krishak Durghtana Bima Yojana.

10. Defence has also produced three witnesses namely, D.W.-1 Lalta Prasad, Tehsildar Mughalsarai, Chandauli, D.W-2, namely, Phulchandra Yadav, Tehsildar Sadar, Chandauli and D.W.-3, namely, Khushhal Prasad, retired Lekhpal.

11. Upon perusal and consideration of the material placed on record by the parties, the trial court held that P.W.-3 and P.W.4 are the eye-witnesses of the incident and on the basis of their statements (in examination-in-chief as well as in cross-examination) it has come to the conclusion that the deceased Kailash was murdered by the accused by assaulting him with brick and the eye witnesses have seen the incident with their own eyes in the headlight of a Jeep passing through the area. The court below has also concluded that the death of the deceased Kailash Yadav was not in a road accident, but he was done to death by the accused appellant. P.W.-10, namely Dr. Ashok Kumar has denied that the deceased died due to injuries sustained in a road accident and has stated that injury No.3 cannot come from being crushed under the wheel and the same could be the cause of death of the deceased and due to this injury the bones of skull of the deceased were fractured. The trial court also opined that benefit of Krishak Durghatana Bima Yojana is not limited to the dependents who died in road accident, but can also be given in the case of murder. After recording the aforesaid finding the trial court held that the murder of the deceased has been committed by the accused-appellant. Therefore, the prosecution has been able to prove the guilt of the accused-appellant beyond reasonable

doubt and has accordingly convicted and sentenced him to undergo life imprisonment along with fine. It is against this judgment of conviction that the present appeal has been preferred.

12. Learned counsel for the accused-appellant submits that the accused-appellant has been falsely implicated in the present case due to enmity. He further submits that a dispute in respect of passage and open land was going on between the parties and the informant has intentionally implicated the accused appellant. It is also submitted that the deceased met with an accident on the road and the prosecution has given it a colour of murder. Deceased's wife namely Jokhni Devi has received a cheque of Rs.5 lakhs under the scheme of Krishak Durghatana Bima Yojana. The incident occurred at about 7:45 P.M. on the road and there was no source of light and all the witnesses, who have alleged that they have seen the incident are not the eye witness because they reached the place of occurrence after the death of the deceased. He next submits that the autopsy report does not support the prosecution case and no brick part has been recovered from the place of occurrence.

13. Learned A.G.A. on the other hand submits that this is a case in which enmity is admitted and the statement of eye-witnesses namely, P.W.-3 and P.W.-4 are absolutely credible and reliable and there is direct evidence against the accused-appellant to support the prosecution case. The place of occurrence has not been disputed by the prosecution. On the cumulative strength of the evidence led by the prosecution, learned A.G.A. submits that this is a case of direct evidence and the impugned judgment and order does not suffer from any infirmity and illegality and the present appeal is liable to be dismissed by this Court.

14. We have examined the respective contentions urged by the learned counsel for the parties and have perused the records of the present appeal including the lower court records.

15. The only question required to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded to the accused-appellant is legal and sustainable in law and suffers from no infirmity and perversity.

16. Before entering into the merits of the case set up by the learned counsel for the accused-appellant and the learned A.G.A. qua impugned judgment and order of conviction passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses.

17. The prosecution in order to prove its case has relied upon the statement of P.W.-1, namely, Muse Yadav (first informant) son of the deceased. He has stated that the incident occurred on 17.6.2012. At the time of the incident, his father Kailash Yadav used to sell milk. He used to collect milk every day and take it to Saran Yadav's place by bicycle. On the fateful day, the deceased Kailash Yadav had gone to sell milk as usual in the evening and while he was returning home, Rajendra Yadav son of Jaganandan Yadav of his village, who was waiting in ambush at a deserted place around 7:45 P.M., threw his father off the bicycle and killed him by assaulting him with a brick. A dispute in respect of passage and open land was going on between the accused and his family from before the incident, due to which

accused-appellant harboured enmity with the deceased. On the fateful day, Nakhdu Yadav (P.W.-3) and Shankar Yadav (P.W.-4) of his village were also returning after supplying milk. Nakhdu Yadav came to his house and told him at around 8 o'clock in the night that Rajendra Yadav had killed his father by assaulting him with a brick near the village Katesar Bhusa Mandi Bawan Bigha Field. On this information, informant P.W.-1 along with his brother reached the place of occurrence and saw that his father's dead body was lying at a deserted place on a rough road, about 500 meters away from Bhusa Mandi. After that he went to Police Station Kotwali Mughalsarai, accompanied by his brother Bodar Yadav (P.W.-2) and gave the written report at the police station on which the F.I.R. was registered.

18. In the cross-examination, this witness has stated that he got the information about the murder of his father from Nakhdu Yadav, and when he reached the place of occurrence it was about 8:15 P.M., he shook his father but got no response, because of which he apprehend that his father had died. His father's head and face were completely crushed and blood was oozing from one side of his face. Apart from this, there was no other injury. He further stated that he had filed an application against Rajendra Yadav on the information of Nakhdu Yadav. Nakhdu Yadav had informed him that the deceased Kailash Yadav was killed by the accused-appellant Rajendra Yadav by assaulting him with a brick. He has also stated that Nakhdu Yadav had not disclosed that someone else had also seen the incident or he tried to save the deceased. When the inquest was conducted by the Investigating Officer Nakhadu Yadav was not present. He disclosed the Investigating Officer that the brick, bicycle and the milk bucket (Balta) were lying nearby the deceased.

19. P.W.-2 namely, Bodar Yadav son of the deceased has supported the prosecution case and substantially adapted the stand taken by P.W.-1 at the stage of trial. The murder occurred on the sidewalk of Bavan Bigha Bhusa Mandi. He has admitted that he had not seen the incident and he and his brother Muse Yadav were informed by Nakhdu Yadav. When he reached the place of occurrence he saw that blood was oozing out from the face of the deceased and there was no bleeding from other parts of the body. It was about 8 o'clock in the night and there was no light. His house is 500 meters away from the place of occurrence. None of the villagers informed that Rajendra had killed Kailash. Nakhdu Yadav is his cousin. There was a dispute between Nakhdu Yadav and Rajendra Yadav in which both the sides have implicated each other, before the incident. He has further stated that he is not aware that his mother had received a cheque of Rs. 5 lakh towards motor accident claim under the scheme of Krishak Durghatana Bima Yojana with regard to death of his father, Kailash Yadav in a road accident. He has denied that the case was registered on the wrong information given by Nakhdu Yadav.

20. P.W.-3, Nakhdu Yadav in his examination in chief has stated that the incident occurred on 17.6.2012 at about 7:45 pm. On the date of the incident he and Shankar Yadav were returning after supplying milk. Kailash Yadav (deceased) was ahead of them, who too was returning after supplying milk. When they reached near village Kateshar Bhusa Mandi Bawan Bigha Field, they saw in the headlight of a passing jeep that Rajendra Yadav son of

Jaganandan Yadav killed the deceased Kailash Yadav by assaulting him with brick and Kailash Yadav was stuck in the cycle. He has further stated that he and Shanker (P.W.4) have seen the incident. They rushed to the spot and tried to catch Rajendra Yadav but he escaped in the bush. They came home and informed the sons of the deceased about the incident. He has further stated that he had filed a case against the accused Rajendra Yadav in respect of dispute of passage. Deceased Kailash Yadav was his real uncle. The accused-appellant Rajendra Yadav was seen from a distance of 20 paces from the place of occurrence. He tried to save the deceased when the accused-appellant was assaulting the deceased but he could not catch him because of darkness.

21. This witness has further stated that it was dark when Rajendra was assaulting Kailash. He has admitted that after 10 to 15 or 20 days police recorded his statement under section 161 Cr.P.C. He has shown his inability to disclose whether Jokhani Devi, wife of deceased had received 5 lakh rupees as compensation by showing Kailash's death as a death in a road accident.

22. PW-4, namely, Shankar Yadav has stated that on the day of the incident, he alongwith Nakhdu Yadav were returning home after supplying milk. Kailash Yadav was ahead of them. At about 7:45 P.M., when they reached near Kateshar Bhusa Mandi, Bawan Bigha Ground, they saw in the headlight of a jeep coming from front, which was available for one to two seconds that Kailash Yadav was stuck in the bicycle with his milk bucket and the accused Rajendra Yadav was assaulting Kailash with a brick. Accused Rajendra Yadav killed the deceased due to enmity on account of a dispute in respect of passage and open land. He has further stated that he and Nakhdu have seen the incident from a distance of more than 15-20 paces and that it was dark at the time of occurrence. He admitted that the jeep did not stop at the spot and they could not see its registration number. He has admitted that there was litigation pending between Nakhdu Yadav and accused Rajendra Yadav.

23. P.W.-5, namely, Pintu Yadav is the witness of inquest (Exhibit Ka-1). He has also proved the recovery memo of bicycle and milk bucket. He has been cross examined in which he has stated that he had signed on a blank paper. He has admitted that since the recovery memo of blood stained and plain earth has not been shown to him in the court, therefore he could not prove the said recovery. He has further admitted that a litigation was pending between Rajendra Yadav and his father Nakhdu Yadav with regard to a fight (maar-peet). He has admitted that there was animosity between both of them.

24. P.W.- 6, namely S.I. Ramkumar Singh has proved the chik F.I.R (which is marked as Exhibit Ka-6).

25. P.W.-7 is Ramprakat Yadav, who has submitted charge sheet no. 110/12 against the accused-appellant Rajendra Yadav s/o Jaganand Yadav under section 302 I.P.C. He has been cross-examined in which he has stated that since the alleged weapon i.e. piece of brick has not been shown to him in the trial Court, he was unable to prove the same. He has stated that he could not disclose as to on which date and month the piece of brick has been sent for forensic examination to the Forensic Science Laboratory and the forensic report has also not been produced. He has further

stated in his cross-examination that since the number of the jeep was not revealed by the witnesses and various Jeep passes every day on that road, he could not locate the jeep in the headlight of which the incident was seen by the prosecution witnesses.

26. P.W.-8 is Sanjay Singh. He has partly conducted investigating in this case. He admitted that the dead body was lying in the field at a distance of 7-8 hundred meters from G.T. Road. He has denied that the body of the deceased was lying on the pitch road. He has further admitted that the weapon of assault i.e. the piece of brick has not been sent to the forensic science laboratory for forensic examination. There was no supply of electricity at the place of occurrence and it was completely dark. He has admitted that he has not marked the place in the site plan from where the witnesses have seen the occurrence. He did not send the weapon of assault i.e. piece of brick, blood stained and plain earth for forensic examination. He has not investigated whether the wife of deceased received any amount towards road accident claim/ insurance.

27. P.W.-9 namely, inspector Praveen Kumar Singh has been examined who has prepared the inquest report. He has stated in his examination-in-chief that proceeding of inquest started on 18/6/12 at 6 a.m. and concluded at 7:30 am. P.W.-10 namely, Dr. Ashok Kumar has conducted post-mortem of the body of the deceased. He has been cross-examined in which he alleged that injury no. 1 may be caused from a sharp edged weapon or due to a fall by force. Injury No. 2 cannot come from falling on a hard object, it can come from assault with a blunt weapon or upon being hit by a vehicle. Injury No. 2 can also come from a forceful impact of a vehicle. He admitted that Injury No. 3 can result from forceful hit of something or forceful hit by a heavy object and could have been the cause of death of the deceased as the bone of his skull was fractured. Injury No. 4 was a grievous injury. It may be caused from a hard object or collision. It cannot come from fall and can also be caused with a blunt weapon. Injury No. 4 may be caused from iron bumper or iron fitted in the vehicle if it is hit forcefully. Injury No. 3 was a crush injury.

28. DW-1 Lalta Prasad, was posted in Azamgarh on 2/3/14 and not at Chandauli. D.W.-2 Phool Chandra Yadav, Tehsildar, Sadar Chandauli, has stated that he was not in service on 13/5/13. The benefit of farmer accident insurance is not only given to the dependants of a deceased farmer who dies in a road accident but also in cases of drowning in rivers, ponds, etc., house collapse, vehicle accident areas, being bitten by animals. etc. He has further stated that in this case, Jokhani Devi, wife of the deceased Kailash Yadav, has been given the benefit of Krishak Durghtana Bima Yojana on 3/9/13 by the then Tehsildar Sadar Chandauli. Presently the village of deceased Kailash Nath is within the territorial limits of Tehsil Mughalsarai.

29. From the perusal of the prosecution witnesses, it is apparently clear that as per the prosecution case, P.W.-3 Nakhadu Yadav, who happens to be real nephew of the deceased and P.W.-4 Shanker Yadav are witnesses of fact/eye witnesses, whereas P.W.-1 Muse Yadav, P.W.-2 Boder Yadav, who happen to be the sons of the deceased and P.W.-5 Pintoo Yadav, who happens to be son of P.W.-3 Nakhadu Yadav, are hear-say witnesses and other prosecution witnesses, namely, P.W.-6 to P.W.-10 are formal witnesses. From the

prosecution side, it is claimed that this is a case of direct evidence in which P.W.-3 and P.W.-4 have seen the incident with their own eyes. Therefore, the statements of P.W.-3 and P.W.-4 require deeper scrutiny by us.

30. It is important for us to refer to the statement of P.W.-3. In the examination-in-chief, P.W.-3, who is stated to be 60 year of age, has stated that on the date of the incident he and P.W.-4 were returning together after supplying milk. The deceased was on a bicycle ahead of them, who was also returning after supplying milk. When they reached the village Kateshar Bhusa Mandi Bawan Bigha Field, they saw in the headlight of a jeep, coming from the front that the accused-appellant killed the deceased by assaulting him on his head with a brick and the deceased was stuck in the bicycle. He has further stated that the incident was seen by him and also P.W.-4. They reached the spot and tried to catch the accused-appellant but he succeeded in running away and hiding himself in the bush. He has also admitted that there was dispute qua the passage and open land between the deceased and the accused-appellant. He has also admitted that there was enmity between the accused-appellant and himself qua a passage and he has also filed a case against the accused-appellant for title over the disputed passage, meaning thereby that enmity between the accused-appellant and P.W.-3 is admitted on record due to which the possibility of false implication of the accused-appellant in the present case by P.W.-3 cannot be ruled out.

31. He has stated in his examination-in-chief that when he arrived at the place of incident along with Shanker Yadav (P.W-4), the deceased Kailash Yadav was lying dead on the road. Similarly, in the cross-examination he has stated that when he along with Shanker Yadav (P.W.-4) reached near the village Kateshar Bhusa Mandi Bawan Bigha Field, they saw that the deceased was stuck in his bicycle. From the perusal of both the aforesaid statements of P.W.-3, it is apparent that the deceased had already died by when P.W.-3 and P.W.-4 reached the place of occurrence and they have not seen the incident when it occurred. In his cross-examination at one place P.W.3 has stated that he saw the accused-appellant at the place of incident from 20 paces whereas at another place he has stated that he saw the deceased from a distance of 1.6 kilometer (one mile) on the northern side of road towards Ramnagar to Padaav. Similarly, at other place, P.W.-3 has stated that the deceased was at a distance of 20 to 25 paces ahead from him. When the accused-appellant was beating the deceased, he tried to save him but he could not caught him due to darkness. He has further stated that by the time they reached, the accused-appellant ran away and hide himself in bush. It was dark at the time when he saw the accused killing the deceased and running away. From the aforesaid statement, it is doubtful for any person to have seen the incident, which occurred at a distance of 20 to 25 paces or 1.6 kilometers, when it was dark, and to recognize the assailant who committed the offence.

32. P.W.-4 happens to be uncle of P.W.-3 and is aged 66 years. He too is stated to be an eye-witness of the incident. He has stated in his examination-in-chief that at about quarter to 8 in evening he and P.W.3 were returning home on foot after selling milk and when they reached near village Kateshar Bhusa Mandi Bawan Bigha Field, they saw in the headlight of jeep, which was available for one to two seconds that

the deceased got stuck in his bicycle along with bucket of milk and the accused-appellant was assaulting the deceased by brick. In the cross-examination, P.W.-4 has stated that he and P.W.-3 were together and they were 70-80 paces behind the deceased and it was getting dark and nothing was visible. He has further stated that they saw the accused assaulting the deceased from a distance of 15 to 20 paces. He has admitted that there was enmity between the accused-appellant and the deceased with regard to a passage. He has further stated that he saw the deceased in crushed condition and the direction of Jeep was northwards. He has further stated that he saw the accused-appellant running but by then there was no jeep. P.W.-3 was the first to disclose him about the death of deceased. At another place, P.W.-4 has stated that at that time he knew that the death was caused by the accused-appellant. He has further stated that there was litigation going on between P.W.-3 and the accused-appellant and in that case, he went to the Court on behalf of P.W.-3 as he is his nephew.

33. From the statements of P.W.-3 and P.W.-4 it is clear that they saw the accused-appellant running from a distance of 15 to 20 paces and it is highly doubtful that they saw the incident when it actually occurred. Even if it is accepted that they saw the incident when it occurred in the headlight of a jeep it is difficult to believe that P.W.-4 and P.W.-3, who are 66 and 60 years of age could correctly see the incident from a distance of 15 to 20 paces in the dark and identify the accused correctly and that too in the headlight of a moving jeep which was available for a few seconds (one to two seconds) as per P.W.-3 and P.W.-4. Both P.W.-3 and P.W.-4 have admitted in their statements that they could not ascertain the number of jeep. Apart from the above, there is strong possibility of false implication of accused-appellant in the present case by P.W.-3 and P.W.-4, as they have admitted that there was litigation going on between P.W.-3 and the accused-appellant and that P.W.-4 used to go to Court on behalf of P.W.-3. There was admittedly no other source of light available on the spot as is evident from the statement of P.W.-8 i.e. Investigating officer.

34. Upon examination of the statements of prosecution witnesses, who are stated to be eye-witnesses a serious doubt arises with regard to their presence at the place of occurrence or their seeing the incident. There is also contradiction in the statements of prosecution witnesses. As such we do not deem it proper to rely upon the testimony of inimical and interested witnesses of prosecution to return a finding of guilt against the accused.

35. Considering the aforesaid statements as well as the fact that from the statements of prosecution witnesses, we have not found that any one from the prosecution side has seen the incident when it occurred. We also find that possibility of the death of the deceased occurring in a road accident also cannot be ruled out particularly as the defence has proved that wife of deceased had accepted compensation of Rs. 5 Lacs in a State sponsored accidental insurance scheme.

36. Apart from the above, we may also notice that there is no report of concerned Forensic Science Laboratory in respect of forensic examination of weapon of assault i.e. piece of brick, which is alleged to have been used by the accused-appellant in assaulting the deceased due to which he has been done to death. P.W.-8 who has conducted the investigation has stated that he has not sent the weapon of assault i.e. piece of brick for forensic examination, which casts a doubt in the prosecution case.

37. Similarly, recovery memo prepared during the course of investigation qua blood stained and plain earth, which are alleged to have been recovered from the place of occurrence, has not been proved by P.W.-5, who is alleged to be a witness of such recovery. P.W.-5 has stated that at the time of preparation of such recovery, his signature has been obtained by the Police on a blank paper. The aforesaid fact also creates a dent on the prosecution version.

38. Perusal of the site plan (Exhibit-ka/9) also casts doubt in the prosecution case as the place of occurrence as per the site plan and other evidence on record, has been shifted. As per the site plan prepared by P.W.-8 (Investigating Officer), which has also been disclosed by him in his statement during the course of trial, the place of occurrence is 700 to 800 meters away from G.T. Road, whereas as per the statement of prosecution witnesses of fact i.e. P.W.-3 and P.W.-4 the place of occurrence is near the village Kateshar Bhusha Mandi Bawan Bigha field (Maidan). Both the places are far away from each other, meaning thereby that the place of occurrence as per the prosecution has been shifted, which make a flaw in the prosecution case. The site plan also casts an anomaly on the ground that the place from where the prosecution witnesses of fact i.e. P.W.-3 and P.W.-4 are alleged to have seen the occurrence, when it occurred, has not been marked.

39. We may also notice that on the basis of written report of the first informant/P.W.-1, the first information report has been lodged on 17th June, 2012 at 21:25 hrs. whereas in the cross-examination, P.W.-8 has stated that he reached the place of occurrence between 07:30 to 08:00 p.m. meaning thereby that the investigation is ante-timed, which also creates a dent on the prosecution version.

40. In view of the above discussions and deliberation, we find that the trial court although has referred to the testimony of prosecution witnesses especially P.W.-3 and P.W.-4 and the other prosecution evidence but the same has not been carefully evaluated and examined. We hold that prosecution has not been able to establish the guilt of the accused-appellant beyond reasonable doubt. The accused-appellant in the facts of the present case is thus entitled to benefit of doubt.

41. Consequently, the appeal succeeds and is allowed. The impugned judgment and order of conviction and sentence dated 10.02.2021 is hereby set aside. The accused appellant Rajendra Yadav, who is reported to be in jail since 10th February, 2021, shall be released forthwith, unless he is wanted in any other case on compliance of Section 437-A Cr.P.C.

42. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Chandauli henceforth, who shall transmit the same to the concerned Jail Superintendent for release of the accused-appellant in terms of this judgment.

(2023) 2 ILRA 373
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.02.2023

BEFORE

THE HON'BLE PRITINKER DIWAKER, A.C.J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 3503 of 2012
with
Jail Appal No. 4478 of 2012

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

Counsel for the Appellant:
Sri Hemendra Pratap Singh, Sri Dinesh Kumar Mishra, Sri Ankit Pathak, Sri Sautabh Yadav, Sri Harish Chandra Tiwari(A.C.)

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law - Indian Penal Code,1860 - Section 302 - Murder - Testimony of hostile witness - testimony of hostile witnesses can also be relied upon to the extent, it supports the prosecution case - the testimony of hostile witnesses should be scrutinized meticulously and very cautiously and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon - there is no legal bar to base conviction upon hostile witness testimony if corroborated by other reliable evidence (Para 26, 34)

B. Criminal Law - Indian Penal Code,1860 – Section 302 - Murder - Evidence Act, 1872 - Section 32 - Dying Declaration - legal *maxim nemo moriturus praesumitur mentire*, which means, "a man will not meet his Maker with a lie in his mouth" - reliability of dying declaration - in case the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting, it can be the sole basis for awarding conviction - In such an eventuality, no corroboration is required - Held - In the instant case, dying declaration was recorded the Nayab Tehsilder, Sadar, after obtaining the certificate of medical fitness from the concerned doctor - none of the witnesses or the authorities involved in recording the dying declaration turned hostile - they all fully supported the case of prosecution - dying declaration was reliable, truthful and was voluntarily made by the deceased, hence, the dying declaration was acted upon without corroboration and was made the sole basis of conviction, despite the fact that dying declaration was not corroborated by witnesses of fact (Para 49, 58)

C. Criminal Law - Criminal Procedure Code (CrPC) of 1973 – Section 313 - Power to examine the accused - when the dying declaration was put before the accused persons / appellants in their Statements under Section 313 CrPC, and it was specifically asked as to what they have to say regarding the Statement of the deceased mentioning their names specifically as culprits, they simply denied it and remained silent - Held - in the Statement under Section 313 CrPC the silence of accused leads to adverse inference against them (Para 44)

Witnesses of fact in their oral testimonies Stutied that they did not see as to how victim received burn injuries and that the victim had not told them as to who poured kerosene upon her and set her ablaze - informant & grand father of the deceased, the uncles and the aunt of the deceased turned hostile - PW-1 the father of appellant, who, though declared hostile on the point that he had not seen the incident, disclosed the name of both the appellants as culprits, corroborates the prosecution case in material aspects - He has seen the deceased in burning condition - careful scrutiny of his deposition assists to draw a definite conclusion that the time and scene of occurrence is fully proved by his deposition, despite his hostility - the time of the occurrence as well as the nature of the injury as alleged by the prosecution are corroborated by the evidence of hostile witnesses - dying declaration of the deceased, affirmed the presence of both the appellants on the place of occurrence at the time of the incident (Para 28, 38)

Dismissed. (E-5)

List of Cases cited:

1. Koli Lakhmanbhai Chandabhai Vs St. of Guj., 1999 (8) SCC 624

2. Ramesh Harijan Vs St. of U.P. , 2012 (5) SCC 777

3. St. of U.P. Vs Ramesh Prasad Misra & anr. , 1996 AIR (Supreme Court) 2766

4. Bhagwan Dass Vs St. (NCT of Delhi), (2011) 6 Supreme Court Cases 396

5. Shivaji Sahab Rao Vs St. of Mah., 1973 SCC (Cri) 1033

6. Prahlad Vs St. of Raj., (2019) 14 SCC 438

7. Pappu Tiwary Vs St. of Jharkhand, 2022 SCC OnLine SC 109

8. Vijay Pal Vs St. (Government of NCT of Delhi, (2015) 4 SCC 749

9. Jitendra Kumar Vs St. of Har., (2012) 6 SCC 204

10. S.K. Sattar Vs St. of Mah., (2010) 8 SCC 430

11. Lakhan Vs St. of M. P., (2010) 8 Supreme Court Cases 514

12. Krishan Vs St. of Har., (2013) 3 Supreme Court Cases 280

13. Ramilaben Hasmukhbhai Khristi Vs St. of Guj., (2002) 7 SCC 56

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

1. Since these appeals have been preferred against the same judgment and relate to same Crime Number, they were heard together and are being decided by a common judgment.

2. The Additional Sessions Judge, Court No.1, Ghaziabad by the judgment and order dated 31.8.2012 passed in Sessions Trial No. 826 of 2011 (Crime No. 29 of 2011), P.S. Bahadurgarh, District Ghaziabad convicted and sentenced the appellants under Section 302 I.P.C. read with Section 34 IPC to undergo rigorous life imprisonment with a fine of Rs. 5,000/- each with stipulation of default clause. Aggrieved with the said judgment, present appeals have been preferred by the appellants.

3. Brief facts, as culled out from the record, are that a First Information Report was lodged by the informant, Giri Raj son of Sher Singh, resident of Palwara, Police Station Bahadurgarh, District Agra, on 22.10.2011 at 10.15 p.m., with the averments that his son Sompal was residing separately. Smt. Karishma, daughter of Sompal, was married with Sudhir son of Tejveer, resident of village Gotka, police station Sarurpur, District Meerut before two years. For the last 15-20 days, Karishma had been staying in the house of her father. The informant had sold two bigha land for Rs. 4,04,000/-, out of which Rupees One Lakh came in Sompal's share and from then Sompal was wasting money by drinking alcohol. Two days ago Sompal had also called Karishma's husband Sudhir. Sompal and Sudhir both were drinking alchohal since morning over which an altercation took place between Karishma and these two. Tonight at about 9.00 p.m. when Sompal, Sudhir and Karishma were at home, hearing the alarm, informant, his son Upendra alias Pappi and his wife Smt. Bala Devi, Raju son of Bhim Singh came to the house of Sompal, they saw Karishma coming out of the room burning. Sompal and Sudhir came out behind her and ran away seeing them. Karishma told them that her father Sompal poured kerosene upon her with intention to kill her and her husband Sudhir set her ablaze. She was serious and was brought Garhmukteshwar for treatment.

4. On the basis of the written report (Ext. ka-1), chik First Information Report (Ext. Ka-7) was registered at Police Station

concerned on 22.2.2011 at 10.15 p.m. against Sompal (father) and Sudhir (husband) at case crime no. 25 of 2011 under Sections 307 and 326 IPC.

5. On 23.2.2011, dying declaration of the victim (Ext. ka-12) was recorded by the Nayab Tehsildar, Sadar, Meerut. He also took her thumb impression of right leg over the same, as her hands were fully burnt. Victim was conscious at the time of statement. He also obtained certificate from the concerned doctor in this regard.

6. Investigation started by the Station House Officer of the concerned Police Station. The Investigating Officer recorded the statement of witnesses and victim. Site plan was prepared. During course of treatment, victim died on 16.3.2011 at 9.30 a.m. and case was converted into the offence under Section 302 IPC. Inquest report was prepared and post mortem of the deceased was performed. After making thorough investigation, charge sheet was submitted against the appellants. Concerned Magistrate took the cognizance. The case, being exclusively triable by Sessions Court, was committed to the Court of Sessions.

7. The charge framed was under Section 302 of IPC. The accused-persons pleaded not guilty and wanted to be tried. Trial started and in support of its case, prosecution examined 10 witnesses, who are as follows:

1	Giri Raj Singh	PW-1 (informant) (grand father of the deceased)
2	Raju @ Ramendra	PW-2 (uncle of deceased)
3	Upendra @ Pappi	PW-3 (uncle of deceased)
4	Bala Devi	PW-4 (aunt of deceased)
5	Dr. Rajendra Kumar	PW-5 (who medically examined the deceased)
6	Dr. Ram Prasad Sharma	PW-6 (Investigating Officer)
7	H.C. Ram Charan Singh	PW-7 (who proved the signature of scribe)
8	Yogesh Kumar Sharma	PW-8 (who proved the signature of Dr. Shweta Garg, who performed the autopsy of the deceased)
9	Hayat Singh	PW-9 (proved Death Summary Report)
10	Ranjit Kumar	PW-10 (Nayab Tehsildar, Sadar, Meerut, who recorded the dying declaration of deceased)

8. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1	Written report	Ext. A-1
2	Another tehrir	Ext. A-2
3	Site Plan	Ext. A-3
4	Fard	Ext. A-4
5	Fard	Ext. A-5
6	Charge sheet	Ext. A-6
7	Chik F.I.R.	Ext. A-7
8	G.D. Entry	Ext. A-8

9	G.D. Entry	Ext. A-9
10	Post Mortem Report	Ext A-10
11	Death summary report	Ext. A-11
12	Dying declaration of the deceased	Ext. A-12

9. After conclusion of evidence, statement of accused appellants was recorded under Section 313 CrPC, wherein they pleaded their false implication and claimed alibi.

10. In this matter, PW-1 (Giri Raj Singh), PW-2 (Raju @ Ramendra), PW-3 (Upendra @ Pappi) and PW-4 (Bala Devi) are the witnesses of fact.

11. These witnesses in their oral testimonies have stated that they did not see as to how Karishma received burn injuries. They also stated that Karishma had also not told them either on the day of incident or after that as to who poured kerosene upon her and set her ablaze. At that time, she was not in a position to speak. These witnesses have been declared hostile. However, PW-1 has proved written report Ext. ka-1 and death information of the deceased Ext. ka-2.

12. PW-5 to PW-10 are the formal witnesses.

13. PW-5, Dr. Rajendra Kumar has prepared the medico legal report Ext. ka-3 of the victim when she was alive and found her in burnt condition.

14. PW-6, Dr. Ram Prasad Sharma is the Investigating Officer of the case, who has proved the proceeding of investigation in his testimony and also proved the site plan, other papers including charge sheet as Ext. ka-3 to Ext. ka-6.

15. PW-7, Head constable Ram Charan Singh is scribe of F.I.R., who has proved chik F.I.R. Ext. ka-7 and registration of amending G.D. as Ext. ka-8 and Ext. ka-9, respectively.

16. PW-8, Yogesh Kumar Verma, was posted as Lab Assistant in Safdarjang Hospital, New Delhi. As secondary witness, he has proved the signature of Dr. Shweta Garg, who has performed the autopsy of the deceased and prepared the Autopsy Report Ext. ka-10.

17. Autopsy report indicates that at Safdarjung Hospital, Delhi the victim expired on 16.3.2011 at 9.30 a.m. where she was referred from L.L.R.M. Medical College and associated SVBP Hospital, Meerut on 23.2.2011 at 5.45 p.m.. She had sustained 50% burn injury. Her both longs, chest, membranes and brain alongwith trachea and bronchi and liver, kidney and spleen as well were found congested. As per antemortem external injuries, the burnt areas of the body were found as follows:

"Burnt areas on the body : Dermo epidermal flame burn injuries present over face, neck, chest, abdomen, whole of the back, upper half of anterior surface of right leg. Complete bald patch over head present. The superficial layers of the skin are burnt and peeled off at places revealing yellowish greenish base covered with foul smelling pus. The unpeeled skin is burnt and blackened at places. Hairs over involved part are burn and singed at

places. Approximate area of burn is 50% of total body surface area."

18. In the opinion of the doctor death was caused due to septicemic shock as a result of ante mortem infected flame burns and it occurred about one day before.

19. PW-9, Hayat Singh is the Lower Division Clerk, Safdarjang Hospital, New Delhi. He has proved the signature of Dr. Shobha Jain, who has prepared the death summary report of the deceased. He has proved the Ext. ka-11.

20. PW-10, Ranjit Kumar, is the Nayab Tehsildar, Sadar, Meerut. He has recorded the dying declaration of the deceased. He has stated that before recording the statement of the victim, he had obtained fitness certificate from the concerned doctor. Victim was conscious and able to recognize the place and man at that time. He has further stated that when the questions were put to the victim as to how she received burn injuries, she replied that his father Sompal poured Kerosene upon her and when she tried to escape, her husband Sudhir threw a match upon her due to which she caught fire and burnt. She also stated the reasons for setting her ablaze.

21. On the basis of aforesaid oral and documentary evidence, learned trial court recorded the conviction of the accused and sentenced them, as mentioned herein-above.

22. Heard Shri Saurabh Yadav, Advocate holding brief for Shri Ankit Pathak, learned counsel for the appellant - Sudhir, Shri Harish Chandra Tiwari, learned Amicus Curiae for the appellant - Sompal and Shri H.M.B. Sinha, learned AGA for the State.

23. The impugned judgment and order has been assailed mainly on two grounds by the learned counsel for the appellants. Learned counsel for the appellants submitted that accused persons have been falsely implicated in this case. They have not committed the present offence. It is further submitted by learned counsel that all the witnesses of fact have turned hostile. PW-1, the informant and grand father of the deceased, PW-2, PW-3, the uncles and PW-4, the aunt of the deceased have turned hostile and do not support the prosecution version. They are said to be the witnesses of fact and on the basis of analysis of their evidence, no guilt against the accused appellants is established and proved.

24. Learned counsel for the appellants next submitted that dying-declaration of the deceased was recorded when she was surviving, but this dying-declaration finds no corroboration with any prosecution evidence. All the witnesses of fact have turned hostile and nobody supports the version mentioned in dying-declaration. Therefore, learned trial court committed grave error in convicting the appellants on the basis of dying-declaration only when it was not corroborated at all.

25. Learned AGA, per contra, vehemently opposed the arguments advanced by learned counsel for the appellants and submitted that conviction of accused can be based solely on the basis of dying-declaration, if it is wholly reliable. It requires no corroboration. Moreover, testimony of hostile witnesses can also be relied upon to the extent, it supports the prosecution case. Learned trial court has rightly convicted the appellants under Section 302 IPC and sentenced accordingly. There is no merits in the appeals and the same may be dismissed.

26. Upon entering into the established legal area, the first issue raised by learned counsel for the appellants seems to be clumsy because the testimony of hostile witnesses cannot be thrown away just on the basis of the fact that they have not supported the prosecution case and were cross-examined by the prosecutor. The testimony of hostile witnesses can be relied upon to the extent, it supports the prosecution case. Needless to say that the testimony of hostile witnesses should be scrutinized meticulously and very cautiously.

27. The points raised by learned counsel for the appellants take us to the testimonies of PW-1, PW-2, PW-3 and PW-4.

28. PW-1 is the father of appellant Sompal, who, though declared hostile on the point that he had not seen the incident and has denied the contents of his written report Ext. ka-1 to the extent, it discloses the name of both the appellants as culprits, corroborates the prosecution case in material aspects. He has seen the deceased in burning condition in the night at 9.00 p.m. at the house of Sompal. It is pertinent to mention here that PW-1 happens to be the father of appellant Sompal and states that Sompal lives separately from him. He also affirms the fact that the appellant Sudhir, husband of the deceased, had come to the house of the other appellant Sompal on the date of the occurrence. Though he states that he had not seen the appellants present over there at the time of occurrence yet a careful scrutiny of his deposition assists us to draw a definite conclusion that the time and scene of occurrence is fully proved by his deposition, despite his hostility. He has seen the deceased in burning condition and that is the case of prosecution also. PW-1 also proves Ext. ka-2, which is an application for information to the police in respect of death of the deceased.

29. Likewise, PW-2, who is the uncle of the deceased, also proves the fact that the deceased was seen by him in burning condition at the same place and time, as prosecution claims. His statement that both the appellants were very fond of drinking, offers relevant support to the prosecution version.

30. PW-3, who is the brother of the accused Sompal, in the same manner proves the place of occurrence and burning condition of the deceased and the time of the incident as well.

31. The fact of burning of the deceased is also affirmed by PW-4, aunt of the deceased.

32. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat, 1999 (8) SCC 624,*** has held that evidence of hostile witness can be relied upon to the extent, it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is a settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

33. In ***Ramesh Harijan vs. State of U.P. , 2012 (5) SCC 777***, the Hon'ble Apex Court has also held that it is settled legal position that the evidence of a prosecution

witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

34. In ***State of U.P. vs. Ramesh Prasad Misra and another , 1996 AIR (Supreme Court) 2766***, the Hon'ble Apex Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon.

35. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

36. The aforesaid scrutiny of deposition of PW-1, PW-2, PW-3 and PW-4 leads us to draw the conclusion that these witnesses, despite their hostility, affirm the time and place of the occurrence and the cause of injury to the deceased.

37. All the aforesaid witnesses resiled from their statements recorded under Section 161 CrPC and turned hostile, however, PW-6 the Investigating Officer, firmly states that he had recorded the statements of aforesaid witnesses during course of investigation.

38. PW-6 has also made the topography of the scene of occurrence and prepared the site plan Ext. ka-3, which also finds support from the statements of the aforesaid four prosecution witnesses. PW-6 also proves the burnt pieces of ropes of cot, can, and pieces of quilt and seizure memo Ext. ka-4 has been proved by him. Besides it, plain soil from earth and ash was also taken from the place of occurrence and the memo prepared has been proved as Ext. ka-5 by the PW-6. All these facts are quite discernible to prove that the place of occurrence is the same as the prosecution claims and also affirmed by the statements of PW-1, PW-2, PW-3, PW-4 and by PW-6 as well. We have no hesitation to hold that the time of the occurrence as well as the nature of the injury as alleged by the prosecution are corroborated by the evidence of hostile witnesses i.e. PW-1, PW-2, PW-3 and PW-4 as well and their testimony is countenanced to that extent.

39. The conduct of PW-1, PW-2, PW-3 and PW-4, who are family members and related to both the appellants turning hostile in their testimony before the Court take us to the law laid down by the Hon'ble Apex Court in ***Bhagwan Dass vs. State (NCT of Delhi), (2011) 6 Supreme Court Cases 396*** wherein the mother of the accused turned hostile and resiled from her statement given to the Investigating Officer and in the given facts and circumstances, the Hon'ble Apex Court observed like this :

"15. The mother of the accused, Smt. Dhillo Devi stated before the police that her son (the accused) had told her that he had killed Seema. No doubt a statement to the police is ordinarily not admissible in evidence in view of Section 162(1)Cr.PC, but as mentioned in the proviso to Section 162(1) Cr.PC it can be used to contradict the testimony of a witness. Smt. Dhillo Devi also appeared as a witness before the trial court, and in her cross examination, she was confronted with her statement to the

police to whom she had stated that her son (the accused) had told her that he had killed Seema. On being so confronted with her statement to the police she denied that she had made such statement.

16. We are of the opinion that the statement of Smt. Dhillo Devi to the police can be taken into consideration in view of the proviso to Section 162(1) Cr.PC, and her subsequent denial in court is not believable because she obviously had afterthoughts and wanted to save her son (the accused) from punishment. In fact in her statement to the police she had stated that the dead body of Seema was removed from the bed and placed on the floor. When she was confronted with this statement in the court she denied that she had made such statement before the police. We are of the opinion that her statement to the police can be taken into consideration in view of the proviso of Section 162(1) Cr.PC."

40. If we translate the legal principle emerged out from the aforesaid proposition into the facts and circumstances of this case, we can reach the conclusion that PW-1, PW-2, PW-3 and PW-4 were lying before the Court and whatsoever they had stated before the Investigating Officer during course of investigation was the true version of the case and they deliberately turned hostile and resiled from their earlier statements given to the Investigating Officer during the proceedings of evidence in the Court. PW-6, the Investigating Officer, has stated specifically that he had recorded the statement of aforesaid witnesses and denied the suggestion, contrary to it, given by the defence, in his testimony.

41. Learned counsel for the appellants vehemently argued that since the witnesses of fact adduced by the prosecution state in clear terms that they did not see any of the appellants present over the place of occurrence at the time of incident, hence they were not standing in need to adduce any defence evidence of alibi i.e. in respect of their absence at the place of occurrence at the relevant time. Learned State counsel, per contra, has vehemently argued that the dying declaration of the deceased, which is valuable and reliable piece of evidence, affirms the presence of both the appellants on the place of occurrence at the time of the incident. We are going to discuss the evidentiary value and reliability of the dying declaration of the deceased in the present case, later in this judgment, but indubitably the burden to prove "alibi' lies upon the accused in all cases. Since there is no evidence regarding alibi, we hold that the plea of alibi taken by the appellants is not sustainable and not proved at all.

42. In their statement under Section 313 CrPC, both the appellants have stated that they were not present at the place of occurrence at the time of the incident. We have perused the statement of the appellants under Section 313 CrPC and find that except the plea of alibi, there is a mere denial on the part of the appellants to the incriminating circumstances and the evidence adduced by the prosecution against them and nothing specific has been claimed.

43. The nature and scope of statement under Section 313 CrPC has been explained by the Hon'ble Apex Court in Shivaji Sahab Rao vs. State of Maharashtra, 1973 SCC (Cri) 1033 and it has observed that:

"The prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. Where such an

omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. It is open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assumed that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction."

44. It is noteworthy that as an incriminating evidence when the dying declaration was put before the accused persons / appellants in their statements under Section 313 CrPC, and it was specifically asked as to what they have to say regarding the statement of the deceased mentioning their names specifically as culprits, they have simply denied it and remained silent, whereas something more was expected from them to meet out the aforesaid specific incriminating evidence like dying declaration of the deceased. We can safely rely upon ***Prahlad vs. State of Rajasthan, (2019) 14 SCC 438*** here, wherein it has been held that in the statement under Section 313 CrPC the silence of accused leads to adverse inference against him.

45. It is pertinent to mention that to take a specific plea of alibi by an accused means that he talks completely out of the scene when the crime was committed and assures his presence anywhere else other than the place of occurrence and that is why the burden of proof in respect of plea of alibi lies completely over the accused. We find that no defence evidence has been adduced by the appellants in the present case in support of their plea of alibi.

46. In umpteen cases, it has been held that burden to prove plea of alibi lies exclusively on the accused. The law was reiterated by the Hon'ble Apex Court in ***Pappu Tiwary vs. State of Jharkhand, 2022 SCC OnLine SC 109***, wherein the Hon'ble Apex Court referred Vijay Pal vs. State (Government of NCT of Delhi, (2015) 4 SCC 749 in which it was held that the burden on the accused is rather heavy and he is required to establish the plea of alibi with certitude. The legal principle laid down in Jitendra Kumar vs. State of Haryana, (2012) 6 SCC 204 was also referred and relied upon by the Hon'ble Apex Court to the effect that "*the burden of establishing the plea of alibi lay upon the appellants and the appellants have failed to bring on record any such evidence which would, even by reasonable probability, establish their plea of alibi. The plea of alibi in fact is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the place of occurrence and in the house which was the home of their relatives."*

47. In ***S.K. Sattar vs. State of Maharashtra, (2010) 8 SCC 430***, it was clarified that plea of alibi has to be established by the accused by leading positive evidence. Failure of such plea would not necessarily lead to success of prosecution case which has to be independently proved by prosecution beyond reasonable doubt..... Plea of alibi has to be proved with absolute certainty so

as to completely exclude possibility of presence of appellant at the place of occurrence at the relevant time.

48. So far as the dying-declaration is concerned, it was recorded by Shri Ranjit Kumar, Nayab Tehsildar, Sadar, Meerut, who was examined as PW-10. Dying-declaration was recorded by him after obtaining the certificate of mental-fitness from doctor in the hospital. It is desirable that statement of PW-10 should be referred in verbatim as to what was actually stated by the deceased, then injured and it is like this :

" मैने ब्यान प्रश्न उत्तर के क्रम में लिखा है। और अपने हस्तलेख में लिखा है। करिश्मा से यह पूछने पर कि तुम कैसे जली तो उसने जवाब दिया कि कल रात लगभग 10.30 बजे मेरे पापा सोमपाल सिंह ने मेरे उपर मिटटी का तेल छिड़क दिया तथा जब मैं भागने लगी तो मेरे पति ने मेरे उपर तीली फेंक दी।

उसी से आग लग गई तथा मैं जल गई। करिश्मा से यह पूछने पर कि तुम्हें क्यो जलाया तो उसने जवाब दिया था कि मेरे पिता तथा मेरे पति दोनों साथ मे दारु पी रहे थे, मैने दारु पीने से मना किया, मैंने अपने पापा से कहा कि तुम खुद दारु पी रहे हो तथा मेरे पति को भी दारु पिला कर बरबाद कर रहे हो इस पर मेरे पापा ने कहा कि तू चुप रह नहीं तो तुझे मार डालेंगे। इस पर मेरे पिता जी के साथ झगड़ा हुआ, इस पर उसने मिटटी के तेल का कनस्तर लिया तथा मेरे ऊपर डाल दिया, जब मै भागने लगी तो उस समय मेरे पति ने माचिस की तिल्ली जलाकर मेरे ऊपर डाल दी जिससे आग लग गयी। उसने यह भी बताया कि उसे अस्पताल पप्पी चाचा व राजू चाचा लेकर आये थे। यह पूछने पर कि तुम्हें जलाने में किसका हाथ है तो करिश्मा ने बताया था कि मुझे जलाने में मेरे पापा सोमपाल सिंह व मेरे पति सुधीर का हाथ है। इसके अलावा और कोई नहीं है। "

49. The law on the issue of dying declaration can be summarized to the effect that in case the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting, it can be the sole basis for awarding conviction. In such an eventuality, no corroboration is required. It is also held by Hon'ble Apex Court in the case of ***Lakhan vs. State of Madhya Pradesh, (2010) 8 Supreme Court Cases 514*** that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

50. Deceased survived for 22 days after the incident took place. Her dying declaration was recorded by PW-10, Shri Ranjit Kumar, the Nayab Tehsilder, Sadar, Meerut after obtaining the certificate of medical fitness from the concerned doctor. This dying declaration was proved by him. This witness is absolutely an independent witness and has no grudge or enmity to the convicts at all.

51. Learned counsel for the appellants has argued that dying declaration is doubtful and not corroborated by witnesses of fact, hence, it cannot form the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble Apex Court has summarized the law regarding dying declaration in the case of ***Lakhan*** (supra). In this case, Hon'ble Apex Court held that

the doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means, "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be direct, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

52. As per the deposition of PW-10, the dying declaration Ext. ka-12, was recorded by him in the hospital on 23.2.2011, where the deceased, then in injured condition, was admitted. The Fitness certificate and the condition of the patient was certified by the doctor prior to recording of the statement and after its recording, another certificate was endorsed by the doctor that during course of the statement patient had been conscious. The dying declaration has been proved as Ext. ka-12 by PW-10. It is noteworthy that PW-10 also states that the hands of the injured were burnt completely and that is why her thumb impression could not be endorsed over the statement rather right toe impression was endorsed thereon. Here our attention is drawn to the statement of PW-5 Dr. Rajendra Kumar, who has also corroborated this fact that when the injured was brought to the hospital both of her hands, chest, neck, face, upper part of the left leg, left and right thigh were burnt. Impression of her both toes were taken over the medico legal register. This register has been proved as Ext. ka-3 by PW-5. This piece of deposition of PW-5 fortifies the statement of PW-10 as to why right toe impression was endorsed over the dying declaration. It should be noted here that the inquest report is not on record and the Investigating Officer - PW-6 has stated in his evidence that the inquest was performed in Delhi and the inquest report was not prepared by him. It appears that the Investigating Officer has omitted to collect the inquest report but it makes no difference as the dying declaration is found reliable and trustworthy and in light of this evidence, the omission made by the Investigating Officer does not affect the prosecution case adversely. The reason of the incident was also asked to the deceased by PW-10 and she stated that her father and husband were taking wine together and when she showed her displeasure over it, her father got angry and altercation took place between the two. Her father scolded her to keep quiet and threatened her for life. He took up the kerosene tin and poured over her and when she tried to run away, her husband threw a burning match stick over her which caught fire. Her uncle Pappi and Raju took her to hospital. Again, she specifically named her father Sompal and husband Sudhir as the assailants. We do not find any reason to doubt the credibility and reliability of the deposition of PW-10, who is an independent witness, and in the circumstances narrated above dying declaration Ext. ka-12 is a reliable and trustworthy piece of evidence.

53. In the wake of aforesaid judgment of ***Lakhan (supra)***, dying declaration cannot be disbelieved, if it inspires confidence. On reliability of dying declaration and acting upon it without corroboration, Hon'ble Apex Court held in ***Krishan vs. State of Haryana, (2013) 3 Supreme Court Cases 280*** that it is not an

absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attending circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

54. In ***Ramilaben Hasmukhbhai Khristi vs. State of Gujarat, (2002) 7 SCC 56,*** the Hon'ble Apex Court held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence, such a dying declaration can be acted upon without any corroboration.

55. From the above legal theories, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so, then there cannot be any challenge regarding its correctness and authenticity.

56. The dying declaration of deceased (Ex.ka-12), it is also important to note, was recorded on 23.2.2011 and the deceased died on 16.3.2011 while the incident took place on 22.2.2011. It means that she remained alive for 21 days after making dying declaration. Therefore, truthfulness of dying declaration can further be evaluated from the fact that she survived for 21 days after making it from which it can reasonably be inferred that she was in a fit mental condition to make the statement at the relevant time. Moreover, in the dying declaration, the deceased did not unnecessarily involve the other family members of the accused appellants. She only attributed the role of burning to her father and husband, who were actual culprits.

57. In such a situation, the hostility of witnesses of fact cannot demolish the value and reliability of the dying declaration of the deceased, which has been proved by the prosecution in accordance with law and is a truthful version of the event that occurred and also of the circumstances leading to her death.

58. As already noticed, none of the witnesses or the authorities involved in

recording the dying declaration had turned hostile. On the contrary, they have fully supported the case of prosecution. The dying declaration is reliable, truthful and was voluntarily made by the deceased, hence, this dying declaration can be acted upon without corroboration and can be made the sole basis of conviction. Hence, learned trial court has committed no error on acting on the sole basis of dying declaration. Learned trial court was completely justified in placing reliance on dying declaration Ex. Ka-12 and convicting the accused-appellants on the basis of it.

59. The other evidence on record also falsifies the pleas taken by learned counsel for the appellants assailing the prosecution version. Autopsy report Ext. ka-10 is proved by PW-8, Assistant Record Keeper, Safdarjung Hospital, New Delhi, who has deposed that post mortem was performed by Dr. Shweta Garg on 17.3.2011 but now she had resigned and her whereabouts were not known. On the basis of record of the hospital, the autopsy report has been proved by this witness as secondary evidence, which was permissible under the law in the circumstances of the case. The autopsy report Ext. ka-10 proves that the death of the deceased was caused due to burn injuries. The death summary report of the deceased was prepared by Dr. Shobha Jain at Safdarjung Hospital, New Delhi which as proved on the basis of hospital record as Ext. ka-11 by PW-9, who is the Lower Division Clerk in the aforesaid hospital.

60. PW-6, the Investigating Officer, has proved the proceedings of the investigation and site plan Ext. ka-3 prepared by him containing all the relevant facts, determines the place of occurrence, which is shown as the house of appellant Sompal, in conformity with the prosecution case. The whole topography of the scene of occurrence has been sketched in Ext. ka-3. Significantly, a plastic can, smelled with Kerosene, and burn pieces of quilt, pieces of burn rope of cot and the pieces of burnt cot were found on the spot and the memo thereof Ext. ka-4 and Ext. ka-5 were also prepared and proved by PW-6, which further affirms the prosecution version. We find no material omission or lapse in the investigation on the part of the Investigating Officer.

61. The F.I.R. and G.D. of the case initially were prepared by Constable Clerk Rajesh Jindal, who had expired in a road accident as deposed by PW-7, while appearing as secondary witness for Rajesh Jindal to prove the F.I.R. and G.D. of the case as Ext. ka-7 and Ext. ka-8. He firmly states that at that time, he was posted as Head Constable at police station Bahadurgarh and subsequently the informant Giri Raj Singh moved a written report in the police station at 22.2.2011 and on the basis of that written report, case was converted under Section 302 IPC and relevant G.D. Ext. ka-9 was prepared.

62. In the case in hand, the prosecution, as discussed above, has established the fact regarding the presence of the appellants on the spot at the relevant time and discharged its onus hence, the burden of proof was upon the appellants to establish their plea of alibi by positive evidence and we have no hesitation to hold that appellants have miserably failed to discharge their burden of absolute certainty qua their plea of alibi and this failure may be read as an additional circumstance against them.

63. A perusal of impugned judgment shows that learned trial court has

scrutinised the evidence on record very carefully and in proper manner and on the basis of cogent and reliable evidence available on record the conviction of the appellants has been recorded and they have been sentenced properly.

64. The learned trial court has meticulously analyzed the documentary and oral evidence available on record and also referred relevant case laws in the impugned judgment. We have no hesitation to hold that there is no material lacuna or misreading of evidence on the part of the trial court and we have no option but to concur with the learned trial court with its conclusion to record the conviction of the appellants.

65. Upon careful analysis and consideration of the settled legal position in the backdrop of the facts and circumstances of the present case, we are of the opinion that the conclusion given by the learned trial court in the impugned judgment and order is in accordance with law and the evidence available on record. Thus, this Court is of the view that the prosecution has been able to establish the guilt of accused appellants under Section 302 IPC read with Section 34 IPC beyond reasonable doubt and to the satisfaction of the judicial conscience of the Court.

66. The impugned judgment of conviction and sentence, which has been sought to be assailed, is well thought and well discussed and same, warranting no interference, is liable to be upheld and appeals having no force are liable to be dismissed. Accordingly, the impugned judgment and order is upheld and the appeals are **dismissed**.

67. Let a copy of this judgment along with trial court record be sent to the Court concerned, Ghaziabad for necessary compliance.

(2023) 2 ILRA 387
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.01.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Election Petition No. 9 of 2022

Sarvesh Kumar Gupta ...Petitioner
Versus
Dr. Neeraj Bora ...Respondent

Counsel for the Petitioner:
Shraddha Tripathi, Pawan Kumar Upadhyay

Counsel for the Respondents:
Dr. Shailendra Sharma, Anupriya Srivastava, Kaushlendra Yadav, Shitesh Jha

A. Election Petition-Representation of People Act, 1951-Section 6 - Allahabad High Court Rules, 1952-Rules 5, 6, 6(c) – non-compliance of rule 6(c)-In the present case petitioner has not followed the rule 6© regarding publication which is mandatory-petitioner refused to deposit the amount required for publication and he may not be exempted from such publication-the present election petition itself is not maintainable.(1 to 26)

B. Section 81(3) of RP Act provides for filing an election petition along with the copies attested by the petitioner-Section 86 of RP Act provides that failure to comply with the provisions of section 81 would result in rejection of election petition at the initial stage.(23,24)

The petition is dismissed.(E-6)

List of Cases cited:

1. Dr. Vijay Laxmi Sadho Vs Jagdish (2001) AIR SC 600

2. Saritha S. Nair Vs Hibi Eden SLP (Civil) No 10678 of 2020

3. T.M. Jacob Vs C. Poulose & ors. in Appeal (Civil) No. 1455 of 1996.

4. Murarka Radhey Shyam Kumar Vs Roop Singh Rathore & ors. (1964) AIR 1545

5. Lal Bahadur Vs Ritesh Pandey (2021) ILR 10 All 653; Election Petition No. 01 of 2019

6. Dr. Mohammad Ismail Faruqui Vs Shri Rajnath Singh : Election Petition No. 5 of 2014)

7. Sheodhan Singh Vs Mohan Lal Gautam (1969) 3 SCR 417 at p. 421: (AIR) 1969 SC 1024 at p. 1026)

8. K.K. ramachandran Master Vs M.V Sreyamakumar (2010) 7 SCC 428

9. Uday Shankar Triyar Vs Ram Kalewer Prasad Singh & anr.. (2006) 1 SCC 75

10. InamatiMallappaBasappa Vs Desai Basavaraj Ayyappa& ors. AIR 1958 SC 698

11. Kamaraja Thevar Vs Kanju Thevar, Civil Appeal No. 763 & 764 of 1957 :Civil Appeal No. 48 of 1958 (AIR 1958 SC 687)

12. Dr. P Nalla Thampy Thera Vs B.L. Shanker & ors. AI 1984 SC 135.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

(i) C.M. Application (IA) No.01 of 2022; the objection against the letter dated 07.05.2022 issued by the Hon'ble Registrar dated 07.05.222 in compliance of order dated 27.04.2022 demanding the petitioner to deposit the amount of Rs.94500/- regarding publication of notice of the Election Petition perferred by the petitioner.

(ii) C.M. Application (IA) No.02 of 2022; Application for taking Vakalatnama on record filed by Dr. Shailendra Sharma, learned counsel for the opposite party.

(iii) C.M. Application (IA) No.03 of 2022; Application / preliminary objection for rejection / dismissal of Election Petition No.09 of 2022 on behalf of respondent under Section 86 (1) read with Section 87 (1) of the Representation of the People Act, 1951 along with Order VII Rule 11 (a) of the Code of Civil Procedure, 1908 (5 of 1908) against the maintainability of the Election Petition.

(iv) C.M. Application (IA) No.04 of 2022; Application for taking of reply of objection filed by the Respondent.

1. Heard Ms. Shraddha Tripathi, learned counsel for the petitioner and Dr. Shailendra Sharma, learned counsel for the sole respondent/ opposite party.

2. By means of the present election petition, the petitioner has prayed that the election of Assembly Constituency 172 Lucknow, North of returned candidate Dr. Neeraj Bora, the opposite party, which was declared on 10.03.2022 may be declared as void and set aside. Consequential order may also be passed in the interest of justice.

3. On the first date of admission, on 27.04.2022 this Court has passed the following order:-

"Heard Ms. Shraddha Tripathi, learned counsel for the election petitioner.

Issue notice to respondent in terms of Chapter XV-A Rule 5 & 6 of Allahabd High Court Rules.

Steps be taken to serve respondent within seven working days.

List after service of notice."

4. Chapter-XV-A of Allahabad High Court Rules,1952 (here-in-after referred to as the "Rules, 1952") defines special provisions relating to the trial of election petition. Since the notice is issued to the opposite party in terms of Rules 5 & 6 of the Rules,1952, therefore, for convenience, Rules 5 & 6 are being reproduced here-in-below:-

"**5. Issue of notice to respondent.-** The election petition shall be laid before the Bench so constituted without delay, and unless it is dismissed under sub-section (1) of Section 86 of the Act or for being otherwise defective, the Bench may direct issue of notice to the respondent to appear and answer the claim on a date to be specified therein. Such notice shall also direct that if he wishes of put up a defence he shall file his written statement together with a list of all documents, whether in his possession or power or not, upon which he indents to rely as evidence in support of his defence on or before the date fixed; and further, that in default of appearance being entered on or before the date fixed in the notice the election petition may be heard and determined in his absence. The notice shall be in Form No.34-A.

6. Process fee and charges.- (a) Notice for the respondent shall issued by ordinary process and simultaneously by registered post.

(b) Notice of the election petition shall also be simultaneously published in a newspaper selected by the Registrar.

(c) Notices, process fee, charges and [a sum of Rs.250] as an initial deposit on account of the cost of publication in a newspaper shall be supplied by the petitioner within seven days of the order directing notice to issue. In default, the election petition shall be laid before the Bench for orders. The Bench may reject the election petition unless for sufficient cause if grants further time.

(d) Where the cost of publication in a newspaper exceeds Rs.50 the Registrar shall call upon the petitioner to deposit the excess amount in Court within the time to be fixed by him. On failure of the petitioner to deposit such costs, the petition shall be laid before the Bench for such orders as the Bench may think fit. In case the cost of publication is less than Rs.50 the petitioner shall be entitled to a refund of the amount in excess."

5. For publication in the newspaper in terms of Rule 6 (c) of the Rules, 1952, the Senior Registrar has indicated in its order dated 05.06.2022 that **"let a notice be published in Dainik Jagran, Lucknow Edition a Hindi Daily Newspaper in accordance with rules.**"

6. By means of an objection bearing No.01 of 2022 filed in the Election Petition No.09 of 2022, the petitioner filed an objection on 13.05.2022 making request that the petitioner may be exempted from requirement of publication in terms of Rule 6 (c) of the Rules, 1952 stating therein that the petitioner is incapable of making such a huge payment i.e. Rs.94,450/- in the name of publication in the newspaper because he is a man of humble background and the payment of such amount is beyond his control and means, as recital to this effect has been given in para-11 of such objection.

7. Learned counsel for the petitioner has referred the mandate of Section 6 of the Representation of People Act, 1951 (here-in-after referred to as the "Act, 1951") to contents that the publication in the newspaper has not been indicated in such

Act, 1951, therefore, the petitioner may not be compelled to deposit such a huge amount for publication. She has further stated that Rule 6 of the Rules, 1952 is contrary to the provisions of Code of Civil Procedure (in short C.P.C.) which is applicable in the election petition under Section 87 of the Act, 1951. She has also stated that since the sole respondent has put in appearance through counsel, therefore, there is no purpose for publication and if the petitioner is compelled to deposit an amount in terms of Rule 6 (c) of the Rules, 1952, that would be meaningless and would be a mockery of law as recital to this effect has been given in para-10 of the objection as well as in para-10 of her written statement. In support of her submissions she has cited the judgment of Apex Court in Re: ***Dr. Vijay Laxmi Sadho vs. Jagdish reported in AIR 2001 SC 600*** referring relevant portions of paras-16-A, 20, 21 & 22, which read as under:-

"16-A. Rule framed by the High Court relating to trial of election petitions are only procedural in nature and do not constitute "substantive law". Those Rules have to be read along with other statutory provisions to appreciate the consequence of non-compliance with the High Court Rules. Article 329 (b) mandates that no election to either House of Parliament or to either House of the State Legislature can be called in question except through an election petition presented to such authority and in such manner as is provided for by or under any law made by the legislature. Section 81 of the Act deals with the presentation of an election petition while Section 82 deals with parties to the election petition and Section 83 with contents of such a petition.

20. The question whether an election petition drawn up in Hindi language is maintainable or not came up for consideration before a learned Single Judge of the High Court of Madhya Pradesh in Election Petition No. 9 of 1980 titled Devilal s/o. Shriram Khada vs. Kinkar Narmada Prasad and others. While rejecting the challenge to the maintainability of the election petition drawn up in Hindi language, it was said :-

"Now it is true that Rule 2(b) of the aforesaid Rules does provide that every election petition shall be written in the English language. But in the absence of any provision in the Act or the Rules made thereunder, non compliance with Rule 2(b) of the a oresaid Rules cannot be a ground for dismissal of the petition under Section 86of the Act."

21. A contrary view was, however, expressed by another Single Judge of that High Court in Jai Bhansingh Pawaiya vs. Shri Madhavrao Scindia. In this case it was held that an election petition filed in Hindi language being violative of Rule 2(b) of the Rules, relating to filing of election petitions, was not maintainable and was liable to be dismissed under Section 86 of the Act. The learned Single Judge opined (para-25 of AIR):

22. The interpretation placed on rule 2 of the High Court Rules, giving it almost primacy over Article 348 (2) of the Constitution, in Jai Bhansingh's case to our mind is fallacious. The learned single Judge appears to have lost sight of the position that Rules framed by the High Court in exercise of powers under Article 225of the Constitution of India are only rules of procedure and do not constitute substantive law and those rules cannot effect the import of constitutional provisions contained in Article 348(2) of the Constitution. The high pedestal on which Rule 2(b) of the High Court Rules has been placed in Jai

Bhansingh's case, not only violates clear constitutional provisions but also introduces a clause in Section 86of the Act which does not exist. The entire approach to consideration of the effect of the notification issued under Article 348 (2) appears to be erroneous. That apart, the defect of not fling an election petition in accordance with Rule 2(b) of the Rules is not one of the defects which falls either under Section 81, 82 of 117 of the Act so as to attract the rigour of Section 86of the Act as rightly held in Devilal's case (supra).

(emphasis supplied)

She has submitted that in view of the aforesaid judgment of the Apex Court, the election petition may not be rejected on technical reasons.

8. Admittedly, by means of her objection she has not prayed for any alternative newspaper. In the wake of the aforesaid objection of the petitioner he has not deposited the amount which was required for publication of notice. Thereafter, the Joint Registrar (J) (N) submitted its report dated 29.06.202, which reads as under:-

"ELEP No.09 of 2022

As per office report dated 27.06.2022, undelivered cover of registered post AD notice issued to opposite party vide dispatch No.3613 dated 04.05.2022 booked on 05.05.2022 has not been received back nor any Vakalatnama has been filed.

Besides, this notice was also sent through District Judge, Lucknow which was received back with remark of process server that notice is served in office of opposite party to Himanshu Patni, Computer Operator.

On the basis of report of process server and registered post AD service of notice is sufficient upon opposite party.

Further, office has submitted that the petitioner has not deposited the required publication charges according to Rule 5 & 6 of Chapter XV-A of High Court Rules, 1952, hence,notice could not be published in daily newspaper as per Rule 6 (b) of Chapter XV-A of High Court Rules-1952.

Lay before the Hon'ble Court.

Joint Registrar (J) (N)

29.06.2022"

9. By means of C.M. Application (IA) No.02 of 2022, Dr. Shailendra Sharma has filed Vakalatnama on 28.07.2022. Vide C.M. Application (IA) No.03 of 2022 Dr. Sharma has filed a preliminary objection for rejection/ dismissal of election petition on the ground of maintainability.

10. Per contra, Dr. Shailendra Sharma, learned counsel for the respondent has stated that election petition does not confer the mandatory and statutory conditions, therefore, the same deserves to be dismissed. He has stated that he has filed objection seeking prayer that after disposal of those objections, if need be, he may be given time to file written submissions/ reply of the election petition. Dr. Sharma has stated that the averments made in para1 of the election petition cannot be admitted to the effect that the petitioner has not contested the election of 172 Lucknow North Assembly Constituency in the name of Sri Sarvesh Kumar Gupta as such name has been mentioned in the list of electoral nominated candidates available on the official Website of the Election Commission of India. Further, Rule 3 of the Rules 1952 provides that every election petition shall be presented to the Registrar. Rules 5 & 6 deals with the process of fees and charges. In the light of the aforesaid rules, if the petitioner has not taken steps for publication in the newspaper which is

mandatory requirement, such election petition may be treated as defective election petition and cannot be proceeded on merits.

11. Dr. Sharma has further submitted that Section 83 (1) (c) of the Act, 1951 provides that election petition shall be signed by the petitioner and verified in the manner laid down in the C.P.C. Section 83 (2) of the Act, 1951 further provides that every annexure to the petition shall also be signed by the petitioner and verified in the same manner as prescribed. Order VI, Rule 15 of the C.P.C. explains for verification of pleadings. As per Dr. Sharma, the aforesaid mandatory exercise is missing in the election petition inasmuch as the election petition along with its all annexures, supplementary affidavit has not been signed and verified by the petitioner in the manner provided by Section 83 (1) (c) and 83 (2) of the Act, 1951 read with Order VI Rule 15 of the C.P.C.

12. Dr. Sharma has stated that the main copy of election petition defers from the additional copy appended with the election petition and the copy provided to the learned counsel for the respondent inasmuch as in the main copy of election petition there is no page number after running page no.14, however, in the additional copy the page number is there as page No.15. Further, in original copy the name of returned candidate has been typed as Dr. Neeraj Bora whereas in the additional copy the name of returned candidate has been mentioned by cutting the name of earlier person writing the name through pen. As per Dr. Sharma, the additional copy and the copy provided to learned counsel for the respondent should be same and identical with the main copy. Further, the aforesaid anomalies may be considered as fraud. If the petitioner wants to change any averment or material of election petition, the same may be done with the prior leave of the court.

13. Replying to the aforesaid submission of the respondent, learned counsel for the petitioner has stated that the defect of pagination is a minor defect not of a vital nature and does not shed the nature of true copy as required by Section 81 (3) of the Act, 1951. Therefore, it does not attract the effect of Section 86 (1) of the Act, 1951. The absence of the page number does not mislead the respondent.

14. As per Dr. Sharma, if the relevant pages are perused then the relief claimed in election petition appears entirely different from relief claimed in mandatory additional copy annexed with the original election petition as the relevant pages indicate some deletion and modification which was never notarized.

15. Replying to the aforesaid contention, learned counsel for the petitioner has submitted that this is a curable defect and has placed reliance upon the case in re: ***Saritha S. Nair vs. Hibi Eden. SLP (Civil) No.10678 of 2020 and T.M. Jacob vs.C. Poulose & Ors in Appeal (Civil) No.1455 of 1996***. Further reliance has been placed upon the case in re: ***Murarka Radhey Shyam Kumar vs. Roop Singh Rathore & Others*** reported in ***AIR 1964 1545*** to submit that a copy in sub Section 3 of Section 81 of the Act, 1951 does not mean an absolutely exact copy but means that the true copy shall be so true that nobody can by any possibility misunderstand it.

16. Dr. Sharma has further submitted that the averments made by the petitioner in

Paragraphs 11 and 13 of the election petition and annexure no. 7 to the petition are contrary to each other and as such the same is against the settled legal proposition of the electoral law which clearly mandates that an election petition must contain a concise statement of material facts capable of giving rise to a triable issue and omission of a single material fact would lead to an incomplete cause of action and an election petition without material fact is not an election petition at all under the provisions of the Act and in such a situation the instant election petition has failed to meet out the aforesaid mandatory requisitions of Section 83 (1). The very basis of the election petition is the objection dated 04.02.2022 (Annexure No.3) is highly misconceived to the extent that it has wrongly illustrated and quoted Article 173 of the Constitution of India and, as such, the alleged objection dated 04.02.2022 is not an objection since it is defective in nature.

17. Dr. Sharma has also submitted that moreover the issue raised by the election petitioner in the instant petition cannot be a subject matter for adjudication by this Hon'ble Court, as the alleged cause of action with regard to recognition of political parties was existing much prior to the notification of the Assembly Election of 2022 in the State of Uttar Pradesh as the same is evident from the perusal of the letter dated 02.04.2022 (Annexed at page 28), therefore, the election petition being misconceived, is liable to be rejected.

18. Dr. Sharma has drawn attention of this Court towards the judgment of this Court dated 25.10.2021 delivered in ***Election Petition No.01 of 2019; Lal Bahadur vs. Ritesh Pandey reported in (2021) ILR 10 All 653*** by submitting that almost identical controversy has been considered by this Court and this Court has rejected the application whereby the exemption from publication was sought and dismissed such election petition treating the same as not maintainable. In the aforesaid judgment, the relevant case laws of the Hon'ble Supreme Court as well as Hon'ble High Court have been considered from both the sides. Therefore, the relevant portion of judgment and order dated 25.10.2021 is reproduced here-in-below:-

*"8. I have considered the submissions made by the parties. In the judgment dated 17.07.2015 delivered in the case of (**Dr. Mohammad Ismail Faruqui vs. Shri Rajnath Singh: Election Petition No.5 of 2014)** also, the Court directed for service of notice by other modes as well as by publication in a newspaper. The petitioner in the said case took steps for service through ordinary post as well as by registered post. He was informed the cost of publication in chosen newspaper to be Rs. 9024/-. The petitioner moved an application dated 8.4.2015, supported by an affidavit, with the prayer that publication of notice in the news paper may be dispensed with, on the ground that it was not possible for him to arrange such huge amount of money. In the said case also a ground was taken that the respondent otherwise also stands served with the notice sent by registered post AD and, thus, there is no necessity of publication. This Court after considering the submissions and the earlier settled law held:*

"The submissions advanced by the petitioner and learned counsel for the contesting respondent have been considered by the Court.

The first submission of the petitioner that as the dispute is between the petitioner

and the sole respondent, the Court should dispense with the publication of the notice in the newspaper since the respondent is represented by a counsel cannot be accepted.

As noticed above, Rule 3 contained in Chapter XV-A of the Rules provides that every election petition shall be presented to the Registrar. Rule 5 provides that the Bench may direct issue of notice to the respondent. Such notice shall also direct that if the respondent wishes to put up a defence he shall file his written statement together with a list of all documents, whether in his possession or power or not, upon which he intends to rely as evidence in support of his defence on or before the date fixed; and further, that in default of appearance being entered on or before the date fixed in the notice the election petition may be heard and determined in his absence. Sub-rule (a) of Rule 6 provides that notice for the respondent shall be issued by ordinary process and simultaneously by registered post. Sub-rule (b) of Rule 6, however, provides that the notice of the election petition shall also be simultaneously published in a newspaper selected by the Registrar. The Registrar had selected a newspaper and the petitioner was duly informed of this fact and the amount that he was required to deposit for publication of the notice. It is at that stage that the petitioner moved an application for dispensation of the publication of the notice in the newspaper.

Dispute in an election petition is not restricted to the petitioner and the respondent alone but involves the entire constituency and every interested person should have notice of the presentation of the election petition. This is what was observed by the Supreme Court in Inamati Mallappa Basappa vs. Desai Basavaraj Ayyappa and others, AIR 1958 SC 698 (supra). The Supreme Court considered this issue in the light of the unamended provisions where the election petition was required to be presented before the Election Commission. The Supreme Court, after placing reliance upon its earlier decisions, observed that by publication of notice in the official gazette not only the respondents to the petition get notice but the entire constituency as a whole receives such a notice so that each and every voter of the constituency and all parties interested become duly aware of the presentation of the election petition. The whole constituency is thus alive to the fact that the result of the election duly declared has been questioned on various grounds with the likely result that the election of all or any of the returned candidates may be declared void and the petitioner or any other candidate declared duly elected in place of the returned candidate. The constituency, therefore, has a vital interest in the proceedings before the Tribunal which have a characteristic of their own different from the ordinary civil proceedings. Paragraphs 10 and 11 of the judgment are reproduced below:

"10. It is necessary at the outset, therefore, to understand the nature and scope of an Election Petition. As has been observed by us in the judgment just delivered in Kamaraja Thevar v. Kunju Thevar, Civil Appeals No.763 & 764 of 1957 and Civil Appeal No.48 of 1958 : (A.I.R. 1958 S.C. 687) (A):-

"An election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power."

.....

"An election petition is not a matter in which the only persons interested are candidates who strove against each other

at the elections. The public also are substantially interested in it and this is not merely in the sense that an election has news value. An election is an essential part of the democratic process."

.....

"An election petition is not a suit between two persons, but is a proceeding in which the constituency itself is the principal party interested."

.....

11. An Election Petition presented to the Election Commission is scrutinised by it and if the Election Commission does not dismiss it for want of compliance with the provisions of Section 81, Section 82 or Section 117 of the Act, it accepts the same ***and causes a copy thereof to be published in the official gazette and a copy thereof to be served by post on each respondent. The respondents to the petition not only get notice of the same but the constituency as a whole receives such notice by publication thereof in the official gazette so that each and every voter of the constituency and all parties interested become duly aware of the fact of such Election Petition having been presented.*** *A copy of the Election Petition published in the official gazette would also show to all of them that the petitioner in a particular Election Petition, in addition to claiming a declaration that the election of all or any of the returned candidates is void, has also claimed a further declaration that he himself or any other candidate has been duly elected.* ***The whole constituency is thus alive to the fact that the result of the election duly declared is questioned on various grounds permitted by law with the likely result that the election of all or any of the returned candidates may be declared void and the petitioner or any other candidate may be declared duly elected, in place and stead of the returned candidate.*** *The constituency may have an interest in either maintaining the status quo or if perchance the election of the returned candidate is set aside, in seeing that some other deserving candidate is declared elected in his place and stead and not necessarily the petitioner or any other candidate sponsored by him whose election could be challenged on any of the grounds mentioned in Section100 (1). It is this interest of the constituency as a whole which invests the proceedings before the Election Tribunals with a characteristic of their own and differentiates them from ordinary civil proceedings. ....."*

(emphasis supplied)

This view was reiterated by the Supreme Court in Dr. P. Nalla Thampy Thera vs. B.L. Shanker and others, AIR 1958 SC 135 (supra) and the contention that the view taken by the Supreme Court in Inamati Mallappa Basappa (supra) that the election dispute involves the entire constituency was not correct was not accepted. The relevant paragraph 22 of the decision in Dr. P. Nalla (supra) is reproduced below:

"22. The ratio of this decision as also the observations in Basappa's case (AIR 1958 SC 698), the appellant contends are, wrong in view of the earlier decisions of this Court taking the view that an election dispute involves the entire constituency because of the paramount necessity of having purity of an election in a democracy safeguarded. We do not think the appellant's contention can be accepted. The earlier decisions of this Court do not in any way militate against the view taken in Dhoom Singh's case (supra) and the observations made in Basappas's case (supra). Those decisions were not concerned with the question as to whether an election petition can be dismissed for

default. The consensus of judicial opinion in this Court has always been that the law in regard to elections has to be strictly applied and to the extent provision has not been made, the Code wold be applicable. About eight years back this Court had occasion to point out that if the intention of the legislature was that a case of this type should also be covered by special provision, this intention was not carried out and there was a lacuna in the Act. We find that even earlier in ***Sheodhan Singh v. Mohan Lal Gautam, (1969) 3 SCR 417 at p. 421: (AIR 1969 SC 1024 at p. 1026),*** *this Court had stated:*

"From the above provisions it is seen that in an election petition, the contest is really between the constituency on the one side and the person or persons complained of on the other. Once the machinery of the Act is moved by a candidate or an elector, the carriage of the case does not entirely rest with the petitioner. The reason for the elaborate provisions noticed by us earlier is to ensure to the extent possible that the persons who offend the election law are not allowed to avoid the consequences of their misdeeds"

(emphasis supplied)

In view of the aforesaid observations made by the Supreme Court in Inamati Mallappa Basappa (supra) and Dr. P. Nalla (supra) that dispute in an election petition is not centered around merely between the petitioner and the respondents but the entire constituency, the publication of the notice in the newspaper is necessary. The contention of the petitioner that the publication of the notice in the newspaper should be dispensed with since the respondent has been served cannot, therefore, be accepted.

The second contention of the petitioner is that since the petitioner does not have the means to pay the cost for publication in the newspaper selected by the Registrar of the Court, the Court can order for deferred payment as was done in Election Petition No.4 of 2014.

It is not possible to accept this contention of the petitioner. Rule 6(b), clearly requires notices of the election petition to be simultaneously published in the newspaper selected by the Registrar. Rule 6(c) also requires that notices, process fee, charges and a sum of Rs.250/- as an initial deposit on account of cost of publication in the newspaper shall be supplied by the petitioner within seven days of the order directing notice to issue. Even this amount was not deposited by the petitioner. Rule 6(d) also requires that where the cost of publication in the newspaper exceeds Rs.50/-, the Registrar shall call upon the petitioner to deposit the excess amount in the Court within the time fixed by him. The Registrar had called upon the petitioner to deposit Rs.9024/-.

As noticed above, while dealing with the first contention of the petitioner, it has been found that publication in the newspaper is to ensure that the entire constituency is made aware of the pendency of the election petition. In this view of the matter deferred payment would not serve any purpose. The submission of the petitioner that even the amount of Rs.250/- which is required to be deposited in terms of Rule 6(c) is on higher side, cannot also be accepted as this is certainly less than the amount that is actually required for publication of the notice.

This election petition was presented before the Registrar of the Court on 27 June 2014. Notice was issued on 6 February 2015. The Court has to be satisfied that the grounds mentioned by the petitioner in the application filed for dispensing the publication of the notice in the newspaper are bona fide grounds and

the intention behind moving of the application is not to merely avoid the deposit of the amount for publication in the newspaper. Rule 6(c) provides that notices, process fee, charges and a sum of Rs.250/- as an initial deposit on account of the cost of publication in a newspaper shall be supplied by the petitioner within seven days of the order directing notice to issue. Rule 6(c) further provides that in default, the election petition shall be laid before the Bench for orders and the Bench may reject the election petition unless for sufficient cause it grants further time. The Court is of the opinion that sufficient cause has neither been placed nor does it exist for dispensing with the publication of the notice in the newspaper and that by filing the application, the petitioner is merely avoiding the deposit of amount for publication in the newspaper.

The application filed by the petitioner for dispensation with the publication of the notice in the newspaper is, therefore, without any substance and deserves to be rejected.

Thus, for all the reasons stated above, Civil Misc. Application No.32181 of 2015 filed by the petitioner for dispensing with the publication of the notice in the newspaper is rejected.

As a result of the rejection of the application, the election petition stands dismissed."

9. The aforesaid case squarely covers the present case. The necessity of publication is duly considered by the Supreme Court and is reiterated by this Court. The failure in publication goes to the root of the matter.

10. In the present case, the petitioner has failed to take steps for publication of notice. The first ground taken by the petitioner for seeking exemption from publication of notice is that the respondent stands served. The said aspect is fully covered by the judgment in the case of ***Dr. Mohammad Ismail Faruqui (supra),*** *as discussed above.*

11. So far as the next submission of the petitioner, that, the Senior Registrar had taken the quotation from Dainik Jagran, Lucknow office instead of Dainik Jagran, Ambedkar Nagar office, is concerned, in case the petitioner had any such objection, he ought to have raised the same at appropriate time before the Senior Registrar or moved an appropriate application before the Court. He failed to take any such steps. Even now, when it was pointed out by the respondent, the petitioner has only moved an application for exemption from publication. There is no prayer made by the petitioner that he is ready and willing to deposit the money for publication. Even during the course of arguments, the petitioner, submitting his case in person, did not reply to the query of the Court, whether he is now willing to deposit the money for publication of notice. His only reply has been that now there is no need for publication of notice.

12. In the given facts and circumstances of the case, I find that the petitioner has failed to comply with the orders dated 18.7.2019 and 23.9.2019 of this Court for publication of notice. He has not sought any condonation of delay in complying with the said orders of the court or shown willingness to make publication even now. Rather he has only sought an exemption from publication of notice. The said exemption cannot be granted by this Court as is already settled by this Court in the case of Dr. Mohammad Ismail Faruqui (supra) and judgments of the Supreme Court referred to in the said case.

27. I have considered the submissions of the parties. The Supreme Court has repeatedly considered the law with regard

to curable and incurable defects of an election petition. Lastly, in the case of Saritha S. Nair vs. Hibi Eden, 2020 SCC Online SC 1006 (SLP (Civil) No.10678 of 2020 dated 9.12.2020), a three Judges Bench of the Supreme Court, referring to its earlier pronouncements, again considered the said issue. Relevant paragraphs for our purposes read:

"21. Chapter-II, Part-VI of the Representation of the People Act, 1951, contains provisions for "Presentation of election petitions to High Court" and Chapter III contains provisions for "Trial of election petitions". Section 86(1), with which Chapter-III begins, obliges the High Court to dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117. The dismissal of an election petition under Section 86(1) is deemed by the Explanation under Section 86(1) to be a decision under Section 98(a). Section 98 speaks about 3 types of orders that could be passed at the conclusion of the trial of an election petition. They are:-

(i) The dismissal of the election petition; or

(ii) A declaration that the election of the returned candidate is void; or

(iii) A declaration not only that the election of the returned candidate is void, but also that the petitioner or any other candidate was duly elected.

22. It is important to note that the above 3 different types of decisions under Section 98, can be rendered by the High Court only at the conclusion of the trial. But the dismissal under Section 86(1) is an exception. The reference in the Explanation under Section 86(1) to Section 98(a), makes it clear that the power of the High Court to dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117, is available at the pre-trial stage."

28. It is relevant to note that the Act keeps in two separate compartments--

(i) the presentation of election petitions; and

(ii) the trial of election petitions.

The presentation of election petitions is covered by Sections 80 to 84 falling in Chapter-II. The trial of election petitions is covered by Sections 86 to 107 and they are contained in Chapter-III.

29. This compartmentalization, may be of significance, as seen from 2 facts namely:--

(i) That under Section 80 no election shall be called in question except by an election petition presented in accordance with the provisions of "this part"; and

(ii) That a limited reference is made to the provisions of the Code of Civil Procedure, 1908 in Chapter-II, only in places where signature and verification are referred to.

35. Section 86(1) empowers the High Court to dismiss an election petition which does not comply with the provisions of Section 81, Section 82 or Section 117 and it does not include Section 83 within its ambit. Therefore, the question whether or not an election petition which does not satisfy the requirements of Section 83, can be dismissed at the pre-trial stage under section 86(1), has come up repeatedly for consideration before this Court. We are concerned in this case particularly with the requirement of Clause (c) of Subsection (1) of Section 83 and the consequence of failure to comply with the same.

36. In Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore AIR (1964) SC 1545, a preliminary objection to the maintainability of the election petition was raised on the ground that the verification was defective. The verification stated that the averments made in some paragraphs of the petition were true to the personal

knowledge of the petitioner and the averments in some other paragraphs were verified to be true on advice and information received from legal and other sources. There was no statement that the advice and information received by the election petitioner were believed by him to be true. Since this case arose before the amendment of the Act under Act 47 of 1966, the election petition was dealt with by the Tribunal. The Tribunal held the defect in the verification to be a curable defect. The view of the Tribunal was upheld by this Court in Murarka Radhey Shyam Ram Kumar (supra). This Court held that "it is impossible to accept the contention that a defect in verification which is to be made in the manner laid down in the Code of Civil Procedure for the verification of pleadings as required by Clause (c) of Sub-section (1) of Section 83 is fatal to the maintainability of the petition".

37. The ratio laid down in Muraraka was reiterated by a three member Bench of this Court in F.A. Sapa v. Singora (1991) 3 SCC 375 holding that "the mere defect in the verification of the election petition is not fatal to the maintainability of the petition and the petition cannot be thrown out solely on that ground". It was also held in F.A. Sapa that "since Section 83 is not one of the three provisions mentioned in Section 86(1), ordinarily it cannot be construed as mandatory unless it is shown to be an integral part of the petition under Section 81".

38. In F.A. Sapa (supra) this Court framed two questions in paragraph 20 of the Report, as arising for consideration. The first question was as to what is the consequence of a defective or incomplete verification. While answering the said question, this Court formulated the following principles:--

(i) A defect in the verification, if any, can be cured

(ii) It is not essential that the verification clause at the foot of the petition or the affidavit accompanying the same should disclose the grounds or sources of information in regard to the averments or allegations which are based on information believed to be true

(iii) If the respondent desires better particulars in regard to such averments or allegations, he may call for the same, in which case the petitioner may be required to supply the same and

(iv) The defect in the affidavit in the prescribed Form 25 can be cured unless the affidavit forms an integral part of the petition, in which case the defect concerning material facts will have to be dealt with, subject to limitation, under section 81(3) as indicated earlier."

39. It was also held in F.A. Sapa (supra) that though an allegation involving corrupt practice must be viewed very seriously and the High Court should ensure compliance with the requirements of Section 83 before the parties go to trial, the defective verification of a defective affidavit may not be fatal. This Court held that the High Court should ensure its compliance before the parties go to trial. This decision was followed by another three-member Bench in R.P. Moidutty v. P.T. Kunju Mohammad (2000) 1 SCC 481.

40. In Sardar Harcharan Singh Brar v. Sukh Darshan Singh (2004) 11 SCC 196, this Court held that though the proviso to Section 83(1) is couched in a mandatory form, requiring a petition alleging corrupt practice to be accompanied by an affidavit, the failure to comply with the requirement cannot be a ground for dismissal of an election petition in limine under Section 86(1). The Court reiterated that non-compliance with the provisions of Section 83 does not attract the consequences envisaged by Section 86(1) and that the

defect in the verification and the affidavit is a curable defect. The following portion of the decision is of significance:

"14. xxxx

Therefore, an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with provisions of Section 83(1) or (2) of the Act or of its proviso. The defect in the verification and the affidavit is a curable defect. What other consequences, if any, may follow from an allegedly "defective" affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case."

41. In ***K.K. Ramachandran Master v. M.V. Sreyamakumar (2010) 7 SCC 428****, this Court followed F.A. Sapa (supra) and Sardar Harcharan Singh Brar (supra) to hold that defective verification is curable. The Court again reiterated that the consequences that may flow from a defective affidavit is required to be judged at the trial of an election petition and that such election petition cannot be dismissed under Section 86(1).*

42. Though all the aforesaid decisions were taken note by a two-member Bench in P.A. Mohammed Riyas v. M.K. Raghavan (2012) 5 SCC 511, the Court held in that case that the absence of proper verification may lead to the conclusion that the provisions of Section 81 had not been fulfilled and that the cause of action for the election petition would remain incomplete. Such a view does not appear to be in conformity with the series of decisions referred to in the previous paragraphs and hence P.A. Mohammed Riyas cannot be taken to lay down the law correctly. It appears from the penultimate paragraph of the decision in P.A. Mohammed Riyas (supra) that the Court was pushed to take such an extreme view in that case on account of the fact that the petitioner therein had an opportunity to cure the defect, but he failed to do so. Therefore, P.A. Mohammed Riyas (supra) appears to have turned on its peculiar facts. In any case P.A. Mohammed Riyas was overruled in G.M. Siddeshwar v. Prasanna Kumar (2013) 4 SCC 776 on the question whether it is imperative for an election petitioner to file an affidavit in terms of Order VI Rule 15(4) of the Code of Civil Procedure, 1908 in support of the averments made in the election petition in addition to an affidavit (in a case where resort to corrupt practices have been alleged against the returned candidate) as required by the proviso to Section 83(1). As a matter of fact, even the filing of a defective affidavit, which is not in Form 25 as prescribed by the Rules, was held in G.M. Siddeshwar to be a curable defect and the petitioner was held entitled to an opportunity to cure the defect.

43. The upshot of the above discussion is that a defective verification is a curable defect. An election petition cannot be thrown out in limine, on the ground that the verification is defective."

36. So far as the argument raised by learned counsel for the respondent that the original petition is not filed before the Court is concerned, the same is a defect which is covered under Section 81(3) of the RP Act which requires that "every election petition shall be accompanied by as many copies thereof .....".

Section 81(3) requires that there has to be an election petition and copies thereof are to accompany the same. Therefore, both are entirely distinct and separate things. The petitioner is required to file an election petition and also file its copies for service upon the respondent.

37. Admittedly, the petitioner herein has not filed before this Court the original election petition. The copy filed along with

the Court fee is a "true copy attested'. Such a declaration is made on each and every page of the election petition and its annexures. It is not a case where it can be said to be a bonafide mistake, as on one page or some of the pages, such a declaration is made. The entire election petition on each and every page bears a declaration that it is a "true copy attested'. In view of this self declaration made by the petitioner, the same cannot be treated to be an original election petition. To submit that since Court fee is paid on the same and the Registry has also reported the same, therefore, it should be treated to be the original petition is a fallacy as it bears a declaration of the petitioner that it is "true copy attested', same declaration as made on each copy accompanying the same. There is no difference between the two except payment of the Court fee. A copy cannot become an original petition only on the basis of the Court fees and its filing before the Court when it bears a declaration that it is a "true copy attested'.

38. The Supreme Court in the case of ***Uday Shankar Triyar vs. Ram Kalewar Prasad Singh and another (2006) 1 SCC 75,*** *has considered the impact of defects in signing of the appeals/petitions and Vakalatnama filed along with the same. After considering the law settled, it concludes in Para-15 which reads:*

"15. It is, thus, now well settled that any defect in signing the memorandum of appeal or any defect in the authority of the person signing the memorandum of appeal, or the omission to file the vakalatnama executed by the appellant, along with the appeal, will not invalidate the memorandum of appeal, if such omission or defect is not deliberate and the signing of the memorandum of appeal or the presentation thereof before the appellate court was with the knowledge and authority of the appellant. Such omission or defect being one relatable to procedure, can subsequently be corrected. It is the duty of the office to verify whether the memorandum of appeal was signed by the appellant or his authorised agent or pleader holding appropriate Vakalatnama. If the office does not point out such defect and the appeal is accepted and proceeded with, it cannot be rejected at the hearing of the appeal merely by reason of such defect, without giving an opportunity to the appellant to rectify it. The requirement that the appeal should be signed by the appellant or his pleader (duly authorised by a vakalatnama executed by the appellant) is, no doubt, mandatory. But it does not mean that non-compliance should result in automatic rejection of the appeal without giving an opportunity to the appellant to rectify the defect. If and when the defect is noticed or pointed out, the court should, either on an application by the appellant or suo motu, permit the appellant to rectify the defect by either signing the memorandum of appeal or by furnishing the Vakalatnama.

Thereafter, the Supreme Court prescribes exception to the aforesaid Rule and in Para-17 held as follows:

"17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well-recognised exceptions to this principle are:

(i) where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance;

(ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;

(iii) where the non-compliance or violation is proved to be deliberate or mischievous;

(iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court;

(v) in case of memorandum of appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant."

Therefore, in normal cases, the defects in the pleadings including the defects in signing the same are curable. Had the present case been one of the regular cases or the defects being a minor irregularity, this Court could have permitted the same to be corrected. Present is an election petition and Section 81(3) of the RP Act specifically provides for filing of an election petition along with copies attested by the petitioner. Section 86 of the RP Act provides that failure to comply with the requirement of Section 81 of the RP Act would result in rejection of the election petition at the initial stage only.

In view thereof, condition no.(i) of Para-17 of Uday Shankar Triyar (supra) is applicable to the present case and thus, the consequences as prescribed under Section 86 of the RP Act are to follow, as is already settled in the case of Saritha S. Nair (supra).

39. In view of the discussions made hereinabove, C.M. Application No.118019 of 2021 under Order VII Rule 11 of C.P.C. is disposed of, holding that the election petition itself is not maintainable.

19. Heard learned counsel for the parties and perused the material available on the record.

20. Notably, the rules of the Court are made by the High Court in exercise of powers confer by Article 225 of the Constitution of India. Chapter XV-A provides a special provisions relating to election petition. The purpose of issuing notice to the respondent as per rule 5 and its publication under rule 6 (c) is loud and clear as has been considered by this Court in more or less identical matter in the case in re: **Lal Bahadur** (supra) referring the decisions of Apex Court and High Courts that the publication of election petition is necessary for the voters of the Constituency concerned to know that one election petition is pending consideration. The Apex Court in re: ***Inamati Mallappa Basappa vs. Desai Basavaraj Ayyappa and others reported in AIR 1958 SC 698*** has observed in para-10 as under:-

"10. It is necessary at the outset, therefore, to understand the nature and scope of an Election Petition. As has been observd by us in the judgment just delivered in ***Kamaraja Thevar vs. Kanju Thevar, Civil Appeals No.763 & 764 of 1957 and Civil Appeal No.48 of 1958: (AIR 1958 SC 687) (A):-***

"An election contest is not a matter in which the only persons interested are candidates who strove against each other at the elections. The public also are substantially interested in its and this is not merely in the sense that an election has news value. An election is an essential part of the democratic process."

.....

"An election petition is not a suit between two persons, but is a proceeding in which the constituency itself is the principal party interested."

The aforesaid decision in ***Kamaraja Thevar (supra)*** has been considered by the

Apex Court in re: ***Dr. P. Nalla Thampy Thera vs. B.L. Shanker and others reported in AIR 1984 SC 135.***

21. In view of what has been considered by Apex Court in re: ***Inamati Mallappa Basappa*** *(supra),* ***Kamaraja Thevar*** *(supra),* ***Dr. P. Nalla Thampy Thera*** *(supra)* and ***Dr. Vijay Laxmi Sadho*** *(supra)* , I am of the considered opinion that the mandatory condition of Rule 6 (c) of the High Court Rules, 1952 regarding publication may not be avoided or ignored inasmuch as the purpose of the publication of election petition is loud and clear and meaningful. That mandatory condition may not be done away with in the pretext that the same is procedural in nature. The Rule/ Rules of the High Court, 1952 have to be read along with very purpose of the rule to appreciate the consequence of non-compliance of that rule. Therefore, the submission of learned counsel for the petitioner regarding compliance of Rule 6 (c) of the High Court Rules, 1952 as a 'mockery of law' is an irresponsible and unacceptable submission inasmuch as the aforesaid rule has its loudable purpose and its compliance is adhere to in all the election petitions.

22. In the present case, the petitioner has admittedly not followed the rule 6 (c) of the Rules, 1952 as he has not deposited the required amount for publication in the newspaper and the purpose of publication in the newspaper is loud and clear as has been considered by the Apex Court from the very beginning to the effect that an election petition is not a matter in which the only persons interested are candidates who strove against each other at the elections but the public also are substantially interested in it and this is not merely in the sense that an election has news value. An election is not a suit between two persons, but is a proceeding in which the constituency itself is the principal part interested. Therefore, non-compliance of rule 6 (c) of the Rules, 1952 would vitiate the very purpose of filing election petition, hence, this election petition may be dismissed on the ground of aforesaid lapse alone i.e. non-compliance of rule 6 (c) of the Rules, 1952.

23. It is trite law that fraud vitiates every solemn act and if the fraud is committed on or before the Court, then the privy to it has committed an error which is unpardonable and has mislead the Court to gain favourable orders by deceit. In the above mentioned election petition, the petitioner has changed the page No.15, though page number not mentioned on that relevant page, captioned as prayer at the top of it, annexed after page No.14 and before page No.16 by fraudulent interpolation/ replacing of the page after filing of the election petition, that too without leave of this Court. The main copy of the prayer clause is typed whereas in the additional copy it appears to have done later on with blue ink.

24. The aspect of defect in memorandum of appeal etc. has been considered by the this Court in re: ***Lal Bahadur*** (supra) referring the dictums of Apex Court and also referring the various provisions of RP Act and C.P.C. On the basis of dictums of Apex Court, this Court in re: ***Lal Bahadur*** (supra) has held that in normal case the defect in pleadings including the defect in signing the same are curable. The present case is an election petition and Section 81 (3) of RP Act specifically provides for filing an election petition along with the copies attested by the petitioner. Section 86 of RP Act

provides that failure to comply with the provisions of section 81 of RP Act would result in rejection of election petition at the initial stage and even learned counsel for the petitioner has not prayed to correct those defects.

25. Therefore, in view of the dictum of Apex Court in re: ***Uday Shanker Triyar*** (supra), the aforesaid defect may be the reason to dismiss the election petition at the initial stage.

26. In view of the above, since the present petitioner has refused to deposit the amount required for publication of election petition and he may not be exempted from such publication, therefore, application for exemption from publication is rejected. Consequently, there is no publication made in the newspaper by the petitioner, which is a mandatory requirement in terms of rule 6 (c) of the Rules, 1952, therefore, the present election petition itself is not maintainable.

27. Accordingly, the instant election petition is dismissed. All the application are disposed of in terms of the aforesaid order.

28. No order as to costs.

[Before parting with, I appreciate the efforts and research done by Ms. Trisha Singh, Law Clerk Trainee attached with me and Sri Ayush Nigam, Law intern for finding out the relevant case laws applicable in the present case]

(2023) 2 ILRA 404
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2023

BEFORE

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

First Appeal from Order No. 357 of 2001
with
Cross Objection No. 70 of 2022

The Oriental Insurance Co. Ltd. ...Appellant

Versus

Lokesh & Anr. ...Respondents

Counsel for the Appellant:
Sri Manish Goyal, Sri Amaresh Sinha, Sri Anubhav Sinha

Counsel for the Respondents:
Sri S.S. Tewari, Sri A.K. Singh, Sri Komal Mehrotra, Sri S.S. Shukla, Sri V.K. Jaiswal, Sri Yogendra Pal Singh

A. Criminal Law - Motor Vehicles Act, 1988-Section 168-Compensation-Injury case-Claimant had sustained amputation of his left leg and sustained a permanent disability of 55%-Held Tribunal is right in holding that 55% permanent medical disability would translate into an equivalent functional disability-There is no infirmity in calculating annual loss of income and determining it at a figure of Rs. 21,600-Claimant would fall in age group of 21 to 25 years, for which appropriate multiplier prescribed is '18'; not '17'-Compensation towards expenses for future and current replacement of artificial limb has to be enhanced from Rs. 35,000 to Rs. 2 lacs-Sum of Rs. 50,000 awarded for mental and physical pain sustained on account of accident and loss of his job by claimant, estimated by Tribunal, is also unexceptionable-Claimant who was a young man of 22 years at a time of accident, he is certainly entitled to future prospects worked out on lost income-Age of claimant , which is below 40 years, for future prospects there has to be an addition to lost income of claimant to extent of 50%.(Para 1 to 31)

The appeal is allowed. (E-6)

List of Cases cited:

1. Sarla Verma (Smt.) & ors. Vs DTC & anr. (2009) 6 SCC 121

2. Shri Ram Kushwaha Vs U.P. St. Sugar Corp. Ltd. thru Gen. Mgr. (2015) 2 ADJ 578

3. Raj Kumar Vs Ajay Kumar & anr.. (2011) 1 SCC 343

4. United India Ins. Co. Ltd. Vs Sanjay Dixit (2022) 2 AWC 1596

5. Jagdish Vs Mohan & ors. (2018) 4 SCC 571

6. New India Assr. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC Online SC 822

7. National Ins. Co. Ltd. Vs Pranay Sethi & ors. (2017) 16 SCC 680

8. Abhuydya Sanstha Vs U.O.I. (2011) 6 SCC

9. Hari Narain Vs Badri Das (1963) AIR SC 1558

10. G. Narayanaswamy Reddy Vs Govt of Karnataka (1991) 3 SCC 261

11. Dalip Singh Vs St. of U.P. (2010) 2 SCC 114

12. Moti Lal Songara Vs Prem Prakesh @ Pappu & anr. (2013) 9 SCC 199

13. Amar Singh Vs U.O.I. & ors. (2011) 7 SCC 69

14. Kishore Samrite Vs St. of U.P. & ors.. (2013) 2 SCC 398

15. ABCD Vs U.O.I. & ors. (2020) 2 SCC 52

16. Pushpadevi M. Jatia Vs M.L. Wadhawan etc.(1987) 3 SCC 367

17. Shashi Vs Anil Kumar Verma (1995) 1 SCC 421

18. K.D. Sharma Vs SAIL & ors. (2008) 12 SCC 481

19. Dhananjay Sharma Vs St. of Har. & ors. (1995) 3 SCC 757

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

This judgement will dispose of First Appeal From Order No. 357 of 2001 and Cross Objection No. 70 of 2022.

2. The aforesaid appeal and the cross objection arise out of the impugned judgment and award dated 20.02.2001, passed by the Motor Accident Claims Tribunal/ XIII Additional District Judge, Ghaziabad rendered in MACP No. 699 of 1998.

3. The facts giving rise to this appeal are these:

On 30.09.1998 at about quarter past 3 o'clock in the afternoon, the claimant-respondent (for short, "the claimant') was riding his scooter bearing Registration No. UP14 J-1607 and proceeding from Village Chauda to Sector 25, NOIDA, then falling in District Ghaziabad. As the claimant reached near Sectors 21, 25, Truck bearing Registration No. DIG/2615, driven by its driver, rashly, negligently and at a high speed, approached from the side of Sector 31 and hit the claimant's scooter. In consequence of the accident, the claimant sustained grievous injuries rendering him permanently disabled. At the time the accident happened, the claimant was aged 22 years. He was on the brink of death. The claimant says that he was a trained technician and employed with Supertonics India Ltd., on the post of a Foreman. He was drawing a handsome salary. It is the claimant's case that on account of injuries sustained and the resultant permanent disability, he suffered mental agony and physical pain. He lost his job. Accordingly, in the claim petition before the Tribunal, he asked for a compensation in the sum of Rs.50 lacs.

4. Gora Lal, who was impleaded as opposite party No.1 in the claim petition is the owner of the offending vehicle. He put in a written statement before the Tribunal denying the claim. The stand taken was that on the fateful day, his driver was driving the offending vehicle with caution and at a slow speed. All of a sudden, the ill-fated scooter ridden by the claimant appeared on the scene. It was being driven rashly, negligently and at a high speed. The claimant applied brakes to save himself from being hit by a car that was moving ahead of the Truck. This resulted in the accident. It is also his plea that at the time of the accident, the claimant did not hold a valid driving license.

5. A separate written statement was filed on behalf of the appellant-Oriental Insurance Company India Ltd., who were opposite party No.2 to the claim petition. The appellant shall hereinafter referred to as, "the Insurers'.

6. It was pleaded on behalf of the Insurers that the compensation claimed is exaggerated. The accident occurred due to negligence of the claimant. The claim petition is bad for non-joinder. It was also the Insurers' case that at the time of the accident, the claimant did not hold a valid and effective driving license. There is also a plea that the claimant did not have a good income.

7. On the pleadings of parties, the following issues were framed, (translated into English from Hindi):

(1) Whether on 30.09.1998, at about 03 O' Clock near electric station crossing of Sector 21, 25, Noida, Police Station Dadri, District Ghaziabad, Truck No. DIG/2615, driven by its driver, rashly and at a high speed, hit the scooter bearing Registration No. UP14 J 1607, in consequence whereof the claimant sustained grievous injuries in the accident?

(2) Whether the accident occurred due to the claimant's negligence?

(3) Whether the scooter rider held a valid driving license at the time of the accident? If yes, its effect?

(4) Whether at the time of the accident, the truck driver held a valid driving license?

(5) To what compensation is the claimant entitled and from which opposite party?"

8. In support of his case, the claimant filed documents through a list, paper No.19-Ga, carrying medical bills and examined PW-1, PW-2 and PW-3 as his witnesses. On behalf of the Insurers, DW-1 has been examined.

9. Issues Nos. 1 and 2, that is to say, the issues about negligence of the driver of the offending vehicle and that relating to contributory negligence were both decided together by the Tribunal. The Tribunal held on both issues in favour of the claimant saying that the accident occurred solely on account of the negligence of the offending vehicle's driver wherein there was no contribution by the claimant.

10. Learned Counsel for the Insurers has assailed the findings of the Tribunal, saying that the Tribunal has ill appreciated the evidence regarding negligence and contributory negligence, while deciding Issues Nos. 1 and 2. It is submitted that the Tribunal has not considered the testimony of PW-1 and the site plan which vitiates its findings on issue Nos. 1 and 2. There is also criticism of the remarks by the Tribunal where it is said that there is

contradiction between the testimony of PW-1 and the site plan. A further criticism by the learned Counsel for the Insurers about the findings on these two related issues is that there is nothing in the testimony of the driver to show that there was no green light on the crossing. Likewise, though there is no mention about the absence of a green light on the crossing in the claimant's testimony, the presumption drawn by the Tribunal that there was no green light on the crossing is said to be based no evidence.

11. Learned Counsel for the claimant, on the other hand, has supported the Tribunal's findings and submitted that the Tribunal has correctly appreciated the evidence of the claimant, PW-1, going into details of the incident and reconstructing the scene of accident to find in the claimant's favour. It emphasized that PW-1 was cross-examined and his testimony having passed the grill of cross-examination, inference drawn from it by the Tribunal is unimpeachable. It is also emphasized that the testimony of PW-1 has also been thoroughly scrutinized by the Tribunal. DW-1 is the truck driver, who has spoken about a Maruti Car moving ahead of his truck, which crossed the green light on the stadium crossing. He has blamed the rider of the scooter for negligent driving, but the Tribunal has minutely examined his testimony comparing it to the site plan and holding it unreliable.

12. Upon hearing learned Counsel for the parties on this issue and perusing the records, this Court finds that the rider of the scooter and the driver of the offending vehicle are expected to speak in the witness box words that may not be absolutely truthful; but, these witnesses have been duly cross-examined. The Tribunal has rightly remarked that the testimony of the driver saying that the scooter applied brakes, because he wanted to avoid hitting the car, does not appear to be correct because the car had already crossed the green light on the crossing. There was, thus, no occasion for the scooter driver proceeding at right angles to avoid hitting the car. The Tribunal has also thoroughly examined the evidence of the claimant to hold that his testimony shows that he was proceeding from Village Chauda in the north-south direction, whereas the truck was approaching the crossing from the east. The Tribunal has indeed inferred rightly from the testimony that the claimant had seen the truck and manoeuvred his two wheeler to the left to avoid a collision, but the truck driver hit him on the left side of the scooter. The Tribunal has rightly remarked that the driver of the truck hitting the claimant on the left side while proceeding from the east towards the crossing shows that it was the truck driver who was negligent. A perusal of the site plan also shows that though the scooter had entered the crossing, but it had turned to its right and was hit on the left hand side by the truck proceeding from the east of the crossing.

13. Looking into the testimony of PW-1 and DW-1, both of which have been subjected to cross-examination and the site plan, this Court is of opinion that the findings of the Tribunal about the truck driver's exclusive negligence is well founded. There is no contributory negligence on the part of the claimant. Even otherwise, the driver of a heavy vehicle ought to exercise more caution when entering a crossing. The findings of the Tribunal, therefore, on Issues Nos.1 and 2 deserves to be affirmed.

14. Issues Nos. 3 and 4, which are issues raised by the opposite parties, have been decided in favour of the claimants

with issue No.3 not being pressed at all, and on issue No.4 there being a finding that the driving license of the driver of the offending vehicle has been produced, which has been acknowledged by the Insurers. Thus, there is no cavil about the said findings in the appeal.

15. On Issue No.5, the Tribunal has awarded a substantive compensation of Rs.3,67,200/-. To this, a sum of Rs. 1,50,000/- has been added for the medical expenses incurred, that are supported by Bills and vouchers. In addition, a sum of Rs.35,000/- has been awarded for the purposes of securing the artificial limb. It has been noted that a cost of Rs.11,000/- is required for replacement of the artificial limb every two years. Rs.50,000/- have been awarded towards mental and physical pain, physical disability, loss of job etc. A sum of Rs.50,000/- has been awarded towards future medical expenses, loss of amenities and the mental pain, yet to come.

16. In this manner, the Tribunal awarded a total sum of Rs. 6,52,200/- The claimant in his cross-examination says that the compensation awarded is far below his entitlement. One of the objections is that interest has been awarded only upon a sum of Rs.1,50,000/- instead of the entire compensation payable, which cannot be countenanced. The next objection by the claimant is that the sum of Rs.50,000/- under the head of future medical expenses is too low, considering the injuries and the future medical treatment required. The claimant ought to be awarded a sum of Rs. 2 lacs, looking to the injuries that he sustained. It is also argued that the sum of Rs.35,000/- granted towards compensation for the future regular change of the artificial limb is also too low, which would be a regular feature during the claimant's life. It is next submitted that the claimant has been declared 55% handicapped in the accident, on account of which he is unable to move anywhere and rendered incapable of doing any work to earn his livelihood. It is the claimant's submission that looking to the nature of his job, which was that of a technician a 55% physical handicap or medical disability, would translate into a 100% functional disability.

17. The Tribunal has accepted evidence about which there is not much cavil by the Insurers as well, that the claimant earned a monthly sum of Rs.3250/- by way of salary. He was a young man of 22 years. The claimant was a technician undertaking the work of electric motor winding. About this, the Tribunal has remarked that this is a kind of job that he can do even while being stationary. He need not move about to carry on his job. The Tribunal has then opined that notwithstanding the fact that the job that the claimant does can still be undertaken by him while being stationary, the fact that he has suffered a permanent disability would have a telling effect on his behaviour and mental outlook. It cannot be said whether he would be able to carry on with his work and earn his livelihood. The Tribunal has also taken note of the fact that he has been removed from his job on account of the permanent disability that he has sustained on account of the accident.

18. In the circumstances, the Tribunal has translated the 55% permanent disability into a numerical equivalent of functional disability. The claimant's salary was a sum of Rs.3250/- at the time when he suffered the accident. His loss of monthly income caused by the functional disability of 55%, has been determined at a sum of Rs. 1800/- per month. The annual loss of income has

been worked out to a sum of Rs. 21,600/-. Since the claimant was a young man of 22 years, the Tribunal has applied the multiplier of "17' to determine the total loss sustained by him about his future income at a figure of Rs.3,67,200/-. The other sums of money that have been added to it are those on account of medical expenses, future medical expenses, mental pain and agony faced and that to be suffered in future, besides compensation and permanent requirement of a biennial change of his artificial limb, as already noticed, hereinabove.

19. Learned Counsel for the Insurers has submitted that the compensation awarded by the Tribunal ought not to be enhanced contrary to what the learned Counsel for the claimant has urged in support of his case for enhancement.

20. Upon hearing learned counsel for the parties on the issue of enhancement, this Court finds that there is on record a medical certificate dated 15.04.1999, issued by the office of the Chief Medical Officer, Ghaziabad, signed by a team of three doctors which includes the Chief Medical Officer, besides an Orthopaedic Surgeon and an Eye Specialist. The said certificate indicates that the claimant had sustained amputation of his left leg and sustained a permanent disability of 55%. There is an attested photograph of the claimant, pasted on the certificate. It shows that the claimant's left leg has been amputated below the knee and he is almost without a functional left lower limb. No doubt, the claimant has sustained a serious and permanent disability at a very young age. The claimant is a technician, which involves physical exertion to undertake the job. Notwithstanding the fact that the work of electric motor winding can be done in a stationary position, this Court is of opinion that the Tribunal is right in holding that the 55% permanent medical disability would translate into an equivalent functional disability. The Tribunal has, therefore, rightly estimated the minimum loss of the claimant's income at the time, in the sum of Rs.1800/- per month. In determining the functional disability various factors have to be taken into consideration, which include the nature of the disability sustained in the accident, such as the loss of a limb etc. and the nature of the claimant's work before the accident, while inferring the functional disability from what is medically certified as the permanent disability.

21. In this regard, reference may be made to the decision of the Supreme Court in **Raj Kumar v. Ajay Kumar and Another 2011(1) SCC 343**, where it has been held:

12. Therefore, the Tribunal has to first decide whether there is any permanent disability and, if so, the extent of such permanent disability. This means that the Tribunal should consider and decide with reference to the evidence:

(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement;

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is, the permanent disability suffered by the person.

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning

capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred per cent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of "loss of future earnings", if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity."

22. In the opinion of this Court, there is no infirmity in calculating the annual loss of income and determining it at a figure of Rs.21,600/-.

23. However, so far as the multiplier of "17' is concerned, we are of the opinion that the Tribunal has erred there. Going by the table to adopt the proper multiplier set out in Paragraph No. 40 of the judgment in **Sarla Devi (Smt.) and Others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121**, the claimant would fall in the age group of 21 to 25 years, for which the appropriate multiplier prescribed is "18'; not "17'. The substantive loss of future income sustained by the claimant was, therefore, Rs.21,600/-.

24. So far as the medical expenses are concerned, that have already been incurred,

there is on record dependable documentary evidence about it. The opinion of the Tribunal in determining it at a figure of Rs.1,50,000/- is unassailable.

25. It has not been doubted or disputed before this Court that the claimant would indeed require replacement of his artificial limb every two years. The cost of the replacement at the time when the Tribunal heard the matter was Rs.11,000/-. That was a long time ago and the rising price index has to be born in mind while estimating the future expense on the replacement of this facility. In the Court's opinion, the compensation towards expenses for future and current replacement of the artificial limb has to be enhanced from Rs.35,000/- to Rs.2 lacs. The sum of Rs. 50,000/- awarded for the mental and physical pain sustained on account of the accident and the loss of his job by the claimant, estimated by the Tribunal, is also unexceptionable. However, the compensation awarded for the loss of future amenities and mental pain yet to come, would not be admissible in view of the fact that the claimant now seeks some addition to the substantive loss of income under the head of future prospects.

26. In **Raj Kumar** *(supra)*, it has been held:

"15. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may."

27. This Court is, therefore, of opinion that for the loss of amenities or loss of expectation of life or pain in the future, a token sum of Rs.2,000/- ought to be awarded instead of Rs.50,000/-.

28. Now, considering the award of future prospects, the claimant who was a young man of 22 years at the time of the accident, he is certainly entitled to future prospects worked out on the lost income. The issue about loss of future prospects in the case of an employee suffering a permanent disability on account of an accident, fell for consideration of the Supreme Court in **Jagdish v. Mohan and Others (2018) 4 SCC 571**. In that case, the claimant was a carpenter, aged 24 years when the accident happened. In the background of those facts, the Supreme Court relying on the decision of the Constitution Bench in **National Insurance Co. Ltd. Vs. Pranay Sethi, (2017) 16 SCC 680**, observed thus:

*"**13.** In the judgment of the Constitution Bench in Pranay Sethi (supra), this Court has held that the benefit of future prospects should not be confined only to those who have a permanent job and would extend to self-employed individuals. In the case of a self-employed person, an addition of 40 per cent of the established income should be made where the age of the victim at the time of the accident was below 40 years. Hence, in the present case, the appellant would be entitled to an enhancement of Rs. 2400/- towards loss of future prospects.*

***14.** In making the computation in the present case, the court must be mindful of the fact that the appellant has suffered a*

serious disability in which he has suffered a loss of the use of both his hands. For a person engaged in manual activities, it requires no stretch of imagination to understand that a loss of hands is a complete Civil Appeal No. 7750 of 2012, decided on 1 November 2012 deprivation of the ability to earn. Nothing - at least in the facts of this case - can restore lost hands. But the measure of compensation must reflect a genuine attempt of the law to restore the dignity of the being. Our yardsticks of compensation should not be so abysmal as to lead one to question whether our law values human life. If it does, as it must, it must provide a realistic recompense for the pain of loss and the trauma of suffering. Awards of compensation are not law's doles. In a discourse of rights, they constitute entitlements under law. Our conversations about law must shift from a paternalistic subordination of the individual to an assertion of enforceable rights as intrinsic to human dignity."

29. Though, the Supreme Court in **Jagdish** (supra) approved the addition of 40% of the established income towards future prospects in case of a self employed man, in the State of Uttar Pradesh future prospects would be governed by Uttar Pradesh Motor Vehicles Rules, 1998 (for short "the 1998 Rules').

30. In **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822.** In **Urmila Shukla (supra)**, it was held:

"9. It is to be noted that the validity of the Rules was not, in any way, questioned in the instant matter and thus the only question that we are called upon to consider is whether in its application, sub-Rule 3(iii) of Rule 220A of the Rules must be given restricted scope or it must be allowed to operate fully.

10. The discussion on the point in Pranay Sethi was from the standpoint of arriving at "just compensation" in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision inPranay Sethicannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated inPranay Sethicannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs."

31. Going by Rule 220-A(3) of the 1998 Rules and the age of the claimant, which is below forty years, for the future prospects there has to be an addition to the lost income of the claimant to the extent of 50%.

32. The award made by the Tribunal deserves to be revised and determined as follows:-

(i)Loss of Monthly Income (to the claimant) = 1800

(ii) Lost Monthly Income + Future Prospects (Lost Monthly Income x 50%) =1800 + 900 = 2700

(iii) Lost Annual Income (to the claimant) = 2700 x 12 = 32,400

(iv)Total Income Lost = Lost Annual Income x Applied Multiplier= 32400x18 = 5,83,000

(v) Medical Expenses = 1,50,000

(vi) Compensation towards expenses for future and current replacement of the artificial limb = 2,00,000

(vii)Sum awarded towards mental and physical pain = 50,000

(viii) Loss of amenities or loss expectations of life or pain in the future = 2,000

The total compensation would therefore, work out to a figure = 9,85,000

33. The impugned award is modified and it is ordered that the Insurance Company shall pay in compensation to the claimants a sum of Rs. 9,85,000/-. The aforesaid sum of money shall carry simple interest at the rate of 7% per annum from the date of institution of claim petition, until realization.

34. The sum of money already deposited with the Tribunal pursuant to the impugned award, or the interim order passed by this Court, shall be adjusted against the award. The other directions of the Tribunal shall remain intact.

35. In the result, FAFO No. 357 of 2001 is **dismissed** and Cross Objection No. 70 of 2022 stands partly **allowed**. Costs easy.

(2023) 2 ILRA 413
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2022
BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal from Order No. 1327 of 2015
with
First Appeal from Order No. 1925 of 2015
with
First Appeal from Order No. 1824 of 2016

The New India Assurance Co. Ltd. ...Appellant

Versus

Smt. Sunita Yadav & Ors. ...Respondents

Counsel for the Appellant:
Sri Kartikey Saran, Sri Ujwal

Counsel for the Respondents:
Sri Amit Kumar Sinha, Deepali Srivastava Sinha, Sri Vishnu Prakash Srivastava

A. Criminal Law - Motor Vehicles Act, 1988-Section 166-U.P. Motor Vehicles Rules, 1998-Rule 220 A(3)(i)-Determination of compensation-Fatal accident case-Deceased was aged about 28 years-He was proprietor of Tent House-Rs. 8,73,500/- awarded by Tribunal-enhancement sought-monthly income of deceased at Rs. 8000/- i.e. 96,000 p.a.-Future prospects taken at 50%-Deducted one-fourth towards personal expenses of deceased-Multiplier of 17 applied-Total loss of dependency assessed at Rs. 18,36,000-And also added Rs. 70,000 for various damages-Entitlement to compensation of Rs. 19,06,000 made-Alongwith interest @ 7% p.a. (Para 1 to 39)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. NIC Vs Pranay Sethi & ors. (2017) 16 SCC 680

2. Sarla Verma (Smt.) & ors. Vs DTC & anr. (2009) 6 SCC 121

3. New India Assr. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC Online SC 822

(Delivered by Hon'ble Ajay Bhanot, J.)

I. INTRODUCTION

1. The two appeals, namely FAFO No. 1327 of 2015 and FAFO No. 1925 of 2015 arise out of an award made by the learned Motor Accident Claims Tribunal/Additional District Judge, Allahabad1 in Motor Accident Claim Petition No.816 of 2013 dated 24.03.2015. The appeals have been filed by the Insurance Company and the claimants who are dependants of the deceased respectively.

2. The appeal, namely FAFO No. 1824 of 2016 arise out of an award made by the learned Motor Accident Claims Tribunal/Additional District Judge, Allahabad in Motor Accident Claim Petition No. 948 of 2013 dated 17.03.2016 by partly allowing the claim of the injured-claimant. The instant appeal has been filed by the injured-claimant.

3. The above said three appeals arise out of the same accident and are being decided by a common judgement.

II. Case of the claimants and respondents before the learned tribunal:

4. Briefly the case of the claimants before the learned tribunal was that the deceased Charan Singh died in an accident on 12.06.2013 which was caused solely by the rash and negligent driving of the driver of offending truck bearing Registration No. UP 70 J 9831. On the fateful day deceased Charan Singh was driving motorcycle bearing registration No. UP 73 D 0335 with Ghanshyam Singh riding pillion. Ghanshyam Singh suffered grievous injuries in the said accident. The offending vehicle was insured by New India Assurance Co. Ltd. The claimants are the dependants of the deceased. The deceased was 28 years of age at the time of his death.

III. Compensation awarded by the learned tribunal

5. The learned tribunal in the impugned award dated 24.03.2015 partly allowed the claim petition and awarded compensation which is depicted in tabulated form hereunder:

Sr.No.	**Heads**	**Amount Awarded by the tribunal**
1.	Monthly Income (A)	4,000/-
2.	Annual Income (B) (Ax12=B)	48,000/-
3.	Future Prospects (C)	50% (Rs. 24,000/-) 48,000+24,000= 72,000/-
4.	Deduction towards personal expenses (D) (1/3 of B)	1/3 of 24,000/- =72,000-24000/- = 48,000/-
5.	Annual Loss of dependancy (E) (B-D =E)	48,000
6.	Multiplier (F)	18
7.	Total loss of dependancy(E x F)	48000 x 18 = 8,64,000/-

8.	Conventional Heads (a) Loss of consortium (b) loss of Estate (c) Funeral Expenses	9500/-
9.	Total compensation	8,64,000 + 9500 =8,73,500/-
10.	Interest	7%

6. The compensation awarded to the injured by learned tribunal in the impugned judgement dated 17.03.2016 is depicted in tabulated form hereunder:

Sr.No.	**Heads**	**Amount Awarded by the tribunal**
1.	Medical expenses	1,09,925.19/-
2.	Special diet	6000/-
3.	Grievous injuries	5000/-
4.	Loss of income	6000/-
5.	Total compensation	1,09,925.19 + 6000 + 5000 + 6000= 1,26,925/-
6.	Interest	7%

7. The appeals filed by the claimants and the injured respectively seek enhancement of compensation. The Insurance Company in appeals has assailed the quantum of compensation as being excessive.

IV. Submissions of learned counsels for the parties:

8. Shri Ujwal, Advocate holding brief of Shri Kartikeya Saran, learned counsel for the appellant-Insurance Company in FAFO No.1327 of 2015 submits that though many grounds have been pleaded in the memo of appeal, only three grounds are being pressed. Firstly, the tribunal erred in law by fixing the entire liability on the appellant-insurance company though it was a case of contributory negligence. Secondly, the income of the deceased was not established. Thirdly, an incorrect multiplier was applied to the facts of the case.

9. Ms. Aruna Singh, learned counsel holding brief of Mrs. Archana Singh, learned counsel for the appellant-Insurance Company in FAFO No.1824 of 2016, contests the quantum of compensation as being excessive awarded by the learned tribunal to the injured who suffers injuries in the said accident.

10. Shri Amit Kumar Sinha, learned counsel for the claimants-respondents refuting the aforesaid submissions and contends that it was not a case of contributory negligence and the entire liability has to be borne by the truck owner/insurance company. The income of the deceased was duly established by oral and documentary evidence, but the learned tribunal failed to consider the same. The compensation is liable to be enhanced.

V. Issues for Consideration:

11. After advancing their arguments, learned counsels for the respective parties

agree that only the following questions fall for consideration in these appeals:

(i) Whether the accident resulted from contributory negligence from the part of the driver of the motor vehicle and the Insurance Company was not liable to pay the entire amount?

(ii) Whether the learned tribunal while determining the compensation lawfully computed the amounts under these heads: income, future prospects, multiplier, conventional head.

VI. Issue of contributory negligence

12. The claimants introduced PW-2 Ghanshyam Singh an eye witness to prove the accident and negligence of the offending vehicle. PW-2 Ghanshyam Singh testified before the learned trial court that he had witnessed the accident and that the driver of the offending truck drove rashly and negligently collided with the rear side of the motorcycle which the deceased was driving. The deceased succumbed to the injuries sustained in the accident. The testimony of PW-2 was not impeached under cross examination.

13. The vehicle inspection report opines that all parts of the motorcycle were badly damaged.

14. The comprehensive damage to the motorcycle is corroborated by the testimony of PW-2. The deposition of PW-2 is consistent with the assertions in the claim petition.

15. The learned tribunal which had the advantage of observing the demeanour of the witness found PW-2 to be reliable and believed his testimony. There is nothing in the arguments or the records which persuades this Court to take a different view in the matter.

16. Evidence in the record establishes that sole negligence was that of the offending truck driver. The deceased motorcycle driver was driving prudently. The rash driving and uncontrollable speed of the offending truck gave the motorcycle driver no time or opportunity to take evasive measures to prevent the accident or save himself. The deceased motorcycle cannot be faulted for the accident. This is not a case of contributory negligence. The driver of the offending truck was solely culpable for causing the accident, and the insurance company is fully liable to pay the compensation.

17. A head on collusion does not ipso facto mean that it is a case of contributory negligence. Contributory negligence occurs when both the parties drive negligently, flout traffic rules, or fail to observe norms of safe driving. Contributory negligence implies that both parties are culpable for the accident. In such cases, the courts have to assess the responsibility of each party in causing the accident, and apportion the liability on the parties accordingly.

18. The learned tribunal found for the claimants and against the insurance company/truck owner of the offending vehicle on the issue of culpability for the accident and liability to pay the compensation. There is no infirmity in the appraisal of evidence and consideration of pleadings material in the record by the learned tribunal. The entire liability to pay the compensation was rightly and lawfully fixed upon the insurance company by the learned tribunal. The findings of the learned tribunal on this issue are affirmed.

VI. Number of dependants and deduction towards expenses

19. The dependants of the deceased in FAFO No. 1925 of 2015 are:

Sr. No.	Name	Age	Relation
1.	Ram Sureman	64	Father
2.	Smt. Shivpati	62	Mother
3.	Smt. Sunita Yadav	27	Wife
4.	Krishna Yadav	4	Son

20. Learned counsel for both the parties agree that the appropriate deduction in the facts and circumstances of this case towards personal expenses would be 1/4th of the income of the deceased.

VII. Issue of Income of the deceased:

21. The wife of the deceased entered the witness box as PW-1 and deposed that the deceased earned Rs.10,000/- per month from a private business and Rs. 5,000/- by selling milk. The issue of income from sale of milk was not pressed before this Court by the claimants as there is no evidence to support the same. The deceased ran a business under the name and style of Army Tent House. Number of receipts from the cash book were introduced as evidence to establish the income of the deceased. The PW-1 proved the receipts of Army Tent House. The said receipts were never challenged, nor was PW-1 confronted on the genuineness of the receipts in the witness box.

22. The learned tribunal in the impugned award found that in absence of registration certificate of the said business, the veracity of the aforesaid receipts was doubtful. The learned tribunal opined that the tent house business is not a perennial business but a seasonal one. The learned tribunal categorized the deceased as an unskilled worker and fixed his income @ Rs.4,000/- per month.

23. The learned tribunal neglected to consider the said receipts of the Army Tent House. The learned tribunal pivoted its findings on failure of the claimants to produce registration certificate of the business. This approach of the learned tribunal vitiate the award. Many business in the country like one of this nature are part of the informal sector of the economy. Such businesses are not very well documented. Lack of formal registration of the business cannot influence determination of the income of the deceased.

24. I am afraid that the learned tribunal was led into error while determining the income of the deceased.

25. The receipts of the Army Tent House recording client orders and payments were duly proved. In the absence of a credible challenge the authenticity of the receipts cannot be called into question. The said receipts depict a business that was of a perennial nature, and that the clientele was a loyal one. Events and celebrations are regular features in the society and are not intermittent fixtures.

26. The tent house business requires high degrees of organisational, logistical marketing skills. The fact that the deceased ran a successful tent business evidences his entrepreneurial skills and managerial expertise. The deceased cannot be classed as an unskilled workman.

27. The exact income of the deceased is not established by the adduced evidence. The enquiry of the court will examine various relevant aspects while assessing the deceased's income. The notified minimum

wage is a good start point but not the final figure.

28. The minimum wage of a skilled labour at the relevant time as notified by the State Government was Rs. 6296/- per month. However, the notified minimum wages would not give a complete picture in the facts of the case. The perennial nature of the business, existence of faithful clients and the entrepreneurial skills of the deceased have to be factored in while determining his income. The testimony of PW-1 to the extent it has been found to be reliable will also guide the Court in evaluating the income of the deceased.

29. In the wake of the preceding discussion, the Court finds that the income of the deceased is fixed @ of Rs. 8,000/- per month.

VIII. Future Prospects

30. The future prospects are liable to be calculated in accordance with the Uttar Pradesh Motor Vehicles Rules, 19982. Rule 220A-3(i) of the Rules is relevant and is reproduced hereunder:

"(3) The future prospects of a deceased, shall be added in the actual salary or minimum wages of the deceased as under--

(i) Below 40 years of age : 50% of the salary."

31. The UP Rules, 1998 came up for consideration before the Supreme Court in **New India Assurance Co. Ltd. vs. Urmila Shukla and others**3. In **Urmila Shukla (supra)** upon consideration of various judgements including **National Insurance Company Ltd. Vs. Pranay Sethi and others**4 held:

"10. The discussion on the point in Pranay Sethi was from the standpoint of arriving at "just compensation" in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in Pranay Sethi cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in Pranay Sethi cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. ***If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid."*** (emphasis supplied)

32. The Rules of the Uttar Pradesh Motor Vehicles Rules, 1998 were not under consideration before the Supreme Court in **Pranay Sethi (supra) or Sarla Verma (Smt) and others Vs. Delhi Transport Company and another**5. Future prospects in Pranay Sethi (supra) were determined without noticing the U.P. Rules, 1998. This fact was adverted to in **Urmila Shukla (supra)**:

"8. It is submitted by Mr. Rao that the judgment in Pranay Sethi does not show that the attention of the Court was invited to the specific rules such as Rule 3(iii) which contemplates addition of 20% of the salary as against 15% which was stated as a measure in Pranay Sethi. In his submission, since the statutory instrument has been put in place which affords more advantageous treatment, the decision in Pranay Sethi

ought not to be considered to limit the application of such statutory Rule."

33. The U.P. Rules,1998 are statutory in nature and their operation is not stymied by **Pranay Sethi (supra)**. The U. P. Rules, 1998 have the force of law and shall apply with full force in appropriate cases. The U.P. Rules, 1998 are more beneficial for the claimants than the provisions made in ***Pranay Sethi (supra)*** for them. The holdings in Pranay Sethi (supra) can not dilute the advantages conferred by U.P. Rules, 1998 upon the eligible beneficiaries.

34. The preceding legal backdrops entitles the claimants-appellants to 50% enhancement in wages towards future prospects, consistent with the UP Rules, 1998. The necessary changes in the award shall be accordingly made.

IX. Multiplier:

35. The age of the deceased was 28 years at the time of his death. Multiplier of 17 has been correctly applied by the learned tribunal and is in line with **Pranay Sethi (supra) and Sarla Verma (supra).**

X. Calculation of Conventional Heads:

36. The amount determined under conventional heads in the impugned award is at variance with **Pranay Sethi (supra)**. The conventional heads were fixed in **Pranay Sethi (supra)** by holding as under:

"54. .....The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- funeral expenses should be Rs. 15,000/-, Rs. 40,000/- And Rs. 15,000/- respectively."

37. The figure under conventional heads determined in ***Pranay Sethi (supra)*** shall be applicable to the facts of this case. The award is modified accordingly.

XII. Interest

38. Interest of 7% and the manner of payment decided by the learned tribunal is just and lawful and does not call for interference.

XII. Determination of Compensation to which claimants are entitled:

39. In wake of the preceding discussion, the amount of compensation to which the claimants are entitled and are hereby awarded is tabulated hereunder:

i. Date of Accident - 12.06.2013

ii. Name of Deceased - Charan Singh

iii. Age of the deceased - 28 years

iv. Occupation of the Deceased - Proprietor Tent House

v. Income of the deceased - 8,000/- per month

vi. Name, Age and Relationship of Claimants with the deceased:

Sr. No.	**Name**	**Age**	**Relation**
1.	Ram Sureman	64	Father
2.	Smt. Shivpati	62	Mother
3.	Smt. Sunita Yadav	27	Wife
4.	Krishna Yadav	4	Son

vii. Computation of Compensation

Sr. No.	Heads	Amount (in Rupees)
1.	Monthly Income (A)	Rs. 8000/-
2.	Annual Income (B)(A x 12 = B)	Rs. 96,000/-
3.	Future Prospects (C)	50% of 96,000/- =48,000/-
4.	Annual Income + Future Prospects (B+C=D)	96,000+ 48,000/-= 1,44,000/-
5.	Deduction towards personal expenses (E) (1/4 of D)	1/4 of 1,44,000/- = 36,000
6.	Annual Loss of dependancy (F) (D-E = F)	1,44,000- 36000= 1,08,000/-
7.	Multiplier (G)	17
8.	Total loss of dependancy (F x G)	1,08,000/- x 17 = 18,36,000/-
9.	Conventional Heads: (a) Loss of consortium - (b) Loss of Estate - (c) Funeral Expenses-	70,000/-
10.	Total compensation	18,36,000 + 70,000 = 19,06,000/-
11.	Interest	7%

FAFO No. 1824 of 2016 (M/S The New India Assurance Co. Ltd. Vs Ghanshyam Singh Yadav and 2 others)

40. The FAFO No. 1824 of 2016 arises from the compensation paid to the injured in the accident. The injured has been awarded a compensation of Rs.1,26,925/- towards medical expenses. A break up of the compensation is as under :-

1. Medical expenses - Rs. 1,09,925/-

2. Special diet and Nourishment - Rs. 6,000/-

3. Grievous injuries - Rs. 5,000/-

4. Loss of income - Rs. 6,000/-

41. In the aforesaid case, the learned tribunal found that the testimony of the driver was inconsistent with the pleadings taken by the insurance company and the truck owner in the written statement. The learned Tribunal found that the injured had

sustained grievous injuries in the accident which led to temporary unemployment. The injury did not suffer any permanent disability. The Tribunal has awarded the compensation under various heads including medical expenses, grievous injuries, loss of income, as seen above. The figures are re-decided in view of the aforesaid findings. The medical evidences are corroborated by the records and hence need no alteration. However the deceased shall be entitled to the following amounts under various heads:

Heads	Entitled amount (in Rupees)
1. Special diet and nourishment	20,000/-
2. Loss of income	30,000/-
3. Grievous injuries	20,000/-p
4. Interest	7%

The award dated 17.03.2016 which is the subject matter of FAFO 1824 of 2016 is modified accordingly.

XIII. Conclusion & Directions:

42. In view of the above, the appeal filed by the Insurance Company viz. First Appeal From Order No. - 1824 of 2016 is dismissed.

43. The appeal filed by Insurance Company and the claimants viz. First Appeal From Order No.- 1327 of 2015 and First Appeal From Order No. 1925 of 2015 are partly allowed to the extent set out in the judgment.

44. The amount of compensation which the claimants have been awarded shall be deposited by the Insurance Company within a period of three months before the learned tribunal. Thereafter the learned tribunal shall release the amount to the claimants without delay. The amount already disbursed to the claimants (if any) shall be adjusted.

45. The amount deposited by the Insurance Company before this Court shall be transmitted to the learned tribunal which shall release the same in favour of the claimants as part of the compensation determined in this appeal.

(2023) 2 ILRA 421
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2023

BEFORE

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

Second Appeal No. 2710 of 1984

Irshad Ahmad ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri Arpit Agrawal, Sri Ravi Kiran Jain, Sri B.D. Misra, Sri R.B.D. Mishra, Sri R.G. Prasad, Sri R.S. Mishra, Sri S. Hasnain

Counsel for the Respondents:
Sri V.K. Nagaich(S.C.), Sri Amit Kumar, Sri R.N. Singh, Sri R.N. Singh, Sri S.N. Singh

A. Civil Law -Civil Procedure Code,1908-Section 11-Res-judicata-Judgment of Revenue Court in appeal while remanding matter to Court of first instance in suit filed by plaintiff u/s 229-B, operating as res judicata in present suit for injuction about nature of land does not arise-Judgment of Addl. Commissioner in appeal arising from declaratory suit earlier instituted by plaintiff is res judicata between plaintiff and defendants on point

alone that suit property had a pajawa on it and was, therefore not land within the meaning of Section 3(5) of Consolidation Act-It is for this reason that Addl. Commissioner held that suit would not be barred by section 49 of Consolidation Act-Nevertheless, Additional Commissioner remanded suit for trial afresh setting aside decree of Trial Court, dismissing it on decision of a preliminary issue about bar u/s 49-Finding of Addl. Commissioner recorded in order of remand is only that land is not one that could be consolidated in a chak, as it was not cultivable-Addl. Commissioner did not hold that Pajawa was a building as envisaged u/s 9 of Act-If he had done so, he would have dismissed suit or directed a return of plaint for presentation to Civil Court-Remand of suit by Addl. Commissioner shows that though he found pajawa to be a structure that rendered suit property not 'land' within meaning of section 3(5) of C.H. Act so as to attract bar of Section 49, he still thought that Revenue court had jurisdiction to try plaintiff's suit u/s 229-B of Act, where plaintiff would have to prove whether suit property had a building on it within meaning of Section 9 of Act, so as to lead to its settlement with him-Upon remand, plaintiff ought to have pursued suit before Revenue Court for purpose of declaration of his title on plea that a Pajawa was a building, settled with him under section 9 of the Act on date of vesting-But, plaintiff upon remand by Commissioner to Assistant Collector, apparently abandoned cause before Revenue Court and instituted present suit before Civil Court, and that too, for an injunction simplicitor-Principle of res judicata will not be applicable.(Para 1 to 66)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Jharkhand St. Housing Board Vs Didar Singh & ors. (2019) 17 SCC 692

2. Anathula Sudhakar Vs P. Buchi Reddy (Dead) by LRs & ors. (2008) 4 SCC 594

3. Kayalulla ParambathMoidu Haji Vs NamboodiyilVinodan (2021) 6 AWC 5651 (SC).

4. T.V Ramakrishna Reddy Vs M. Mallappa & anr. (2021) AIR SC 4293

5. Triloki Nath Vs Ram Gopal & ors. 1974 RD 5

6. Ghanshiam Das Vs Dabi Prasad & anr. (1966) SC 1998

7. Nawand Ram & anr. Vs Gaon Samaj Rura & anr. (1961) ALJ 910

8. Devi Prasad Vs Ghanshiam Dass& anr. (1960) SCC OnLine All 150

9. Ghanshiam Das Vs Debi Prasad

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

This is a plaintiff's appeal arising out of a suit for permanent prohibitory injunction.

2. Original Suit No. 441 of 1979 was instituted by Irshad Ahmad against the State of U.P., represented by the Collector, Muzaffar Nagar and the Town Area Committee, Burhana, District Muzaffar Nagar, represented by its Secretary, praying for a permanent injunction to the effect that the defendants be forbidden from interfering with the plaintiff's peaceful possession in the suit property perpetually.

3. The facts giving rise to the appeal are these:

Irshad Ahmad (for short, 'the plaintiff') instituted a suit before the Munsif of Muzaffar Nagar with a case that he had his Pajawa (an indigenous brick-kiln), located in Khasra No. 3299, admeasuring 1 bigha 8 biswa and Khasra No. 3300, admeasuring 10 biswa, situate in the Town and Tehsil Burhana, District Muzaffar Nagar. The said land was the plaintiff's ancestral property,

that was included in Khewat No. 19, Mahal Abdul Alam. The said property shall hereinafter be called 'the suit property'. It is the plaintiff's case that the Pajawa is situate in the suit property since a very long time, and, is recorded as such, in the revenue records. In Khasra No. 3299, the plaintiff's great grandfather had got a pucca well sunk, that bears a stone engraving of his name. The suit property does not fall within the definition of land envisaged under Section 3(14) of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (for short, 'the Act').

4. In the days gone by, land of Khasra No. 3299 was cultivated and in order to irrigate the land, the well last mentioned was sunk. The State of U.P., represented by the Collector, Muzaffar Nagar and the Town Area Committee, Burhana, hereinafter referred to as 'defendant Nos. 1 and 2, respectively, have neither title nor possession to the suit property and it is the plaintiff, who is in possession of the same. It is the plaintiff's case that without any right, defendant Nos. 1 and 2 want to interfere with the plaintiff's peaceful possession in the suit property. The plaintiff instituted a declaratory suit under Section 229-B of the Act, but the suit property being not land within the definition of Section 3(14) of the Act, the suit was dismissed.

5. The plaintiff questioned the Trial Court's judgment vide Appeal No. 303 of 1978 preferred to the Commissioner of the Division. The Commissioner by his order dated 27.04.1979 remanded the suit for trial. It was held that the suit property was not land under Section 3(5) of the Uttar Pradesh Consolidation of Holdings Act, 1953 (for short, "the Consolidation Act'), and, therefore, the provisions of the said Act, are not attracted, including those of Section 49. It is in these circumstances, the plaintiff says that he instituted a suit for injunction before the Civil Court. It is also the plaintiff's case that he served two notices dated 09.05.1979 upon defendant Nos. 1 and 2 and these were served on 15.05.1979.

6. About defendant Nos. 3 to 10 to the suit, who are not parties to this appeal, for reasons that will shortly be indicated, it was averred that the said defendants have no right in the suit property. It was also averred that defendant Nos. 3 to 10 have executed a conveyance of sorts, called a dastbardari of their share in the plaintiff's favour, who are now owners of the entire suit property. It may be remarked that there is no relief by way of injunction claimed against defendant Nos. 3 to 10. It is lastly averred by the plaintiff that defendant Nos. 1 and 2 are, despite the plaintiff's asking, persistent in their endeavour to take forcible possession of the suit property and interfering with his peaceful possession.

7. Defendant Nos. 1 and 2 have filed a joint written statement. It is their case that the plaintiff has instituted the suit stating incorrect facts. According to these defendants, the suit property is vacant for the last 30 years and banjar in character. Neither the plaintiff nor anyone else has a Pajawa located there. The suit property is not in the plaintiff's possession. It is the defendants' case that there was no Pajawa situate in the suit property, either on the date of vesting under the Act or thereafter. The suit property was vacant and barren (banjar), and, therefore, under the law, defendant Nos. 1 and 2 are owners thereof. It is the defendants' objection that the plaintiff has not pleaded as to how he got title to the suit property. Therefore, the suit

is not maintainable. The plaintiff is not in possession of the suit property. As such, the suit is barred by Sections 34, 38 and 41 of the Specific Relief Act, 1963. The Civil Court has no jurisdiction to try the suit. Defendant Nos. 1 and 2 have prayed that the suit be dismissed with special costs.

8. Defendant Nos. 1 and 2 have filed an additional written statement, where they have come up with a case that neither the plaintiff nor defendant Nos. 3 to 10 have any right in the suit property nor have they been holders of its title ever in the past. It is averred that the suit property is recorded in the revenue records as *Pajawa* and *banjar.* Defendant Nos. 1 and 2 are owners in possession of the suit property. At the time of abolition of *zamindari,* there was no Pajawa and on the date of vesting, the said property was vacant and barren *(banjar*). The defendants have, therefore, urged that the suit be dismissed with costs.

9. A separate written statement was put in on behalf of defendant Nos. 3 to 10, bearing paper No. 83-Ka. It is the said defendants' case that the suit property was originally owned by one Noor Mohammad, a common ancestor of the plaintiff and defendant Nos. 3 to 10. As such, defendant Nos. 3 to 10 are co-sharers and co-owners in possession of the suit property along with the plaintiff. These defendants have taken a stand that they have never executed any kind of a conveyance of their share in the plaintiff's favour. They are, therefore, entitled to their share in the suit property in accordance with law. In the year 1974, the plaintiff asked defendant Nos. 3 to 10 to institute a suit regarding the suit property. For the purpose, the plaintiff came over to the said defendants and obtained their signatures on some papers. He secured their signatures on a blank paper as well. It was represented that the signatures of defendant Nos. 3 to 10 were required for the purpose of instituting a suit to secure the parties' rights in the suit property. It is also the case of defendant Nos. 3 to 10 that a later inspection of the record revealed that the plaintiff had defrauded them. Behind their back, the plaintiff has got his exclusive rights recorded in the suit property.

10. On the pleadings of parties, the Trial Court framed the following issues (translated into English from Hindi):

"1. Whether the plaintiff is the owner in possession of the property in dispute? If yes, its effect?

2. Whether the provisions of the U.P. Z.A. & L.R. Act apply to the property in dispute as described in the plaint? If not, its effect?

3. Whether the suit is barred by Section 80 CPC and Section 106 of the Transfer of Property Act?

4. Whether the suit has been undervalued and the court-fee paid insufficient?

5. Whether the Court has jurisdiction to try the suit?

6. Whether the suit is barred by Sections 34, 38 and 41 of the Specific Relief Act?

7. To what relief is the plaintiff entitled?

8. Whether defendant Nos. 3 to 10 hold title to the suit property? If yes, its effect?"

11. The Trial Court found for the plaintiff on Issues Nos. 1 and 2. Issue No. 3 was not pressed on behalf of defendant Nos. 1 and 2, and, therefore, decided in the plaintiff's favour. Issue No. 4, which relates to valuation and the proper court-fee payable, was disposed of vide order dated

25.04.1980, that was made part of the judgment. There is nothing decided against the plaintiff by the Trial Court in answering the said issue. Issue No. 5 also appears to have been decided earlier, and apparently, in the plaintiff's favour. So far as Issue No. 6 is concerned, the defendants did not address the Court on it and it was, therefore, decided against them. So far as Issue No. 8 is concerned, it was decided in favour of defendant Nos. 3 to 10 and against the plaintiff holding that they were co-sharers in the suit property and also managing the Pajawa therein. The suit property was held to be ancestral and inherited by all.

12. On these findings, the Trial Court decreed the suit against defendant Nos. 1 and 2, injuncting them from interfering with the peaceful possession of the plaintiff and defendant Nos. 3 to 10 in the suit property.

13. The Trial Court's decree was appealed by defendant Nos. 1 and 2 vide Civil Appeal No. 81 of 1981. The plaintiff also appealed the Trial Court's decree vide Civil Appeal No. 70 of 1981, assailing the findings recorded on Issue No. 8 inter se the plaintiff and defendant Nos. 3 to 10.

14. It appears that the two civil appeals were assigned to the 8th Additional District Judge, Muzaffar Nagar. So far as Civil Appeal No. 70 of 1981 is concerned, there was a compromise between the plaintiff and defendant Nos. 3 to 10, with the said defendants acknowledging the plaintiff's possession in the suit property. A formal compromise was filed and verified. Civil Appeal No. 81 of 1981 was, however, heard and determined on merits.

15. The Lower Appellate Court decided both the appeals by a common judgment but separate decrees dated 21.09.1984, whereby Civil Appeal No. 70 of 1981 preferred by the plaintiff was disposed of in terms of the compromise, whereas Civil Appeal No. 81 of 1981 preferred by defendant Nos. 1 and 2 was allowed, the Trial Court's judgment set aside and the suit dismissed.

16. Aggrieved, the plaintiff has instituted the present second appeal.

17. The appeal was admitted to hearing on 31.10.1984 by this Court by a reference made to Substantial Questions of Law Nos. 2, 5 and 6, as mentioned in the memo of appeal. These questions were not formulated. This Court before commencement of hearing, however, recorded the aforesaid questions in the order dated 22.04.2022, whereon the appeal was admitted. It must be clarified here that in the order dated 22.04.2022, the questions mentioned at serial No. 4 was not one of the questions on which the appeal was admitted vide order dated 31.10.1984. To that extent, the order dated 22.04.2022 must be taken to be corrected. This Court must record that before proceeding with the hearing on 22.04.2022, we formulated another three substantial questions of law, numbered as 5, 6 and 7. If the seriatim of these questions were corrected, considering that Question No. 4 mentioned in the order dated 22.04.2022 was never regarded as one of the substantial questions of law involved, there would be a reduction in serial number of questions after Substantial Question Law No. 3 by one. However, for the ease of reference, substantial questions of law would be dealt with going by the serial number in the order dated 22.04.2022. Of course, Question No. 4

would not at all be referred to or set out in this judgment.

18. It is also imperative to notice that after the hearing had proceeded on 22.04.2022 and 29.04.2022, and resumed on 05.05.2022, it was found by this Court that one more substantial question of law was required to be formulated. It was, accordingly, formulated and recorded in the order dated 05.05.2022.

19. The following substantial questions of law were formulated in this appeal:

1. Whether the land in dispute being entered as Pajawa in the revenue records of 1359 Fasli and much before that, a fact proved by documentary evidence of the appellant as also the admission made by the respondents, the property in dispute could be said to be "land" within the meaning of Section 3(4) of U.P. Act 1 of 1951?

2. Whether the lower appellate court committed an error apparent in making an observation that in the suit under Section 229-B of the Act, the Town Area Committee was not a party?

3. Whether the judgment rendered in Suit no.6 under Section 229-B U.P.Z.A & L.R. Act, would operate as res judicata so far as the question of the nature of property in dispute is concerned.?

5. Whether the lower appellate Court entered into an irrelevant issue as to the nature of the land subsequent to the enforcement of U.P. Act 1 of 1951?

6. Whether the lower appellate Court has ignored the material part of the testimony of the plaintiff appellant that Pajawa was different from a brick kiln which did not oblige him by law to take out a licence from Zila Parishad to establish and run it?

7. Whether a suit for permanent injunction forbearing the defendant from interfering with the plaintiff's possession can be decided without framing an issue regarding actual physical possession of parties?

8. Whether in a case where the plaintiff's title is under a cloud, it is imperative to sue for declaration and a suit for injunction simplicitor would not be maintainable?

20. At the hearing of this appeal, that has continued across a number of days, the parties have advanced their submissions on Substantial Questions of Law Nos. 2, 3 and 8, and not on the others. This appeal was, accordingly, heard on the aforesaid substantial questions of law. It must also be recorded that pending this appeal, the plaintiff passed away and his heirs and LRs, who are appellant Nos. 1/1, 1/2, 1/3 and 1/4 to the appeal, were substituted in accordance with the order dated 06.02.2014. These heirs and LRs of the plaintiff too shall be referred to in this judgment as 'the plaintiff'.

21. Heard Mr. Arpit Agrawal, learned Counsel appearing on behalf of the plaintiff, Mr. V.K. Nagaich, learned Standing Counsel appearing on behalf of defendant No.1 and Mr. Amit Kumar, learned Counsel appearing on behalf of defendant No.2.

Findings of the Trial Court

22. The findings of the Trial Court on which the event turned are those recorded on Issues Nos. 1 and 2. The Trial Court considered the evidence of PW-2 and PW-3 to hold that these persons had spoken convincingly in their testimony that there was a Pajawa on the suit property. It has

been remarked that PW-2 has testified to the effect that he had bought bricks made in the plaintiff's Pajawa, and further, that the witness had personal knowledge about the existence of this Pajawa for the past 50 years that he had seen being worked by the plaintiff's ancestors. PW-2's testimony was also noticed about the existence of the well in Khasra No. 3299, part of the suit property with the name of the plaintiff's ancestors engraved thereon. The testimony of PW-2 has also been noticed as one supporting the plaintiff's stand, crediting the witness with impartiality, because he belonged to a different village. The Trial Court also took into consideration Ex. 4 - a copy of the Khatauni for the Fasli Years 1383-1386 and another document, Ex. 5, being a Khasra for the Fasli Year 1357. Another document considered was Ex. 6, being a copy of the Khasra for the Fasli Year 1325. Still another document that was considered is a copy of the Khasra for the Fasli Year 1357. This document does not appear to have been exhibited. There is a reference to paper Nos. 56-C to 66-C without any reference being there in the Trial Court's judgment about the description or the character of these documents and how they precisely bear on the issue.

23. From all this evidence - documentary and oral, the Trial Court drew an inference that the suit property has been utilized as a Pajawa since long. The Trial Court also took note of the fact that despite denial by defendant Nos. 1 and 2, the Additional Collector, in proceedings for correction of records, had directed the nature of the plot on the basis of reports of the Lekhpal and the Supervisor Kanoongo to be recorded as Pajawa. The Trial Court has observed that the revenue entry, which was made under the Additional Collector's orders, may not be conclusive about the nature of the land, but it was weighty evidence, which could be dislodged if the defendants produced evidence in rebuttal.

24. The Trial Court noted that defendant Nos. 1 and 2 did not produce any convincing evidence to displace what the Additional Collector had directed to be recorded. There is also a remark by the Trial Court that considering the statements of the defendants' witness, Prem Chand, it appears that he had never seen the suit property. The witness was a Secretary of the Town Area Committee, who held the post since the year 1980. The Trial Court opined that it is for the said reason that the witness had deficient knowledge about the suit property. The other witness examined on behalf of the defendants, Ram Chand was an employee of the Town Area Committee and has said that he had seen one Devi Sahai work a Pajawa on the suit property. The Trial Court has remarked that there is no such case, about which the witness has spoken. In these circumstances, the Trial Court answered Issue No. 1 in the plaintiff's favour.

25. Regarding Issue No 2, the Trial Court for the most part examined whether a Pajawa would fall in the definition of a "building', so that upon enforcement of the Act, the building vested in the erstwhile *Zamindar*, that is to say, the plaintiff's ancestor. The Trial Court looked into the law relied upon by defendants Nos. 1 and 2 to say that *Pajawa* would not be a building unless there is a boundary wall on all sides, covered by a roof. The Trial Court held that the decision relied upon by defendant No. 1 reported in **1966 RD 310** did not help the said defendant's case, because it only defined a building and never *dealt with the case of a Pajawa. In the opinion of the*

Trial Court, the site of the Pajawa would not vest in the State, but settle with the *Zamindar*, to wit, the plaintiff's ancestor.

26. It is primarily on these findings that the Trial Court decreed the suit.

Findings of the Lower Appellate Court

27. The Lower Appellate Court in writing its judgment of reversal has also dealt with Issue Nos. 1 and 2 albeit without formally framing points for determination. Virtually, the Lower Appellate Court has treated the issues as points to be dealt with. The case of parties has been substantially considered by the Lower Appellate Court while reversing the findings of the Trial Court.

28. The Lower Appellate Court after noticing the Trial Court's findings has looked into the documentary evidence. It has been remarked that Khasra No. 3300 was earlier numbered as 3776 and Khasra No. 3299 was formerly 3797. In 1295 Fasli, the Khasra shows that in Plot No. 3300 (as currently numbered) Pajawa is recorded and likewise in 1325 Fasli in the Khasra relating to Plot No. 3300, the entry showing Pajawa is there. Again in Fasli Year 1325, in the copy of the Khasra bearing paper No. 30-Ga, the same entry is shown. The last document noticed is the Khasra of Plot No. 3300 for the Fasli Years 1383-1386, where too Pajawa is shown. It is remarked that either in 1295 Fasli or 1325 Fasli, nowhere in Naksha Aabpashi (record of irrigation) and in the Khasra for the year 1386 Fasli, paper No. 78-Ga, Pajawa is recorded. Instead, the Lower Appellate Court has remarked that in Khasra No. 3299, banjar is recorded, which supports the stand of defendant No. 1.

29. The Lower Appellate Court has then gone on to remark that in Khasra No. 3300, the Trial Court has accepted the existence of Pajawa going by documentary evidence alone, and, therefore, the oral evidence on the point is also required to be considered. What a Pajawa is, has also been commented upon by the Lower Appellate Court to opine that it is a place, where bricks are moulded. It has been held by the Lower Appellate Court that it is incorrect to say, therefore, that the plaintiff was carrying on the work of a brick-kiln.

30. The Lower Appellate Court has considered the testimony of the plaintiff in the witness-box, where he testified as PW-1. It is noted that this witness has said that there was a brick-kiln in the suit property for the past 30 years. It is also remarked that PW-1 has also testified that those running a Pajawa or brick-kiln had to take out licences from the Zila Parishad, which is an annual licence issued on deposit of a fee. The plaintiff, however, has not brought on record any licence relating to the Pajawa. There is also a reference to the plaintiff's testimony, where he said that some 6-7 years ago, a licence was taken out on payment of Rs. 10/- in fee to the Zila Parishad, but no receipt or a copy of the licence was issued. A copy of the licence as aforesaid, the witness admitted, was not produced in evidence.

31. The Lower Appellate Court has observed that the above evidence shows that for establishing and running a Pajawa or any kind of brick manufacturing work, a licence has to be taken out, granted by the Zila Parishad, but no such licence has been produced by the plaintiff. It is also remarked that the evidence of the plaintiff, where he says that he paid the requisite licence fee, cannot be believed in the

absence of a receipt. The Lower Appellate Court has disbelieved the plaintiff's explanation about non-production of the receipt holding that what the plaintiff said on the issue is unbelievable. The plaintiff's explanation for non-production of the receipt was that no receipt was issued by the Zila Parishad. This explanation was not accepted by the Lower Appellate Court.

32. The Lower Appellate Court has also frowned upon the fact that the plaintiff did not produce a copy of the annual licence for running the Pajawa, a fact about which it is remarked that the licence would, if produced, establish the plaintiff's case about the suit property being used as a Pajawa. The Lower Appellate Court has then reasoned further that if for argument's sake it be accepted that the plaintiff was running a brick-kiln, its registration with the Sales Tax Department is imperative; and for the purpose, a definitive procedure is there. The plaintiff has not produced any registration with the Sale Tax Department or other document that may substantiate the existence of a Pajawa in the suit property.

33. The oral evidence of the other witnesses has also been commented upon by the Lower Appellate Court to opine that they have given different lengths of time, during which the Pajawa was functional. Their testimony has been found to be contradictory and irreconcilable; and for the said reason not worth credence. The Lower Appellate Court has observed that the testimony does not show the establishment or existence of the Pajawa and if that is the case, the suit property would be vacant land. In the Khasra for the Fasli Years 1383-1386, paper No. 28-Ga, Khasra No. 3299 has been recorded as banjar, which supports the case of defendant Nos. 1 and 2 in the opinion of the Lower Appellate Court.

34. On a meticulous examination of oral and documentary evidence, the Lower Appellate Court has disagreed with the findings of the Trial Court on Issue No. 1 and held that the plaintiff is not the owner of the suit property and there is no Pajawa in existence there.

35. As regards the findings on Issue No. 2, the Lower Appellate Court has held that land, that is used for agriculture, horticulture, animal husbandry or poultry farm, falls within the definition of land under the Act. It is remarked that there is no evidence on record that may suggest that the suit property was used for agriculture purposes. The logical inference, according to the Lower Appellate Court, is that it is banjar and under the Act would vest in the State. In the opinion of the Lower Appellate Court, the suit property has not been used for agriculture purposes nor was there any house or building standing thereon. Therefore, the plaintiff is neither the owner nor the bhumidhar of the suit property. In the opinion of the Lower Appellate Court, the suit property would vest in the State under the Act. The findings of the Trial Court on Issue No. 2 were, therefore, set aside and the said issue answered in favour of defendant Nos. 1 and 2.

36. The Lower Appellate Court, on the basis of these findings, reversed the decree passed by the Trial Court.

Substantial Questions of Law requiring consideration and their order

37. Before considering the submissions on behalf of the parties by the learned Counsel, this Court considers it appropriate to say that though the learned Counsel for parties have addressed the Court on three out of the seven substantial questions of law formulated, to wit,

Questions Nos. 2, 3 and 8, this Court is of opinion that it would be convenient and logical to answer Substantial Question of Law No. 8 first in order, and then the other two.

Substantial Question of Law No. 8

38. The learned Counsel for the plaintiff has submitted that it is not a case where the suit can be said to be not maintainable, because the relief of declaration has not been sought and instead an injunction alone claimed. It is argued by the learned Counsel for the plaintiff that this is a plea, which had not been taken on behalf of defendant Nos. 1 and 2 before the Courts below and raised here for the first time, and that too at the hearing of the appeal. It is argued that the decision of the Supreme Court relied upon on behalf of defendant Nos. 1 and 2 in **Jharkhand State Housing Board v. Didar Singh and others, (2019) 17 SCC 692** , would not apply to the facts of the case here. It is further argued that the principle laid down in **Anathula Sudhakar v. P. Buchi Reddy (Dead) by LRs and others, (2008) 4 SCC 594**, also relied on behalf of defendant Nos. 1 and 2, provides for an exception to the Rule about the imperative to seek a declaration, which is precisely the case here. Learned Counsel for the plaintiff has drawn the Court's attention to Paragraph No. 15 of the report in **Anathula Sudhakar (supra)**, which reads:

"15. In a suit for permanent injunction to restrain the defendant from interfering with the plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and the defendant tried to interfere or disturb such lawful possession. Where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees/licensees. Even in respect of a land without structures, as for example an agricultural land, possession may be established with reference to the actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally."

39. It is next submitted on behalf of the plaintiff that in **Didar Singh (supra)**, the Supreme Court carved out an exception to the Rule about the imperative for seeking a declaration, holding:

"11. It is well settled by catena of judgments of this Court that in each and every case where the defendant disputes the title of the plaintiff it is not necessary that in all those cases plaintiff has to seek the relief of declaration. A suit for mere injunction does not lie only when the defendant raises a genuine dispute with regard to title and when he raises a cloud over the title of the plaintiff, then necessarily in those circumstances, plaintiff cannot maintain a suit for bare injunction."

40. It is submitted by the learned Counsel for the plaintiff further that on their pleaded case and the evidence led, defendant Nos. 1 and 2 could not raise a cloud over the plaintiff's otherwise unimpeachable title and the plaintiff has also proved his possession along with title by documentary as well as oral evidence, that was duly considered by the Trial Court. However, the Lower Appellate Court overturned the judgment of the Trial Court on a perverse reasoning. Further, reliance

has been placed on behalf of the plaintiff on the decision of the Supreme Court in **Kayalulla Parambath Moidu Haji v. Namboodiyil Vinodan, 2021 (6) AWC 5651 (SC)**, where it has been observed:

"11. The issue is no more res integra. The position has been crystalised by this Court in the case of Anathula Sudhakar (supra) in paragraph 21, which read thus:--

"21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) x x x

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in Annaimuthu Thevar [Annaimuthu Thevar v. Alagammal, (2005) 6 SCC 202]). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

12. It could thus be seen that this Court in unequivocal terms has held that where the plaintiff's title is not in dispute or under a cloud, a suit for injunction could be decided with reference to the finding on possession. It has been clearly held that if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

13. No doubt, this Court has held that where there are necessary pleadings regarding title and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. However, it has been held

that such cases are the exception to the normal rule that question of title will not be decided in suits for injunction."

41. On the basis of the aforesaid principles, it is submitted by the learned Counsel for the plaintiff that the suit property here is a 'Pajawa' and 'well', that is a constructed building, and, as such, 'actual possession' was required to be looked into. But, the Lower Appellate Court had not given any finding regarding possession. It is submitted that the principle in **Kayalulla Parambath Moidu Haji** as well as that in **Didar Singh and Anathul Sudhakar** would apply, if it is a case where the defendants had proved their title or substantially cast a cloud over the plaintiff's title. Else, there is absolutely no necessity of seeking a declaration and the case would fall in the exception where the relief of injunction alone would suffice.

42. It is next argued that even if a question of title is involved, the principle in Paragraph No. 13 of the report in **Kayalulla Parambath Moidu Haji** clearly shows that where an issue relating to title has been raised and parties have led evidence, the Court may decide the issue about title even in a suit for injunction. It is submitted by the learned Counsel for the plaintiff that if nothing else, the principle in Paragraph No. 13 of the report in **Kayalulla Parambath Moidu Haji** would apply. It is further argued that in this case, there are sufficient pleadings and evidence to enable the Court to go into the question of the plaintiff's title to the suit property, and the Courts below have recorded finding regarding title. The case is simple and straightforward, which can be decided in this suit without the necessity of a declaratory relief. It is particularly argued that documentary evidence in this case was illegally weeded out in the record room of the District Court, even though the present second appeal was pending hearing. The extract of revenue records filed on behalf of the plaintiff have also been weeded out and no revenue records are available as on date. It is urged that at this distance of time, no purpose would be served by a remand. It is also argued that the plaintiff has been dispossessed by defendant Nos. 1 and 2 without following the procedure prescribed by law, that is to say, the procedure envisaged under Section 67 of the U.P. Revenue Code, 2006 or its corresponding provision in Section 122-B of the Act. The unauthorized eviction of the plaintiff is also patently illegal and unjust. The Lower Appellate Court failed to consider the effect of the aforesaid act bearing in mind the law.

43. Mr. V.K. Nagaich, learned Counsel for defendant No. 1 and Mr. Amit Kumar, learned Advocate appearing on behalf of defendant No.2 have in unison submitted that the suit is one which essentially involves adjudication of the plaintiff's title, that is seriously disputed on behalf of the said defendants. As such, a suit for a mere injunction without claiming a declaratory relief is not maintainable. As already noticed while recording the plaintiff's submissions, the learned Counsel for the defendants say that the suit is not maintainable in view of the decision of the Supreme Court in **Anathula Sudhakar** and **Didar Singh**. If at all the plaintiff had to claim relief, he had to seek a declaration about his rights. The plaintiff cannot, by instituting a suit for a mere injunction, obtain relief, where there is a serious dispute or cloud of doubt affecting the plaintiff's claimed title to the suit property.

44. A perusal of the findings recorded by the two Courts below divergently on

Issues Nos. 1 and 2 show that there is a thick dispute about title to the suit property arising between parties, with both sides attempting to prove their case by oral and documentary evidence. The documentary evidence relied upon by the plaintiff are largely revenue entries, and that too, in the Khasra for different periods of time. These include calendar years 1887, 1917 and 1978. These would correspond to the Fasli Years 1295, 1325 and 1386, respectively. The Lower Appellate Court has noticed that the entry about a Pajawa is there in the Khasra for the aforementioned years relating to Khasra No. 3300, but not with regard to the other Khasra, that is part of the suit property, to wit, No. 3299.

45. As regards Khasra No. 3299, the Lower Appellate Court has recorded a finding that a perusal of the Khasra for the relative years show that it is recorded as banjar. The Lower Appellate Court has not stopped at that and looked into the parties' oral evidence, where the mostly the plaintiff's evidence has been considered to hold that there is nothing of the kind of a brick-kiln situate in the suit property. All other kinds of evidence, that would possibly be there, if a brick-kiln were operating, has been considered. The Trial Court has not paid much attention to these aspects of the oral or documentary evidence while returning its finding on Issue No.1.

46. So far as this Court is concerned, we cannot re-appreciate the oral and documentary evidence of parties virtually as a Court of first appeal. These findings and the case of parties have been referred to in wholesome detail in order to find out whether there is a cloud cast over the plaintiff's title to the suit property, regarding which he has claimed an injunction simplicitor. The pleadings of parties and the way the trial has proceeded, spares little doubt that the defendant Nos. 1 and 2 have raised a wholesome challenge to the plaintiff's title, claiming the suit property to be banjar vested in the State. The plaintiff on his part does not have a case, where he is a neatly recorded tenure-holder or owner of the suit property, asking for an injunction simplicitor. His title is mired in controversy. It requires establishment.

47. The contention of the learned Counsel for the plaintiff that if this objection about the want of a relief of declaration were to be raised by the defendants, it ought to have been done at the earliest and before the Courts below, cannot be countenanced. The reason is that the principles in **Didar Singh and Anathula Sudhakar,** to which some further reference shall shortly be made, make it imperative for a plaintiff to appropriately seek relief. The plaintiff would know what kind of doubt or cloud exist over his title and must appropriately frame his relief. The plaintiff cannot carve out a niche for himself pleading an exception to the rule based on a lack of objection by the defendant in this behalf at the earliest opportunity. The plaintiff certainly has that opportunity once the defendants filed their written statement. If at that stage, the plaintiff finds that the defendants have raised a serious dispute about title, the plaintiff must immediately move to appropriately amend his relief and other pleadings, and seek a declaration. The plaintiff cannot get over the flaw emanating from the absence of a relief for declaration, where it is imperative by urging that the defendants did not raise an objection in this behalf. The principle about the relief to be claimed in **Anathula Sudhakar**, has been wholesomely stated thus:

"13. The general principles as to when a mere suit for permanent injunction will

lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

13.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

14. We may, however, clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that the defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raise a serious dispute or cloud over the plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.

15. In a suit for permanent injunction to restrain the defendant from interfering with the plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and the defendant tried to interfere or disturb such lawful possession. Where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees/licensees. Even in respect of a land without structures, as for example an agricultural land, possession may be established with

reference to the actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally.

16. But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs."

48. Again, in **Didar Singh**, regarding cases where it would be imperative to seek a declaration and not merely an injunction, it was observed by the Supreme Court, thus:

"10. The issue that fall for our consideration is: "Whether the suit for permanent injunction is maintainable when the defendant disputes the title of the plaintiff?"

11. It is well settled by catena of judgments of this Court that in each and every case where the defendant disputes the title of the plaintiff it is not necessary that in all those cases plaintiff has to seek the relief of declaration. A suit for mere injunction does not lie only when the defendant raises a genuine dispute with regard to title and when he raises a cloud over the title of the plaintiff, then necessarily in those circumstances, plaintiff cannot maintain a suit for bare injunction.

12. In the facts of the case the defendant Board by relying upon the land acquisition proceedings and the possession certificate could successfully raise cloud over the title of the plaintiff and in those circumstances plaintiff ought to have sought for the relief of declaration. The courts below erred in entertaining the suit for injunction."

49. The question yet again figured recently before their Lordships of the Supreme Court in **T.V. Ramakrishna Reddy v. M. Mallappa and Another, AIR 2021 SC 4293,** where it was held:

"10. It could thus be seen that this Court in unequivocal terms has held that where the plaintiff's title is not in dispute or under a cloud, a suit for injunction could be decided with reference to the finding on possession. It has been clearly held that if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

11. No doubt, this Court has held that where there are necessary pleadings regarding title and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit

for injunction. However, it has been held that such cases are the exception to the normal rule that question of title will not be decided in suits for injunction.

12. x x x x

13. The plaintiff-appellant claims to be the owner of the suit property on the basis of a sale-deed executed by one K.P. Govinda Reddy in his favour on 13.4.1992. In turn, according to him, the said property was sold by one Smt. Varalakshmamma in favour of his vendor K.P. Govinda Reddy on 26.3.1971. He claims that he had mortgaged the suit property for taking loan from one financial institution. He further claimed that an endorsement was also issued by the Corporation of City of Bangalore that Khata regarding the suit property is transferred to the appellant. According to the plaintiff-appellant, when the Bangalore Mahanagar Palike withdrew the Khata in his favour, he went to the High Court and succeeded therein.

14. Per contra, the defendant No. 2 (respondent No. 1 herein) is specifically denying the title of the plaintiff-appellant. He claims to be the owner of the suit property on the basis of a sale-deed dated 5.4.1984 from one M. Shivalingaiah. He also claims to be in peaceful possession and enjoyment of the same on the basis of the said sale-deed. It is his case that K.P. Govinda Reddy got the title set up falsely and created fabricated documents with regard to possession. It is also his case that compound wall was constructed by him and not by the plaintiff, as claimed.

15. It could thus clearly be seen that this is not a case where the plaintiff-appellant can be said to have a clear title over the suit property or that there is no cloud on plaintiff-appellant's title over the suit property. The question involved is one which requires adjudication after the evidence is led and questions of fact and law are decided."

50. Here, it is unmistakable that the defendants wholesomely deny the plaintiff's title to the suit property and his possession as well. Even if the plaintiff says that he has established by evidence that on the date the cause of action arose, he was in possession, it does not render the case one, where the dispute about title is, but a mere farce. Going by the settled position of the law, if the plaintiff's title is clear, recorded and free from cloud of controversy, without doubt the plaintiff may bring a suit for injunction, with no imperative to seek declaration. But, where the plaintiff's title is clouded in controversy and doubted with the defendants challenging it on an arguable basis, a mere injunction would not suffice; a declaration would then be necessary.

51. It has been noticed above that the case of defendant Nos. 1 and 2 raises a serious issue about title arising by virtue of the nature of the suit property and its recorded character on the date of vesting, where the defendants say that it was recorded as banjar with regard to Khasra No. 3299. So far as the issue about some recorded entries in the Khasra indicating that there was a Pajawa, it requires determination whether a Pajawa qualifies as a building within the meaning of Section 9 of the Act. So far as the claim about there being a well in Khasra No. 3299 is concerned, that too is quite a disputed fact requiring determination by a Court of competent jurisdiction as to what is the area occupied by the well, who sunk the well, was it in existence on the date of vesting and what area is appurtenant to it, that may be held settled with the plaintiff by the

State Government under Section 9 of the Act.

52. Since none of these facts are admitted by defendant Nos.1 and 2, these are matters which require to be determined, on a declaration sought by the plaintiff from a Court of competent jurisdiction, and not merely by the plaintiff asking for an injunction, as if his rights were apparent and free from doubt or challenge.

53. In the opinion of this Court, therefore, a suit for mere injunction, without a declaration, could not be maintained by the plaintiff.

54. The question whether the plaintiff ought to have filed for declaration is all the more obvious, because the plaintiff had earlier instituted Suit No. 307 of 1978, under Section 229-B of the Act against defendant Nos. 1 and 2, which was dismissed holding that the suit was barred by Section 49 of the Consolidation Act. The said judgment was passed by the Assistant Collector on 25.09.1978, that was challenged by the plaintiff before the Commissioner, Meerut Division, Meerut by means of Appeal No. 330 of 1978. The Commissioner allowed the appeal and remanded the suit to the Court of first instance for trial in accordance with law, holding that the Consolidation Court had no jurisdiction to adjudicate as the land was Pajawa. The bar of Section 49 was held inapplicable. The suit before the Revenue Court was not pursued. Instead, the present suit was instituted. What is relevant is, so far as this question is concerned, that the plaintiff himself thought that he ought to sue for declaration and did sue in the competent Revenue Court. Having lost before the Revenue Court, he agitated the matter in appeal and secured a remand.

55. This course of proceeding shows that the plaintiff was conscious of the fact that he required a declaration about his rights to the suit property and that is why he instituted a suit for declaration. What made him then to sue for a mere injunction before the Court is inexplicable.

56. In the circumstances, **Substantial Question of Law No. 8 is answered in the affirmative** and it is held that where the plaintiff's title is under cloud, he must sue for declaration. A suit for injunction simplicitor would not be maintainable.

Substantial Question of Law No. 2

57. About Substantial Question of Law No. 2, the contention of the learned Counsel for the plaintiff, Mr. Arpit Agarwal is that the remark by the Lower Appellate Court that in the suit under Section 229-B of the Act, the Town Area Committee was not a party suffers from an error apparent. The substantial question was framed in the context that the Revenue Court had held that the suit property is not land as defined under Section 3(5) of the Consolidation Act, because there was a Pajawa found there. This finding was recorded by the Commissioner in an appeal from the order of the Assistant Collector dismissing the suit on the ground that since the suit property was land and no steps were taken under the Consolidation Act, the suit was barred under Section 49 of the Act, last mentioned. This finding was set aside by the Commissioner in appeal, as already noticed, holding the land to be a Pajawa with a remand to the Trial Court.

58. The contention of the learned Counsel for the plaintiff that the Lower Appellate Court has committed an error apparent in holding that the finding of the

Revenue Court, last mentioned, would not bind defendant No.2, because the Town Area Committee was not a party to the suit before the Revenue Court, that went to the Commissioner in appeal, is correct. A true copy of the Additional Commissioner's judgment rendered in Appeal No. 303 of 1978 is available on record of the motion papers relating to this appeal as Annexure No. 4 to the affidavit filed in support of the temporary injunction application. Apparently, a certified copy of this judgment was on record before the Courts below as paper No. 32-C, but on account of the very serious indiscretion committed by the officials of the record room of the District Court, this record has been weeded out. The parties have agreed before this Court that the copy of the Commissioner's order as aforesaid is a true copy of the order dated 27.04.1979, passed by the Additional Commissioner, Meerut Division in appeal as aforesaid. A perusal of the said order shows that the State Government was a party and so was the Town Area Committee. The following finding is there in the Additional Commissioner's order of remand dated 27.04.1979:

"The State Government did not contest. Town Area Committee contested the suit."

59. In view of the said finding, there is no gainsaying the fact that the Lower Appellate Court did commit an error apparent on the face of the record holding that the Town Area Committee was not a party to the proceedings before the Revenue Court. **Substantial Question of Law No.2 is, therefore, decided in the affirmative** and it is held that the Lower Appellate Court committed an error apparent in holding that the Town Area Committee was not a party to the suit under Section 229-B of the Act.

Substantial Question of Law No. 3

60. This brings us to Substantial Question of Law No.3. It is submitted by Mr. Arpit Agarwal, learned Counsel for the plaintiff that the Additional Commissioner, Meerut while allowing Appeal No. 303 of 1978 by the plaintiff vide judgment and order dated 27.04.1979 and remanding the suit to the Trial Court held that the suit property does not come within the ambit of land as defined under Section 3(14) of the Act and the Revenue Courts have no jurisdiction to adjudicate the issue regarding land, that is recorded as Pajawa. He submits that the aforesaid finding recorded by the Additional Commissioner in appeal was never challenged by defendant Nos. 1 and 2 and has attained finality inter partes. It is, particularly, argued that though the Revenue Court trying a suit under Section 229-B of the Act is not competent to try the present suit, yet it is a Court of exclusive jurisdiction empowered to adjudicate the issue relating to nature of the property being agricultural or non-agricultural. This jurisdiction is also exclusively conferred upon it. If that question were to arise before a Civil Court, the special procedure envisaged under Section 331-A of the Act has to be followed.

61. It is argued that being a Court of limited jurisdiction within the meaning of Explanation 8 to Section 11 of the Code, the finding of the Additional Commissioner in the appeal arising out of the suit under Section 229-B about the nature of the land would bind the Civil Court as res judicata, notwithstanding the fact that the Revenue

Court does not have jurisdiction to try the present suit.

62. It is submitted that the Lower Appellate Court has erred in law by ignoring the aforesaid matter from consideration altogether, while reversing the Trial Court. In support of his submission, learned Counsel for the plaintiff has relied upon the decision of this Court in **Triloki Nath v. Ram Gopal and others, 1974 RD 5**. Learned Counsel for the plaintiff has drawn the attention of the Court to the following observations in **Triloki Nath** (supra):

"14. For the reasons given above, we are in agreement with the view expressed by Hon'ble Broome, J. that as the area in question was being used for the purposes of making bricks that is for purposes unconnected with agriculture etc. such an area would not be covered by the definition of the word 'land' and hence the consolidation courts would have no jurisdiction to adjudicate upon the rights of the parties in respect thereto. Merely because the area in question could on future date be used for purposes of agriculture, to our mind does not justify the application of the provisions of Consolidation of Holdings Act to land not covered by that Act."

63. Upon hearing learned Counsel for the parties on the issue involved, this Court finds that the question about the judgment of the Revenue Court in appeal, while remanding the matter to the Court of first instance, in the suit earlier filed by the plaintiff under Section 229-B, operating as res judicata in the present suit about the nature of the land, does not arise.

64. The judgment of the Additional Commissioner in appeal arising from the declaratory suit earlier instituted by the plaintiff is res judicata between the plaintiff and defendant Nos. 1 and 2 on the point alone that the suit property had a Pajawa (an indigenous brick-kiln) on it and was, therefore, not land within the meaning of Section 3(5) of the Consolidation Act. It is for this reason that the Additional Commissioner held that the suit would not be barred by Section 49 of the Consolidation Act. Nevertheless, the Additional Commissioner remanded the suit for trial afresh after setting aside the decree of the Trial Court, dismissing it on the decision of a preliminary issue about the bar under Section 49.

65. The finding of the Additional Commissioner recorded in the order of remand is only that that the land is not one that could be consolidated in a chak, as it was not cultivable. The Additional Commissioner did not hold that the Pajawa was a building as envisaged under Section 9 of the Act. If he had done so, he would have dismissed the suit or directed a return of the plaint for presentation to the Civil Court. The remand of the suit by the Additional Commissioner shows that though he found the Pajawa to be a structure that rendered the suit property not "land' within the meaning of Section 3(5) of the Consolidation Act, so as to attract the bar of Section 49, he still thought that the Revenue Court had jurisdiction to try the plaintiff's suit under Section 229-B of the Act, where the plaintiff would have to prove whether the suit property had a building on it within the meaning of Section 9 of the Act, so as to lead to its settlement with him. .

66. Upon remand, the plaintiff ought to have pursued the suit before the Revenue Court for the purpose of declaration of his

title on the plea that the Pajawa was a building, settled with him under Section 9 of the Act on the date of vesting. But, the plaintiff upon remand by the Commissioner to the Assistant Collector, apparently abandoned cause before the Revenue Court and instituted the present suit before the Civil Court, and that too, for an injunction simplicitor. It would seem that the plaintiff in understanding the Additional Commissioner's order of remand read between the lines to infer that the Additional Commissioner had held the Pajawa to be a building or otherwise an abadi, regarding which jurisdiction would vest in the Civil Court to grant relief. That assumption was utterly erroneous. That the plaintiff assumed that the Additional Commissioner had declared the suit property to be a building or an abadi, regarding which relief could be had in the Civil Court, is the only logical inference to be drawn from the conduct of the plaintiff in abandoning the suit before the Revenue Court and instituting the present suit before the Civil Court. It is, in fact, explicit from the plaintiff's pleadings that figure in Paragraph No.9 of the plaint:

"9- यह कि वादी ने एक वाद धारा 229 कानून जमींदारी विनाश इस सम्बन्ध में योजित किया परन्तु चूँकि सम्पत्ति धारा 3:14 कानूनन जमींदारी विनाश के अन्तर्गत लैन्ड की परिभाषा में नहीं जाती इस कारण उपरोक्त वाद निरर्थक रहा उक्त वाद पहले खारिज हूई। जिसकी अपील नम्बरी 303 सन् 78 श्रीमान कमिश्नर साहब महोदय के यहां किया गया और बजरिये आदेश दिनांक 24.7.79 रिमाण्ड हुआ। और यह निश्चित हुआ कि उक्त भूमि धारा 3:14 जमींदारी कानून विनाश के अन्तर्गत लैन्ड नहीं है और इस कारण से कानून चकबन्दी की धारा 49 इस पर लागू नहीं होती है। उपरोक्त सूरते हालात में वाद न्यायालय दीवानी से सम्बन्धित है और योजित किया जाता है।" (emphasis by Court)

67. A perusal of the aforesaid part of the plaintiff's pleadings would show that he thought that the Additional Commissioner had decided that the suit property was not land within the meaning of Section 3(14) of the Act, and, therefore, the bar of Section 49 did not apply. That assumption is grossly erroneous. All that the Additional Commissioner held was that the suit property was not land within the definition of Section 3(5) of the Consolidation Act, which had to be kept out of the consolidation scheme. Being a Pajawa, it was obviously not cultivable land and, therefore, the Additional Commissioner was right in his view that it had to be kept out of the consolidation scheme; and a fortiori the bar of Section 49 would not apply.

68. As already remarked, the Additional Commissioner remanded the suit under Section 229-B of the Act to the Court of first instance for trial afresh on all issues, because it is there that the plaintiff would have to prove that the Pajawa was a "building', entitling the suit property to be settled with him under Section 9; or how much of the suit property was the site of a well and that it was a well entitling the plaintiff to the benefit of Section 9 of the Act. A Pajawa is an indigenous brick-kiln and need not be a building within the meaning of Section 9. In fact, every brick-kiln does not qualify for a "building' under the aforesaid provision. It has to be proved on facts pleaded and evidence led that it is indeed a building. The law in this regard was settled long ago by the Supreme Court in **Ghanshiam Das v. Debi Prasad and another, AIR 1966 SC 1998,** where the issue in the context of the Act had directly arisen. In that case, a brick-kiln, that was leased out by its owner before the date of vesting, was pleaded by the lessee to have

vested in the State under Section 6 of the Act, so as to disentitle the lessor to sue the lessee for recovery of rent. In **Ghanshiam Das (supra)**, it was held by their Lordships, thus:

"4. The word "building" has not been defined in the Act and must, therefore, be constructed in its ordinary grammatical sense unless there is something in the context or object of the statute to show that it is used in a special sense different from its ordinary grammatical sense. In the Websters New International Dictionary the word "building" has been defined as follows:

"That which is built specif: (a) as now generally used a fabric or edifice, framed or constructed, designed to stand more or less permanently and covering a space of land for use as a dwelling, store house, factory, shelter for beasts or some other useful purpose. Building in this sense does not include a mere wall, fence, monument, hoarding or similar structure though designed for permanent use where it stands, nor a steamboat ship or other vessel of navigation."

From this definition it does not appear that the existence of a roof is always necessary for a structure to be regarded as a building. Residential buildings ordinarily have roofs but there can be a non-residential building for which a roof is not necessary. A large stadium or an open-air swimming pool constructed at a considerable expense would be a building as it is a permanent structure and designed for a useful purpose. The question as to what is a "building" under S. 9 of the Act must always be a question of degree-a question depending on the facts and circumstance of each case. As Blackburn, J. observed in R. v. Neath Canal Navigation Co., (1871) 40 LJMC 193 (197).

"The masonry on the sides of a canal is not sufficient to constitute it a 'building'. A London street, though paved and faced with stonework, would yet be 'land'; whilst the Holborn Viaduct would be a 'building'."

The question for determination in the present case, therefore, is whether the kiln leased out to the appellant is a "building" within the meaning of S. 9 of the Act. It has been found by the first appellate Court that the brick kiln has no site and is not a roofed structure. It was a mere pit with some bricks by its sides. It is also admitted in this case that there was no structure standing on the Bhatta. Upon these facts, it is clear that the brick kiln has no walls and no roof but it is a mere pit dug in the ground with bricks by its side. In the circumstances, we are of the opinion that the brick kiln leased out to the appellant, in the present case, is not a "building" within the meaning of S. 9 of the Act. It follows, therefore, that the title to both the plots Nos. 596 and 597 along with the brick kiln vested in the State Government with effect from July 1, 1952 and the respondents are not entitled to claim any rent from the appellant for the period from October 1, 1952 to September 30, 1953."

69. The question directly fell for consideration of a Division Bench of this Court in **Newand Ram and another v. Gaon Samaj Rura and another, 1961 A.L.J. 910.** The question in **Newand Ram (supra)** was whether a brick-kiln was a building within the meaning of Section 9 of the Act. Their Lordships of the Division Bench acknowledged the formula of a three fold test on the basis of the decision in ***Re. St. Peter the Great, Chichester, 1961 (2) All. E.R. 51***3 in order to determine whether the brick-kiln, subject matter of the said case, would qualify as a building for the purpose of Section 9. It would be of

immense profit to quote from the report of decision in **Newand Ram** in extenso:

"In connection with the first contention the principal question which arises for decision is whether the brick kiln which is said to be situated on a portion of the land can be considered to be "a building" within the meaning of term as used in Sec. 9 of the Zamindari Abolition and Land Reforms Act. A subsidiary question would be whether the rest of the land in dispute can be said to be appurtenant to the building if the brick kiln is a building at all.

Unfortunately for the plaintiffs in the present case the point that they were entitled to the benefit of Sec. 9 of the Z.A. & L.R. Act was taken for the first time in second appeal. The question not having been raised earlier no materials were brought on the record in the trial court to show whether the brick kiln in question could be considered to be a building. It is true that in the pleadings and in the revenue papers a brick kiln is mentioned as existing on the land. It may also be assumed that bricks were baked and were stocked on the land. No details have, however, been brought out about the exact situation on the spot. We do not know whether the brick kiln in dispute contains any walls, constructions or structure. It has admittedly no roof. There is nothing to show that there is anything on the land except an excavation in which unbaked bricks brought from adjacent plots are arranged in rows and baked. It appears from the record that at one stage a commissioner was appointed to go to the spot. He has submitted a report. But in this report also there are no materials on the basis of which one can decide that the brick kiln amounted to a building.

It is interesting to notice in this connection that for the English word "building" which appears in Sec. 9 of the English version of the Zamindari Abolition and Land Reforms Act, the word "imarat" has been used in the Hindi version of the Act. We have, therefore, to consider whether a brick kiln can be considered to be an "imarat or "building". The word building has not been defined in the Z.A. & L.R. Act and has, therefore, to be given its ordinary meaning. In a recent case reported in Re. St. Peter the Great, Chichester, 1961 (2) All. E.R. 513, Chancellor Buckle, had to consider what the word "building' meant. Three tests were suggested to him for the decision of the question and he accepted them as correct. The three tests were:--

(1) Would an ordinary man think that the structure was a building.

(2) Has the relevant structure four walls and a roof, and

(3) can anyone say that the structure was built.

He pointed out that the first test had been formulated on the basis of some of the general observations made by Chitty, J. in Harris v. De Pinna, (1886) 33, Ch. D. 238. The second test had been taken from Moir v. Williams, (1892) 1 Q.B. 264 and the 3rd test was based on the observations in South Wales Aluminium Company Ltd. v. North Area Assessment Committee,(1943) 2, All. E.R. 587.

The three tests appear to us to be reasonable tests to be applied for deciding the question whether the brick kiln in question is building. Before applying these tests in the present case we would like to make it clear that the facts and circumstances of each case will have to be kept in view while deciding the question. There are brick kilns of various kinds and designs. Different considerations would naturally apply if the bricks are baked or stored in a specially constructed closed and roofed structure with walls all round. We

are not concerned in the present case with anything of this kind. The only material we have before us is that there is on the land in dispute a brick kiln in which bricks are baked. Now, ordinarily what is known as brick kiln is only an excavation in the ground. The land is dug to a certain extent so as to enable the brick kiln owner to arrange unbaked bricks in a certain manner to facilitate them being baked after fire has been set to the coal or wood which is used for purposes of baking. Such a kiln does not usually contain any walls and there is no question of there being any roof. It is not even an enclosure or structure. The kiln is not intended to be used for residential purpose nor can it be used for any of the ordinary purposes for which a building is usually employed. An ordinary man using the word building or "imarat' in its usual prevalent sense will, therefore, never use the word for a brick kiln. There is no structure there at all. There is no wall or roof. When nothing has to be done except excavating a pit in the earth of a particular size or shape and arranging bricks in it for the purpose of being baked, it is difficult to see how it can be said that anything is being "built" or "created" in connection with such a brick kiln.

Learned counsel for the appellant suggested that in the brick kiln in question there was a wall lining on each of the pit excavated in the earth. There is, however, no material on the record to support the suggestion and we cannot, therefore, take any notice of it.

We are, therefore, of opinion that a brick kiln of the kind which appears to be in dispute in this case cannot be called a building for the purpose of Sec. 9 of the Zamindari Abolition and Land Reforms Act and if the brick kiln is not a building there can be no question of the rest of the land in dispute being appurtenant to any building. No advantage can, therefore, be derived by the appellant of the provisions of Sec. 9 of the Z.A. & L.R. Act on the ground that on the date of the coming into force of the Act, he was in possession of the brick kiln or the land in dispute.

From the reported judgment it Devi Prasad v. Ghanshyam Das, 1961 A.L.J. 193, the details of the brick kiln which was held to be a building by the learned judge are not clear. The learned Judge considered the dictionary meaning of the word "building" which required that there should be some structure, edifice or fabric "constructed or built or raised." He, therefore, observed:

"In my opinion it is possible for a kiln to be a building provided it is a permanent structure raised for use as a Bhatta."

We respectfully share the opinion that it is so possible. We would, however, point out every brick kiln does not have a "permanent structure, raised for use as a Bhatta". Such a structure is not necessary for baking bricks. It may or may not be erected. Even if it is there it may not amount to a "building". In the case before the learned Judge it was admitted that--

"There was no structure standing on the Bhatta".

The learned Judge expressed his inability to understand these words and thought,

"A Bhatta is itself a structure".

He also interpreted "Bhatta khisht' as meaning "a kiln constructed with bricks". With profound respect we are unable to endorse this interpretation. Bhatta means kiln and khisht means brick. But "bhatta khisht" does not necessarily mean "kiln constructed with bricks." It can equally mean kiln meant for preparing bricks and that is the sense in which the expression is ordinarily used (cf. Bhatta chuna or Bhatta Surkhi). As we have said, usually a brick

kiln has no structure of its own. It is only an excavation made in the earth. When, therefore, it was admitted that "there was no structure standing on the bhatta" the admission was not meaningless. If it was intended to be laid down in Devi Prasad's case, 1961 A.L.J. 193 that all brick kilns whatever their nature, must be considered to be buildings for the purposes of Sec. 9 of the Zamindari Abolition and Land Reforms Act, we respectfully do not agree with that view."

70. It must be mentioned here that the decision of the learned Single Judge in **Devi Prasad v. Ghanshiam Dass and another, 1960 SCC OnLine All 150,** that was not subscribed to by the Division Bench in **Newand Ra**m, held that a brick-kiln made of bricks must be regarded as a building under Section 9 of the Act. It is to be noted that the decision of this Court in **Devi Prasad v. Ghanshiam Dass** (supra) was overturned by their Lordships of the Supreme Court in **Ghanshiam Das v. Debi Prasad** (supra). It was, therefore, a matter of pleading, proof and evidence for the plaintiff to establish what kind of a brick-kiln that he has called a Pajawa is, and whether it qualifies for a "building' or not. All this would require the plaintiff, as already held in answer to Substantial Question of Law No. 8, to sue for declaration and prove by his evidence that, in fact, the Pajawa was a building and the suit property would be settled with him under Section 9.

71. For the said reason, it has also been held that a suit for injunction simplicitor would not lie. It is to be noticed that there is no evidence brought to the notice of the Courts below or a plea raised to establish the character of the Pajawa as a building within the meaning of Section 9. It has all been assumed by the plaintiff from the order of remand passed by the Additional Commissioner. The Additional Commissioner has not, as already said, held that the Pajawa is a "building' and the suit property one that is settled under Section 9. It could be conveniently proved by the plaintiff, as already remarked, after remand by the Commissioner in the suit under Section 229-B of the Act, which he elected not to do and moved the Civil Court, instead.

72. The finding of the Additional Commissioner in the remand order, therefore, in no way operates as res judicata, because it was never decided by the Additional Commissioner that the suit property with the Pajawa was a building that stood settled under Section 9 of the Act with the plaintiff. Possibly, the Additional Commissioner could not have recorded that finding while remanding the suit, dismissed on the preliminary issue of a bar under Section 49 of the Consolidation Act, to the Court of first instance in the revenue jurisdiction for trial afresh on all issues.

73. **Substantial Question of Law No. 3 is, therefore, answered in the negative** holding that the finding recorded in Suit No. 6 under Section 229-B of the Act vide the order of remand passed in the appeal, arising from the said suit, would not operate as res judicata as far as the nature of the suit property is concerned.

74. The other substantial questions of law, though mooted and formulated, were not pressed in support of the appeal on behalf of the plaintiff at the hearing.

75. In view of the answers to the three substantial questions of law, whereon this

appeal has been heard, no case for interference with the decree is made out.

76. The appeal **fails** and is **dismissed** with costs throughout.

77. Let a decree be drawn up, accordingly.

(2023) 2 ILRA 445
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2023

BEFORE

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

Special Appeal No. 595 of 2022
with Special Appeal No. 1206 of 2019 & Special Appeals No.98 and 154 of 2020

State of U.P. & Anr. ...Appellants
Versus
Khusaboo Kumari Gupta ...Respondent

Counsel for the Appellant:
Sri Ajit Kumar Singh (Addl. A.G.), Sri Sudhanshu Srivastava(Addl. C.S.C.)

Counsel for the Respondent:
Sri H.N. Singh(Sr. Advocate), Sri Om Prakash, Sri Jitendra Sarin, Sri Pushpendra Singh, Ms. Khushboo Kumari Gupta, Sri Pramod Kumar(In Person)

Civil Law - Service Matter - Uttar Pradesh Rural Development (Gram Sewak) Service Rules 1980 - Candidature of the respondent rejected on the ground that she do not possess CCC Certificate from DOEACC/NIELIT - Held - candidature of the writ petitioners cannot be rejected on the ground that she do not possess CCC Certificate from DOEACC/NIELIT as in the Rules or even in the advertisement issued, there was no mention of qualification of CCC Certificate from any specified Institute i.e. DOEACC/NIELIT - without mentioning in the advertisement, the Institute from where that certificate has to be, on this ground the candidature of a candidate could not be rejected - A candidate is supposed to know the relevant Rules under which the recruitment is sought to be made - Inter-departmental communications, which are not referred to in the advertisement, are not supposed to be in the knowledge of a candidate (Para 20,21) (E-5)

List of Cases cited:

Mukul Kumar Tyagi Vs St. of U.P. & ors., (2020)4 SCC 86

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

ORDER

1. This order will dispose of bunch of appeals bearing Special Appeal Nos.1206 of 2019, 98 and 154 of 2020 and 595 of 2022 as the common legal issues are involved.

FACTS OF THE CASE

Special Appeal No. 595 of 2022

2. The writ petitioner/respondent herein, who appeared in person, was a candidate for the post of Village Development Officer (hereinafter referred to as "VDO"). The writ petition was filed by her as her candidature was rejected, after the recommendation made by the Uttar Pradesh Subordinate Selection Commission, on the ground that she does not have CCC Certificate from DOEACC/NIELIT. The writ petition was allowed by the learned Single Judge.

3. To put the record straight, it needs to be mentioned that earlier the petitioner approached this Court by filing writ

petition bearing Writ-A No.14181 of 2018 as she was not allowed to participate in the interview. The said writ petition was dismissed on June 27, 2018. However, in Special Appeal No.1165 of 2018 filed by her, she was allowed to participate in the interview and her result was directed to be placed before the Court. The aforesaid appeal was finally disposed of on April 29, 2019. When the mark-sheet of the writ petitioner was placed before the Court, learned counsel for the State submitted that on the basis of marks secured by the writ petitioner in interview, her position in merit list shall be examined and final result shall be communicated to her.

Special Appeal No.1206 of 2019

4. The writ petitioners/respondent Nos.1 to 17 in the present case were Ex-Servicemen and were candidates to the post of VDO. The issue again was with reference to qualification of CCC Certificate. The stand of the State that the same was required only from DOEACC/NIELIT was not accepted and the direction was issued by the learned Single Judge that the candidature of the writ petitioners will not be ignored only on the ground that their CCC Certificates are not issued from DOEACC/NIELIT.

Special Appeal Nos. 98 and 154 of 2020

5. The writ petitions, on identical facts, were disposed of by the learned Single Judge in the same terms as its earlier judgment in Writ Petition No.1782 of 2019 titled as Pramod Kumar and others v. State of U.P. and others against which Special Appeal No.1206 of 2019 is pending.

ISSUE INVOLVED IN THE CASE

6. The controversy in the writ petitions revolves around the qualification required for the post of VDO. It is again limited to CCC Certificate. Firstly, as to whether that qualification is required and secondly as to whether it is required only from DOEACC/NIELIT or some other Institute as well. The learned Single Judge held in favour of the writ petitioners. The State is in appeal.

7. At the time of hearing, when this Court had asked a specific question to the learned counsel for the State as to whether there is any other writ petition/appeal pending in this Court raising the same legal issues, the answer was in negative.

SUBMISSIONS

8. Argument raised by the learned counsel for the State is that the advertisement for the post of VDO was issued vide Advertisement No.3 (Exam)/2016. The same clearly provided the qualifications required for the post, which included CCC Certificate in computer operation. It was provided for in terms of the Government Order issued by the Government on March 27, 2012. As it was approved by the Governor, hence the qualification is required for the post. The aforesaid Government Order was followed by the another Government Order dated July 23, 2013, wherein it was specifically provided that CCC Certificate has to be from the DOAECC. The argument is that none of the respondents in the appeals possesses the said certificate from DOAECC/NIELIT. Hence, they were not eligible and have been wrongly directed to be appointed by learned Single Judge. In support of the argument, reliance was placed upon the judgment of the Hon'ble Supreme Court in **Mukul Kumar Tyagi v.**

State of Uttar Pradesh and others, (2020)4 SCC 86.

9. In response, learned counsel appearing for the respondents and also the respondent, who appeared in person, submitted that the post in question is governed by the Uttar Pradesh Rural Development (Gram Sewak) Service Rules 1980 (hereinafter referred to as the "Rules"). For the post in question, CCC Certificate is not the requisite qualification. Hence, it could not have been added in the advertisement. Still, what is sought in the advertisement is merely a certificate and not the Institute from where it should be. In fact, no Institute as such can be specified. The required certificate should be from recognized Institute. It was further submitted that by communication issued by the Secretary, Government of U.P., the statutory Rules cannot be amended. Rules framed under Article 309 of the Constitution of India cannot be changed only by writing letters. Proper procedure has to be followed. What is evident from letter dated March 27, 2012 issue by Principal Secretary, Government of U.P. is that the Governor has granted permission for addition of CCC Certificate as a qualification for the post of VDO. Thereafter, due process was to be followed for amendment of Rules. Nothing was done, as the Officers in the State do not follow the law or they are law into themselves. Another communication was sent by Special Secretary, Government of U.P. dated July 23, 2103 whereby sanction was granted for recruitment to the vacant post. In this letter, it was mentioned that CCC Certificate has to be from DOEACC.

10. The submission is that the qualification having not been prescribed in the Rules, the same could not be a ground to reject the candidature of the respondents. Anything stated in the advertisement, which is contrary to the Rules, has to be ignored, as the legal position is otherwise that the qualification prescribed in the Rules will be applicable, even if advertisement is different. It was submitted that in the advertisement what is required is only CCC Certificate and no other condition. However, the candidature is sought to be rejected on the ground that CCC Certificate from DOEACC/NIELIT only is required. It was mentioned in inter-departmental communication. Though the letter dated July 23, 2013 is sought to be relied upon for the purpose, still in the advertisement issued nothing was mentioned. The candidate is not supposed to know what is mentioned in the inter-departmental communication. He can be knowing only the Rules which are notified and not otherwise.

11. It was submitted that in Ex-Servicemen (Re-employment in Central, Civil Services and Post) Rules, 1979, amendment was carried out on February 12, 1986, wherein it was provided that if sufficient number of candidates holding the requisite qualifications are not available, the qualification can be relaxed subject to the condition that such relaxation will not affect the level of performance.

12. In the case in hand, the respondents are having the qualification equivalent to CCC Certificate and in no way their performance can be compromised.

13. In response, it was submitted by learned counsel for the State that when the pay-scales were revised by VIth Pay Commission, it was recommended by the Commission that the qualification of CCC Certificate is required to be added. It was

for the reason that the entire country was going in digital mode. Hence, for government employees' knowledge of computer was required. No question could be raised by the candidates, as it is for improving efficiency in discharging of their duties to serve the public.

DISCUSSION

14. Heard learned counsel for the parties and perused the paper book.

15. The undisputed fact on record is that an advertisement for recruitment to the post of VDO was issued providing for the following qualifications :

"अनिवार्य अर्हता- 1- विज्ञान या कृषि के साथ माध्यमिक क्षिक्षा परिषद, उ०प्र० की इंटरमीडिएट परीक्षा या राज्यपाल द्वारा उसके समकक्ष मान्यता प्राप्त कोई परीक्षा उत्तीर्ण की हो।

2- कम्प्यूटर संचालन में "सी० सी० सी०" प्रमाण पत्र की अर्हता।"

16. The post in question is governed by the Rules where the qualification for the post provided for is as under:

"Academic qualification- A candidate for direct recruitment to the service must have passed the Intermediate examination with Science, or Agriculture, from the U.P. Board of High School and Intermediate Education or an examination recognised by the Governor as equivalent thereto."

17. The origin of qualification of CCC Certificate for the post in question is a communication dated March 27, 2012 issued by Principal Secretary, Government of Uttrar Pradesh to Commissioner, Village Development, Uttar Pradesh, Lucknow, which mentions that Governor has granted approval for addition of CCC Certificate along with existing qualifications for the post of VDO. The relevant para thereof reads as under:

"उपर्युक्त विषय के सम्बंध में मुझे यह कहने का निर्देश हुआ है कि वित्त विभाग के शासनादेश संख्या- वे०आर०-2-1987/दस-54(एम)/2008 टी०सी०, दिनांक 22 नवम्बर, 2011 द्वारा लिये गये निर्णय के क्रम में ग्राम विकास विभाग के ग्राम विकास अधिकारी के पदों पर वर्तमान में निर्धारित शैक्षिक अर्हता के साथ कम्प्यूटर संचालन में 'सी०सी०सी०' प्रमाण पत्र की अर्हता को सम्मिलित किये जाने की श्री राज्यपाल से महोदय सहर्ष स्वीकृति प्रदान करते हैं।"

18. Vide subsequent letter dated July 23, 2013 when the vacant posts were sanctioned for recruitment, it was mentioned that CCC Certificate was required from DOEACC/NIELIT.

19. It is in view of the aforesaid two letters, which the State claims to be Government Orders, that the candidature of the respondents is sought to be rejected on the ground that they do not possess CCC Certificate from DOEACC/NIELIT. It was not disputed that all of them have CCC Certificate issued by different Institutes from where they passed the same after getting the training. The fact remains that in the Rules or even in the advertisement issued, there is no mention of qualification of CCC Certificate from any specified Institute i.e. DOEACC/NIELIT. A candidate is supposed to know the relevant Rules under which the recruitment is sought to be made and has to be qualified in terms thereof. Inter-departmental communications, which are not referred to

in the advertisement, are not supposed to be in the knowledge of a candidate.

20. The learned Single Judge allowed the writ petition bearing Writ-A No.13847 of 2021 on the ground that in earlier round of litigation the State-respondents themselves had given clear statement that CCC Certificate was not essential qualification which was clear from the Rules and also nothing that was placed on record contrary to that. While writ petitions bearing Nos.1782, 5076 and 5140 of 2019 were allowed by the learned Single Judge holding that the candidature of the writ petitioners cannot be ignored on the ground that they do not possess CCC Certificate from DOEACC/NIELIT as the Rules and the advertisement do not prescribe so.

21. We find merit in the contention raised by the learned counsel for the State that on account of large scale computerisation in Government functioning, qualification of computer knowledge is must at all levels in the State and in case such a qualification was prescribed and all the candidates knowing fully had participated in the process of selection, no issue can be permitted to be raised. Though it was claimed that the VIth Pay Commission suggested this qualification to be added, however, without mentioning in the advertisement, the Institute from where that certificate has to be, on this ground the candidature of a candidate could not be rejected. CCC Certificate as such may be required, however, condition that it should be from DOEACC/NIELIT cannot stand to judicial scrutiny.

22. So far as the judgement of Hon'ble Supreme Court in **Mukul Kumar Tyagi's case (supra)** is concerned, the same will not come to rescue of the State for the reason that the fact as pleaded before Hon'ble the Supreme Court was that there is no other Institute except DOEACC/NIELIT which issues CCC Certificate. In the case in hand, the respondents have produced certificates from different Institutes and the qualification as such has not been denied by the learned counsel for the State.

23. While concurring with the view expressed by learned Single Judge in Writ-A No.1782 of 2019 and in Writ-A No.13847 of 2021, the present appeals are disposed of and the writ petitioners are held entitled to the relief, as granted by learned Single Judge.

24. As the issues under consideration pertain to an advertisement issued way back in the year 2016 for which the selection process was concluded in the year 2019, any other writ petition filed claiming the same relief will be considered on its own merits including the principle of delay and laches.

(2023) 2 ILRA 449
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.01.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 3597 of 2009

C/M National Inter College, Barabanki
...Petitioner
Versus
J.D. of Edu., Faizabad & Ors.
...Respondents

Counsel for the Petitioner:
Neerav Chitravanshi

Counsel for the Respondents:
C.S.C., Sharad Pathak

Civil Law - Intermediate Education Act, 1921 - Regulation 31 - punishment order after retirement - Opposite party no.3 retired on 30.6.2002 on attaining the age of superannuation - Vide order dated 29.6.2007, resolution for dismissal of opposite party no.3 was passed by the committee of management - By impugned order dated 28.5.2009 the D.I.O.S. disapproved the proposed punishment of dismissal & directed for payment of the arrears of salary - Held - there is no provision contained in the Regulations under the Intermediate Education Act, 1921 providing for conducting a disciplinary enquiry & passing punishment order after the employee attains the age of superannuation nor there is any provision providing that in case misconduct is established, a deduction could be made from retiral benefits - Also prior approval of Inspector or Regional Inspectress is necessary in case of dismissal of non-teaching staff and if such prior approval is not taken before termination of the services, the termination is illegal - the respondent no.3 entitled for the payment of arrear of salary applicable to the post of clerk. (Para 25, 26)

Disposed off. (E-5)

List of Cases cited:

1. C/M Sarswati Laghu Madhyamik Vidyalaya Vs St. of U.P. & ors.

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Shri Neerav Chitravanshi, learned counsel for the petitioner, learned Standing Counsel for the respondents-State and Shri Sharad Pathak, learned counsel for the respondent no.3.

2. By means of the present writ petition, the petitioner has prayed for issuance of a writ in the nature of Certiorari quashing the impugned order dated 28.5.2009 passed by opposite party no.2 with further prayer to issue a writ in the nature of Mandamus commanding the opposite parties not to give effect to the impugned and further to grant approval for the dismissal of service of the opposite party no.3 in pursuance to the resolution of the petitioner dated 29.06.2007 (Annexure No.18 to the writ petition).

3. Facts of the case are that the Management Committee National Inter College, Fatehpur, Barabanki (hereinafter referred to as 'Society'), is a Society registered under the Societies Registration Act, 1860 which manages and runs National Inter College, Fatehpur, Barabanki through its Committee of Management to be elected as per the Intermediate Education Act, 1921 as well as the approved scheme of administration. The college is a recognized aided institution.

The opposite party no.3 was working as Assistant Clerk in the National Inter College, Fatehpur, Barabanki (hereinafter referred to as 'College') , who was assigned the charge of Library of the College. On 24.1.2007, the opposite party no.3 was suspended by the petitioner in contemplation of a disciplinary enquiry in respect of several charges of very serious nature. The order of suspension was sent to the opposite party no.2 for his approval vide letter dated 24.2.2007. The Manager of the College was also appointed as the enquiry officer for conducting the inquiry against the opposite party no.3 vide resolution of the petitioner dated 24.01.2007 itself.

Thereafter, on 14.3.2007, the opposite party no.2 had approved the order of suspension of the opposite party no.3. In

the meantime, the enquiry officer had served the charge-sheet dated 9.2.2007 containing seven serious charges along with all the relevant material on the opposite party no.3 which was earlier refused to be received by the opposite party no.3 personally and had asked him to submit his reply to the charge-sheet within the time stipulated in the same.

Despite service of the charge-sheet, the opposite party no.3 did not submit any reply to the charge-sheet within the stipulated time. The enquiry officer again by means of several letters and reminders including dated 14.2.07, 17.2.07, 21.02.07, 05.03.07 and 14.03.07 asked the opposite party no.3 to submit his reply to the charge-sheet and also requested him to participate in the enquiry fixing date and time in the said letters and reminders for holding the enquiry and had also specifically asked the opposite party no.3 to be present before him on the specified date and time and if he wants any document or examine any record he may do so on the specified date and time.

In spite of several letters and reminders, the opposite party no.3 did not submit any reply to the charge sheet nor he ever appeared before the enquiry officer on the date and time so specified in the said letters and reminders but he had been prolonging the enquiry by adopting the dilatory tactics and writing letters in this regard.

Thereafter, the enquiry officer having left with no other option had concluded the enquiry ex-parte and submitted its report to the petitioner on 16.04.2007 in which all the charges levelled against the petitioner were found proved on the basis of evidence and material on record.

On 17.4.2007, the enquiry officer issued a show cause notice to the opposite party no.3 along with the enquiry report asking him to submit any reply or representation to the charge-sheet or to the enquiry report, if any, as a last opportunity. In reply to the said notice, the opposite party no.3 submitted a letter demanding certain documents, though all the material referred to in the charge-sheet was already made available to the opposite party no.3.

Subsequently, the enquiry officer submitted its enquiry report along with the show cause notice and all the relevant material and also explaining the conduct of the opposite party no.3 during the enquiry before the petitioner on 5.5.2007 and the petitioner inturn issued a notice to the opposite party no.3 on 6.5.2007 fixing 20.5.2007 as the date of meeting of the petitioner and had asked the opposite party no.3 to remain present on the said date before the petitioner and to present his case if he so desires, before the petitioner.

In response to the said notice of the petitioner, the opposite party no.3 appeared before it on the said date fixed and submitted a letter demanding certain documents. Though all the material was already made available to the opposite party no.3 but taking a lenient view the petitioner again vide a letter dated 20/24.5.07 supplied all the relevant documents to the opposite party no.3. But, even after receiving the said documents, the opposite party no.3 did not submit any reply and only in order to further prolong the proceedings again submitted a letter demanding some more documents, though they have got no relevancy with the submission of reply.

When the opposite party no.3 had again failed to submit any reply or representation to the charge-sheet or enquiry report or to present his case, the enquiry officer having regard to the conduct of the opposite party no.3 during the enquiry and after his suspension also

submitted its supplementary report to the petitioner on 10.6.2007 in which all the charges were found proved against the opposite party no.3 in view of the earlier enquiry report.

Subsequently, the petitioner in its meeting held on 29.06.07 considered the entire matter of the opposite party no.3 including the charge-sheet, enquiry report, notice, its reply as well as all the relevant material and evidence on record and unanimously passed the resolution for dismissing the services of the opposite party no.3.

Thereafter, the said resolution of the petitioner along with all the relevant material in this regard including the charge-sheet, enquiry report, notice, its reply as well as the entire material on record was sent by the petitioner to the opposite party no.2 for his prior approval on 6.7.07. After the submission of letter dated 6.7.07, the petitioner never heard anything from the opposite party no.2 nor it was given any information about any proceedings held by the opposite party no.2 in this regard. It was only in the mid of February, 2009, the petitioner came to know that the opposite party no.2 has passed some order on 10.2.09, whereby he has set aside the order of suspension as well as resolution of the petitioner along with letter dated 6.7.07 issued with regard to the dismissal of the opposite party no.3 and has further directed for reinstating him in service.

In the said order dated 10.02.2009, the opposite party no.2 has mentioned that the opposite party no.3 has given some representation to him on 29.01.09 on which he has sought the report from the petitioner fixing 09.02.09 as the date in the matter. But it does not disclose as to on what date the opposite party no.2 has issued any letter or order to the petitioner informing about the matter and as to whom the said letter or order was served in the college.

It is respectfully submitted that no such letter or order of the opposite party no.2 as alleged was ever received in the college nor any such alleged information was ever received and as such, the petitioner was having no knowledge about any such alleged proceedings. Since the said order dated 10.02.2009 was passed ex-parte without providing any opportunity to the petitioner on the basis of unauthorized representation made by the Assistant Manager as well as the opposite party no.2 did not even consider the records relating to enquiry and resolution of the petitioner in this regard so, the petitioner has filed a writ petition before this Hon'ble Court being Writ Petition No.2495 (SS) of 2009 (Committee of Management of National Inter College v. Joint Director of Education and others), challenging the order dated 10.2.2009. The said writ petition was disposed of vide judgment and order dated 29.4.2009 directing the opposite party no.2 to consider and pass an order afresh after providing opportunity to the petitioner as well as having regard to the records submitted by the petitioner and the opposite party no.3.

Though the entire records relating to enquiry and resolution passed by the petitioner have already been submitted before the opposite party no.2 way back on 06.07.2007 itself but in compliance of the judgment and order passed by this Court dated 29.4.2009, the petitioner has on 18.05.2009 again submitted a detailed representation before the opposite party no.2 along with all necessary material including charge-sheet, inquiry report as well as the resolution of the petitioner etc. for the purposes of grant of approval for dismissal of the opposite party no.3.

The opposite party acknowledged the said representation of the petitioner has issued a letter on 18.5.2009 itself fixing 27.05.2009 at 12.00 noon as the next date for hearing in the matter. The opposite party no.2 also required the opposite party no.3 to place the material, if any, on or before the date fixed. On the date fixed by the opposite party no.2 i.e. 27.5.2009 the Manager of College has gone to the office of the opposite party no.2 at 12.00noon and remained present their till 2.00 o'clock, but the opposite party no.2 has not come to his office during the said period. In the circumstances, the Manager submitted a letter in the office of the opposite party no.2 stating therein the aforesaid position and requested for informing about the next date fixed in the matter and then she left the office of the opposite party no.2.

Thereafter, the petitioner never heard anything from the office of the opposite party no.2 about the next date fixed in the matter or any other information in this regard. However, on 30.5.2009, the petitioner came to know that the opposite party no.2 has again on 28.05.2009 ex-parte passed an order setting aside the order of suspension as well as the letter seeking approval for dismissal of service of the opposite party no.3 and further directed for payment of the arrears of salary.

4. Learned counsel for the petitioner submitted that the impugned order passed by the opposite party no.2 is illegal, malafide and has been issued without any application of mind, as such the same is liable to be quashed as he has totally ignored the entire material and evidence on record before him for taking decision as regards the grant of approval for dismissing the services of opposite party no.3 which has been submitted him after a detailed enquiry on the basis of material on record.

5. Learned counsel for the petitioner next submitted that the impugned order has been passed by the opposite party no.2 without even providing any opportunity of being heard to the petitioner for the extraneous consideration in utter violation of Articles 14 and 16 of the Constitution of India as well as principles of natural justice, equity and good conscience, as such also the impugned order is liable to be quashed.

6. Learned counsel for the petitioner next submitted that opposite party no.2 also did not inform to the petitioner about any next date fixed in the matter as requested in the letter dated 27.5.2009 and the petitioner was given no information about the date fixed i.e. 28.5.2009 as alleged in the impugned order, which fact has also been incorrectly mentioned by the opposite party no.2.

7. Learned counsel for the petitioner next submitted that the opposite party no.2 has also incorrectly mention the fact in the impugned order that the petitioner did not produce any material and evidence in the matter under reference without even failing to consider that the entire material relating to the enquiry as well as the resolution of the petitioner was before him along with letter dated 6.7.2007 seeking approval for dismissal of the opposite party no.3. He next submits that the opposite party no.2 has also failed to consider that the petitioner in compliance of the judgment and order of this Court has again on 18.5.2009 submitted all necessary material relating to enquiry and resolution of the petitioner along with its representation.

8. Learned counsel for the petitioner next submitted that the opposite party no.2 has also failed to consider that the

resolution of the petitioner for dismissal of service of the opposite party no.3 was unanimously passed after a detailed enquiry on the basis of documentary evidence on record and the entire material relating to the said enquiry was submitted before the opposite party no.2 along with the letter dated 6.7.2007 seeking his prior approval for dismissing the services of the opposite party no.3. He next submitted that the opposite party no.2 ought to have taken any decision only on the basis of the material on record before him and not otherwise.

9. Learned counsel for the petitioner next submitted that on the one hand, the opposite party no.2 is not acting in accordance with law in the matter of taking decision for the grant of approval for dismissal of the opposite party no.3 and again and again passing the orders for extraneous considerations and on the other hand, the opposite party no.2 is coercing the petitioner to make the payment of salary to the opposite party no.3.

10. Per contra, learned counsel for the respondents-State submitted that pursuant to the order dated 29.4.2009 passed by Hon'ble Court in Writ Petition No.2495(SS) of 2009 letters were sent to the Committee of Management and Ajay Kumar Nigam for hearing and thereafter, giving them proper opportunity of hearing the matter was decided on documents made available to opposite party no.2 by the parties in question.

11. Learned counsel for the respondents-State next submitted the present Committee of Management was sought paragraph reply on the representation of opposite party no.3 dated 29.1.2009, but the Assistant Manager of the College informed the then DIOS that no documents have been made available to the present Committee of Management by the previous Committee of Management and the present Committee of Management has no complaint against the opposite party no.3 and no documents were made available and therefore, the impugned order was passed accordingly and the suspension and the dismissal of the opposite party no.3 were set aside.

12. Learned counsel for the respondents-State submitted that the then D.I.O.S. on the representation of the petitioner dated 18.5.2009 and 27.5.2009 have decided the entire issue after giving opportunity of hearing to both the parties and on the request of the petitioner the date of hearing has been postponed from 27.5.2009 to 28.05.2009.

13. Learned counsel for the respondent no.3, while adopting submissions advanced by learned counsel for the respondents-State, submitted that in the writ petition stand has been taken in regard to non-payment of subsistence allowance to the petitioner that bill regarding payment of subsistence allowance has been sent to the office of District Inspector of Schools, but the subsistence allowance has not been paid due to fault of the office of the District Inspector of Schools.

14. Learned counsel for the respondent no.3 next submitted that another contrary stand has been taken that the subsistence allowance because the petitioner did not come to College and did not request for payment of subsistence allowance and, therefore the subsistence allowance has been refused to be paid.

15. Learned counsel for the respondent no.3 next submitted that the contradictory stand itself disentitles the

petitioner from approaching this Hon'ble Court under extraordinary jurisdiction under Article 226 of the Constitution of India. The fact is that the petitioner has not been paid subsistence allowance and the petitioner has made repeated request for payment of the same. On the repeated request of the petitioner for payment of subsistence allowance the then Manager (Shri Prabhakar Dutt Shukla) himself has directed for payment of subsistence allowance and directed the officiating Principal to prepare the bill for payment of subsistence allowance on 13.11.2007 and again on 17.11.2008.

16. Learned counsel for the respondent no.3 next submitted that on 27.5.2009 the District Inspector of Schools after finding that no enquiry has been conducted in the matter observed that the entire proceedings against the deponent is illegal and then adjournment was sought by Smt. Suman Singh.

17. Learned counsel for the respondent no.3 next submitted that in view of the aforesaid facts it is apparent that the petitioners are guilty of not only concealment of facts but also not approaching the Hon'ble Court with clean hands and, therefore, the present writ petition deserves to be dismissed by this Court.

18. Learned counsel for the respondents next submitted that opposite party no.3 retired from service. In the Basic Education Act, 1972 and Act of 1978, there is no provision to continue the disciplinary proceedings, therefore, his submission is that in absence of any provision under the Act to continue the disciplinary proceeding after the retirement, no proceeding can be continued against the petitioner, thus he is entitled for all benefits available.

In support of his submission, learned counsel for the respondent no.3 has placed reliance upon judgment and order 18.1.2021 passed by this Court in the Case of C/M Sarswati Laghu Madhyamik Vidyalaya v. State of U.P. and others.

19. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

20. In the Case of C/M Saraswati Laghu Madhyamik Vidyalaya (supra) relied by learned counsel for respondent no.3, this Court has held in paragraphs 14,15,16 and 17 as under:

"14: On perusal of the record, it is evident that the Director of Education (Basic) has directed the Committee of Management to make payment of salary as well as arrears to the respondent No.5. The Director of Education (Basic) in absence of any order passed by the District Basic Education Officer, has no jurisdiction to usurp the power of the District Basic Education Officer, but as a matter of fact, the disciplinary proceeding initiated against the respondent No.5 and proposal made to the District Basic Education Officer is subject to approval required under Rule 15 of the Rules of 1978. The provision contained under Rule 15 of The U.P. Recognised Basic Schools (Junior High Schools) (Recruitment And Conditions Of Service Of Teachers) Rules, 1978 is quoted below :-

"15. Termination of service. - No Headmaster or Assistant Teacher of a recognised school may be discharged or removed or dismissed from service or reduced in rank or subjected to any diminution in emoluments or served with notice of termination of service except with the prior approval in writing of the District Basic Education Officer :

Provided that in the case of the Headmaster or an Assistant Teacher of a minority institution the approval of the District Basic Education Officer shall not be necessary."

15: The controversy in regard to the continuation of disciplinary proceeding and payment of salary after retirement came for consideration before the Hon'ble Supreme Court in the case of Bhagirathi Jena Vs. Board of Directors O.S.F.G. & others [AIR 1999 SC 1841], wherein the Hon'ble Supreme Court while considering the disciplinary proceeding after retirement, has held as under :-

"It will be noticed from the abovesaid regulations that no specific provision was made for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of departmental enquiry after superannuation, in view of the absence of such provision in the abovesaid regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30.6.95. there was no authority vested in the Corporation or continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement.

Learned senior counsel for the respondent placed reliance on the judgment of this Court in T.S. Mankad v. State of Gujarat reported in, [1989] Suppl. 2 SCC 110. It is true that that was a case of imposing a reduction in the pension and gratuity on account of unsatisfactory service of the employee as determined in an enquiry which was extended beyond the date of superannuation. But the above decision cannot help the respondent inasmuch as in that case there was a specific rule namely Rule 241-A of the Junagadh State Pension and Parwashi Allowance Rules, 1932 which enabled the imposition of a reduction in the pension or gratuity of a person after retirement. Further, there were rules in that case which enabled the continuance of departmental enquiry even after superannuation for the purpose of finding out whether any misconduct was established which could be taken into account for the purpose of Rule 241-A. In the absence of a similar provision with Regulations of the respondent Corporation, the above judgment of Mankad's case cannot help the respondent.

The question has also been raised in the appeal in regard to the payment of arrears of salary and other allowances payable to the appellant during the period he was kept under suspension and upto the date of superannuation. Inasmuch as the enquiry had lapsed, it is, in our opinion, obvious that the appellant would have to get the balance of the emoluments payable to him after deducting the suspension allowance that was paid to him during the abovesaid period.

The appeal is therefore allowed directing the respondent to pay arrears of salary and allowances payable to him during the period of suspension upto the date of superannuation after deducting the suspension allowance paid to him for the said period and also to pay the appellant, all the retiral benefits otherwise payable to him in accordance with the rules and

regulations applicable, as if there had been no disciplinary enquiry or order passed there in."

In the circumstances the judgment and order of the High Court is set aside. The writ petition of the appellant is allowed in terms of the directions given above. No order as to costs."

16: This Court in the case of Ravindra Singh Rathore Vs. District Inspector of Schools and Others decided by the Allahabad High Court in Writ Petition No.16905 of 2000 vide judgment and order dated 26.9.2003 has held that in absence of provision, no disciplinary proceeding can continue after the retirement and the employee is entitled for all consequential benefit permissible to the post. The relevant paragraphs 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32 are being quoted below :-

"23. As noticed hereinbefore there is no specific provision which empowers the continuance of a disciplinary proceedings against an employee, teacher and Principal of an aided educational institution in the State of U.P. Rules 30 and 32 of the 1964 Rules also do not empower for continuance of departmental enquiry once the person has retired. Thus, the disciplinary proceedings could not have continued and it lapsed.

24. In the case of State Bank of India v. A.N. Gupta and Ors., (1997) 8 SCC 60, the Hon'ble Supreme Court was considering the question as to whether a departmental enquiry can be continued after the retirement in case of an employee of the State Bank of India. The Apex Court considered the judgment of the Andhra Pradesh High Court in T. Narasiah v. State Bank of India, (1978) 2 LLJ 173. In paragraph 14 of the judgment, the Hon'ble Supreme Court has held as follows :

"14. In the case before the Andhra Pradesh High Court (T. Narasiah) the petitioner was an officer in the State Bank. Disciplinary proceedings were initiated against him but before these could be completed the officer was informed by the Bank through its letter dated 5.5.1976, that it was not possible for the Bank to complete the enquiry well in time before the officer attained the age of 60 years which was the date of his superannuation. He was told he would therefore cease to be in the Bank's service on the date of his superannuation and he would not be paid any subsistence allowance with effect from that date. The officer was treated as having retired and ceasing to be in the employment of the Bank with effect from 10.5.1976. The Officer claimed his provident fund and pension and on the Banks' refusal to pay the same, a writ petition was filed. During the course of the hearing of the writ petition it was submitted by the Bank that it had since decided to pay the provident fund in full to the officer and the Bank had also no objection to pay his contribution to the pension and that as far as the payment of the Bank's share in the pension fund was concerned, the officer was not entitled thereto unless and until the Bank granted the same in accordance with Rule 11 of the Pension Rules. It was contended before the Andhra Pradesh High Court by the officer that Rule 11 had no application in his case and on attaining the age of superannuation he automatically went out of the service of the Bank. The Bank, however, relied on Rule 11 to withhold the Bank's contribution to the pension fund. The Court was of the view that Rule 11 had to be read in its context and consistent with the object behind the said Rule. It held that the Rule applied not only in the case of the retirement contemplated by Rule 19 but also to cases of retirement of employees on attaining the age of superannuation. The Court observed that it might happen that

the irregularities of misfeasance of an employee could not be detected well before his retirement so as to initiate and complete disciplinary enquiry in the matter and again there might be a case where disciplinary enquiry was initiated but could not be completed before the delinquent employee attained the age of superannuation. The Court noted that there was no provision in the Service Rules of the Bank providing for extension of service of an employee to enable the authorities to complete the disciplinary enquiry against him which power was available under the Government Service Rules. The Court said even if an enquiry was pending against an employee there was nothing to stop him from retiring on his attaining the age of superannuation. The enquiry could not continue after his retirement. The Court was therefore, of the opinion that it was for that reason that the bank had reserved to itself the power to sanction the pensionary benefit under Rule 11 and if there was nothing wrong with the service of an employee throughout, the Bank would naturally sanction the pension, but if there was sufficient material disclosing grave irregularities on the part of the employee, the Bank might be well within its power in refusing to sanction the pensionary benefits, or in sanctioning them only partly. The learned single Judge of the Andhra Pradesh High Court then went on to hold as under :

"Of course, such decision has to be arrived at fairly, which necessarily means after holding an enquiry, giving a fair opportunity to the concerned officer to defend himself against the accusation. Such an enquiry would not be a 'disciplinary enquiry' within the ordinary meaning of the term, but an enquiry confined to the purposes of the Rules, viz., whether the employee should be granted any pensionary benefits ; and if so, to what extent? Such an enquiry can also be made after the retirement (of an employee ; and particularly in cases of retirement) on attaining the age of superannuation, probably, such enquiry will have to be conducted only after retirement."

*The Court, therefore, gave direction as to how the enquiry was to be conducted against the officer so as to entitle him to the pensionary benefits if he was exonerated. We are afraid that this view of the Andhra Pradesh High Court does not commend to us. By giving such an interpretation to Rule 11 the Andhra Pradesh High Court has, in effect, lend validity to disciplinary proceeding against an employee even after his superannuation for which no provision existed either in Pension Rules or in the Service Rules and when the High Court had himself observed that an enquiry even if initiated during the service period of the employee could not be continue*d after his retirement on superannuation."

Thus, the Hon'ble Supreme Court has held that no disciplinary proceedings against an employee even after his superannuation for which no provision existed either in the Pension Rules or in the Service Rules, can be continued.

25. Recently, the Hon'ble Supreme Court in the case of Chandra Singh v. State of Rajasthan and Anr., JT 2003 (6) SC 20, has held as follows :

"37. .....A departmental proceeding can continue so long as the employee is in service. In the event, a disciplinary proceeding is kept pending by the employer the employee cannot be made to retire. There must exist specific provision in the pension rules in terms whereof, whole or a part of the pension can be withheld or withdrawn wherefor a proceeding has to be initiated. Furthermore, no rule has also been brought to our notice providing for

continuation of such proceeding despite permitting the employee concerned to retire. In absence of such a proceeding, the High Court or the State cannot contend that the departmental proceedings against the appellant Mata Deen Garg could continue."

26. Applying the principle laid down in Chandra Singh (supra) and Bhagirathi Jena (supra) to the facts of the present case, in the absence of any specific provision in the 1964 Rules, the proceedings for continuation of enquiry after the retirement of the employee lapsed.

27. The disciplinary proceedings can also not be saved in the present case on the ground that the committee of management had passed a resolution dismissing Sri Ravindra Singh Rathore from the post of Principal in the college and only the proposed punishment was required to be approved by the Board under Section 21 of the Act of 1982. Section 21 of the Act of 1982 reads as follows :

"21. Restriction on dismissal etc. of teachers.--The Management shall not, except with the prior approval of the Board, dismiss any teacher or remove him from service, or serve on him any notice of removal from service, or reduce him in rank or reduce his emoluments or withhold his increment for any period (whether temporarily or permanently) and any such thing done without such prior approval shall be void."

28. The statement of objects and reason for enacting the Act of 1982, inter alia, provided as follows ;

".....Under Section 16G (3) of the Intermediate Education Act, 1921, managements were authorised to impose punishment with the approval of the District Inspectors of Schools in matters pertaining to disciplinary action. This provision was found to be inadequate in cases where the management proposed to impose the punishment of dismissal, removal or reduction in rank and so it was considered necessary that this power should be exercised subject to the prior approval of the Commission or the Selection Boards, as the case may be, which could function as an independent and impartial body."

29. The Hon'ble Supreme Court in the case of Committee of Management, St. John Inter College v. Girdhari Singh and Ors., (2001) 4 SCC 296, has, after taking into consideration the statement of objects and reasons of the Act of 1982, held that it unequivocally indicates that earlier provisions continued under Section 16G (3) (a) of the Education Act were found to be inadequate where the management proposed to impose the punishment of dismissal, removal or reduction in rank. In other words, the Legislature thought that the power of approval/disapproval to an order of punishment imposed by the management should not be vested with a lower educational authority, like the District Inspector of Schools, but should be vested with an independent Commission or Board which would function as an independent and impartial body.

30. Under Section 21 of the Act of 1982 the Board has to examine the merits of the case and apply its mind independently to the question whether the evidence on record justify the removal or not. The Hon'ble Supreme Court in the case of Committee of Management Bishambhar Sharan Vaidic Inter College, Jaspur, Nainital and Anr. v. U.P. Secondary Education Service Commission and others, 1995 (Supp) 3 SCC 244, in paragraph 4 of the judgment, has held as follows :

"..... We have also noticed Section 21 of the Act to which our attention was particularly drawn. We are of the view that

the High Court has fallen in error in holding that the enquiry was vitiated because the charge-sheet was not framed by the enquiry committee but by the committee of management. The High Court has also committed an error in holding that the Commission could not have gone into the merits of the case. According to us, in view of the provisions of the said Section 21, the Commission while deciding whether or not to grant approval of the removal of a teacher, has necessarily to go into the merits of the case and apply its mind independently to the question whether the evidence on record justify the removal. It must be remembered that thecommission appointed under the Act is a high-powered body and as a body entrusted with the important function of supervising the actions taken by the Management against the teachers, it has to discharge its responsibility circumspectively. It cannot exercise its function effectively unless it scrutinizes the material and applies its mind carefully to the facts on record....."

31. In the case of Punjab National Bank and Ors. v. Kunj Behari Misra, (1998) 7 SCC 84, the Hon'ble Supreme Court has held that the disciplinary proceedings breaks into two stages. The first stage commences when the disciplinary authority arrives at its conclusion on the basis of the evidence, the enquiry officer's report and the delinquent employee replied to it. The second stage begins when the

disciplinary authority decides to impose penalty on the basis of its conclusion. Since under Section 21 of the Act of 1982, it has been provided that if the management dismisses any teacher or removeshim from service or serves on him any notice of removal from service or reduces him in rank or reduces his emoluments or withholds his increments for any period, whether temporarily or permanently, except the prior approval of the Board, such thing done without such prior approval shall be void. 32. Thus, it can safely be said that till such time the Board after considering the relevant material and going into the merits of the charges either approves or disapproves the proposed order of punishment, the disciplinary proceedings are continuing. Since Sri Ravindra Singh Rathore has retired before the Board had considered the matter for according approval, as required under Section 21 of the Act of 1982, the disciplinary proceedings cannot be continued."

17: In view of the above, the cause of action in challenging the order of Director on the ground of jurisdiction is not required to be decided at present. It is admitted case of the parties that the District Basic Education Officer has yet not granted approval, as required under Rule 15, therefore, it cannot be termed that the disciplinary proceeding against the respondent No.5 has attained finality in the eyes of law. Under Rule 15, the District Basic Education Officer can approve the proposal of the Committee of Management and also can disapprove the same with the direction to conclude the disciplinary proceeding in the light of the observation made therein. The respondent No.5 on attaining the age of superannuation, has retired from service on 30.6.2002, therefore, challenge to the order of Director has rendered infructuous."

21. Regulation 31 of the U.P. Education Manual which deals with the punishment, inquiry and suspension of Class IV employee, as translated, is as hereunder:-

"31. Punishment awarded to the employees, for which prior approval of the

Inspector or the Regional Inspector shall be necessary, may be in any of the following manners -

(a) Appointment

(b) Separation or release

(c) Downgrading in category

(d) Reductions in perquisites For awarding any of the aforesaid punishments to class four employees, the Principal or the Headmaster shall be competent. In case of punishment being awarded by the competent authority, class four employee may appeal before the Committee of Management. This appeal must be presented within one month from the date of information of the punishment and thereupon a decision shall be taken by the Committee of Management within a maximum period of 6 weeks of receipt of the appeal. On consideration of all the necessary documents and after hearing the employee, in case he does want to appear before the Committee of Management in person, the Committee of Management will give its decision on the appeal.

The class four employee shall also have the right to make a representation to the District Inspector of schools/Regional Inspector of Girls school against the decision taken by the Committee of Management on his appeal, within one month from the date of information of the decision.

Provided that in case the Committee of Management does not give its decision on the appeal within the aforesaid prescribed period of six weeks, then the concerned employee may submit his representation directly to the District Inspector of Schools/Regional Inspector of Girls' School, after lapse of aforesaid six weeks' period.

The District Inspector of Schools/Regional Inspector of Girls' School shall give its decision on the aforesaid representation within a maximum period of three months from the date of receipt of such representation and this decision shall be final.

With regard to submission of representation, consideration and decision, Regulation 96 to 98 of this Chapter with necessary modification shall be applicable."

22. On perusal of the above extracted judgment, it is evidently clear that the disciplinary proceedings breaks into two stages. The first stage commences when the disciplinary authority arrives at its conclusion on the basis of the 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 evidently clear that no disciplinary proceedings against an employee even after his superannuation for which no provision existed either in the Pension Rules or in the Service Rules, can be continued.

23. On perusal of the Regulation 31, it is evident that Regulation 31 of the U.P. Intermediate Education Regulations while providing for prior approval in case of Class IV employees the said paragraph refers to all employees and there is no reason to exclude Class IV employees from the applicability of the said regulation. Subsequent paragraph of the Regulation 31 also refers to Class IV employees.

24. Perusal of the material on record reflects that vide order dated 24.1.2007 the opposite party no.3 was placed under suspension by the Committee of Management. Charge sheet was given to opposite party no.3. Ex parte enquiry report was submitted on 16.4.2007 to which

opposite party no.3 submitted his reply on the show cause notice dated 17.4.2007. Vide order dated 29.6.2007, resolution for dismissal of opposite party no.3 was passed. Subsistence allowance after being placed under suspension, was not paid. Vide order dated 10.2.2009, the District Inspector of Schools disapproved the proposed punishment of dismissal. The Committee of Management filed Writ Petition No.2495(SS) of 2009 which was disposed of with direction to D.I.O.S. to hear the Committee of Management again.

The D.I.O.S. fixed dates for hearing on 18.5.2009, 26.5.2009 and 27.5.2009. After considering, D.I.O.S. has again disapproved the proposed punishment of dismissal. The Committee of Management has to pass the final punishment order of dismissal from service only when the prior approval is given by the District Inspector of Schools, which on the contrary in the present was refused. No final order of punishment can be passed by the appointing authority i.e. Committee of Management as there is no provision contained in the Regulations under the Intermediate Education Act, 1921 providing for passing punishment order after the employee attains the age of superannuation. In this view of the matter, the law-report cited by learned counsel for the petitioner is fully applicable to the present facts and circumstances of the case.

25. In the various judgments of the Hon'ble Apex Court as well as this Court, it has been repeatedly held that prior approval in case of dismissal of non-teaching staff is necessary and if such prior approval is not taken before termination of the services, the termination is illegal and prior approval of Inspector or Regional Inspectree is necessary.

26. It is the admitted position that the opposite party no.3 has retired on 30.6.2002 on attaining the age of superannuation, therefore there is no provision for conducting a disciplinary enquiry after his retirement and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits.

27. Considering in totality of facts and circumstances of the case, respondent no.3 is entitled for the payment of salary applicable to the post of clerk of the institution inasmuch as the arrears of salary w.e.f. the date found due. Therefore, District Inspector of Schools is directed to ensure entire payment inasmuch as arrears of salary to the respondent no.3 within a period of three months from the date of production of a certified copy of this order.

28. In the result, the writ petition is finally **disposed of**.

(2023) 2 ILRA 462
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.01.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-A No. 8973 of 2022

Pushpa Singh ...Petitioner
Versus
G.M. Baroda U.P. Gramin Bank, GKP. & Ors. ...Respondents

Counsel for the Petitioner:
Ravi Shankar Mishra, Shiv Kumar Soni

Counsel for the Respondents:
Prashant Kumar Srivastava

A. Civil Law - Family Pension - Pension Regulations, 2018 - Regulation 38(6)(d) - Regulation 38(6)(d) (i) Where family pension is payable to more widows than one, the family pension shall be paid to the widows in equal shares - Regulation 38(6)(d) (iii) Where the deceased employee or pensioner is survived by a widow but has left behind eligible child or children from another wife who is not alive, the eligible child or children shall be entitled to the share of family pension which the mother would have received if she had been alive at the time of the death of the employee or pensioner - Hindu Marriage Act, Ss 5, 11 - A Hindu, cannot have two widows living at the same time, as the second marriage by virtue of S. 5 & S. 11 is a void marriage - Regulation 38(6)(d) would not be applicable in the case of Hindus unless the said person has married before the enactment of the Hindu Marriage Act - Regulation 38(6)(d) of the Pension Regulations, 2018 was enacted keeping in mind that the employee can be other than Hindu also where the second marriage is not a void marriage by virtue of applicability of personal laws - *Interpretation* - a provision cannot be interpreted so as to violate any other statutory enactment - in the present case being the Hindu Marriage Act - Literal interpretation is to be avoided where it leads to consequences which are not contemplated by a central enactment being the Hindu Marriage Act. (Para 12, 13, 15)

B. Claim of the petitioner for payment of family pension - Petitioner was the first wife of Late Tilak Dhari Singh who once again married during the lifetime of the petitioner with another lady namely Uma Devi - petitioner was called upon to obtain a Succession Certificate in respect of the claim of the family pension - Bank argued that the children born out of a void marriage would be legitimate and would be entitled to succeed to the estate - *Held* - Once the second marriage of a Hindu is a void marriage, the person married to such a person - in the present case Uma Devi - shall not qualify as a widow, thus, the eligible child from the second marriage would not get the benefit of 'family pension' in equal proportion as is proposed to be argued by learned counsel for the respondents/Bank (Para 16)

Allowed. (E-5)

List of Cases cited:

1. Smt Violet Issaac & ors. Vs U.O.I. & ors.; (1991) 1 SCC 725

2. Nitu Vs Sheela Rani & ors.; (2016) 16 SCC 229

3. Rameshwari Devi Vs St. of Bihar & ors.; AIR 2000 SC 735

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Shri Ravi Shankar Mishra, learned counsel for the petitioner and Shri Prashant Kumar Srivastava, learned counsel for respondents/Bank.

2. Present petition has been filed stating that the husband of the petitioner was working with the respondents - Bank on a Class - IV post as a Peon and died on 23.11.2017. Subsequent to the death, the petitioner moved an application for release of the retiral dues, however, the same has been denied and the petitioner was called upon to obtain a Succession Certificate. In pursuance to the said condition, the petitioner filed proceedings before Civil Judge (Junior Division), Pratapgarh being M.N.R. No.48 of 2019. The said suit considered the fact that the petitioner was the first wife of Late Tilak Dhari Singh who once again married during the lifetime of the petitioner with one lady called Uma Devi. The M.N.R. No.48 of 2019 considered the respective claims of the petitioner as well as the children of Uma Devi and gave a categorical finding with

regard to the dues holding that the petitioner alongwith the children born out of the marriage of Late Tilak Dhari Singh and Uma Devi would be entitled to the retiral dues in the proportion as determined by the Court.

3. The dispute, subsequent to the filing of the suit, has arisen on account of claim of the petitioner for payment of family pension. The respondents/Bank, on a claim being made by the petitioner, refused to grant the relief of payment of family pension to the petitioner solely on the ground that in the M.N.R. No.48 of 2019, the issue with regard to family pension was not decided by the Court and thus, placing reliance on provisions of Regulation 38(6)(d) of Baroda U.P. Bank (Employees') Pension Regulations, 2018 (hereinafter referred to as 'the Pension Regulations, 2018'), the petitioner was called upon to obtain a fresh Succession Certificate in respect of the claim of the family pension. The petitioner has challenged the said decision of the petitioner.

4. Learned counsel for the respondent/Bank after having obtained instructions argues that the payment of family pension is to be determined in terms of the guidelines as provided under Regulation 38(6)(d) of the Pension Regulations, 2018. He further argues that the children born out of a void marriage would be legitimate and would be entitled to succeed to the estate as has been determined through the litigation in between the parties.

5. Learned counsel for the petitioner rebuts the said argument by arguing that the law with regard to second marriage is fairly well settled and the second marriage of Uma Devi with the husband of the petitioner was null and void by virtue of Section 5 and Section 11 of the Hindu Marriage Act.

6. In the light of the said submission, this Court is to decide the import of Regulation 38(6)(d) of the Pension Regulations, 2018. Regulation 38 of the Pension Regulations, 2018 framed by the Bank provides for the manner of payment of family pension. Regulation 2(n) of the Pension Regulations, 2018 defines 'family', which reads as under:

*"**2. Definitions.**- (1) In these regulations, unless the context otherwise requires,-*

".....

*(n)"**family**" in relation to an employee means,-*

(i) wife in the case of a male employee or husband in the case of a female employee (whether the marriage took place before or after retirement);

(ii) a judicially separated wife or husband, such separation not being granted on the ground of adultery and the person surviving was not held guilty of committing adultery;

(iii) (A) unmarried sons or unmarried daughters (born before or after retirement including those adopted) who have not attained the age of twenty-five years;

(B) unmarried sons or unmarried daughters suffering from any disorder or disability of mind or physically crippled;

(iv) widowed daughters or divorced daughters (born before or after retirement) without any age restriction;

(v) parents who were wholly dependent on the employee when such employee was alive, subject to the following conditions:

(A) the deceased employee had left behind neither a widow or widower nor an eligible son or daughter or a widowed or divorced daughter and that the earnings of the parents is less than two thousand five hundred and fifty rupees per month.

(B) where the deceased employee has left behind a childless widow, they become eligible for family pension only after the death of childless widow or when her independent income from all other sources becomes equal to or higher than two thousand five hundred and fifty rupees per month;"

7. Regulation 38(6)(d) with which the issue raised in the present case is concerned, is quoted herein below:

38. Payment of family pension.-

"(6).....

(d) (i) Where family pension is payable to more widows than one, the family pension shall be paid to the widows in equal shares.

(ii) On the death of a widow, her share of the family pension shall become payable to her eligible child:

Provided that if the widow is not survived by any child, her share of the family pension shall not lapse but shall be payable to the other widows in equal shares, or if there is only one such other widow, in full, to her.

(iii) Where the deceased employee or pensioner is survived by a widow but has left behind eligible child or children from another wife who is not alive, the eligible child or children shall be entitled to the share of family pension which the mother would have received if she had been alive at the time of the death of the employee or pensioner:

Provided that on the share or shares of family pension payable to such a child or children or to a widow or widows ceasing to be payable, such share or shares shall not lapse, but shall be payable to the other widow or widows or to the other child or children otherwise eligible, in equal shares, or if there is only one widow or child, in full, to such widow or child.

(iv) Where the deceased employee or pensioner is survived by a widow but has left behind eligible child or children from a divorced wife or wives, such eligible child or children shall be entitled to the share of family pension which the mother would have received at the time of death of the employee or pensioner had she not been so divorced:

Provided that on the share or shares of family pension payable to such a child or children or to a widow ceasing to be payable, such share or shares, shall not lapse, but shall be payable to the other widow or widows or to the other child or children otherwise eligible, in equal shares, or if there is only one widow or child, in full, to such widow or child."

8. Learned counsel for the respondents at this stage argues that Regulation 38(6)(d) deals with the issue, however, Regulation 49 which deals with nomination and Regulation 54 which is residuary provision, would also have some bearing in the issue raised in the present petition. Regulation 49 and 54 are quoted herein below:

*"**49. Nomination.**- (1) The trust shall allow every employee governed by these regulations to make a nomination conferring on one or more persons the right to receive the amount of pension benefits under these regulations in the event of his death before that amount becomes payable or, having become payable, has not been paid and such*

nomination shall be made in such form as may be specified by the Bank from time to time.

(2) If any employee nominates more than one person under sub-regulation (1), he shall, in his nomination, specify the amount or share payable to each of the nominees in such a manner as to cover the whole of the amount of the pension benefits that may be payable in the event of his death.

(3) A nomination made by an employee may, at any time, be modified or revoked by him after giving a written notice to the trust of his intention of doing so in such form as the Bank may from time to time specify.

(4) A nomination or its revocation or its modification shall take effect to the extent it is valid on the date on which it is revised by the trust."

*"**54. Residuary provisions.**- In case of doubt, in the matter of application of these regulations, regard may be had to the corresponding provisions of Central Civil Services Rules, 1972 or Central Civil Services (Commutation of Pension) Rules, 1981 applicable for Central Government employees with such exceptions and modifications as the Bank, after consultation with Bank of Baroda being the Sponsor Bank and the National Bank and with the previous sanction of the Central Government, may from time to time, determine."*

9. It is well settled that family pension does not form a part of the estate and is payable to only the persons who are named in the regulations/rules governing the grant of family pension. The said issue was considered by the Hon'ble Supreme Court in the case of ***Smt Violet Issaac & Ors. v. Union of India & Ors.; (1991) 1 SCC 725*** wherein the Hon'ble Supreme Court has held as under:

4. The dispute between the parties relates to gratuity, provident fund, family pension and other allowances, but this Court while issuing notice to the respondents confined the dispute only to family pension. We would therefore deal with the question of family pension only. Family Pension Rules, 1964 provide for the sanction of family pension to the survivors of a Railway employee. Rule 801 provides that family pension shall be granted to the widow/widower and where there is no widow/widower to the minor children of a Railway servant who may have died while in service. Under the Rules son of the deceased is entitled to family pension until he attains the age of 25 years, an unmarried daughter is also entitled to family pension till she attains the age of 25 years or gets married, whichever is earlier. The Rules do not provide for payment of family pension to brother or any other family member or relation of the deceased Railway employee. The Family Pension Scheme under the Rules is designed to provide relief to the widow and children by way of compensation for the untimely death of the deceased employee. The Rules do not provide for any nomination with regard to family pension, instead the Rules designate the persons who are entitled to receive the family pension. Thus, no other person except those designated under the Rules are entitled to receive family pension. The Family Pension Scheme confers monetary benefit on the wife and children of the deceased Railway employee, but the employee has no title to it. The employee has no control over the family pension as he is not required to make any contribution to it. The family pension scheme is in the nature of a welfare scheme framed by the Railway administration to provide relief to the widow and minor children of the deceased employee. Since, the Rules do not

provide for nomination of any person by the deceased employee during his lifetime for the payment of family pension, he has no title to the same. Therefore, it does not form part of his estate enabling him to dispose of the same by testamentary disposition.

5. In Jodh Singh v. Union of India [(1980) 4 SCC 306 : 1980 SCC (L&S) 549], this Court on an elaborate discussion held that family pension is admissible on account of the status of a widow and not on account of the fact that there was some estate of the deceased which devolved on his death to the widow. The court observed:

"Where a certain benefit is admissible on account of status and a status that is acquired on the happening of certain event, namely, on becoming a widow on the death of the husband, such pension by no stretch of imagination could ever form part of the estate of the deceased. If it did not form part of the estate of the deceased it could never be the subject matter of testamentary disposition."

The court further held that what was not payable during the lifetime of the deceased over which he had no power of disposition could not form part of his estate. Since the qualifying event occurs on the death of the deceased for the payment of family pension, monetary benefit of family pension cannot form part of the estate of the deceased entitling him to dispose of the same by testamentary disposition."

10. The said judgment was followed by the Hon'ble Supreme Court in the case of ***Nitu v. Sheela Rani & Ors.; (2016) 16 SCC 229,*** wherein the Hon'ble Supreme Court has held as under:

"17. *It is pertinent to note that in this case the pension is to be given under the provisions of the Scheme and therefore, only the person who is entitled to get the pension as per the Scheme would get it. Similar issue had arisen before this Court in Violet Issaac v. Union of India [Violet Issaac v. Union of India, (1991) 1 SCC 725 : 1991 SCC (L&S) 551] and after considering the relevant provisions, this Court came to the conclusion that family pension does not form part of the estate of the deceased and therefore, even an employee has no right to dispose of the same in his will by giving a direction that someone other than the one who is entitled to it, should be given the same. In the instant case, as per the provisions of the Scheme, the appellant widow is the only family member who is entitled to the pension and therefore, the respondent mother would not get any right in the pension. Of course, it cannot be disputed that if there are other assets left by late Shri Yash Pal, the respondent mother would get 50% share, if late Shri Yash Pal had not prepared any will and it appears that late Shri Yash Pal had died intestate and no will had been executed by him."*

11. Considering the submissions made at the Bar, Regulation 38(6)(d) of the Pension Regulations, 2018, on its plain reading, provides that where the family pension is payable to more widows than one, the family pension shall be paid to the windows in equal shares; Regulation 38(6)(d)(ii) provides that in the event of death of a widow, her share of the family pension shall become payable to her eligible child, and Regulation 38(6)(d)(iii) provides that in case the deceased employee is survived by a widow and has left behind eligible child or children from another wife who is not alive, the eligible child or children shall be entitled to the share of family pension which the mother

would have received if she had been alive at the time of death of the employee or pensioner.

12. A plain reading of the provision as contained in Regulation 38(6)(d) of the Pension Regulations, 2018 makes it clear that where there are more widows than one, they would be entitled to family pension in equal shares, however, keeping in view the mandate of the Hindu Marriage Act, it is not possible that a Hindu after enactment of the Hindu Marriage Act is survived by more than one widow as the second marriage by virtue of Section 5 and Section 11 is a void marriage. It appears that Regulation 38(6)(d) of the Pension Regulations, 2018 was enacted keeping in mind that the employee can be other than Hindu also where the second marriage is not a void marriage by virtue of applicability of personal laws.

13. On the first brush, on a plain reading of Regulation 38(6)(d), the right of more than one than one widow is evident, however, it is well settled that a provision cannot be interpreted so as to violate any other statutory enactment - in the present case being the Hindu Marriage Act. Literal interpretation is to be avoided where it leads to consequences which are not contemplated by a central enactment being the Hindu Marriage Act.

14. In the present case, without doing any mischief to Regulation 38(6)(d) of the Pension Regulations, 2018, the only rule of interpretation which can be adopted is the purposive interpretation.

15. As a Hindu, after the enactment of the Hindu Marriage Act, by virtue of the statute, cannot have two widows living at the same time, I have no hesitation in holding that Regulation 38(6)(d) of the Pension Regulations, 2018 in respect of rights of more than one widows would not be applicable in the case of Hindus unless the said person has married before the enactment of the Hindu Marriage Act.

16. Similarly interpreting Regulation 38(6)(d)(iii), the said provision entitles eligible children of a widow only in the event that she qualifies to be a 'widow'. Once the second marriage of a Hindu is a void marriage, the person married to such a person - in the present case Uma Devi - shall not qualify as a widow, thus, the eligible child from the second marriage would not get the benefit of 'family pension' in equal proportion as is proposed to be argued by learned counsel for the respondents/Bank.

17. Coming to the provisions of Regulation 49, which provides for nomination, it is well settled that a nominee has a right to receive for benefits of all the legal heirs and there cannot be any quarrel with the provision contained in Regulation 49 of the Pension Regulations, 2018. In any event, in view of the law laid down by the Hon'ble Supreme Court in the case of ***Smt Violet Issaac (supra)*** and ***Nitu (supra)***, no right of nomination is available in respect of 'family pension'.

18. As regards Regulation 54, which provides that in the event of doubt, the Bank has the option to take a decision and modify the rules to align the same with the Central Civil Services Rules, 1972 or Central Civil Services (Commutation of Pension), Rules, 1981 with the previous sanction of Central Government, it is admitted that no such determination of applying any of the said two Rules have been made applicable with the previous

sanction of the Central Government by the Bank so far.

19. At this stage, learned counsel for the respondents has placed reliance on an Office Memorandum dated 27.11.2012 issued by the Government of India, Ministry of Personnel, P.G. & Pension, Department of Pension & Pensioners' Welfare, however, as I have already held that the Bank has not yet taken any decision of applying the aforesaid two Rules on the Bank employees, the said office memorandum will be of no avail.

20. Coming to the judgments cited by learned counsel for the respondents in the case of ***Rameshwari Devi v. State of Bihar and Ors.; AIR 2000 SC 735***, the Hon'ble Supreme Court was considering the benefits which flow to the children of the second wife and the Court held that they would be entitled. However, while doing so, the Court had referred to the CCS Rules as well as the Bihar Government Servants Conduct Rules and had given the interpretation in view of the rules prevalent there.

21. In the present case, the rules are different and are not akin to the CCS Rules or the Bihar Government Servants Conduct Rules, which prohibit second marriage and the Court held that no departmental inquiry was initiated against the employee while he was surviving on the basis of the said rules, thus, the said judgment would have no applicability to the facts of the present case.

22. Coming to the other judgment relied upon by the respondents in the case of ***Amlawati Devi v. The State of Bihar & Ors.; MANU/BH/0047/2003*** wherein the Court placing reliance on the judgment of the Hon'ble Supreme Court in the case of ***Rameshwari Devi (supra)*** has held that the second wife would be entitled to the share of family pension.

23. As I have already held that the facts leading to the judgment in the case of ***Rameshwari Devi (supra)*** would not be applicable while interpreting the regulations as framed by the Bank, thus, the judgment in the case of ***Amlawati Devi (supra)*** would have no applicability to the facts of the present case.

24. Coming to the third judgment cited by learned counsel for the respondents in the case of ***Indu Devi v. The State of Bihar & Ors.; Civil Writ Jurisdiction Case No.7092 of 2016*** decided on 14.11.2017 where the High Court had the occasion to deal with the circular of the Finance Department dated 06.09.1996 and had held that the second wife would also be entitled for family pension. The said judgment has no applicability to the facts of the present case as no such circular/provision in the present case exists.

25. In view of the interpretation as recorded above, ***the writ petition deserves to be allowed and ordered accordingly.***

26. Order dated 14.10.2022 as contained in Annexure - 3 is set aside with direction to the respondents/Bank to pay the family pension to the petitioner in accordance with law.

27. The arrears of family pension shall be paid to the petitioner after its computation within a period of four months.

(2023) 2 ILRA 470
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2023

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE RAJENDRA KUMAR -IV

Writ A No. 9739 of 2018
with connected cases

Bal Krishana & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Satyaveer Singh, Sri Arun Kumar Yadav, Sri Ravindra Kumar Patel, Sri Saquib Mukhtar, Sri Satyaveer Singh, Sri Shri Krishna Mishra, Sri Thakur Prasad Dubey, Sri Yawar Mukhtar, Sri T.P. Singh(Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Abhinava Krishna Srivastava, Sri Anand Kr. Srivastava, Sri Arun Kumar Yadav, SriAvneesh Tripathi, Sri Bharat Pratap Singh, Sri M.N. Singh, Sri Tarun Agarwal

A. Civil Law - Qualification for appointment - Assistant Teacher (Men/ Women) Hindi to teach students of Class 9th and 10th in Government Secondary Intermediate Schools or Colleges - NCTE (Determination of Minimum qualifications for persons to be recruited as Education Teacher and Physical Education Teacher in Pre-primary, Upper primary, Secondary, Sr. Secondary or Intermediate Schools or colleges) Regulation 2014 - Regulation 4 prescribes graduation in the subject as minimum educational qualification for the post of Assistant Teacher - U.P. Subordinate Educational (Trained Graduate Grade) Service Rules, 1983, Rule 8(6) - U.P. Subordinate Education (Trained Graduates Grade) Service (Fourth Amendment) Rules, 2016, Rule 8 - educational qualification for the post of Assistant Teacher (Hindi) is *(i) Bachelor's degree with Hindi and Intermediate with Sanskrit (ii) B.Ed.* - Grievance of the petitioners was that they were graduates in Sanskrit and Hindi & that the respondents cannot deny eligibility of the petitioners on the ground that the petitioners are not intermediate with Sanskrit subject - Held - The point of dispute is the prescribing of additional qualification of *"Intermediate with Sanskrit as a subject or equivalent examination with Sanskrit"* under Rule 8(6)(i) - prescribing of Intermediate with Sanskrit as a subject, in addition to the minimum qualification prescribed under Regulation 4 of the NCTE Regulations, 2014 is looking into the syllabus of Class 9th and 10th - the additional qualification has a direct bearing with the syllabus prescribed for Class 9th and 10th - petitioners who have not passed Intermediate with Sanskrit as a subject, but passed the Intermediate with other subjects and did graduation in Sanskrit, can not be said to possess higher qualification as they have not completed graduation through the channel/faculty of the prescribed qualification of Sanskrit as a subject in Intermediate. (Para 24, 20)

B. Civil Law - Constitution of India,1950 - Article 226 - Judicial Review - Scope - Qualification for appointment - essential qualifications for appointment to a post are for the employer to access, determine and decide - Court can not in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer - It is for the employer to determine and decide the relevancy and suitability of the qualification for any post and it is not for the court to consider and assess it - while prescribing the qualifications for a post, the St., as employer, may legitimately bear in mind several factors including the nature of the job, the aptitudes requisite for the efficient discharge of duties, the functionality of a qualification and the content of the course of studies (Para 15, 16)

C. Civil Law - Qualification for appointment - Possession of Higher Qualification - Normal rule is that candidate with higher qualification is deemed to fulfill the lower qualification prescribed for a post - But that higher qualification has to be in the same channel - Further, this rule will be subject to an exception - Where the prescription of a particular qualification is found to be relevant for discharging the functions of that post and at the same time, the Government is able to demonstrate that for want of said qualification a candidate may not be suitable for the post, even if he possesses a "better" qualification but that "better" qualification has no relevance with the functions attached with the post (Para 19)

D. Civil Law - Interpretation - Principles of Constitutional Validity - constitutional validity of an Act can be challenged only on two grounds, viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision - In considering the validity of a Statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles - For sustaining the constitutionality of an Act, Court may take into consideration matters of common knowledge, reports, preamble, history of the times, object of the legislation and all the other facts which are relevant - courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity - Where a Statute is silent or is inarticulate, the Court would attempt to transmutate the inarticulate and adopt a construction which would lean towards constitutionality - While examining the challenge to the constitutionality of an enactment, the court is to start with the presumption of constitutionality and try to sustain its validity to the extent possible (Para 30)

Dismissed. (E-5)

List of Cases cited:

1. Jai Prakash Yadav & ors. Vs The U.O.I. & ors. Writ-A No.11545 of 2018 dt 10.05.2018

2. St. of U.P. & ors. Vs Bhupendra Nath Tripathi & ors., (2010) 13 SCC 203

3. Dr. Preeti Srivastava & anr. Vs St. of M.P. & ors., (1999) 7 SCC 120

4. A.P. Cooperative Oil Seeds Growers Federation Ltd., Hyderabad, Andhra Pradesh Vs D. Achyuta Rao & ors.

5. Bhupendra Nath Tripathi & ors. Vs St. of U.P. & ors., (2009) 2 All LJ 401 (FB)

6. St. of U.P. & ors. Vs Bhupendra Nath Tripathi & ors., (2010) 4 SCC 606

7. St. of Punjab & ors. Vs Anita & ors., (2015) 2 SCC 170

8. Zahoor Ahmad Rather & ors. Vs Sheikh Imtiyaz Ahmad & ors., (2019) 2 SCC 404

9. Maharashtra Public Service Commission Vs Sandeep Shriram Warade & ors.(2019) 6 Supreme Court Cases 362

10. Chief Manager, Punjab National Bank & anr. Vs Anit Kumar Das 2020 SCC OnLine SC 897

11. St. of Punjab & ors. Vs Anita & ors. (2015) 2 SCC 170

12. Zahoor Ahmad Rather Vs Imtiyaz Ahmad (2019) 2 SCC 404

13. Anant Mills Vs St. of Gujarat reported in AIR 1975 SC 1234

14. Charanjit Lal Choudhary Vs U.O.I. & ors., AIR 1951 SC 41

15. U.O.I. Vs Elphinstone Spinning and weaving Co. Ltd. & ors., AIR 2001 SC 724

16. St. of Bihar & ors. Vs Smt. Charusila Dasi, AIR 1959 SC 1002

17. Kedar Nath Singh Vs St. of Bihar, AIR 1962 SC 955

18. Corporation of Calcutta Vs Libery Cinema, AIR 1965 SC 1107

19. Anandji Haridas and Co. (P) Ltd. Vs S.P. Kasture and ors., AIR 1968 SC 565

20. Sunil Batra Vs Delhi Administration and ors., AIR 1978 SC 1675

21 St. of Bihar Vs Bihar Distilleries, AIR 1997 SC 1511

22. Zameer Ahmad Latifur Rehman Sheikh Vs St. of Mah. & ors., J.T. 2010 (4) SC 256

23. Greater Bombay Co-operative Bank Ltd. Vs United Yarn Tex (P) Ltd. & ors., (2007) 6 SCC 236

24. Promoters and Builders Association Vs Pune Municipal Corporation (2007) 6 SCC. 143

25. Hukum Chand Vs U.O.I., (1972) 2 SCC 601

26. General Officer Commanding-in-Chief Vs Subhash Chandra Yadav & anr., (1988) 2 SCC 351

27. Additional District Magistrate (Rev.) Delhi Administration Vs Siri Ram, (2000) 5 SCC 451

28. Sukhdev Singh & ors. Vs Bhagatram Sardar Singh Raghuvanshi & anr., (1975) 1 SCC 421

29. St. of Karn. & anr. Vs H. Ganesh Kamath & ors., (1983) 2 SCC 402

30. Kunj Behari Lal Butail & ors. Vs St. of H.P. & ors., (2000) 3 SCC 40

31. U.O.I. Vs M/s G.S. Chatha Rice Mill, (2021) 2 SCC 21 209

32 Kerala St. Electricity Board & ors. Vs Thomas Joseph @ Thomas M.J. & ors. and Civil Appeal Nos.9252-9253 of 2022 dt 16.12.2022

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri T.P. Singh, learned Senior Advocate, assisted by Sri Satyaveer Singh, Sri Radha Kant Ojha, learned Senior Advocate assisted by Sri Lalit Kumar Pandey, and Sri Ramesh Chandra Tiwari, learned counsels for the petitioners, Sri Neeraj Tripathi, learned Additional Advocate General assisted by Sri Shashank Shekhar Singh, learned Additional Chief Standing Counsel for the State-respondents and Sri Avaneesh Tripathi, learned counsel for the respondent no. 3 (U.P. Public Service Commission, Allahabad).

2. With the consent of learned counsels for the parties WRIT - A No. - 9739 of 2018 is treated as the leading writ petition and facts thereof are being noted.

3. The reliefs sought in the leading writ petition is as under :

"A. Issue a writ order or direction in the nature of mandamus declaring the impugned rules 8(6) of U.P. Sub-ordinate Educational (Trained Graduate Grade) services (4th Amendment) rules 2016 to be ultra virus to article 40 of the Constitution of India to an extent that it does prescribed as one of the qualification of having passed intermediate with subject Sanskrit one of the qualification relating to Assistant Teacher (Trained Graduates Grade) Subject Hindi.

B. Issue a writ order or direction in the nature of certiorari calling the record and quashing impugned advertisement dated 15.03.2018 being advertisement no., -1 / b -1 - / 2018 issued by Secretary U.P. Public Service Commission, Allahabad to an extent that it prescribes Sanskrit as a subject in Intermediate Qualification of Assistant Teacher (Trained Graduate Grade) Subject Hindi as provided in impugned rule 8(6) of U.P. Sub-ordinate

Educational (Trained Graduate Grade) services (4th amendment) Rules 2016.
C. Issue a writ order or direction in the nature of mandamus directing the respondents to initiate selection on the post of Assistant Teacher (Trained Graduate Grade) Subject Hindi after prescribing qualification B.A. or equivalent with Hindi and Sanskrit and B.Ed. not Sanskrit as subject in intermediate in government inter college in state of U.P."

Facts :

4. Briefly stated facts of the present case are that the petitioners claim themselves to be aspirants to apply in selection of Assistant Teachers (Trained Graduate Grade) (Men/Women Branch) Examination 2018, wherein qualification for assistant teachers (Men/Women Branch) - Hindi, in brief, has been prescribed **as Intermediate with Sanskrit** as one of the subject and graduation with Hindi and B.Ed. for appointment as Assistant Teacher for Class 9th and 10th in **Government Secondary Intermediate Schools or Colleges.** All the petitioners claim that they have degree of graduation with the subject Hindi and Sanskrit and also have B.Ed. Degree from recognised Universities but have passed their intermediate without Sanskrit as a subject. Since Sanskrit had not been their one of the subject in Intermedia, therefore, as per provisions of the U.P. Subordinate Educational (Trained Graduate Grade) Services (4th Amendment) Rules 2016, they are not eligible to apply for the post of Assistant Teacher (Hindi) for Class 9th and 10th in Government Colleges.

5. According to the petitioners, Rule 8(6) of the Uttar Pradesh Subordinate Educational (Trained Graduate Grade) Service Rules, 1983 as amended by the 4th Amendment Rules 2016 (hereinafter referred to as the Rules, 1983) providing for Sanskrit as a subject in Intermediate for Hindi Teachers for High School (Class 9th and 10th) is arbitrary, illegal and is in conflict with the eligibility provided under the U.P. Intermediate Education Act, 1921 which does not provide Sanskrit as a mandatory subject in Intermediate for the post of Assistant Teacher (Hindi). Consequently the petitioners have filed the present writ petitions praying to declare the impugned Rules 8(6) of the amended Rules 1983 to be viloative of Article 14 of the Constitution of India to the extent it prescribes Sanskrit as a subject in Intermediate as one of the qualification for the post of Assistant Teachers (Hindi) and the consequent Advertisement No.A-I/E-1/2018, dated 15.03.2018 issued by the Secretary U.P. Public Service Commission Allahabad. They have also sought a writ, order or direction in the nature of mandamus to the respondents to initiate selection on the post of Assistant Teachers (Trained Graduate Grade) Subject - Hindi by deleting Sanskrit as one of the subject in Intermediate.

Submissions on behalf of the Petitioners

6. Learned counsel for the petitioners submit as under :-

(i) Qualification prescribed under the Uttar Pradesh Sub-ordinate Educational (Trained Graduate Grade) Services Rules, 1983 (hereinafter referred to as "Rules, 1983") enacted by the State Government in exercise of powers conferred under the proviso to Article 309 of the Constitution of India, as amended by the 4th amendment Rules, 2016, providing for academic qualification for the post of Assistant

Teachers (Men / Women) (Hindi), is in conflict with Appendix-A (Regulation I) Chapter II framed under the U.P. Intermediate Education Act, 1921 (hereinafter referred to as the "Act, 1921") and the Regulation 4 of the National Council for Teachers Education (Determination of Minimum Qualifications for Recruitment of Teachers in Schools) Regulations 2001) (hereinafter referred to as NCTE Regulation, 2001), inasmuch as the Rules 1983 prescribes qualification for Assistant Teacher (Hindi) to be **(I) Bachelor's Degree with Hindi as a subject from a recognized University in India and Intermediate with Sanskrit as a subject or equivalent examination with Sanskrit and (II) B.Ed. or equivalent degree from a recognized University in India,** whereas the regulations framed under the Act, 1921 provides academic qualification for Hindi Teacher to be graduation in Hindi and Sanskrit and the NCTE regulation provides graduate/postgraduate as academic qualification for Assistant Teacher (Hindi) to be minimum educational qualification. Therefore, the petitioners who are graduate in Sanskrit and Hindi both, possesses the required academic qualification for the post of Assistant Teacher (Hindi). **Thus, the Rules 1983 providing for graduation in Hind with Sanskrit in Intermediate as a subject, is in conflict with the aforesaid regulations framed under the Act 1921 and NCTE regulations, 2001.** Consequently it being conflict with the regulations, is not a valid piece of legislation.

(ii) The petitioners have applied for the post of Assistant Teacher (Hindi) in Government owned Schools / Colleges for which the academic qualification has been provided in the Rules 1983, whereas the academic qualification for aided Colleges is provided in the regulations framed under the Act 1921. **The qualification prescribed under the Rules 1983 is not based on any reasonable classification**, therefore, the relevant provision under the Rules, 1983 prescribing academic qualification for Assistant Teacher (Hindi) is violative of Article 14 of the Constitution of India.

(iii) Even if it assumed that the State Government can lawfully prescribed academic qualification for the post of Assistant Teacher, despite it having been provided under the NCTE Regulation 2001, **yet the State Government can only prescribe higher qualification than as provided under the NCTE Regulations, 2001. Providing for qualification of Intermediate in Sanskrit would be a lower qualification. Therefore, to this extent the Rules 1983 as amended by the 4th Amendment Rules 2016 is ultra vires to the NCTE Regulations 2001.**

(iv) **Different academic qualification has been prescribed** by the regulations framed under the Act, 1921 **for Non-Government aided institutions and** under the 4th Amendment Rules, 2016 **for Assistant Teacher (Hindi) in Government institution whereas the pay scale and the service benefits of Government and aided Non-Government Schools Assistant Teachers are at par.** Syllabus etc. of both types of schools are governed by the provisions of Act, 1921. Thus, the 4th Amendment Rules, 2016 is clearly **discriminatory.** Assistant Teacher (Hindi) teaching in Government Schools or Non-Government aided schools are teaching one and the same syllabus to students. The judgement of Hon'ble Supreme Court in the case of **Zahoor Ahmad Rather and others vs. Sheikh Imtiyaz Ahmad and others, (2019) 2 SCC 404** as may be relied by the State respondents is clearly distinguishable

inasmuch as **it relates to some** training course.

7. In support of their submissions of learned counsel for petitioners have relied upon the following judgements :-

i. Judgement dated 10.05.2018 in Writ-A No.11545 of 2018 (Jai Prakash Yadav and 46 others vs. The Union of India and 4 others).

ii. State of Uttar Pradesh and others vs. Bhupendra Nath Tripathi and others, (2010) 13 SCC 203.

Submissions on behalf of the respondents

8. Sri Neeraj Tripathi, learned Additional Advocate General, submits as under :-

(i) Academic Qualification prescribed for Class 9th and 10th of the Government institutions under the U.P. Intermediate Education Act, 1921, the regulations were amended on 04.05.2016 prescribing qualification similar to the qualification prescribed under the Rules 1983 as amended by the 4th amendment Rules 2016 for non Government aided Schools/Colleges. Therefore, there is absolutely no difference between the academic qualification prescribed for recruitment of Assistant Teacher in Government Colleges and aided Schools/Colleges. Now both academic qualification stands at par. Therefore, there is no discrimination.

(ii) **The State may prescribe any additional qualification** in addition to the qualifications prescribed under the NCTE Regulation, 2014. Therefore, **prescribing Intermediate with Sanskrit Subject in addition to the graduation in (Hindi) by the 4th amendment Rules, 2016, is not in conflict with the NCTE Regulation, 2014.** Reliance is placed upon the judgement of Hon'ble Supreme Court in **Dr. Preeti Srivastava and another vs. State of M.P. and others, (1999) 7 SCC 120 (Paragraphs 35 to 38), A.P. Cooperative Oil Seeds Growers Federation Limited, Hyderabad, Andhra Pradesh vs. D. Achyuta Rao and others (Paragraph 41), Bhupendra Nath Tripathi and others Vs. State of U.P. and others, (2009) 2 All LJ 401 (FB), State of U.P. and others Vs. Bhupendra Nath Tripathi and others, (2010) 4 SCC 606.**

(iii) As per syllabus provided in the advertisement No. A-1/E-1/2018 dated 15.03.2018, for subject (Hindi), Sanskrit Sahitya is included which indicates **imparting of education of elementary Sanskrit to Class 9th and 10th Students.** The petitioners who are not intermediate with Sanskrit but have graduated in Sanskrit are not suitable to impart education of elementary Sanskrit required in the syllabus .

(iv) The impugned rules are neither arbitrary nor violative of Article 14 of the Constitution of India nor is in conflict with the regulation framed under the Act, 1921 nor in conflict with the NCTE Regulation, 2014.

(v) Candidates not possessing the prescribed academic qualification but possessing higher qualification, cannot be held to be eligible candidate unless, the rules prescribes that a candidate possessing higher qualifications would be eligible. Reliance is placed upon the judgements of Hon'ble Supreme Court in the case of **State of Punjab and others vs. Anita and others, (2015) 2 SCC 170 (Paragraphs 7 to 16) and Zahoor Ahmad Rather and others vs. Sheikh Imtiyaz Ahmad and**

others, (2019) 2 SCC 404 (Paragraphs 23, 25, 26 and 27).

9. Sri Avaneesh Tripathi, learned counsel for Public Service Commission supports the submissions advanced by learned Additional Advocate General.

Discussion and Findings

10. Before we proceed to consider the rival submissions of learned counsels for the parties, it would be appropriate to reproduce relevant portion of Rule 8(6) of the Amended Rules 1983, as under :-

"8. Academic qualification. - A candidate for direct recruitment to the various posts in the service must possess the following qualifications or as specified by the Government from time to time -

(6)	*Assistant Teacher (Men/Women) Hindi*	*(I) Bachelor's degree with Hindi as a subject from a recognised University in India and Intermediate with Sanskrit as a subject or equivalent examination with Sanskrit. (ii)B.Ed. or equivalent degree from a recognised University in India.*

"

11. In paragraph 4 of the short counter affidavit, the respondent no.6 i.e. the National Council for Teachers Education, (for short NCTE) has stated that in exercise of powers conferred under Clause (dd) of sub section (2) of Section 33 read with Section 12 A of the National Council for Teachers Education Act 1993 and in super session of the National Council for Teachers Education (determination of minimum qualification for recruitment of teachers in schools) Regulations 2001 the NCTE has framed "The National Council for Teachers Education (determination of minimum qualification for persons to be recruited as education teachers and physical education teachers in pre-primary, primary, upper primary, secondary, senior secondary or Intermediate schools or colleges) Regulation 2014 (hereinafter referred to as "the NCTE Regulations 2014).

12. Regulation 4, Clause 4 of the 1st Schedule of the NCTE Regulations, 2014 provides as under :

"4. Qualification for Recruitment *- The qualifications for recruitment of teachers in any recognized school imparting Pre-primary, Primary, Upper Primary, Secondary, Senior Secondary or Intermediate Schools or Colleges imparting senior secondary education shall be as given in the First and Second Schedule(s) annexed to these Regulations.*

(b) For promotion of teachers the relevant minimum qualifications as specified in the First and Second Schedule(s) are applicable for consideration from one level to the next level.

4.Secondary/ High School (For Classes IX-X)	*(a) Graduate/Post Graduate from recognized University with at least 50% marks in either Graduation or Post Graduation (or its equivalent) and Bachelor of Education. (B.Ed) from National Council for Teacher Education recognized institution.* *Or*

	(b) Graduate/Post Graduate from recognized University with at least 45% marks in either Graduation or Post Graduation (or its equivalent) and Bachelor of Education (B.Ed.) from National Council for Teacher Education recognized institution {in accordance with the National Council for Teacher Education recognized institution (Form of application for recognition, the time limit of submission of application, determination of norms and standards for recognition of teacher education programmes and permission to start new course or training) Regulations, 2002 notified on 13.11.2002 and National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2007 notified on 10.12.2007} *Or* *(c) 4-years degree of B.A.Ed/B.Sc.Ed. from any National Council for Teacher Education recognized institution.*

"

13. Syllabus of Hindi Subject for Class 9th and Class 10th as prescribed by the U.P. Secondary Education Board includes a little elementary Sanskrit relating to Sanskrit Grammer, translation from Sanskrit to Hindi and two questions to be answered in Sanskrit. The syllabus of Class 11th and 12th of Sanskrit subject prescribed by the U.P. Secondary Education Board are reproduced below :

" संस्कृत

कक्षा-11

खण्ड-क(गद्य)

चन्द्रापीडकथा

(साहं पितृभवने बालतया ..... सर्व रमणीयकानाम् एकनिवासभूताम्, कादम्बरीं ददर्श)

खण्ड-ख (पद्य)

रधुवंशमहाकाव्यम् (द्वितीय सर्ग)

(श्लोक संख्या 27 से 40 तक)

खण्ड-च (व्याकरण)

कारक एवं विभक्ति- द्वितीय विभक्ति- अधिशीङस्थासा कर्म, कालाध्वनोरत्यन्तसंयोगे।

स्वर सन्धि- एङिपररूपम्, एङःपदान्तादपि।

शब्दरूप- पुल्लिगं- भगवत्, करिन्, पति, सखि चन्द्रमस्।

स्त्रीलिंग- वाच्, सरित्, श्री, स्त्री, अप्।

धातुरूप- परस्मैपद-अस्, नश्, आप्, शक्, इष्, कृष्।

कक्षा-12

खण्ड क-(गद्य)

चन्द्रापीडकथा

निर्गतायां केयूरकेण सह ..... आनन्दस्य अध्यगच्छन्।

खण्ड-ख (पद्य)

रधुवंशमहाकाव्यम् (द्वितीय सर्ग)

श्लोक संख्या 65-75 तक।

खण्ड-च (व्याकरण)

कारक एवं विभक्ति- चतुर्थी विभक्ति स्पृहेरीप्सितः, पंचमी विभक्ति- जुगुप्साविरामप्रमादार्थानामुपसंख्यानम् (वा०)।,

आख्यातोपयोगे। षष्ठी विभक्ति- क्तस्य च वर्तमाने, षष्ठी चानादरे। सप्तमी विभक्ति- साध्वसाधुप्रयोगे च (वा०)

व्यंजन सन्धि- झलां जश् झशि, तोर्लि, अनुस्वारस्य ययि परसवर्णः।

विसर्ग सन्धि- अतोरोरप्लुतापप्लुते, वा शरि, रोरि, ढ्रलोपे पूर्वस्य दीर्घो णः।

शब्द रूप- नपुंसकलिंग- जगत्, ब्रह्मन्, धनुष।

सर्वनाम- इदम्, अदस्।

धातुरूप- आत्मनेपद- भाष्, विद्।

उभयपद- चुर, श्रि, क्री, धा।"

14. Graduation course in Sanskrit includes a higher standard of Sanskrit but does not include the course of Sanskrit included in the syllabus of Hindi subject for class 9th and 10th. Assistant Teachers (Men/Women) - Hindi have to teach students of Class 9th and 10th a little elementary Sanskrit. Therefore, for efficient discharge of duties, the functionality of qualification, contents of the course of studies and the functions attached with post is relevant. Therefore, looking into the syllabus of Class 9th and 10th for Hindi subject, the State Government in its wisdom and on due consideration of relevant aspects, has prescribed certain academic qualification under Rule 8(6) of the Rules, 1983 for Assistant Teacher (Hind) includig *"bachelor's degree with Hindi as a subject from a recognised University in India* ***and intermediate with Sanskrit*** *as a subject or equivalent examination with Sanskrit and B.Ed."*. Thus, looking into the syllabus of Class 9th and 10th graduation in Hindi has been prescribed as academic qualification for the post of Assistant Teacher (Men/Women) - Hindi.

15. It is settled law that essential qualifications for appointment to a post are for the employer to access, determine and decide. Court can not in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer. It is for the employer to determine and decide the relevancy and suitability of the qualification for any post and it is not for the court to consider and assess it. A greater latitude is permissible for the State Government to prescribe qualification for the post of Assistant Teachers but it should not be repugnant to the NCTE Regulations, 2014. The view taken by us is also supported by the law laid down by Hon'ble Supreme Court in **Maharashtra Public Service Commission Vs. Sandeep Shriram Warade and others(2019) 6 Supreme Court Cases 362 (para 9), Chief Manager, Punjab National Bank and another Vs. Anit Kumar Das 2020 SCC OnLine SC 897 (para 21) and State of Punjab and others Vs. Anita and others (2015) 2 SCC 170 (para 14).**

16. It is settled law that while while prescribing the qualifications for a post, the State, as employer, may legitimately bear in mind several factors including the nature of the job, the aptitudes requisite for the efficient discharge of duties, the functionality of a qualification and the content of the course of studies. Reference in this regard may be had to the judgment of Hon'ble Supreme Court in the case of **Zahoor Ahmad Rather Vs. Imtiyaz Ahmad (2019) 2 SCC 404** (para 27).

17. Therefore, the prescribed academic qualification in question can not be said to be arbitrary or based on irrelevant consideration.

18. So far as question of **higher qualification** is concerned, we are of the

view that normal rule to the concept of "Higher Qualification" is that candidature of a candidate possessing higher qualification can not be rejected on that basis **but that higher qualification must be through the channel/faculty of the prescribed qualification.**

19. Therefore, the petitioners who admittedly passed Intermediate without a subject of Sanskrit, can not be said to possess a higher qualification only because they have graduated in Sanskrit subject, since they do not possesses graduation degree in Sanskrit through the channel/faculty of the prescribed qualification of Sanskrit as a subject in Intermediate. The view taken by us is also supported by the law laid down by Hon'ble Supreme Court in the case of **State of Uttarkhand and others Vs. Deep Chandra Tewari and another (2013) 15 SCC 557**, wherein Hon'ble Supreme Court considered the concept of higher qualification (paras 11and 12) and held as under :

"11. We are conscious of the principle that when particular qualifications are prescribed for a post, the candidature of a candidate possessing higher qualification cannot be rejected on that basis. ***No doubt, normal rule would be that candidate with higher qualification is deemed to fulfill the lower qualification prescribed for a post. But that higher qualification has to be in the same channel. Further, this rule will be subject to an exception. Where the prescription of a particular qualification is found to be relevant for discharging the functions of that post and at the same time, the Government is able to demonstrate that for want of said qualification a candidate may not be suitable for the post, even if he possesses a "better" qualification but that "better" qualification has no relevance with the functions attached with the post.***

12. In the present case, we find the situation falling in this excepted category. As pointed out above, the Assistant Teacher is meant to impart education to students at primary level. For teaching primary students, subjects studied while doing basic B.Ed. Degree would be relevant and appropriate. For teaching such students, B.Ed. with Specialisation in vocational education would be of no use as those students are not imparted vocational education, which is the thrust in the degree obtained by the respondents herein. In the instant case, proficiency in the basic subjects taught at primary level is required and thus vocational training would not serve any purpose. Thus, when we find that in the instant case, essential education qualification is B.Ed. Degree which is prescribed in the relevant rules, having statutory flavour, the action of the Government cannot be faulted with, in rejecting the candidature of the respondents because of the reason that they do not have the qualification, as mentioned in the advertisement viz. B.Ed. Degree simpliciter."

(Emphasis supplied by me)

20. In view of the discussions made above, we hold that the petitioners who admittedly have not passed Intermediate with Sanskrit as a subject, but passed the Intermediate with other subjects and did graduation in Sanskrit, can not be said to possess higher qualification as they have not completed graduation through the channel/faculty of the prescribed qualification of Sanskrit as a subject in Intermediate.

Whether academic qualification prescribed under Rule 8(6) of the Rules 1983 for Assistant Teachers (Men/Women) Hindi for Class 9th and

10th of Government Schools/Colleges, is different from the academic qualification provided for aided Schools/Colleges for Class 9th and 10th in Appendix-A of Chapter II of the Regulations framed under the U.P. Intermediate Education Act, 1921 ?

21. We have already reproduced in para 12 above the academic qualification for Assistant Teachers Class 9th and 10th for Government Schools/Colleges under Rule 8(6) of the Rules 1983. Earlier Sanskrit as a subject in intermediate was not provided in the Regulation framed under the Act, 1921. After Rule 8 of the Rules 1983 was amended by the 4th Amendment Rules, 2016, simultaneously the Appendix-A of Chapter II of the Regulation framed under the Act, 1921 was also amended and Sanskrit as a subject in intermediate or equivalent examination, was provided as an essential academic qualification for appointment of Assistant Teachers in High School (Class 9th and 10th), by notification No.Parishad - 9/133 dated 04.05.2016. Thus, the submissions of learned counsels for the petitioners that Sanskrit as a subject in intermediate has not been prescribed in the academic qualification for Assistant Teachers (Hindi) in aided Schools/Colleges under Chapter II of the Regulations framed under the Act, 1921, is totally groundless. Therefore, the submission deserves to be rejected and is hereby rejected. That apart, the teachers of Government Colleges and teachers of private/aided Colleges are two different class, and both are governed by different sets of rules. Therefore, the academic qualification provided in Chapter II of the regulations framed under the Act, 1921 is not even relevant for the purposes of the Rules, 1983.

Whether there is conflict between the prescribed minimum qualification for teachers by NCTE and the academic qualification prescribed under Rule 8(6) of the Rules 1983 ?

22. By virtue of the Constitution 42nd Amendment Act, 1976, the subject 'Education' was withdrawn from Entry II (List-II) - State List, and was placed in Entry 25 of List-III - Concurrent List. Thus the Legislative Competence to legislate on the subject "Education" was brought under the Concurrent List. In view of the provisions of Article 246 (2) of the Constitution of India, notwithstanding anything in clause (3), the Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule. The Parliament enacted The National Council for Teacher Education Act, 1993 (No.73 of 1993) (hereinafter referred to as 'the Central Act 1993') to provide for the establishment of a National Council for Teacher Education with a view to achieve planned and co-ordinated development of the teacher education system throughout the country, regulation and proper maintenance of norms and standards in the teacher education system and for matters connected therewith. Section 12A of the Central Act, 1993 as inserted by Act No.18 of 2011 dated 12.10.2011 w.e.f. 01.06.2012, confers power upon the NCTE to determine minimum standards of education of school teachers which is reproduced below:

"12A. Power of Council to determine minimum standards of education of school teachers.*-For the purpose of maintaining standards of education in schools, the Council may, by regulations, determine the qualifications of persons for being recruited as teachers in any pre-*

primary, primary, upper primary, secondary, senior secondary or intermediate school or college, by whatever name called, established, run, aided or recognised by the Central Government or a State Government or a local or other authority:

Provided that nothing in this section shall adversely affect the continuance of any person recruited in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate schools or colleges, under any rule, regulation or order made by the Central Government, a State Government, a local or other authority, immediately before the commencement of the National Council for Teacher Education (Amendment) Act, 2011 solely on the ground of non-fulfilment of such qualifications as may be specified by the Council:

Provided further that the minimum qualifications of a teacher referred to in the first proviso shall be acquired within the period specified in this Act or under the Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009)."

23. Relevant portion of the minimum standard of education as prescribed by the NCTE has already been reproduced in paragraph 12 above.

24. Rule 8(6) of the Rules, 1983 has prescribed qualification for Assistant Teacher (Men/Women) - Hindi, to be Bachelor's degree with Hindi. Thus, to this extent there is no conflict between the aforequoted NCTE Regulations and Rule 8(6) of the Rules, 1983. The point of dispute is the prescribing of additional qualification of "Intermediate with Sanskrit as a subject or equivalent examination with Sanskrit" under Rule 8(6)(i). Thus, the prescribing of Intermediate with Sanskrit as a subject, is in addition to the minimum qualification prescribing under Regulation 4 of the NCTE Regulations, 2014 looking into the syllabus of Class 9th and 10th. This additional qualification has a direct bearing with the syllabus prescribed for Class 9th and 10th. Therefore, we hold that there is no conflict between the Rule 8(6) and Regulation 4 of the NCTE Regulations, 2014.

25. The submissions of the petitioners with reference to the academic qualification prescribed in regulations framed under the U.P. Intermediate Education Act, 1921, has no substance. This aspect of the matter was considered by a coordinate Bench of this Court in **Writ A No.11545 of 2018 Jai Prakash Yadav And 46 Others Vs. The Union Of India And 4 Others, decided on 10.05.2018** and after referring to various provisions of the U.P. Intermediate Education Act, 1921, The Uttar Pradesh Secondary Education Services Selection Board Act, 1982, it has been held as under :

"On conjoint reading of the Intermediate Act, Act 1982 and the Rules and Regulations framed thereunder, selection of teachers against substantive vacancy of private and aided schools is exclusively within the domain of the Selection Board. The selection of teachers for government high school/intermediate schools is with the government which is outside the purview of the Selection Board."

26. Thus, the selection of teachers for Government High School/Intermediate Schools is with the State Government and in this regard the Rules, 1983 prescribing minimum qualification for Assistant Teacher in Government High School/Intermediate Schools, has been

enacted which holds the field and the academic qualification prescribed thereunder shall continue to hold good until it is repugnant to the qualification prescribed by the NCTE regulations. In the present set of facts we have already held that the academic qualification prescribed under Rule 8(6) of the Rules, 1983 is not repugnant or in conflict with the academic qualification prescribed under Regulation 4 of the NCTE Regulations, 2014. Thus, the submissions of the petitioners taking shelter of the regulation framed under the U.P. Intermediate Education Act, 1921, deserves to be rejected and is hereby rejected.

Presumption of Constitutional Validity

27. In the case of **Anant Mills Vs. State of Gujarat reported in AIR 1975 SC 1234 (para 20)**, the Hon'ble Supreme Court has held that :-

"20. ***There is a presumption of the constitutional validity of a statutory provision.*** *In case any party assails the validity of any provision on the ground that it is violative of Article 14 of the Constitution, it is for that party to make the necessary averments and adduce material to show discrimination violative of Article 14. No averments were made in the petitions before the High Court by the petitioners that the assessments before the coming into force of Ordinance 6 of 1969 bad been made by taking into account the rent restriction provisions of the Bombay Rent Act. Paragraph 2B and some other paragraphs of petition No. 233 of 1970 before the High Court, to which our attention was invited by Mr. Tarkunde, also do not contain that averment. No material on this factual aspect was in the circumstances produced either on behalf of the petitioners or the Corporation. The High Court, as already observed, decided the matter merely on the basis of a presumption. It is, in our opinion, extremely hazardous to decide the question of the constitutional validity of a provision on the basis of the supposed existence of certain facts by raising a presumption. The facts about the supposed existence of which presumption was raised by the High Court were of such a nature that a definite averment could have been made in respect of them and concrete material could have been produced in support of their existence or non-existence. Presumptions are resorted to when the matter does not admit of direct proof or when there is some practical difficulty to produce evidence to prove a particular fact. When, however, the fact to be established is of such a nature that direct evidence about its existence or non- existence would be available, the proper course is to have the direct evidence rather than to decide the matter by resort to presumption. A pronouncement about the constitutional validity of a statutory provision affects not only the parties before the Court, but all other parties who may be affected by the impugned provision. There would, therefore, be inherent risk in striking down an impugned provision without having the complete factual data and full material before the court. It was therefore, in our opinion, essential for the High Court to ascertain and field out the correct factual position before recording a finding that the impugned provision is violative of article 14. The fact that the High Court acted on an incorrect assumption is also borne out by the material which has been adduced before us in the writ petitions filed under article 32 of the Constitution."*

(Emphasis supplied by us)

28. In **Charanjit Lal Choudhary Vs. Union of India and others, AIR 1951 SC 41**

(para 10), Hon'ble Supreme Court has held that there is presumption that the legislature understands and correctly appreciates the need of its people. In **Union of India Vs. Elphinstone Spinning and weaving Co. Ltd. and Ors., AIR 2001 SC 724 (para 9)**, Hon'ble Supreme Court has held that there is presumption that the legislature does not exceed its jurisdiction. In **State of Bihar and others Vs. Smt. Charusila Dasi, AIR 1959 SC 1002 (para 14)**, the Hon'ble Supreme Court has laid down the law that there is presumption that the legislature does not intend to exceed its jurisdiction. In **Kedar Nath Singh Vs. State of Bihar, AIR 1962 SC 955 (para 26**), Hon'ble Supreme Court held that provision should be construed in the manner as will uphold its constitutionality. In **Corporation of Calcutta Vs. Libery Cinema, AIR 1965 SC 1107,** Hon'ble Supreme Court has laid down the law that the provision should be read in the manner as will make it valid. Similar view has been expressed by the Constitution Bench of Supreme Court in **Anandji Haridas and Co. (P) Ltd. Vs. S.P. Kasture and ors., AIR 1968 SC 565 (para 32)**. In **Sunil Batra Vs. Delhi Administration and ors., AIR 1978 SC 1675,** Hon'ble Supreme Court observed that the legislature expresses wisdom of community. In **State of Bihar VS. Bihar Distilleries, AIR 1997 SC 1511 (para 18),** Hon'ble Supreme Court observed that an Act made by legislature represents the will of people and cannot be lightly interfered with. In **Zameer Ahmad Latifur Rehman Sheikh Vs. State of Maharashtra and ors., J.T. 2010 (4) SC 256 (para 34)**, Hon'ble Supreme Court observed that every legally possible effort should be made to uphold the validity. In **Greater Bombay Co-operative Bank Ltd Vs. United Yarn Tex (P) Ltd. and others, (2007) 6 SCC 236 (paras 82 to 85),** Hon'ble Supreme Court observed as under :

" 82 ***The constitutional validity of an Act can be challenged only on two grounds,*** *viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision. In State of A. P. & Ors. v. McDowell & Co. & Ors. [(1996) 3 SCC 709], this Court has opined that except the above two grounds, there is no third ground on the basis of which the law made by the competent legislature can be invalidated and that the ground of invalidation must necessarily fall within the four corners of the afore-mentioned two grounds.*

83. Power to enact a law is derived by the State Assembly from List II of the Seventh Schedule of the Constitution. Entry 32 confers upon a State Legislature the power to constitute cooperative societies. The State of Maharashtra and the State of Andhra Pradesh both had enacted the MCS Act 1960 and the APCS Act, 1964 in exercise of the power vested in them by Entry 32 of List II of the Seventh Schedule of the Constitution. Power to the enact would include the power to re-enact or validate any provision of law in the State Legislature, provided the same falls in an entry of List II of Seventh Schedule of the Constitution with the restriction that such enactment should not nullify a judgment of a competent court of law. In the appeals / SLPs/petitions filed against the judgment of the Andhra Pradesh High Court, the legislative competence of the State is involved for consideration. Judicial system has an important role to play in our body politic and has a solemn obligation to fulfil. In such circumstances, ***it is imperative upon the courts while examining the***

scope of legislative action to be conscious to start with the presumption regarding the constitutional validity of the legislation. The burden of proof is upon the shoulders of the the incumbent who challenges it. *It is true that it is the duty of the constitutional courts under our Constitution to declare a law enacted by Parliament or the State Legislature as unconstitutional when Parliament or the State Legislaturehad assumed to enact a law which is void, either for want of constitutional power to enact it or because the constitutional forms or conditions have not been observed or where the law infringes the fundamental rights enshrined and guaranteed in Part III of the Constitution.*

84. ***As observed by this Court in CST v. Radhakrishnan in considering the validity of a Statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, a Court may take into consideration matters of common knowledge, reports, preamble, history of the times, objection of the legislation and all other facts which are relevant. It must always be presumed that the legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations.*** *It is also well- settled that the courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. A provision conferring very wide and expansive powers on authority can be construed in conformity with legislative intent of exercise of power within constitutional limitations. Where a Statute is silent or is inarticulate, the Court would attempt to transmutate the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. These principles have given rise to rule of "reading down" the provisions if it becomes necessary to uphold the validity of the law.*

85. In State of Bihar & Ors. v. Bihar Distillery Ltd. & Ors. [(1997) 2 SCC 453], this Court indicated the approach which the Court should adopt while examining the validity/constitutionality of a legislation. It would be useful to remind ourselves of the principles laid down, which read: (SCC p.466, para 17):

"The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ignored out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application."

In the same para, this Court further observed as follows:

"The Court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the legislature and the executive are expected to show due

regard and deference to the judiciary. It cannot also be forgotten that our Constitution recognizes and gives effect to the concept of equality between the three wings of the State and the concept of "checks and balances" inherent in such scheme."

(Emphasis supplied by us)

29. In the case of **Promoters and Builders Association Vs. Pune Municipal Corporation (2007) 6 SCC. 143 (para 9)**, Hon'ble Supreme Court has held that while exercising legislative function, unless unreasonableness and arbitrariness is pointed out it is not open for the Court to interfere.

Principles of Constitutional Validity:-

30. The constitutional validity of an Act can be challenged only on two grounds, viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision. Except the above two grounds, there is no third ground on the basis of which the law made by a competent legislature can be invalidated. The ground of invalidation must necessarily fall within the four corners of the aforementioned two grounds. In considering the validity of a Statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, Court may take into consideration matters of common knowledge, reports, preamble, history of the times, object of the legislation and all the other facts which are relevant. It must always be presumed that the legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations. The courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. Where a Statute is silent or is inarticulate, the Court would attempt to transmutate the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. These principles give rise to rule of "reading down" the provisions if it becomes necessary to uphold the validity of the law. While examining the challenge to the constitutionality of an enactment, the court is to start with the presumption of constitutionality and try to sustain its validity to the extent possible. The court cannot approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. An act made by the legislature represents the will of the people and that cannot be lightly interfered with. It is presumed that the legislature expresses wisdom of the community, does not intend to exceed its jurisdiction and correctly appreciates the need of its own people.

Principles governing validity of a subordinate legislation:-

31. Apart from the aforenoted principles to determine constitutional validity, one additional ground is available to test the validity of a subordinate legislation. The additional ground is that the authority making subordinate legislation must act within the limits of its power and cannot transgress the same. Reference with regard to these settled principles of validity of a subordinate

legislation can be found in the judgments of Hon'ble Supreme Court in **Hukum Chand vs. Union of India, (1972) 2 SCC 601, General Officer Commanding-in-Chief vs. Subhash Chandra Yadav and another, (1988) 2 SCC 351, Additional District Magistrate (Rev.) Delhi Administration vs. Siri Ram, (2000) 5 SCC 451, Sukhdev Singh and others vs. Bhagatram Sardar Singh Raghuvanshi and another, (1975) 1 SCC 421, State of Karnataka and another vs. H. Ganesh Kamath and others, (1983) 2 SCC 402, Kunj Behari Lal Butail and others vs. State of H.P. and others, (2000) 3 SCC 40, Union of India vs. M/s G.S. Chatha Rice Mill, (2021) 2 SCC 209 and judgment dated 16.12.2022 in Civil Appeal Nos.9252-9253 of 2022 (Kerala State Electricity Board and others vs. Thomas Joseph @ Thomas M.J. and others).**

32. We have already found rational behind prescribing additional qualification to be Sanskrit as a subject in Intermediate in addition to the graduation in Hindi and B.Ed. for the post of Assistant Teachers in Hindi to teach students of Class 9th and 10th in Government owned colleges so as to maintain standard of education. The academic qualification as provided under Rule 8(6) of the Rules 1983, as already held; is neither in conflict with the regulation framed under the U.P. Intermediate Education Act, 1921 nor in conflict with Regulation 4 of the NCTE Regulation, 2014 nor it is beyond the rule making power of the State Government. Therefore, the impugned Rules are wholly valid. The State Government has not transgressed its power under Article 309 of the Constitution of India to frame the Rules, 1983 prescribing qualification for Assistant Teachers (Men/Women) - Hindi under Rule 8(6). Thus, the impugned rules and the impugned advertisement are wholly valid. All the writ petitions have no merit and, therefore, deserves to be dismissed.

33. For all the reasons aforestated, all the writ petitions are **dismissed**.

(2023) 2 ILRA 486
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2022

BEFORE

THE HON'BLE JASPREET SINGH, J.

Writ-A No. 15574 of 2022

Amit Narayan Rai & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Srishti Gupta, Sri Kartikeya Saran, Sri M.C. Chaturvedi (Sr. Advocate)

Counsel for the Respondents:
C.S.C.

A. Civil Law - Service Matter - Constitution of India,1950 - Art. 226 - Interference in transfer order - Violation of Transfer policy - transfer policy is merely a guidelines and though it must be adhered but its infraction does not give rise to any enforceable rights to an aggrieved party - no employee have a vested right to serve at any given place of his choice - transfer is an incidence of service and if an employee who is holding a transferrable post, is transferred, he cannot urge that there is any violation of a legal right - order of transfer is an administrative order and the Courts are reluctant to interfere with transfer order unless the order of transfer is shown to be an outcome of malafides or in violation of statutory provisions prohibiting any such transfer - employer being best suited to judge the suitability of the employee and

the place at which work is to be taken cannot be interfered with by the Court in exercise of the writ jurisdiction (Para 25, 31, 33)

B. Civil Law - Service Matter - Transfer policy of 2022-23 - Transfer order - Validity - Clause 12 of the Transfer Policy provides that in case a transfer is to be made of an office bearers of the District Level then prior approval of the District Magistrate is to be taken - Held - each of the petitioners have been in their place of posting for about 20 years & have already joined on their place of posting, in consequence of transfer order - In the instant case prior approval of the Authority one rank higher than the Appointing Authority has been taken, which authority is even higher than the District Magistrate - In absence of any clear prejudice established, mere deviation in compliance of Clause 12 is cosmetic, especially when the service conditions does not place any embargo on such transfer, not vitiates transfer order - No Interference (Para 25, 31, 33)

Dismissed. (E-5)

List of Cases cited:

1. S.K. Naushad Rahaman & ors. Vs U.O.I. & ors.; AIR 2022 SC 1494

2. Shanti Kumari Vs Regional Deputy Director, Health Services, Patna Division, Patna & ors.; (1981) 2 SCC 72

3. Gujarat Electricity Board & anr. Vs Atmaram Sungomal Poshani; 1989 (2) SCC 602

4.U.O.I. & ors. Vs S.L. Abbas; 1993 (4) SCC 351

5. N.K. Singh Vs U.O.I. & ors. (1994) 6 SCC 98

6. S.C. Saxena Vs U.O.I. & ors.; (2006) 9 SCC 583

7. Rajendra Singh & ors. Vs St. of U. P. & ors. (2009) 15 SCC 178

8. Dharmendra Kumar Saxena Vs St. of U.P. & ors. 2013 (7) ADJ 53

9. Ajay Kumar Srivastava Vs St. of U.P. & ors. Special Appeal No. 411 of 2022 dt 11.10.2022

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

1. Heard Sri Kartikeya Saran, learned counsel for the petitioner as well as Sri M.C. Chaturvedi, learned Senior Counsel along with Sri Ankit Gaud, learned counsel for the State-respondents.

2. The present petitioners pray for issuance of a writ in the nature of certiorari quashing the impugned transfer order dated 20.06.2022 and 06th July, 2022 passed by the respondent no. 2. The primary ground of challenge to the aforesaid transfer order is that it is in violation of the transfer policy of 2022-23 in so far as it relates to the petitioner.

3. The case as setup by the petitioners is that they are all selected and appointed as Class-III Clerical employees and are presently discharging their duties at various places in the State of Uttar Pradesh. It is also stated that all the petitioners being the ministerial employees are also the office bearers of the Uttar Pradesh Medical and Public Health Ministerial Association. The details of each of the petitioners along with his post, place of posting, date on which each was elected when they were elected in the respondent no.4-Association and where have they been transferred has been indicated in a chart which is the part of paragraph 4 of the petition.

4. The learned counsel for the petitioner Sri Saran submits that the Government had modified the transfer policy for the year 2022-23 on 15.06.2022. Heavy reliance has been placed on Clause 12 of the Transfer Policy to buttress the submission that the said clause makes it

very clear that in case a transfer is to be made of an office bearers of the District Level (which is the case of the present petitioners) then prior approval of the District Magistrate is to be taken in the said case. It is urged that in the present case, there is no approval of the District Magistrate rather only a general approval has been granted by the Director General (Medical and Health Services) Uttar Pradesh which is de-hors the transfer policy.

5. It is also urged that the Director General (Medical and Health Services) Uttar Pradesh just a day prior to his retirement on 30.06.2022 had given the approval to transfer 260 ministerial staff which included the present petitioners. An attempt has been made to show that the said transfer order has been passed in a malafide manner as 260 employees have been approved for transfer in one go which indicates that there is no application of mind. It is also urged that there is a clear violation of Clause 12 of the transfer policy and for the said reason, the order of transfer in so far as it relates to the petitioner is concerned, is bad and accordingly deserves to be set aside.

6. The learned counsel for the State Sri Ankit Gaud while opposing the aforesaid submissions submits that there is no violation of Clause 12, inasmuch as, prior approval of the Authority one rank higher than the Appointing Authority has been taken. It has been urged that similar issue was raised by another set of Class-III Ministerial Employees who had challenged their transfer before this Court at Lucknow in the case of ***Ajay Kumar Srivastava Vs. State of U.P. and others bearing Writ-A No. 4766 of 2022*** which was connected with Writ-A no. 5568 of 2022 wherein similar grounds were taken and the said petition came to be dismissed by means of order dated 12.09.2022 holding that the transfer was valid.

7. It is further urged that the said order of the learned Single Judge was assailed in Special Appeal No. 411 of 2022 where again this issue including Clause 12 of the transfer policy was considered and thereafter it was held that there is no error or ground to interfere with the transfer and as such the Special Appeal was dismissed by means of order dated 11.10.2022.

8. It is thus urged that once the issue of transfer has been considered and decided by a coordinate Bench of this Court which has been affirmed in Special Appeal, the issue regarding the invalidity of the transfer that Clause 12 of the transfer policy has been violated is not open to be canvassed any more and it is liable to be rejected. It has also been submitted that all the petitioners have joined on their respective places of posting and it has further been pointed out that in so far as the petitioner no. 13 and 19 is concerned, they have been transferred on their volition as they had made a request for transfer by moving an application to the Competent Authority on the online portal.

9. It has also been pointed out that in so far as the petitioners are concerned, the respondent had received two lists of office bearers of different rival groups of Uttar Pradesh Medical Public Health Ministerial Association and in pursuance of the Government Order dated 16.01.2009, the steps are being taken for holding fresh elections. Since the fresh elections are to take place and by cancelling earlier elections, hence, it cannot be said that the petitioners are the elected office bearers of

the District Level Associations, hence, for the said reason as well, Clause 12 has no applicability.

10. It has also been pointed out that almost all the petitioners have been posted for more than 15 years in their place of posting/region and thus for this reason as well there is no error which can be pointed out in the transfer order which may require any interference from this Court and the writ petition deserves to be dismissed.

11. Sri Saran, learned counsel for the petitioners responding to the aforesaid submissions in rejoinder has pointed out that the Uttar Pradesh Medical and Public Health Ministerial Association has already filed a writ petition bearing No. 35634 (writ-C) of 2022 wherein the Court found that the elections for the Association are held for two years and the last election was held on 14.08.2021 and after a lapse of one year, the State-Authorities have woken up to the representations of certain individuals and has passed the impugned order and taking note of the aforesaid granted indulgence by means of order dated 25.11.2022 and provided that even though the elections may take place but the final results will not be declared.

12. It has also been pointed out that the Division Bench of this Court in its order dated 30.11.2022 had recorded the statement of the learned Standing Counsel to the effect that the results of the elections have been kept in a sealed cover and they have not been implemented as on date and that the charge continues to be with the earlier elected individuals.

13. It is thus urged on the strength of the aforesaid orders that in so far as the present petitioners are concerned they were elected in the election which took place in the year 2021 and as admitted to the other side, the charge is still with the previously elected office-bearers which includes the petitioners, hence, in the instant case, the submission of learned counsel for the respondents that Clause-12 of the transfer policy does not have any bearing is absolutely misconceived.

14. It is also urged that there is a clear violation of Clause-12 and though the State has filed its counter affidavit but it could not dispute that there is no prior approval of the District Magistrate before passing the order of transfer, hence, for the said reasons, the transfer order is bad.

15. The Court has heard the learned counsel for the parties and also perused the material on record including the decision of a coordinate Bench of this Court in the case of Ajay Kumar Srivastava (supra) and the decision of the Division Bench of this Court dated 11.10.2022 in Special Appeal No. 411 of 2022 (Ajay Kumar Srivastava Vs. State of U.P. and others) also the interim orders passed in Writ-C No. 35634 of 2022 (Uttar Pradesh Medical and Public Health Ministerial Association and another Vs. State of U.P. and others) dated 25.11.2022 and 30.11.2022.

16. Before considering the rival contentions, it will be appropriate to draw the contours within which this Court in exercise of powers under Article 226 of the Constitution of India can interfere in an order of transfer by taking aid of judicial pronouncements.

17. Recently, the Apex Court in ***S.K. Naushad Rahaman and others vs. Union of India and others; AIR 2022 SC 149***4 had the occasion to consider the basic

precepts of service jurisprudence relating to transfer and the relevant paragraphs of the said decision reads as under:-

24. First and foremost, transfer in an All India Service is an incident of service, Whether, and if so where, an employee should be posted are matters which are governed by the exigencies of service. An employee has no fundamental right or, for that mater, a vested right to claim a transfer or posting of their choice.

25. Second, executive instructions and administrative directions concerning transfers and postings do not confer an indefeasible right to claim a transfer or posting. Individual convenience of persons who are employed in the service is subject to the overreaching needs of the administration.

26. Third, policies which stipulate that the posting of spouses should be preferrably, and to that extent practicable, at the same station are subject to the requirement of the administration.

27. The above principle was cited with approval in Union of India vs. SL. Abbas, where the Court held that transfer is an incident of service.

.....

28. Fourth, norms applicable to the recruitment and conditions of service of officers belonging to the civil services can be stipulaed in;

(I) A law enacted by the competent legislature;

(ii) Rules made under the proviso to Article 309 of the Constitution; and

(iii) Executive instructions issued under Article 73 of the Constitution, in the case of civil services under the Union and Article 162, in the case of Civil services under the States.

29. Fifth, where there is a conflict between exectutive instructions and rules framed under Article 309, the rules must prevail. In the event of a conflict between the rules framed under Article 309 and a law made by the appropriate legislature, the law prevails. Where the rules are skeletal or in a situation when there is a gap in the rules, executive instructions can supplement what is stated in the rules.

29. Sixth, a policy decision taken in terms of the power conferred under Article 73 of the Constitution on the Union and Article 162 on the States is subservient to the recruitment rules that have been framed under a legislative enactment or the rules under the proviso to Article 309 of the Constitution.

18. In the case of ***Shanti Kumari Vs. Regional Deputy Director, Health Services, Patna Division, Patna and others; (1981) 2 SCC 72***, the Apex Court has held as under:-

" 2. Having heard learned counsel for the parties, we are of the opinion that the High Court rightly declined to interfere with the impugned order. Transfer of a Government servant may be due to exigencies of service or due to administrative reason. The Courts cannot interfere in such matters. Shri Grover, learned counsel for the appellant, however, contends that the impugned order was in breach of the Government instructions with regard to transfers in the Health Department. If that be so, the authorities will look into the matter and redress the grievance of the appellant."

19. In ***Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani ; 1989 (2) SCC 602***. the Apex Court held as under:-

" 4. Transfer of a Government servant appointed to a particular cadre of transferable posts from one place to other is an incident of service. No Government

servant or employee of public undertaking has legal right for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to the competent authority for stay, modification, or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant rules, as has happened in the instant case. The respondent lost his service as he refused to comply with the order of his transfer from one place to the other."

20. In ***Union of India and others Vs. S.L. Abbas; 1993 (4) SCC 351*** wherein the Apex Court held as under:-

"7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the Authority must keep in mind the guidelines issued by the Government on the subeject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right."

21. In ***N.K. Singh Vs. Union of India and others (1994) 6 SCC 98*** wherein the Apex Court held as under:-

"6. Shri Ram Jethmalani, learned counsel for the appellant did not dispute that the scope of judicial review in matters of transfer of a Government servant to an equivalent post without any adverse consequence on the service or career prospects is very limited being confined only to the grounds of malafides and violation of any specific provision or guideline regulating such transfers amounting to arbitrariness. In reply, the learned Additional Solicitor General and the learned counsel for Respondent 2 did not dispute the above principle, but they urged that no such ground is made out; and there is no foundation to indicate any prejudice to public interest."

22. In ***S.C. Saxena Vs. Union of India and others; (2006) 9 SCC 583***; wherein the Apex Court held as under:-

" 6. We have perused the record with the help of the learned counsel and heard the learned counsel very patiently. We find that no case for our interference whatsoever has been made out. In the first place, a Government servant cannot disobey a transfer order by not reporting at the place of posting and then go to a Court to ventilate his grievances. It is his duty to first report for work where he is transferred and make a representation as to what may be his personal problems. This tendency of not reporting at the place of posting and indulging in litigation needs to be curbed. Apart therefrom, if the appellant really had

some genuine difficulty in reporting for work at Tezpur, he could have reported for duty at Amritsar where he was so posted. We too decline to believe the story of his remaining sick. Assuming there was some sickness, we are not satisfied that it prevented him from joining duty either at Tezpur or at Amritsar. The medical certificate issue by Dr. Ram Manohar Lohia Hospital proves this point. In the circumstances, we too are of the opinion that the appellant was guilty of the misconduct of unauthorisedly remaining absent from duty."

23. In ***Rajendra Singh and others Vs. Sate of Uttar Pradesh and others (2009) 15 SCC 178,*** wherein the Apex Court held as under:-

"8. A Government servant has no vested right to remain posted at a place of his choice nor can he insist that he must be posted at one place or the other. He is liable to be transferred in the administrative exigencies from one place to the other. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contrary. No Government can function if the Government servant insists that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires (see State of U.P. v. Gobardhan Lal, MANU/SC/0281/2004 ; (2004) 11 SCC 402; 2005 SCC (L&S) 55, SCC p. 406, para 7)."

24. In ***Dharmendra Kumar Saxena Vs. State of U.P. and others 2013 (7) ADJ 53***; wherein a coordinate Bench of this Court held as under:-

"24. From the aforementioned cases, it is evident that the Government is bound by executive order/policies. The guidelines are made to follow it and not to breach it without any justifiable reasons. Whenever the Government deviates from its policies/guidelines/executive instructions, there must be cogent and strong reasons to justify the order; when transfer order is challenge by way of representation, there must be material on record to establish that the decision was in public interest and it does not violate any statutory provision, otherwise the order may be struck down as being arbitrary and violate of Article 14 of the Constitution. The authorities cannot justify their orders that breach of executive orders do not give legally inforceable right to aggrieved person. As observed by Justice Frankfurter "An executive agency must be rigorously held to standards by which it professes its action to be judged."

25. Having taken note of the settled legal principles in respect of the scope of interference in matters relating to transfer, it is now well settled that no employee can seek a vested right to serve at any given place of his choice. The transfer is an incidence of service and an employee who is holding a transferrable post and if transferred cannot urge that there is any violation of a legal right. The order of transfer needless to say is an administrative order and the Courts are reluctant to interfere with transfer order which are made in public interest and for administrative reasons unless the order of transfer is shown to be an outcome of malafides or in violation of statutory provisions prohibiting any such transfer.

26. In the aforesaid backdrop, if the impugned order is examined, it would reveal that the transfer order under

challenge cannot said to be an outcome of malafides nor it has been so alleged. Neither can it be said to be in violation of any statutory provision which prohibits such a transfer. However, the pith and substance of the submission of the learned counsel for the petitioner is that the said transfer order is in violation of the Clause 12 of the transfer policy dated 15.06.2022.

27. For appropriate consideration, Clause 12 of the transfer policy is being reproduced hereinafter for ready reference:-

"12. सरकारी कर्मचारियों के मान्यता प्राप्त सेवा संघो के पदाधिकारियों के स्थानान्तरणः-

सरकारी सेवकों के मान्यता प्राप्त सेवा संघों के अध्यक्ष/सचिव, जिनमें जिला शाखाओं के अध्यक्ष एवं सचिव भी सम्मिलित हैं, के स्थानान्तरण, उनके द्वारा संगठन में पदधारित करने की तिथि से 02 वर्ष तक न किये जायें। यदि स्थानान्तरण किया जाना अपरिहार्य हो, तो स्थानान्तरण हेतु प्राधिकृत अधिकारियों से एक स्तर उच्च अधिकारी का पूर्वानुमोदन प्राप्त किया जाय। जिला शाखाओं के पदाधिकारियों के स्थानान्तरण प्रकरणों पर जिलाधिकारी की पूर्वानुमति प्राप्त की जाए।"

28. The aforesaid Clause only provides that such employees who are the office bearers which also includes the President and Secretary of the Association which are recognized should not be transferred for a period of two years from the date they assume the charge of office bearers, however, in case if the transfer is necessary then the approval of one rank higher authority than the Prescribed Authority must be taken and in respect of office bearers of District Associates, the prior approval of the District Magistrate be taken.

29. It will also be relevant to notice that in **Dharmendra Kumar Saxena** (supra), this Court after considering the decisions of the Apex Court held that transfer policy is not binding as it does not give rise to a legally enforceable right to an aggrieved person. In the instant case, it is not disputed that the prior approval of one rank higher authority than the Prescribed Authority has been taken and the same has also been noticed by a Division Bench of this Court in its judgment dated 11.10.2022 in **Special Appeal No. 411 of 2022 (Ajay Kumar Srivastava Vs. State of U.P. and others)** wherein Clause 12 of the transfer policy was considered and noticed.

30. The learned counsel for the petitioner has also urged that in the case of **Ajay Kumar Srivastava (supra)**, the Division Bench did make a reference to Clause 12 but it did not deal with the issue regarding the non-compliance of prior approval from the District Magistrate where it relates to the office bearers of District Level Associations.

31. Be that as it may, the issue regarding Clause 12 has been noticed by the Division Bench and turned down. As already noted above, the transfer policy is merely a guidelines and though it must be adhered but its infraction does not give rise to any enforceable rights to an aggrieved party. Moreover, the petitioners could not demonstrate any visible prejudice caused only for the reason that though the approval exists from one rank higher authority which is even higher than the District Magistrate but not from the District Magistrate itself. In absence of any clear prejudice established, mere deviation in compliance of Clause 12 appears to be cosmetic, especially when the service conditions does not place any embargo on such transfer.

32. The learned counsel for the petitioners could not dispute the fact that all

the petitioners have been in their place of posting for more than 15 years prior to the impugned transfer and the details as mentioned in paragraph 5 of the counter affidavit filed by the State relating to each of the petitioners clearly indicates the fact that all the petitioners have been at one place for last almost 20 years. In so far as the petitioner nos. 13 and 19 are concerned, they themselves have sought their transfer on their own volition.

33. Considering the aforesaid material, submissions made by the respective parties and taking a holistic view including the fact that the petitioners have already joined on their place of posting and drawing strength from settled legal principles culled out from the pronouncements noted hereinabove, this Court does not find that there is any cogent reason for this Court to interfere in the transfer order. The larger public interest as well as the fact that each of the petitioners have been in their place of posting for about 20 years and more in itself in terms of the transfer policy requires consideration and for the said reason, the employer being best suited to judge the suitability of the employee and the place at which work is to be taken cannot be interfered with by the Court in exercise of the writ jurisdiction.

34. For the reasons as detailed hereinabove, this Court does not find favour with the petitioner and the petition is sans merit, accordingly, it is dismissed. In the facts and circumstances, there shall be no order as to costs.

(2023) 2 ILRA 494
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.02.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 4745 of 2023

Leellu ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amish Kumar Srivastava, Ms. Sanju Lata

Counsel for the Respondents:
C.S.C., Sri Kaushal Kishore Mani

A. Civil Law - U.P. Revenue Code, 2006 - Sections 67, 225-A & 233 - U.P. Revenue Code Rules, 2016 - Rules 67, 186 & 192 - unauthorized occupation of Gram Panchayat property - Eviction proceedings - Natural Justice - In view of Rule 192, proceedings u/s 67 are summary proceedings, and therefore, adherence to the principles of Natural Justice is a statutory mandate, as per Rule 186 - Time to notice to show cause u/s 67(2) - though no specific period has been prescribed to show cause but still sufficient time must be given to the notice to submit objections - Violation of Principles of Natural Justice - Court deprecated the conduct of the Tahsildar, who initiated and concluded the proceedings u/s 67 within no time i.e. within a period of 11 days from the date of their inception - Petitioner was granted *only two days' time to show cause* against the proposed dispossession - petitioner was deprived of his say in the matter - Court held that the principles of Natural Justice and the scheme of the Code & the Rules were not followed by the Tahsildar - Impugned order quashed (Para 8, 22, 33,35, 36)

B. Constitution of India,1950 - Art.226 - Judicial review - Administrative Law - Proportionality and Wednesbury principles - To judge the validity of any administrative order normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was

irrational in the sense that it was in outrageous defiance of logic or moral standards or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at – could would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide or whether the decision was absurd or perverse - court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him (Para 31)

Allowed. (E-5)

List of Cases cited:

1. Canara Bank Vs V.K. Awasthy, 2005 (6) SCC 321

2. U.O.I. & anr. Vs G. Ganayutham, [1997] 7 SCC 463

3. Rishipal Singh Vs St. of U.P. & ors., 2023 (1) AWC 4

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Amish Kumar Srivastava along with Ms. Sanju Lata, learned counsel for the petitioner, learned Standing Counsel for the State-respondents and Shri Kaushal Kishore Mani, learned counsel for respondent No. 4.

2. The petitioner has made two prayers in the writ petition. The first prayer is for quashing of the order dated 04.01.2023, whereby the Tehsildar concerned has directed eviction of the petitioner in the proceedings under section 67 of U.P. Revenue Code, 2006 and also imposed penalty to the extent of Rs. 1,36,600/-. The second prayer is for deciding the restoration application filed by the petitioner on 16.01.2023 seeking recall of the order dated 04.01.2023.

3. Learned counsel for the petitioner submits that the Tehsildar, Nakud, Saharanpur issued a notice dated 26.12.2022 in purported exercise of powers under section 67 (2) of U.P. Revenue Code, 2006 calling upon the petitioner to remove his alleged unauthorised possession within a period of two days fixing 28.12.2022 at 10.00 a.m. for compliance of notice and to show cause. The notice states that in case objections are not filed against the show cause notice within the aforesaid date and time, the case shall be decided ex-parte.

4. The relevant portion of notice dated 26.12.2022 reads as under:

*"अतः एतदद्वारा आपको नोटिस दी जाती है कि आप **02 दिनों के अन्दर** अवैध अध्यासन को हटा ले, और रूपये की नुकसानी जमा कर दे। नुकसान की मरम्मत करे, अथवा दुर्वियोजन के कारण हुई क्षति को पूर्ण करे अथवा रूपय 2732000/- ग्राम सभा को सौपी गयी भूमि के नुकसान अथवा दुर्वियोजन के कारण हुई क्षति को पूर्ण करे अथवा रूपये 2732000/- रूपये नुकसान के रूप में जमा करे, अथवा करने से विरत रहे। दिनांक 28.12.2022 को समय 10 बजे मेरे न्यायालय में मेरे समक्ष इस नोटिस के पालन की सूचना के लिये अथवा उसके विरूद्ध कारण बताने के लिये उपस्थित हो।*

आपको यह भी सूचित किया जाता है कि यदि आप उल्लिखित दिनांक और समय को या तो व्यक्तिगत रूप से अथवा अधिवक्ता के माध्यम से उपस्थित नहीं होते है, और कारण बताओं नोटिस के विरूद्ध आपत्ति दाखिल नहीं करते तो मामले में विनिश्चय किया जायेगा और आपके विरूद्ध एक पक्षीय रूप से आदेश पारित किया जायेगा।

मेरे हस्ताक्षर व न्यायालय की मुहर से दिनांक 26.12.2022 को जारी किया गया।"

5. Learned counsel for the petitioner submits that the very next week, the impugned order dated 04.01.2023 has been passed observing that despite service of notice, the petitioner has not made any opposition hence the case proceeded day by day. It is the case of the petitioner that the order dated 04.01.2023 being ex-parte and in violation of the principles of Natural Justice, he immediately preferred a recall application dated 16.01.2023 stating that immediately after having come to know about the order dated 04.01.2023, restoration/recall application is being moved, which should be allowed.

6. Learned counsel for the petitioner has placed reliance upon the provisions of section 67 of U.P. Revenue Code, 2006, sub-sections (2) and (3), whereof read as follows:

67. Power to prevent damages, misappropriation and wrongful occupation of Gram Panchayat property. -

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or misappropriation of the property or for wrongful occupation as the case may be, be recovered from such person as arrears of land revenue."

7. He has also placed reliance upon Rule 67 of the Rules framed under the Act in 2016, which reads as follows:

67. Further inquiry by Assistant Collector (Section 67). *- (1) On receipt of the information under rule 66, or on facts otherwise coming to his knowledge, the Assistant Collector may make such inquiry as he deems proper and may obtain further information regarding the following points:-*

(a) full description of damage or misappropriation caused or the wrongful occupation made with details of village, plot number, area, boundary, property damaged or misappropriated and market value thereof;

(b) full address along with parentage of the person responsible for such damage, misappropriation or wrongful occupation;

(c) period of wrongful occupation, damage or misappropriation and class of soil of the plots involved;

(d) value of the property damaged or misappropriated calculated at the circle rate fixed by the Collector and the amount sought to be recovered as damages.

(*2) The Assistant Collector shall thereafter proceed to take action under section 67(2) and for that purpose issue a notice to the person concerned in R.C. Form-20 to show cause as to why*

compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the notice referred to in section 67(2) remains uncomplied with or if the cause shown by the person concerned is found to be insufficient, the Assistant Collector may direct by order that-

(a) such person be evicted by using such force as may be necessary; or

(b) the amount of compensation for damage or wrongful occupation ordered by the Assistant Collector, if not paid in specified time, may be recovered as arrears of land revenue, including the amount of expenses referred to in sub-rule (3).

(4) The amount of damages sought to be recovered and the expenses of execution of the order shall be specified in such notice, which shall be determined in the following manner:-

(a) In the case of damage or misappropriation, the amount of damages shall be assessed at the prevailing market rate.

(b) In the case of unauthorized occupation of any land, the amount of damages shall be the amount equal to the five percent of the market value of the land calculated at the circle rate fixed by the Collector for each year of unauthorized occupation.

(c) The expenses of execution of the order shall be assessed on the basis of one day's pay and allowances payable to the staff deputed.

(5) If the person wrongfully occupying the land has done cultivation therein, he may be allowed to retain possession thereof until he has harvested the crops subject to the payment by him of the amount equal to the five percent of the market value of the land calculated as per the circle rate which shall be credited to the Consolidated Gaon Fund or the Fund of the local authority other than the Gram Panchayat as the case may be. If the person concerned does not make the payment of the aforesaid amount within the period specified in the notice in R.C. Form-20, the possession of the land shall be delivered to the Land Management Committee or the local authority, as the case may be, together with the crop:

Provided that where such person again wrongfully occupies the same land or any other land within the jurisdiction of the Gram Panchayat or the local authority as the case may be, he shall be evicted therefrom forthwith and possession of the land vacant or together with the crop thereon shall be delivered to the Land Management Committee or the local authority as the case may be.

(6) The Assistant Collector shall make an endeavor to conclude the proceeding under section 67 of the Code within the period of ninety days from the date of issuance of the show cause notice and if the proceeding is not concluded within such period the reasons for the same shall be recorded.

(7) Nothing in sub-rule (5) shall debar the Land Management Committee or the local authority as the case may be from prosecuting the person who encroaches upon the same land second time in spite of having been evicted under the Code or the rules, under section 447 of the Indian Penal Code, 1860.

(8) There shall be maintained in the office of each Collector a register in R.C. Form-21 showing details of the amount ordered to be realized on account of damages and compensation awarded in proceedings under section 67.

(9) A similar register shall also be maintained by each tahsildar showing realization of damages and compensation

awarded in such proceeding. The entries made in the register maintained at tahsil shall be compared with the register maintained by the Collector to ensure accuracy of the entries made therein.

(10) A progress report showing realization of damages and compensation awarded in proceedings under section 67 shall be sent to Board of Revenue, U.P., Lucknow by the fifteenth day of April and October every year. The Board after consolidating the report so received from the districts shall send it to the Government.

(11) Nothing in rules 66 and 67 shall debar any person from establishment of his right, title or interest in a court of competent jurisdiction in accordance with the law for the time being in force in respect of any matter for which any order has been made under section 67 of the Code.....

8. The contention of the learned counsel for the petitioner is that issuance of notice under sub-section (2) of section 67 for showing cause must have provided sufficient time to the noticee to submit objections and merely because under section 67 of the Code or Rule 67 of the Rules, no time period has been fixed for calling upon the noticee to submit objections, it cannot be expected that the notice issuing authority is under unbridled power to issue a notice granting only two days' time to vacate the property, and therefore, the very basis of the impugned proceedings is contrary to the principles of Natural Justice as well as the provisions of the Code and the Rules.

9. On the other hand, learned Standing Counsel submits that since the restoration application has already been preferred by the petitioner seeking recall of the order dated 04.01.2023, it would not be appropriate for this Court to examine the validity of the order dated 04.01.2023, inasmuch as in case the recall application is decided either way, the same would give rise to further proceedings depending upon result of restoration/recall application. Learned Standing Counsel further submits that since no specific period has been prescribed either under section 67 of the U.P. Revenue Code, 2006 or under Rule 67 of the Rules, 2016, issuance of notice calling upon the petitioner in the present case, to show cause within a period of two days, does not suffer from any infirmity or illegality.

10. I have heard the learned counsel for the parties and perused the record.

11. Section 67 of the U.P. Revenue Code, 2006 is a substantial provision describing the power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property. The provision is divided into various sub-sections and the Rule 67 of the Rules clearly provides for holding of comprehensive and specific proceedings before arriving at a conclusion under section 67 of the Act.

12. Apart from above, insofar as applicability of the Code of Civil Procedure, 1908 to the proceedings under U.P. Revenue Code, 2006, reference to Rule 186 of U.P. Revenue Code Rules, 2016 should be made.

13. Rule 186 of the U.P. Revenue Code Rules, 2016 reads as follows:

"186. Non-applicability of CPC (Section 214).- *The provisions of the Code of Civil Procedure, 1908 shall not be applicable to the summary proceedings*

under the Code or these rules, but the principles enshrined in the Code of Civil Procedure, 1908 and the ***principles of natural justice shall be observed*** *in the disposal of such proceedings."*

14. Though, Rule 186 excludes provisions of applicability with respect to the summary proceedings under the U.P. Revenue Code of 2006, however it clearly mandates that principles enshrined in the Code of Civil Procedure, 1908 and the principles of Natural Justice shall be observed in the disposal of such proceedings.

15. Apart from the above, section 225-A read with Rule 192 of the Rules provide for determination of questions in any summary proceedings under the U.P. Revenue Code, 2006. For ready reference, section 225-A of U.P. Revenue Code, 2006 and Rule 192 of U.P. Revenue Code Rules, 2016 are reproduced herein below:

"225-A Determination of questions in summary proceeding.*-Notwithstanding anything contained in other provisions of this Code, all the questions arising for determination in any summary proceeding under this Code shall be decided upon affidavits, in the manner prescribed:*

Provided that if Revenue Court or Revenue Officer is satisfied that the cross examination of any witness, who has filed affidavit, is necessary, it or he may direct to produce the witness for such cross examination.

"192. Determination of questions in summary proceedings (Section 225-A).*- (1) All the questions arising for determination in any summary proceeding under this Code or these rules shall be decided upon affidavits.*

(2) The following proceedings shall be treated as summary proceedings, namely:

Section	***Particulars***
24	*Demarcation proceedings.*
25	*Proceeding regarding rights of way and other easements.*
26	*Proceeding regarding removal of obstacle.*
30(2)	*Proceeding regarding physical division of minjumla number.*
31(2)	*Proceeding regarding determination of shares.*
32	*Proceeding regarding correction of records.*
35	*Mutation proceedings.*
38	*Proceeding regarding correction of error or omission.*
49	*Proceeding regarding revision of map and records.*
58	*Proceeding regarding dispute arising in respect of any property referred to in sections 54,56 or 57.*
66	*Proceeding regarding inquiry into irregular allotment of Abadi sites.*
67	*Proceeding regarding eviction of unauthorised occupants*
80	*Proceeding regarding declaration for nonagricultural use*
82	*Proceeding regarding cancellation of declaration.*
98	*Proceeding regarding permission to transfer Bhumidhari land to person other than Scheduled Caste.*

101	*Proceeding for exchange.*
105(5)	*Proceeding for possession of Land.*
128	*Proceeding for cancellation of allotment and lease.*
149 & 150	*Proceeding for eviction of Government lessee.*
193	*Proceeding to set aside sale for irregularity.*
195	*Proceeding for setting aside of sale by Collector or Commissioner.*
212	*Proceeding for transfer of cases.*

(3) The State Government or the Board may declare any other proceeding except the suits under the Code or these rules as the summary proceeding.

(4) The procedure for disposal of summary proceedings is contained in Revenue Court Manual."

16. The aforesaid Rules of 2016 have been framed by the State Government in exercise of powers under section 233 of the U.P. Revenue Code, 2006. For the purposes of instant case, section 233 (2) (xiv) is extracted herein-below:

"233. Rules.(1) *The State Government may by notification make rules for carrying for the purposes of this Code.*

(2) Without prejudice to the generality of the foregoing power, such rules may also provided for-

(xiv) the procedure relating to the conduct and prosecution of suits, appeals and other proceedings, including the procedure of conducting various inquiries under the provisions of this Code."

17. From the aforesaid quoted provisions, it is clear that proceedings under section 67 of the U.P. Revenue Code, 2006 are summary proceedings, and therefore, in view of aforesaid quoted provisions, adherence to the principles of Natural Justice is a statutory mandate.

18. The crucial question that remains to be adjudicated in the present case is whether principles of natural justice have been violated; and if so, to what extent any prejudice has been caused. It may be noted at this juncture that in some cases it has been observed that where grant of opportunity in terms of principles of natural justice do not improve the situation, ``useless formality theory'' can be pressed into service.

19. The Apex Court in its judgement pronounced in the case of ***Canara Bank vs V.K. Awasthy***, 2005 (6) Supreme Court Cases, 321, elaborately described the principles governing concept of Natural Justice and its application in the judicial/quasi judicial/administrative proceedings and this Court is taking aid of the said decision in reiterating the deliberations made by different courts on the issue, in the forthcoming paragraphs:

20. Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is

the substance of justice which has to determine its form.

21. The expressions ``natural justice'' and ``legal justice'' do not present a water-tight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigants. Defence.

22. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the ``Magna Carta''. The classic exposition of Sir Edward Coke of natural justice requires to ``vocate interrogate and adjudicate''. In the celebrated case of Cooper v. Wandsworth Board of Works, (1963) 143 ER 414, the principle was thus stated:

''Even God did not pass a sentence upon Adam, before he was called upon to make his defence. ``Adam'' says God, ``where art thou has thou not eaten of the tree whereof I commanded thee that though should not eat''.

Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.

23. Principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi- judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

24. What is meant by the term "principles of natural justice" is not easy to determine. Lord Summer (then Hamilton, L.J.) in Ray v. Local Government Board, (1914) 1 KB 160, described the phrase as sadly lacking in precision. In General Council of *Medical Education & Registration of U.K. v. Sanckman,* (1943) AC 627; Lord Wright observed that it was not desirable to attempt `to force it into any Procrustean bed' and mentioned that one

essential requirement was that the Tribunal should be impartial and have no personal interest in the controversy, and further that it should give `a full and fair opportunity', to every party of being heard.

25. Lord Wright referred to the leading cases on the subject. The most important of them is the Board of Education v. Rice, (1911) AC 179, where Lord Loreburn, L.C. observed as follows:

"Comparatively recent statutes have extended, if they have originated, the practice of imposing upon departments or offices of State the duty of deciding or determining questions of various kinds. It will, I suppose usually be of an administrative kind, but sometimes, it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases, the Board of Education will have to ascertain the law and also to ascertain the facts. I need not and that in doing either they must act in good faith and fairly listen to both sides for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial....." The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari".

Lord Wright also emphasized from the same decision the observation of the Lord Chancellor that the Board can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view". To the same effect are the observations of Earl of Selbourne, LO in Spackman v. Plumstead District Board of Works, (1885) 10 AC 229, where the learned and noble Lord Chancellor observed as follows:

"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice".

Lord Selbourne also added that the essence of justice consisted in requiring that all parties should have an opportunity of submitting to the person by whose decision they are to be bound, such considerations as in their judgment ought to be brought before him. All these cases lay down the very important rule of natural justice contained in the oft-quoted phrase `justice should not only be done, but should be seen to be done'.

26. 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.

27. Natural justice has been variously defined by different Judges. A few instances will suffice. In Drew v. Drew and Lebura, (1855) 2 Macg. 1, Lord Cranworth defined it as `universal justice'. In James Dunber Smith v. R., (1878) 3 A.C 614, (PC) Sir Robort P. Collier, speaking for the judicial committee of Privy council, used the phrase `the requirements of substantial justice', while in Arthur John Specman v. Plumstead District Board of Works, (1885) 10 AC 229, the Earl of Selbourne, S.C. preferred the phrase `the substantial requirement of justice'. In Vionet v. Barrett, (1885) 55 LJRD 39, Lord Esher, MR defined natural justice as `the natural sense of what is right and wrong'. While, however, deciding Hookings v. Smethwick Local Board of Health, (1890) 24 QBD 712, Lord Fasher, M.R. instead of using the definition given earlier by him in Vionet's case (supra) chose to define natural justice as `fundamental justice' In Ridge v. Baldwin, (1963) 1 QB 539, Harman LJ, in the Court of Appeal countered natural justice with `fair-play in action' a phrase favoured by Bhagawati, J. In Maneka Gandhi v. Union of India, [1978] 1 SCC 248. In H.K (an infant) in Re (1967) 2 QB 617, Lord Parker, CJ, preferred to describe natural justice as `a duty to act fairly'. In fairmount Investments Ltd. v. Secretary to State for Environment, (1976) 1 WLR 1255 Lord Russell of Willowan somewhat picturesquely described natural justice as `a fair crack of the whip' while Geoffrey Lane, LJ. In R. v. Secretary of State for Home Affairs Ex Parte Hosenball, (1977) 1 WLR 766 preferred the homely phrase `common fairness'.

28. How then have the principles of natural justice been interpreted in the Courts and within what limits are they to be confined? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is `nemo judex in causa sua' or `nemo debet esse judex in propria causa sua' as stated in (1605) 12 Co. Rep.114 that is, `no man shall be a judge in his own cause' Coke used the form `aliquis non debet esse judex in propria causa quia non potest esse judex at pars. (Co.Litt. 1418), that is, `no man ought to be a judge in his own case' because he cannot act as Judge and at the same time be a party' The form `nemo potest esse simul actor et judex', that is, `no one can be at once suitor and judge' is also at times used. The second rule is `audi alteram partem', that is, `hear the other side' At times and particularly in continental countries, the form `audietur at altera pars' is used, meaning very much the same thing. A

corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely `qui aliquid statuerit parte inaudita alteram actquam licet dixerit, haud acquum facerit' that is, `he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right' (See Bosewell's case (1605) 6 Co. Rep. 48-b, 52-a) or in other words, as it is now expressed, `justice should not only be done but should manifestly be seen to be done' Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left upon. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated.

29. What is known as `useless formality theory' has received consideration of this Court in M.C. Mehta v. Union of India, [1999] 6 SCC 237. It was observed as under:

"22. Before we go into the final aspect of this contention, we would like to state that cases relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of `real substance' or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed. (See *Malloch v. Aberdeen Corpn.*, [1971] 2 All ER 1278, (per Lord Reid and Lord Wilberforce), Glynn v. Keele University, [1971] 2 All ER 89; *Cinnamond v. British Airports Authority*, [1980] 2 All ER 368, CA and other cases where such a view has been held. The latest addition to this view is R. v. Ealing Magistrates. Court, ex p. Fannaran, (1996) 8 Admn. LR 351, (see de Smith, Suppl. P.89) (1998) where Straughton, L.J. held that there must be `demonstrable beyond doubt that the result would have been different. *Lord Woolf in Lloyd v. McMohan*, [1987] 1 All ER 1118, has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in McCarthy v. Grant, (1959) NZLR 1014 however goes halfway when it says that (as in the case of bias), it is sufficient for the applicant to show that there is `real likelihood-not certainty- of prejudice.' On the other hand, Garner Administrative Law (8th Edn. 1996. pp.271-72) says that slight proof that the result would have been different is sufficient. On the other side of the argument, we have apart from Ridge v. Baldwin, (1964) AC 40 Megarry, J. in John v. Rees, [1969] 2 All ER 274 stating that there are always `open and shut cases. and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the authority to consider. Ackner, J has said that the `useless formality theory' is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that `convenience and justice are often not on speaking terms'. More recently, Lord Bingham has deprecated the `useless formality theory' in R. v. Chief Constable of the Thames Valley Police Forces, ex p. Cotton (1990 IRLR 344) by giving six reasons. (see also his article `Should Public Law Remedies be Discretionary?" 1991 PL. p.64). A detailed and emphatic criticism of the `useless formality theory has been made much earlier in `Natural Justice, Substance or Shadow' by Prof. D.H. Clark of Canada (see 1975 PL.pp.27-63) contending that Malloch (supra) and

Glynn (supra) were wrongly decided. Foulkes (Administrative Law, 8th Edn. 1996, p.323), Craig (Administrative Law, 3rd Edn. P.596) and others say that the court cannot prejudge what is to be decided by the decision-making authority. De Smith (5th Edn. 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the court. Wade (Administrative Law, 5th Edn. 1994, pp.526-530) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a `real likelihood' of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their `discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in State Bank of Patiala v. S.K. Sharma, [1996] 3 SCC 364 and Rajendra Singh v. State of M.P., [1996] 5 SCC 460 that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived.

23. We do not propose to express any opinion on the correctness or otherwise of the `useless formality theory' and leave the matter for decision in an appropriate case, inasmuch as the case before us, `admitted and indisputable' facts show that grant of a writ will be in vain as pointed by Chinnappa Reddy, J."

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30. But where an administrative action is challenged as "arbitrary" under Article 14 on the basis of Royappa [1974] 4 SCC 3 (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is ``rational" or ``reasonable" and the test then is the Wednesbury test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. In G.B. Mahajan v. Jalgaon Municipal Council, [1991] 3 SCC 91 at p. 111 Venkatachaliah, J. (as he then was) pointed out that ``reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. In Tata Cellular v. Union of India, [1994] 6 SCC 651 at pp. 679-80), Indian Express Newspapers Bombay (P) Ltd. v. Union of India, [1985] 1 SCC 641 at p. 691, Supreme Court Employees. Welfare Assn. v. Union of India, [1989] 4 SCC 187 at p. 241 and U.P. Financial Corpn. v. Gem Cap(India) (P) Ltd., [1993] 2 SCC 299 at p. 307 while judging whether the administrative action is ``arbitrary" under Article 14 (i.e. otherwise then being discriminatory), this Court has confined itself to a Wednesbury review always.

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31. In ***Union of India and Anr. v. G. Ganayutham***, [1997] 7 SCC 463, this Court summed up the position relating to proportionality in paragraphs 31 and 32, which read as follows:

"31. The current position of proportionality in administrative law in England and India can be summarized as follows:

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury (1948 1 KB 223) test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU (1985 AC 374) principles.

(3)(a) As per Bugdaycay (1987 AC 514), Brind (1991 (1) AC 696) and Smith (1996 (1) All ER 257) as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of ``proportionality'' and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14.

32. Finally, we come to the present case. It is not contended before us that any fundamental freedom is affected. We need not therefore go into the question of ``proportionality''. There is no contention that the punishment imposed is illegal or vitiated by procedural impropriety. As to ``irrationality'', there is no finding by the Tribunal that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there a finding, based on material, that the punishment is in ``outrageous'' defiance of logic. Neither Wednesbury nor CCSU tests are satisfied. We have still to explain "Ranjit Thakur, [1987] 4 SCC 611)".

32. This Court very recently in the case of ***Rishipal Singh vs State of U.P. and others***, reported in 2023 (1) AWC 4, has elaborately explained the effect of non-compliance of the provisions of section 67 of U.P. Revenue Code, 2006, and rule 67 of the U.P. Revenue Code Rules, 2016 and has clearly laid down in detail that whenever violation of the aforesaid provisions of law is found to have been committed by the authorities dealing with the matters under the said provision, their action shall be liable to be set aside.

33. Having heard the learned counsel for the parties, this Court finds that undue haste has been shown by the Tahsildar concerned in holding proceedings under section 67 of the U.P. Revenue Code, 2006, which is apparent from perusal of the notice dated 26.12.2022, whereby only two days time was granted to the noticee (petitioner) to remove the alleged unauthorized possession from the spot with a threat that in case compliance of notice is not made within such time period, ex-parte order shall be passed. Further the impugned order dated 04.01.2023 demonstrates that it has been passed only on the ground that since the petitioner has failed to submit reply against notice, the case was fixed on day-to-day basis, and therefore, it has been decided against the petitioner directing his dispossession and imposition of damages to the aforesaid extent. Before this Court comments upon validity of the notice dated 04.01.2023 impugned in the present writ petition, the soul of the U.P. Revenue Code, 2006 insofar as it relates to the observance of the principles of Natural Justice is required to be dealt with with the aid of certain relevant statutory provisions.

34. In the present case, admittedly the impugned order dated 04.01.2023 is a consequence of notice dated 26.12.2022 granting **only two days'** time to the petitioner to show cause against the proposed dispossession.

35. This Court seriously deprecates the conduct of the Tahsildar, Nakud, Saharanpur, who has initiated and concluded the proceedings under section 67 of U.P. Revenue Code, 2006, **within no time i.e. within a period of 11 days from the date of their inception**. What persuaded the Tahsildar to act in such haste is not clear from the record. However, one thing is clear that the petitioner has been deprived of his say in the matter and the principles of Natural Justice have been given a complete go-by.

36. Keeping in view the provisions of sections 67, 225-A and 233 of the U.P. Revenue Code, 2006 and the Rule 67, 186 and 192 of the Rules, 2016 and having perused the notice dated 26.12.2022 as well as order impugned dated 04.01.2023, it would be a futile exercise to issue directions for consideration of the restoration/recall application as this may

further delay the matter. This Court having found that the principles of Natural Justice have been utterly violated and the scheme of the Code and the Rules has been thrashed by the Tahsildar concerned, the order impugned dated 04.01.2023 cannot be sustained.

37. In view of above, the writ petition succeeds and is allowed. A writ of certiorari is issued quashing the order dated 04.01.2023, (annexure No. 4 to the writ petition) rendering the recall/restoration application as infructuous. The proceedings under section 67 of the U.P. Revenue Code, 2006 covered by Case No. 260 of 2022 are restored to their original number and status.

38. The petitioner shall submit his objections against the notice within a period of one month from today. Thereafter, the authority concerned shall conduct proceedings strictly in consonance with section 67 of the U.P. Revenue Code, 2006 read with Rule 67 of the Rules of 2016 and after giving full opportunity of hearing to the petitioner for leading evidence, etc., the proceedings shall be decided within a period of six months from the date of certified copy of this order is produced before him.

(2023) 2 ILRA 508
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.01.2023

BEFORE

THE HON'BLE SAMEER JAIN, J.

Criminal Misc. Ist Bail Application No. 29318 of 2022

Neelam Devi ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Vivek Sharma

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - Bail - Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 21/22, Section 42 - Power of entry, search, seizure and arrest without warrant or authorization , Section 37 - Offences to be cognizable and non-bailable , Bail can only be granted to an accused involving commercial quantity when there is a reasonable ground that he is not guilty and he will not commit any offence after released on bail. (Para -11)

(B) Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 50 - Conditions under which search of persons shall be conducted - if in spite of appraising the right of accused he/she did not choose either to be searched before a Magistrate or a Gazetted Officer then search may be taken by the empowered officer and it is not imperative on his part to take the accused either before a Magistrate or a Gazetted Officer. (Para - 15)

Commercial quantity of Alprazolam powder (240 gms) - recovered from possession of applicant - more than commercial quantity - before taking search - empowered officer apprised - right to be searched either before a Magistrate or a Gazetted Officer - applicant did not opt to be searched either before a Magistrate or a Gazetted Officer - with consent search was made by two female police constables - empowered officer complied provisions of Section 50 of NDPS Act.**(Para - 16)**

HELD:-Question whether or not the procedure prescribed has been followed and the requirement of Section 50 of NDPS Act had been met, is a matter of trial (case of Vijaysinh Chandubha Jadeja) . Compliance of Section 50 of the NDPS Act has been made, so no finding can be recorded that it was not complied with. Not a fit case to enlarge applicant on bail. **(Para - 20,21,22)**

Bail application rejected. (E-7)

List of Cases cited:-

1. Vijaysinh Chandubha Jadeja Vs St. of Guj., (2011) 1 SCC 609

2. St. of Punj. Vs Baldev Singh (1999) 6 SCC 172

3. Nabi Alam Vs St. (Govt. of NCT of Delhi) MANU/DE/1045/2021

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

1. Heard Sri Vivek Sharma, learned counsel for the applicant and Sri Ravi Kant Kushwaha, learned A.G.A. for the State.

2. The instant bail applicant has been moved on behalf of applicant to release him on bail during trial in Case Crime No. 608 of 2022 under Section 21/22 of NDPS Act, Police Station- Highway, District- Mathura.

3. According to the prosecution case on 3.6.2022 at about 10:29 A.M. from the possession of the applicant 240 gms. of Alprazolam powder was recovered.

4. Learned counsel for the applicant submits that entire allegation made against the applicant is totally false and baseless and nothing incriminating has been recovered from the possession of applicant.

4.1 He next submitted that even at the time of search and recovery mandatory provisions of Section 50 of NDPS Act have not been complied.

4.2. He submits, although from the perusal of the recovery memo, it appears that an option was given to the applicant that if she wants, she may give her search either before a Gazetted Officer or a Magistrate but in fact no such option was ever given to the applicant and only with intention to show the compliance of Section 50 of NDPS Act, it has been noted in the recovery memo.

4.3 He further submits, even in view of the judgment of Apex Court passed in case of Arif Khan @ Agha Khan Vs. State of Uttarakhand, 2018 AIR (SC) 2123 no compliance of Section 50 of NDPS Act at the time of search was made as indisputedly applicant did not either produce before Magistrate or Gazetted Officer and her search was made by the police personnel at alleged spot of recovery.

4.4. Learned counsel for the applicant urged that in view of the law laid down in case of Arif Khan (Supra), it was imperative for searching officer to produce applicant before a Magistrate or Gazetted Officer which is not done in the present matter and, therefore, considering the fact that mandatory provisions of Section 50 of NDPS Act have not been complied with entire recovery vitiates.

4.5. Learned counsel also placed reliance on the judgement and order passed by this court in Criminal Misc. Bail Application No. 27291 of 2020 Mohd. Asageer Vs. NCB.

4.6. Learned counsel for the applicant further submits, applicant is a lady and she is not having any criminal history and she is in jail in the present matter since 03.06.2022 i.e. for last more than six months and, therefore, considering the facts and circumstances of the case and detention of applicant she should be released on bail.

5. Per contra, learned A.G.A opposed the prayer for bail and submits that from the possession of the applicant 240 gms. of Alprazolam powder was recovered which

involves commercial quantity as commercial quantity of Alprazolam powder is only 100 gms.

6. Learned A.G.A further submits that before search an option was given to the applicant that if she wants then she may be searched either before a Magistrate or a Gazetted Officer and from the perusal of the recovery memo it further reflects that it was also stated to her (applicant) that it is her right but in spite of the option given to her, she did not opt to be searched either before a Magistrate or a Gazetted Officer and she stated that she may be searched by the Searching Officer and thereafter her search was made by two female police constables and therefore, from the perusal of the recovery memo dated 03.06.2022 it appears that provisions of Section 50 of NDPS Act have been duly complied with in its letter and spirit and, therefore, considering the non obstante clause of Section 37 of NDPS Act, applicant should not be released on bail.

7. I have heard both the parties and perused the record of the case.

8. Indisputedly, from the possession of the applicant commercial quantity of Alprazolam powder (240 gms) was recovered.

9 . Section 37 of the NDPS Act regulates the bail involving commercial quantity and runs as under:

"37. Offences to be cognizable and non-bailable-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

I. the Public Prosecutor has been given an opportunity to oppose the application for such release and,

II. where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

10. Therefore, as per Section 37 of NDPS Act no person accused for offences under NDPS Act involving commercial quantity shall be released on bail unless:

(a) Public prosecutor has been given an opportunity to oppose the bail application,

(b) The Court is satisfied that there are reasonable grounds for believing that accused is not guilty of such offence,

(c) He is not likely to commit any offence while on bail.

11. Therefore, from perusal of the Section 37 of the NDPS Act it appears that bail can only be granted to an accused involving commercial quantity when there is a reasonable ground that he is not guilty and he will not commit any offence after released on bail.

12. Learned counsel for the applicant with regard to the condition "(b)"of Section 37 of NDPS Act submitted that as mandatory provisions of Section 50 have not been complied at the time of search, therefore, there is reason to believe that he is not guilty as Section 50 of NDPS Act is mandatory and its non-compliance will be resulted in the acquittal of applicant. To analyze the argument advanced by learned counsel for the applicant, it is necessary to refer Section 50 of NDPS Act which is extracted below:

"50. Conditions under which search of persons shall be conducted-

1. When any officer duly authorised under section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

2. If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

3. The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

4. No female shall be searched by anyone excepting a female.

5. When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

6. After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

13. From the perusal of Section 50 of the NDPS Act it appears that according to the Section 50 (1) of NDPS Act the officer authorized to search shall, if such person so requires, to take such person to nearest Gazetted Officer of any department mention in Section 42 of NDPS Act or to the nearest Magistrate, therefore, as per Section 50 of NDPS Act, if an accused person opted to be searched either before a Gazetted Officer or a Magistrate then it is imperative on the part of Searching Officer to take him before such Officer but if even after giving option the accused did not opt to be searched either before a Magistrate or a Gazetted Officer then he can make a search himself without taking the accused either before a Magistrate or a Gazetted Officer.

14. The Constitution Bench of the Apex Court in case of Vijaysinh

Chandubha Jadeja Vs. State of Gujarat (2011) 1 SCC 609 after discussing the judgment of another Constitution Bench of the Supreme Court in case of State of Punjab Vs. Baldev Singh (1999) 6 SCC 172 observed as follows with regard to provisions of Section 50 of NDPS Act:

"23. In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in Baldev Singh case (supra). We are concerned with the following conclusions:(SCC pp. 208-10, Para 57).

"(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused,

notwithstanding the recovery of that material during an illegal search."

24. Although the Constitution Bench in Baldev Singh case did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

25. As noted above, sub-sections (5) and (6) were inserted in Section 50 by Act 9 of 2001. It is pertinent to note that although by the insertion of the said two sub-sections, the rigour of strict procedural requirement is sought to be diluted under the circumstances mentioned in the sub-sections, viz. when the authorised officer has reason to believe that any delay in search of the person is fraught with the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance etc., or article or document, he may proceed to search the person instead of taking him to the nearest gazetted officer or Magistrate. However, even in such cases a safeguard against any arbitrary use of power has been provided under sub-section (6). Under the said sub-section, the empowered officer is obliged to send a copy of the reasons, so recorded, to his immediate official superior within seventy two hours of the search. In our opinion, the insertion of these two sub-sections does not obliterates the mandate of sub-section (1) of Section 50 to inform the person, to be searched, of his right to be taken before a gazetted officer or a Magistrate.

26. The object and the effect of insertion of sub-sections (5) and (6) were considered by a Constitution Bench of this Court, of which one of us (D.K. Jain, J.) was a member, in Karnail Singh Vs. State of Haryana13. Although in the said decision the Court did observe that by virtue of insertion of sub-sections (5) and (6), the mandate given in Baldev Singh case (supra) is diluted but the Court also opined that it cannot be said that by the said insertion, the protection or safeguards given to the suspect have been taken away completely. The Court observed : (Karnail Singh case13, SCC p. 553, para 31)

"31. ...Through this amendment the strict procedural requirement as mandated by Baldev Singh case was

avoided as relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 Cr.P.C. was included by the legislature. The effect conferred upon the previously mandated strict compliance with Section 50 by Baldev Singh case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in Baldev Singh case is diluted."

27. It can, thus, be seen that apart from the fact that in Karnail Singh, the issue was regarding the scope and applicability of Section 42 of the NDPS Act in the matter of conducting search, seizure and arrest without warrant or authorisation, the said decision does not depart from the dictum laid down in Baldev Singh case insofar as the obligation of the empowered officer to inform the suspect of his right enshrined in sub-section (1) of Section 50 of the NDPS Act is concerned. It is also plain from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, sub- section (6) of Section 50 of the NDPS Act makes it imperative and obligatory on the authorised officer to send a copy of the reasons recorded by him for his belief in terms of sub-section (5), to his immediate superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.

28. We shall now deal with the two decisions, referred to in the referral order, wherein "substantial compliance" with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In Prabha Shankar Dubey, a two Judge bench of this Court culled out the ratio of Baldev Singh case, on the issue before us, as follows: (Prabha Shankar Dubey case, SCC p. 64, para 11)

"11. ...What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word "right" at relevant places in the decision of Baldev Singh case seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the "suspect" at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it."

However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that case, finding similarity in the nature of evidence on this aspect between the case at hand and Joseph Fernandez, the Court chose to follow the views echoed in the latter case, wherein it was held that searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression

"substantial compliance" in the following words: (Prabha Shankar Dubey case2, SCC p. 64, para 12)

"12. The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh case. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations."

It is manifest from the afore-extracted paragraph that Joseph Fernandez does not notice the ratio of Baldev Singh and in Prabha Shankar Dubey, Joseph Fernandez is followed ignoring the dictum laid down in Baldev Singh case.

29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

15. Therefore, from the judgement of the Apex Court passed in case of Vijaysinh Chandubha Jadeja (supra), it is apparent that provisions of Section 50 of the NDPS Act are mandatory and it is the duty of empowered officer to apprise the accused that he is having right to be searched either before a Magistrate or a Gazetted Officer and if no such option is given to the accused then entire recovery would be vitiated but from the perusal of the provisions of Section 50 of NDPS Act as well as from the judgements of Constitutional Benches of Apex Court in cases of Baldev Singh (supra) and Vijaysinh Chandubha Jadeja (supra), it is also clear that if in spite of appraising the right of accused he/she did not choose either to be searched before a Magistrate or a Gazetted Officer then search may be taken by the empowered officer and it is not imperative on his part to take the accused either before a Magistrate or a Gazetted Officer.

16. The similar issue arose before Delhi High Court and in light of the judgement of Arif Khan (supra), learned single Judge referred the matter to larger bench and Division Bench of the High Court of Delhi in case of Nabi Alam Vs. State (Govt. of NCT of Delhi) MANU/DE/1045/2021 after analyzing the judgement of Vijaysinh Chandubha Jadeja (supra) and Baldev Singh (supra) observed as under:

"20. On a plain reading of the above decision, it is clear that the obligation of the empowered officer under

sub-Section (1) of Section 50 of the NDPS Act makes it imperative on his part to apprise the person intended to be searched, of his right to be searched before a Gazetted Officer or Magistrate; failure to comply with which prescription, which requires strict compliance, would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person accused during such search or suspected of being in possession of any narcotic drug or psychotropic substance during the said search. However, for the purposes of the issue to be determined in the instant case, it is relevant and pertinent to note that the Constitution Bench of the Hon'ble Supreme Court of India in Vijaysinh Chandubha Jadeja (supra) clearly observed that "Thereafter, the suspect may or may not choose to exercise the right provided to him under the said proviso". The sequitur to this observation of the Supreme Court leaves no manner of doubt that once the suspect has been apprised by the empowered officer of his right to be searched before a Gazetted Officer or a Magistrate, but chooses not to exercise that right, the empowered officer can conduct the search of such person without producing him before a Gazetted Officer or a Magistrate, for the said purpose.

21. Coming now to the emphasis placed on behalf of the applicant/accused on the judgment rendered by the Supreme Court in Arif Khan @ Agha Khan (supra), the question that needs to be considered is whether that decision is an authority for the proposition that notwithstanding the person proposed to be searched has, after being duly apprised of his right to be searched before a Gazetted Officer or Magistrate, but has expressly waived this right in clear and unequivocal terms; it is still mandatory that his search be conducted only before a Gazetted Officer or Magistrate.

22. In this behalf, it is necessary to consider the observations of the Hon'ble Supreme Court in Arif Khan @ Agha Khan (supra), the relevant paragraphs of which decision are being extracted hereinbelow:

"18. What is the true scope and object of Section 50 of the NDPS Act, what are the duties, obligation and the powers conferred on the authorities under Section 50 and whether the compliance of requirements of Section 50 are mandatory or directory, remain no more res integra and are now settled by the two decisions of the Constitution Bench of this Court in State of Punjab v.Baldev Singh [State of Punjab v. Baldev Singh, MANU/SC/0981/1999 : (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] and Vijaysinh Chandubha Jadeja [Vijaysinh Chandubha Jadeja v. State of Gujarat, MANU/SC/0913/2010 : (2011) 1 SCC 609] .

19. Indeed, the latter Constitution Bench decision rendered in Vijaysinh Chandubha Jadeja (supra) has settled the aforementioned questions after taking into considerations all previous case law on the subject.

20. Their Lordships have held in Vijaysinh Chandubha Jadeja that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the police officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a gazetted officer or a

Magistrate. It is held that it is equally mandatory on the part of the authorised officer to make the suspect aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a gazetted officer or a Magistrate."

23. A plain reading of the above extracted paragraphs leads to but one inescapable conclusion that their Lordships of the Hon'ble Supreme Court whilst following the ratio of the decision of the Constitution Bench in Vijaysinh Chandubha Jadeja (supra) held that the same has settled the position of law in this behalf to the effect that, whilst it is imperative on the part of the empowered officer to apprise the person of his right to be searched only before a Gazetted Officer or Magistrate; and this requires a strict compliance; the Hon'ble Court simultaneously proceeded to reiterate that, in Vijaysinh Chandubha Jadeja (supra) "it is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act". In this view of the matter, the reliance placed by counsel for the applicant/accused on the decision of the Supreme Court in Arif Khan @ Agha Khan (supra), in our respectful view does not come to his aid.

24. Having considered the case law on the subject, we are inclined to answer the Reference in the following manner.

25. In view of the discussion in the foregoing paragraphs, we answer the issue that arises for consideration in the present Reference in the negative.

26. For the sake of clarity it is held that, axiomatically, there is no requirement to conduct the search of the person, suspected to be in possession of a narcotic drug or a psychotropic substance, only in the presence of a Gazetted Officer or Magistrate, if the person proposed to be searched, after being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistate categorically waives such right by electing to be searched by the empowered officer. The words "if such person so requires", as used in Section 50(1) of the NDPS Act would be rendered otiose, if the person proposed to be searched would still be required to be searched only before a Gazetted Officer or Magistrate, despite having expressly waived "such requisition", as mentioned in the opening sentence of sub-Section (2) of Section 50 of the NDPS Act. In other words, the person to be searched is mandatorily required to be taken by the empowered officer, for the conduct of the proposed search before a Gazetted Officer or Magistrate, only "if he so requires", upon being informed of the existence of his right to be searched before a Gazetted Officer or Magistrate and not if he waives his right to be so searched voluntarily, and chooses not to exercise the right provided to him under Section 50 of the NDPS Act."

17. Therefore, although in the case of Arif Khan (supra) Hon'ble Apex Court held that it was imperative on part of Searching Officer to take the accused either before a Magistrate or a Gazetted Officer and his

search ought to have been made before a Magistrate or a Gazetted Officer, in spite of the fact that he waived his right to be searched either before a Magistrate or a Gazetted Officer but in light of the Judgement of the Constitution Bench of Apex Court in case of Vijaysinh Chandubha Jadeja (supra) no benefit can be extended in favour of applicant in view of the observation made in case of Arif Khan (supra).

18. As in case at hand, from the possession of the applicant 240 gms. of Alprazolam powder was recovered which is more than commercial quantity and before taking search empowered officer apprised her that she is having right to be searched either before a Magistrate or a Gazetted Officer but in spite of that she (applicant) did not opt to be searched either before a Magistrate or a Gazetted Officer and with her consent her search was made by two female police constables therefore, in view of the law laid down in the judgment of Constitution Bench of Apex Court in case of Vijaysinh Chandubha Jadeja (supra) empowered officer has complied the provisions of Section 50 of NDPS Act and it cannot be said that there is a violation of Section 50 of NDPS Act.

19. Further, at the stage of bail it is only to see that whether prima facie provisions of Section 50 of NDPS Act have been complied with or not.

20. At the stage of bail it cannot be precisely ascertained that whether compliance of Section 50 of NDPS Act has been substantially made or not, it can only be ascertained during trial.

21. The Constitution Bench of Apex Court in case of Vijaysinh Chandubha Jadeja (supra) observed that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 of NDPS Act had been met, is a matter of trial (see Para 31).

22. As in the present matter, from the perusal of the recovery memo prima facie it appears that compliance of Section 50 of NDPS Act has been made, therefore, at this stage no finding could be recorded that it was not complied.

23. From the discussion made above, I find no merit in the argument advanced by learned Counsel for the applicant and as from the possession of the applicant commercial quantity of Aprazolam powder, a narcotic substance was recovered, therefore, considering the provisions of Section 37 of NDPS Act, in my view it is not a fit case in which applicant should be enlarged on bail.

24. Accordingly, the instant bail application is **rejected**.

(2023) 2 ILRA 518
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2023

BEFORE

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

Criminal Appeal No. 1405 of 1990

Ompal **...Appellant**

Versus

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

Counsel for the Appellants:
Sri M.M. Tripathi, Sri Apul Misra, Sri Bhuvnesh Kumar Singh

Counsel for the Opposite Party:

G.A.

A. Criminal Law - Indian Penal Code, 1860 - Section 302 - Murder case - Circumstantial evidence – conviction - a conviction based on circumstantial evidence can be ordered only if the prosecution establishes the chain of events pointing exclusively to the hypothesis of guilt on part of the accused appellant and that no hypothesis consistent with innocence of accused is otherwise available (Para 31)

B. Indian Penal Code, 1860 - Section 302 - Murder case - deceased's naked body, with multiple injuries, discovered in the accused's father field, and her torn saree was found nearby - deceased had gone to serve morning meals to her father through the accused's field but she didn't return home - circumstances which emerged against the accused - weapon of assault i.e. serrated sickle, was promptly recovered with human blood and hairs on the pointing out of the accused - in doctor opinion serrated sickle caused the injuries - scab marks on the accused, matched the possible time of the incident - accused's shirt missing button & broken bangles found at the scene suggest a struggle - no plea or ground of false implication - independent witness saw the accused in a perplexed state after the incident without a clear explanation - facts established beyond reasonable doubt by the prosecution to connect the accused appellant with the commissioning of offence (Para 33, 34, 35, 36, 37, 38)

Dismissed. (E-5)

List of Cases cited:

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

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
&
Hon'ble Shiv Shanker Prasad, J.)

1. This appeal is by the accused appellant Ompal challenging the judgment and order of conviction and sentence, dated 27.03.1990, passed by the Ist Additional Session Judge, Bijnor in Session Trial No. 459 of 1987 (State vs. Ompal) arising out of Case Crime No.69 of 1987, Police Station Sherkot, District Bijnor, whereby he has been convicted and sentenced to life imprisonment under section 302 IPC and seven years' imprisonment under section 376/511 IPC with fine of Rs.1,000/- and in default of fine he is to undergo six months' additional rigorous imprisonment. All the sentences are to run concurrently.

2 . The basis of prosecution case is the written report (Ex.Ka.1) of first informant Chain Sukh (PW-1), brother of the deceased, stating that his sister Geeta Devi aged 27 years got married about 4 months back and at around 09.00 AM she had gone on bullock cart (Bailgadi) alongwith his younger brother Hetram to offer morning meal to his father who was in the agricultural field. She returned around 11.00 AM. When informant came to fetch grass at 02.00 PM in the fields his father said that the deceased has not brought his afternoon meal. Informant told his father that she has not returned home after serving food. Informant's father stated that the deceased returned saying that she would return for cutting grass alongwith sister-in-law (Bhabhi). The informant was occupied with agricultural work and when he returned home around 04.00 PM it was found that his sister (deceased) had not returned. Her disappearance was disclosed to Suresh Singh, Hari Singh, Chunnu Singh, Ram Chandra Singh, Leela Singh, Tejpal Singh etc. who joined the informant to locate his sister. While searching her (deceased) in the sugarcane field it was found that at a distance of 100 meter in the

field of Jaidev (father of accused appellant) beneath rosewood (shisam tree) naked body of deceased was lying and her petticoat was tied to rosewood and her saree was in three parts, one of which was tied to sugarcane crop. There were injuries on head, neck and cheek of the deceased and she has been intentionally killed.

3. On the basis of aforesaid written report the First Information Report (Ex.Ka.4) got registered as Case Crime No.69 of 1987, under Sections 302 IPC, Police Station Sherkot, District Bijnor on 22.08.1987 at 09.30 PM. Inquest (Ex.Ka.2) was conducted on the next day as there was no source of light at the place of occurrence. Inquest proceedings commenced at 06.30 AM on 23.08.1987 and concluded at 08.00 PM. The inquest witnesses found that there were injuries on cheek of deceased apart from injuries on her head and other parts of body. In the opinion of inquest witnesses the deceased Geeta died due to injuries caused to her and postmortem be got conducted to ascertain the cause of death. The dead body was consequently sealed and sent for postmortem.

4. The postmortem (Ex.Ka.3) was got conducted on 23.08.1987 at 02.30 PM, which contains following particulars:-

Age- 17 years

External Examination

A young lady of average built. Rigor mortis passed from upper extremity in passing out stage in lower extremity. Both eyes closed P.M. staining seen over left side of elbow lower part left thigh upper third.

Antemortem Injuries

(1) Incised wound on front of lateral aspect (both side) neck measuring 8" x 3" x soft tissue deep.

(2) Incised wound 1" x ¼" x muscle deep on left side of face.

(3) 3 Incised wound each ½" x ¼" x muscle deep on dorsum of left hand.

(4) Incised wound 1" x ½" x muscle deep on left iliac fossa.

(5) Abrasion 4" x ½" on deltoid prominence left upper arm.

(6) Incised wound 1" x ¼" x muscle deep on the back right side lumber region.

Cause of death

Shock and haemorrhage due to antemortem injuries.

Duration - About one day old.

5. The Investigating Officer recorded the statement of witnesses under section 161 Cr.P.C., including Ramesh Singh (PW-2) and Chhote Singh (PW-3), who have stated that soon after the incident they saw the accused appellant in perplexed state and on being asked he said nothing. The dead body of deceased was later found in the area. The statement of these two witnesses were recorded on the date of incident itself i.e. 22.08.1987.

6. The accused appellant was arrested on 24.08.1987 and medically examined on 25.08.1987, at 01.30 PM, wherein following injuries were found on him:-

"(1) Abrasion 1.5cm x 1cm left side of chest 8 cm above nipple at 10 O'clock position with scab is presents.

(2) Abrasion 1cm x ½cm on the front of neck near the adam's apple, scab is present, hard.

(3) Abrasion 1.5 cm x 1cm on the right side of top of shoulder joint, scab is present, hard."

7. On the pointing out of the accused appellant a bloodstained sickle (Daranti) [Ex.Ka.3] was also recovered on 24.08.1987. The Investigating Officer also collected bloodstained earth & plain earth (Ex.Ka.12) from the place of occurrence. A shirt button as well as clothes, bangle pieces etc. were recovered vide recovery memo (Ex.Ka.13) and the shirt worn by the accused appellant was also recovered vide recovery memo (Ex.Ka.15) in which one of the buttons was missing. The recovered items were sent for forensic report. As per the forensic report (Ex.Ka.17) the sickle had human blood and human hair on it. Blood was also found on the clothes worn by the deceased. The bloodstained and plain earth was found disintegrated. No blood was, however, found on the shirt worn by the accused appellant.

8. On the basis of evidence collected during investigation a charge sheet (Ex.Ka.16) came to be filed against the accused appellant on 29.08.1987 under section 302, 376/511 IPC. The concerned Magistrate took cognizance and committed the case to the court of Sessions where charges were framed against the accused appellant. The charges were read out to the accused appellant, who claimed himself to be not guilty and demanded trial.

9. During the course of trial the prosecution has adduced oral testimony of PW-1 (first informant Chain Sukh), who has supported the prosecution case by stating that the accused appellant is son of Jaidev and is resident of his village. The deceased was his sister who got married about 3-4 months back. As per him the agricultural field of Jaidev falls between his plots and for reaching his agricultural land he has to necessarily cross the field of Jaidev. PW-1 has also stated that as and when they go to work in the field their ladies or children came to serve them food at the field. He has explained that the deceased left the field for home around 11-11½ after serving morning meals to her father. His sister, however, never reached home. In the afternoon he came to the field around 02.00 for cutting grass when his father informed that the deceased has not brought his afternoon meal. PW-1 has supported the prosecution version that the deceased did not return home after serving morning meals to her father. PW-1 has then narrated the manner in which others were informed about disappearance of the deceased and the fact that the dead body of deceased was found naked in the field of Jaidev with multiple marks of injuries. The saree of deceased was torned in three parts and her petticoat was hanged on the rosewood (shisam tree). It is also stated that one side of saree was tied around the deceased while other part was below her head. The recovery of clothes worn by the deceased was also proved by this witness. In the cross-examination PW-1 has largely remained intact.

10. PW-2 is one Ramesh Singh, who has stated that he knows the accused appellant and he is son of Jaidev. He has asserted that while going towards jungle from his house when he reached the field of Jaidev, wherein sugarcane crops were standing, he saw the accused appellant

coming out in perplexed state and on being asked the accused said nothing and left towards the village. This incident occurred around 12 to 12.15 PM. PW-2 also stated that when he returned around 5-5.30 PM he came to know that the deceased has been done to death. This witness is also an inquest witness and has verified it. In the cross examination not much could be extracted by the defence as he remained intact on his statement made in the examination-in-chief.

11. PW-3 is Chhote Singh, who has stated that he knows the accused appellant and that at around 12 - 12.15 PM on the date of incident he saw the accused appellant at trisection, coming from east, in perplexed state and he was moving fast. On being asked he said nothing and left towards his house. He claims that in the evening he came to know that the deceased has been done to death. In the cross examination of this witness his testimony could not be effectively challenged.

12. PW-4 is one Benami Singh, who has verified the recovery of sickle (Daranti) from the field of the father of accused near the bund (Medh). He has stated that he was with the police party and had gone to the field alongwith accused who had already been arrested by then. It is also stated that the accused appellant brought them to the field of his father where sugarcane crops were standing and having a rosewood (sisham tree). The sickle (Daranti) was taken out from the bund (Medh). In the cross examination this witness has stated that from a distance the recovered item was not visible as the sugarcane crop was standing and the sickle (Daranti) was taken out from the bund (Medh) by the accused appellant and was given to police.

13. PW-5 is Dr. U.S. Fauzdar, who has proved the postmortem report. He has also stated that injuries on the deceased could have been caused by sickle (Daranti) and that Daranti could have been used for causing injury nos.1 to 4 and 6. The doctor has been specifically asked about the nature of weapon from which injuries could have been caused to the deceased and in his opinion the nature of injuries on the deceased could have been caused by sickle (Daranti).

14. PW-6 (Ram Bhagwan) is the Head Constable, who has proved the chik FIR and G.D. entry.

15. PW-7 is Dr. V. K. Narula, who has examined the accused on 25.08.1987 and has proved the injuries on him. In his opinion the injuries on accused could be caused by finger nails while struggling on 22.8.1987, at any time between 11 AM and 4 PM. In the cross-examination this witness has stated that he cannot differentiate between scabbing caused between 8 hours to 10 hours and he can only point out the difference of scabbing between 24 hours and fresh scabbing. He further stated that colour of scabbing would be same after 24 hours to three days. He also denied the suggestion that period of scabbing can be ascertained by touching the scab.

16. PW-8 (Mohan Singh) is the Constable, who took the dead body for postmortem.

17. PW-9 (Ram Singh) is the father of deceased and has verified in his statement that the bloodstained sickle (Daranti) was recovered from the agricultural field of

Jaidev on the pointing out of accused appellant which was of his daughter. He has supported the prosecution case and not much could be extracted from him either during the cross examination.

18. PW-10 (Ravi Chaturvedi) is the Investigating Officer, who has verified the police papers and has also stated that the accused was arrested on 24.08.1987 at about 04.00 PM. He has also proved the recovery made on the pointing out of the accused. In the cross examination he has admitted that there was no blood on the shirt of accused and the button (Ex.Ka.9) is otherwise available in the market.

19. On the basis of incriminating material adduced during the course of trial the statement of accused has been recorded under Section 313 Cr.P.C., in which he has claimed ignorance about the incident. He has only admitted that the dead body was in the field of his father. In reply to question no.8 he has stated that he was at home and does not know as to how PW-2 saw him. He has also stated that while returning home he has been arrested. He has also stated that he was at Sherkot. He claimed that he has been falsely implicated.

20. On the basis of evidence so led in the matter the trial court has come to the conclusion that the prosecution has proved its case beyond reasonable doubt, and that the accused attempted rape on the deceased and later fled after killing her.

21. The judgment of conviction and sentence is assailed in the present appeal on behalf of accused appellant primarily on the ground that this being a case of circumstantial evidence the chain of events pointing exclusively to the hypothesis of guilt on part of the accused has not been joined and that an alternate hypothesis consistent with the innocence of the accused cannot be ruled out. It is also contended that the evidence collected by the prosecution does not establish that the offence of rape has been committed upon the deceased and the prosecution case that an attempt was made to commit offence under Section 376 IPC is based purely on conjectures and surmises.

22. Sri Apul Mishra, learned counsel for the appellant, emphatically contends that the evidence on record suggests that the motive for the crime was not the commissioning of rape but was to eliminate the deceased for which apparently no motive could be attributed to the accused appellant. It is also urged that the injuries on the accused could have been caused while he was in custody of police, as the villagers apparently were enraged on seeing the incident and suspecting it to have been done by the accused appellant he was assaulted, thereby causing injuries to him. Submission is that the accused appellant has been falsely implicated and as the passage leading to the field of informant passes through the field of father of accused appellant, the possibility of some discord between them cannot be ruled out, which might be cause of false implication.

23. Mrs. Archana Singh, learned AGA, on the other hand, contends that the chain of events in this case has clearly been connected by the prosecution, which leads to an inescapable conclusion that it was the accused appellant alone, who committed the offence. It is pointed out that the circumstances on record clearly show that there was an attempt to commit rape and when the deceased objected to it, the accused assaulted her, apparently by using her Daranti, which has been recovered on

the pointing out of the accused. She further submits that the judgment and order of conviction and sentence contains elaborate reasons for conviction of the accused appellant, which is neither perverse nor any relevant aspect has been omitted from consideration and, therefore, the appeal merits no interference.

24. We have heard learned counsel for the parties and carefully examined the records.

25. The prosecution case is based on the information given by PW-1, as per which his sister had gone to the agricultural field and had not returned after serving morning meal to her father, though she was to come back again in the afternoon for cutting the grass. The fact with regard to the deceased going to the agricultural field in the morning and then not returning home is established. The records further show that since the deceased had not returned there was an attempt to search her in which her dead body was found in the agricultural field of Jaidev, father of the accused appellant. The accused appellant in his statement under Section 313 Cr.P.C. has also admitted that the dead body was recovered from the agricultural field of his father.

26. The medical evidence on record clearly shows that the death of deceased was homicidal. The postmortem report has been proved by the Autopsy Surgeon, who has clearly stated that the ante-mortem injuries on the body of the deceased were the cause of her death. The injuries include incised wound on front and lateral aspect both side of neck; incised wound on left side face, and three incised wounds on dorsum of left hand. The injuries clearly show that the deceased was assaulted with a serrated sickle and in the opinion of the doctor also her injuries could have been caused by the serrated sickle (Daranti). In the facts of this case it is on record that a serrated sickle (Daranti) was recovered on the pointing out of the accused appellant. The prosecution witnesses have asserted that the serrated sickle (Daranti) recovered on the pointing out of the accused appellant actually belonged to the deceased.

27. So far as recovery of serrated sickle (Daranti) is concerned, the same has been proved by an independent witness, namely Benami Singh. He has clearly explained the circumstances in which the sickle was recovered on the pointing out of the accused appellant. Though the recovery is from an open field near the bund (Medh) of the accused appellant but it has clearly been stated by the witness that the serrated sickle (Daranti) was not visible from a distance on account of standing crops in the field. He has stated that it was the accused appellant who took out the serrated sickle (Daranti) and gave it to the Investigating Officer. The recovery of sickle (Daranti), therefore, has been proved. There is no credible challenge to this recovery.

28. The prosecution in order to prove its case has also produced the forensic report in which it is found that the Daranti recovered at the pointing out of the accused appellant had human blood and hairs. The other important circumstance against the accused is the recovery of a button from the place of occurrence on the very next day of the incident. It has also been found that the shirt worn by the accused appellant had a missing button, which exactly was the button found at the place of occurrence.

29. The next circumstance against the accused appellant is in the form of

statement of witnesses PW-2 and PW-3, who have stated that they saw the accused appellant coming out from the place of occurrence in a perplexed state, and on being asked no coherent reply was given by him and he left. This circumstance is also relied upon by the prosecution against the accused appellant. It is on the basis of aforesaid materials that the trial court has convicted the accused appellant.

30. The question that arises for consideration in the facts of the present appeal is as to whether the prosecution has been able to establish the guilt of accused appellant beyond reasonable doubt on the basis of evidence led by it. It has also to be seen as to whether the court below was justified in imposing the punishment as has been done vide the impugned judgment.

31. This admittedly is a case based on circumstantial evidence. None has actually seen the commissioning of the offence. It is by now well-settled that a conviction based on circumstantial evidence can be ordered only if the prosecution establishes the chain of events pointing exclusively to the hypothesis of guilt on part of the accused appellant and that no hypothesis consistent with innocence of accused is otherwise available. Law in that regard stands crystallized in the judgment of the Supreme Court in Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116, which has consistently been followed since then. In paragraphs 152 to 154, the Supreme Court in Sharad Birdhichand Sarda (supra) observed as under:-

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. The State of Madhya Pradesh.(1) This case has been uniformly followed and applied by this Court in a large number of later decisions uptodate, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh(2) and Ramgopal v. Stat of Maharashtra(3). It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (supra):

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

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be'

established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra where the following observations were made:

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

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

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

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

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

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

32. It is in light of the principles laid down by the Supreme Court in Sharad Birdhichand Sarda (supra) that this Court is required to examine the prosecution evidence led in the facts of the present case.

33. The records clearly reveal that the accused is a resident of same village and his house adjoins that of the informant. It is also on record that agricultural field of the informant passes through the field of the father of accused appellant. The dead body in the present case has been found in the field of the accused appellant. The evidence on record also shows that it was through the field of the accused appellant that the deceased had gone to serve meals to her father and was to return from the same passage. The deceased admittedly did not return home, and therefore it is apparent that the incident leading to her death occurred while she was returning from her own field by passing through the field of the accused appellant. The fact that her dead body has been found in the field of the accused appellant clearly shows that while on her return she was apparently dragged from this passage into the fields, wherein the incident occurred.

34. The postmortem report clearly shows that there were multiple wounds on her body. These wounds could have been caused by a serrated sickle (Daranti) in the opinion of the doctor. There are three distinct circumstances emerging on record against the accused appellant, which may be noticed at this stage. The first circumstance is that weapon of assault, which apparently has been used for causing injuries, leading to death of the deceased has been recovered on the pointing out of the accused appellant. The recovery of weapon of assault has been made promptly, on the very second day of the incident. The recovered serrated sickle (Daranti) had human blood and hairs. Though attempt has been made to question the recovery on the ground that it was recovered from an open field but the argument in that regard does not appear to be convincing, inasmuch as

there was an independent witness apart from formal witnesses to prove the recovery. It has clearly been stated that serrated sickle (Daranti) was not visible from a distance on account of crops standing nearby and that the accused took the police personnel on the spot and took out the serrated sickle (Daranti) and gave it to the Investigating Officer.

35. The other important circumstance is the injury found on the accused appellant. Though it is sought to be urged that the injuries could have been caused on account of assault made by villagers, once they came to know that the appellant is accused of committing the offence, but we do not find much substance in such contention. Admittedly, the injuries on the accused are not caused by any blunt or sharp object as would have been expected, if the villagers were to react in such circumstances. The injuries are primarily scab marks, which could have been caused in an scuffle between two persons. The inquest papers also show that broken bangles were found at the place of occurrence and the manner of injuries caused to the deceased shows that there was some resistance on part of the deceased while she was being assaulted by the accused. It is quite possible that the deceased in order to save herself caused scratches by nail etc. resulting in scab marks on the accused appellant. There is otherwise no cogent explanation furnished by the accused for existence of such injuries. The doctor, who has examined the accused appellant, has clearly stated that the injuries could have been caused to the accused appellant more than 24 hours before the examination and less than 03 days before it. The time of occurrence, therefore, matches the possible time of injury on the accused. This is a very important circumstance which links the accused appellant with commissioning of the offence.

36. Coupled with it, it is to be observed that the shirt worn by the accused appellant had a missing button, which has been recovered from the place of occurrence. It may be noticed that the recovery of button and shirt worn by the accused is proximate in terms of time to the incident. This is a circumstance which strongly implicates the accused appellant. We may also notice, at this stage, that the defence has not come forward with any specific plea or ground of false implication.

37. It is in the context of the above deliberations that we may refer to the testimony of PW-2 and PW-3, who are independent persons and have clearly stated that soon after the incident they saw the accused coming from the place of occurrence in a perplexed state and no cogent reason of such conduct was explained by the accused appellant. This is a very strong circumstance, which has not been properly explained by the defence.

38. The chain of events pointing exclusively to the hypothesis of guilt on part of the accused is thus complete, inasmuch as the facts have been established beyond reasonable doubt by the prosecution to connect the accused appellant with the commissioning of offence. No alternate hypothesis consistent with innocence of accused appellant is shown to exist. We have examined the judgment of the trial court, which also takes notes of the fact that there was no enmity between the parties and there existed no reason of false implication of accused appellant. The trial court has also taken note of the fact that the injuries on

the accused appellant caused almost at the time of incident remains unexplained. The recovery of button from the spot is also a definite circumstance which implicates the accused appellant with the commissioning of offence. On the basis of elaborate analysis of evidence led in the matter we find no reason to disagree with the conclusion drawn by the court below that prosecution has established its case beyond reasonable doubt.

39. So far as the punishment imposed upon the accused appellant is concerned, we find that the offence is brutal in nature in which deceased has been done to death by the accused appellant. The punishment imposed by the trial court for transportation of life, therefore, is found appropriate.

40. From the above discussions and deliberations, we find that this appeal lacks merit and is, accordingly, dismissed.

(2023) 2 ILRA 528
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2023

BEFORE

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

Criminal Appeal No. 3069 of 2015
with
Criminal Appeal No. 2339 of 2015

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

Counsel for the Appellants:
Sri Preetpal Singh Rathore, Abhilasha Singh, Sri Ashutosh Yadav, Sri Shyam Lal

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

A. Indian Penal Code, 1860 - Section 302 - Murder case - prosecution case based upon the testimony of P.W.-2, who is the brother of the deceased - However, presence of P.W.-2 at the place of occurrence not established by the prosecution beyond reasonable doubt - Neither any scratch or a bruise on the body of P.W. 2 nor blood stain found on his clothes - P.W.-2 although claims that he had accompanied the deceased but neither he is a witness to the inquest proceedings nor is he a witness to the recovery of blood stained & plain earth as well as empty cartridges - though it was alleged that P.W. 2 was traveling on the motorcycle but the motorcycle has neither been produced nor any explanation has been given as to where this motorcycle has gone - None saw P.W. 2 grieving or weeping - P.W.-2 is the only witness of fact who has seen the incident and has supported the prosecution case - A doubt with regard to his presence at the place of occurrence seriously creates a dent on the prosecution version - Trial Court omits to consider factors which creates a doubt upon presence of P.W.-2 at the place of occurrence (Para 53, 55)

B. Indian Penal Code, 1860 - Section 302 - Evidence Act, 1872 - Section 3 - Appreciation of Evidence - Omissions & Contradictions in evidence of witness - Murder case - statement of P.W.-2 (real brother of deceased) is contradictory inasmuch as at one place he states that the incident occurred while they were on way to Sadat Wadi Temple while he later states that the incident occurred while they were returning from the temple - at one place P.W.-2 has claimed that there were forest around the place of incident while he later claims that there were agricultural plots nearby - at one stage he claims that there were large number of people working around and later contradicted himself by saying that there were no persons available nearby - prosecution has not been able to establish the guilt of the accused appellants beyond reasonable doubt and the accused

appellants are entitled to benefit of doubt in the matter (Para 55)

C. Indian Penal Code, 1860 - Section 302 - Evidence Act, 1872 - Section 3 - Appreciation of Evidence - Non production of Independent witness - independent witness to the incident as per the prosecution case was Rukam Singh, who was not produced at the time of trial - Rukam Singh being an eye witness he ought to have been produced by the prosecution - no reason disclosed for non production of Rukam Singh although he was an important witness - Rukam Singh is not a member of the family and to a certain extent his testimony would have carried greater weight - Non production of Rukam Singh as a witness during trial assumes greater significance as there was an insinuation against this witness of having authored the injuries on the deceased - fact that Rukam Singh has not been produced is also a circumstance to be taken note of - scribe of the F.I.R. Indrapal, also not produced (Para 42)

Allowed. (E-5)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
&
Hon'ble Shiv Shanker Prasad, J.)

1. These appeals are by the accused appellants- Veerpal and Bhadrapal, who have been convicted vide judgment and order dated 02.06.2015 passed by Additional Sessions Judge, Chandausi, (Moradabad) in Session Trial Nos. 629 of 2010 and 630 of 2010, arising out of Case Crime Nos. 743 of 2009 and 22 of 2010, under Sections 302/34 I.P.C. and Section 25 of Arms Act, Police Station Bahjoi, District Moradabad and sentenced to life imprisonment each under Section 302 I.P.C. along with fine of Rs. 25,000/-, in default thereof, to further undergo two months additional imprisonment each.

2. The prosecution case is based upon a written report of the informant Vijaypal (P.W.-2) son of Nawab Singh, who claims to be a resident of Village Lehra Nagla Shyam, Police Station Gunnaur, District Budaun. It is alleged that the informant has enmity with one Veerpal S/o Sipattar Singh Yadav (accused appellant). The brother of accused Veerpal namely, Munipal had eloped with Sunita daughter of one Ganga Sahay Sharma. The informant's brother Mahipal (deceased) was a witness in the F.I.R. lodged under Section 366 I.P.C. against Munipal for enticing Sunita. On account of this enmity firing had taken place between the accused and the informant sometime back. On 16.11.2009 the informant's brother Mahipal alongwith the informant Vijaypal and one Rukam Singh S/o of Nawab Singh Yadav left on a motorcycle for offering prayers and served water (Jal) at Sadat Wadi Mandir and for purchasing fertilizer thereafter. While on their way at about 02:30 p.m. a kilometer before the Sadat Wadi Temple, the accused namely Veerpal, Munipal sons of Sipattar Singh and Bhadrapal son of Latoori Singh stopped them and the three accused dragged the informant's brother Mahipal aside and indiscriminately fired on him. Mahipal sustained fire arm injuries on his head and chest. Mahipal died on the spot and the dead body was lying there.

3. The contents of the above referred written report were entered in the G.D. and a first information report came to be lodged in the matter and got registered as Case Crime No. 743 of 2009 under Section 302 I.P.C. against accused appellant Veer Pal, Munipal and Bhadrapal. The accused Munipal has been declared a juvenile. The two other accused namely, Veerpal and Bhadrapal have been convicted and

sentenced under Section 302 I.P.C. and are before this Court in the present appeals.

4. Pursuant to the F.I.R. lodged in the matter the Investigating Officer proceeded on the spot and collected blood stained and plain soil along with three empty cartridges of 315 bore from the spot. The recovery made from the spot has been exhibited as Ka-2. One Mahendrapal and Chhatrapal are the witnesses of this recovery. The police also conducted inquest of the dead body and its report is exhibited as Ka-1. The inquest report contains an overwriting and the time for receipt of information is shown as 04:00 p.m. in place of 05:00 p.m. The inquest witnesses are Mahendra Singh, Chhatrapal, Manoj Kumar, Bharat Singh and Chhote, who are all resident of Village Sadat Wadi and Satnauli. None of the inquest witnesses are from village Lehra Nagla Shyam to which the informant or the deceased belonged. At the last page of inquest the Investigating Officer has recorded the time of completion of inquest as 05:30 p.m. As per the opinion of the inquest witnesses the deceased died due to fire arm injuries and for ascertaining the cause of death post mortem be conducted. The body was accordingly sealed and was delivered to constable Surendra Kumar and Veerendra for being sent to the mortuary.

5. The post mortem on the dead body has been conducted on the next day i.e. on 17.11.2009 at 03:00 p.m. by Dr. N.L. Sharma (P.W.-6). As per the autopsy surgeon, the deceased sustained following ante-mortem injuries:-

" (I) Gun shot wound of entry 2 c.m. x 1.8 c.m. on the right side forehead of lateral part just above lateral to lateral end of right eyebrow.

(II) Gun shot wound of exit 11 c.m. x 4 c.m. on left side head behind left ear pinna. Brain tissue coming out continue with injury no. 1.

(III) Gun shot wound of entry 1 c.m. x 0.8 c.m. on the right side of face 3 c.m. below lateral right angle of mouth.

(IV) Gun shot wound of entry 3 c.m. x 1 c.m. on the back of left side chest 4 c.m. below, medial lower end of scapula, gun powder present around the wound; direction oblique.

(V) Gun shot wound of exit 2 c.m. x 1 c.m. on the right side frontal chest 6 c.m. above nipple at 11 o'clock direction continue with injury no. 4.

(VI) Gun shot wound of entry 2 c.m. x 1 c.m. on the back of left shoulder underlying bone blackening seen around bone, gun powder present.

(VII) Gun shot wound of exit 2.8 c.m. x 1.8 c.m. on ante aspect of left shoulder, continue with injury no. 6.

(VIII) Gun shot wound of entry 2.8 c.m. x 2 c.m. on the right anterior iliac crest region.

(IX) Gun shot wound of exit 3.2 c.m. x 2.5 c.m. on the right buttock upper part, continue with injury no. 8.

(X) Lacerated wound 3 c.m. x 1 c.m. x muscle deep on the right index finger medial aspect middle part, blackening present.

(XI) Lacerated wound 2 c.m. x 1 c.m. on the right middle finger lateral aspect middle part, blackening present.

On deep dissection of injury no. 3-1 big metal bullet recovered from right side. Neck muscle fractured, right side mandible present. Margins of all entry wound lacerated, inverted, and all exit wound lacerated and everted."

6. The clothes wore by the deceased along with blood stain and plain earth were sent to forensic laboratory and its report dated 22.02.2011 is on record as exhibit ka-9.

7. It transpires that the Investigating Officer arrested the two accused on 14.01.2010 vide recovery memo of the same date (Exhibit Ka-6) while they tried to flee and from their possession two tamanchas (country made pistols) of 315 bore with two live bullets were recovered. A First information report came to be registered as Case Crime No. 21 of 2010, under Section 307 I.P.C. as well as Case Crime No. 22 of 2010, under Section 25 of Arms Act in respect of accused Veerpal and Case Crime No. 23 of 2010, under Section 25 of Arms Act in respect of accused Munipal.

8. The Investigating Officer sent the recovered country made pistols as also the empty cartridges recovered from the place of occurrence for forensic examination and report of the ballistic experts from the forensic laboratory at Agra has been produced as exhibit ka-8.

9. On the basis of the material collected during the course of the investigation as also after recording the statement of witnesses under Section 161 Cr.P.C. the charge sheet came to be submitted against the accused appellants firstly on 17.01.2010 under Section 25 of Arms Act and thereafter on 18.03.2010 under Section 302 I.P.C. Permission was also obtained from the District Magistrate, Moradabad for proceeding under Section 25 of Arms Act.

10. The Magistrate took cognizance of the charge sheet and committed the case to the Court of Sessions.

11. Two separate sessions trial were accordingly registered in the matter. Session Trial No. 629 of 2010 was registered in respect of offence under Section 302 I.P.C. whereas Session Trial No. 630 of 2010 has been registered in respect of offence committed under Section 25 of Arms Act by accused Veerpal. Both these session trials have been held together and are decided finally by the judgment and order of the Court below dated 02.06.2015. So far as the offence under Section 307/34 I.P.C. arising out of Case Crime No. 21 of 2010 is concerned, the Court of Sessions vide a previous judgment dated 19.11.2010 acquitted the accused appellants. Relying upon it the Court below has acquitted the accused Veerpal of offence under Section 25 of Arms Act. The conviction and sentence of the two accused is therefore under Section 302 I.P.C., which is amounted in this appeal.

12. The Sessions Court framed charges against the accused appellants under Section 302/34 I.P.C. vide order dated 24.07.2010. The charges were read out to the accused appellants who denied it and demanded trial.

13. The trial commenced in which the prosecution has adduced following documentary evidence, which have been duly proved and consequently marked as Exhibits:

"First information report dated 16.11.2009 has been marked as Exhibit-Ka-11; written report dated 16.11.2009 has been marked as Exhibit-Ka-3; recovery

memo of blood stain & plain soil & three bullets 315 bore dated 16.11.2009 has been marked as Exhibit-Ka-2; Panchayatnama dated 16.11.2009 has been marked as Exhibit-Ka-1; Post mortem report dated 17.11.2009 has been marked as Exhibit-Ka-10; F.I.R. dated 14.01.2010 has been marked as Exhibit-Ka-19; Recovery memo of two tamanchas 315 bore with two live bullets dated 14.01.2010 has been marked as Exhibit-Ka-6; Charge sheet dated 17.01.2010 has been marked as Exhibit-Ka-21; Charge sheet dated 18.03.2010 has been marked as Exhibit-Ka-4; Report of forensic science laboratory dated 23.08.2010 has been marked as Exhibit-Ka-8; and report of forensic science laboratory dated 22.02.2011 has been marked as Exhibit-Ka-9."

14. In addition to the documentary evidence the prosecution has produced Mahendrapal (P.W.-1), who is resident of Sadat Wadi, Police Station Bahjoi, District Moradabad. P.W.-1 is a witness of inquest and the recovery memo of blood stained and plain earth as well as the empty cartridges (exhibit ka-2). He has stated that the place of incident is about 01 k.m. from his village and the police arrived much after he came to the place of occurrence. He stated that large number of persons had gathered at the spot and the informant disclosed that the dead body is of his brother Mahipal.

15. Before examining the testimony of P.W.-2, who is the solitary eyewitness of the incident it could be appropriate to notice the testimony of two other witnesses namely P.W.-3 and P.W.- 4 who are the witnesses of inquest. P.W.-3 is a resident of Village Sadat Wadi and has stated that the incident is of around 04:00 p.m. and after coming to know of it he arrived at the place of occurrence by when police had already arrived. The inquest was conducted and he is one of the witness of it. In his cross-examination this witness has stated that he does not know the informant and had also not seen him at the place of occurrence.

16. P.W.-4 is one Chhatrapal S/o Hari Singh, who claims that the incident is of 11:00 a.m. and by the time he arrived at the place of occurrence the police had already reached. He has proved the inquest which contains his signatures. He has asserted that P.W.-2 was not known to him and that none was found grieving on the spot.

17. The prosecution case is essentially based upon the testimony of P.W.-2, who is the brother of the deceased. He has asserted that the deceased was his brother and the incident occurred at 02:30 p.m. on 16.11.2009 about 01 k.m. before Sadat Wadi. He has supported the prosecution case as per which P.W.-2 along with deceased and one Rukam Singh had left on a motorcycle to Sadat Wadi Temple for offering prayers by pouring holy water on the deity and for purchasing fertilizer from Bahjoi. He claims that the accused Veerpal, Munipal and Bhadrapal met them a kilometre before Sadat Wadi. These persons stopped the motorcycle and dragged the deceased whereafter they fired on him. On account of gun shot injuries the deceased died on the spot. This witness has identified the two accused appellants as being the perpetrators of crime. He has stated that the accused also extended threats to him. Large number of persons had later gathered at the place of occurrence. He has stated that the written report was got scribed by one Indrapal of his village on which P.W.-2 affixed his thumb impression and gave it to Police Station Bahjoi. He has admitted that the

written report was scribed on his instructions and its content were read out to him. The written report has thus been verified by him. He has also stated that the daughter of fellow villager Ganga Sahay Sharma was enticed by accused Veerpal and Munipal in respect of which a case was pending and the deceased was a witness of this incident due to which the accused party maintained enmity with the informants. He has also stated that for this reason alone the deceased has been done to death. Injuries had been sustained by the deceased in his hands, eyes and chest.

18. In the cross-examination P.W.-1 has stated that the prayers by offering holy water on deity could be made at any time and it was not necessary that it be in the morning only. He has stated that he does not remember the registration number of the motorcycle by which he had gone. He has also stated that Rukam Singh had left on the motorcycle from his residence and that he had not gone to the Chakki (flour mill). The distance between his village and the place of occurrence is about 15-20 km. The witness met none while on way. These persons however stopped at Patariya Chowki but he could meet none there. The stay was for about half hour and was spent in repairing the motorcycle which had developed some defects. The witness was going to the temple whereafter fertilizers were to be purchased and there was no altercation between P.W.-2 and the accused Veerpal. The place of occurrence has been described by the witnesses as being surrounded by forest from all the sides. It is stated that the accused persons stopped the motorcycle 3-4 paces prior to the place where they were standing. It is then alleged that accused Veerpal had dragged the deceased, who was at 2-3 paces from him. All three accused fired on the deceased. About 4-5 fires were shot. The first fire was shot by accused Veerpal. The second fire was shot by accused Munipal, which hit near the eyes of the deceased. The third fire was shot by accused Bhadrapal but he does not remember the place where the bullet hit. The witness says that while the deceased was dragged by the accused he raised an alarm but none responded even after hearing the gun shot. It is also stated that the people were working in the forest area and he stayed there for about 10-15 minutes whereafter he left for Pathakpur Chowki. The other companion namely Rukam Singh also left with him for Pathakpur Chowki. He claims that the scribe Indrapal met him as he had also come for offering the prayers to deity. In his further cross-examination P.W.-2 has stated that the Nanihal of Rukam Singh is in his village. He also claims to know Udal of his village, who is not a bad person. The witness however, was not aware that Udal had gouged out the eyes of Lakhan. No report was lodged by deceased under Section 307, 324 I.P.C. against Udal and Banwari. He further stated that he had no knowledge that there were about 10-12 cases against Udal and that proceedings under the Gangster Act have been initiated against him. He has further admitted that when Kuanram was shot by Udal, the deceased Mahipal was an informant. Kuanram is the uncle of the witness P.W.-2 Vijaypal. He has denied the suggestion that Mahipal and Mukesh had fired three months thereafter on Kuanram after the incident of firing by Udal. He has denied the suggestion that he arrived late and was not with the deceased at the time of incident. It is further stated that when Mahipal left he was carrying about Rs.10,000/- for purchasing fertilizer. He also claims that he was not aware whether there is any police chowki at Pataria. He

further asserted that he has no knowledge of the make of motorcycle by which he had gone along with the deceased and Rukam Pal. The colour of motorcycle was yellow and the registration number is not remembered by him. He also stated that the motorcycle was taken by the Police.

19. P.W.-2 in his cross-examination held on 11.11.2011 however stated that he had offered prayers at Sadat Wadi temple but the time of his arrival is not remembered by him since he had no watch. It is stated that he had no mobile and that mobile was with his brother but its number and make is not known to him. He claims that accused had taken out the mobile from the deceased. He has admitted that this recital is not made in the F.I.R. He claims that he stopped nowhere after leaving the house till Sadat Wadi. He further stated that till date he is not aware as to whose motorcycle was taken by Mahipal. It is then alleged that the motorcycle was not borrowed and belonged to Mahipal. He claims that they had reached Sadat Wadi Temple in about one and half hours. They left from the temple for purchasing fertilizers for Bahjoi but before reaching there the deceased was done to death. He claims that the place of incident is about one and half to two k.m. from Sadat Wadi Temple. It is further alleged that he has not seen anybody working near the fields. He has stated that at the time of firing he was standing at a distance of 10-15 paces. The fire continued for 2-3 minutes and P.W.-2 and Rukam Singh tried to save Mahipal. It is further asserted that no injuries were received by the witness himself but threats were extended to him.

20. The witness has been confronted with his statement under Section 161 Cr.P.C. where no such disclosure is made by him to the police. He has also denied that he had run away from the place of incident. The witness further stated that the accused had taken out Rs. 10,000/- from the pocket of the deceased. As per him about 2500/- Rs. were recovered from the deceased which was given to him by the police. He further stated that Rs. 25,000/- was recovered from the deceased and was given to him by the Investigating Officer. This witness has been confronted with his notarial affidavit given to the D.I.G. exonerating the accused persons to which he specifically denied. He stated that no such affidavit was given by him. He has further denied that the deceased was of criminal nature or that he was not present at the place of occurrence.

21. P.W.-8 is the first Investigating Officer, who has proved the recovery. He has however specifically stated that possession of the motorcycle is not with the police nor any recovery memo in respect of motorcycle was prepared. He claimed that at the time of his arrival at the place of occurrence there was no motorcycle. He has further admitted that the site plan has been prepared on the basis of information received from P.W.-2.

22. P.W.-5 is the second Investigating Officer, who has proved the recovery of fire arm and has also filed the charge sheet.

23. P.W.-6 is the autopsy surgeon who has specified that the deceased had 11 wounds on his body. There were five entry wounds of fire arm while four exit wounds were present along with two other lacerated wounds.

24. P.W.-8 has also stated that there were no bushes around the place of occurrence. He has also stated that P.W.-2

had not informed him that Rs. 10,000/- were taken from the deceased by the accused persons nor has he endorsed the return of amount to P.W.-2, as alleged by P.W.-2 in his testimony.

25. P.W.-9 is the Sub-Inspector, who had conducted the inquest of the deceased. This witness has clearly stated that he saw none from the village Lehra Nagla Shyam at the place of occurrence when he reached there. P.W.-10 has proved the chik F.I.R. lodged under Section 307 I.P.C. P.W.-11 has proved the chik F.I.R. lodged under Section 302 I.P.C. P.W.-12, Swami Sharan was the Investigating Officer of the case lodged under the Arms Act.

26. On the basis of incriminating material produced during the course of trial against the accused appellants the statement was recorded of accused under Section 313 Cr.P.C. The accused appellants denied their implication and it was stated that the prosecution case has been falsely instituted against them. Accused Veerpal has further stated that on account of enmity false accusation has been made against him.

27. Defence in support of its case has relied upon an affidavit allegedly given by P.W.-2 to the D.I.G., Moradabad Range wherein he has asserted that the deceased was done to death by Rukam Singh and another and that the F.I.R. version is not correct. This affidavit has been brought on record as exhibit Kha-1. In order to prove the notarial affidavit the defence has produced Kalyan Das (D.W.-1), who is an advocate and has asserted that on the instructions of P.W.-2 the affidavit was prepared. Similarly, D.W.-2 is the Notary who has verified the affidavit allegedly given by P.W.-2.

28. On the basis of above evidence led in the matter the Trial Court has found the charges leveled against the accused appellants to be proved beyond reasonable doubt under Section 302 I.P.C. However in respect of the offence under the Arms Act the accused have been acquitted.

29. Sri Shyam Lal, learned counsel appearing for the appellants submits that the accused-appellants have been falsely implicated in the present case on account of enmity and that they have not committed the offence as alleged by the prosecution. He further submits that the independent witness to the incident as per the prosecution case was Rukam Singh, who has not been produced at the time of trial and no reason has been disclosed for non production of Rukam Singh although he was an important witness. He further submits that the star prosecution witness P.W.-2 was actually not present at the place of occurrence for following reasons:-

(i) though it is alleged that three persons were traveling on the motorcycle but no injuries have been caused to the other two persons namely P.W.-2 and Rukam Singh, which creates a doubt on the presence of P.W.-2 at the place of occurrence. He further submits that being the real brother, P.W.-2 was expected to have resisted the move of accused to drag him from the motorcycle and the fact that no injuries were on him makes the prosecution case improbable.

(ii) though it is alleged that three persons were traveling on the motorcycle but the motorcycle has not been produced nor any explanation has been given as to where this motorcycle has gone. Even the registration number of the motorcycle or it's make is not known. It is therefore,

contended that the plea of motorcycle has been engineered only to show the presence of P.W.-2 at the spot.

(iii) the presence of P.W.-2 is belied by the fact that neither he is the witness to inquest nor is he a witness to the recovery of empty cartridges and blood stained and plain earth.

(iv) the presence of P.W.-2 is also doubtful on the spot since no blood stain etc. has been found on his clothes.

(v) It is also urged that statement of P.W.-2 is contradictory inasmuch as at one place he states that the incident occurred while they were on way to Sadat Wadi Temple while he later states that the incident occurred while they were returning from the temple. Submission is that this contradiction in his testimony renders it untrustworthy. It is also urged that at one place P.W.-2 has claimed that there were forest around the place of incident while he later claims that there were agricultural plots nearby. Contradiction is also pointed out in the testimony of P.W.-2 as at one stage he claims that there were large number of people working around and later contradicted himself by saying that there were no persons available nearby.

(vi) Learned counsel further submits that the affidavit given by P.W.-2 has been proved as per which the offence was not committed by the accused but by someone else along with Rukam Singh. This affidavit also explains as to why Rukam Singh was not produced in evidence.

(vii) It is also argued that the allegation of loot of mobile phone at the stage of recording of statement is not corroborated by any other material and is contradicted by the witness himself later. Similarly, the allegation of return of Rs. 25,000/- is not corroborated by any independent material. It is also argued that the inquest and other police papers contains cutting and overwriting at different places and in most of papers the time of conclusion of inquest etc. is not mentioned. It is also argued that the inquest concluded in the evening whereas the post mortem was conducted after 24 hours without explaining as to where the body was kept throughout the night.

30. In reply, learned A.G.A. submits that contradiction pointed out by the defence are minor and do not shake the prosecution case. Submission is that prosecution witnesses are wholly trustworthy and the Court below has rightly placed reliance upon them. It is contended that it is a case of broad day light murder committed for a definite motive and the eye witness account of P.W.-2 is rightly relied upon by the Court below and the appeal merits no interference.

Analysis of facts:-

31. From the facts as have been placed on record it transpires that the prosecution case pointedly is that the deceased along with P.W.-1 and one Rukam Singh were going towards Sadat Wadi Temple for offering prayers and while they were a kilometer before the temple the accused persons ambushed the informant team and the deceased was taken a little away and then indiscriminately fired by the three accused. The motive for the offence as per the prosecution is the fact that the accused Munipal had enticed the daughter of one Ganga Sahai in which the deceased, Mahipal was a witness and,

therefore, with an intend to remove the hurdle so that the deceased may not stand in trial or support the prosecution case that he has been done to death. The trial court has held that the prosecution has succeeded in proving the incident. This Court, therefore, is required to examine as to whether the prosecution has proved its case beyond reasonable doubt on the basis of evidence adduced at the trial or not?

32. The answer to the above question would then determine whether the court below has rightly convicted the accused and thereby determine the fate of this appeal.

33. The prosecution case essentially relies upon the testimony of P.W.-2 apart from the documentary evidence which are in the nature of inquest report; post mortem report; report of forensic laboratory etc.

34. The post mortem report is on record which clearly shows that the deceased died on account of coma due to ante mortem fire arm injuries. There are five entry wounds and four exit wounds of gun shot injuries apart from two other injuries caused by blunt object. The inquest report also shows that the deceased died on account of gun shot injuries. It is, therefore, not in issue that the death of the deceased was homicidal. The fact that he was shot dead remains undisputed.

35. The question primarily is as to whether the prosecution has succeeded in establishing that it was the accused who fired on the deceased and the incident has been witnessed by the prosecution witness?

36. P.W.-2 has been produced as the sole eye witness and, therefore, his testimony requires careful consideration. The case of the appellants is that P.W.-2 was not present and therefore, the prosecution has not been able to establish the incident in the manner alleged by it. P.W.-2 is otherwise a related witness being the brother of the deceased and enmity with the accused is admitted. It is settled that enmity can be the cause for committing the offence and can also be a reason for false implication. It has thus to be seen whether testimony of P.W.-2 is trustworthy and finds corroboration from other evidence available on record.

37. The arguments advanced on behalf of the appellants have already been noticed above and we now proceed to examine the same with reference to the testimony of P.W.-2 and the attending circumstances.

38. As per P.W.-2 he was going along with the deceased and one Rukam Singh to offer prayers at Sadat Wadi Temple and they were then to go to Bahjoi for purchasing fertilizers. This witness in his testimony has clearly stated that they were on way to Sadat Wadi Temple when the three accused ambushed them and shot dead the deceased. The place of incident has been specified as being a place which was a kilometer before the temple. In his examination-in-chief this witness has clearly stated that the three accused stopped them a kilometer before the temple whereafter the deceased was dragged aside and was fired upon by the accused persons. Relevant portion of his statement is extracted hereinbelow:-

"मृतक महीपाल मेरा भाई था। घटना दिनांक 16.11.2009 की दिन के ढ़ाई बजे की है। घटना सादात बाड़ी से एक किलोमीटर पहले जंगल की है। उस दिन मेरा भाई महीपाल और

मैं तथा हुकम सिंह एक ही मोटर साईकिल से सादात बाड़ी जल चढ़ाने तथा बहजोई खाद लेने घर से साथ चले थे। वीरपाल मुनीपाल व भद्रपाल सादात बाड़ी से एक किलोमीटर पहले मिले। मोटर साइकिल मेरा भाई महीपाल चला रहा था। इन लोगो ने मोटर साइकिल रोक कर और मेरे भाई महीपाल को खीच कर जान से मारने की नियत से फायर किये। फायर लगने से मेरा भाई महीपाल की मौके पर मृत्य हो गयी।"

39. However in the cross-examination the witness has come up with a different version that they had reached the temple in about one and half hours, offered prayers and then proceeded to buy fertilizers but before they could reach Bahjoi for purchasing fertilizer the deceased was done to death. The utterances of P.W.-2 contradicting his earlier statement in his examination-in-chief is extracted herein below:-

"गांव से सादात वाड़ी मंदिर लगभग एक डेढ़ घंटे में पहुँच गये थे। मुझे नही मालुम पूजा करने और जल चढ़ाने में कितना समय लगा होगा। फिर मंदिर से वहजोई खाद लेने गये थे। बहजोई खाद लेने नही पहुँच पाये थे उससे पहले ही महीपाल को मार दिया था।"

40. P.W.-2 has then stated that three of them had left by a motorcycle but he does not remember its registration number. He also stated that he does not remember the make of the motorcycle either. It is merely stated that the colour of the motorcycle was yellow. What is relevant is that this motorcycle has neither been recovered from the spot nor was it made a case property. P.W.-2 has stated that the motorcycle was taken away by the police. However, P.W.-8 i.e. the Investigating Officer in his testimony has clearly stated that there was no motorcycle found on the spot by him. The circumstance relating to the motorcycle not being traced is also a circumstance, which has not been proved by the prosecution. In the event the deceased along with P.W.-2 and Rukam Singh were going on a motorcycle and the deceased was ambushed, it was expected that some explanation would be put forth with regard to the motorcycle on which they were traveling. P.W.-2 also stated in his cross-examination at one stage that he left by the motorcycle to the police station but then he returned on foot. This apparent contradiction in the statement of P.W.-2 as also the fact that the motorcycle was not recovered is thus a circumstance to be noticed at this stage of deliberation.

41. The next circumstance highlighted on behalf of the appellants is with regard to the surroundings of the place of incident. P.W.-2 has stated that at the place of occurrence there existed jungle on all the four sides, however in the site plan no jungle is shown to exist around the place of occurrence. P.W.-2 towards later stages of his cross-examination has supported the site plan by taking names of tenure holders mentioned in the site plan. His information however is restricted only to the disclosures previously made in the site plan. We find some substance in the contention that the place of occurrence could either be near the jungle or it could be near the agricultural fields. Both cannot co-exist. The statement of P.W.-2 in giving contradictory narration of the surroundings of the place of occurrence is also a circumstance to be noticed.

42. We may also at this stage notice the contention of learned counsel for the appellants that Rukam Singh was the third person travelling with the deceased and P.W.-2 and being an eye witness he ought

to have been produced by the prosecution. The records reveal that statement of Rukam Singh was recorded under Section 161 Cr.P.C. and although in the list of witnesses annexed along with the charge sheet his name was mentioned but subsequently he has been got discharged by the prosecution from appearing before the court below. There is no explanation from the prosecution side as to why Rukam Singh has not been produced. It may also be noticed that while P.W.-2 is the brother of the deceased and is a related witness, Rukam Singh is not a member of the family and to a certain extent his testimony would have carried greater weight. The fact that Rukam Singh has not been produced is also a circumstance to be taken note of.

43. We may at this stage refer to another piece of evidence led by the defence which is the photo copy of a notarial affidavit allegedly sent by P.W.-2 to the Deputy Inspector General of Police, Moradabad Range. This document has been exhibited as Ex. Kha-1 and the same contains a recital that in fact the murder has been committed by Rukam Singh and the averments made in the F.I.R. about the appellants being the author of injuries is incorrect. Attempt has been made to prove Exh. Kha-1 by producing the Advocate, who had prepared the affidavit i.e. D.W.-1 and the notary, who had attested his thumb impression on the affidavit as D.W.-2.

44. Learned A.G.A. has made attempts to impeach this document on the ground that original or the certified copy of this affidavit has not been produced and that neither the stamp papers contain proper seal of the stamp vendor nor any date of its issuance is mentioned and, therefore, this document cannot be relied upon particularly when P.W.-2 has denied its existence.

45. As against the contention of learned A.G.A., learned counsel for the appellants submits that the original of this affidavit was submitted before the Deputy Inspector General of Police, Moradabad and therefore, the original cannot be produced by the defence as the document itself was not expected to be available with them. It is also urged that its certified copy also could have been issued only by the state authorities, who were opposed to them. It is contended that the only manner in which this document could have been proved as a secondary piece of evidence was by producing the Advocate who had prepared the affidavit and by producing notary, who had authenticated the thumb impression of the witness. Both of whom have been produced.

46. We are not inclined to enter into the debate with regard to genuineness or otherwise of this affidavit. The limited purpose for which we take note of the affidavit is that there was a plea by the defence that the author of the injuries was not the accused but it was Rukam Singh and Rup Kishore. Non production of Rukam Singh as a witness during trial thus assumes greater significance when it emerges on record that there was an insinuation against this witness of having authored the injuries on the deceased. We further find that there is absolutely no reason disclosed by the prosecution for not producing Rukam Singh. Even if the affidavit is ignored yet the fact of non production of Rukam Singh cannot be underestimated. This again becomes a circumstance to be noticed in the matter. Another circumstance which may be noticed in the facts of the case is that the scribe of the F.I.R. Indrapal, who happens to be the maternal uncle of Rukam Singh has also not been produced.

47. The presence of Indra Pal at the place of occurrence is at best a matter of chance. It is alleged by the prosecution that he too was going towards the temple when the incident occurred and P.W.-2 being a literate person availed his services for writing the written report. The coincidence of presence by chance of the maternal uncle of Rukam Singh at the place of occurrence for scribbing the written report is also worth noticing. The non production of Rukam Singh and Indra Pal both remains unexplained.

48. We may also notice from the statement of P.W.-2 that there was some enmity between one Udal who was accused of murdering Kuanram, uncle of P.W.-2. This is reflected from the following passage in the statement of P.W.-2, which are reproduced herein below:-

"मै अपने गांव के ऊदल को जानता हूँ। यह वदमाश किस्म का आदमी नही है, सही है। मेरे गांव के ऊदल ने लाखन की आंखे निकाली यह मुझे नही मालुम। मेरे भाई महीपाल ने धारा 307, 324 आई0 पी0 सी0 के तहत ऊदल व बनवारी के खिलाफ कोई रिपोर्ट नहीं लिखाई। मुझे नही मालुम कि विकास निवासी लावर थाना गुन्नौर के कत्ल में ऊदल जेल गया था या नही मुझे नही मालुम। मुझे नही पता कि इस ऊदल पर करीव 10-12 मुकदमे कत्ल जान लेवा हमले तथा 25 ए. ऐक्ट व गैंगस्टर एक्ट के मुकदमे लगे हो। ऊदल ने कूवाराम को गोली नही मारी और न ही कूंवाराम पर गोली मारने का मुकदमा चला यह कूवाराम मेरे सगे चाचा है। कूवाराम को ऊदल ने जब गोली मारी थी उस मुकदमे मे मेरा भाई महीपाल मृतक वादी था इस बात की मुझे जानकारी है।

यह कहना गलत है कि मृतक महीपाल व मौहकम निवासी नूरपुर व मुकेश? पुत्र सुरेश निवासी वहरौलपुर ने कूवाराम को गोली लगने के तीन महीने वाद ऊदल पर गोली चलाई थी तथा गांव वालों ने घेर कर मोहम्मद को मार दिया था। इस घटना में महीपाल व मुकेश जेल गये थे इस बात की मुझे कोई जानकारी नही है।"

49. From the above statements of P.W.-2 it appears that there had been other instances of murders and offences relating to family of the informant, which supports the appellants contention that there existed enmity of the deceased with others and the possibility of those persons committing the offence can not be ruled out.

50. Though P.W.-2 claims that he was present at the place of occurrence but it remains admitted to him that no injuries were received by him in the incident. He admits that he was on the same motorcycle when the deceased was dragged a few steps away after stopping the motorcycle in an ambush. In the event brother of P.W.-2 was being forcibly taken by the accused one would ordinarily expect some resistance on part of P.W.-2 or the third person available i.e. Rukam Singh. Some sort of injuries or scuffle was ordinarily expected. The fact that P.W.-2 remained a mute spectator in an incident where his real brother was shot dead without a scratch or a bruise to him creates a doubt regarding his presence at the place of occurrence. It has also been argued on behalf of the appellant that P.W.-2 although claims that he had accompanied the deceased but neither he is a witness to the inquest proceedings nor is he a witness to the recovery undertaken by the police of blood stained and plain earth as well as empty cartridges. In fact some of the prosecution witness namely P.W.-3 who happens to be the inquest witness has clearly stated that P.W.-2 was not present at

the place of occurrence. P.W.-4, who is the other prosecution witness has stated that none from the Village of P.W.-2 i.e. Lehra Nagla Shyam was present at the place of occurrence.

51. The circumstance which have been noticed by us on the aspect relating to the presence of P.W.-2, taking cumulatively, does create a doubt about the presence of P.W.-2 at the place of occurrence. P.W.-4 has also stated that at the place of occurrence he saw none grieving or weeping, which is also a circumstance to doubt the presence of P.W.-2 as it would be natural to expect that having lost his brother P.W.-2 would have shown signs of grief, if he was present.

52. P.W.-9- the Investigating Officer, who had prepared the inquest proceedings has also categorically stated that he saw none from the Village Lehra Nagla Shyam at the place of occurrence. This statement of P.W.-9 is crucial as he is an independent witness and his assertion that none from the village of P.W.-2 was present creates a serious doubt upon the presence of P.W.-2 at the place of occurrence.

53. In view of the deliberation held above we find that the presence of P.W.-2 at the place of occurrence has not been established by the prosecution beyond reasonable doubt. P.W.-2 is otherwise the only witness of fact who has seen the incident and has supported the prosecution case. A doubt with regard to his presence at the place of occurrence therefore seriously creates a dent on the prosecution version.

54. The argument of learned State Counsel that the presence of P.W.-2 is proved by the fact that he has described the injuries on the deceased is not of much relevance inasmuch as on the date when P.W.-2 appeared in the witness box he was aware of the kind of injuries sustained by the deceased in view of the existence of post mortem report. The disclosure of the places where gun shot injuries were sustained by the deceased would thus not be conclusive of his presence.

55. Although the Trial Court has convicted the accused appellant but the judgment of conviction omits to consider factors noticed by us which creates a doubt upon presence of P.W.-2 at the place of occurrence. The contradictions and embellishments in his testimony have also been overlooked. The contradiction in the testimony of P.W.-2 with regard to the place of occurrence i.e. whether while going to the temple or on return from the temple; the disappearance of motorcycle and non furnishing of details in that regard; contradictory version of P.W.-2 with regard to the surroundings of the place of occurrence; non production of Rukam Singh and his maternal uncle Indrapal (scribe); P.W.-2 not being a witness of inquest or recovery etc. have clearly been overlooked. We are therefore of the view that the Court below has clearly erred in law in arriving at a finding that prosecution has established its case beyond reasonable doubt on the basis of evidence led in the matter.

56. In the facts of the present case, we find that the prosecution has not been able to establish the guilt of the accused appellants beyond reasonable doubt and the accused appellants are entitled to benefit of doubt in the matter.

57. Consequently the appeals succeed and are allowed. The impugned judgment

and order of the Court below dated 02.06.2015, is hereby set aside.

58. The accused appellants, who are in jail for the last about 13 years would be released on compliance of Section 437-A Cr.P.C. unless they are wanted in any other case, forthwith.

(2023) 2 ILRA 542
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.01.2023

BEFORE

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

Criminal Appeal No. 3866 of 2013
with
Criminal Appeal No. 3867 of 2013

Smt. Rama Devi ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri R.R.Singh, Sri A.K. Mishra, Sri Krishna Mohan Tripathi

Counsel for the Opposite Party:
G.A.

A. Indian Penal Code,1860 - Section 302 - Murder case - recovery memo - P.W.-6 stated that nearby the body of the deceased the knives were lying - when the knives were already present nearby the dead body of the deceased how could the prosecution claim that the knives (Ala Katals) to have been recovered on the pointing out of the accused-appellants, separately - (P.W.-2), witness of recovery of the knives (Ala Katal) not supported the recovery memo - other witnesses of the recovery memo have not been produced during the course of trial - prosecution failed to substantiate as to how and in what manner such recovery has been made on the pointing out of the accused appellants - recovery memo not reliable - benefit of doubt - prosecution not able to establish the guilt of the accused-appellants beyond reasonable doubt (Para 32)

B. Indian Penal Code,1860 – Section 302 - Murder case - Evidence Act, 1872 – Sections 3 & 8 - Appreciation of Evidence - material contradiction & inconsistency in the statement of witness - Motive for Murder - Proof witness - Star witness P.W.-6 (real brother of the deceased) - In the examination-in-chief, P.W.-6 stated that there was illicit relationship between the deceased and accused-appellant but in the cross-examination, P.W. 6 stated that there was no illicit relationship between the deceased and the accused-appellant - P.W.-6 have broken the door and entered into the house, whereas in his cross-examination, P.W.-6 has stated that they jumped over the wall and reached inside the house and after reaching inside, he opened the door from inside and then other persons came inside the house - other prosecution witnesses of fact turned hostile - on the basis of contradictory statement of P.W.-6, the prosecution failed to establish the motive against the accused appellants - prosecution not able to establish the guilt of the accused-appellants beyond reasonable doubt and they are clearly entitled to the benefit of doubt (Para 27, 28)

Allowed. (E-5)

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

1. These Criminal Appeals are directed against the impugned judgment and order dated 14.8.2013, passed by Additional Sessions Judge, Ist, Rampur in Sessions Trial No. 193 of 2010 (State Vs. Ram Kishore and another) arising out of

Crime No. 172 of 2010, whereby accused-appellants Smt. Rama Devi and Ram Kishore have been convicted of offence Section 302 and have been sentenced to undergo life imprisonment alongwith fine of Rs.50,000/- for commissioning of offence under Section 302 I.P,C.; in default thereof, they have to further undergo one year additional simple imprisonment, each. As both the appeals are directed against a common judgment and order and have been heard together, they are being decided by this common judgment.

We have heard Mr. Krishna Mohan Tripathi, learned counsel for the accused-appellants and Kumari Meena, learned A.G.A. for the State as also perused the entire material available on record.

2. As per the prosecution case a written report (Ext. Ka-1) was given on 9.2.2010 to the Police Station Tanda, District Rampur, by Pritam Singh (P.W.-1/first informant), who happens to be the brother of the deceased stating that one of his villagers Ram Kishore son of Sri Sohan Singh had enmity with his brother Dharmpal (since deceased) for some reason and they were not on talking terms. On 9.2.2010 when the informant, his brother Mahendra Singh (P.W.-6), Prem Singh (P.W.-3) and Jagan Singh (P.W.-2) were talking to each other at the intersection (Tiraha), while Dharmapal was coming from the shop, situated in the north, after buying some goods and as soon as he came in front of Ram Kishore's house, Ram Kishore called him inside his house and closed the door. After some time, at around 7.30 P.M., Dharmapal's scream was heard by them. On hearing the same, all the four persons including the informant rushed to Ram Kishore's door, but the door was locked from inside and Dharmpal was screaming inside. They broke the door and entered into the house of Ram Kishore. When they reached the northern room of the house, they saw that Dharmpal was writhing from pain. When the first informant asked him as to what has happened, in reply he told that Ram Kishore and his wife namely, Rama Devi stabbed him and that he would not survive any more and saying these words he died. On searching Ram Kishore and his wife, all the four persons including the first informant found that they had already escaped and the dead body of the deceased was lying on the spot.

3. On the basis of the above referred written report a first information report dated 9.02.2010 (Ex.Ka.14) was lodged as Case Crime No. 172 of 2010, under Section 302 against the accused-appellants.

4. After registration of the first information report, P.W.-7, namely, Sub-Inspector Suresh Chandra Sharma reached the place of occurrence. The inquest proceedings were conducted on 10.02.2010, which commenced at 07:00 A.M. and completed at about 8:20 A.M. Pritam Singh (P.W.-1/first informant), Mahendra Singh (P.W.-6), Prem Singh (P.W.-3) and Jagan Singh (P.W.-2) along with one Madanpal were the inquest witnesses. In the opinion of the inquest witnesses, the death of the deceased has been caused due to injuries sustained on the body of the deceased but for ascertaining the exact cause of death, the post-mortem be done. Whereafter the body of the deceased was sealed and sent to Mortuary for post-mortem.

5. The post mortem has been conducted in which cause of death has been found to be shock and hemorrhage as a

result of following ante mortem injuries found on the body of the deceased:-

1. Incised wound 4cm x 0.5cm on right side of head 10 cm above right ear.

2. Incised wound 2.5cm x 0.5cm on right side of head 2cm below injury no.1.

3. Incised wound 3cm x 1cm on pinna of left ear.

4. Incised wound 1.5cm x 0.5cm , 1.5cm below left ear.

5. Incised wound 2cm x 1cm on left side neck just below the thyroid cartilage.

6. Incised wound 2cm x 0.5cm on right angle of mandible.

7. Incised wound 3cm x 0.5cm on lower aspect of right angle of mandible.

8. Incised wound 5cm x 2cm on right side of neck just lateral to thyroid cartilage.

9. Incised wound 2cm x 1cm, 1cm below right angle of mandible.

10. Incised wound 3cm x 2cm on right side of neck just lateral to injury no. 8.

11. Incised wound 3cm x 1cm just below injury no. 8.

12. Incised wound 1cm x 0.5cm just below injury no.11.

13. Incised wound 1cm x 0.5cm on right side of neck, 8cm below right ear.

14. Incised wound 2cm x 1cm on right side neck, 9cm below right ear.

15. Incised wound 2cm x 1cm on right side chest, 10cm below right nipple.

16. Incised wound 7cm x 4cm cavity deep, omentum and part of small intestine is pretuding outside of the wound which is 5cm lateral to umblicus on right side of abdomen.

17. Incised wound 2cm x 1cm, 7cm below injury no. 16.

18. Multiple Incised wound in area 14cm x 4cm left side of abdomen just lateral to umblicus.

19. Incised wound 8cm x 1cm muscle deep on palmer aspect of right hand.

20. Incised wound 3cm x 1cm on top of right knee.

21. Incised wound 3cm x 0.5cm on lateral aspect of left hip.

22. Incised wound 2cm x 0.5cm, 5cm posterior to injury no.21.

23. Incised wound 5cm x 2cm on lateral aspect of left thigh above left knee.

24. Incised wound 2cm x 1cm, 3cm posterior to injury no. 23.

25. Incised wound 2cm x 1cm on lateral aspect of left ankle.

6. The Investigating Officer of this case Station House Officer Ganesh Dutt Joshi (P.W.-8) reached the place of occurrence and collected blood stained

earth, plain earth, one bed sheet and blood stained clothes from the spot vide Ex. Ka-3.

7. On 10.2.2010, after the arrest of the accused persons, S.H.O. Ganesh Dutt Joshi (P.W.-8) came to the house of the named accused-persons, namely, Ram Kishore and Rama Devi along with them, from where a knife was recovered on the pointing out of accused Ram Kishore. On interrogation, Ram Kishore told that he stabbed the deceased Dharampal by the said knife. Another knife has also been recovered on the pointing out of another accused Rama Devi, which was kept under the granary. On interrogation, Rama Devi has also stated that she stabbed the deceased by the said knife. The police has collected both knives as weapon of assault i.e. ala katla (Exhibit-Ka-11).

8. The Investigation ultimately concluded in terms of Chapter XII of the Code of Criminal Procedure and the charge-sheet was submitted against the accused-appellants on 21st February, 2010 (Exhibit-ka-13). Upon submission of the charge-sheet dated 21st February, 2010, the concerned Magistrate took cognizance and committed the case to the Court of Sessions, wherein charges have been framed under Section 302/34 I.P.C. against the accused-appellants on 24th January, 2011. Charges were read out to the accused-appellants, who denied the accusation and demanded trial.

9. The prosecution in order to establish the charge levelled against the accused-appellants, has relied upon following documentary evidences, which were duly proved and consequently marked as Exhibits:

"Written report dated 9.2.2010 has been marked as Exhibit-Ka-1; F.I.R dated 9.2.2010 has been marked as Exhibit-Ka-14; Site plan dated 10.2.2010 has been marked as Exhibit-Ka-12; recovery memo of Blood Stained & Plain Earth dated 10.2.2010 has been marked as Exhibit-Ka-3; Recovery Memo of two knives dated 10.2.2010 has been marked as Exhibit-Ka-11; Post mortem report dated 10.2.2010 has been marked as Exhibit-Ka-4; Panchayatnama dated 10.2.2010 has been marked as Ex. Ka.-5; Charge Sheet dated 21.2.2010 has been marked as Ex. Ka.-13 and Forensic Science Lab Report dated 21.2.2010 has been marked as Exhibit-Ka-19."

10. The prosecution has also adduced oral testimony of following witnesses:-

"P.W.-1/ informant, namely, Pritam Singh; P.W.-2, namely Jagan Singh; P.W.-3, namely Prem Singh; P.W.-4, namely, Jamuna Devi, wife of the the deceased, P.W.-5, namely, Dr. R.K. Sharma, who conducted the post-mortem of the deceased; P.W.-6, namely, Mahendra Singh, P.W.-7 S.I., Suresh Chandra Sharma, who prepared the Panchayatnama and sealed the dead body; P.W.-8 S.H.O. Ganesh Dutt Joshi, the Investigating Officer.

11. On the basis of material so collected and produced by the prosecution during trial incriminating material were put to the accused-appellants for recording their statements under Section 313 Cr.P.C. The accused-appellants have stated that the statements of the prosecution witnesses are incorrect. They have been falsely implicated in the present case due to ulterior motive. The accused-appellant Ram Kishore has stated that a dispute between his wife Rama Devi and himself arose 2 years ago and due to the said dispute, she left his house and went to her maternal

house. Accused-appellant also lived outside in connection with his work. At the time of incident he was not living in his house. Accused-appellant has further stated that since the deceased Dharampal was a domineering, quarrelsome and angry man, he had disputes with many people of the village, although he had no dispute with the deceased Dharampal. He has also denied the illicit relationship between his wife Rama Devi and the deceased Dharampal. He has further stated that since the deceased Dharampal had dispute from various persons, some one else killed the deceased Dharampal and kept his dead body in his house by breaking the door of his house as the same was locked. The accused-appellants have stated that they have not committed any crime and they have been falsely implicated in the present case and in support of the said plea the defence has produced Jhandu Singh (D.W.-1), who happens to be the neighbour of the accused-appellants.

12. The trial court has recorded a finding that P.W.-6 Mahendra Singh is an eyewitness of the incident. In his cross-examination, there is no reason to doubt his credibility. The statement of P.W.-6 has also been corroborated by the post-mortem report of the deceased (Exhibit- Ka-4), in which there are 25 cut wounds of a knife, which are said to be possible at the time of the incident. The recovery of weapon of assault is fully reliable under Section 27 of the Evidence Act in view of the disclosure made by the accused. The accused-appellants have admitted to kill the deceased by the recovered knives. The accused-appellant could not discharge the burden of proof of Section-106 of the Evidence Act since the dead body was found in their house, which the witnesses saw. After recording the aforesaid finding the trial court has held that the murder of the deceased has been committed by the accused-appellants by stabbing and the incident is not possible to be done by any person other than the accused-appellants. The trial court has come to the conclusion that the prosecution has been able to prove the guilt of the accused-appellants beyond reasonable doubt under Section 302 I.P.C. and has accordingly convicted the accused-appellants and sentenced them to undergo life imprisonment along with fine. It is against this judgment of conviction that both the appeals have been preferred.

13. Learned counsel for the accused-appellants has submitted that most of the prosecution witnesses have turned hostile, therefore, the prosecution case has no legs to stand. Further submission is that since the prosecution has not been able to prove the source of light, therefore, the testimony of the prosecution witnesses is not reliable. Next submission is that the recovery of Ala Katal (two knives) is manipulated, hence the recovery of the same is doubtful, as Jagan Singh, who is the witness of recovery of Ala Katal (two knives) has not supported the recovery memo. The other witnesses of recovery have not been produced to support the said recovery memo. It is further submitted that there is inconsistency in the statement of P.W.-6, as per prosecution, who is a star witness. Learned counsel for the accused-appellants also submits that P.W.-6 in his statement has stated that at the time of incident, he was standing at cross-road (Tiraha) to offer his services for work for the next day but no one came. Ordinarily and generally, laborers stand at cross-roads (Chauraha) or at a particular place early in the morning to do labor work and not in the evening and if a person has to get the labor work done for the next day also, then he informs the laborer on the

same day after the work is over in the evening. Therefore, not only the presence of P.W.-6 at the place of occurrence is doubtful but also his statement is not trustworthy. He next submits that both the accused-appellants Ram Kishore and Rama Devi have not committed the alleged offence. Due to disputes between husband and wife i.e. Ram Kishore and Rama Devi, the accused-appellant Rama Devi had started living at her maternal place two years prior to the incident and the accused-appellant Ram Kishore also started to live outside for doing job/work and his house was locked at the time of incident as both the accused-appellants stayed outside. The said fact has also been supported by the D.W.-1 in his statement.

14. Per contra, learned A.G.A. submits that though most of the prosecution witnesses have turned hostile but the statement of the star witness i.e. P.W.-6 is consistent and reliable and there was definite motive for the accused-appellants to commit the offence. Learned A.G.A. therefore, urges that in the circumstances, the conviction and sentence awarded to the accused-appellant by the court below merits no interference.

15. We have examined the respective contentions urged by the learned counsels for the parties and have perused the records of the present appeal including the lower court records.

16. The only question which requires to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the trial court and the sentence awarded is legal and sustainable in the eyes of law and suffers from no infirmity and perversity.

18. P.W.-1, who has lodged the F.I.R. has turned hostile. P.W.-1 is the brother of the deceased, who in his testimony has clearly stated that he does not know as to who killed the deceased and how. The accused-appellants have no role in the murder of his brother. He had not lodged any report regarding the murder of his brother Dharampal, nor had he got scribed any written report by Madanpal. He was not present at the cross-road (tiraha) on the fateful day. He came to know about the murder of his brother from the people of the village. He has not supported his statement recorded under Section 161 Cr.P.C. during the course of investigation. He has emphatically denied the charge that the accused persons have killed his brother. P.W.-1 and has thus been declared hostile.

19. The prosecution has also produced the evidence of Jagan Singh son of Sri Baburam (P.W.-2), who also has turned hostile and stated that he has no information about the relationship between Rama Devi and Dharmapal. He further stated that he does not know how Dharampal died because he had gone to another village on the fateful day. He has also not supported his statement recorded under Section 161 Cr.P.C. He has further denied that the police has recovered the knives (ala katla) in his presence.

20. P.W.-3 has also been declared hostile. P.W.-4, namely, Jamuna Devi, wife of the deceased has stated that she was married to the deceased three years ago. She did not know about the relationship between her husband Dharampal and accused appellant- Rama Devi. But in her cross-examination she has stated that on the date of the incident she had gone to her maternal home, Chahapura. Her brother-in-law Pritam Singh informed her about her

husband's murder. Her husband Dharampal and accused-appellant Ram Kishore had no enmity with each other. He used to get angry very quickly and used to often quarrel with the people of the village.

21. Dr. R. K. Sharma, who has conducted post mortem has also been produced as P.W.-5, who has proved the post mortem report and has stated that the post mortem was conducted by him and he found the cause of death to be shock caused due to profuse bleeding from ante mortem injuries. In the cross-examination he has specifically stated that the vocal cord of the deceased was cut, this vocal cord is the one from which the sound comes out of the mouth. He has further stated that from injury no. 4 to 14, it is possible for a person to die instantly since a lot of blood must have come from these wounds.

22. P.W.-6, namely, Mahendra Singh, brother of the deceased stated that Rama Devi is the wife of Ram Kishore. Deceased Dharampal had illicit relations with Rama Devi. Ram Kishore used to have a grudge against Dharmapal regarding this issue and they were not on talking terms. On the date of the incident he along with his brother, Pritam Singh, Jagan Singh and Prem Singh were standing at the cross-road (tiraha) behind Jagan Singh's house and were talking each other. His brother Dharampal was bringing goods from the shop from the north. When Dharampal reached in front of Ram Kishore's home, accused called him inside the house and closed the door. At that time it was 7:30 P.M. in the evening. Dharampal's voice was heard from Ram Kishore's house that save him. All four people rushed towards Ram Kishore's main door and saw from the hole in the door that Ram Kishore and Rama Devi were assaulting Dharampal with knives; lamp was lightening inside the room; the incident was clearly visible in light of lamp from the hole of the door. Both the accused were having knives. He has further stated that they broke open the door, entered inside the house. Ram Kishore and his wife Rama Devi were coming out from the room on the north of the house, Dharampal was writhing due to injuries. Dharampal told them that the accused-appellant had stabbed him by knives and he would not be able to survive and saying this he died. While they were talking to Dharampal, the accused persons fled away.

23. In his cross-examination, this witness stated that the deceased Dharampal had no illicit relationship with Rama Devi. About two years prior to this incident, Dharampal used to visit Ram Kishore's house. Ram Kishore also used to come to Dharampal's house. Both of them used to sit and eat together. Till the incident, the relationship between them was normal. He further stated that two years before this incident, there was an altercation between the two, but he was unable to tell when the altercation had taken place. He also stated that two years before the incident, Rama Devi had gone to her maternal home. On the day of the incident, they were standing at the cross-road (Tiraha) for getting work for the next day. When Dharampal went ahead with the goods from the shop, Ram Kishore's house was lying on the way, so he went to his house. After entering in the house of accused screams of Dharampla were heard within two or three minutes. They went to Ram Kishore's house immediately after hearing the scream. On reaching there they saw through the peep-hole in the door; they made noise but the door was not opened. He jumped over the wall and reached inside the house and opened the door from inside and then other

persons namely Pritam, Jagan and Prem Singh could come inside the house. He has specifically stated that knives were lying near the dead body.

24. P.W.-7 S.I. Suresh Chandra Sharma, who has prepared the inquest report and got the dead body of the deceased sealed and sent for post-mortem, has stated that on 10.2.2010 he along with S.O. Ganesh Dutt Joshi and other police personnel were taken to the place of occurrence by the accused-appellants i.e. Ram Kishore's house. The accused persons went inside the room in his house. Accused Ram Kishore himself climbed on top of the cot and took out a blood-stained knife from the storage shelf (taand). It was disclosed that he had killed Dharampal with this knife, and the accused Rama Devi gave a knife kept in the house, which had blood on it, saying that she had killed Dharampal with this knife. Both the knives were taken into custody by the police, stitched in different cloths. He has further stated that they reached the place of occurrence at 10:00 P.M. in the night and they have conducted the panchayatnama in the morning. They have not searched the placed of occurrance in the night because it was dark and they had only torches.

25. P.W.-8, S.I. Ganesh Dutt Joshi, S.H.O., P.S. Kemri, District Rampur, who has recorded Nakal Tahrir Hindi, Nakal Rapat Kyami and also recorded the statement of informant Pritam Singh in the CD. He stated that he along with other police personnel took the accused-appellants to the place of occurrence i.e. his house and after stopping the jeep in front of the house, the accused Ram Kishore climbed on the cot and took out a knife from the storage shelf (tand) at 17-15 hours and disclosed it to be used in the murder.

26. On careful examination and evaluation of the oral as well as documentary evidence brought on record, we find that most of the prosecution witnesses have turned hostile at the stage of trial except the testimony of P.W.-6, who is stated to be star prosecution witness and relying upon the same and other evidence, the trial court has convicted the accused-appellants.

27. On careful scrutiny of the statement of P.W.-6 referred to above, we find that there is material contradiction and inconsistency in the statement of P.W.-6. In his examination-in-chief he has stated that the deceased Dharampal had illicit relations with accused-appellant- Rama Devi due to which her husband Ram Kishore (accused-appellant) used to have a grudge against Dharmapal and they did not talk to each other, whereas in his cross-examination he has stated that the deceased Dharampal had no illicit relationship with Rama Devi. Till the incident, the relationship between these two were cordial. He has further stated that two years before this incident, there was an altercation between the deceased and accused-Ram Kishore. He has also stated that two years before the incident, Rama Devi had gone to her maternal home, meaning thereby that at the time of incident accused Rama Devi was not present at the place of occurrence. He further stated that when he reached the place of occurrence along with other people he saw from the peep-hole of the door that Ram Kishore and Rama Devi were stabbing Dharampal by knives, there was lamp inside the room and the light of the lamp was clearly visible from the door. Both the accused were having knives. He has further stated that they have broken the door and entered into the house, whereas in his cross-examination, P.W.-6 has stated that they

saw through the peephole in the door, after that they made noise and when the door did not open, he jumped over the wall and reached inside the house and after reaching inside, he opened the door from inside and then other persons namely Pritam, Jagan and Prem Singh came inside the house. However, P.W.-8 Sub Inspector Ganesh Dutt Joshi in his cross-examination has stated that during the course of investigation, none of the prosecution witnesses including P.W.-6 has disclosed to him that on opening the door of the accused-appellants by P.W.-6, they entered into their house. P.W.-8 has also stated that during the course of investigation, he has seen the broken door of the main gate of accused-appellants. From the aforesaid contradictory statements of the prosecution witnesses, it is not clear as to how and in what manner, after seeing the incident from peephole of the door of the house of accused-appellants, the prosecution witnesses including P.W.-6 have entered into the house.

28. P.W.-6 has stated that at the time of incident, in the light of lamp, which was lightening, he saw the commissioning of offence by the accused-appellants from peephole of the door along with others, but the Investigation Officer has not recovered any lamp from the place of incident nor produced the same during the course of trial. P.W.-7 Sub-Inspector Suresh Chandra in his cross-examination has stated that there was no source of light at the place of occurrence except the torch light. Therefore in absence of any light having been found and recovered from the place of occurrence it is impossible for any witnesses including P.W.-6 to see the incident from peephole of the door which occurred in darkness i.e. 07.30 p.m.

29. P.W.-6 has admitted that due to illicit relationship between the deceased and the accused-appellant Rama Devi (wife of accused-appellant Ram Kishore), they did not talk to each other. If that was so why will accused-appellant Ram Kishore invite the deceased Dharampal to his house and why will the deceased go to his house? What was the occasion for the deceased to go to the accused-appellants on the date of incident has not been borne out from the evidence.

30. Though the prosecution has tried to provide the motive for commissioning of the murder of the deceased as being the illicit relationship between the deceased and the accused-appellant Rama Devi but the said motive has not been proved from the statements of the prosecution witnesses including P.W.-6 and other evidence brought on record. In the examination-in-chief, P.W.-6 has although stated that there was illicit relationship between the deceased and accused-appellant but in the cross-examination, P.W. 6 has stated that there was no illicit relationship between the deceased and the accused-appellant Rama Devi. The other prosecution witnesses of fact have turned hostile. Therefore, on the basis of contradictory statement of P.W.-6, the prosecution has failed to establish the motive in the facts of the present case against the accused-appellants.

31. The recovery of two knives i.e. Ala Katal which is alleged to have been recovered on the pointing out of the accused-appellants is also doubtful. The prosecution has failed to substantiate as to how and in what manner such recovery has been made on the pointing out of the accused-appellants. Apart from the above, Jagan Singh (P.W.-2), who happens to be the witness of recovery of such knives (Ala Katal) has not supported the recovery memo. Even otherwise, the other witnesses of the recovery memo have not been

produced during the course of trial. Interestingly, P.W.-6 has stated that nearby the body of the Dharampal the Knives were lying. It is surprising that when the knives were already present nearby the dead body of the deceased Dharampal how could the prosecution claim that the knives (Ala Katals) to have been recovered on the pointing out of the accused-appellants, separately. The recovery memo thus is not reliable.

32. The trial court although has referred to the testimony of P.W.6 and has relied upon the recovery but the evidence on record, in that regard has not been carefully examined. We hold that prosecution has not been able to establish the guilt of the accused-appellants beyond reasonable doubt. The accused-appellants in the facts of the present case are clearly entitled to the benefit of doubt.

33. Consequently, both the appeals succeed and are allowed. The judgment and order of conviction and sentence dated 14.8.2013 passed by Additional Sessions Judge, Kach Sankya 1 Rampur in Sessions Trial No. 193 of 2010 (State Vs. Ram Kishor and another) arising out of Case Crime No. 172 of 2010 against the accused appellants, is reversed. The accused-appellants are held entitled to benefit of doubt.

34. The accused appellants, namely, Rama Devi and Ram Kishore, who are reported to be in jail since 14th August, 2013 and 10.02.2010, respectively shall be released forthwith, unless she is wanted in any other case on compliance of Section 437-A Cr.P.C.

35. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Rampur henceforth, who shall transmit the same to the concerned Jail Superintendent for release of the accused-appellants in terms of this judgment.

(2023) 2 ILRA 551
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.01.2023

BEFORE

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

Criminal Appeal No. 6192 of 2011
with
Criminal Appeal No. 5681 of 2011

Lal Jeet & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Suresh Singh Yadav, Sri Kuldeep Johri, Sri Ankur Singh Kushwaha (Amicus Curiae)

Counsel for the Opposite Party:
G.A.

Criminal Law - Indian Penal Code,1860 – Section 376(2)(g) - Gang Rape - Informant, father of the victim aged about 7 years, lodged FIR, alleging that his daughter, student of class-three was playing outside the house at around 7 p.m. when three accused persons on the pretext of bringing gutkha carried her to a drain and forcibly raped her - Held - victim deposed that all three accused persons did bad things with her - They removed her underwear and licked her legs - victim was only 7 years old at the time of incident and from the medical report and the evidence, her testimony has been corroborated - considering that it was a case of gang rape by three persons with a 7 year old girl child, Court was of the view that the trial court has rightly imposed the sentence of life imprisonment and fine of

Rs.10,000/- each - The victim, a young unmarried girl, aged about 19 years old & accused being residents of the neighbouring village, court was of view releasing them could pose serious risks to the victim's social and personal safety - no mitigating circumstances to reduce the sentence already imposed by the trial court. (Para 60, 61, 63)

Dismissed. (E-5)

List of Cases cited:

1. Bable Vs St. of Chhattisgarh, AIR 2012 SC 2621

2. Jarnail Singh Vs St. of Pun., (2009) 9 SCC 719

3. Bhagwan Jagannath Markad Vs St. of Mah., (2016) 10 SCC 537

4. St. of U.P. Vs Manoj Kumar Pandey, AIR 2009 SC 711

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

6. Mukesh Vs St. NCT of Delhi & ors., AIR 2017 SC 2161

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

8. Sudip Kumar Sen Vs St. of W. B., (2016) 3 SCC 26

9. Jarnail Singh Vs St. of Pun., 2009 (1) Supreme 224

10. Syed Ibrahim Vs St. of Andhra Pradesh, AIR 2006 SC 2908

11. Avtar Singh Vs St. of Har., AIR 2013 SC 286

12. Sucha Singh Vs St. of Pun., (2003) 7 SCC 643

13. Bhagwan Singh Vs St. of M. P., 2002 (44) ACC 1112 (SC)

14. Shyamla Ghosh Vs St. of W. B., AIR 2012 SC 3539,

15. Amit Vs St. of UP, AIR 2012 SC 1433

16. Hukum Singh Vs St. of Raj., 2000 (41) ACC 662 (SC)

17. Sadhu Saran Singh Vs St. of U.P., (2016) 4 SCC 357

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

19. Nand Kumar Vs St. of Chhatisgarh, (2015) 1 SCC 776

20. Rohtash Kumar Vs St. of Har., (2013) 14 SCC 434

21. Sandeep Vs St. of UP, (2012) 6 SCC 107

22. Hukum Singh & ors. Vs St. of Raj., 2001 CrLJ 511 (SC)

23. Chhotanney Vs St. of U.P., AIR 2009 SC 2013

24. Gangadhar Behera Vs St. of Orissa, (2002) 8 SCC 381

25. Raja Vs St. of Karn., (2016) 10 SCC 506

26. St. of UP Vs Chhoteylal, AIR 2011 SC 697

27. Ganga Singh Vs St. of M.P., AIR 2013 SC 3008

28. St. of T. N. Vs Ravi @ Nehru, 2006 (55) ACC 1005 (SC)

29. Baijnath Sigh Vs St. of Bihar, 2010 (70) ACC 11 (SC)

30. Utpal Das Vs St. of W. B. AIR 2010 SC 1894

31. Vishnu @ Undrya Vs St. of Mah., (2006) 15 SCC 283

32. Solanki Chimanbhai Ukabhai Vs St. of Guj., AIR 1983 SC 484

33. Gopal Krishan Vs St. of Pun., (2003) SCC OnLine 280 (P&H)

34. Krishna Lal Vs St. of Har., AIR 1980 SC 1252

35. St. of Himachal Pradesh Vs Asharam, AIR 2006 SC 381

36. St. of Pun. Vs Gurmit Singh, (1996) 2 SCC 384

37. St. of Pun. Vs Ramdev Singh, AIR 2004 SC 1290

38. Bhura Vs St. of U.P., (2022) SCC OnLine (All) 151

39. Thongam Tarun Singh Vs St. of Manipur, (2019) 18 SCC 77

40. Manoj Mishra @ Chhotkau Vs St. of U.P. (Criminal Appeal No.1167 of 2021 (arising out of SLP (Cri) No.7828 of 2019)

41. Bavo @ Manubhai Ambalal Thakore Vs St. of Guj., (2012) 2 SCC 684

42. Rajendra Datta Zarekar Vs St. of Goa, (2007) 14 SCC 560

43. Dinesh @ Buddha Vs St. of Raj., (2006) 3 SCC 771

44. St. of UP Vs Naushad, AIR 2014 SC 384

45. Shyam Narayan Vs St. NCT of Delhi, AIR 2013 SC 2209

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

1. These appeals have been preferred by the convicted accused appellants against the order of conviction and sentencing passed by ASJ, Court No.4, Pilibhit on 25.08.2011 in Crime No.1051 of 2010, under Section 376(2)(g) IPC, PS Newriya, District Pilibhit, whereby the accused appellants were convicted under Section 376(2)(g) IPC and were awarded life imprisonment and Rs.10,000/- fine each and in case of non-payment of fine they had to undergo for one year's additional rigorous imprisonment.

2. Heard Sri Kuldeep Johri and Sri Ankur Singh Kushwaha, learned amicus curiae appearing for the appellants, learned AGA for the State and perused the record.

3. At the outset as per CJM report dated 11.05.2022 and the office report dated 17.11.2022 the accused-appellant, Lal Jeet has died, therefore, the appeal so far as Lal Jeet is concerned, stands abated.

4. In brief, facts of the case are that informant Tej Ram, father of the victim aged about 7 years lodged FIR in PS Newriya, District Pilibhit, alleging that on 30.09.2010 his daughter, student of class-three in primary school, Tandola, was playing outside the house at around 7 p.m. when Lal Jeet, son of Budh Sen, Tej Bahadur, son of Hori Lal, and Chintu, son of Kali Charan, residents of neighbouring Village Himmat Nagar @ Chiraindapur, on the pretext of bringing gutkha carried her to a drain situated in the east of the village and forcibly raped her. The victim did not return for a long time, her parents along with other villagers went to search with torches, and heard the victim's scream coming from the side of the drain, then the informant, his wife Tarawati, his elder brother Ram Pal, younger brother Prem Pal and many other villagers reached there, and saw that Lal Jeet and Chintu were catching hold his daughter and Tej Bahadur was doing bad things with her. Seeing them all the three accused persons ran away leaving the victim covered in blood. In the morning all three were again seen in the village. The villagers were very angry and agitated, they caught them. The victim was taken to

Kusum Hospital, Pilibhit, for treatment at night. They could not go to the police station due to lack of facilities and thereafter brought the girl and the accused to the police station. Informant requested to register the report and take necessary action.

5. On the basis of the written complaint the case was registered against all the three accused persons being Crime No.1051 of 2010, under Section 376 IPC. The Investigating Officer (I.O.) started investigation, recorded the statement of the witnesses. The victim was medically examined, X-Ray was done and supplementary medical report was prepared. Visiting the spot along with the complainant a map was drawn and the shirts and underwears of the accused were taken into possession and sent to FSL by the I.O. On finding sufficient evidence against all the three appellants a charge sheet under Section 376 IPC was submitted to the court. The case was committed to the court of sessions wherefrom the file was transferred to the concerned court.

6. On 31.01.2011 accused persons were charged under Section 376(2)(g) IPC. They denied the charge and claimed trial.

7. The prosecution examined following **witnesses** to prove the charges:-

(i) PW-1, informant, Tej Ram; (ii) PW-2, victim; (iii) PW-3, Dr. R.K. Maheshwari; (iv) PW-4, Constable Netra Pal Singh; (v) PW-5, Dr. Mahavir Singh; (vi) PW-6, S.O, Tapeshwar Sagar; (vii) PW-7, Dr. Vijay Laxmi.

8. The prosecution produced the following **documentary evidence** to prove the prosecution case:-

(i) Ex.Ka-1, written complaint; (ii) Ex.Ka-2, X-Ray report; (iii) Ex.Ka-3, chik FIR; (iv) Ex.Ka-4, photocopy GD; (v) Ex.Ka-5, report of the vaginal slide; (vi) Ex.Ka-6, map; (vii) Ex.Ka-7, recovery memo of underwear and shirt of the victim and upper cloth of the pocket of the shirt of the accused, Tej Bahadur; (viii) Ex.Ka-8, recovery memo of the blood stained underwear of the accused persons upon which as per investigating officer there was blood of the victim; (ix) Ex.Ka-9, charge sheet; (x) Ex.Ka-10, medical report of the victim; and (xi) Ex.Ka-11, supplementary medical report of the victim.

9. Following **material exhibits** were produced during the trial:

(i) Material Ex.1, X-Ray plate and underwear of the victim; (ii) Material Ex.2, shirt of the victim; (iii) Material Ex.3, underwears of the accused persons.

10. After closer of the prosecution evidence statement of the accused persons were recorded u/s 313 CrPC. All the accused persons denied the case and the allegations. In addition to that accused Lal Jeet stated that before this incident Salig Ram and Bhimsen of his village had contested the election of Gram Pradhan. Bhimsen had won the election. The complainant and Bhimsen felt bad. The injury to the daughter of the informant was caused at some other place or in some other manner, but due to electoral rivalry he has been falsely implicated.

11. Accused Chintu had also denied the prosecution version of the case and in addition to that has given the same explanation. Tej Bahadur has also given similar explanation. Accused appellants have not produced any evidence in their defence.

12. It would be proper to produce a brief narration of the evidence of the witnesses.

13 . According to PW-1, informant, Tej Ram, accused persons are the residents of the neighbouring village Charaindapur. At the time of incident his daughter aged about 7 years, student of class-three, was playing outside of the house at about 7 p.m. On the pretext of bringing gutkha, accused took her outside the village to a dirty drain. All the three accused raped the victim. When she was not seen, PW-1 and others went out to search her. On hearing her cry, he reached near the drain along with Ram Pal, Prem Pal and his wife. They saw that Tej Bahadur and Lal Jeet were holding her while Lal Jeet was raping her. She was covered in blood. Seeing them, all the three accused ran away. PW-1 took the victim to the hospital. Next day in the morning all three accused persons were again seen in the village. He caught them with the help of the villagers. Thereafter, they went to the police station. The report was written by Amarjeet outside the police station. The witness has proved the written complaint Ex.A-1. He had given the complaint to diwanji who wrote a report on that basis. Investigating Officer had taken his statement at the police station.

14. During cross-examination the witness recognized all the accused persons and in reply to the questions repeated the version of the examination-in-chief and admitted that before him the accused persons did not take his daughter for taking gutkha. When the girl did not come for an hour, he went out to search her with 10-15 villagers with torches, but without sticks. When she was taken away, she was wearing black shirt and blue jeans. When he reached near the drain, the sound of her crying was heard. Her bloodied pant and shirt were lying there. The girl was in an injured condition. She was conscious for a while and then fainted. When he reached the spot, all the three accused were also there. They tried to catch them but they ran away. His daughter was about 300 yards away when he flashed the light. They were to the west of the girl. When the torch was lit first, these accused persons were near the girl and had caught hold her but later on fled after seeing the light. Their faces were visible. The pant of accused Lal Jeet and Tej Bahadur had come off and the underwear was sliding down. They were trying to take the girl away. The accused had run away with their pants. After reaching there they took the girl to the hospital where he was advised to take her to the government hospital. Thereafter, the girl was taken to the police station and therefrom to the Government Hospital, Newriya, where they were referred to the District Hospital, Pilibhit. His three shirts were stained with the girl's blood. Munshi had said to write whatever you want to give. Two sarees of his wife were stained with blood. Amar Deep had taken his signature. He had narrated the complaint to Amar Deep and none else. He did not give blood stained shirt and wife's sarees to the Investigating Officer but the blood stained clothes of the girl were given to him. He went to the government hospital where doctor seeing the deteriorating condition of the girl referred her to Government Hospital, Pilibhit, where she was admitted for 13 days. For two days the girl remained unconscious, then she started regaining consciousness. Accused were caught together in the morning and taken along with them. After admitting the girl he did not go to the village and stayed together. His daughter was found in an empty place and there was a ditch before it. West of it is

the garden of Ganga Ram. North is a road which goes to Sanjana. There is a drain in the south which would be 1.5 meter wide and 1 meter deep and is flooded during the rainy season. Paddy was harvested at that time. The witness denied that due to the enmity of Gram Pradhan election he felt bad and has falsely implicated the accused persons. He also denied that his daughter had sustained injuries elsewhere and in any other manner. He had stated to the Investigating Officer that he was carrying the torch, if he did not write, he cannot tell the reason. If it is not written in the complaint, he cannot tell the reason. He replied that it is wrong to say that today for the first time in the court he was telling about seeing the incident in the light of torch. Two torches were shown to the Inspector but he neither took it in possession, nor, did he write it.

15. PW-2, victim was firstly tested under Section 118 of the Indian Evidence Act, 1872 (in short "the Act, 1872'), and when the court found that she understands the meaning of affidavit and is capable to be testified, she was testified on oath, she deposed that she knows the accused persons but does not know them by name. They are the residents of Chiraindapur. At the time of incident she was playing outside her house. These three accused persons came to her, asked her to bring gutkha and took her outside the village. There was farm land on both sides where these three did dirty work with her. They removed her underwear and licked her legs. Pointing towards accused Tej Bahadur, the witness said that earlier he did bad things with her. Then pointing towards Lal Jeet she told that he had done bad things with her, then pointing towards the third accused Chintu she said that he did bad things with her. She was playing. Chintu had given her some medicine. Pointing towards Chintu she told that he had pressed her neck. After doing bad things with her all the three accused ran away. Her father, uncle and elder uncle came from her house and had seen these people on the spot. Her mummy dressed her at home. Her father took her to the doctor at night.

16. In cross-examination she replied that when she was playing outside the house, accused persons carried her in their arms in the dark night. At that time her father and uncle were not there, brother was there. She cried and shouted then these accused persons gave her medicine. Her brother did not cry. When she cried, villagers did not reach the place where she was taken. Her elder brother had called his parents. Father, uncle and elder uncle had come later. The accused persons had taken her outside the village and pushed her, she fell on the ground. Her head collided on the ground and hurt her back. The injury was severe. She was conscious when her father came there. She regained conscious after some time. Therefrom she had come with her parents near the government tap which is away from her house and is installed in front of the field. She had informed her parents, uncle and elder uncle that three persons had taken her away. The villagers had caught these three and brought them. It is wrong to say that she was giving false testimony at the behest of her parents and other people. It is wrong to say that the accused persons had not taken her. It is wrong to say that she suffered injury in some other manner or in any other place.

17. PW-3, Dr. R.K. Maheshwari, radiologist deposed that he had prepared X-Ray report of the victim and found: (i) right knee joint epiphysis around knee joint were not fused (ii) about right wrist joint, he

found that epiphysis around wrist were not fused. He proved X-Ray report Ex.Ka-2 and X-Ray plate Material Ex.1. He denied the suggestion that he had done X-Ray of any other person in place of the victim. He also denied that forged X-Ray report was prepared by him.

18. PW-4, Constable Moharrir, Netra Pal Singh, has proved chik FIR Ex.Ka-3 and kaymi GD Ex.Ka-4 and deposed that on 30.09.2010, at 10:20 a.m, he had prepared chik FIR and had entered the case in original G.D. In cross-examination he admitted that no date is mentioned regarding presentation of chik FIR before the concerned C.O. He further replied that this chik FIR was presented before C.J.M. on 04.10.2010. He admits that special report is not available in the file. He also admits that name of the persons who came to lodge the FIR has not been mentioned in G.D. Ex.Ka-4. It is also not mentioned that how the accused were tied and from which vehicle they were carried to the police station. He admits that injuries of the accused persons are not mentioned in Ex.Ka-4, but he denied the suggestion that Ex.Ka-3 and Ex.Ka-4 were forged and ante-timed.

19. PW-5, Dr. Mahavir Singh, Senior Consultant, District Hospital, Pilibhit, deposed that on 01.10.2010, he had examined vaginal smear slide of the victim sent by Dr. Vijay Laxmi of PHC, Newriya. He deposed that in examination he did not find spermatozoa but he found red blood cells in large quantity. He proved his report Ex.Ka-5. He denied that he was falsely deposing.

20. PW-6, S.O, Tapeshwar Sagar, deposed that on 30.09.2010, the case was lodged in his presence. He started investigation, copied chik FIR, recorded the statement of the informant, FIR writer-Netra Pal Singh and the statement of the accused persons. He copied the medical report, inspected the place of occurrence and prepared the map Ex.Ka-6. He took the lining of the pocket of the accused Tej Bahadur and underwear and shirt worn by the victim, sealed it and prepared specimen seal. He prepared recovery memo Ex.Ka-7 in his hand writing. He also took blood stained underwear of all three accused and kept in polythene, did chitbandi and put in cloth sealed, prepared specimen seal and recovery memo Ex.Ka-8 in his own hand writing, copied both the recovery memo in C.D, recorded the statement of witnesses of recovery, witness Prem Pal, victim and Tarawati, copied the pathology report and X-Ray report, recorded the statement of S.I, Rajendra Babu, Constable Netrapal Singh, Home Guard Daulat Ram and complaint writer Amar Deep. On 27.10.2010 he sent the clothes to FSL, Lucknow, through Constable, Subedar Singh. He proved the docket Ex.Ka-8. He copied the supplementary report and submitted charge sheet Ex.Ka-9 to the court. During the testimony he proved the underwear and black shirt of the victim as Material Exs.1 and 2, underwears of the accused-persons as Material Exs.3, 4 and 5 respectively.

21. In cross-examination this witness replied that witness Tej Ram or the villagers had not produced the torch used by them. Tej Ram had informed the names of some witnesses, such as, Prem Pal, Ram Pal and Tarawati and had not informed the names of 10-15 persons. He admits that till the time of submission of charge sheet, FSL report was not obtained. He has admitted that concerned G.D. is not referred in case diary, its copies are also not available on the file. He admits that he has

not entered time of closer of investigation in C.D. According to him he did not find blood on the spot but had found blood on the shirt of the victim which is not written in Ex.Ka-7. According to him there was blood on the underwears of the accused persons which is written in recovery memo. It was prepared at police station. Recovery memo (Ex.Ka-7) of victim's clothes was prepared on spot. He admits that in Exs.Ka-6, 7 and 8 names of the accused persons are not mentioned. On asking the colour of the underwears of the accused persons, he replied that one underwear is brown and the second is green in colour and another is light almond colour. He further deposed that underwear of the victim is brown in colour. One shirt is black. He further deposed that Tej Ram and his wife neither showed their blood stained clothes, nor, those were taken into possession. He denied the suggestion that he had done all the investigation sitting at the police station and has submitted false charge sheet on the basis of fake investigation. He denied that Exs.Ka-6, 7 and 8 were prepared ante-time.

22. PW-7, Dr. Vijay Laxmi deposed that on 30.09.2010, during her posting she had examined the victim, at 11:30 a.m. brought by Constable Durga Prasad, Police Station Newriya, with injury letter.

23. During the internal examination she found that the outer part of the victim's vagina was swollen and red in colour. It was very difficult to do the internal examination. The victim was fainting repeatedly due to pain and swelling. The vagina was cut from both sides and fresh blood was oozing. There were deep wounds up and down inside the vagina opening from which blood was oozing. The lower wound was up to the anus. The lower part of the inside vagina was coming up to the anus. There was deep wound inside the vagina that its examination was difficult. In the said situation the victim was immediately referred to the surgery department for advance treatment. X-Ray was advised to determine her age, hence, referred to the radiologist. Two samples of the victim's vaginal discharge were prepared. It was sent to the pathology for examination. She had prepared the medical report Ex.Ka-10 and supplementary medical report Ex.Ka-11 on 20.10.2010, in her own writing. The injury of the victim was of serious nature and fatal for her life due to which she could have died.

24. In cross-examination this witness admitted that she had not given any opinion about rape. On asking by the court the witness replied that the condition of the child was so serious that she did not think about the opinion of rape. The girl was fainting and there was heavy bleeding which could prove fatal. Further, she was questioned why was the girl sent to you. She answered that the victim was sent for testing, if she had died during examination its responsibility would fall on her. On asking whether she read injury letter. She answered that she had read it, wherein, it was requested to inform about the medical result and report whether the victim had been raped. On asking whether the victim was raped or not, she replied that there was no clear narrative about rape, that is why she did not give clear report. When there is no possibility of someone dying, the victim gives a clear opinion regarding rape, the girl's condition was so bad that is why she could not think about it. On asking when a woman is in very serious condition, one gets emotional and forgets everything. She replied not on emotion, she wanted to refer the victim for proper treatment. A question was again put, whether in the

circumstances would suggest that the victim was raped. She replied that if there is fresh injury in the internal organs then I would give an opinion, I am sure that she has been raped. A question was again asked that the victim of this case had suffered injuries on her internal organs then in that case why did she not give an opinion regarding rape. She replied that she made a mistake at that time, did not pay attention. On being questioned whether she did it intentionally. She replied that it is impossible.

25. After that learned counsel for the accused persons started cross-examination, to which she replied that in injury report, pathology report, supplementary medical report and X-Ray report she had not mentioned about the opinion of rape. She further replied that the victim was raped, she is saying not on the basis of memory but after seeing the report. She admits that in her report she did not give any opinion regarding rape of the victim. Life of the victim would have been lost, is not in her report. The hymen gets torn when the victim was raped. In her report it is written that it is difficult to identify the hymen separately. PW-7 further replied that in internal organs of the victim, semen was not found anywhere. If a girl falls or collided on a cut sugarcane or cut structure or cut round stick and the bite goes towards the anus, it is not possible to get such inquiries. On falling the injury would come at one place. The nature of injury suffered by the victim cannot come from sliding and falling. It is correct to say that the victim must have been raped. But PW-7 admits that she has told this for the first time in the court today and had not mentioned it in any report. She denied the suggestion that she was not telling the right things and she was lying in the court and is not giving correct statement based on the medical examination report.

26. After closure of the prosecution evidence statement of all the three accused persons were recorded u/s 313 CrPC as already mentioned at page-4 wherein they denied the allegations and had not produced any evidence in defence.

27. The appeal is being decided in the backdrop of above noted evidence as under:-

I. In this case, according to prosecution the occurrence took place on 29.09.2010, at about 07:00 p.m. in the evening, FIR was lodged on 30.09.2010, being Crime No.1051 of 2011, under Section 376 IPC against the named accused-appellants at 10:20 a.m. The distance of police station from the concerned village is 9 kms, after the incident, the victim was first admitted in Kusum Hospital, Pilibhit, in the night and thereafter, she was referred to the Government Hospital, Newriya, Pilibhit, from there victim was referred to the District Hospital, Pilibhit, for further treatment.

II. Next day on 30.09.2010 the accused persons were caught by the informant and the villagers. Thus, it cannot be said that any undue delay was caused in lodging the FIR.

III. In **Bable Vs. State of Chhattisgarh, AIR 2012 SC 2621,** it is held that FIR is not a substantive piece of evidence and it is not an encyclopedia. In **Jarnail Singh Vs. State of Punjab, (2009) 9 SCC 719 and Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537**, it is also held that the

only requirement is that at the time of lodging the FIR, the informant should state all those facts which normally strike to mind and help in assessing gravity of the crime or identity of the culprit briefly.

IV. In **State of UP Vs. Manoj Kumar Pandey, AIR 2009 SC 711**, **(three-Judge-Bench)** and in **Santosh Moolya Vs. State of Karnataka, (2010) 5 SCC 445,** it is held that normally the prosecution has to explain delay and lack of prudence does not apply per se to rape cases.

V. In **Mukesh Vs. State NCT of Delhi and others, AIR 2017 SC 2161 (three-Judge-Bench), Munshi Prasad Vs. State of Bihar, 2002 (1) JIC 186 (SC)** and in several other cases it has been held that if causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging the FIR and the delay would not adversely affect the case of the prosecution. Delay caused in sending copy of FIR to Magistrate would also be immaterial if the prosecution has been able to prove its case by reliable evidence. Thus, it is concluded that there is no delay in lodging the FIR in this case.

VI. The present case is based on direct evidence and on the evidence of the victim. Hence, there is no need to prove the motive behind the commission of crime. From the evidence the mens rea to commit the alleged offence has been proved beyond reasonable doubt. It is also proved from the evidence of the prosecution witness that there was no enmity or false implication of the accused persons. In the said crime though the accused persons have suggested the witnesses of fact that due to enmity of Gram Pradhan election the accused persons have been falsely implicated, but it is not proved that either the accused persons or any family member of their family or any friend was the candidate in Gram Pradhan election.

VII. **Burden of proof** rests on the shoulder of the prosecution. As per section 134 of the Act, 1872, no particular number of witnesses is required to prove any fact. Plurality of witnesses in a criminal trial is not the legislative intent. If the testimony of a sole witness is found reliable on the touchstone of credibility, accused can be convicted on the basis of such sole testimony as held i**n Sudip Kumar Sen Vs. State of West Bengal, (2016) 3 SCC 26, Jarnail Singh Vs. State of Punjab, 2009 (1) Supreme 224, Syed Ibrahim Vs. State of Andhra Pradesh, AIR 2006 SC 2908, Avtar Singh Vs. State of Haryana, AIR 2013 SC 286.**

VIII. In this case only informant, father of the victim and the victim were examined as eye-witness.

IX. In **Sucha Singh Vs. State of Punjab, (2003) 7 SCC 643, Bhagwan Singh Vs. State of Madhya Pradesh, 2002 (44) ACC 1112 (SC), Bhagwan Jagannath Markad (supra), Shyamla Ghosh Vs. State of West Bengal, AIR 2012 SC 3539,** Amit Vs. State of UP, AIR 2012 SC 1433 and in so many other cases it is held that the testimony of a witness in criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence, in such situation the court has to adopt careful approach in analysing the evidence of such witness and if the testimony of the related

witness is otherwise found credible, the accused can be convicted on the basis of testimony of such related witness.

X. In **Hukum Singh Vs. State of Rajasthan, 2000 (41) ACC 662 (SC), Sadhu Saran Singh Vs. State of UP, (2016) 4 SCC 357, Ashok Kumar Chaudhary Vs. State of Bihar, 2008 (61) ACC 972 (SC)** and in **Bhagwan Jagannath Markad (supra)**, it is held that non-examination of the material evidence is not a mathematical formula for discarding the weight of the testimony available on record however natural, trustworthy and convincing it may be. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with stroke of pen. Court can convict an accused on statement of a sole witness even if he is relative of the deceased and non-examination of independent witness would not be fatal to the case of prosecution.

XI. In **Nand Kumar Vs. State of Chhatisgarh, (2015) 1 SCC 776, Rohtash Kumar Vs. State of Haryana, (2013) 14 SCC 434** and **Bhagwan Jagannath Markad (supra),** it is held that prosecution need not examine its all witnesses. Discretion lies with the prosecution whether to tender or not, witness to prove its case. Adverse inference against prosecution can be drawn only if withholding of witness was with oblique motive.

XII. Generally now-a-days people avoid to be witness and appear in witness-boxes specially in criminal cases due to the fear of enmity, therefore, independent witnesses do not come forward to be testified on oath in a court of law.

XIII. In **Sandeep Vs. State of UP, (2012) 6 SCC 107, Hukum Singh and others Vs. State of Rajasthan, 2001 CrLJ 511 (SC)**, sections 226 and 231 CrPC has been examined and it is held that it is expected from the public prosecutor to produce evidence in support of the prosecution and not in derogation of the prosecution case. If he knew at this stage itself certain witnesses might not support the prosecution case, he is at liberty to state before the court that fact. It would be unreasonable to insist on the public prosecutor to examine those persons as witnesses for prosecution.

XIV. In **Chhotanney Vs. State of UP, AIR 2009 SC 2013, Gangadhar Behera Vs. State of Orissa, (2002) 8 SCC 381 and in Bhagwan Jagannath Markad (supra)** it is held that doubt should be reasonable only then benefit of doubt can be given to the accused persons. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute a reasonable doubt, it must be free from an over-emotional response. Doubts must be actual and substantial doubts. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must be grow out of the evidence in the case. Exaggeration of the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape.

XV. In **Raja Vs. State of Karnataka, (2016) 10 SCC 506, State of UP Vs. Chhoteylal, AIR 2011 SC 697 and Santosh Moolya** (supra) and in so may other cases the Apex Court held that in a case of rape testimony of prosecutrix stands

at par with that of an injured witness. It is really not necessary to insist for corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible. The accused can be convicted on the basis of sole testimony of the prosecutrix without any further corroboration provided the evidence of the prosecutrix inspires confidence and appears to be natural and trivial. Woman or girl raped is not an accomplish and to insist for corroboration of the testimony amounts to insult to womanhood. The evidence of a victim of a sex offence is entitled to great weight absence of corroboration notwithstanding. Corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases but such evidence cannot be expected in sex offences having regard to the very nature of the offence. It would therefore be adding insult to the victim to insist of corroboration drawing inspiration from rules devised by the courts in the western world. As a general rule, there is no reason to insist of corroboration except from the medical evidence where having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to disqualification that corroboration can be insisted upon when a woman having attained majority is found in a compromising position and there is likelihood of her having levelled such an acquisition on account of the instinct of self-preservation or when probability factor is found to be out of tune.

XVI. In the present case the victim was only 7 years old at the time of incident and from the medical report and the evidence, her testimony has been corroborated. In **Ganga Singh Vs. State of MP, AIR 2013 SC 3008**, it is held that where a girl child is the victim of offence of rape punishable under Section 376 IPC, she has to be given some weight as is given to an injured witness and her evidence needs no corroboration.

XVII. In **State of Tamil Nadu Vs. Ravi @ Nehru, 2006 (55) ACC 1005 (SC),** a girl of five years old was raped and the opinion of the doctor was that penis would not have gone inside the girl's vagina, the Supreme Court held that the opinion of the doctor was irrational when hymen was found torn. Even a slight penetration of penis into vagina without rupturing the hymen would constitute rape. Evidence of victim of sexual assault stands at par with the evidence of an injured witness. Conviction of her sole testimony without corroboration is justifiable.

XVIII. In this case an argument has been advanced by the counsel for the appellants that the statement of the victim has not been recorded by the Magistrate under Section 164 CrPC. In **Baijnath Sigh Vs. State of Bihar, 2010 (70) ACC 11 (SC), Utpal Das Vs. State of West Bengal, AIR 2010 SC 1894,** it is held that statement recorded under Section 164 CrPC cannot be used as substantive evidence. It can be used only to corroborate or contradict the witness in accordance with the provisions under Sections 145 and 157 of the Evidence Act. It appears that considering the tender age of the victim, the IO did not produce her before the Magistrate for recording her statement under Section 164 CrPC.

XIX. For the fault of the Investigating Officer the prosecution would not suffer.

28. In the case at hand informant PW-1 has proved the facts of the case, the only

contradiction is that according to FIR version when the informant and other persons reached on the spot, they found that Lal Jeet and Chintu were catching hold the victim and Tej Bahadur was raping her. Contrary to that PW-1 has deposed in the court that when he alongwith other persons reached on the spot they saw that Tej Bahadur and Lal Jeet were holding the victim while Lal Jeet was raping her. It might be a writing mistake. The evidence has to be considered as a whole.

29. So far as the victim is concerned, she has deposed that all three accused persons did bad things with her. They removed her underwear and licked her legs. Pointing towards the accused Tej Bahadur, Lal Jeet and Chintu, she deposed that they did bad things with her. All the three accused persons had taken her out side the village and pushed her on the ground, thereafter, they raped her. Thus, the argument has no force and is accordingly rejected.

Medical Evidence

30. Earlier the medical evidence has been discussed in detail. From the evidence of the PW-3 Dr. R.K. Maheshwari, Radiologist, it is proved that knee and wrist joints were not fused and the victim was of a very tender age.

31. PW-5 Dr. Mahavir Singh had examined vaginal smear slide of the victim though he did not find spermatozoa but he found red blood cells in large amount.

32. The victim was medically examined by PW-7, Dr. Vijay Laxmi, her evidence has been discussed at page nos.12-14, wherein, she has finally admitted and deposed that the victim was raped.

33. As per Section 45 of the Evidence Act, a doctor is a medical expert and the medical evidence is only an evidence of opinion and is not conclusive. In **Vishnu @ Undrya Vs. State of Maharashtra, (2006) 15 SCC 283**, Apex Court held that the opinion of medical officer is to assist the court, he is not the witness of fact, and the evidence given by medical officer is of an advisory character and is not binding on the witnesses of fact. In **Solanki Chimanbhai Ukabhai Vs. State of Gujarat, AIR 1983 SC 484**, Supreme Court observed that ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence makes of the medical evidence, is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witness.

34. In the present case the injury report and the evidence of PW-7 is not contrary to the prosecution evidence and it can be said that both corroborate each other. It has not been proved that the injuries to the victim had been caused at any other place and in any other manner.

35. Pointing to the evidence of the witnesses it has been argued by the learned counsel for the appellants that the place of occurrence has not been proved beyond reasonable doubt. In this respect the evidence may be re-evaluated.

36. According to the FIR version on the pretext of bringing gutkha the victim

was carried to a drain situated in the east of the village, where she was forcibly raped. During the course of search, the witnesses and the villagers heard the victim's scream from the side of drain, they reached there and found that Lal Jeet and Chintu were catching hold the victim and Tej Bahadur was raping her. PW-1, in his evidence has deposed the same fact. In cross-examination also this witness has deposed that where his daughter was found, it is an vacant place and a ditch before that. In the west, there is garden of Gangaram, a road in the north which goes to Sanjana. There is a drain in the south.

37. Map Ex.Ka-6 has been proved by the I.O, PW-6. The place of occurrence is shown by letter "X' which is somewhat south to the alleged drain. Just adjacent to the place "X' at place "A', the upper part of the pocket of the shirt of accused Tej Bahadur (which was torn by the victim) had been found. Hence, it is concluded that there is no variation about the place of occurrence between the facts of the FIR and the evidence of the informant PW-1. PW-2, the victim has also deposed that these persons took her outside of the village, there was farm land on both sides where these three did dirty things with her. Though in cross-examination this witness has deposed that there from she had come with her parents to the government tap which is away from her house and is installed in front of the field. On the basis of this evidence counsel for the appellants argued that there is no government tap near the place of occurrence.

38. The victim is not saying that she was raped at, or near the government tap. It appears that there is government pipe under the drain some steps away from the place of occurrence about which this witness was deposing or there might be tap near the place of occurrence not shown by the I.O. in the map Ex.Ka-6. The Court is of the opinion that on the basis of this evidence it cannot be said that there is contradiction or variation between the evidence of PW-1 and PW-2 about the place of occurrence as narrated in the complaint.

39. It would be proper to examine the status of section 376 IPC at the time of the alleged occurrence. Section 376 IPC was amended by Act No.13 of 2013 w.e.f. 03.02.2013. Earlier section 376 was substituted by Act 43 of 1983, (w.e.f. 25.12.1983) section 376 before substitution by Act of 13 of 2013, stood as under:-

"1. Subs. by Act 13 of 2013, sec. 9, for section 376 (w.r.e.f. 3-2-2013). Earlier section 376 was substituted by Act 43 of 1983, sec. 3 (w.e.f. 25-12-1983). Section 376(1) and explanation, before substitution by At 13 of 2013, stood as under:

"376. Punishment for rape.--(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be

mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

Explanation 1.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section."

40. It has been established that at the time of commission of crime the victim was aged about 7 years and below 12 years of age. Hence, in case of rape with girl of a tender age, if the charges are proved beyond reasonable doubt, the accused shall be punished with imprisonment of either description for a term which shall not be less than 7 years, but which may be for life or for a term which may extend to 10 years and shall also be liable to fine. Though as per the proviso the court may, for adequate and special reasons mentioned in the judgement, imposed sentence of imprisonment for a term of less than 7 years. As per Explanation-1 where a woman is raped by one or more persons in a group acting in furtherance of the common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. It has been proved that it is a case of gang rape by all the accused persons with the victim.

Some relevant judgments:-

41. In **Gopal Krishan Vs. State of Punjab, (2003) SCC OnLine 280 (P&H)**, the accused raped a minor girl of 6 years. The evidence of the prosecutrix, her mother and the medical and medico-legal report showed that libiya minora and hymen of the victim was ruptured to the extent of nearly one inch and was bleeding profusely. The accused in his defence pleaded that no semen was found at his clothes and the clothes of the victim. Rejecting the plea, Court held that emission of semen was not an essential requirement for conviction in a rape case as the explanation attached to Section 375 clearly specifies that mere penetration is sufficient to constitute an offence of rape. The conviction and sentence of the accused was therefore, proper.

42. In **Krishna Lal Vs. State of Haryana, AIR 1980 SC 1252,** the Apex Court observed that a socially sensitised Judge is better statutory armour against gender outrage than long clauses of a complex section with all the protections writ into it. The Court cannot cling to a fossil formula and insist on corroborative testimony. Judicial response to human rights cannot be blunted by legal bigotry.

43. In **State of Himachal Pradesh Vs. Asharam, AIR 2006 SC 381,** Apex Court reiterated that the evidence of a victim of rape is entitled to great weight, absence of corroboration notwithstanding. The Court identified the following factors as rationale for the rule to be followed in rape cases:--

(1) A woman/girl in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

(2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members,

relatives, friends, and neighbours. She would have to face the whole world.

(3) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.

(4) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable family.

(5) It would almost inevitably result in great mental torture and suffering to herself.

(6) The fear of being taunted by others will always haunt her.

(7) She would naturally like avoidance of publicity to the incident and so also her husband, family members etc. would avoid publicity due to fear of social stigma.

(8) The fear of the victim being herself considered to be promiscuous would haunt her regardless of her innocence.

(9) The fear of facing interrogation by investigating agency, Court and to face stiff cross-examination by counsel for the defence (accused) and risk of being disbelieved may act as a deterrent to the victim.

44. In **State of Punjab Vs. Gurmit Singh, (1996) 2 SCC 384,** the Apex Court observed that rape is not merely a physical assault, it is often destructive of the whole personality of the victim. A murderer destroys the physical body of the victim, a rapist degrades the very soul of the helpless female. The Court should, therefore, shoulder greater responsibility while trying an accused on charges of rape and sexual molestations.

45. In **State of Punjab Vs. Ramdev Singh, AIR 2004 SC 1290,** the Apex Court advised the subordinate courts to display a greater sense of responsibility and be more sensitive while dealing with the cases involving sexual assaults on women particularly of girls of tender age. Such cases should be dealt with sternly and severely. The Court reiterated its earlier stand that was taken in **Krishna Lal** (Supra).

46. Having regard to the above noted precedents and discussion, this Court is of the considered view that the accused appellants committed gang rape with the victim, a girl of a tender age, not understanding any one characteristics of sex and pleasure related to it. Even her sexual organs were not developed properly. The victim was of the age of a girl child of the accused persons, even then they committed such cruel, merciless, illegal and uncivilized act with her.

47. In view of the above discussion, it is concluded that the learned trial court committed no illegality in holding the accused persons guilty of committing gang rape.

48. Alternatively, it has been argued by the counsel for the accused appellants that the accused appellants are in jail since 2010. Considering the age and future life of the accused, if this Court finds that the charges are proved beyond reasonable doubt, a lenient view may be adopted so far as sentencing is concerned. In this regard

learned counsel for the appellants relied on the following judicial precedents:-

49. (1) In **Bhura Vs. State of UP, (2022) SCC OnLine (All) 151**, wherein the sentence of life imprisonment was modified to RI for 13 years with a fine of Rs.3,000 under section 376(2)(g) IPC for committing the rape of a 14 year old girl. In the case one of accused was held juvenile.

50. (2) In T**hongam Tarun Singh Vs. State of Manipur, (2019) 18 SCC 77, section 376(2)(g) IPC**, the sentence of imprisonment of 15 years and 10 years were reduced to 8 years and 2 years. In the case the victim was about 16 years old.

51. (3) In **Manoj Mishra @ Chhotkau Vs. State of UP (Criminal Appeal No.1167 of 2021 (arising out of SLP (Cri) No.7828 of 2019)** as per FIR, the victim was aged about 14 years (as per doctor, she was 16 years of age) the appellant had undergone sentence for more than 8 years. The Apex Court directed that the appellant be released on payment of fine. The Apex Court accepted the period spent in jail as full sentence and directed to release the accused.

52. Learned AGA argued that having regard to the difference in age of the victims, facts and circumstances of the cited cases and the present case, the sentence of life imprisonment cannot be commuted.

53. (4) In **Bavo @ Manubhai Ambalal Thakore Vs. State of Gujarat, (2012) 2 SCC 684,** the victim was aged about 7 years. The trial court convicted the appellant under section 376(2)(f) IPC and sentenced him to undergo imprisonment for life. The High Court conformed the conviction and sentence. The incident occurred nearly 10 years ago, at the time of incident the accused was about 18/19 years of age. He had already served nearly 10 years of rigorous imprisonment. The Apex Court held that award of life imprisonment is not warranted in this case. It was modified to RI for 10 years.

54. Learned AGA argued that in the facts of the present case, it is a case of gang rape by three responsible persons who committed the brutal sexual offence with a 7 year old girl child, hence, the principles laid down in the said case cannot be applied to the present case. The appellants were mature and family persons, therefore, they cannot be treated at par to the accused of 18/19 years of age.

55. (5) In **Rajendra Datta Zarekar Vs. State of Goa, (2007) 14 SCC 560,** the victim was aged about 6 years. It was a rape by single young man of 20 years, wherein only fine was reduced from Rs.10,000/- to Rs.1,000/- but the sentence of 10 years RI was maintained by the Apex Court. Hence, the appellants cannot claim parity with the case at hand.

56. The prosecution relied on the citation **Dinesh @ Buddha Vs. State of Rajasthan, (2006) 3 SCC 771**, wherein, the victim was below the age of 12 years. It was a case under section 376(2) proviso and 376(2)(f) IPC, the sentence was imposed below 10 years RI. The Apex Court held that normally sentence in such a case be not less than 10 years. Courts are obliged to respect the legislative mandate in this regard. Recourse to the aforesaid proviso can be had only for special and adequate reasons and not in a casual manner which would depend upon variety of factors and the peculiar circumstances of

each case. In paragraph-12, Apex Court held that sentence must depend upon the conduct of the accused, the state and age of the victim and the gravity of the criminal act, the socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations. Crimes of violence upon women need to be severely dealt with, object of law is to protect the society and deter the criminal to be achieved by imposing an appropriate sentence. The courts should impose proper sentence commensurate with gravity of crime. In paragraph-6 the Apex Court held that the courts should deal with cases of sexual crime against women sternly and severely.

57. In rebuttal the prosecution relied on the judgement **State of UP Vs. Naushad, AIR 2014 SC 384,** in which the sentence of life imprisonment was upheld.

58. In **Shyam Narayan Vs. State NCT of Delhi, AIR 2013 SC 2209**, a girl aged about 8 years was brutally raped by the accused. The trial court and the High Court confirmed the charge of rape and sentenced the accused to imprisonment for life. On appeal, Supreme Court upheld the sentence of life imprisonment for the act of the accused and dismissed the plea of mitigating circumstances put forth for reduction of sentence to mandatory 10 years. The court observed that punishment ought to be commensurate to gravity of crime and the accused must get to "just desert" apart from the deterrence aspect of sentencing.

59. The Court observed "rape is a monstrous burial of girl's dignity in the darkness. Her dignity and purity of physical frame is shattered and she may not be able to assert the honour of a woman for no fault of her".

60. It is not a case of rape by juvenile, a single accused with a mature lady or with a girl who is on the verge of attaining the age of puberty or majority. The victim was not knowing even the nature of the offence. Therefore, considering the nature of injuries, age of the victim, age of the accused persons and that it is a case of gang rape with a little girl, this Court is of the view that the trial court has rightly imposed the sentence of life imprisonment and fine of Rs.10,000/- each. This Court does not find any sufficient and cogent ground to reduce the sentence. It is informed by the learned AGA that presently the victim is a young-unmarried-girl. At present she is about 19 years of age. The accused are the residents of the neighbouring village. If the sentence is reduced and they are released, social and personal safety problems may cause serious prejudice to the victim.

61. On the basis of aforenoted discussion, this Court is of the view that there are no mitigating circumstances present to reduce the sentence already imposed by the trial court. Accordingly, the order of punishment and sentence by the trial court is found to be appropriate and no interference is warranted.

62. The appeals being devoid of merit are liable to be dismissed.

ORDER

63. The appeals are **dismissed**. The order of punishment and sentence passed by the trial court is affirmed. The appellants, Tej Bahadur and Chintu @ Tej Prakash are already serving the sentence in jail.

64. The ASJ-IV, Pilibhit, to ensure compliance.

65. Let a copy of this order alongwith record of the trial court be sent back to the ASJ-IV, Pilibhit, for taking necessary steps and for the consignment of the records.

66. Sri Kuldeep Johri and Sri Ankur Singh Kushwaha, learned amicus curiae appearing for the appellants shall be paid Rs.7,500/- each as fee.

(2023) 2 ILRA 569
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.04.2022

BEFORE

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

Criminal Appeal No. 7544 of 2019

Sunil Kumar ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Sanjeev Kumar Pandey, Sri Rohit Nandan Pandey

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Indian Penal Code, 1860 - Section 302 - Evidence Act, 1872 - Section 106 - Burden of proving fact especially within knowledge - When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him - Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt - It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused - it is well-settled that Section 106 of the Evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased (Para 14)

B. Criminal Law - conviction on a criminal charge - suspicion - in a criminal trial, suspicion, howsoever grave, cannot substitute proof - prosecution has to elevate its case from the realm of "may be true" to the plane of *"must be true"* for conviction on a criminal charge - fundamental principle of criminal jurisprudence is that the *accused must be guilty* 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 (Para 18, 19)

C. Criminal Law - Indian Penal Code, 1860 - Section 302 - Evidence Act, 1872 - Section 106 - Wife of the appellant was married on 20.2.2015 - She died in her matrimonial house on 24.3.2017 - It was accused specific stand that at the time of the incident he was at Etah Bazar, his father and mother were in Delhi and his brother was at his shop when some miscreants looted the house and killed his wife - He came to know about the incident at 12:30 hours in the day but the report was lodged at 4:30 PM not by him but by the father of the deceased - Trial court taking into account that the deceased died a homicidal death and she died in her matrimonial home where she resided with her husband, by taking the aid of Section 106 of the Evidence Act , placed the burden on the accused-appellant to explain the circumstances in which the deceased had suffered the injuries - As there was no acceptable explanation, trial court recorded conviction - Held - even if the accused was guilty of not promptly lodging the FIR, it cannot be taken as a conclusive circumstance reflecting a guilty mind - The initial burden was on the

prosecution to first establish that the accused was present in the house at the time the deceased was killed - Had the prosecution established that fact, then the burden would have shifted on to the accused-appellant, by virtue of Section 106 of the Evidence Act, to explain the circumstances in which the deceased had suffered those injuries on account of which she died - But as the prosecution has completely failed to discharge its initial burden with regard to the presence of the appellant in the house when the deceased died, conviction of the appellant, only on the ground that he did not lodge the FIR and had failed to explain the circumstances in which the deceased died, is not at all sustainable in law

Allowed. (E-5)

List of Cases cited:

1. Shivaji Chintappa Patil Vs St. of Mah. 2021 (5) SCC 626

2. Vijay Shankar Vs St. of Har., (2015) 12 SCC 644

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

4. Bablu Vs St. of Raj., (2006) 13 SCC 116

5. Shivaji Sahabrao Bobade & anr. Vs St. of Mah., (1973) 2 SCC 793

6. Devi Lal Vs St. of Raj., (2019) 19 SCC 447

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

1. This appeal has been filed against the judgement and order dated 2.11.1999 passed by Additional Sessions Judge/ Special Judge, Gangsters Act, Court No. 5, Etah in S.T. No. 70 of 2018, whereby, though the appellant Sunil Kumar, co-accused Gajraj Singh and Nirmala Devi have been acquitted of the charge of offences punishable under Sections 498A, 304B IPC and ¾ Dowry Prohibition Act but, the appellant - Sunil Kumar has been convicted under Section 302 IPC and sentenced to imprisonment for life whereas, the co-accused Gajraj Singh and Nirmala Devi have been acquitted of the charge of offence punishable under Section 302 read with Section 34 IPC. While admitting this appeal, vide order dated 7.12.2019, lower court record was summoned and office was directed to prepare the paper book of the appeal. Paper book of the appeal is ready therefore, with the consent of Sri Sanjeev Kumar Pandey, learned counsel for the appellant, and Sri Amit Sinha, learned AGA for the State, this appeal has been heard and is being decided finally by this order.

Introductory facts

2. The wife of the appellant-Sunil Kumar, namely, Sangeeta was married to the appellant on 20.2.2015. She died in her matrimonial house on 24.3.2017 of which a first information report (vide written report-Ex. Ka-1) was lodged by PW-1 (Jamuna Prasad) father of the deceased. In the first information report, it is alleged that the accused, namely, Sunil Kumar (husband); Gajraj Singh (father-in-law); Sudhir and Yogendra (Devars) and Nirmala Devi (mother in law) were not happy with the dowry provided in the marriage and were pressing for a three wheeler and Rs. Fifty thousand in cash. It was alleged that in connection with the said demand, the deceased was being harassed and assaulted by the accused. It is also alleged that in connection with that, several times panchayats were organised but the accused did not relent and as the demand was not met, the accused killed Sangeeta. This FIR

was registered at police station Mirhachi, District - Etah on 24.3.2007 at 16.25 hrs. of which a Chik FIR (Ex. Ka-3) and G.D. Entry (Ex. Ka-4) was prepared/made by PW-10. Inquest was conducted at 18.25 hrs on 24.3.2017 at deceased's matrimonial house in the presence of her family members of which inquest report (Ex. Ka-10) was prepared.

3. Autopsy of the body of the deceased was conducted by PW-9 on 25.3.2017 at about 2:50 pm. The autopsy report (Ex. Ka-2) revealed three ante mortem injuries:

(i) Abrasion size 3 cm X 1 cm left size of neck below left mandibular angle placed obliquely.

(ii) Abrasion front of trachea size 2 cm X 1 cm front of neck above thyroid cartilage placed horizontally.

(iii) Abrasion 5 cm X 1 cm back of neck (right side) placed obliquely.

On dissection under injury No.1 clotted blood with rupture of muscles was noted.

The cause of death was ascertained to be due to asphyxia as a result of ante mortem throttling.

The estimated time of death was about a day before.

4. After investigation, a charge sheet (Ext. Ka-5) was submitted against three persons, namely, Sunil Kumar (appellant), Gajraj Singh and Smt. Nirmala Devi.

5. After taking cognizance on the charge sheet and committal to the court of session, the trial court framed charges against the said three accused for the offences punishable under Sections 498-A, 304-B IPC and ¾ Dowry Prohibition Act with an alternative charge of an offence punishable under Section 302 read with Section 34 IPC.

Prosecution Evidence

6. During the course of trial, the prosecution examined eleven witnesses, out of which six, namely, PW-1 (father of the deceased); PW-2 (scribe of the written report); PW-3 (mother of the deceased); PW-4 also a relative of the informant; PW-5 another relative of the informant; PW-6 (brother of the informant) were witnesses of fact. All of them except PW-6 were declared hostile. Notably, PW-6, though, he might not have been declared hostile but he did not support the prosecution case, in his cross examination. What is important is that all the witnesses of fact in unison have denied harassment of the deceased in connection with demand of dowry and have not supported the prosecution case in respect of alleged demand of dowry. Rather, they disclosed that the goods of the house were strewn all over as if there was robbery/ theft in the house. They also admitted that the father in law and mother in law of the deceased were in Delhi at the time of the incident. It be noticed that PW-6 though, in his examination-in-chief, sought to support the prosecution case in respect of demand of dowry but in his cross-examination he did not support the allegation in respect of demand of dowry. What is most important is that none of the prosecution witnesses of fact have deposed with regard to the presence of the appellant in the house on or about the probable time of the incident.

7. PW-7 and PW-8 who are witnesses of the inquest proceeding have stated that at

the spot they noticed that the goods were strewn all over the house and it appeared that a robber or thief had killed the deceased.

8. PW-9 (autopsy surgeon) proved the autopsy report prepared by him and stated that he conducted the autopsy between 2.20 and 2.50 pm on 25.3.2017 and according to him the deceased might have died a day before the autopsy.

9. PW-10, Head Moharrir posted at the police station concerned proved the registration of the FIR and G.D. entry thereof.

10. PW-11 (the Investigating Officer) proved the various stages of investigation. Investigating Officer, however, did not support the theory of there being theft or robbery in the house as he did not notice anything unusual at the spot, at the time of inspection. He stated that he submitted charge-sheet on the basis of material collected by him during the course of investigation and on the basis of statements recorded under Section 161 Cr.P.C.

11. Incriminating circumstances appearing in the prosecution evidence were put to the accused. As this appeal is filed by the appellant-Sunil Kumar, we propose to notice, in brief, the statement of Sunil Kumar recorded under Section 313 Cr.P.C. In his statement recorded under Section 313 Cr.P.C., the accused appellant denied the allegation in respect of demand of three wheeler and Rs. 50,000/- in connection with dowry and also denied the allegation of harassment of the deceased in connection therewith. Notably, the statement of accused-appellant Sunil Kumar, under Section 313 Cr.P.C., was recorded twice. One on 30.11.2018 and the other on 17.10.2019. In both the statements, the specific stand is that at the time of the incident he was at Etah Bazar, his father and mother were in Delhi and his brother was at his shop when some miscreants looted the house and killed his wife Sangeeta. In the statement recorded on 30.11.2018, he specifically stated that at the time of the incident, nobody else other than the deceased was in the house. The accused also led evidence by examining two defence witnesses. They also supported the stand taken by the accused-appellant in his statement under section 313 CrPC.

Trial Court Findings

12. The trial court upon noticing that there was no evidence forthcoming in respect of demand of dowry and harassment of the deceased by the accused, acquitted the accused of the charge of offences punishable under Sections 498A, 304B IPC and Section ¾ Dowry Prohibition Act. The court, however, drew adverse inference against the present appellant on the basis of circumstance that according to the accused i.e. statement under Section 313 Cr.P.C. he came to know about the incident at 12:30 hours in the day but the report was lodged at 4:30 PM not by him but by the father of the deceased, which suggests that true facts were being hidden. Secondly, the I.O. had not noticed anything significant at the spot to suggest possibility of a theft or robbery in the house. Consequently, by taking into account that the deceased died a homicidal death and she died in her matrimonial home where she resided with her husband by taking the aid of Section 106 of the Evidence Act and placing the burden on the accused-appellant to explain the circumstances in which the deceased had suffered the injuries, upon finding that

there was no acceptable explanation, recorded conviction.

Submissions on behalf of the appellant

13. Learned counsel for the appellant has 'questioned' the judgment and order of the trial court on the ground that the prosecution evidence would suggest that the incident occurred during day time. There is no evidence whatsoever that the accused-appellant was in the house at the time of the incident whereas there is an explanation of accused-appellant that he was elsewhere, therefore, placing the burden on the accused-appellant to explain the circumstances in which the deceased had suffered those injuries, as a result of which she expired, the court committed manifest error of law. Hence, the conviction recorded is liable to be set aside.

14. Learned counsel for the appellant has placed reliance on a recent three-judge Bench decision of the Supreme Court in the case of **Shivaji Chintappa Patil Vs. State of Maharashtra 2021 (5) SCC 626,** wherein, in paragraph no. 23, the Apex Court has observed as follows:-

"It could thus be seen, that it is well-settled that Section 106 of the Evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused."

In **paragraph no. 25** of that decision (supra) it has also been observed that "it is well-settled principle of law, that false explanation or non-explanation can only be used as an additional circumstance, when the prosecution has proved the chain of circumstances leaving to no other conclusion than the guilt of the accused. However, it cannot be used as a link to complete the chain."

15. By relying upon the aforesaid exposition of law, learned counsel for the appellant submitted that even if the appellant was guilty of not promptly lodging the FIR on getting information with regard to the death of his wife, it cannot be taken as a conclusive circumstance reflecting a guilty mind. The burden was on the prosecution to first establish that the appellant was present in the house at the time the deceased was killed. Had the prosecution established that fact, then the burden would have shifted on to the accused-appellant, by virtue of Section 106 of the Evidence Act, to explain the circumstances in which the deceased had suffered those injuries on account of which she died. But as the prosecution has completely failed to discharge its initial burden with regard to the presence of the appellant in the house when the deceased died, conviction of the appellant, only on the ground that he did not lodge the FIR and had failed to explain the circumstances in which the deceased died, is not at all sustainable in law.

Submissions on behalf of the State

16. Per contra, Sri Amit Sinha, learned AGA submitted that the appellant being the husband of the deceased would in ordinary course be presumed to be residing with the deceased and as no cogent evidence has been led by the appellant as to where else he was present at the time when the incident occurred, the trial court rightly placed the burden on the appellant to record conviction with the aid of Section 106 of the Evidence Act. Moreso, when the factum of robbery/theft was not confirmed by the testimony of the investigating officer.

Analysis

17. Having considered the rival submissions and having noticed the prosecution evidence, it is not in dispute that the motive set out for the crime, which is demand of dowry and harassment in connection therewith, has not been proved and the trial court has specifically recorded its finding in that regard and all the accused including accused-appellant who were put to trial on that charge, have been acquitted. Once that is the position the benefit of legal presumption, which the prosecution could get under section 113-B of the Evidence Act, is not available. Hence, the burden would squarely fall on the prosecution to prove the charge of murder either by direct evidence or circumstantial evidence. Admittedly, there is no direct evidence. The law for conviction on the basis of circumstantial evidence has been well settled. In one of the recent decisions of the Apex Court, in **Vijay Shankar V. State of Haryana, (2015) 12 SCC 644,** following its earlier **decisions in Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116 and Bablu V. State of Rajasthan, (2006) 13 SCC 116**, in respect of a case based on circumstantial evidence, it was held that *"the normal principle is that in a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of any hypothesis other than that of the guilt of the accused and inconsistent with their innocence"*. Further (vide paragraph 153 in **Sharad Birdhichand Sarda's case),** it is settled, the circumstances from which the conclusion of guilt is to be drawn should be fully established meaning thereby they 'must or should' and not 'may be' established.

18. In addition to above, we must bear in mind that the most fundamental principle of criminal jurisprudence is that *the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions* **(vide Shivaji Sahabrao Bobade & Another v. State of Maharashtra, (1973) 2 SCC 793).**

19. These settled legal principles have again been reiterated in a three-judge Bench decision of the Supreme Court in **Devi Lal v. State of Rajasthan, (2019) 19 SCC 447** wherein, in paragraphs 18 and 19 of the judgment, it was held as follows:-

"18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the

impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

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

(Emphasis Supplied)

20. In the instant case, we do not find any evidence on record to demonstrate that at the time of the incident, the accused-appellant was seen in the house with the deceased. The incident, as per prosecution case including the autopsy surgeon, was of day time. During day time, it cannot be presumed that all members of the house, particularly, male member, would be at home because they might be away to attend to their daily chores. Specific case has been taken by the appellant that he was at Etah Bazar when the information came to him, at about 12:30 hours, with regard to the incident. There is no evidence that on or about the probable time of incident, the appellant was noticed in the house or around or was seen exiting the house. In these circumstances, the prosecution has miserably failed to discharge the initial burden placed upon it to prove that the appellant was in the house or in all probability would have been in the house, at the time when the incident occurred. The circumstance that the accused-appellant did not immediately inform the police of the occurrence in our view is not so clinching or conclusive in its tendency as to hold the appellant guilty. No doubt, conduct of the accused does assume importance in a given facts of the case. But, here, the delay in lodging the FIR is barely of 4 hours. Notably, the information was received by the appellant, as is his case, at 12.30 hours, while he was in the Bazaar. The in-laws of the appellant lodged report at 16.25 hours on that very day, therefore, there was hardly time enough for the appellant to respond to enable an adverse inference from his conduct. Once this is the position, keeping in mind the decision of the Apex Court in **Shivaji Chintappa Patil (supra)**, in our considered view, the trial court misled itself by recording conviction with the aid of Section 106 of Evidence Act.

21. That apart, there is another important feature of the prosecution case, which is, that all prosecution witnesses of fact including witnesses of inquest have consistently deposed with regard to the goods strewn all over the house suggestive of a robbery or theft in the house. As this circumstance is noticeable in the prosecution evidence there was all the more reason to accept the explanation offered by the appellant. In our view, therefore, the judgment and the order of conviction recorded by the trial court cannot be sustained.

22. The appeal is **allowed**. The judgment and order dated 2.11.2019 passed by Additional Sessions Judge/Special

Judge, Gangsters Act, Court No. 5, Etah is **set aside to the extent** it convicts and sentences the appellant. The appellant is acquitted of the charge of the offence of murder for which he has been convicted. The appellant is reported to be in jail, he shall be released forthwith subject to compliance of provisions of Section 437-A Cr.P.C. to the satisfaction of the trial court.

23. Let a copy of this order/judgment and the original record of the lower court be transmitted to the trial court concerned forthwith for necessary information and compliance. The office is further directed to enter the judgment in compliance register maintained for the purpose of the Court.

(2023) 2 ILRA 576
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2022

BEFORE

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

First Appeal From Order No. 817 of 1993

State of U.P. & Anr. ...Appellants
Versus
Gauri Shanker Singh ...Plaintiff/Respondent

Counsel for the Appellants:
S.C.

Counsel for the Respondent:
Sri A.K. Saxena

A. Arbitration and Conciliation Act, 1940-Sections 30,33 & 20-Arbitration award-setting aside- legality of- respondent instituted a suit u/s 20 of Act-Arbitrator by award directed the Contractor/ respondent to pay Rs. 4,47,875 to PWD and Rs. 97,650 to respondent-Challenge against-Aforesaid well-reasoned arbitral award was interfered by the Court on the ground that finding is bad-Reversal of arbitral award found erroneous-Interference with impugned order declined. (Para 1 to 24)

The appeal is dismissed. (E-6)

List of Cases cited:

1. K. Marappan (Dead) Vs Superintending Engr. T.B.P.H.L.C Circle Anantapur (2019) JX SC 391

2. Raveechee & Co. Vs U.O.I. (2018) AIR SC 3109

3. Puri Construction Pvt. Ltd. Vs U.O.I. (1989) AIR SC 777

4. St. of Ori. Vs B.N Agrawal (1997) 2 SCC 469

5. FCI Vs JoginderpalMohinderpal (1989) 2 SCC 347

6. St. of U.P. & ors. Vs J.M. Cons. Co. FAFO No. 714 of 2005

7. K.P. Paulose Vs St. of Ker. & anr.. (1975) 2 SCC 236

8. Hind Builders Vs U.O.I. (1990) 3 SCC 338

9. DandasiSahu Vs St. of Orissa (1990) 1 SCC 214

10. Thawer Das Vs U.O.I. (1955) AIR SC 468

11. Raipur Dev. Authority & ors. Vs Chokhamal & ors. (1989) SCC 721

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

1. Heard Sri Rathor for the appellant-state.

2. The State is aggrieved by the order dated 1.5.1993 passed by VIth Additional District Judge, Gorakhpur, whereby the

application for setting aside the award dated 5.2.1993 given by the Arbitrator has aggrieved the State.

3. On hearing the matter, the appellant - State was directed to deposit the amount within 3 months vide order dated 13.8.1993 and which was to be paid to the respondent.

4. The brief facts as culled out from the record, memo of appeal and the judgment are where separate contracts were executed on behalf of Government of U.P. by the Superintending Engineer, Constructions Division, P.W.D., Gorakhpur, for the work which were connected with the constructions of Clinic Block, Academic Block and Hostel Building in the Regional Health and Family Planning Welfare Training Centre at B.R.D. Medical College, Gorakhpur.

5. The litigation began when the respondent instituted a Suit under Section 20 of the Arbitration Act, 1939 and an Arbitrator was appointed so as to dispute the lis between the parties. The court below appointed Sri D.N. Srivastava, Gorakhpur and Sri S.C. Srivastava, Chief Personal Officer, North Eastern Railway, Gorakhpur, as Arbitrator that was also challenged which was number as F.A.F.O. No.746 of 1993.

6. The claim petition came to be filed before the Arbitrator. The appellant also contested the same. The Arbitrator by their award dated 5.2.1993 directed the Contractor - respondent to pay Rs. 4,47,875/- to the Public Works Department, Construction Division, Gorakhpur and Rs. 97,650/- was directed to be paid by the appellant to the respondent and made the award rule of the Court.

7. After the elaborate order of the Arbitrators it was made the award of the Court which is under challenge under Section 39 of the Arbitration Act. There were 5 contract bonds between the parties for performing certain works and the procedure for appointment of Arbitrator, in case of dispute between the parties, was laid down in clause 34 of the conditions of contract and the procedure for appointment of Arbitrator on a suit filed by the plaintiff under Section 20 of the Arbitration Act and the appointment of Arbitrators against the provisions of clause 34 of the conditions of contract, was illegal and without jurisdiction.

8. It is submitted that under Section 34, on a dispute being referred, the Chief Engineer has the jurisdiction to appoint an Arbitrator and the procedure having not been followed in accordance with the terms and conditions of Contract, the appointment of Arbitrators as nominated by the Board was illegal and the award given by such Arbitrators is void.

9. While just submitting that there is misconduct of the Arbitrator, this Court does not find any such argument before the court below. The judgment is a well reasoned judgment of the learned court below on the contors of the arbitration.

10. This is an appeal under Arbitration Conciliation Act, 1940.

11. It is submitted by learned Advocate that judgment of the Apex Court in **K.Marappan (Dead) Versus Superintending Engineer T.B.P.H.L.C. Circle Anantapur, 2019 JX(SC) 391** and in **Raveechee and Company Versus Union of India, AIR 2018 SC 3109,** has interpreted the role of the Courts while hearing matters under the arbitration Act. The judgment goes to show that pendente

lite interest will depend upon several factors such as; phraseology used in the agreement clauses conferring power relating to arbitration, nature of claim and dispute referred to arbitrator, and on what items power to award interest has been taken away and for which period. The Court observed:

"34. Thus our answer to the reference is that if contract expressly bars award of interest pendente lite, the same cannot be awarded by the Arbitrator. And that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court , it would be for the Division Bench to consider the case on merits."

12. The decision of Supreme Court in **Puri Construction Pvt. Limited Versus Union of India, AIR 1989 SC 777 and State of Orissa Versus B.N. Agarwalla , (1997) 2 SCC 469** and submits that in view of the said judgment, the appeal requires to be allowed as none of the aspects which are needed for upturning the well reasoned arbitral award and the finding of facts and upholding the same do not show that there was any perversity, though it was not proved that any misconduct or that there was breach of any of the provisions under the Arbitration Act which would call for interference by this Court in its appellate jurisdiction.

13. The Apex Court in **FCI Versus Joginderpal Mohinderpal, (1989) 2 SCC 347** has held that the objection against an arbitral award can be raised only if it falls within the parameters fixed by the provisions of Section 14, and 33 of the Act, 1940. If the award satisfies that it is based on equity, fair play, principles of natural justice and established practice and procedure then the award should not be interfered. In proceedings of arbitration there must be adherence to justice, equity, law and fair play in action. The proceedings must adhere to the principles of natural justice and must be in consonance with such practice and procedure which will lead to a proper resolution of the dispute and create confidence of the people for whose benefit these processes are resorted to **FCI Versus Joginderpal Mohinderpal (supra).**

14. Section 30 of the Act, 1940 read as follows :

"Section 30. Grounds for setting aside award. An award shall not be set aside except on one or more of the following grounds, namely:-

(a) that an arbitrator or umpire has misconducted himself or the proceedings

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is other- wise invalid."

15. Section 33 of the Act, 1940 read as follows :

"*33. Arbitration agreement or award to be contested by application. Any party to an arbitration agreement or any*

person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits: Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

16. Thus, the judicial review of an award has been circumscribed by Apex Court in **FCI Versus Joginderpal Mohinderpal (supra)** wherein it has been held that arbitration as a mode for settlement of disputes between the parties, has a tradition in India. It has a social purpose to be fulfilled today,. It has a great urgency today when there has been an explosion of litigation in the courts of law established by the sovereign power . It is, therefore, the function of Courts of Law to oversee that the arbitrators act within the norms of justice. Once they do so and the award is clear, just and fair, the Courts should, as far as possible, give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator. It is in this perspective that one should view the scope and limit of correction by the court of an award made by the arbitrator.

17. In backdrop of this it will have to be decided as to whether can it be said that the decision of arbitrator upturned by the Court below is bad and was wrongly not made the Rule of Court as per Arbitration Act, 1940.

18. While perusing the award 26.7.1998, it is found that the arbitrator considered each item threadbare and has given his findings. Can it be said that arbitral award does not fulfill the contours of principles which are required to be followed by an arbitrator under the Act, 1940. Item No.5 is taken as illustration so as not to burden the judgment but to come to the conclusion as to show that the Arbitrator and the Judge both had applied the legal acumen.

19. This Court in **First Appeal From Order No.714 of 2005, State of U.P. and other Vs. J.M. Construction Company, decided on 11.4.2019**, has summarised the principles for deciding matters under the Arbitration Act, 1940 & 1996 wherein in paragraph no.24 it is observed as follows:-

"In **Rajasthan State Road Transport Corporation**, the learned counsel for the respondent-Company submitted that in fact there was no material on which the finding was recorded by the Arbitrator. In support thereof, learned counsel invited our attention to a decision of this Court in the case of **K.P. Poulose v. State of Kerala & Anr., reported in [1975] 2 SCC 236** wherein it was held that the award can be set aside on the ground of misconduct if relevant documents are not considered by the Arbitrator. Therefore, we asked learned counsel for the appellant-Corporation to substantiate the finding recorded by the arbitrator that it is based on the material on record. In pursuance to the direction given by this Court, learned counsel for the Corporation filed an affidavit on 12.7.2006 and submitted that the document wherein the details on divisionwise average kilometer of new tyres and retreaded tyres along with average short-fall in guaranteed kilometers for the various periods was on record of arbitrator and same was produced before us. The details were given of all the

Divisions i.e. Bharatpur, Jaipur, Sikar, Kota, Ajmer, Bikaner, Jodhpur and Udaipur. In all these eight divisions for the various period i.e. from June 1991 to February, 1994 the details have been given to substantiate the allegations that what was the average mileage of the new tyre and what was the average mileage given by the retreaded tyres and on that basis, the short-fall was given and accordingly, the amount of loss was worked out. These details which were placed before us formed part of the record before the arbitrator. The arbitrator in his detailed award has recorded his finding on the basis of the average performance of new vehicle tyres with that of the retreaded tyres of the Company and on that basis he has worked out the assessment in paragraph 17 of the award. Paragraph 17 of the award reads as follows :

"The RSRTC has compared the performance of retreaded tyres with the performance of new tyres in each division. In each division, as mentioned earlier, the road conditions, the vehicles used, the weather conditions, the general driving skills of the drivers and the level of maintenance and upkeep of vehicles were similar for the new tyres as well as retreaded tyres. The retreaded tyres should have given a kilometerage of 46,000 or 95 % of the life of new tyres. Therefore, the assessment of the performance done by the RSRTC is strictly in conformity with the provisions of clause 5 of the agreement. Notwithstanding the acceptance by the respondent of an error of judgment in guaranteeing 46,000 kms for a retreaded tyre, from the Statements enclosed by the claimant with its letters mentioned in para 5 of this order, it is clear that the retreaded tyres performance fell short of the guaranteed level. I, therefore, find claim of the RSRTC to be fully justified."

"9. This is the finding of fact given by the arbitrator. As against this, learned Single Judge as mentioned above, has held that there was no assessment in each division in similar conditions. Therefore, the learned Single Judge set aside the award but it is not factually correct. As mentioned above, there was a comparative assessment given by the Corporation and that was part of the record before the arbitrator and on that basis the finding of fact was recorded by the arbitrator. Learned counsel for the respondents strenuously urged before us that the performance of new tyres and of retreaded tyres on roads like Jaipur-Delhi would be better as against the road of Jaipur-Lalsot. Therefore, there was no assessment of performance of the new tyres vis-a-vis the retreaded tyres supplied by the Company in similar conditions. In fact, an average has to be taken of each division. It is not necessary that in each of the divisions of the Corporation, the road conditions will be similar. Once the company has entered into an agreement knowing fully well the conditions obtaining in the State of Rajasthan that all the routes in the State are not the roads of Class `A' category but there are roads of Class `A', Class `B' and Class `C' categories also. Therefore, the average performance has been recorded taking into consideration this aspect. It is unlikely that all over the State of Rajasthan the road condition like Jaipur-Delhi will be available for all other divisions. Therefore, in all the divisions the average performance has been taken into consideration. The assessment has been based on average of similar conditions of the roads i.e. the good quality as well as the poor quality. Therefore, average performance of the new tyres with the retreaded tyres has to be taken on the basis of roads available in Rajasthan. The

average running of the new tyres on these road conditions with that of the retreaded tyres was to be compared to find out whether the performance of retreaded tyres was up to 95% average or not. After assessing the comparative assessment and going through the materials on record the arbitrator has recorded his finding. It was for the company if they wanted more information or wanted to allege that the road conditions are not similar or that the performance of the tyres which were fitted in the rear axle or on the front axle would not be the same, all these details if it wanted, it could have obtained from the Corporation but they did not do so and only at this stage the company wants to bring this factual controversy that retreaded tyres were not used in similar conditions. This argument at this belated stage cannot be accepted as all the materials have been considered by the arbitrator and after taking into consideration the average of each tyre in each region of the corporation has worked out that the performance of the retreaded tyres was not to the extent of 95%. This was a finding of fact recorded by the arbitrator and the same was made rule of the court by the District Judge. But the learned Single Judge erroneously took upon himself to sit as a court of appeal and disturbed this finding of fact. In our opinion, the view taken by the learned Single Judge of the High Court cannot be sustained."

20. During the pendency of this appeal, stay has not been granted. The appellant has seen that the amount awarded by the District Judge is secured by way of bank guarantee or any other security. Clause-9 of contract reads as under:-

"(iii) Clause-9 Special Conditions (modified):

Plant and Machinery:

The plant and equipment procured by the Board shall be made available to the contractor on terms and conditions laid down as under:-

(A) Plant/equipment available for the work for exclusive use by the contractor:

(i) The plant and equipment as per Annexure-VII, procured by the Board for execution of part of work under the contract to shall have to be taken over by the contractor at the cost occassioned to the Board which has been indicated in Col.4 of the said Annexure. This coast shall be set-off against the total amount of advance for equipment admissible to the contractor under Clause-8 (modified) of the General Conditions of contract and shall be recovered in accordance with Clause-9 of the same condition of the contract."

21. Clause-9 of the General conditions does not speak about payment of interest is the submission of Sri Khanna as a special condition which is at page 180 of the paper-book. He has further relied on the judgment of the Apex Court in ***Hind Builders Vs. Union of India, (1990) 3 SCC 338, K Marappan (Dead) through sole LR Balasubramanian Vs. Superintending Engineer TBPHLC Circle Anantapur, 1019 LawSuit (SC) 977 and State of U.P. and others Vs. J.M. Construction Company, FAFO No.714 of 2005, decided on 11.4.2019*** by this High Court., which has interpreted the contract to mean that where there are two interpretations possible, the Arbitrator's view would prevail. In this case, in fact there was no two views possible. The view taken by the Arbitrator is laud and clear and the

Arbitrator's view was such that the first court should not have interfered. Similar view has been reiterated recently by the Apex Court and this Court is the submission of Sri Khanna.

22. It is further submitted by the counsel for the contractor that while reading the aribtral award, it cannot be said that it falls within the parameters as envisaged under Section 30 of Act, 1940. It cannot be said that the arbitrator has misconducted himself and that there is any error apparent on the face of record. The factual errors are not open for correction by a Court. It is submitted that no mistake of fact is justiciable hence in view of the decision of the Apex Court in **Dandasi Sahu Versus State of Orissa, (1990) 1 SCC 214** wherein it has been held that the arbitrator, in the case of a reference made to him in pursuance of an arbitration agreement between the parties, being a person chosen by parties and was apprised as the sole arbitrator of all the questions and the parties bind themselves as a rule, to accept, the award as final and conclusive. The arbitrator need not give any reasons and even if he commits a mistake either in law or in fact in determining the matter referred to him, where such mistake does not appear on the face of the award, the same could not be assailed or quashed or upturned. The award could be interfered with only in limited circumstances as provided under Section 16 and 30 of the Arbitration Act, 1940. In this situation the Court has to test the award with circumspection.

23. While considering the factual background and interpreting the arbitral award and the order of the District Judge, the award of the arbitrator is in consonance with clause 8 and 9 of the contract. The District Court seems to have return the judgment as if it was sitting in appeal and deciding the Suit which could not have been done. The authorities were also of the view that no interest could have been charged from the appellant but they reviewed their own decision which became subject matter of arbitration and the arbitrator gave cogent reasons for allowing the appellant's application and held that no interest was payable. This well reasoned arbitral award was interfered by the court on the ground that the finding is bad though he referred to several judgments he himself embarked on fact finding mission and appreciated on the basis that the arbitrator had committed an error and relying on ***AIR 1955 SC 468 in the case of Thawer Das Vs. Union of India*** and misread the award as if there was an error apparent on the face of record. The modified clause 9 did not permit any interest and the advance was to be given without any interest. The arbitral award also was based on the decision of the Apex Court in ***1989 (2) SCC 721, Raipur Development Authority and other Vs. Chokhamal and others.*** The reasons were well assigned by the arbitrator, thus, the judgment of the District Court reversing the arbitral award is bad in the eye of law and contrary to the contours of arbitral award being set aside by courts.

24. This Court has limited jurisdiction to interfere in the matter. No case is made out to interfere in the well reasoned judgment of the court below. Hence, this appeal stands dismissed.

25. If the amounts are still not deposited, they shall be deposited with interest.

26. Record and proceedings be sent back to the Trial Court.

(2023) 2 ILRA 583
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2023

BEFORE

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

First Appeal From Order No. 1907 of 2004

Branch Manager, National Insurance Co. Ltd. ...Appellant
Versus
Pramod Kumar Yadav & Ors. ...Opp. Party/Respondents

Counsel for the Appellant:
Sri V.K. Birla

Counsel for the Respondents:
Sri Sajjan Kumar Yadav, Sri Kailash Singh Yadav

A. Accident Claim-Workmen's Compensation Act, 1923-Section 3, 4(a)-challenge to-award-substantial question of law-deceased was a driver and he had a valid driving licence-Nothing has been proved by the Insurance Company that the driver did not have a proper driving licence-Apex Court has settled the insurance company with liability even on the smallness of the amount-In fact the substantial question of law raised are the question of facts-the finding of the Commissioner is not perverse-the question of law framed by the Insurance Company are answered against it.(Para 1 to 11)

B. As per Apex Court judgment insurance has to be paid by Insurance Company from the date of accident-Thus, this issue is no longer res-integra and is decided against the appellant. (Para 4)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Oriental Ins. Co. Vs Siby Geoge& ors. (2012) 4 T.A.C. 4 SC

2. New India Assr. Co. Ltd. Vs Kamla & ors..

3. North East Karnataka Road Trans. Corpn Vs Smt. Sujatha Civil Appeal No. 7470 of 2009

4. Golla Rajanna Etc Vs Div.Mgr. & anr. (2017) 1 TAC 259

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

1. By way of this appeal, the appellant had challenged the award and after the allegation of the advocate, despite the fact that notice was served, no one has appeared on behalf of the appellant.

2. As far as the respondents are concerned, the notice has been served and Shri Kailash Singh Yadav, learned counsel has been instructed to appear on their behalf.

3. The present appeal involves following substantial questions of law:

a) Whether even if any employee is entitled for the compensation under the Workmen Compensation Act, it is open for the insurer to avoid that liability on the ground that the deceased driver was not holding driving license and there had been any breach of policy conditions?

b) Whether the case was covered under Section 3 of the Workmen's Compensation Act 1923, and if not, whether the Appellant Company, being the indemnifier only, is liable to pay any compensation?

c) Whether the court below could have granted interest @ 12% p.a. that too from the date of accident?

4. So far as Question No. 'c' is concerned, it is covered by the statutory provisions under Section 4(a) of the Act. The recent judgment of the Apex Court in **Oriental Insurance Company Vs. Siby George and Others, 2012 (4) T.A.C. 4 (S.C.)** held that the interest has to be paid by the Insurance Company from the date of accident. Therefore, the said issue is no longer res-integra and is decided against the appellant.

5 . As far as the substantial question no. 'b' is concerned, the matter was covered by the Insurance Policy. The factual data will not permit the Court to take a different view than that taken by the Workmen's Compensation Commissioner. The fact that the vehicle dashed with the truck and the driver was in the jeep and, therefore, the policy covered the death of the driver. Issue no. 1 and 2 have been answered against the appellant by giving the cogent reasons and therefore when the deceased died due to accidental injuries due to his employment and the driver was having his license, thus, the issue no. 1 and 2 having been decided against the appellant. There are questions of facts and therefore the vehicle being insured, it was the liability of the Insurance Company to indemnify the owner of the vehicle with whom the deceased was employed. There was a connection between the death, employment and accident. The accident arose out of employment is proved by cogent evidence. Hence, the said question is also answered against the appellant.

6. As far as the substantial question of law is concerned, the finding of fact is very clear that the deceased was a driver and the deceased had driving license which is a valid driving license. Nothing has been proved by the Insurance Company that the driver did not have a proper driving license proved from the record. The Learned Judge has heavily relied on the decision on the judgement of the **Apex Court in New India Assurnace Co. Ltd. Vs. Kamla and Others** and therefore has settled the Insurance Company with liability even on the smallness of the amount, the appeal requires to be dismissed.

7. At the outset, it is relevant to discuss the scope of this Court to entertain appeal against the award of Workmen's Compensation Commissioner. The Apex Court in **Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided on 2.11.2018** has held as under :

"9. At the outset, we may take note of the fact, being a settled principle, that the question as to whether the employee met with an accident, whether the accident occurred during the course of employment, whether it arose out of an employment, how and in what manner the accident occurred, who was negligent in causing the accident, whether there existed any relationship of employee and employer, what was the age and monthly salary of the employee, how many are the dependents of the deceased employee due to injuries suffered in an accident, whether there was any insurance coverage obtained by the employer to cover the incident etc. are some of the material issues which arise for the just decision of the Commissioner in a claim petition when an employee suffers any bodily injury or dies during the course of his employment and he/his LRS sue/s his employer to claim compensation under the Act.

10. The aforementioned questions are essentially the questions of fact and,

therefore, they are required to be proved with the aid of evidence. Once, they are proved either way, the findings recorded thereon are regarded as findings of fact."

8. The Apex Court further went on to hold as under :

"15. Such appeal is then heard on the question of admission with a view to find out as to whether it involves any substantial question of law or not. Whether the appeal involves a substantial question of law or not depends upon the facts of each case and needs an examination by the High Court. If the substantial question of law arises, the High Court would admit the appeal for final hearing on merit else would dismiss in limini with reasons that it does not involve any substantial question/s of law.

16. Now coming to the facts of this case, we find that the appeal before the High Court did not involve any substantial question of law on the material questions set out above. In other words, in our view, the Commissioner decided all the material questions arising in the case properly on the basis of evidence adduced by the parties and rightly determined the compensation payable to the respondent. It was, therefore, rightly affirmed by the High Court on facts.

17. In this view of the matter, the findings being concurrent findings of fact of the two courts below are binding on this Court. Even otherwise, we find no good ground to call for any interference on any of the factual findings. None of the factual findings are found to be either perverse or arbitrary or based on no evidence or against any provision of law. We accordingly uphold these findings."

9. As far as present appeal is concerned, the so called substantial questions of law framed are the questions of facts and the findings of the Commissioner on the said issues are not perverse. As far as question (d) namely of interest is concerned, the same is answered against the Insurance Company in view of the decision of the Apex Court in **North East Karnataka Road Transport Corporation Case (Supra). In Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC)** also it has been held that under Section 30, the High Court cannot enter into the arena of facts unless they are proved to be perverse.

10. In view of the above, the appeal fails and is dismissed. The so called questions of law framed by the Insurance Company are answered against it. In fact the substantial questions of law raised are the questions of fact.

11. Interim relief, if any, shall stand vacated forthwith. The amount be disbursed to the claimant forthwith.

(2023) 2 ILRA 585
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2023

BEFORE

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

First Appeal From Order No. 2682 of 2017

Reliance General Insurance Co. Ltd.
...Appellant
Versus
Raghav Sharan & Anr.
...Claimants/Respondents

Counsel for the Appellant:

Sri Sushil Kumar Mehrotra

Counsel for the Respondents:
Sri Ram Singh, Sri S.K. Singh Yadav

A. Criminal Law - Motors Vehicle Act, 1988-Sections 166, 163-A & 168-Claim/Compensation-Injury case-Tribunal did not consider future prospects- Such issues High Court would have determined for itself and passed an award straightaway, but Tribunal did not give any finding in regard to estimating functional disability sustained by claimant-Matter remanded for reconsideration. (Para 1 to 40)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Sarla Verma (Smt.) & ors. Vs DTC & anr. (2009) 6 SCC 121

2. Shri Ram Kushwaha Vs U.P. St. Sugar Corp. Ltd. thru Gen. Mgr. (2015) 2 ADJ 578

3. Raj Kumar Vs Ajay Kumar & anr.. (2011) 1 SCC 343

4. United India Ins. Co. Ltd. Vs Sanjay Dixit (2022) 2 AWC 1596

5. Jagdish Vs Mohan & ors. (2018) 4 SCC 571

6. New India Assr. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC Online SC 822

7. National Ins. Co. Ltd. Vs Pranay Sethi & ors. (2017) 16 SCC 680

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

This appeal by the Insurance Company is directed against the judgment and award of the Motor Accident Claims Tribunal/ Additional District Judge, Court No.1, Banda dated 29.05.2017, allowing Motor Accident Claims Petition No. 39/70/2012. By the impugned judgment and award, a sum of Rs. 10 lakhs has been awarded by the Tribunal for the permanent disability sustained by the claimant-respondent in a motor accident.

2. Heard Mr. S.K. Mehrotra, learned Counsel for the appellant-Insurance Company and Mr. Ram Singh, learned Counsel appearing on behalf of claimant-respondent No.1. No one appears on behalf of the owner-respondent No. 2.

3. The facts giving rise to this appeal are that the claimant-respondent No. 1 (for short, "the claimant') instituted the claim petition before the Tribunal giving rise to this appeal with a case that on 26.09.2011 at about half past five in the evening, he was proceeding on a bicycle from Village Ahila to his village. As soon as the claimant emerged from Village Ahila and moved on to the Banda-Baberu Road reaching the culvert, he met one Ram Kishan son of Basdev, a resident of Village Poon. The claimant stood on the side of the road and the two were talking amongst themselves. Suddenly, a vehicle of Marshal Max Make, bearing registration No. UP-90B/9067, driven by Kalka Prasad @ Kela, rashly, negligently and at a high speed, approached from the Banda end. The vehicle aforesaid struck the claimant, causing him to be severely injured. The claimant's son and Ram Kishan ferried him to the District Hospital for medical aid. He was found to have sustained grievous injuries on his body and lower limbs, for the treatment whereof he was referred by the District Hospital to a higher centre at Kanpur. The claimant was admitted for treatment to the North Star Hospital at Kanpur. The Doctors there advised that one of his lower limbs was absolutely crushed and would have to be amputated in order to save his life. The lower part of his limb

was, therefore, amputated. The claimant urged that he has sustained a loss in the sum of Rs. 10 lakhs, which he sought to recover from the owner of the offending vehicle and the respondent-Insurance Company (for short, "the Insurers').

4. A written statement was filed on behalf of Kalka Prasad son of Bhaiyadeen, who is the driver and the owner of the offending vehicle both. He has denied the assertions in the claim petition generally, but acknowledged that he is the owner of the offending vehicle. It is also accepted that he was driving the vehicle. It is pleaded that the offending vehicle is insured with the Insurers under a policy that was valid from 23.12.2010 to 22.12.2011. The claimant is not entitled to receive any compensation. It is further said that if the Court finds the claimant entitled, it is the Insurers who have to make good the compensation.

5. A separate written statement was filed on behalf of the Insurers. They have generally denied the claimant's case. It is asserted that the accident did not happen on account of the driver of the offending vehicle driving it negligently and at a high speed. It has been pleaded that the claimant has not suffered any permanent disability and is not entitled to claim compensation. It is also the Insurers' case that the amount of Rs. 10 lakhs claimed in compensation is excessive and exorbitant.

6. On the pleadings of parties, the Tribunal framed the following issues (translated into English from Hindi):

"1. Whether on 26.09.2011 at about 5:30 p.m. on the culvert situate at the Banda-Baberu State Highway within the limits of Village Ahila, falling under Police Station Bisanda, District Banda, vehicle Marshal Max, bearing registration No. UP-90B/9067, driven by its driver Kalka Prasad at a high speed and negligently, struck Raghav Sharan, who was standing on the roadside, leading him to sustain grievous injuries?

2. Whether on the date and time of the accident, the driver of vehicle, Kalka Prasad held a valid and effective driving licence and the vehicle had other valid papers available?

3. Whether on the date and time of accident, the vehicle, bearing registration No. UP-90B/9067 was insured with opposite party No. 2, Reliance General Insurance Company Limited and the vehicle was being operated according to the terms of the insurance policy?

4. Whether the claimant is entitled to compensation? If yes, how much and from which of the opposite parties?"

7. The claimant in support of his case examined PW-1, Raghav Sharan, PW-2, Ram Kishan, PW-3, Jawahar Lal Rajput and PW-4 Kamta Prasad. In support of the claimant's case, a number of documents were filed, a summary of which is detailed in the impugned judgment. For the brevity of record, there is no imperative to recapitulate the same. However, the relevant of this evidence shall be referred to during the course of this judgment.

8. The Insurers through a list, paper No. 16 Ga-1 filed the Registration Certificate, paper No. 17-Ga, the Insurance Policy, paper No. 18-Ga and a photostat copy of Kalka Prasad's driving licence, numbered as paper No. 19-Ga.

9. Issues Nos. 1, 2 and 3 were all dealt with together by the Tribunal. All these

issues were answered in favour of the claimants and it was held that the accident was caused by Kalka Prasad driving the offending vehicle at a high speed and negligently. On the date of accident, he had a valid and effective driving licence. Also, the vehicle was validly insured on that date by the Insurers.

10. Issue No. 4 was decided separately by the Tribunal. The Tribunal accepted evidence about the expenditure on the treatment that the claimant incurred, which led the Tribunal to hold that a sum of Rs. 3,46,182/- was spent in the treatment. The Tribunal looked into the disability certificate wherefrom it found certified a permanent disability of 70%. In the absence of documentary evidence, the Tribunal did not find for the claimant that he had, from his dairy business and agriculture, a monthly income of Rs. 30,000/-. Indeed, the Tribunal determined for the claimant a notional income of Rs. 3000/-. Thereafter, the Tribunal has proceeded to hold, rather interestingly, that a man's life is expectedly 100 years. Since the claimant is aged 50, the probability is that he would live for another 25 years. The total income for the remainder of the claimant's life has been determined by multiplying his annual income with a multiplier of "25'.

11. The certified medical disability of 70% has been regarded by the Tribunal as one leading to 75% functional disability, proportionately depriving the claimant of 75% of his income. Out of the total income that the Tribunal has arrived at by adopting the multiplier of "25', 75% has been discounted as lost income, leading to a figure of Rs. 6,75,000/-. This, according to the Tribunal, is the loss of income that the claimant has sustained. To this figure, has been added the sum of Rs.3,46,182/-, spent on medical treatment.

12. A further sum of Rs.2,00,000/- has been awarded towards loss on account of mental agony, particularly caused by the fact that the claimant had lost one of his limbs permanently. At the tail-end of his reasoning, the Tribunal has opined that the total compensation to which the claimant would be entitled, worked out to a figure of Rs. 12,21,182/-, but since the claimant has sought a compensation of Rs. 10,00,000/- alone, that is what he can be held entitled to.

13. Mr. Sushil Kumar Mehrotra, learned Counsel for the Insurers has submitted that the involvement of the offending vehicle in the accident is not proved. To support the said submission, he relies on the fact that the First Information Report regarding the incident was lodged 20 days afterwards. The Investigating Officer submitted a final report. He says that the said fact shows that the offending vehicle was introduced as an afterthought and the FIR lodged after much delay to create evidence in support of the claim.

14. The next submission is that assuming the accident happened the way it is alleged, the site-plan shows that the claimant was talking to an acquaintance, standing on the roadside. It was callous behaviour on his part and he invited the accident himself. Contributory negligence is, therefore, to be apportioned.

15. About the quantum, Mr. Mehrotra submits that the Tribunal has committed grave error to hold that a multiplier of "25' would apply assuming that the claimant would live for another 25 years. He has referred to the judgment of the Supreme Court in **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another, (2009) 6 SCC 121** to urge that

going by the Table set forth in Paragraph No. 40 of the judgment in **Sarla Verma** *(supra)*, the claimant being in the age bracket of 46-50 years, the applicable multiplier would be "13'.

16. It has next been submitted that the compensation worked out on the assumption that the claimant has sustained 75% disability is manifestly illegal, inasmuch as the disability certificate speaks about 70% permanent disability, which cannot be equated for a like figure of functional disability or loss of earning capacity. There is no way that 70% medical disability could translate to 75% functional disability.

17. Mr. Mehrotra in the last submits that going by the settled principles, the compensation awarded in a motor accident claim, should be one that is just and reasonable. It should neither be a pittance nor a bonanza.

18. Mr. Ram Singh, learned Counsel for the claimant, on the other hand, submits that the Tribunal has made a just award and what cannot be ignored is that the claimant has suffered amputation one of his lower limbs. The injury is disabling and permanent. He further submits that it is incorrect to say that the injured sustained the accident on account of his contributory negligence or that the offending vehicle was not involved in the accident. He has pointed out to the oral testimony and the site-plan to submit that there is overwhelming evidence on record to establish the factum of the accident, the involvement of the offending vehicle and the sole negligence of the driver of the offending vehicle with no contribution on the claimant's part.

19. Upon hearing the learned Counsel for parties, the foremost to be determined is the question whether the offending vehicle was involved in the accident and if at all there was any contributory negligence on the injured's part.

20. The scathing attack launched on behalf of the Insurers about the involvement of the offending vehicle in the accident is primarily founded on the belated FIR. A perusal of the FIR shows that the explanation about the delay is to be found in its contents. This Court must remark that the explanation to its face is reasonable and acceptable. The FIR was lodged by submission of a written report to the Superintendent of Police, Banda on 13.10.2011, on the basis whereof after the SP's order dated 14.10.2011, the case was registered on 16.10.2011 and a Check FIR issued. In the written information, after describing the accident and what followed regarding the injured's treatment between the District Hospital, Banda and Kanpur, the informant, who is the claimant's son, has stated that he went to lodge the FIR at Police Station Bisanda, but the Police there did not register it. Accordingly, he was making the report to the SP.

21. It is commonplace that FIRs about accidents are very callously dealt with by the Police, who refuse registration for frivolous reasons. It also needs to be taken note of that no one from amongst the general public dare insist with the Police to register their case for fear of their reputed reprisals. The Police have earned that kind of a reputation amongst the general public that the behaviour that is reflected in this case, including the delay, is absolutely consistent with an honest reporting of the incident at the earliest through safe means. The fact that the Police after investigation

have submitted a final report is no reason to disbelieve the incident, particularly where the final report was duly protested before the Magistrate. The certified copies of the protest etc. are on record.

22. A perusal of the testimony of PW-1, Raghav Sharan indicates that he has supported the incident in all material particulars in his examination-in-chief. In his cross-examination at the instance of the Insurers, the claimant has stated that he saw the truck number as it slowed down. It has been admitted that the claimant knew the owner-driver of the truck and he was the claimant's acquaintance for about 10-15 years. The mere fact that the owner-driver of the truck was known to the claimant is not by itself a circumstance to infer a case of fraudulent introduction of the offending vehicle in the accident caused by an unknown vehicle. There are multiple witnesses, who have testified to the offending vehicle's involvement, which lends assurance to the claimant's case about the identity of the offending vehicle. A close scrutiny of the evidence of the witnesses does not spare a shadow of doubt about the involvement of the offending vehicle and there is no reason to disbelieve it. The site-plan drawn by the Police shows that the offending vehicle, in fact, hit the claimant by straying away from its path, which shows exclusive negligence on the part of the driver of the offending vehicle.

23. This Court is, therefore, inclined to agree with the Tribunal regarding its findings on Issues Nos. 1 and 2.

24. So far as the quantum of compensation is concerned, this Court is inclined to accept the submission of Mr. Mehrotra that the Tribunal committed a manifest error of law in adopting the multiplier of '25'. The choice of the multiplier by settled law is governed according to the principles laid down by the Supreme Court in **Sarla Verma**. Paragraph No. 40 of the judgment in **Sarla Verma** indicates the various multipliers that would be applicable in cases of victims of motor accidents, both fatal and non-fatal. The age brackets have been given and for each such bracket, the proper multiplier to be adopted has been indicated. Going by the Table in Paragraph No.40 of the judgment in **Sarla Verma**, the injured being in the age bracket of 46-50 years, the applicable multiplier would be '13'. It cannot be '25', because that is a multiplier not at all envisaged in **Sarla Verma**. The highest multiplier stipulated in **Sarla Verma** is '18' and nothing more. The multiplier of "18' can be adopted in the case of much younger victims. So much about the proper multiplier to be adopted in this case.

25. So far as the entitlement of the claimant to compensation is concerned, the most crucial issue to be determined is the functional disability arising from the physical disability, medically assessed. The document, on the basis of which the Tribunal has inferred a 75% disability, is the "certificate for persons with disability' issued by the Medical Board in the office of the Chief Medical Officer, Banda. It comprises three Doctors, an Eye Surgeon, an E&T Surgeon and an Orthopedic Surgeon. It is countersigned by the Chief Medical Officer himself. It bears a photograph of the injured. It shows him without his right lower limb. The description of the disability is amputation at right knee and the disability certified is 70% in figures. The certificate has been issued on a printed proforma and this Court must remark that the disability percentage entered in figures is '70%', but in words

placed in brackets it seems to be 75%. The document, no doubt, is a public document within the meaning of Sections 74 and 77 of the Indian Evidence Act. The formal proof of such a document is not required. In this connection, the principle laid down by a Division Bench of this Court in **Shri Ram Kushwaha v. U.P. State Sugar Corporation Ltd. through General Manager, 2015 (2) ADJ 578** is clear. But, in this case, there does not appear to be much quarrel about the genuineness of this certificate; neither before the Tribunal nor before this Court.

26. It must be remarked here that that Jawahar Lal Rajput, Chief Pharmacist, District Hospital, Banda, was examined on behalf of the claimant as PW-3 and he testified to the fact on the basis of records that on 29.09.2011 at 8.40 p.m., the claimant was medically examined at the District Hospital. The medical examination report from the District Hospital, paper No. 70-Ga1 was proved. It was testified that the report bore the signatures of the Emergency Medical Officer, Dr. Vineet Sachan. The witness also said that Dr. Vineet Sachan examined the claimant. This witness also proved the discharge/ referral slip, referring the claimant to a Higher Centre at Kanpur, paper No. 40-Kha. Though, this witness did not specifically prove the disability certificate given the circumstances and the fact that its genuineness has not been disputed, besides the certificate being a public document, it must be held duly proved.

27. The thrust of the issue in this case is not about the validity of the disability certificate. The question is whether the 70% physical disability assessed by the Medical Board translates into 70% or 75% functional disability, as the Tribunal has held. The Tribunal has not at all gone into this issue. It has arithmetically inferred from the percentage of permanent physical disability certified by the Medical Board an equivalent functional disability for the claimant. In fact, the impugned judgment and award passed by the Tribunal does not seem to indicate that the Tribunal was aware about the distinction between medically certified "permanent physical disability' and the percentage "functional disability' arising therefrom. It is of prime importance, because it is the functional disability, which alone is relevant to determine compensation to which the injured is entitled. The law is well settled that the permanent physical disability, medically found, may not translate into the same percentage of functional disability.

28. The determination of functional disability depends upon multiple factors. A three step test in this regard has been held by the Supreme Court to be essential for the Tribunal or Court to apply in order to determine the percentage of the functional disability, arising from a specified percentage of permanent physical disability. The principles to assess the percentage of functional disability suffered by a victim, in consequence of a motor accident have been laid down by the Supreme Court in **Raj Kumar v. Ajay Kumar and another, (2011) 1 SCC 343**. In **Raj Kumar** *(supra)*, it has been held:

"13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of

amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred per cent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of "loss of future earnings", if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.

15. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may."

29. It has also been emphasized in **Raj Kumar** that the Tribunal has to play a proactive or inquisitorial role in ascertaining the percentage of functional disability with reference to whole body. This is necessary in order to determine what just compensation would be. In **Raj Kumar**, it has further been held:

"16. The Tribunal should not be a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular, the extent of permanent disability. Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to "hold an enquiry into the claim" for determining the "just compensation". The Tribunal should therefore take an active role to ascertain the true and correct position so that it can assess the "just compensation". While dealing with personal injury cases, the Tribunal should preferably equip itself with

a medical dictionary and a handbook for evaluation of permanent physical impairment (for example, Manual for Evaluation of Permanent Physical Impairment for Orthopaedic Surgeons, prepared by American Academy of Orthopaedic Surgeons or its Indian equivalent or other authorised texts) for understanding the medical evidence and assessing the physical and functional disability. The Tribunal may also keep in view the First Schedule to the Workmen's Compensation Act, 1923 which gives some indication about the extent of permanent disability in different types of injuries, in the case of workmen.

17. If a doctor giving evidence uses technical medical terms, the Tribunal should instruct him to state in addition, in simple non-medical terms, the nature and the effect of the injury. If a doctor gives evidence about the percentage of permanent disability, the Tribunal has to seek clarification as to whether such percentage of disability is the functional disability with reference to the whole body or whether it is only with reference to a limb. If the percentage of permanent disability is stated with reference to a limb, the Tribunal will have to seek the doctor's opinion as to whether it is possible to deduce the corresponding functional permanent disability with reference to the whole body and, if so, the percentage.

18. The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give "ready to use" disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily give liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or discharge certificate will not be proof of the extent of disability stated therein unless the doctor who treated the claimant or who medically examined and assessed the extent of disability of the claimant, is tendered for cross-examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local hospitals/medical colleges) and refer the claimant to such Medical Board for assessment of the disability.

19. We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that the percentage of loss of earning capacity is the same as the percentage of permanent disability).

(iii) The doctor who treated an injured claimant or who examined him

subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

20. The assessment of loss of future earnings is explained below with reference to the following illustrations:

Illustration A.-- The injured, a workman, was aged 30 years and earning Rs. 3000 per month at the time of accident. As per doctor's evidence, the permanent disability of the limb as a consequence of the injury was 60% and the consequential permanent disability to the person was quantified at 30%. The loss of earning capacity is however assessed by the Tribunal as 15% on the basis of evidence, because the claimant is continued in employment, but in a lower grade. Calculation of compensation will be as follows:

(a) Annual income before the accident : Rs. 36,000
accident

(b) Loss of future earning per annum (15% of the prior annual income) : Rs. 5400

(c)Multiplier applicable with reference to age : 17

(d)Loss of future earnings:
(5400 × 17) : Rs. 91,800

Illustration B.-- The injured was a driver aged 30 years, earning Rs. 3000 per month. His hand is amputated and his permanent disability is assessed at 60%. He was terminated from his job as he could no longer drive. His chances of getting any other employment was bleak and even if he got any job, the salary was likely to be a pittance. The Tribunal therefore assessed his loss of future earning capacity as 75%. Calculation of compensation will be as follows:

(a) Annual income prior to the accident : Rs. 36,000

(b) Loss of future earning per annum (75% of the prior annual income) : Rs. 27,000

(c)Multiplier applicable with reference to age : 17

(d)Loss of future earnings:
(27,000 × 17) : Rs. 4,59,000

Illustration C.-- The injured was aged 25 years and a final year Engineering student. As a result of the accident, he was in coma for two months, his right hand was amputated and vision was affected. The permanent disablement was assessed as 70%. As the injured was incapacitated to pursue his chosen career and as he required the assistance of a servant throughout his life, the loss of future earning capacity was also assessed as 70%. The calculation of compensation will be as follows:

(a) Minimum annual income he would have got if had been employed as an engineer : Rs. 60,000

(b) Loss of future earning per : Rs. 42,000
annum (70% of the expected annual income)

(c)Multiplier applicable (25 years) : 18

(d)Loss of future earnings: (42,000 × 18) : Rs. 7,56,000

[Note.-- The figures adopted in Illustrations (A) and (B) are hypothetical. The figures in Illustration (C) however are based on actuals taken from the decision in Arvind Kumar Mishra [(2010) 10 SCC 254 : (2010) 3 SCC (Cri) 1258 : (2010) 10 Scale 298] .]"

30. This Court is of clear opinion, as already said, that the percentage of physical disability cannot arithmetically translate into an equivalent functional disability.

31. I had occasion to consider this question in **United India Insurance Co. Ltd. vs. Sanjay Dixit, 2022 (2) AWC 1596. In Sanjay Dixit** *(supra)*, it was held:

"10. The crux of the matter is that a particular percentage of physical disability cannot arithmetically translate into an equal measure of functional disability. Functional disability would mean the curtailment of the victim's overall capacity on account of injuries sustained in the accident to pursue his profession, avocation, calling, business or service and the resultant total of the loss of earning capacity. The degree of functional disability for the same measure of permanent disability medically certified may be different for different occupations, jobs or professions. It is not the doctors' opinion about the physical disability per se that would determine the functional disability. It is after ascertaining from the doctor the nature of limitations that would result from the injuries that the Court has to decide, bearing in mind the nature of the occupation, profession etc. of the victim, the degree and extent of loss to his earnings that would ensue..."

32. In this case, the Court finds that the Tribunal has rendered the impugned award without the slightest of consideration about the functional disability arising from the medically certified 70% physical disability. The Tribunal's assessment of the disability as 75% appears to be without basis because the disability certificate that is on record clearly mentions in figures a permanent disability of 70%. It appears that the mention of "seventy five' percent faintly in words have been acted upon by the Tribunal to accept it as a certification of 75% physical disability. Thereafter, of course, the Tribunal has gone completely astray to work out the percentage disability without caring to determine the functional disability resulting from the injury. There is absolutely no assessment done by the Tribunal about the way the permanent physical disability assessed by the Medical Board has affected the claimant's income. The determination of functional disability in this case may require the Tribunal to go into the nature of the physical disability and how it impacts the claimant's capability and physical ability to earn his livelihood by the means that he did. It would require consideration of the impact of the physical disability on the prospects of the claimant in his job, business or profession.

33. This Court does not mean to say that the percentage physical disability found in this case could not produce the same percentage of functional disability,

but then it has to be inquired into by the Tribunal by considering the nature of the claimant's work that he does to earn his livelihood and how that would be affected by the injury. It could turn out to be that the functional disability is an equivalent percentage of the permanent physical disability. It could also turn out to be something entirely different in terms of percentage. It may require some inquiry to be made from one of the Doctors of the Medical Board, who have given the disability certificate. The Doctor's evidence would not be up before the Tribunal for determination of the truth of it or otherwise. It has to be carefully evaluated to determine how the permanent disability, given the nature of the injury, would affect the prospects of the injured in earning his livelihood. Here, the Doctor was never called by the claimant as a witness. The Tribunal also did not think it proper to call the Doctor either. This Court is of opinion that one of the Doctors of the Medical Board, preferably the Orthopedic Surgeon, should be summoned in order to enable the Tribunal to ascertain the precise nature of the claimant's disability and then determine its percentage impact on the claimant's functional disability. In this Court's opinion, one of the Doctors on the Medical Board, is particularly required to be examined, which in any case ought to be done, because the disability certificate is on a printed proforma. It gives information about the disability sustained broadly, and rather, bereft of much individual assessment.

34. This Court before proceeding further in the matter must remark that so far as the award of the Tribunal relating to the medical expenses is concerned, the same is unexceptionable. The sum of Rs. 3,46,182/- that the Tribunal has accepted as the medical expenditure involved for the claimant to secure treatment is found by this Court to be correct and is upheld.

35. The Tribunal has proceeded to determine the loss sustained by the injured on the basis of a notional income of Rs.3000/- per month, discarding the claimant's case of income from agriculture and dairy business in the sum of Rs.30,000/-. Upon a consideration of the entire evidence on record, this Court is in agreement with the Tribunal so far as the monthly income of the claimant is concerned. It is, therefore, held that the claimant's income has to be worked out on that basis before the accident, at the relevant time, without anything added to it. This is not to say that nothing is to be added towards future prospects. The claimant had a monthly income of Rs. 3000/-. This finding of the Tribunal is also affirmed.

36. The applicable multiplier would, of course, be '13' and not the fanciful figure of '25' as held by the Tribunal, already referred to hereinbefore. The Tribunal has awarded a compensation for mental pain and suffering, liquidating it at a figure of Rs. 2,00,000/-. In the opinion of this Court that assessment for the mental pain suffered by the claimant is just and fair, considering that he has lost his right lower limb at the knee.

37. The only fallacy that the Tribunal has committed is not summoning one of the Doctors on the Medical Board and assessing on the parameters provided in Raj Kumar, the percentage functional disability arising from the medically certified permanent disability. It is on that account and for the limited reason alone that this matter must go back to the Tribunal for re-

determination. Apart from that, the other findings of the Tribunal, as indicated hereinabove, are affirmed and whatever has been held to be determinative of the parties' rights in liquidating the compensation by this Court, shall not be re-opened by the Tribunal. This includes the monthly income, the multiplier applicable, the medical expenses awarded and the compensation in the sum of Rs. 2,00,000/- awarded for the mental pain and agony suffered by the claimants.

38. In addition, the various heads, under which the compensation must be worked out, have been comprehensively indicated by their Lordships of the Supreme Court in **Jagdish v. Mohan and others, (2018) 4 SCC 571**. Most of these heads have been taken into account by the Tribunal and pronounced upon for the purpose of compensation and some of the findings of the Tribunal have been affirmed by this Court. Still, Paragraph No. 8 of the report in **Jagdish** *(supra)* would show that the Tribunal, in order to make a just award, may consider any of the heads for award of compensation that have not been considered while passing the impugned award. Above all, what has to be considered by the Tribunal is the award of future prospects, which again fell for consideration in Jagdish.

39. In the State of Uttar Pradesh, bearing in mind the decision of the Supreme Court in **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822,** addition of income towards loss of future prospects has to be determined in accordance with Rule 220-A (3) of the U.P. Motor Vehicles Rules, 1998 (for short, the Rules of 1998) and not according to the scale of future prospects envisaged in **National Insurance Company Limited v. Pranay Sethi and others, (2017) 16 SCC 680.**

40. These are issues which this Court would have determined for itself and passed an award straightaway, but the Tribunal has rendered us handicapped in estimating the functional disability sustained by the claimant.

41. It also deserved to be made explicit that the Tribunal is in no way handicapped in limiting the award of compensation to what the claimant has prayed. It is by now well settled that the Tribunal in awarding compensation should make a just award; and that may well exceed the claimant's demand. The Tribunal shall bear that in mind while passing the award afresh, of course, subject to findings that have been affirmed by this Court and which are not open to determination afresh.

42. In the result, this appeal **succeeds** and stands **allowed in part.** The impugned award is **set aside**, with a remand of the claim petition to the Tribunal, now competent to hear it. The Tribunal shall hear and decide the claim petition afresh in accordance with the remarks in this judgment and on issues alone that are made over to it for determination. The findings and issues that have been affirmed by this Court shall not be re-opened. The necessary evidence shall be examined by the Tribunal, in particular, summoning and examining one of the Doctors on the Medical Board, who have issued the disability certificate to the claimant, for the purpose of passing an award that determines just compensation. The sum of money already paid to the claimant under the Tribunal's award, since set aside, in terms of this judgment, shall not be

recovered from the claimant and abide by the final determination to be made about the claim. Any part of the compensation held in deposit with the Tribunal or a Bank under interim orders passed in this case shall, however, be refunded to the appellant. The Tribunal shall proceed to decide the claim petition afresh within three months of receipt of a copy of this judgment, after hearing parties, that is to say, the Insurance Company and the claimant, bearing in mind the directions in this judgment. Both the parties shall appear before the Presiding Officer, Motor Accident Claims Tribunal, Banda on **30.01.2023.**

43. Let a copy of this order be communicated to the Presiding Officer, Motor Accident Claims Tribunal, Banda by the Registrar (Compliance) forthwith.

(2023) 2 ILRA 598
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 3796 of 2005

Devendra Bahadur Singh ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Pradeep Kumar

Counsel for the Respondent:
C.S.C.

A. Civil Law – Indian Stamp Act, 1899 – Sections 47-A & 56 – GOs. dated 31.05.2001, 30.06.2001 and 01.07.2004 – Sale-deed executed after auction proceeding – Relaxation in stamp duty – GOs provide that the stamp duty would be paid on the actual consideration amount, which has been accepted by the U.P.F.C in auction proceedings – Junked cold storage was purchased in the auction on the basis of highest bid – Assessment of value of land of cold storage – Stamp deficiency imposed on the basis of actual price – Penalty also imposed – Validity challenged – Held, the stamp duty would be payable on the auctioned value and rest market value excluding the market value. (Para 20, 24 and 27)

Writ petition disposed of. (E-1)

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

1. Heard Sri Pradeep Kumar, learned counsel for the petitioner, Sri Satish Mohan Tiwari, learned Standing Counsel for the State and perused the material available on record.

2. This writ petition has been filed by the petitioner to issue a writ order or direction in the nature of certiorari quashing the impugned order dated 20.07.2004, passed by the Collector, Etawah and order dated 27.12.2004 passed by Revisional Court (C.C.R.A).

3. In brief facts of the case are that the U.P.F.C under Section 29 of the U.P. Financial Corporation Act 29 of the State Financial Corporation Act has taken the possession of one Cold Storage situated in Village Lakhana known as Durga Cold Storage in recovery action of its loan. It was lying for about decay in the custody of U.P. Financial Corporation and it has come almost in the junked shape when the advertisement has been made by U.P. F.C to sell it in the year 2002.

4. The petitioner's highest bid was accepted for the sale of Cold Storage by the

U.P.F.C on a sum of Rs.15,00,000/- (fifteen lacs), which has been registered later on before the Sub Registrar Bharthana, District Etawah on 14.06.2002.

5. The Collector, Etawah has issued the notice and impounded the sale-deed on the ground that the sale consideration amount is less to the actual price etc. The petitioner submitted the reply to the Collector, Etawah against the notice issued under Section 47-A of Indian Stamp Act, which was registered as Case No. 04 of 2003-04 - (*State Vs. Devendra Bahadur Singh*). The petitioner in his objection has categorically stated that the sale consideration amount, which has been paid by him, was the actual price of the dilapidated Cold Storage Building, where there was no plant and machinery and it was not in working condition. The offer was made by the petitioner on the advertisement issued by the U.P.F.C and the highest offer of the petitioner was accepted by the U.P.F.C for a sum of Rs. 15,00,000/- on which the stamp duty was paid by the petitioner. The Principal Secretary has issued the departmental order dated 26.11.2001. The amount is the actual market value of the property, no less stamp has been paid by the petitioner. The said order passed by the Principal Secretary is appended as Annexure No. 1.

6. Earlier the State Government had issued an order 31.05.2001, whereby the State Government had taken the decision that if any corporation has sold the attached property then the consideration amount, which has been paid, be treated to be the actual consideration amount and the registration shall be made on the sale consideration amount. The said G.O has been appended as Annexure No. 2.

7. The State Government has again issued direction on 30th June, 2001, which is appended as Annexure No. 3. Recently on 01.07.2004, the State Government has again issued a notification under Section 9 (1) (A) of the Act that transfer to be made on the consideration amount offered for any auction proceeding, which is appended as Annexure No. 4. (In this G.O. for the first time the U.P.F.C has been included with other corporations).

8. The Collector, Etawah has illegally passed an order dated 20.07.2004 whereby he assessed the value of the land of the cold storage as Rs. 53,86,500.00/- of 7695 square meters land and the value of plant, machinery and premises has calculated Rs.15,00,000/- on which Rs.5,50,960 was calculated as a deficient stamp duty. The paid amount of Rs.1,20,000/- has been reduced and he determined Rs. 4,30,960.00/- as balance stamp duty alongwith the imposed penalty of Rs.1,75,040.00, which is appended as Annexure No. 5.

9. Feeling aggrieved, the petitioner preferred a revision under Section 56 (I) of Indian Stamp Act before the Chief Controller Revenue Authority U.P. at Allahabad-cum-Board of Revenue. The said revision has been marked as Revision No. 35 of 2004-05- Etawah (Devendra Bahadur Singh Vs. State of U.P.), which is appended as Annexure No. 6.

10. The petitioner has specifically taken the ground that he purchased the junked cold storage, which was in the custody of U.P. Financial Corporation about in a decayed condition and he offered the highest price in the auction for a sum of Rs. 15,00,000/- which was accepted by the U.P.F.C. The sale-deed has been executed

in his favour, the petitioner did not make any concealment of fact, the sale-deed has been accepted without any objection, therefore the imposition of stamp duty and penalty under Section 47-A of the Act is illegal. The Revisional Court, after hearing the matter, has dismissed the revision vide its judgment and order dated 27.12.2004 mainly on the ground that the petitioner is not entitled to get any benefit of Government Order dated 01.07.2004 on the ground that prior to that the U.P. Financial Corporation was not included in the list of exempted Departments, he did not consider the matter on other aspects and he passed an erroneous order and bad in law. The impugned order of the Revisional Court dated 27.12.2004 is appended as Annexure No. 07 to this writ petition.

11. The authorities below have committed manifest error in deciding the dispute and they have wrongly imposed stamp duty sum of Rs. 4,30,960.00/- as well as penalty of Rs. 1,75,040.00/- without any basis. The State Government has given exemption to the property auctioned by the U.P.F.C.

12. The Government Orders and Departmental orders, which have been issued from time to time, have categorically stated that the stamp duty would be paid on the actual consideration amount, which has been accepted by the U.P.F.C in auction proceedings. Therefore, the order is perverse and is liable to be set-aside. In the orders cogent findings have not been recorded and neither the circle rate has been determined by the Collector, Etawah nor report of the Tehsildar, that the price of the property in question was not less than Rs. 15,00,000/-. On this aspect, the Collector, Etawah and Revenue Authorities have

13. On the aforesaid ground, the petitioner has prayed to quash the aforesaid impugned orders.

14. The respondents have filed counter affidavit on 09.05.2005 alleging that it is true that the petitioner had purchased a cold storage alongwith the building and machinery standing thereon and the deed was registered on 14.06.2002, but the proper stamp duty was not paid by the petitioner in accordance with circle rate floated by the Collector and also on the valuation of the property, building standing thereon, therefore notices were issued to the petitioner.

15. The petitioner filed an objection and has claimed for exemption of the stamp duty in accordance with the Government Order dated 31st may, 2021, which has already been cancelled by the subsequent G.O. dated 23.06.2021, thereafter on 26.11.2021 the State Government has further issued Government Order providing therein that no exemption can be granted on the deeds, which are being executed by the U.P. State Financial Corporation. This fact has been further clarified *vide* Government Order dated 07.12.2002. It is clarified that the G.O, which is annexed as Annexure No. 3 to the writ petition was issued on 23rd June, 2001 and not on 30.06.2001 as referred by the petitioner in para no. 07 in the writ petition.

16. The Government Order issued on 01st July, 2004 has no retrospective application because the exemption granted by the G.O. dated 01.07.2004 can not be applied retrospectively to the sale deed which was executed on 14th June, 2002, because at the time of presentation of sale-deed by the U.P.F.C no such exemption was available to the petitioner.

17. The order passed by the Collector on 20th July, 2004 was passed after affording full opportunity to the petitioner after taking into account the objection of the petitioner. The order dated 20th July, 2004 is self explanatory wherein it is directed that the Collector has taken a very appropriate steps by not imposing the deficiency of stamp duty at commercial rate and as the property situated in village area therefore residential rate has been taken into account by the Collector in order to determine the correct value of the property. The Collector has applied right formula and has taken into account the rate floated by him in exercise of power conferred under the provisions of U.P. Stamp (Valuation of Property) Rules, 1997 and very concurrent findings of facts have been recorded that the total valuation comes to the tune of Rs. 53,86,500/- and the building and cold storage standing therein has been further valued to the tune of Rs.1,50,000/- and thus the total valuation has been arrived to the tune of Rs. 68,86,500/- and on the aforesaid amount the total stamp duty was payable to the tune of Rs. 5,50,960/-, but the petitioner deliberately and knowingly only in order to evade, the stamp duty has paid to the tune of Rs.1,20,000/- and thus deficiency of stamp duty has rightly been charged to the tune of Rs.4,30,960/-. The order passed by the Collector dated 20th July, 2004 is self explanatory. However, the Naib Tehsildar has submitted the report on 23.10.2002 that the property in question was commercial one.

18. The grounds taken in the writ petition are totally misconceived. The C.C.R.A has rightly affirmed and confirmed the order passed by the Collector taking into account the situation of the cold storage and its building, potentiality and machinery plant standing thereon. Since in the G.O. dated 26.11.2001 and 07.12.2002, the exemption claimed by the petitioner is not available to him, therefore, the authorities have rightly not granted any benefit of exemption to the petitioner. Two authorities have recorded concurrent finding of fact, therefore the writ petition is totally misconceived and is liable to be dismissed.

19. The petitioner has filed rejoinder affidavit on 19th January, 2006 and has denied the averments of the counter affidavit and has alleged that the dilapidated condition of the building of cold storage and non-functional machinery laying inside the building was purchased by the petitioner from U.P.F.C in auction/ negotiation and the U.P.F.C has executed the sale-deed, which was registered on 14.06.2002.

It is wrong to say that the G.O. dated 01st July, 2004 is not applicable in present controversy. The previous G.O. dated 31.05.2001 was also issue to provide relaxation in stamp duty to the purchaser, if any unit would be purchased from U.P.F.C and the Stamp Duty would be paid on actual consideration amount in light of the said G.O. dated 31.01.2001 and 23.5.2001, the subsequent G.O. dated 01st July, 2004 has again being issued by the State Government.

20. The order dated 20th July, 2004 passed by the Collector is wholly illegal and it has been passed without considering the complete facts and circumstances of the case and he has wrongly assessed the value of the land building and junked machinery much more to the price on which the petitioner has purchased the cold storage. The amount of tenancy and penalty imposed by the respondent is wholly arbitrary manner. The

cold storage is situated out side the urban area in front of agriculture land. The building was almost in a junked condition and as per report of the In-Charge Tehsildar dated 23.10.2002, it is proved that the cold storage was damaged by fire in the month of February, 2002. The fire brigade unit came there for rescue. Both the authorities have not considered this facts of the case and has wrongly assessed the valuation. Therefore, the order dated 20th July, 2004 and 27.12.2004 are patiently illegal and liable to be quashed. The conditional order dated 28th January, 2005 has been complied with by the petitioner and he has deposited the amount of Rs.43,000/- in compliance of the order passed by this Hon'ble Court on 28th January, 2015, therefore, the petition be allowed and the impugned orders be quashed.

21. The findings of this case are as under:

22. In the sale-deed the consideration amount was Rs.15,00,000/-. The cold storage was ceased by the U.P.F.C in recovery proceedings under Section 29. It is incorrect to say that the said value was not paid by the petitioner. The circle rate was assessed by the respondent in access and the Sub Registrar, referred the matter to the Stamp Authority, where the petitioner filed an objection. The G.O. applicable was produced in support of the case and it was said that the respondents authorities have illegally decided the petition ignoring the Government Order and the facts of the case.

23. The penalty was also illegally imposed as Rs. 1,75,040.00/-, the revision was also dismissed by the C.C.R.A.

24. In this case the property in question was purchased by the petitioner from the U.P.F.C on the basis of highest bid on 04.06.2002, which was registered before the Sub Registrar, Bharthana, District Etawah. Before the said date following G.Os were issued in respect of payment of stamp duty, which are as under:

1. G.O dated 31.05.2001,

2. G.O. dated 23.06.2001, by which the Government order dated 31.05.2001 was repealed.

25. On 26.11.2001, a D.O. letter was issued by Sri T. George Jokhan, I.A.S, Member Secretary (Tax & Registration Department), U.P. Government, Lucknow, to consider U.P.F.C also in view of the letter dated 08th November, 2001 sent by Additional Secretary, Board of Revenue, Allahabad for issuance of circular.

26. On 01st July, 2004, a Government Notification was issued specially in respect of U.P. Finance Corporation that, in case, any occasion is held and any instruction is executed between the bidders and U.P.F.C, the stamp duty would be payable in accordance with schedule 1-B of Article 23 Clause "A of U.P.F.C Act, 1951 and the stamp duty would be payable on the auctioned value and rest market value excluding the market value.

27. Learned counsel for the petitioner contends that the benefits of ordinance dated 01st July, 2004, was available to the petitioner. Contrary to that arguments of the respondents is that since the auction and registration of the deed had taken place since before the issuance of date of ordinance and at the tine of auction and execution of sale deed, the U.P.F.C was not given privilege, therefore, the benefits provided by the ordinance dated 01st July,

2004 was not available to the petitioner. On 04.06.2002 only the G.O. dated 30th June, 2001, was available, by which the notification dated 31st May, 2001 was repealed. The learned counsel for the petitioner could not place any law, which provides the benefits of ordinance dated 01st July, 2004 to the petitioner. In this ordinance it is no where mentioned that it has any retrospective effect, therefore though the auction had been finalised between the petitioner and U.P.F.C for a sum of Rs.15,00,000/-(fifteen lac) even then the stamp duty was payable on the circle rate as per the Article 23 (a) Schedule 1 (B) of the Indian Stamp Act.

28. From the perusal of the impugned orders, it is very much clear that since the property in question was situated in a rural area, therefore the Collector ought not have been valued the property at commercial rate. Since the property in question was in the rural area out side the Town Bakewar, therefore he assessed the property in question at the rate of Rs.7,00/- per square meter and multiplied the area into Rs.700/- i.e. 7,695x700, and he came to the conclusion that the valuation of land is Rs.53, 86, 500/-.

29. Contrary to that no evidence could be placed by the petitioner at the time of auction and execution proceeding of sale-deed, the rate of land of the cold storage was less than Rs.7,00/- per square meter.

30. So far as the valuation of cold storage building, plant and machinery are concerned, it is apparent on the face of record that the learned Collector estimated it at Rs.15,00,000/- without any basis and in an imaginary way. The price of cold storage and building plant and machinery should have been valued properly, considering the condition and also after deducting the depreciation value.

31. Thus, it is found that so far as the value of the cold storage building, plant and machinery are concerned, the Collector and C.C.R.A have not properly appreciated the evidence and in imaginary way, they fixed the price of the same as Rs.15,00,000/- and adding this amount of Rs.15,00,000/- in the amount of Rs.53, 86, 500/- have fixed the stamp duty and the penalty treating short fall of stamp duty.

32. On the basis of the aforesaid discussions, this Court is of the considered view that so far as the valuation of the cold storage building and machinery is concerned, the same is not properly valued, therefore, the order of Collector and the C.C.R.A are bad in the eyes of law in the facts of the case. Therefore, the case is liable to be remanded back to the District Magistrate, Etawah, for a fresh decision particularly regarding the valuation of the building of the cold storage, plant and machinery in accordance with law.

O R D E R

33. With the aforesaid observation, the writ petition is accordingly partly allowed and the Collector, Etawah, is directed to value the case properly afresh. For this, the Collector may also take help of P.W.D Department, regarding correct assessment of the plant machinery and building of the cold storage. It is directed that the Collector, Etawah shall decide the case after affording full opportunity of hearing to the petitioner within a period of six months from the date of production/receiving certified copy of this order.

34. A copy of this order be also sent to the Collector, Etawah, for compliance through the Registrar (Compliance).

35. The writ petition is accordingly **disposed of**.

(2023) 2 ILRA 604
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.05.2022

BEFORE

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

Writ-C No. 12112 of 2022

Heera Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gautam Kumar

Counsel for the Respondents:
Sri Ajay Prakash Paul, State Law Officer, Ms. Ishita Sand, Ms. Anjali Upadhya

Constitution of India, Art. 226 - Mandamus - Uttar Pradesh Urban Planning and Development Act, 1973 - Section 17 - restoration of the land - *Held* - there is no automatic lapse of acquisition u/s 17 - proviso to S. 17(1) of the Act gives a right to an ousted land holder to apply to the State Government for restoration of land, if it remains unutilized by a Development Authority after expiration of a period of five years from the date of acquisition - right is to apply for restoration and not to any kind of an automatic restoration that the Court may enforce - It is for the Government to decide, if a person applies for the enforcement of his rights under Section 17(1), which the Government may grant or refuse - Even if the Government does consider it to be a case for the restoration of land to the original land holder, it is subject to repayment of charges incurred in connection with acquisition, together with interest at the rate of 12% per annum, besides development charges, if any, as have been incurred - no mandamus can be issued to the Government or the Greater NOIDA by the mere lapse of a time period of five years after acquisition, during which the land has not been utilized (Para 6)

Dismissed. (E-5)

List of Cases cited:

Shyoraj Singh & anr. Vs St. of U.P. & ors. (2022) 1 All LJ 546

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

1. Heard learned counsel for parties.

2. It appears that the petitioner has brought this petition, seeking to redeem his land bearing Khasra No. 375, admeasuring 3240/2 square meters, situate at Village Dabra, Pargana and Tehsil Dadri, District Gautam Buddh Nagar, which has been acquired by the State under the Land Acquisition Act, 1894 (*for short 'the Act of 1894*') for the purpose of planned industrial development by the Greater New Okhla Industrial Development Authority (*hereinafter referred to as 'Greater NOIDA'*). The aforesaid land shall hereinafter referred to as 'the land in dispute'.

3. It appears that the land in dispute was acquired through a notification dated October 31, 2005 under Section 4/17 of the Act of 1894 followed by a declaration dated September 1, 2006 under Section 6/17 of the Act. A perusal of the khatauni for the years 1409-1414, that correspond to the calendar years 2001-2006, shows that in compliance with the order of the Additional District Magistrate (Land Acquisition) Greater NOIDA, the name of the ousted

land holder, Heera Singh, the petitioner has been mutated out and that of Greater NOIDA recorded. Apparently, the possession of the land in dispute has been taken and it is acquired land of the public authority. The petitioner, somehow, has continued in possession of the acquired land as a downright encroacher and some dilapidated structure is standing on a part of the land. For reasons best known to the Authorities of the Greater NOIDA, a report at the instance of the petitioner has been put in by the Greater NOIDA functionaries that a 24-meter wide road for the industrial development of Tech Zone-2 be shifted away from Plot No. 6365, where it is planned. The reason assigned in the report dated July 6, 2016 is that a part of the said land falls in the green belt and on some part of it, two rooms and a verandah belonging to the land holder are in existence. Besides those structures, there are some trees and the land holder has not taken compensation for the land.

4. Learned counsel for the petitioner virtually wants this Court to enforce the internal report dated July 6, 2016 submitted by some nondescript functionaries of the Greater NOIDA, so that he may continue in his illegal occupation of the acquired land of the said Authority. In the opinion of this Court, the petitioner cannot rid himself of a concluded acquisition by acts such as continued illegal occupation of the acquired land, which is downright encroachment of public land or by refraining from taking his due compensation pursuant to the award made for the acquisition. The land in dispute stands vested in the Greater NOIDA, free from all encumbrance. The first relief claimed by the petitioner is, therefore, clearly without merit.

5. The other part of the relief seeks a direction to the respondents to return the land in dispute, in view of Section 17 of the Uttar Pradesh Urban Planning and Development Act, 1973 *(for short 'the Act of 1973'*). Section 17 of the Act of 1973 reads :

"17. Compulsory acquisition of land.- (1) If in the opinion of the State Government any land is required for the purpose of development or for any other purpose, under this Act, the State Government may acquire such land under the Provisions of the Land Acquisition Act,1894 : Provided that, any person from whom any land is so acquired may after the expiration of a period of five years room the date of such acquisition apply to the State Government for restoration of that land to him on the ground that the land has not been utilized within the period for the purpose for which it was acquired, and if the State Government is satisfied to that effect, it shall order restoration of the land to him on re-payment of the charges which were incurred in connection with the acquisition together with interest at the rate of twelve per cent per annum and such development charges as if any may have been incurred after acquisition. (2) Where any land has been acquired by the State Government, that Government may, after it has taken possession of the land, transfer the land to the Authority or any local authority for the purpose, for which the land has been acquired on payment by Authority or the local Authority of the compensation awarded under that Act and of the charges incurred by the Government in connection with the acquisition."

6. Looking to the provisions of Section 17 of the Act of 1973, it is apparent that there is no automatic lapse of acquisition under Section 17. The proviso to Section 17(1) of the Act gives a right to

an ousted land holder to apply to the State Government for restoration of land, if it remains unutilized by a Development Authority after expiration of a period of five years from the date of acquisition. The right is to apply for restoration and not to any kind of an automatic restoration that the Court may enforce. It is for the Government to decide if a person applies for the enforcement of his rights under Section 17(1), which the Government may grant or refuse. Even if the Government does consider it to be a case for the restoration of land to the original land holder, it is subject to repayment of charges incurred in connection with acquisition, together with interest at the rate of 12% per annum, besides development charges, if any, as have been incurred. The provision, therefore, leaves no manner of doubt that no mandamus can be issued to the Government or the Greater NOIDA by the mere lapse of a time period of five years after acquisition, during which the land has not been utilized. Here, the petitioner has not pleaded a case that they have applied to the State Government to seek restoration of the land in dispute on the ground that it has remained unutilized for a period of five years or more from the date of acquisition. Therefore, no right under the proviso to Section 17(1) of the Act of 1973 is crystallized in the petitioner's favour. That apart, the land here has been earmarked for the construction of a 24-meter wide road, part of a scheme for industrial development known as Tech Zone-2 by the Greater NOIDA. The fact that some officials of the Greater NOIDA have proposed shifting something as important as a 24-meter road to another site, does not mean that the land is unutilized. Big projects take a long time to complete and the fact that a particular part of the project has not been constructed upon until after lapse of five years does not mean that the land is unutilized by the Development Authority, within the meaning of proviso to Section 17(1) of the Act of 1973. It is only that physical development, part of a big planned development, has not actually reached a particular place.

7. Similar question fell for consideration before a Division Bench of this Court in **Shyoraj Singh and another v. State of U.P. and others, (2022) 1 All LJ 546,** where it was held :

"16 As far as the argument raised by learned counsel for the petitioners for invoking Section 17 of the 1973 Act is concerned, the same is to be noticed and rejected. A perusal of Section 17 of the 1973 Act shows that in case the acquired land is not utilized for a period of five years from the date of its acquisition, the land owner can apply to the State for restoration thereof. If the State Government is satisfied that the land had not been utilized for a period of five years for the purpose it was acquired, it can order restoration thereof to the landowners on re-payment of the amount incurred for acquisition along with interest thereon including the development charges, if any.

17.In the case in hand, the definite stand of the State on the record is that immediately after acquisition of the land, which was for development of an industrial estate by the Corporation, the possession thereof was taken and handed over to the Corporation which had even carved out the plots thereon and industrial estate stood developed. Number of industrial units are operating. A perusal of notice dated August 10, 2021, issued to the petitioners for removal of the unauthorized construction also establishes this fact. It is

mentioned therein that the plot on which the petitioners had raised unauthorized construction is part of plot allotted to Smt. Amarjeet Kaur way back on September 28, 2007, hence the claim that petitioners are entitled to invoke Section 17 of the 1973 Act for restoration of the land to them on the ground that the same has not been utilized is totally misconceived and hence, deserves to be rejected."

8. The handing over of acquired land to the Development Authority for a planned project, as big as a technical zone, including the land in dispute, does not mean that the land is unutilized because of delays in the project implementation or priorities.

9. In this view of the matter, no case for interference is made out.

10. In the result, this petition fails and is dismissed.

11.There shall be no order as to costs.

(2023) 2 ILRA 607
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 20121 of 2000

Sri Purushottam Agarwal & Anr.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Madhav Jain

Counsel for the Respondents:
C.S.C.

A. The Indian Stamp Act, 1889 - Section 47-A (1) - Under-Valuation of the instrument - U.P. Stamp Rules, 1942, Rule 341 (iii) (a)- minimum market value of immovable property - According to Rule 341 (iii) (a) of 1942 Rules, where the building is assessed to house tax by the municipal board and it is occupied by the owner or is wholly or partly, let out to the tenant, then 25 times the actual or assessed annual rental value, whichever is higher, would be considered for payment of stamp duty - in the year 1997, the U.P. Stamp Rule 1942 were repealed (Para 16)

B. U.P. Stamp Rules, 1942 - Rule 341 (iii) (a)- Property in question was purchased on 17.04.1993 & the stamp duty was payable in accordance with the provisions of Rule 341 (iii) (a) of U.P. Stamp Rule, 1942 - Property in question was a building & was assessed for the purposes of House Water etc - Nagar Palika assessed Rs. 3,600/- to be the annual rental value of the property in question - On multiplying Rs.3,600/- into 25 times, the value of the property becomes Rs. 90,000 - petitioner purchased the property for Rs. 1,43,005 and on that amount, he paid the stamp duty which was more than the market value computed in accordance with the Rule 341 (iii) (a) - Sub Registrar imaginarily opined that the rent of the room in question would not be less than Rs.2,500/- per month - learned court below assuming the rental value Rs.2,500/- per month calculated that there is deficiency in payment of stamp duty and also imposed the penalty - For determining the rate of rent to be Rs.2,500/- the learned Sub Registrar did not collect any DATA from the nearby shop or vicinity - Impugned orders quashed - respondents directed to refund the recovered amount to the petitioners alongwith the interest at the rate of six percent per annum (Para 31)

Allowed. (E-5)

List of Cases cited:

1. Vijay Kumar & Surendra Kumar Both sons of Shri Daulat Ram Vs Commissioner, Meerut Division & Additional District Magistrate (Finance and Revenue) MANU/0682/2008

2. Mahabir Prasad Vs Collector, Cuttack [1987] 2 SCR 289

3. Ram Khelawan @ Bachchan Vs St. of U.P. through Collector, Hairpur & anr. 2005 (98) RD 511

4. Prakashwati Vs Chief Controlling Revenue Authority Board of Revenue, Allahabad 1996 (87) R.D 419

5. Collector of Nilgiris at Ootacamund Vs Mahavir Plantations Pvt. Ltd. MANU/TN/0285/1982

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

1. Heard Sri Madhav Jain, learned counsel for the petitioners and Sri Jitendra Narayan Singh, learned Additional Chief Standing Counsel for the State respondents.

2. This writ petition has been filed to quash the order dated 19.06.1999 passed by Additional District Magistrate (Finance & Revenue), Agra and order dated 11.01.2000 passed by the Commissioner, Agra Division, Agra, whereby both the authorities in relation to assignment dated 17th April, 1993, regarding unexpired lessee rights in the land with constructed con-structure assigned in favour of the petitioners for a sum of Rs.1,43,005/- concluded the deficiency of stamp duty.

3. In brief the facts of the case are that the Society known as Alok Sahkari Grah Nirman Samiti Ltd., Agra, has acquired lease hold rights for a period of eighty years from the Agra Development Authority, Agra in land of Block No. 34 at Sanjay Place, Agra, by means of registered lease deed dated 16.06.1980 and executed an agreement deed of lease on 17.04.1993 (Annexure No.1). The Sub Registrar, Agra exercised power under Section 33, 47-A (A) & (4) of the Stamp Act for realization of Stamp Duty by means of reference (Annexure No.2), which is patiently illegal and without jurisdiction.

4. In pursuance of the reference, Stamp Case No. 1255 of 1995-96 was registered and the notices were served upon the petitioners, who filed objection (Annexure No. 3) to the writ petition in support of the reference, no reference was laid on behalf of the respondents, however, the respondent no. 3 vide its judgment and order dated 19.06.1999 (Annexure no. 4), imposed Rs.96,540/- towards deficiency of stamp duty.

5. The petitioners challenged its validity by means of Stamp Revision No. 30 of 1999-2000 on 22.09.1999. In-spite of pendency of revision, the officials of respondent no. 1 recovered the amount under threat of coercive action quite illegally without affording opportunity to obtain interim orders. Respondent no. 1 is bound to return to the petitioner's such amount with interest @ 18 per cent per annum. The revisional court vide its order dated 11th January, 2000 (Annexure-05) to this writ petition, the revision is not maintainable.

6. Both the authorities below have failed to exercise its mined and have failed to consider the legality of the proceedings as the assignment-deed is not chargeable with stamp duty on it's market value under Section 47-A of the Stamp Act. The respondent nos. 2 and 3 failed to consider

that land underneath the construction was possessed by the Society under a lease agreement from the Agra Development Authority, Agra and the Society assigned unexpired lease right in respect of the land together with constructions after charging the lease area premium and costs of constructions, under this circumstances the respondent nos. 2 and 3 ought to have drop the proceeding, but instead of doing so acted illegally while imposing deficiency of Stamp Duty against the petitioners. The determining the deficiency of Stamp Duty is absolutely uncalled for and is applicable as it is not supported by any evidence to establish that the rate of rent assumed by them.

7. The respondents have failed to consider that the petitioner's acquired limited rights to enjoy its usufruct and also failed to consider that the property in question fetch rent @ 2,500/- per month. The respondent no. 2 committed error apparent on the face of record while dismissing the revision on the ground of its being not maintainable. The respondents have acted illegally while treating the transaction as the transaction of sale of the building without considering that the Society from which the petitioners have got it's right assigned, was not having any saleable interest in the land and in so far as the value of construction is concerned there was no dispute raised from the side of the respondents. The petitioners having no other alternative remedy, have filed this writ petition. The aforesaid annexures have been annexed with the writ petition.

8. The respondents have filed counter affidavit on 13th January, 2004 and have denied the allegations of the writ petition and have admitted that the said land was acquired for lease for eighty years. The action was initiated as per the provisions of Stamp Act. The respondents have imposed deficit stamp duty with penalty as the petitioners had intentionally evaded the duty. The R.C is served upon the petitioners as per the procedure laid down in the Stamp Act. The market value of the property in question is assessed as per the procedure of Stamp Act. The property was for the use as commercial purposes . The land and shops are also in the lease-deed. Only the land was given on lease not the shops constructed for the purposes of commercial use, hence the market value can be assessed as present basis.

9. Article 226 of the Constitution of India shall not apply to this case, hence the present writ petition is dismissed.

10. The petitioners have filed rejoinder affidavit alongwith application no. 86990 of 2008 and have denied the averments of counter affidavit and have reiterated the facts already enumerated in the writ petition and have said that on 17.04.1993 at the time of execution of said deed, the area was not developed and even the necessary facilities such as electricity, water, sever etc. were not available at the site of building. No basis for the assumed rental value of the building has been assigned by the Collector, Agra. The market value of the property assessed by the Collector is contrary to the report of the Sub Registrar. Neither the report of the Sub-Registrar recites the market value of the property nor it mentions the rental value either assessed, assumed or actual. No basis has been assigned by the respondents to support the assumed rental value of the property. The assumed rental value on the face of it is highly excessive and does not correspond to the rental value of the property on the date of its purposes. Any

change in the nature, value or use of the property subsequent to the date of its purchase is absolute irrelevant but the authorities concerned have influenced its judgment by taking into consideration the development subsequent to purchase of building by the petitioners. Since the predecessor of the petitioners possessed lessee rights in the underneath the construction of the building, the transfer of the said right cannot be valued at the higher rate, so far as the value of the construction of building is concerned. The petitioners have paid the stamp duty on the basis of costs of construction together with unexpired lessee rights. The value of building assessed by the respondents is without any evidence and basis, the impugned judgment and orders are patiently illegal and perverse, contrary to the facts and are liable to be set aside.

11. Heard and perused the file.

12. The provision of the Rule 341 provides the method for computation of the market value of a property for the purpose and determination of the stamp duty of an instrument.

13. Rule 341 is as under:-

For the purposes of payment of stamp duty, the minimum market value of immovable property forming the subject of an instrument of conveyance, exchange, gift, settlement, award or trust, referred to in Section 47-A (1) of the Act, shall be deemed to be not less than that as arrived on the basis of the multiples given below:-

(i) Where the subject is land:-

(a) in case of Bhumidari-800 times the land revenue.

(b) in case of Sirdari land-400 times the land revenue.

(c) where the land is not assessed to revenue but net profits have arisen from it during the three years immediately preceding the date of the instruments 25 times the annual average of such profits.

(d) where the land is not assessed to revenue and no profits have arisen from it during the three years immediately preceding the date of the instrument 400 times the assumed annual rent.

(e) where the land is non-agricultural and is situate within the limits of any local body referred to in clause (c) of sub-rule (i) of rule 340-equal to the value worked out on the basis of the average price per square meter, prevailing in the locality on the date of the instrument.

(ii) where the subject is grove or garden:

(a) If assessed to revenue the value of the land shall be worked out in the manner laid down in rule 341 (i) (a) and the value of the trees standing thereon shall be worked out according to the average price of the trees of the same size, and age prevailing in the locality on the date of the instruments.

(b) If not assessed to revenue or is exempted from it the value there of shall be determined at 20 times the annual rent plus the premium or 20 times of the annual average of income which has arisen during the three years immediately preceding the date of instrument and the value of the trees thereon shall be

determined in accordance with rule 341 (ii) (a)

(iii) Where the subject is Building:

(a) Where the building is assessed to house tax and is occupied by the owner or is wholly or partly let out to tenants-25 times the actual or assessed annual rental value, whichever is higher as the case may be.

(b) Where the building is not assessed to house tax and is occupied by the owner or is wholly or partly let out to tenants-25 times the actual or assumed annual rental value, whichever is higher as the case may be.

14. It is noteworthy that in the year 1997, the U.P. Stamp Rule 1942 were repealed. Since it is a matter of 1993 and the property in question was purchased on 17.04.1993, therefore the stamp duty would be payable in accordance with the provisions of U.P. Stamp Rule, 1942.

15. It is undisputed that the property in question is a building which has been assessed for the purposes of House Water and other related municipal taxes, therefore, the provisions of Rule 341 (iii) (b) are applicable to the property in question.

16. The aforesaid provisions provide that if the market value of the property has been assessed by the municipal board, it can only be computed by multiplying 25 times of the assessed or the actual reasonable value. From the extracts of Municipal Board's Register the valuation of the property in question is Rs. 3,600/- (Rs. 900X 12) only.

17. Therefore, the valuation of the property as per Rules becomes Rs.90,000/- only. The learned court below assuming the rental value Rs.2,500/- per month calculated that there is deficiency in payment of stamp duty and also imposed the penalty though the penalty has been removed by Commissioner, Agra Division Agra / (C.C.R.A). It is clear from the aforesaid discussions that on the basis of accompanying report of Sub Registrar, A.D.M (F&R) accepted the rental value of the room in question Rs.2,500/- per month. For determining the rate of rent to be Rs.2,500/- the learned Sub Registrar did not collect any DATA from the nearby shop or vicinity. If the rental value was wrongly mentioned by the Nagar Palika Parishad, it was the duty of the respondents to raise an objection and to get it corrected, but instead of adopting the reasonable and sound method in legal way, the Sub Registrar imaginarily opined that the rent of the room in question would not be less than Rs.2,500/- per month.

18. This Court is of the opinion that if the property in question would not have been assessed by the Nagar Palika Parishad, there was an option to Sub Registrar and the respondent to apply the provisions of Section 341 (iii) (b).

19. When the property in question was assessed by the Nagar Palika, which is very much clear from the extract of the concerned Register and the U.P. Stamp Rules, 1942, was into exists, there was no opportunity to the respondents and the Sub Registrar except to act in accordance with the Rule 341 (iii) (a) according to which where the building is assessed to house tax and it is occupied by the owner or is wholly or partly, let out to the tenant, 25 times the actual or assessed annual rental value whichever is higher as the case may be,

would be considered for payment of stamp duty.

20. In this case the Nagar Palika has assessed Rs. 3,600/- annual rental value of the property in question, therefore as per the existing law in the year 1993, the petitioner was under an obligation to pay the stamp duty in accordance with Rule 341 (iii) (a). If we multiply Rs.3,600/- into 25 times, the value of the property becomes Rs. 90,000/-. The petitioner has purchased the property for Rs. 1,43,005/- and on this amount, he has paid the stamp duty accordingly, which is more than the market value computed in accordance with the Rule 341 (iii) (a).

21. Since the rules of U.P. Stamp Rules, 1997 had not come into force and the Sub Registrar had not given any DATA regarding rent of the property in question, the respondents had to act upon in accordance with the provisions of U.P. Stamp Rules, 1942.

22. In ***Vijay Kumar and Surendra Kumar Both sons of Shri Daulat Ram Vs. Commissioner, Meerut Division and Additional District Magistrate (Finance and Revenue) MANU/0682/2008*** decided on 27.03.2008, it is held that the burden to prove that the market value more than the minimum as prescribed by Collector under Rule is on Collector. Report of Sub-Registrar or Tehsildar, itself is not sufficient to discharge that burden.

23. In ***Mahabir Prasad Vs. Collector, Cuttack [1987] 2 SCR 289,*** it is held that the "market value' of land means a price at which both buyers and sellers are willing to do business; the market or current price.

24. In ***Ram Khelawan allias Bachchan Vs. State of U.P. through Collector, Hairpur and Anr. 2005 (98) RD 511***, it has been held that report of Tahsildar may be a relevant factor for initiation of proceedings under Section 47-A of the Act but it cannot be relied upon to pass an order under the aforesaid section. In other words the said report cannot form itself basis of the order passed under Section 47-A of the Act.

25. In ***Prakashwati Vs. Chief Controlling Revenue Authority Board of Revenue, Allahabad 1996 (87)*** *R.D 419* "Hon'ble the Apex Court has held that situation of a property in an area close to a decent colony not by it self would make it part thereof and should not be a factor for approach of the authority in determining the market value.

26. In ***Collector of Nilgiris at Ootacamund Vs. Mahavir Plantations Pvt. Ltd.*** MANU/TN/0285/1982, the Madras High Court while dealing with the valuation guidelines has held that the Collector under Section 47-A can not shrink his responsibility of determining the market value by adopting the guidelines nor can he fix the market value without proper materials and evidence to support it. The very idea of an inquiry contemplated by Section 47-A and the detailed procedure prescribed in the relevant rules goes to show that the Collector's finding must be verifiable by evidence. The valuation guidelines prepared by the Revenue officials at the instance of the Board of Revenue were not prepared on the basis of any open hearing of the parties concerned, or of any documents with a view to eliciting the market value of the properties concerned. They were based on data gathered broadly with reference to classification of land, grouping of land and the like. This being so, the Collector acting

under Section 47-A cannot regard the guidelines valuation as the last word on the subject of market value.

27. From the aforesaid discussions, it is very much clear that respondents has flouted the provisions of U.P. Stamp Rules, 1942, which was prevalent at the time of execution of the sale-deed.

28. On the basis of aforesaid discussions, this Court is of the opinion that the respondents have not acted properly and in accordance with the existing U.P. Stamp Rules, 1942 and have passed the impugned orders in arbitrary and illegal manner, therefore the writ petition is liable to be **allowed.**

O R D E R

29. The writ petition is allowed and the impugned judgement and orders dated **19.06.1996, Annexure No. 4** and the order dated **11.01.2000 Annexure No. 5** to this writ petition are hereby quashed.

30. In this case Rs.96,500/- has been recovered from the petitioners for which they were not entitled as per this decision. The petitioners have prayed to return the said amount alongwith eighteen percent (18%) annual interest.

31. In the opinion of this Court, the respondents are liable to refund the recovered amount of Rs.96,500/- to the petitioners alongwith the interest arising therefrom at the rate of six percent per annum . Therefore, it is also ordered that the respondents shall pay the above amount of Rs. 96,500/- to the petitioners alongwith six percent (6%) simple interest from the date of realisation till the date of refund of the said amount to the petitioners, failing which the petitioners would be entitled to recover the same from the respondents as per the Rules.

(2023) 2 ILRA 613
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-C No. 69115 of 2009

Lal Singh & Ors. ...Petitioners
Versus
Competent Authority Urban Land (Ceiling & Regulation) Act, 1976, Aligarh & Ors. ...Respondents

Counsel for the Petitioners:
Sri J.K. Shisodhaa, Sri B. Upadhyay, Sri Rajneesh Pratap Singh

Counsel for the Respondents:
C.S.C.

U.P. Urban Land (Ceiling and Regulation) Act, 1976 - Section 10 - Acquisition of vacant land in excess of ceiling limit - Urban Land Ceiling & Regulation (Repeal) Act, 1999 - Constitution of India, Art. 226 - Writ petition - Delay & Laches - notification u/s 10(1) with regard to the acquisition of land in excess of ceiling limit was issued followed by notice u/s 10(5) of the Act, issued on 31.05.1993 & the possession of the land was taken by the competent authority not faced with any objections - writ petition, filed after lapse of 13 years, with prayer not to dispossess from the land declared surplus in proceedings under 1976 Act - Held - writ petition hit by inordinate unexplained laches - "delay defects equity" - discretionary relief can be had, provided one has not by his act or conduct given a go-by to his rights - Equity favours a

vigilant rather than an indolent litigant (Para 14, 15)

Dismissed. (E-5)

List of Cases cited:

1. St. of Assam Vs Bhaskar Jyoti Sharma & ors., (2015) 5 SCC 321

2. Shiv Ram Singh Vs St. of U.P. & ors., 2015 (7) ADJ 630

3. Shivgonda Anna Patil Vs St. of Mah., (1999) 3 SCC 5

4. Municipal Council, Ahmednagar Vs Shah Hyder Beig (2000) 2 SCC 48

5. Kapilaben Ambalal Patel & ors. Vs St. of Guj., 2021 (12) SCC 95

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard learned counsel for the parties.

2. By the instant writ petition, petitioners and the subsequent purchasers seek direction to the State-respondent not to dispossess the petitioners from the land declared surplus in proceedings under the U.P. Urban Land (Ceiling and Regulation) Act, 1976 (for short 'Act').

3. The land in dispute being Plot No. 397, admeasuring 1.370 hectares, situated in Asadpur Kayam, Tehsil Koil, Aligarh. As per the pleadings set up by the petitioners, the predecessor in interest of the petitioners, namely, Chunni Lal, filed statement under Section 6 of the Act. Under Section 8(4), the order came to be passed on 18 March 1985, against Chunni Lal, by the competent authority. No objections was filed by the land owner. The final statement, thereafter, was issued under Section 9 on 4 October 1985. Thereafter, notification under Section 10(1) with regard to the acquisition of land in excess of ceiling limit was issued, followed by publication of notification under Section 10(3) declaring the land to have vested absolutely in the State Government free from all encumbrances. The notification under Section 10(1) was issued on 27 February 1988, followed by declaration under Section 10(3) of 20 September 1988. Thereafter, pursuant to notice under Section 10(5) of the Act, issued on 31 May 1993, the possession of the land was taken by the competent authority not faced with any objections.

4. The learned counsel for the petitioners submits that no notice came to be issued under Section 10(6) for taking possession forcefully from the petitioners, further, it is alleged that pursuant to notice under Section 10(5), the land in excess was not surrendered. It is alleged that possession of the land was never delivered by predecessor in interest, i.e., Chunni Lal.

5. It appears, thereafter, the petitioners herein, subsequently, sold and consequently transferred the excess land in favour of the proposed petitioners who have sought impleadment.

6. In the counter affidavit filed on behalf of the respondents, a categorical stand has been taken that no objection against the notice under Section 10(5) of the Act was filed by the land owner, consequently, there was no occasion for proceeding under Section 10(6).

7. Further, it is being stated that the land in question has since been transferred to Aligarh Development Authority on 24

February 2001, and development work over the said land has been undertaken.

8. On specific query, the learned counsel for the petitioners has not disclosed as to when the land after notification under Section 10(1)/10(3) was transferred by way of registered sale-deed.

9. We have considered the rival submissions and perused the material placed on record.

10. It is not in dispute that the notice under Section 10(5) was issued on 31 May 1993, which was not objected to by the land owner, therefore, the occasion of issuing notice under Section 10(6) to the land owner did not arise. The petitioners herein waited for long and for the first time approached this court in 2006, by filing writ petition being Writ Petition No. 49369 of 2006, which came to be disposed of by order dated 7 September 2009, directing the Collector to decide the representation. It appears that the representation was not decided, hence, the present writ petition came to be filed in 2009.

11. In this backdrop, it is evident that the petitioners have raised the issue of possession and notice under Section 10(6) the Act after a lapse of 13 years and there is no explanation for the delay.

12. 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)

13. 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. I****f 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)

14. In **Shivgonda Anna Patil Vs. State of Maharashtra, (1999) 3 SCC 5** wherein, the Supreme Court while dealing with section 10 of the Act held that the writ petition under Article 226 for reopening the proceeding on the ground that the competent authority had not taken into consideration certain fact, filed after ten years, after the excess land was vested in the State Government was rightly summarily dismissed by the High Court.

15. While deciding the question of delay and laches in preferring the petition under Article 226, the Supreme Court in **Municipal Council, Ahmednagar Vs. Shah Hyder Beig (2000) 2 SCC 48** held that the equitable doctrine, namely, "delay defects equity" has its fullest application in the matter of grant of relief under Article 226 of the Constitution. The discretionary relief can be had provided one has not by his act or conduct given a go-by to his rights. Equity favours a vigilant rather than an indolent litigant and this being the basic tenet of law.

16. Recently, in **Kapilaben Ambalal Patel and Others Vs. State of Gujarat, 2021 (12) SCC 95,** Supreme Court declined to accept the pleas setup by the legal heirs/representatives of the original land holder on the ground of inordinate delay. The Court noted the submission of the land owner:

"Feeling aggrieved, the landowners have approached this Court. It is urged that there is no tittle of evidence to substantiate the fact asserted by the respondent State that physical possession of the land in question has been taken over on 20-3-1986. It was merely a paper-possession in the form of possession panchnama. According to the appellants, de facto possession of the subject land as on the date of the Repeal Act is crucial and entails in abatement of all the actions of the State authorities under the 1976 Act. Mere issuance of notification under Section 10(3) of the 1976 Act regarding deemed vesting of the land in the State is not enough for the purposes of the Repeal Act. Reliance has been placed on ***Vinayak Kashinath Shilkar Vs. Collector & Competent Authority, (2012) 4 SCC 718, State of U.P. Vs. Hari Ram (2013) 4 SCC 280, Gajanan Kamlya Patil vs. Additional Collector & Competent Authority (ULC) (2014) 12 SCC 523 and Mangalsen Vs. State of U.P. (2014) 15 SCC 332.*** *The consistent view of this Court is that physical possession must be taken by the State authorities, failing which the proceedings shall abate on account of the Repeal Act. The appellants have relied on revenue records to show that the continued possession remained with the appellants/landowners even after the possession panchnama was made on 20-3-1986. The revenue entries have presumptive value and the respondent State had failed to rebut the same."*

17. In Paragraph 25 of Kapilaben Ambalal Patel (supra), the Court noted the delay and declined to interfere with the order of the High Court. Relevant portion reads thus:

"Furthermore, in the grounds all that is asserted is that the High Court erred in holding that there was delay of 14 years in filing of writ petition and in not appreciating that the notice under Section 10(5) of the 1976 Act dated 23-1-1986, was not served upon Ambalal Parsottambhai Patel as he had already expired on 31-12-1985 and notice sent to him was returned bacy on 2-2-1986 unserved with remark "said owner has expired". Further, the legal heirs of Ambalal Parsottambhai Patel ought to have been served with the said notice.....Be that as it may, we are not inclined to reverse the conclusion recorded by the Division Bench of the High court that the writ petition filed by the appellants was hopelpessly delayed and suffered from laches. That is a possible view in the facts of the present case."

18. For the reasons aforestated and also in view of the law laid down by Hon'ble Supreme Court in the case of **Bhaskar Jyoti Sharma (supra), Kapilaben Ambalal Patel (supra)** and a coordinate bench decision of this Court in the case of **Shiv Ram Singh (supra)**, we do not find any merit in the writ petition, apart from the fact that it is also hit by inordinate unexplained laches. Consequently, the writ petition is **dismissed.**

(2023) 2 ILRA 618
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.02.2023

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 466 of 2001

Abu Talib & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Ajmal Khan

Counsel for the Respondent:
Govt. Advocate, Prem Prakash Singh

Criminal Law- Probation of Offenders Act, 1958- Section 4 - Code of Criminal Procedure, 1973-Section 357, Section 360- The effect, relevance and applicability of Section 360 Cr.P.C. have not been considered by the trial court and appellants deserve probation under Section 325 IPC - Since the incident occurred near about 31 years ago and during intervening period he had not indulged into any criminal activity nor he had any criminal background - Section 357 Cr.P.C. empowers the Court to award compensation to the victim(s) of the offence in respect of the loss/injury suffered. The object of the section is to meet the ends of justice in a better way. This section was enacted to reassure the victim that he is not forgotten in the criminal justice system. The amount of compensation to be awarded under Section 357 Cr.P.C. depends upon the nature of crime, extent of loss/damage suffered and the capacity of the accused to pay, which the Court has to conduct a summary inquiry-Benefit of Section 4 of the Probation of First Offender Act, 1958 should be provided to the appellants- Fine of Rs.10,000/-each is enhanced to Rs.30,000/-each, which shall be deposited before the trial court.

The Probation of Offenders Act confers power upon the court to release certain offenders on probation of good conduct, the same Act along with Section 357 of the CrPc also gives power to the courts to provide compensation to the victim and therefore the said provisions have to be

taken into account by the courts at the stage of sentencing the accused.(Para 22, 23, 24, 25)

Criminal Appeal partly allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Ankush Shivaji Gaikwad Vs St. of Maha. MANU/SC/0461/2013: (2013) 6 SCC 770

2. Jitendra Singh Vs St. of U.P. MANU/SC/0679/2013 : (2013) 11 SCC 193

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Heard Mr. Azmal Khan, learned counsel for appellant, Mr. Prem Prakash Singh, learned counsel for complainant and Ms. Shikha Sinha, learned A.G.A. for the State and perused the trial court record.

2. This criminal appeal has been preferred by appellants challenging the impugned judgment and order dated 26.06.2001 passed by learned Additional Sessions Judge (Fast Track Court), Pratapgarh in Sessions Trial No. 103 of 1994, arising out of Case Crime No. 22 of 1990, under Sections 307/34 & 323/34 IPC, Police Station Raniganj, District Pratapgarh. By the said judgment, the appellants has been convicted and sentenced for offence under Section 307/34 IPC for ten years rigorous imprisonment and fine of Rs. 10,000/- each. In default of payment of fine, they were to undergo for three months additional imprisonment. For the offence under Section 323/34 IPC for six months rigorous imprisonment. Both the sentences were directed to run concurrently.

3. Brief facts of this case emerges out as under:-

An FIR was lodged by complainant Ismail with the allegation that on 2.2.1990 at 9:00 a.m., dried bush of acacia was lying in the way near his house by which the pathway was obstructed. When the informant Ismail and his daughter Kismatulnishan tried to remove the said bush then due to old enmity, the appellants on the exhortation of co-accused Fariduddin; other appellants started threatening with dire consequences and attacked with lathi on the head of Kismatulnisha. The complainant tried to save his daughter then all the appellants also inflicted lathi blow to complainant. On the shrieks of complainant, Shamshad Ali, Murtaza and other villagers rushed towards the place of occurrence and intervened. Due to this incident, injured Kismatulnishan received grievous injuries. FIR of this case was lodged by complainant Ismail. On the basis of this written report, FIR of this case was lodged on 2.2.1990 at 15:05 hours against the accused appellants. After lodging of this FIR, investigation of this case was entrusted to Investigating Officer Nehal Ahmad.

4. Before lodging the FIR injured Kismatulnishan was examined before the District Hospital Pratapgarh on 2.2.1990 at 11;45: a.m. and following injuries were found on her body:-

(i) Lacerated wound 5 cm. x 1 cm. x scalp deep left side head above 2 cm. left ear. Fresh bleeding was present.

(ii) Complain of pain on left side chest during respiration. On examination tenderness is present over the lower rib.

5. Both the injuries were kept under observation. The injury was caused by some hard and blunt object. The duration was over three-four hours late.

6. The injury of injured Kismatulnishan was kept under

observation. As per x-ray report, so far as injury no. 1 is concerned, no any discrepancy was seen on the head of Kismatulnishan. But as per x-ray of chest, there was fracture of 9th, 10th and 11th ribs of left side.

7. Other injured Ismail was also examined in District Hospital, Pratapgarh at 12:02 hours on the same day and following injuries were seen:-

(i) Lacerated wound 1 c.m. x ½ cm. x scalp deep, on right side head, 11 c.m. right along right pinna, fresh bleeding present.

8. The injury was simple in nature and caused by some hard and blunt object and duration was about 3-4 hours late.

9. During course of investigation, the Investigating Officer collected medical reports of the injured persons and statements of first informant and injured and several other persons were recorded. During investigation also the Investigating officer prepared site plan on the pointing out of the first informant.

10. After completing all the formalities of the investigation, the Investigating Officer filed charge sheet before the court concerned against all the appellants under Sections 323, 504, 506, 325 and 307 IPC. Thereafter the case was committed on 27.10.1994 to the court of sessions for trial, which is registered as Sessions Trial No. 103 of 1994.

11. At the time of framing of charge, co-accused Fariduddin was reported to be no more, so the trial was abated by the trial court. After hearing both the parties, the charges were framed against the accused appellants under Section 307/34 and 323/34 IPC in which charges were read-over to the appellants in hindi to which they denied all the allegations levelled against them and claimed to be tried.

12. In order to prove its case, the prosecution has examined the following witnesses:-

(i) PW-1 Mohd. Ismail, who is the complainant of this case. He proved the written report as Ex. Ka-1.

(ii) PW-2 Kismatulnishan was examined. She is also an injured witness. She has stated in her statement that due to old enmity, the assailant committed Maarpeet with lathi, kicks and fists, due to this reason, she got injuries on her head and left side of ribs. She remained in hospital about 13 days. Thus she supported the entire version of the prosecution.

(iii) PW-3 Dr. Ajit Kumar Kulshreshtha, who proved the injury report of PW-2 injured Kismatulnishan as Ex. Ka-2 and injury report of PW-1 complainant injured Ismail as Ex. Ka-3. He also proved x-ray report as Ex. Ka-4 as secondary evidence.

(iv) PW-4 Shamshad Ahmad, eyewitness of the alleged incident. He is independent witness and has supported the prosecution case. There is no material contradictions in the statement of this witness.

(v) PW-5 Nehal Ahmad has stated that this case was registered in his absence and later, the investigation of this case was entrusted to him. During course of investigation, he prepared the site plan, which has been proved as Ex. Ka-5. After collecting the x-ray and x-ray report and injury report, he converted the case under Section 307 and 325 IPC. During investigation he prepared recovery memo of bloodstained clothes, which has been

proved as Ex. Ka-6 and charge sheet was proved by him as Ex. Ka-7. Thus he is a formal witness.

13. Thus the prosecution has relied upon the oral evidence of PW-1 to PW-5 and Ex. Ka-1 to Ex. Ka-7 as documentary evidence.

14. Subsequent to closure of prosecution evidence, statement of appellants under Section 313 Cr.P.C. was recorded by trial court explaining entire evidence and other incriminating circumstance. In statement recorded under Section 313 Cr.P.C., the accused appellant denied prosecution version and stated that at the time of incident they were not present on the place of occurrence. The appellants have falsely been implicated. In defence, they did not choose to lead any evidence.

15. After hearing both the parties and appreciating entire oral and documentary evidence available on record, the trial court convicted the accused appellants as aforesaid.

16. Learned counsel for appellants has submitted that the appellants are innocent and have falsely been implicated in this case. Further submission is that there are material contradictions in the statements of PW-1 and PW-2. As per prosecution version, three persons inflicted with lathi but only two injuries were seen on the body of the injured Kismatulnishan. It is further submitted that the place of injury, which was inflicted to Kismatulnishan was not found on the vital part. Therefore, the case under Section 307 IPC is not made out against the appellants. The trial court without appreciating the evidence available on record, has wrongly convicted the appellants under Section 307 IPC. If the prosecution case is admitted in toto, then the case does not travel beyond the purview of Section 325 IPC.

17. Learned counsel for appellants has lastly submitted that the matter pertains to the year 1990 and 33 years have already passed. The first informant Ismail and co-accused Fariduddin is no more. Both of them were the real brother but injured PW-2 Kismatulnishan is the daughter of first informant and other appellants are the cousin. Presently both the parties, the appellants and injured Kismatulnishan, who is 76 years old and cordial relations developed between them, are well rooted in society. He further submits that it is an old matter and no fruitful purpose would be served to send the appellants in jail. Further submission is that the appellants are ready to pay compensation to the injured. The appellants have not been convicted previously for any offence, therefore, lenient view may be taken against the appellants.

18. It is further submitted that if the prosecution case admitted in toto, the case does not travel beyond Section 325 IPC. Further learned counsel for appellants submitted that though there are sufficient reason to challenge the judgment on merits yet they are restricting the challenge to non-consideration of the applicability of provision contained in Section 4 of Probation of Offenders Act, 1958 (in short "Probation Act") and Section 360 Cr.P.C. as the offence under Section 325 IPC is made out against the appellant.

19. Learned A.G.A. for the State has opposed the appeal and has submitted that there is no material irregularity or illegality committed by the trial court. Further

submission is that keeping in view the evidence available on record the accused-appellant has rightly been convicted by the trial court.

20. It would be appropriate to quote Section 360 Cr.P.C. reads as follows:-

Section 360 Cr.P.C. reads as follows:

"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 subsection 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 recognisance, 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 warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and 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 1951), 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."

Section 361 Cr.P.C. reads 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.

Section 3, 4 and 5 of the Probation of First Offenders Act reads as under:-

Section 3- Power of court to release certain offenders after admonition.

When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him 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 so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4, release him after due admonition.

Explanation.--For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4.

Section 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.

Section 5-**Power of court to require released offenders to pay compensation and costs.**

(1) The court directing the release of an offender under section 3 or section 4, may, if it thinks fit, make at the same time a further order directing him to pay--

(a) such compensation as the court thinks reasonable for loss or injury caused to any person by the commission of the offence; and

(b) such costs of the proceedings as the court thinks reasonable.

(2) The amount ordered to be paid under sub-section(1) may be recovered as a fine in accordance with the provisions of sections 386 and 387 of the Code.

(3) A civil court trying any suit, arising out of the same matter for which the offender is prosecuted, shall take into account any amount paid or recovered as compensation under sub-section (1) in awarding damages.

21. It is rightly contended by the learned counsel for the appellant that the effect, relevance and applicability of Section 360 Cr.P.C. have not been considered by the trial court and appellants deserve probation under Section 325 IPC also.

22. There are other legislative requirements that need to be kept in mind. The Probation of Offenders Act provides, in Section 5 thereof for payment of compensation to the victim of a crime (as does Section 357 of the Code of Criminal Procedure). Yet, additional changes were brought about in the Code of Criminal Procedure in 2006 providing for a victim compensation scheme and for additional rights to the victim of a crime, including the right to file an appeal against the grant of inadequate compensation. How often have the Courts used these provisions?

23. In ***Ankush Shivaji Gaikwad v. State of Maharashtra MANU/SC/0461/2013: (2013) 6 SCC 770*** and ***Jitendra Singh v. State of U.P. MANU/SC/0679/2013 : (2013) 11 SCC 193*** the Court held that consideration of grant of compensation to the victim of a crime is mandatory, in the following words taken from Ankush Shivaji Gaikwad:

"While the award or refusal of compensation in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation."

24. Coming to the sentence to be imposed on the appellant, since the incident occurred near about 31 years ago and during intervening period he had not indulged into any criminal activity nor he had any criminal background, so in view of the above, considering the entire facts and circumstances of the case.

25. In the present appeal fine of Rs.10,000/- each has been imposed by the trial court on the appellants. Section 357 Cr.P.C. empowers the Court to award compensation to the victim(s) of the offence in respect of the loss/injury suffered. The object of the section is to meet the ends of justice in a better way. This section was enacted to reassure the victim that he is not forgotten in the criminal justice system. The amount of compensation to be awarded under Section 357 Cr.P.C. depends upon the nature of crime, extent of loss/damage suffered and the capacity of the accused to pay, which the Court has to conduct a summary inquiry as well as considering the submission of learned counsel for appellant as earlier, this Court is of the view that benefit of Section 4 of the Probation of First Offender Act, 1958 should be provided to the appellants. Thus the ***appeal is p*****artly allowed**. The conviction as directed by trial court under Section 307 IPC is converted to Section 325 IPC as *prima facie* offence does not travel beyond the purview of Section 325 IPC. Thus the conviction under Section 325/34 and 323/34 IPC is confirmed and the appellants are directed **to be released on probation under Section 4 of the U.P. Probation of First Offenders Act with stipulated condition that he will keep peace and good conduct for one year subject to furnishing personal bond and two sureties of like amount of Rs.40,000/- before the Court.**

26. Considering the law propounded by Hon'ble Apex Court and as per

provisions of Section 357 Cr.P.C., I am of the view that compensation should be awarded to the victim's family.

27. Therefore, fine of Rs.10,000/-each is enhanced to Rs.30,000/-each, which shall be deposited before the trial court. Out of Rs.90,000/-, Rs. 60,000/- shall be paid to injured Kismatulnishan and Rs. 30,000/- shall be deposited in State Exchequer. If the appellants fail to pay aforesaid amount then, they shall undergo imprisonment and sentence as directed by they trial court. Fifteen days time is granted to appellants to deposit the fine as mentioned by this Court. The appellants are on bail. They need not to surrender.

28. Fifteen days is provided to the appellants to deposit fine amount from the date of production of a certified copy of this order.

29. **Thus, the appeal is dismissed on the point of conviction and partly allowed on the point of sentence.**

30. Office is directed to communicate this order to the trial court concerned. The trial court record be sent back.

(2023) 2 ILRA 626
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.02.2023

BEFORE

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

Criminal Appeal No. 943 of 2009

Munna Lal Patel ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Mrs. Alka Srivastava, Sri Amit Rai, Sri C.L. Chaudhary (A.C.), Sri Mohd. Akhtar, Ms. Sufiya Bano

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

Criminal Law- Indian Evidence Act, 1872- Sections 3 & 45- The direct evidence in the case is that of the eye-witnesses who had seen and narrated the entire occurrence. The evidence of a doctor or an expert is merely an opinion which lends corroboration to the direct evidence in the case. Where there is a glaring inconsistency between direct evidence and the medical evidence in respect of the entire prosecution story, that is undoubtedly a manifest, defect in the prosecution case. There is no inconsistency between the direct evidence and the medical evidence. The post-mortem report as well as statement of P.W.-3 who conducted the autopsy, as per which the cause of death of the deceased is asphyxia due to strangulation and fully corroborate the prosecution version i.e. statements of witnesses of fact P.W.-1 and P.W.-2. In the present case motive is also present.

Where the medical evidence corroborates the direct evidence then the case of the prosecution cannot be disbelieved unless there is a glaring contradiction between the direct evidence and medical evidence.

Indian Evidence Act, 1872- Section 3- Merely because the witnesses examined by the prosecution are relatives of the victim/deceased by itself will not be sufficient to discard and discredit the evidence of the relative witnesses, if otherwise they are found to be truthful witnesses and rule of caution is that the evidence of the relative witnesses has to be reliable evidence which has to be accepted after deep and thorough scrutiny. It is no doubt true that in the present case, the prosecution has not

been able to produce any independent witness but the prosecution case cannot be doubted on the ground of non-examination of independent eye witnesses.

Settled law that non-examination of independent witnesses by the prosecution is not fatal where the testimony of the related witnesses is found to be truthful and credible after due caution and scrutiny by the court. (Para 36, 40)

Criminal Appeal rejected. (E-3)

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

1. This jail appeal is by the accused-appellant Munna Lal challenging the judgment and order dated 28th January, 2009 passed by the Special Judge (E.C. Act), Mirzapur, in Sessions Trial No. 229 of 2007 (State Vs. Munna Lal Patel) arising out of Case Crime No. 433 of 2007, under Sections 302 I.P.C., Police Station-Kachhawan, District Mirzapur, whereby the accused-appellant has been convicted and sentenced to undergo life imprisonment for the offence punishable under Section 302 I.P.C. with fine of Rs. 10,000/-, in default thereof, to further undergo two years additional imprisonment.

2. We have heard Mr. C.L. Chaudhary, learned Amicus Curiae, appearing for the accused-appellant and Kumari Meena, learned A.G.A. for the State.

3. The prosecution case proceeds upon a written report dated 13th July, 2007 (Exhibit-Ka/1) of first informant, namely, Badama Devi (P.W.-1) scribed by Daya Sanker Singh, son of Lalman Patel resident of Village Diyav Raghauna, Police Station Kachhawan, District Mirzapur, on the basis of which the first information report (Exhibit-ka/11) got registered as case crime no. 433 of 2007 under Section 302 I.P.C. on the same day at 13:25 p.m. The report has been proved by P.W.-1 in which it has been alleged that the marriage of her daughter, namely, Rekha Devi (since deceased) aged about 24 years was solemnized with the accused-appellant three years ago and her daughter has a baby girl of about 8 to 9 months. Rekha came and was staying at her house for the last 15 days and the accused-appellant was also staying at her house since 2 to 3 days. The accused-appellant used to crack indecent jokes with her second daughter, namely, Sulekha (P.W.-2) on which the deceased used to feel bad and object due to which there was altercation and quarrel between the husband and wife. It is alleged that yesterday i.e. 12th July, 2007, also on the same issue an altercation took place between them. Last night, when the accused-appellant and the deceased were sleeping in the same room, at around 3 to 4 o'clock in the night, the deceased screamed on which she, her second daughter Sulekha (P.W.-2) and Ajay woke up and went there and saw that the accused-appellant had killed the deceased by pressing her mouth. When the accused-appellant was going to perform the last rites of the deceased, she and villagers objected and stopped the same. Since the accused-appellant has murdered the deceased by strangulating her, her report be lodged and appropriate action be taken. It is further alleged that on raising her alarm, her neighbour Ramjatan son of Bhukkhal and Munnalal son of Basant came to the spot at the time of incident.

4. After registration of the aforesaid first information report, the investigation proceeded in the matter and the Sub-Inspector Suresh Rai (P.W.-7) after entering

the chick first information report and the written report of the first informant/P.W.-1 in the Case Diary, has recorded the statement of first informant/P.W.1, P.W.-2 and son of P.W.-1 Ajay (not produced) under Section 161 Cr.P.C. at the police station. After recording the same, P.W.-7 reached the place of occurrence along with the first informant/P.W.-1 and on her pointing out, P.W.-7 has prepared the site plan (Exhibit-ka/13).

5. On the instruction of Naib Tehsildar Manoj Kumar Tiwari (P.W.-4), the inquest proceedings of the deceased were conducted on the same day i.e. 13th July, 2007, which commenced at 19:30 p.m. and concluded at 20:30 p.m. The inquest report (Exhibit-ka/3) has been prepared by P.W.-7 on dictation of P.W.-4. The Inquest witnesses opined that since the death of the deceased Rekha seems to be dubious, therefore, for ascertaining the exact cause of death, post-mortem be got conducted. The dead body of the deceased was then sealed and sent to Mortuary.

6. The autopsy of the dead body of the deceased Rekha has been done on 14th July, 2007 at 04:00 p.m. by the Autopsy Surgeon, Dr. H.R. Maurya, Medical Officer (P.W.-3) along with Dr. V.K. Tiwari. As per the post-mortem report the cause of death is asphyxia due to strangulation. P.W.-3 has also found following ante-mortem injuries on the deceased:

"Head and neck-Swollen & skin peeled off.

Membrane and brain-congested.

Left and right lungs-congested.

Larynx, trachea and bronchi-congested, hyoid bone fractured. Heart-left side empty and right side filled.

Subcutaneous tissue between....congested, pleura gland congested.

Skin peeling off due to decomposition, therefore, any external injury could elicited. "

7. On 14th July, 2007, the investigation has been taken over by the Sub-Inspector Gopal Singh (P.W.-5), who was then posted as Station House Officer of Police Station Kachhawan, District Mirzapur. P.W.-5 has recorded the statements of Ramjatan and Munnalal son of Basanta (whose names have been mentioned in the FIR) under Section 161 Cr.P.C. On 17th July, 2007, P.W.-5 has arrested the accused-appellant. After completion of statutory investigation under Chapter XII Cr.P.C., charge-sheet (Exhibit-ka/10) came to be submitted by P.W.-5 on 25th July, 2007 against the accused-appellant. Having taken cognizance on the charge-sheet dated 25th July, 2007 the concerned Magistrate committed the case to the Court of Sessions where the following charge was framed against the accused-appellant on 19th November, 2007 under Sections 302 I.P.C.:

"मैं, बो० डी० वर्मा, विशेष न्यायाधीश, ई० सी० एक्ट, मिर्ज़ापुर आप अभियुक्त मुन्ना लाल को निम्न आरोप से आरोपित करता हूँ।

प्रथम- यह कि दिनांक 12/13.7.2007 को समय करीब 3,4 बजे, रात बहद स्थान मौजा दियांव थाना कछवां जनपद मिर्ज़ापुर में आपने वादिनी मुकदमा बदामा देबी की लड़की रेखा देबी को जान बुझकर नियत पूर्वक मृत्यु कारित कर हत्या की। इस प्रकार आपने जान बूझकर भा० दं० सं० की धारा 302 का दण्डनीय अपराध किया है जो इस न्यायालय के प्रसंज्ञान में है।

एतद्वारा मैं निर्देशित करता हूँ कि उपरोक्त आरोप में आपका परीक्षण इसी न्यायालय द्वारा किया जायगा।"

Charges were also read out to the accused-appellant, who denied the accusation and demanded trial.

8. In order to establish its case, the prosecution has adduced following documentary evidence:

"i). Written report (Exhibit-ka/1) dated 13th July, 2007 of the informant/P.W.-1 scribed by Daya Shanker Singh, which has been marked as Exhibit-Ka/1

ii). The first information report dated 13th July, 2007 has been marked as Exhibit- Ka/11;

iii). The inquest report (Panchayatnama) dated 13th July, 2007 has been marked as Exhibit-ka/3;

iv). Site plan with index dated 13th July, 2007 has been marked as Exhibit-ka/13

v). Post-mortem report dated 14th July, 2007 has been marked as Exhibit-ka/2; and

vi). Charge-sheet dated 25th July, 2007 has been marked as Exhibit-ka/10."

9. In addition to the above documentary evidence, the prosecution has also adduced two witnesses of fact, namely, Badama Devi (P.W.-1/first informant) and Sulekha (P.W.-2), who happen to be the mother and younger sister of the deceased respectively. Autopsy Surgeon Dr. H.R. Maurya, who conducted the post-mortem of the deceased, has been adduced as P.W.-3. P.W.-4, namely, Manoj Kumar Tiwari, then posted as Naib Tehsildar, Tehsil Sadar, District Mirzapur, on whose instruction the inquest proceedings of the deceased were conducted. P.W.-5 Sub-Inspector Gopal Singh, the then Station House Officer, Police Station-Kachhawan, District Mirzapur, the second investigating officer has submitted the charge-sheet and also proved the same during the course of trial. Constable-138 Sudama Yadav, then posted as Head Moharir, who has prepared the chik FIR and proved the same during the course of trial, has been adduced as P.W.-6. P.W.-7 Sub-Inspector Suresh Rai, the first investigating officer, who has prepared the site plan and inquest report on the dictation of P.W.-4 and he has also proved the same.

10. On the basis of above incriminating material placed on record during the course of trial the statement of the accused-appellant has been recorded under Section 313 Cr.P.C. in which he has denied the accusation. He has admitted that he was married to the deceased Rekha Devi three years prior to the incident and out of their wedlock a girl child was born and at the time of incident she was 8 to 9 months old. About the incident, the accused-appellant has stated that at that time, he was sleeping outside and hearing the noise, he came inside the room. He has denied the rest of the prosecution version. He has also stated that the Investigating Officer by doing wrong investigation, has submitted charge-sheet against him. The prosecution witnesses have given wrong statements against him. No defence witness has been adduced by the defence.

11. Before coming to its conclusion, the trial court has recorded its finding that P.W.-3 the Autopsy Surgeon has been cross-examined by the defence but nothing has come up in it that could lead to his statement being treated to be wrong. In his cross-examination, this witness has clarified that strangulation leads to fracture of the hyoid bone of neck. If any person is killed by smothering with a pillow or anything else, hyoid bone of his neck will not be fractured. In the statements of both

the prosecution witnesses of fact, it has come in evidence that the deceased's neck was strangulated by the accused-appellant. Murder of the deceased by strangulating her is sufficient evidence of his intention. Fracture of the hyoid bone of the deceased due to strangulation, as per her post-mortem report indicates that the accused-appellant strangulated her with such force that the hyoid bone of the deceased was fractured, which shows his intention to kill her. From the aforesaid, it cannot be said that he strangulated the neck of the deceased only to scare her as was suggested by P.W.-2. Therefore, on the basis of the above, the trial court opined that the accused has killed the deceased by strangling her neck. Hence, this case cannot be treated to be culpable homicide not amounting to murder.

12. The trial court after perusing the entire oral as well as documentary evidence available on record, has come to the conclusion that the accused-appellant taking advantage of the financial condition of the informant/P.W.-1, with the intention of establishing illicit relationship with Kumari Sulekha, has strangulated the deceased. Hence the prosecution has succeeded in establishing the guilt of the accused-appellant beyond reasonable doubt. The trial court has, therefore, held the accused-appellant guilty of murder of his wife i.e. the deceased Rekha Devi under Section 302 I.P.C. and convicted him accordingly and sentenced him to undergo life imprisonment with fine of Rs. 10,000/-.

13. Aggrieved by the aforesaid judgment and the order of conviction and sentence, the present jail appeal has been filed on the ground that conviction is against the weight of evidence on record and against the law and the sentence awarded to the accused-appellants is too severe.

14. Learned Amicus Curiae appearing for the accused-appellants submits that as per the prosecution case, the incident occurred in the night of 13th July, 2007 between 03:00 a.m. to 04:00 a.m. There was no source of light and it was dark, as such in absence of any light it was impossible for any person to see the occurrence or to identify the person who was committing such incident. Further submission is that the accused-appellant with intention to scare the deceased had pressed her neck but accidentally, she died, as such this case be treated to be culpable homicide not amounting to murder, as is evident from the statements of P.W.-2 in her cross-examination and P.W.-5 in his examination-in-chief. Next submission is that at the time of occurrence, the accused-appellant was sleeping on the well outside the room and when he heard the noise he came inside the room. Further submission is that none of the prosecution witnesses i.e. P.W.-1 and P.W.-2 have seen the incident, when it was occurring with their own eyes. Both the alleged eye-witnesses P.W.-1 and P.W.-2 being mother and sister of the deceased, are interested witnesses, therefore, their testimonies are not reliable and credible. It is also contended that the accused-appellant has been falsely implicated in the present case by both the prosecution witnesses of fact only due to apprehension/suspicion. It is urged that the accused-appellant has no motive to commit the alleged offence. It is further urged that the site plan (Exhibit-ka/13 prepared by the Investigating Officer does not support the statement of P.W.-1, in which she has admitted that on the cot in the north side of the room, accused-appellant and deceased were sleeping together, whereas on the cot

in the east side of the room, P.W.-2 Sulekha was sleeping, which casts a doubt in the prosecution case.

On the cumulative strength of the aforesaid, learned Amicus Curiae appearing for the accused-appellant submits that the impugned judgment and order of conviction cannot be legally sustained and is liable to be quashed.

15. On the other-hand, Kumari Meena, learned A.G.A. for the State, while supporting the prosecution case submits that there is direct evidence against the accused-appellant in the form of the statements of P.W.-1 Badama Devi and P.W. 2-Sulekha, who happen to be the mother and sister of the deceased respectively and are reliable and credible in the facts and circumstances of the case. Both the witnesses of fact are consistent and intact and being eye-witnesses they have clearly disclosed about the commissioning of the offence of murder. The medical evidence also fully supports the aforesaid direct evidence. Therefore, the trial court has not committed any error in holding conviction of the accused-appellant under Section 302 I.P.C. On the cumulative strength of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct evidence, the impugned judgment and order of conviction does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the present appeal filed by the accused-appellant who committed heinous crime by murdering deceased Rekha, is liable to be dismissed.

16. We have considered the submissions made by the learned counsels for the parties and have gone through the records of the present appeal especially, the judgment and the order of conviction and evidence adduced before the trial court.

17. The only question which is required to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the trial court and the sentence awarded is legal and sustainable under law and suffers from no infirmity and perversity.

18. For coming to a fruitful conclusion in the present appeal, it is important for us to record brief statements of the prosecution witnesses.

19. This Court may record that P.W.-1 has supported the prosecution case. She in her examination-in-chief has stated that the marriage of her daughter, namely, Rekha (now deceased) was solemnized with the accused-appellant, namely, Munnalal 3 years before the incident. She had a baby girl of 8 to 9 months at that time. She came to her place 15 days before the incident and stayed with her. The accused-appellant was also staying at her house for 2 to 3 days from the incident. He used to crack indecent jokes with her second daughter, namely, Sulekha (P.W.-2) due to which the deceased used to feel bad and scold him and that is why both of them used to fight. This witness has further stated that about 10 months ago, in the month of Asadh, there was a quarrel between the deceased and the accused-appellant and after that the same night both of them (accused-appellant and the deceased) slept on a cot and the other daughter (P.W.-2) slept on another cot in the same room, whereas she was sleeping in the hutment of one Bhukkhal son of Aliyar next to the same room with her son Ajay and daughter of the deceased. At 3 to 4 o'clock in the morning, the

deceased screamed on which she, her son Ajay and P.W.-2 woke up and lit torch and saw that the accused-appellant pressed the mouth and throat of the deceased due to which she fainted. P.W.-1, Mattu, Smt. Chironji Devi, Munnalal son of Basanta took the deceased to Dr. Shiv Shanker Patel by a Tempo of Sukkhu Harijan for her treatment where she was declared dead, whereafter they took her dead body to her house. After that when the accused-appellant was taking the body of the deceased for last rites, she protested on which some villagers came and the accused-appellant was stopped by them in front of the medicine shop of Dr. Madan Mohan Singh. P.W.-1 has further stated that the accused-appellant strangulated the deceased to death as she used to protest and scold him on his joking with P.W.-2. On hearing the noise, Ramjatan and Munnalal son of Basant also came to the spot at the time of incident. In relation to the incident, on her dictation, Dayashanker had written an application, which has been given to the police station. On the said written report, her thumb impressions were also appended. She has also proved the same as Exhibit Ka-1.

20. In the cross-examination this witness has stated that there are six members in her family i.e. she, her two sons, two daughters and grand-daughter (daughter of deceased) and they used to sleep in same room. She has further stated that it was raining on the night of the incident. Around the time of the incident, the rains stopped at 4 o'clock in the night. There was no electricity in her hutment. The lamp was lit in the hutment. She had kept two cots in the hutment and on one cot she, her younger son and her grand-daughter were sleeping whereas on other cot, her elder son Chandrashekhar was sleeping.

21. This witness has further stated that she deliberately did not put P.W.-2 to sleep in that room, but due to lack of space, she made her sleep separately in the accused's room. She did not put her grand-daughter and son to sleep in that room. Cot of P.W.-2 was at some distance from deceased's cot in that room. The accused-appellant did not sleep with P.W.-2 but slept with the deceased. The accused-appellant and the deceased were sleeping on a cot on the north side of the room, whereas P.W.-2 slept on a separate cot on the eastern side of the room.

22. This witness has further stated that P.W.-2 is her second daughter. The name of her third daughter is Sangeeta, who slept with her on the night of the incident. The police came on the spot at 2 o'clock in the afternoon. When the police came, accused-appellant was present there. After questioning, the police took him away. When she heard the noise, she along with her sons Chandrashekhar and Ajay and daughter Sageeta saw the incident by lighting a torch in the room. She cannot tell as to why the name of Sageeta was not mentioned in her statement as having seen the incident at the spot. P.W. 2 was sleeping in the room of the deceased and when she reached there, she woke up her and then she got up. P.W.-2 slept after taking medicine for headache. When she reached the room, her daughter i.e. deceased fainted. When she lit the torch light she saw her unconscious. When she lit the light, the accused-appellant was standing next to her and then said that he had strangled her daughter (deceased) to death. All the children were woken up by lighting the torch. When she heard the screams, everyone who was with her woke up and went to the room. There is no electricity in her house and she saw the incident in the torch light.

23. This witness has further stated that accused-appellant used to joke with P.W.-2 which the deceased did not like and suspect that they had an illicit relationship. On the evening of the incident, the deceased asked the accused-appellant to bring her a saree (Dhoti) which he could not give due to which there was a fight between them. That night both slept on the same cot. When she reached the room at the time of the incident, the accused-appellant said that he was scaring the deceased.

24. This witness has denied that on the night of incident, the accused slept near the well. She has also denied the version that when he reached the room along with her, the deceased was unconscious.

25. Similarly, P.W.-2 has supported the prosecution case. This witness has stated that the accused-appellant strangulated the deceased to death as she used to object and scold him on an apprehension of his having illicit relations with her sister i.e. P.W.-2 and for making fun with her. Apart from the above, in her examination-in-chief this witness has adopted the same version as stated by P.W.-1, therefore, we need not reiterate the same once again except her statement in cross-examination.

26. In the cross-examination, this witness has stated that on the date of incident, she was sleeping when her sister shouted. P.W.-1 came and woke her up. She was awake when the accused-appellant was fighting with her sister (deceased) in the room at night. When the fight was over, she fell asleep. The deceased and the accused-appellant had also fallen asleep. When she woke up, the deceased was unconscious. She was in the room, P.W.-1, her brother, the accused-appellant, Ramjatan, Munnalal son of Basanta and Chiroji Devi came before she awoke. They took the deceased to the doctor, where she was declared dead. When the police came on the spot, they caught hold of the accused-appellant and took him to the police station. All the family members of the accused-appellant ran away. This witness has further stated that deceased was her elder sister, whereas Sangeeta is her younger sister. Sangeeta slept with P.W.-1, who was sleeping in the hutment adjacent to her room. The deceased was killed by strangulation. This witness has denied that the accused-appellant did not sleep in the room on the date of the incident or that he slept on the well. She has denied that she was giving false testimony.

27. P.W.-3 Dr. H.R. Maurya, Autopsy Surgeon in his examination-in-chief has stated that the texture of body was normal. The stiffness was over. Rotting had started in the body. The skin was peeling off at various places. The eyes were turned outward. The tongue was out. The upper part of the torso was lying blue. He has further stated that due to putrefaction, the skin had been removed from various places. No external injury marks were found on the body as the skin was removed. There was swelling on the neck and the skin was removed. Membrane and brain were congested. The tissue under the skin between both the breasts was congested (due to bleeding). The pleura was congested. The vocal cords and trachea were also congested. Hyoid bone was found to be fractured. The right and left lung was congested. The left chamber of the heart was empty and the right chamber was full. The teeth were 16/16 and the tongue was turned outward. Undigested food and gas were found in the small

intestine and digested food and gas in the large intestine. This witness has further stated that in his opinion the death of the deceased is due to suffocation by strangulation. He also proved the post-mortem report. This witness has also stated that the death of the deceased seems to have been caused by forceful strangulation on her chest.

28. In the cross-examination, this witness has stated that squeezing the throat causes a fracture in the hyoid bone in the throat. If some one is killed by smothering with a pillow or anything else, there will be no fracture in the hyoid bone. This witness has denied that he was making a false statement.

29. It would be worthwhile to reproduce the relevant portion of the statement of this

*"**मेरी राय मे मृतका मृत्यु गला दबा कर दम घुटन के वजह से उसकी मृत्यु हुई है।** PM रिपोर्ट मैने अपने लेख हस्ताक्षर मे तैयार किया था वह इस समय मेरे सामने है। इस पर मेरा व डाक्टर बी० के० तिवारी के हस्ताक्षर है इस पर प्रदर्श क 2 डाला गया। मृतका की मृत्यु दिनांक 12/13-7-07 के 3-4 बजे भोर की हो सकती है। पंचायतनामा के समय जो पुलिस पेपर जिसमे चिक की कार्बन कापी जी०डी० पचायत नामा, प्रपत्र 13 नक्शा नाश सी0 एम0 ओ0 को लिखा गया पत्र, प्रतिसार निरीक्षक को लिखा गया पत्र व नमूना मोहर जो क्रमशः कागज संख्या 3 अ/14, 3 अ/15, 3 अ/12, 3 अ/13, व 3 अ/16 लगायत 3 अ/20 है। गवाह को दिखाया गया तो उसपर अपने लघु हस्ताक्षर बनाये जाने का शिनाख्त किया।*

मृतका का मृत्यु सीने पर चढ़कर हुमचकर गला दबा कर किया जाना प्रतीत होता है।"

30. P.W.-4 Naib Tehsildar, Tehsil-Sadar, District-Mirzapur, Manoj Kumar Tiwari has instructed P.W.-7 to prepare inquest report and ensure that the dead body of the deceased is sealed and sent to Mortuary for post-mortem.

31. P.W.-5 Sub-Inspector, Gopal Singh, the then Station House Officer, Police Station Kachhawan, District-Mirzapur, has investigated the case from the second day of incident i.e. 14th July, 2007 and has submitted the charge-sheet and proved it. He has stated in his examination-in-chief that after investigation, he found that the accused-appellant used to make fun and joke with P.W.-2 i.e. the younger sister of the deceased, which she felt bad and they used to altercate and quarrel with each other about it. On the date of the incident i.e. 12.07.2007 also, there was altercation and quarrel between them and only to scare his wife i.e. deceased, the accused-appellant pressed her throat and mouth in the night due to which she fainted and fell down and ultimately died.

32. P.W.-6, Constable-138 Sudama Yadav, the then Head Moharir at Police Station-Kachhawan has prepared the chik FIR and proved it. P.W.-7 Sub-Inspector Suresh Rai has investigated the matter on the first day of incident and prepared the inquest report on the instruction of P.W.-4 and also prepared the site plan and proved them.

33. The statement of the accused-appellant was recorded under Section 313 Cr.P.C. in which he has accepted that he was married to the deceased Rekha Devi 3 years before the incident and a girl was born from their wedlock, who at that time was 8 to 9 months old. The accused-

appellant has stated that at the time of incident he was sleeping outside and went inside the room on hearing the noise. The Investigating Officer has deliberately recorded false statements of the prosecution witnesses and conducted biased investigation in order to submit charge-sheet against the accused-appellant.

34. On bare perusal of the oral evidence (statements of all the prosecution witnesses including the witnesses of fact, namely, P.W.-1 and P.W.-2) as well as documentary evidence led by the prosecution during the course of trial, we find substance in the contentions raised by the learned A.G.A. for the State.

35. The testimony of witnesses of fact i.e. P.W.-1 and P.W.-2, who have been cross-examined at full length has been perused by us and no benefit can be derived by the accused as both the witnesses of fact have established their presence at the place of occurrence, when it occurred.

36. It is well settled that the direct evidence in the case is that of the eye-witnesses who had seen and narrated the entire occurrence. The evidence of a doctor or an expert is merely an opinion which lends corroboration to the direct evidence in the case. Where there is a glaring inconsistency between direct evidence and the medical evidence in respect of the entire prosecution story, that is undoubtedly a manifest, defect in the prosecution case. This however is not the position here. There is no inconsistency between the direct evidence and the medical evidence. The post-mortem report as well as statement of P.W.-3 who conducted the autopsy, as per which the cause of death of the deceased is asphyxia due to strangulation and fully corroborate the prosecution version i.e. statements of witnesses of fact P.W.-1 and P.W.-2. In the present case motive is also present.

37. Now we may come to the contentions advanced by the learned Amicus Curiae appearing for the accused-appellant. The first contention is that there was no source of light and it was dark between 03:00 a.m. to 04:00 a.m. on the date of incident i.e. 13th July, 2007 is only stated to be rejected on the ground that in their statements, both the witnesses of fact/eye-witnesses i.e.P.W.-1 and P.W.-2, on hearing the shouting of the deceased, P.W.-1, her son Ajay and Ramjatan reached the room and lit the torch in which they saw along with P.W.-2 that the accused-appellant was pressing the mouth and throat of the deceased due to which she fainted.

38. The third and fourth contentions advanced by the learned Amicus Curiae are distinct contentions, as the first contention is that only in order to scare her, the accused-appellant pressed the face and throat of the deceased and accidentally she died, whereas the second contention is that at the time of incident, he was sleeping outside the room i.e. near the well and after hearing the noise, he went inside the room. Both the stands cannot be pressed concurrently. Either he pressed the face and throat of the deceased with an intent to scare her and accidentally she died or else he has not committed the offence as he was outside the room when it occurred. Even if it is accepted that the deceased was accidentally done to death by the accused-appellant, as he pressed her mouth and face only to scare her also cannot be accepted by us. P.W.-3 in his statement has stated that the death of the deceased seems to have been caused by forceful strangulation

on her chest. In the cross-examination, this witness has stated that squeezing the throat by force causes a fracture in the hyoid bone in the throat. Only to scare no one is strangulate with such force or pressure that it breaks the bone of the throat so that he/she becomes unconscious. The fourth contention advanced on behalf of the accused-appellant that at time and date of incident he was sleeping outside the room and hearing the noise he went inside is also liable to be rejected on the ground that P.W.-1 has clearly stated in her statement that it was raining on the night of the incident and the rains stopped at 4 o'clock in the night.

39. The fifth contention advanced on behalf of the accused-appellant that none of the prosecution witnesses has seen the incident from his/her own eyes is incorrect. Being the mother and sister of the deceased, P.W.-1 and P.W.-2 are natural witnesses and their testimony cannot be said to be unreliable or untrustworthy as they are interested witnesses. From the prosecution evidence it is apparently established that P.W..-1 and P.W.-2 are witnesses of fact/eye-witnesses, who have been cross-examined in detail by the defence during the course of trial but in their cross-examination, both of them have fully supported the prosecution case.

40. It is well settled that merely because the witnesses examined by the prosecution are relatives of the victim/deceased by itself will not be sufficient to discard and discredit the evidence of the relative witnesses, if otherwise they are found to be truthful witnesses and rule of caution is that the evidence of the relative witnesses has to be reliable evidence which has to be accepted after deep and thorough scrutiny. It is no doubt true that in the present case, the prosecution has not been able to produce any independent witness but the prosecution case cannot be doubted on the ground of non-examination of independent eye witnesses. In these days, common people are generally insensitive and do not come forward to give any statement in respect of any criminal offence. Unless it is inevitable, people normally keep away from the court as they find it distressing and stressful. Though this kind of human behaviour is indeed unfortunate, but it is a normal phenomena. We cannot derail the entire case on the mere ground of absence of independent witness as long as the evidence of the eyewitness, though interested, is trustworthy.

41. So far as the sixth contention advanced on behalf of the accused-appellant that only on apprehension or suspicion, the accused-appellant has been falsely implicated in the present case is concerned, we may record that from deeper scrutiny of the statements of the witnesses of fact i.e. P.W.-1 and P.W.-2, it is apparent that in the torch light they have seen that the accused-appellant pressed the face and throat of the deceased due to which she fainted and ultimately died, there was quarrel between them in the evening of 12th July, 2007 as the accused-appellant made fun with P.W.-2 which the deceased protested and scolded the accused-appellant. Therefore there is no possibility of any suspicion or apprehension to falsely implicate the accused-appellant by the prosecution. To the seventh contention advanced on behalf of the accused-appellant that the accused-appellant has no motive or intention to commit the alleged offence, it may be worth noticing that the accused-appellant has strong motive/intention to commit the alleged

offence on the ground that the accused-appellant cracked indecent jokes with his sister-in-law (P.W-2 herein) and wanted to have a relationship with her, because of which his wife (deceased herein) scolded and quarreled with him as well as she was an obstacle between him and his sister-in-law, therefore the accused-appellant has killed her wife (deceased) by strangulation removing his obstacle.

42. Qua the last submission made on behalf of the accused-appellant that the site plan does not support the prosecution story with regard to places of cots on which deceased and accused-appellant as well as P.W.2 were sleeping separately on the night of the incident, we may record that as per the site plan prepared by P.W.-7 (Exhibit-ka/13) on the cot kept on the west side of the room, P.W.-2 was sleeping, whereas on the cot kept on the east side, the accused-appellant and the deceased were sleeping when as a matter of fact, as per the statement of P.W.-1, the accused-appellant and the deceased were sleeping together on the cot of north side of room whereas P.W.-2 was sleeping alone on the cot of east side of room, meaning thereby that there is a difference between the site plan and the statement of P.W.-1 only in the location/direction of the cot on which the deceased and the accused-appellant were sleeping together, which can be called a minor error. Therefore, this submission has also no substance.

43. From the aforesaid facts, which have been noted herein above, we find substance in the submissions made by the learned A.G.A. that this is a case of direct and clinching evidence of two eye witnesses of the incident, namely, P.W.-1 and P.W.-2. The medical evidence fully supports the prosecution evidence. The incident occurred between 03:00 a.m. to 04:00 a.m. on 12/13th July, 2007 and the first information report was lodged by the informant at 01:35 p.m. Though there is delay of nine hours in lodging the FIR but the same has satisfactorily been explained by the prosecution. The accused-appellant had also motive to commit such offence. The incident and the place of incident were not disputed by the defence side.

44. As already discussed above, we find that the testimony of both the eye-witnesses i.e. P.W.-1 and P.W.2 is credible and trustworthy as they were subjected to lengthy cross-examination but nothing could be elicited to discredit their testimony. The police documents and statements of Investigating officer and the Autopsy Surgeon as well as medical evidence fully support the prosecution version.

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

46. This jail appeal has no substance and the same is **dismissed.** The accused-appellant has been enlarged on bail by this Court vide order dated 29th September, 2022. His bail bonds stand cancelled and sureties stand discharged and he be taken into custody for serving the remaining sentence.

47. The dismissal of this criminal appeal however shall not prejudice the rights of the accused-appellant to apply for remission, which shall be dealt with in accordance with law on merits.

48. We record our appreciation for the able assistance rendered in the case by Mr. C.L. Chaudhary, learned Amicus Curiae,

who would be entitled to his fee from the High Court Legal Service Authority.

49. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Mirzapur, who shall transmit the same to the Jail Superintendent concerned for information of the accused-appellant henceforth.

(2023) 2 ILRA 638
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.02.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 1099 of 2021

Sushil Kumar Jaiswal & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Abhishek Kumar Singh

Counsel for the Respondent:
G.A.

Criminal Law- U.P. Gangster and Anti Social (Prevention of Activities) Act, 1986- Sections 3(1), 14(1) & 15- Section 16(2)- 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 its satisfaction on this point. The object behind providing the power of judicial scrutiny under Section 16 of the Code is to check arbitrary exercise of power by the District Magistrate in depriving a person of his property and to restore the rule of law, therefore a heavy duty lies upon the Court to hold a formal enquiry to find out the truth with regard to the question, whether the property was acquired by or as a result of the commission of an offence triable under the Act. The order to be passed under Section 17 of the Act must disclose reasons and the evidence in support of finding of the Court.

While passing an order of attachment the District Magistrate is required to record his subjective satisfaction that the property so attached is an outcome of his activities as a gangster and the court too has to hold a formal inquiry in order to come to the conclusion that the attached property is the proceeds of his commission of offences punishable under the Act. (Para 16,17,18,21)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Smt. Maina Devi Vs St. of U.P. 2013(83) ACC 902

2. Smt. Shanti Devi w/o Sri Ram Vs St. of U.P. 2007(2) ALJ 483 (All)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Pleadings have already been exchanged between the parties and are on the record. The case is ripe up for final hearing.

2. Heard Ms. Shubhangi Singh, Advocate, holding brief of Shri Abhishek Kumar Singh, the learned counsel for appellants, Shri Diwakar Singh, the learned A.G.A. for the State-opposite party and perused the material available on record.

3. Perused the lower court record.

4. The present appeal under Section 18 of U.P. Gangster and Anti Social (Prevention of Activities) Act, 1986 (herein after referred to as, 'Gangster Act') has been preferred by the appellants, namely, Sushil

Kumar Jaiswal and Kamal Kishore Jaiswal against the judgment and order dated 10.03.2021 passed by the court of learned Special Judge, Gangster Act/ Additional Sessions Judge, Court No. 5, Unnao in Criminal Misc. Case No. 94 of 2021, Sushil Kumar Jaiswal Vs. State, arising out of Case Crime No. 336 of 2017, under Section 3(1) of the Gangster Act, Police Station Hasanganj, District Unnao, whereby the learned trial court has rejected the application under Section 16(2) of Gangster Act moved on behalf of appellants and confirmed the order dated 01.01.2021 passed by the District Magistrate, Unnao, directing attachment of property of appellants.

5. In Short facts of the case are that initially a first information report dated 06.09.2017 was lodged by Shri Hanuman Prasad Pandey, Incharge Inspector of Police Station Hasanganj, District Unnao bearing Case Crime No. 0336 of 2017 against the applicants alleging therein that when on 06.09.2017 along with other police personnel were present were making round of Hasanganj and Kureel village, then some villagers informed him that Sushil Kumar Jaiswal along with his son Kamal Kishore Jaiswal has made an organized gang, they are involved in the work of mixing kerosene and nickel converting it into diesel and by adulterating petrol they are earning illegal money, on account of which State Exchequer is suffering from huge revenue and for their conduct a case was earlier got lodged against them bearing Case Crime No. 132/17, under Sections 420 I.P.C. read with Section 3/7 of Essential Commodities Act at Police Station Hasanganj, District Unnao, wherein after investigation charge sheet has already been submitted before the court concerned against them. Accused-Sushil Kumar Singh is involved in anti social activities and on account of fear created by him in the locality no one has dare to adduce evidence against him. He is involved in the illegal activities against Chapter 16, 17 and 22 of Indian Penal Code.

6. Learned Counsel Ms. Shubhangi Singh submits that on implication of appellants in Case Crime No. 336 of 2017, under Section 3(1) of U.P. Gangster and Anti Social (Prevention of Activities) Act, registered at Police Station Hasanganj, District Unnao, wherein they have already been enlarged on bail, the District Magistrate, Unnao by its order dated 22.09.2020 by exercising its power vested under Section 14(1) of the Gangster Act, attached two vehicles, i.e., U.P. 35 AJ 5623 Maruti Suzuki Ertiga Car and Pickup Dala No. UP 35T 4181 as well as five shops situated at Khasra No. 256, measuring 0.014 Hectare situated at Village Kurauli, Tehsil Hasangaj, District Unnao.

7. Ms. Shubhangi Singh submits that the said attachment was done without prior notice or knowledge to the appellants and on coming it to know the appellants made a representation under Section 15 of the Gangster Act before the concerned District Magistrate. On making their representation by the appellants only the vehicle bearing Registration No. UP 35 AJ 5623 Maruti Suzuki Ertiga Car has been ordered to be released by the concerned District Magistrate by its order order dated 01.01.2021, but the shops/ land and other vehicle, i.e., Pickup Dala bearing Registration No. UP 35 T 4181 have not been released.

8. Ms. Shubhangi Singh further submits that the District Magistrate has wrongly and incorrectly attached the shops/

land and vehicle of the appellants on the wrong presumption that the said properties have been made from the income earned by the appellants involving in anti social activities, whereas, appellants were neither Gangsters nor they have earned these properties from involving in anti social activities. It has further been argued that the shops/ land and the vehicle in dispute are not existing in the names of appellants, but it has been presumed by the District Magistrate in its order dated 22.09.2020 and 01.01.2021 that the same has been earned by them from involving in anti social activities while these attached properties are in the name of their father and of son of appellant No. 1 namely, Vimal Jaiswal.

9. Ms. Shubhangi Singh further submits that being aggrieved from attachment of their properties in question the appellants moved an application under Section 16(2) of the Gangster Act before the trial court, which remained pending, therefore, appellants approached this Court by filing Writ Petition No. 3566 (MB) of 2021, Sushil Kumar Jaiswal and another Vs. State of U.P. and others, wherein a Division Bench of this Court vide order dated 17.02.2021 directed the trial court to decide the aforesaid pending application of appellants within a stipulated time.

10. Ms. Shubhangi Singh further submits that the learned trial court while passing the impugned order, without properly perusing the contents of application and documents annexed with the said application have wrongly and incorrectly rejected the said application by presuming that the shops/ land in question have been earned from the income indulging in anti social activities without going through documentary evidence filed on behalf of appellant and wrongly interpreting that appellants have not filed any documents to prove that the said shops/ land in question have not been earned from the income indulging in anti social activities and is in the name of father of the applicant No. 1-Sushil Kumar Jaiswal.

11. Ms. Shubhangi Singh further submits that the learned trial court had erred in law while rejecting the application of appellants for release of property in dispute despite of the fact that the car in question and the land in question is entered in the name of father of appellant No. 1 and this property was inherited by their forefathers, and the vehicle in question belongs to Vimal Jaiswal who is son of appellant No. 1, who is a businessman having GST registration and who has also filed income tax return, who had purchased the said vehicle through his income which is clearly apparent from Khatauni and registration certificate of the said vehicle.

12. Shri Diwakar Singh, the learned A.G.A. has vehemently argued that the learned trial court has correctly appreciated the material on record before passing the impugned order. The District Magistrate, Unnao has passed the order dated 22.09.2020 and 01.01.2021 after being fully satisfied that appellants have acquired the properties in question by illegal means involving in anti social activities as prescribed under the Gangster Act, as such there is no illegality, infirmity or perversity in the impugned order. The learned trial court after considering the entire material including the documentary evidence available on record has passed the impugned judgment and order in correct perspectives and it needs no interference.

13. I have heard learned counsel for both the parties and gone through the impugned judgment and order passed by the court below.

14. It seems to be just and expedient to refer to the relevant provisions of the Gangster Act which are as under :-

2. Definitions- *In this Act,- (a) "Code" means the Code of Criminal Procedure, 1973;*

(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, namely-

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code, 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 or the Narcotic Drugs and Psychotropic Substances Act, 1985 or any other law for the time being in force, or

(iii) occupying or taking 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

(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 Act, 1956, or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867, 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 rights 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 The Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xvv) indulging in crimes that impact security of State, public order and even tempo of life,"

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities;

(d) "public servant" means a public servant as defined in Section 21 of the Indian Penal Code or any other law for the time being in force, and includes any person who lawfully assists the police or other authorities of the State, in investigation or prosecution or punishment of an offence punishable under this Act, whether by giving information or evidence relating to such offence or offender or in any other manner;

(e) "member of the family of a public servant" means his parents or spouse and brother, sister, son, daughter, grandson, granddaughter or the spouses of any of them, and includes a person dependent on or residing with the public servant and a person in whose welfare the public servant is interested;

(f) words and phrases used but not defined in this Act and defined in the Code of Criminal Procedure, 1973, or the Indian Penal Code shall have the meanings respectively assigned to them in such Codes.

***3. Penalty**-(1) A gangster, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to ten years and also with fine which shall not be less than five thousand rupees:*

Provided that a gangster who commits an offence against the person of a public servant or the person of a member of the family of a public servant shall be punished with imprisonment of either description for a term which shall not be less than three years and also with fine which shall not be less than five thousand rupees.

(2) Whoever being a public servant renders any illegal help or support in any manner to a gangster, whether before or after the commission of any offence by the gangster (whether by himself or through others) or abstains from taking lawful measures or intentionally avoids to carry out the directions of any Court or of his superior officers, in this respect, shall be punished with imprisonment of either description for a term which may extend to ten years but shall not be less than three years and also with fine.

15. The issue involved in the present case may be resolved with the help of the consideration of provisions of section 14, 15 and 17 of the Gangsters Act, which read as under:

14. Attachment of property.-*(1) If the District Magistrate has reason to believe that any property, whether movable or immovable, 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. Release of property .- *(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 6 property shall be made over to the claimant.

16. Inquiry into the character of acquisition of property by court .-

(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 on 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. V 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 or office ;

(e) issuing commission for examination of witnesses 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. Order after inquiry.- *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.*

16. It is now well settled that 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 its 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, in that case the person aggrieved has 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.

17. The object behind providing the power of judicial scrutiny under Section 16 of the Code is to check arbitrary exercise of power by the District Magistrate in depriving a person of his property and to restore the rule of law, therefore a heavy duty lies upon the Court to hold a formal enquiry to find out the truth with regard to the question, whether the property was acquired by or as a result of the commission of an offence triable under the Act. The order to be passed under Section 17 of the Act must disclose reasons and the evidence in support of finding of the Court. The Court is not empowered 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 Gangster chart can be attached by District Magistrate under Section 14 of the Act.

18. The provisions of Section 14 of the Act, referred to above, empowers the District Magistrate to attach the property acquired by the Gangster as a result of commission of an offence triable under this Act. The District Magistrate may appoint an Administrator of any property attached, to administer such property in the best interest thereof but there must be reason to believe that any property whether moveable or immovable in possession of any person, has been acquired by a Gangster as a result of commission of an offence, triable under this Act but the District Magistrate in its order has not recorded his satisfaction having reason to believe with regard to the property attached that it was acquired by appellants as a result of commission of an offence triable under Gangster Act, even though while deciding the reference under Section 16 of the Act, the court below does not appreciate the evidence and in a mechanical manner passed the impugned order relying upon the observations made by the District Magistrate which is illegal and an unjustified approach.

19. A coordinate Bench of this Court sitting at Allahabad in the case of **Smt. Maina Devi versus State of U.P. 2013(83) ACC 902** in paras-8, 9 and 10 has been pleased to held as under:-

8. Considering the facts, circumstances of the case, submissions made by the learned Counsel for the appellant and the learned A.G.A. and from the perusal of the record it appears that the issue involved in the present case may be resolved with the help of the consideration of the provisions of section 14, 15 and 17 of the Gangsters Act, which read as under:

15. Release of property.--(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.

17. Order after inquiry*--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.*

9. In light of above mentioned provisions of the Gangster Act the District Magistrate is empowered to attach movable or immovable properties in possession of

any person acquired by a gangster as a result of the commission of an offence triable under this Act. But for exercising such powers there must be the reason to believe to the District Magistrate that such property was acquired by a gangster as a result of the commission of an offence triable under this Act. The words reason to believe are stronger than the word "satisfied", it must be passed on reasons which are relevant and material. In the present case, from the perusal of the lower Court record it appears that only on the basis of the police report submitted by the officer incharge of P.S. Sarai Lak-hansi, District Mau, the District Magistrate, Mau has attached two houses of the appellant, no material was supplied to the District Magistrate to have a reason to believe that the property in question was acquired by the gangster Raj Bahadur Singh as a result of commission of an offence triable under this Act. It vitiates the subjective satisfaction of the District Magistrate also. The learned District Magistrate was having no material in support of the police report that both the houses of the appellant were acquired by his son Raj Bahadur Singh. The learned District Magistrate rejected the application under section 15 of the Gangsters Act moved by the appellant for releasing the attached houses. The application was moved well within the time, the application was a representation to the District Magistrate, Mau, it was having all the details disclosing the sources by which both the houses were acquired by the appellant. But learned District Magistrate did not consider the sources disclosed by the appellant and rejected the application vide order dated 29.12.2008. The explanation of all the sources by which the appellant acquired the houses has not been properly considered. Therefore, impugned order dated 29.12.2008 has become illegal. The learned Special Judge (Gangsters Act), Azamgarh rejected the application moved by the appellant under section 17 of the Gangsters Act without considering the provisions of the section 14 of the Gangsters Act and the "relevancy of the reasons' recorded by the District Magistrate to believe that both the attached houses were acquired by a gangster Raj Bahadur Singh son of the appellant as a result of commission of an offence triable under this Act. The order dated 17.3.2009 passed by learned Special Judge (Gangsters Act)/Additional Sessions Judge, Azamgarh in Criminal Misc. Application No. 2 of 2009 is also illegal.

10. In view of the above discussion, the order passed by District Magistrate, Mau under section 14(1) of the Gangsters Act attaching two houses of the appellant the order dated 29.12.2008 passed by District Magistrate, Mau by which the application under section 15(1)(2) of the Gangster Act has been rejected and the order dated 17.3.2009 passed by learned Special Judge (Gangster Act), Additional Sessions Judge, Azamgarh in Criminal Misc. Application No. 2 of 2009 are illegal, the same are hereby set aside and the District Magistrate, Mau is hereby directed to release both the houses No. 204-D/8 and 205-D/9 situated in Mohalla Chandmari, Imiliyan, P.S. Sarai Lak-hansi, District Mau in favour of the appellant forthwith.

20. Further, another coordinate Bench of this Court sitting at Allahabad in the case of **Smt. Shanti Devi wife of Sri Ram versus State of U.P. 2007(2) ALJ 483** (All) in paras-9, 10 and 11 has been pleased to held as under:-

9. The conjoint reading of these sections shows that first it has to be proved

that gangster or any person on his behalf is or has been in possession of the property, and such property has been acquired by the commission of any offence triable under this Act, only then the District Magistrate acquires jurisdiction to proceed in the matter and to attach the property. Only when the initial burden is discharged, the onus shifts to the gangster or such person, to account for the same satisfactorily. But if it is found that the concerned person was not a gangster and did not acquire the property in commission of any offence triable under this Act, it has to be released as provided in Section 17. In other words the initial burden is on the prosecution to show that the concerned person is a gangster and has acquired property on account of his criminal activity as triable under the Act.

10. Therefore, in order to proceed under section 14 there must be materials for objective determination of the District Magistrate that the person is either a member, leader or organiser of a gang and has acquired any property in commission of any offence under the Act. There must be a nexus between his criminal acts as enumerated therein and the property acquired by him. His mere involvement in any offence is not sufficient to attach his property. In other words what is necessary to find is whether, his acquisition of property was a result of commission of any offence enumerated in the Act being a member, leader or organiser of a gang. One might have committed several offences but if the property acquired by him was with the aid of his earning from legal resources no action under Section 14 of the Act can be taken against him.

11. In the case of Badan Singh alias Baddo v. State of U.P., 2002 Cri LJ 1392 : 2001 All LJ 2852 it has been held by this Court that Section 14 of the Act is a harsh provision that affects one's right to property, which is a fundamental right under the Constitution. Therefore, initial burden was upon the State to satisfy the District Magistrate with necessary materials that a gangster acquired the properties as a result of commission of any offence. It has also been held in this case that the Act does not provide that the aggrived person seeking release of the properties from attachment must prove the source of income for acquisition thereof.

21. Keeping in view the aforesaid settled proposition of law and the judgment rendered by this Court in the case of **Smt. Maina Devi versus State of U.P. 2013(83) ACC 902** and **Smt. Shanti Devi wife of Sri Ram versus State of U.P. 2007(2) ALJ 483 (All),** this Court is of the view that the attached land property is the ancestral property of appellants and the attached vehicle belongs to the son of appellant No. 1 and the prosecution has failed to prove its case that the properties in question, which were attached, were acquired by them after accumulating money after committing offence as it is settled law that the property being made subject matter of 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 impugned orders were not passed on reasons which are relevant and material. In the present case from the perusal of the court orders and record it appears that only on the basis of the police report the D.M. has attached the property in question, no material was supplied to the District Magistrate to have reasons to believe that the property in question was acquired by the gangster the present appellants as a result of commission of any offence triable under this Act. It vitiates the subjective satisfaction of the District Magistrate also

from the record it appears that the District Magistrate has no material in support of the police report that the property in question was acquired by the present appellants being gangsters even though the proceedings was not followed as per the provisions of the Act. While passing the impugned orders of attachment the order was passed in mechanical manner without application of mind and is arbitrary. Thus the order passed by learned Special Judge Gangsters Act / Additional Session Judge Court No.-5 Unnao is also illegal and the same is also liable to be quashed.

22. In view of above facts and circumstances of the case, the impugned judgment and order of the learned court below cannot be said to be passed in correct perspectives as it is not sustainable in the eye of law and requires interference by this court, the prosecution has failed to establish that the provisions of Section 2 and 3 of the Gangster Act is attracted in the case of of appellants, and further the appellants' property is also not attached in accordance with law, as the prosecution has failed to establish that the said property and vehicle acquired and owned by the appellants have been earned from the income indulging in anti social activities. The enquiry under Section 16 was not done in accordance with the Act, the provisions of Section 14, 15 & 17 was also not followed in accordance with the Act, thus the entire proceeding initiated in pursuance thereof is vitiated.

23. Accordingly, the present appeal is allowed. The impugned judgment and order dated 10.03.2021 passed by the court of learned Special Judge, Gangster Act/ Additional Sessions Judge, Court No. 5, Unnao in Criminal Misc. Case No. 94 of 2021, Sushil Kumar Jaiswal Vs. State, arising out of Case Crime No. 336 of 2017, under Section 3(1) of the Gangster Act, Police Station Hasanganj, District Unnao is hereby quashed.

24. Consequently the order dated 22.09.2020 and 01.01.2021 passed by District Magistrate, Unnao, are also quashed.

25. The District Magistrate, Unnao is directed to release the vehicles Pickup Dala No. UP 35T 4181 as well as five shops situated at Khasra No. 256, measuring 0.014 Hectare situated at Village Kurauli, Tehsil Hasangaj, District Unnao in favour of appellants, forthwith.

26. No order as to costs.

(2023) 2 ILRA 648
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.02.2023

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 2490 of 2022

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

Counsel for the Appellant:
Sushil Pandey

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code,1860 - Section 304-B - Indian Penal Code,1860 - Dowry death - Punishment – Sentence - duty of a court to use its judicial discretion to award a sentence that is ''proper' in the backdrop of circumstances of the case at hand, and ''matches' with the guilt of

offender - court to prepare a balance sheet of mitigating and aggravating circumstances and quantify the "punishment' based thereon - In the instant case the appellant was in jail since 10.4.2013 i.e. for about 10 years - deceased committed suicide by hanging & that the accused was not present on the spot - Court reduced the maximum sentence U/s 304-B IPC from 14 years to 10 years with all remissions (Para 24)

Allowed. (E-5)

List of Cases cited:

1. Hem Chand Vs St. of Har. (1994) 6 SCC 727

2. Kashmir Kaur Vs St. of Pun. AIR 2013 SC 1039

3. Gajanan Dashrath Kharate Vs St. of Mah. 2016 (4) SCC Page 604

4. Sher Singh @ Pratapa Vs St. of Har. 2015 (89) ACC 288 (SC)

5. Gurukukh Singh Vs St. of Har., reported in 2009(11) Scale 688

6. Jameel Vs St. of U. P., reported in 2009(13) SCALE 578

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. This criminal appeal has been filed under Section 374 (2) Cr.P.C. against the judgment and order dated 14.9.2022 passed by Additional District & Sessions Judge, Sitapur in Sessions Trial No. 809 of 2013 arising out of Case Crime No. 51 of 2013 relating to Police Station- Khairabad, District- Sitapur, whereby convicted and sentenced the appellant for the offences under section-304-B I.P.C. for fourteen years rigorous imprisonment with fine of Rs. 5,000/- and in default of payment of fine, three months additional simple imprisonment; under Section- 498-A I.P.C. for three years rigorous imprisonment with fine of Rs. 2,000/- and in default of payment of fine, two months additional simple imprisonment; under Section- 201 IPC for two years imprisonment with fine of Rs. 2,000/- and in default of payment of fine, two months additional simple imprisonment; and under Section- 4 of Dowry Prohibition Act for one year rigorous imprisonment with fine of Rs. 1,000/- and in default of payment of fine, one month additional simple imprisonment.

2. The prosecution story, in brief, is that the complainant Qamar Jahan, W/o Imamuddin is a resident of Biswan, Sitapur. The complainant had married her daughter Tarannum with Tajeem (appellant) about 18 months ago. In the marriage, the applicant had given dowry according to her status, but the accused-appellant and her mother Asiya, Aafaq and Aafaq and his wife and Sajia Bano were not happy with the dowry given and the additional dowry demand of motorcycle was being raised. On non-fulfillment of the demand, they used to harass the daughter of the complainant right from the time of her marriage and on 01.04.2013, they killed the complainant's daughter by thrashing her and hanging her with a rope around her neck and buried the dead body secretly. On getting information from others, when the complainant went to matrimonial house of her daughter and inquired about her daughter (deceased), the family members of the appellant chased the complainant away from their house by abusing her and extended threat that if you take any legal action, I will kill you too. On the basis of written report, the First Information Report was registered against the appellant and other family members in Case Crime No. 51 of 2013, under Sections 498A, 304B, 302, 201, 504, 506 IPC and

3/4 of Dowry Prohibition Act on 02.04.2013 at police station- Khairabad, District- Sitapur.

3. During course of investigation, on 3.4.2013 on receiving oral information from the City Magistrate, the Nayab Tehsildar Rohit Kumar Maurya reached the place of occurrence near the cemetery secretariat. The Sub-Inspector Vidyashankar Shukla of Thana Khairabad was already present there. As per the instructions of Additional District Magistrate, Sitapur and City Magistrate, the proceedings of Panchayatnama were conducted by them. An arbitrator was appointed from among the people present there and after taking the opinion of the arbitrators, S.I. Vidyashankar prepared the panchayatnama under his direction. Thereafter, the dead body was sealed and relevant police papers for postmortem were handed over to Constable Vijay Kumar Verma and Pindarlal. After preparing the relevant papers relating to postmortem, the dead body was sent for post mortem and the same was conducted by the PW-4, Dr. Rakesh Kumar, Senior Consultant on 3.4.2013 at district hospital, Sitapur and prepared post mortem report. The doctor opined that the cause of death was due to hanging. The time of death of the deceased may be about three days ago i.e. on 1.4.2013.

4. After completion of the investigation, the investigating officer submitted the charge-sheet against the appellant and other family members including the accused Sajia U/s 498A, 304B, 302, 201, 504, 506 IPC and Sections 3/4 of Dowry Prohibition Act on 23.6.2013 and 25.7.2013 before the magistrate court who took cognizance and the case was committed to the court of sessions on 26.11.2013 where the case was registered as S.T. No. 809/2013 and thereafter, this case was transferred to the court of Additional District & Sessions Judge, Sitapur for trial. The charges were framed against the appellant and other co-accused U/s 498A, 304B, 302/34, 201, 504, 506 IPC and Section 4 of Dowry Prohibition Act on several dates i.e. 26.8.2014, 2.4.2015 and 20.4.2015. The charges were read over to the appellant and other co-accused but they denied the charges levelled against them in toto and claimed to be tried.

5. The prosecution in order to prove its case has examined the following witnesses:

(i) PW-1, Qamar Jahan who is the complainant as well as the mother of the deceased. She supported the entire prosecution version and proved the written report as Ex-ka-1.

(ii) PW-2, Jiyauddin who is the uncle of the deceased. He also supported the entire prosecution version.

(iii) PW-3, Imauddin who is the father of the deceased. He also supported the entire prosecution version.

(iv) PW-4, Dr. Rakesh Kumar who conducted the post-mortem of the deceased on 3.4.2013 at 05.25 pm and following injuries were found on the body of the deceased:

(1) The ligature mark was present in the middle of the neck above the thyroid carlways, which was present around the neck, which was 31 cm in length, 1.5 to 2 cm in width, which was 6 cm below and 5.5 cm below the chin. Mild unitosis was present along the edge of the ligature mark. On cutting the ligature mark, the left half bone was fractured.

(2) Multiple lacerations of 6 cm x 4 cm were present on the inner side of the left leg.

(3) Multiple lacerations of 5 cm x 3 cm were present on the inner side of the right knee.

The Doctor opined that the cause of the death of the deceased was hanging. He proved the post-mortem report as Ex-ka-3.

(v) PW-5, Rohit Kumar Maurya, Nayab Tehsildar who proved the panchayatnama report as Ex-ka-3 and relevant police papers as Ex-ka-4 to Ex-ka-8.

(vi) PW-6, Radhey Lal, Retired S.I. who registered the FIR on the basis of written report given by the complainant. He proved the copy of chik and G.D. as Ex-ka-9 and Ex-ka-10, respectively.

(vii) PW-7, Akhilesh Kumar Chaurasia, Circle Officer who conducted the investigation. During course of investigation, he prepared the site plans of the place where the deceased was buried and the residence of the accused-appellant and proved it as Ex-ka-11 and Ex-ka-12, respectively. Thereafter on 10.4.2013, he arrested the appellant Tajeem and submitted the charge-sheet against the appellant and other family members on 23.6.2013 and proved it as Ex-ka-13. He submitted another charge-sheet against the accused Sajia Bano on 25.7.2013 and proved it as Ex-ka-14. He also proved the recovery memo of marron, yellow, red, white scarf (dupatta) as Ex-ka-15.

(viii) PW-8, Jagdish Yadav, Inspector who recovered the scarf of the deceased in presence of the witnesses namely, Shakil Ahmad and Iliyas and sealed it. He received a letter for ensuring further proceedings from the office of ADM, which was proved as Ex-ka-16.

6. Thus, the prosecution relied on oral evidence of PW-1 to PW-8 as well as documentary evidence of Ex-ka-1 to Ex-ka-16.

7. After conclusion of the evidence of the prosecution, the statement of the appellant was recorded U/s 313 CrPC in which the accused-appellant denied the charges and stated that he is innocent and has been falsely implicated in the case. He further stated that with their consent, the last rites of the deceased were done in the presence of the witnesses from the mayka side of the deceased. After the last rites, the family members of the deceased were demanding the expenses incurred in the marriage. Due to non- completion, the false and frivolous case was filed against him. The deceased was alone at home at the time of the incident. This incident was committed by unknown persons by entering the house.

8. In defence, the witness DW-1, Shakeel Ahmed was examined, who supported the version of the appellant Tajeem and stated that after the list rites of the deceased, the family members of the deceased demanded the expenses incurred in the marriage from the appellant. When he refused to do so, then the family members of the deceased lodged the false and frivolous FIR against the appellant and his family members.

9. After appreciating the evidence available on record, the trial court acquitted the other co-accused persons and convicted the appellant vide order dated 14.9.2022, as aforesaid.

10. Being aggrieved and dissatisfied with the aforesaid order dated 14.9.2022, this criminal appeal has been preferred U/s 374(2) CrPC.

11. I have heard Mr. Sushil Pandey, learned counsel for the appellant, Mr. Vijay Srivastava, learned AGA appearing for the State and perused the material available on record.

12. Learned counsel for the appellant submits the trial court has convicted the appellant on the basis of conjecture and surmises. The trial court failed to appreciate the evidence available on record. There are material contradictions in the statement of prosecution witnesses. It is also submitted that only on the basis of interested witnesses, the trial court convicted the appellant and in this matter no independent witness was produced by the prosecution. The counsel for the appellant submits that at the time of incident, he was not present on the spot when the deceased committed suicide by hanging. It is further submitted that after last rites of the deceased, the complainant and other family members of the deceased demanded the expenses incurred in marriage from the accused-appellant. When he refused to do so, then the FIR was lodged by the mother of the deceased against the appellant. It is also submitted that the last rites of the deceased was performed in presence of the appellant. Thus, the learned counsel for the appellant submits that this is the case of suicide not of dowry death and therefore, the accused is supposed to be given the benefit of doubt as ingredients of 304-B IPC are not made out against him.

13. Learned counsel has further submitted that what was the date of demand is nowhere proved, it is submitted that there is a missing link between the date of demand and the death and therefore, the accused would be entitled to the benefit as propounded by the Apex Court in ***Hem Chand Vs. State of Harayana (1994) 6 SCC 727.*** Thus the prosecution has failed to establish that the death of the deceased (Tarannum) occurred due to cruelty and harassment by the appellant. He further submits that the prosecution has failed to establish the charges against the appellant beyond shadow of doubt.

14. Lastly, the counsel for the appellant submits that the appellant is languishing in jail since 10.4.2013. Thus, the appellant is lodged in jail since about 10 years. Apart from arguing the merit of the case, learned counsel for the appellant contended that there is no evidence against the appellant regarding the cruelty or harassment committed by him. If the Court arrives at a conclusion that the appellant was guilty, his sentence kindly be reduced to the period already undergone U/s 498A, 304B, 201 IPC and Section 4 of Dowry Prohibition Act.

15. Learned AGA submitted that the deceased committed suicide at her matrimonial home and the deceased died under unnatural circumstances. It is further submitted that the prosecution has fully established that the death of the deceased was done under unnatural circumstances right from the time of marriage and soon before her death she was subjected to harassment and cruelty due to demand of dowry and the appellant has been rightly convicted U/s 498A, 304B, 201 IPC and Section 4 of Dowry Prohibition Act and on perusal of the judgement, it reveals that the prosecution has clearly established the charges levelled against the appellant and thus the prosecution has not failed to establish beyond shadow of doubt and learned trial court rightly convicted and sentenced him, as aforesaid. Thus, in these circumstances, there is no ground for leniency of the Court.

16. To appreciate the argument of the parties, it is necessary to look into the provisions of Sections 498A, 304B IPC and 133 of the Evidence Act.

17. Their Lordship of Hon'ble Supreme Court ***in AIR 2013 (SC 1039) in case of Kashmir Kaur vs. State of Punjab*** has explained the ingredients of offence under section 304B of IPC which reads as under:-

From the above decisions the following principles can be culled out:

a) To attract the provisions of Section 304B IPC the main ingredient of the offence to be established is that soon before the death of the deceased she was subjected to cruelty and harassment in connection with the demand of dowry.

b) The death of the deceased woman was caused by any burn or bodily injury or some other circumstance which was not normal.

c) Such death occurs within seven years from the date of her marriage.

d) That the victim was subjected to cruelty or harassment by her husband or any relative of her husband.

e) Such cruelty or harassment should be for or in connection with demand of dowry.

f) It should be established that such cruelty and harassment was made soon before her death.

g) The expression (soon before) is a relative term and it would depend upon circumstances of each case and no straightjacket formula can be laid down as to what would constitute a period of soon before the occurrence.

h) It would be hazardous to indicate any fixed period and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113B of the Evidence Act.

i) Therefore, the expression "soon before" would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate or life link between the effect of cruelty based on dowry demand and the concerned death. In other words, it should not be remote in point of time and thereby make it a stale one.

j) However, the expression "soon before" should not be given a narrow meaning which would otherwise defeat the very purpose of the provisions of the Act and should not lead to absurd results.

k) Section 304B is an exception to the cardinal principles of criminal jurisprudence that a suspect in the Indian Law is entitled to the protection of Article 20 of the Constitution, as well as, a presumption of innocence in his favour. The concept of deeming fiction is hardly applicable to criminal jurisprudence but in contradistinction to this aspect of criminal law, the legislature applied the concept of deeming fiction to the provisions of Section 304B.

l) Such deeming fiction resulting in a presumption is, however, a rebuttable presumption and the husband and his relatives, can, by leading their defence prove that the ingredients of Section 304B were not satisfied.

m) The specific significance to be attached is to the time of the alleged cruelty and harassment to which the victim was subjected to, the time of her death and whether the alleged demand of dowry was in connection with the marriage. Once the said ingredients were satisfied it will be called dowry death and by deemed fiction of law the husband or the relatives will be deemed to have committed that offence.

Section 113 B of the Act reads as follows:

[113B. Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a

woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in 304 B of the Indian Penal Code, (45 of 1860).]

18. As per definition of dowry death under Section 304 B IPC and the wording in the presumptive Section 113 B of the Act, if it is proved that death of woman is caused by any burn or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death (i) She was subjected to cruelty or harassment by her husband or his relatives, or (ii) Such cruelty or harassment was for, or in connection with, demand of dowry, or (iii) Such cruelty or harassment was soon before her death; then it becomes obligatory on the court to raise a presumption that accused caused dowry death.

19. **In [2016 (4) SCC Page 604], in the case of Gajanan Dashrath Kharate v. State of Maharashtra, their Lordships of Hon. Supreme Court have held** that the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer explanation. In paragraph no.13, their Lordships have held as under:-

"13. As seen from the evidence, appellant Gajanan and his father Dashrath and mother Mankarnabai were living together. On 7-4-2002, mother of the appellant-accused had gone to another Village Dahigaon. The prosecution has proved presence of the appellant at his home on the night of 7-4- 2002. Therefore, the appellant is duty-bound to explain as to how the death of his father was caused. When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer. On the date of the occurrence, when the accused and his father Dashrath were in the house and when the father of the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime."

20. Now, it has to be seen that just before her death, deceased was subjected to cruelty or harassment by her husband and any relative of husband in connection with demand of dowry. This element and burden of prove in case of dowry deaths have been

dealt with in detail by ***Hon'ble The Apex Court in Sher Singh @ Pratapa v. State of Haryana 2015 (89) ACC 288 (SC)***. The Apex Court held as under:

12. In our opinion, it is beyond cavil that where the same word is used in a section and/or in sundry segments of a statute, it should be attributed the same meaning, unless there are compelling reasons to do otherwise. The obverse is where different words are employed in close proximity, or in the same section, or in the same enactment, the assumption must be that the legislature intended them to depict disparate situations, and delineate dissimilar and diverse ramifications. Ergo, ordinarily Parliament could not have proposed to ordain that the prosecution should "prove" the existence of a vital sequence of facts, despite having employed the word "shown" in Section 304 B. The question is whether these two words can be construed as synonymous. It seems to us that if the prosecution is required to prove, which always means beyond reasonable doubt, that a dowry death has been committed, there is a risk that the purpose postulated in the provision may be reduced to a cipher. This method of statutory interpretation has consistently been disapproved and deprecated except in exceptional instances where the syntax permits reading down or reading up of some words of the subject provisions.

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

"Burden of Proof: The duty of a party to litigation to prove a fact or facts in issue. Generally the burden of proof falls upon the party who substantially asserts the truth of a particular fact (the prosecution or the plaintiff). A distinction is drawn between the persuasive (or legal) burden, which is carried by the party who as a matter of law will lose the case if he fails to prove the fact in issue; and the evidential burden (burden of adducing evidence or burden of going forward), which is the duty of showing that there is sufficient evidence to raise an issue fit for the consideration of the trier of fact as to the existence or non-existence of a fact in issue.

The normal rule is that a defendant is presumed to be innocent until he is proved guilty; it is therefore the duty of the prosecution to prove its case by establishing both the actus reus of the crime and the mens rea. It must first satisfy the evidential burden to show that its

allegations have something to support them. If it cannot satisfy this burden, the defence may submit or the judge may direct that there is no case to answer, and the judge must direct the jury to acquit. The prosecution may sometimes rely on presumptions of fact to satisfy the evidential burden of proof (e.g. the fact that a woman was subjected to violence during sexual intercourse will normally raise a presumption to support a charge of rape and prove that she did not consent). If, however, the prosecution has established a basis for its case, it must then continue to satisfy the persuasive burden by proving its case beyond reasonable doubt (see proof beyond reasonable doubt). It is the duty of the judge to tell the jury clearly that the prosecution must prove its case and that it must prove it beyond reasonable doubt; if he does not give this clear direction, the defendant is entitled to be acquitted.

There are some exceptions to the normal rule that the burden of proof is upon the prosecution. The main exceptions are as follows. (1) When the defendant admits the elements of the crime (the actus reus and mens rea) but pleads a special defence, the evidential burden is upon him to prove his defence. This may occur, the example, in a prosecution for murder in which the defendant raises a defence of self-defence. (2) When the defendant pleads automatism, the evidential burden is upon him. (3) When the defendant pleads insanity, both the evidential and persuasive burden rest upon him. In this case, however, it is sufficient if he proves his case on a balance of probabilities (i.e. he must persuade the jury that it is more likely that he is telling the truth than not). (4) In some cases statute expressly places a persuasive burden on the defendant; for example, a person who carries an offensive weapon in public is guilty of an offence unless he proves that he had lawful authority or a reasonable excuse for carrying it".

14. As is already noted above, Section 113 B of the Evidence Act and Section 304B of the IPC were introduced into their respective statutes simultaneously and, therefore, it must ordinarily be assumed that Parliament intentionally used the word 'deemed' in Section 304B to distinguish this provision from the others. In actuality, however, it is well nigh impossible to give a sensible and legally acceptable meaning to these provisions, unless the word 'shown' is used as synonymous to 'prove' and the word 'presume' as freely interchangeable with the word 'deemed'. In the realm of civil and fiscal law, it is not difficult to import the ordinary meaning of the word 'deem' to denote a set of circumstances which call to be construed contrary to what they actually are. In criminal legislation, however, it is unpalatable to adopt this approach by rote. We have the high authority of the Constitution Bench of this Court both in State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory, AIR 1953 SC 333 and State of Tamil Nadu v. Arooran Sugars Limited (1997) 1 SCC 326, requiring the Court to ascertain the purpose behind the statutory fiction brought about by the use of the word 'deemed' so as to give full effect to the legislation and carry it to its logical conclusion. We may add that it is generally posited that there are rebuttable as well as irrebuttable presumptions, the latter oftentimes assuming an artificiality as actuality by means of a deeming provision. It is abhorrent to criminal jurisprudence to adjudicate a person guilty of an offence even though he had neither intention to commit it nor active participation in its commission. It is after deep cogitation that we consider it imperative to construe the word 'shown' in Section 304B of the IPC as

to, in fact, connote 'prove'. In other words, it is for the prosecution to prove that a 'dowry death' has occurred, namely, (i) that the death of a woman has been caused in abnormal circumstances by her having been burned or having been bodily injured, (ii) within seven years of a marriage, (iii) and that she was subjected to cruelty or harassment by her husband or any relative of her husband, (iv) in connection with any demand for dowry and (v) that the cruelty or harassment meted out to her continued to have a causal connection or a live link with the demand of dowry. We are aware that the word 'soon' finds place in Section 304B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304B or the suicide under Section 304B of the IPC. Once the presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt. It seems to us that what Parliament intended by using the word 'deemed' was that only preponderance of evidence would be insufficient to discharge the husband or his family members of their guilt. This interpretation provides the accused a chance of proving their innocence. This is also the postulation of Section 101 of the Evidence Act. The purpose of Section 113B of the Evidence Act and Section 304B of the IPC, in our opinion, is to counter what is commonly encountered - the lack or the absence of evidence in the case of suicide or death of a woman within seven years of marriage. If the word "shown" has to be given its ordinary meaning then it would only require the prosecution to merely present its evidence in Court, not necessarily through oral deposition, and thereupon make the accused lead detailed evidence to be followed by that of the prosecution. This procedure is unknown to Common Law systems, and beyond the contemplation of the Cr.P.C.

21. It is well settled principle that once prosecution proved that death was occurred within 7 years of marriage and the deceased/victim was subjected to cruelty and harassment by her husband and relative of her husband soon before her death in connection with the demand of dowry, then heavy burden of proof lies upon accused to adduce evidence dislodging his guilt, beyond reasonable doubt. In the present case, the prosecution failed to prove his case that why the deceased (Tarannum) herself committed suicide by hanging.

22. Last argument of learned counsel for the appellant is that the appellant is languishing jail since 10.4.2013. Appellant is a very poor person. It is also submitted that the deceased committed suicide by hanging and, therefore, he prayed for reduction of sentence to the period already undergone in jail. It is evident that the appellant is languishing in jail for about 10 years.

23. The Indian Penal Code, like other major penal statutes, prescribes punishment for various offences created under it. It provides for four kinds of punishments;

(i) death; (ii) imprisonment for life; (iii) imprisonment for various terms which may be either simple or rigorous, and(iv) fine. A further peep into the

legislative paradigm of the code discloses that certain offences are made punishable with a minimum sentence with a cap qua the maximum, with or without fines, For some offences, it prescribes an upper limits of sentence, leaving the minimum, to the discretion of the court, which may even be of one day.

24. The Code, thus, gives much leeway to, and confers wide discretion on, the judiciary to pick up an opt punishment, if the offence concerned is made punishable by different forms of alternate punishment and a choice is given to it to opt either of them, in isolation or combination, and/or to quantify "punishment' within the range of "minimum' and "maximum' punishment, if any, prescribed for the offence. In the absence of any sentencing policy or standardized guiding principles in India, a court is virtually left to determine sentence which, in its opinion, meets the ends of justice. However, it is the duty of a court to use its judicial discretion to award a sentence that is "proper' in the backdrop of circumstances of the case at hand, and "matches' with the guilt of offender.

25. In ***Gurukukh Singh v. State of Haryana, reported in 2009(11) Scale 688***, the Supreme Court not only emphasized that it is the duty and obligation of every court to award proper sentence but also enumerated various factors that the court is required to consider while determining the sentence. They are (i) motive or previous enmity; (ii) whether the incident had taken place on the spur of the moment; (iii) the intention/knowledge of the accused while inflicting the blow or injury; (iv) the gravity, dimension and nature of injury; (v) the age and general health condition of the accused; (vi) whether the injury was caused without premeditation in a sudden fight; (vii)the nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted; (viii) the criminal background and adverse history of the accused; (ix) number of other criminal cases pending against the accused; (x) incident occurred within the family members or close relations, and (xi) the conduct and behavior of the accused after the incident, whether the accused had taken the injured/ the deceased to the hospital immediately to ensure that (s)he gets proper medical treatment ? In the same breath, the apex court has made it clear that these factors are only illustrative and not exhaustive. These are some of the relevant factors which are required to be kept in view by a sentencing court. Each case, obviously, has to be seen from its special perspective. The court must ensure that the accused receives appropriate sentence and that it must be proportionate to the gravity of the offence committed by the convict. Proportion between "crime' and "punishment' is one of the accepted goals of criminal justice system. The principle of proportion between crime and punishment essentially requires a court to prepare a balance-sheet of mitigating and aggravating circumstances and quantify the "punishment' based thereon. The principle of proportionality is evolved to remove (or at least to minimize) arbitrariness in the sentencing process.

26. In ***Jameel v. State of Uttar Pradesh, reported in 2009(13) SCALE 578,*** the apex court further stressed that the imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice, the court stated, demands that the courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the

crime and conscience of the society. It also reminded the courts of the need that they, while modulating sentence, need to be stern or to be tempered with mercy whenever factual matrix of a case at hand warrants. 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 other attending circumstances may be necessary pointers for the court in tailoring "proper' sentence.

27. So far as the question of sentence is concerned, the same is a matter of discretion of the learned trial Judge. It is well settled law that when the discretion has been granted to the learned trial Judge, if the same is not arbitrarily, capriciously or perversely but has been properly exercised by accepted judicial norms, the appellate court ought not to interfere to the detriment of the accused person unless there are very strong reasons which are not disclosed on the face of the judgment for the lesser punishment.

28. Considering the above propositions of law and facts and circumstances of the present case, I am of the view that the appellant is in jail since 10.4.2013 and as such, about 10 years have already elapsed. So, in the interest of justice, the **maximum sentence U/s 304-B IPC from 14 years is reduced to 10 years with all remissions under Section 304-B IPC.** But the sentence awarded U/s 498-A, 201 I.P.C. and Section 4 of the Dowry Prohibition Act shall remain unaltered. All the sentences shall run concurrently. It is made clear that the fine clause shall remain unaltered.

29. The Jail Authority will calculate the period of his incarceration with remission and decide the same in accordance with jail manual.

30. **Thus the appeal is dismissed on the point of conviction and partly allowed on the point of sentence.**

31. The trial court record be sent back. A copy of this order be also sent to the court concerned as well as District Superintendent of Jail, Sitapur for necessary compliance.

(2023) 2 ILRA 659
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.01.2023

BEFORE

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

Criminal Appeal No. 3426 of 2010

Babloo @ Ranjeet Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Apul Misra, Sri P.N. Misra, Sri Raghuvansh Misra, Sri C.L. Chaudhary (A.C.), Sri Anil Kumar Singh Bishen

Counsel for the Respondent:
Government Advocate, Sri I.K. Upadhyay

A. Criminal Law - Indian Penal Code,1860 - Section 302 - Murder - A mango grove was jointly owned by Virendra Singh (father of accused), Doodh Nath Singh, and the deceased Kailash - Mangoes were sold for Rs. 1,500, with Kailash (deceased) receiving Rs. 600, Doodh Nath Singh receiving Rs. 500, and the accused, Bablu Singh, receiving Rs. 400 - Bablu, dissatisfied with his share, obstructed Kailash's house entrance with bamboo sticks - Upon Kailash's return, Bablu

attacked him with a 'Sabbal', on neck and chest, resulting in Kailash's death- Held - ocular testimony and the injuries caused by the accused commensurate - As per testimony of doctor the injuries were sufficient in ordinary course of nature to cause death - unequal distribution of money, which in fact caused annoyance to the accused-appellant and served as motive of committing the crime - act of the appellant was pre planned and it cannot be said that it was a case of sudden quarrel - accused cannot get advantage of his own misdeed, which alone culminated into death of the deceased - origin of the crisis was created by none other than the accused himself by putting hurdle in free passage from and to the house of deceased- by putting bamboo barrier in front of his house - accused caused blow with Sabbal on the head and chest of the deceased - doctor has rightly opined that the injury so caused was sufficient in the natural course to cause death (Para 28, 36, 37, 40)

Dismissed. (E-5)

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

1. Heard learned counsel for the appellant as well as 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 of conviction dated 01.05.2010 passed by the Special/Additional Sessions Judge, Ballia in Session Trial No.187 of 2008, arising out of Case Crime No.93 of 2008, under Section - 302 I.P.C., Police Station - Nagra, District - Ballia, whereby the appellant has been convicted and sentenced to undergo imprisonment for life under Section - 302 I.P.C., coupled with fine Rs.3,000/- in default of payment of fine, two years additional rigorous imprisonment.

3. Factual matrix of this case as discernible from record, proceeds on facts that Smt. Suman Singh, wife of deceased-Kailash Singh lodged a written report against accused- Bablu @ Ranjeet Singh, son of Sri. Virendra Singh, resident of Village - Deoria, Police Station - Nagra, District - Ballia at Police Station- Nagra, District - Ballia at 10:20 a.m. on 10.06.2008 regarding the incident, which took place in her Village - Deoria in District - Ballia, located about four kilometers north-east of the police station to the import that there is one mango grove in partnership owned by the informant as well as Virendra Singh and Doodh Nath Singh. Mango of that grove was sold out for Rs.1,500/- and Virendra Singh had decided that out of aforesaid Rs.1,500/-, Kailash Singh will get Rs.600/-, Doodh Nath Singh will get Rs.500/- and Bablu Singh (son of Virendra Singh) will get Rs.400/- and the money was distributed among them accordingly. Bablu alias Ranjeet Singh was annoyed over it as he received lesser money Rs.100/- than the two others. To express his anguish he created hurdle in the way in the free egress and ingress to the house of the deceased-Kailash Singh by fixing bamboo sticks on the soil in front of his house. The informant's husband, Kailash Singh in the meanwhile returned from his field, he saw the hurdle so created and began to remove the bamboos, when the appellant Bablu alias Ranjeet Singh, who appeared on the scene possessing a *"Sabbal'* in his hands caused blow with it on the neck of Kailash, due to which, he fell down, when Bablu alias Ranjeet Singh assaulted Kailash Singh with *"Sabbal'* on his chest. The informant

and the co-villagers tried to take the injured to the Nagra hospital but the injured died on way to the hospital. The incident was alleged to have occurred at 09:00 a.m. (on 10.06.2008).

4. A case was registered at Police Station - Nagra against the appellant- Bablu alias Ranjeet Singh and concerned Check F.I.R. (Ext. Ka-3) was prepared at Case Crime No. 93 of 2008, under Section - 304 I.P.C. On the basis of the entry made in the check F.I.R., relevant entry was also made in the concerned General Diary at Serial No.20 of the aforesaid date at 10:20 a.m. at aforesaid police station - Nagra at aforesaid Case Crime No.93 of 2008, under Section - 304 I.P.C. and a case was registered against appellant-Bablu alias Ranjeet Singh.

5. Consequently, the investigation ensued and was entrusted to P.W.6- Vijay Bahadur Singh. Relevant to mention that after the report had been lodged, Ramesh Chandra Mishra P.W.7 rushed to the spot with relevant papers at P.H.C. Nagra for preparation of inquest report of deceased- Kailash Singh,- son of Jai Mangal Singh and completed the task at 12:05 hours on 10.06.2008. The same has been proved by the aforesaid witness as Ext. Ka-7. Apart from inquest report, he has also proved preparation of relevant papers, say report R.I., specimen seal, letter to C.M.O., photonash, police form no.13 etc. and has proved these papers as Ext. Ka-8 to Ext. Ka-12.

6. After the inquest report was prepared, the dead body of Kailash Singh was sent for postmortem examination at Sadar Hospital, Ballia, where post-mortem was conducted by Dr. P.K. Singh, Medical Officer at 05:00 p.m. on 10.06.2008, wherein he noted two ante mortem injuries :-

1. Lacerated wound 4 c.m. x 1 c.m. x scalp deep at occipital region of scalp 6.2 c.m. away from right ear.

2. Puncture wound 4 c.m. (four centimeter) x 3 c.m. at the level of right nipple of chest, 2 c.m. medial under neath 3rd, 4th chest rip fracture with laceration of right lung pleura, corresponding to puncture wound thoracic cavity full blood and blood clotted. (2 ½ litres).

7. Cause of death was stated to be shock and haemorrhage as a result of ante mortem chest injury. This post mortem examination report has been proved by the doctor PW-5 as Exhibit Ka-2.

8. Since the investigation had commenced, the investigating officer (P.W.-6) proceeded to the place of occurrence and after making entry in the case diary, inspected the place of occurrence, prepared the site-plan at the instance of the informant and the witnesses, which site plan is Ext. Ka-5. Apart from that, he also recorded statement of various prosecution witnesses and after completing the investigation filed the charge-sheet (Ext. Ka-6).

9. After committal proceeding, the trial commenced and the prosecution opened its case by stating the charge brought against the accused and the evidence by which it proposes to prove the guilt and after hearing the accused found *prima facie* case against the accused under Section - 302 I.P.C. and charged him as herein-under :-

"That on 10.06.2008, at about 09:00 a.m. in Village - Deoria, P.S. Nagra, District - Ballia, you did an act viz. assaulted by *"SABBAL'* on neck and chest of Kailash Singh, and by that, you did commit murder by intentionally causing the death of Kailash Singh, and thereby committed an offence punishable under Section - 302 of the Indian Penal Code and within the cognizance of this court.

in the alternative, the accused was charged as under :-

10. That, on 10.06.2008 at about 9 A.M. in village Deoria, P.S. Nagra, district Ballia, you did an act viz. assaulted by *"SABBAL'* on neck and chest of Kailash Singh, and by that act, you caused the death of Kailash Singh, and thereby you committed an offence of culpable homicide not amounting to murder, punishable under Section - 304 of the Indian Penal Code and within the cognizance of this court.

11. The charge was read over and explained to the accused in Hindi, who abjured the charge and opted for trial."

12. Consequently, the prosecution was required to adduce his testimony. Resultantly, the prosecution produced in all seven witnesses:-

13. P.W.-1, Suman Singh is the wife of the deceased. P.W.-2, Doodh Nath is brother of the deceased. P.W.-3, Vishwanath Singh, he is witness of fact and claims himself to be present at the time of occurrence. All the three witnesses are fact witnesses. P.W.-4 Dr. P.K. Singh conducted post mortem examination on body of the deceased Kailash Singh. P.W.-5 is Constable Bhagwan Ram who has proved fact of written report being presented by the informant- Suman Singh, wife of deceased, Kailash Singh at the Police Station - Nagra on 10.06.2008, and prepared the Check F.I.R. and noted relevant entry of the same in the concerned G.D. at Serial No.20 and has proved the Check F.I.R. (Ext. Ka-3) and the relevant G.D. (Ext. Ka-4). P.W.6, S.I. Vijay Bahadur Singh is the investigating officer, he conducted the investigation and filed the charge sheet. P.W.-7, S.I. Ramesh Chandra Mishra has prepared the inquest (Exhibit Ka-7) report of deceased-Kailash and has proved it.

14. The evidence for the prosecution was closed and statement of accused-Bablu was recorded under Section - 313 Cr.P.C., wherein he denied the charges and stated in answer to questionaire that he has been falsely implicated in this case, on account of fact that the informant was having illicit relationship with Doodh Nath and the accused had objected to their illicit relationship. He further stated that the informant was younger than 20 years with her husband and in order to eliminate the deceased, these two persons have committed murder and falsely implicated him in the case.

15. The defence has got examined Mukur Dhan as D.W.-1. Thereafter, evidence for the defence was closed and the case was heard on its merit and after appraisal of the evidence and analysis of facts qua circumstances returned the aforesaid finding of conviction under Section - 302 I.P.C. and passed sentence for imprisonment of life coupled with fine with default clause for suffering additional imprisonment for one year, vide judgment and order dated 01.05.2010.

16. Consequently, this appeal.

17. Contention of learned *amicus curiae* for the appellant proceeds on to

claim that in this case the presence of the witnesses of fact on the spot at the time of occurrence, who claimed to have seen the occurrence becomes doubtful. If the testimony of the informant P.W.-1 taken to be true on the whole, would reflect that she is not telling the truth. In fact no one saw the occurrence and no one was present on the spot. It is admitted position to the prosecution that P.W.2 Doodhnath is the younger brother of the deceased (Kailash) and brother-in-law *(''Devar')* of the complainant P.W.1 Suman Singh, (wife of the deceased). It so happened that Doodhnath and Suman had developed illicit relationship between them. That was seen by the appellant and he objected to it, due to which both the witnesses were annoyed and they planned to eliminate the deceased from their life consequently they clandestinely committed the offence and involved the present appellant in the offence, whereas, no such incident was caused by him.

18. Apart from that, learned *amicus curiae* vehemently urged that as per the testimony of P.W.1- the wife of the deceased- she made her signature at the police station in the afternoon on 10.6.2008 whereas the report regarding the incident had been lodged after the occurrence the very same day at 10.20 a.m.

19. In so far as the testimony of the doctor witness (P.W.-4) is concerned that by itself is indicative of fact that concerned injury might have been caused by the fall of the victim and cannot be attributed solely to the act of the appellant.

20. Apart from that learned *amicus curiae* also brought to our notice the testimony of other prosecution witnesses and claimed the same is fraught with material contradictions. He also claimed that these contradictions are material and hit to the root of the prosecution case. The testimony on record does not inspire confidence.

21. Per contra, Sri Aswani Prakash Tripathi, learned A.G.A. vehemently opposed the contention and replied to the ambit that in so far as the testimony of P.W.1 and P.W.2 is concerned, the same when taken as a whole would establish fact that the act attributed to the appellant was committed by him and the evidence is forthcoming directly. There is no supporting material or circumstances whispering about and working, even in the least, to the hypothesis that there existed some illicit relationship between P.W.1 and P.W.2 and because of that they were involved in the commission of the crime and the appellant was falsely implicated in this case.

22. In so far as the presence of both the witnesses of fact on the spot at the time of occurrence is concerned, the same is most natural and their version of the incident is consistent with the description of occurrence contained in the F.I.R. and so far as the ante-mortem injuries noted by the doctor at the time of postmortem examination of the deceased is concerned, it has been categorically stated by the doctor witness, P.W.-4, P. K. Singh to have been/might have been caused at 09:00 a.m. on 10.06.2008 and that part of the statement remained unchallenged by the defence. Apart from that the learned A.G.A. summed up that the cumulative reading of the facts and circumstances of this case qua testimony reasonably proved beyond doubt guilt of the accused.

23. In the wake of aforesaid submission, the moot point that crops up for determination of this appeal relates to fact whether the prosecution has been able

to prove charge under Section - 302 I.P.C. beyond all reasonable doubt ?

24. Now insofar as the merit of this case is concerned, we may begin with the origin of the incident as reported by the informant, wife of deceased (P.W.1 Suman Singh), when she lodged the written report (Ext. Ka-1) at Police Station - Nagra, District - Ballia on 10.06.2008 at 10:20 a.m., wherein she proceeds with the description of the occurrence by claiming that Virendra Singh, Doodhnath Singh and the informant are partners of mango grove, which was rented / sold out for Rs.1,500/- and the sale proceeds was distributed among Kailash Singh, husband of the informant, Doodhnath Singh and Bablu @ Ranjeet Singh in the ratio of Rs.600/-, Rs.500/- and Rs.400/-, respectively.

25. On account of above distribution, Bablu alias Ranjeet Singh son of Virendra Singh felt annoyed, since he was given lesser money in comparison to others, therefore, the accused out of anguish blocked passage of house of deceased-Kailash by placing bamboos and thorny bushes (in front of the door) and thereby tried to close the passage (of the house of deceased). At that point of time, deceased-Kailash Singh had gone for work on his field. When he returned, he began to remove the hurdle so created and began to uproot the bamboos and thorny bushes,- then accused Bablu alias Ranjeet Singh possessing *''Sabbal'* (an iron like instrument for digging the soil) in his hand caused blow with it on the neck of deceased- Kailash Singh, due to which, he fell down, then accused dealt another blow on his chest. The deceased was injured. He was taken to the Nagra Hospital but he died on way to the hospital. The report was got scribed and lodged at Police Station - Nagra, District - Ballia (at 10:20 a.m. on 10.06.2008).

26. In the backdrop of aforesaid fact position, we come across the post-mortem examination report Ext. Ka-2, which has been proved by doctor witness P.K. Singh (P.W.-4), whereby he has noted two ante mortem injuries. One injury on the occipital region of scalp 6.2 c.m. away from right ear in the shape of lacerated wound with the dimension 4 c.m. x 1 c.m. x scalp deep and second injury has been described to be punctured wound 4 c.m. x 3 c.m. at the level of right nipple of chest 2 c.m. medial underneath IIIrd and IVth chest rib fracture with laceration of right lungs and pleura corresponding to punctured wound. The post-mortem was conducted at 05:00 p.m. on 10.06.2008, the very same day, wherein the cause of death was shown to be ante mortem chest injury, shock and haemorrhage.

27. In the light of aforesaid fact situation, we proceed further with the scrutiny of testimony of the prosecution witnesses of facts namely, Suman Singh, Doodhnath Singh and Vishwanath Singh, P.W.-1, P.W.-2 and P.W.-3, respectively. Insofar as the testimony of these three witnesses of fact is concerned, a cumulative reading of the same would reveal that they have testified to the fact of origin of the controversy to the ambit that the accused Bablu @ Ranjit Singh son of Virendra Singh felt annoyed by unequal distribution of money after the mango grove was rented / sold out, wherein he received his father's share Rs.400/- in all.

28. We may observe that it is a case of eye account testimony of the occurrence and the motive does not carry any importance and holds pivotal point.

However, considering the cause of action on issue of distribution of money among three persons, the same is proved to be unequal distribution of money, which in fact caused annoyance to the accused-appellant and served as motive of committing the crime. A cumulative reading of the testimony of aforesaid witnesses of fact is overwhelmingly supporting the case of the prosecution that it was the accused, who put bamboos and thorny bushes in front of house of Kailash Singh and blocked free access to the house, while Kailash Singh was away on his field. When he returned in short while and tried to remove hurdle so created, the accused-appellant appeared on the scene possessing a *"Sabbal'* in his hand and gave first blow on the head / neck of the deceased Kailash, due to which, he fell down then another blow was given with *"Sabbal'* on the chest of the deceased.

29. Now, insofar as the point of occurrence is concerned, we also gather sufficient corroboration from the independent testimony of Vishwanath Singh (P.W.3), who, at that point of time, claims to have been present on the spot and he was bathing. Specific suggestion has been made by the prosecution that the involvement of the appellant has been falsely made by the informant herself, for the reason that she had developed illicit relationship with Doodhnath, her brother-in-law and she was seen/found in objectionable position by the accused and he had threaten to divulge the secret, due to which, both Doodhnath P.W.-1 and the P.W.-1 Suman hatched conspiracy between them and killed Kailash Singh secretly and the accused has been made scapegoat, but the specific suggestion has been denied.

30. We come across testimony of the prosecution witnesses of fact, wherein the suggestion regarding existence of illicit relationship between Suman Singh and Doodhnath has been countered by them and denied specifically.

31. We also come across testimony of defence witness Mukur Dhan- (D.W.-1). He has testified to the degree that he was threatened by the prosecution witness Doodhnath not to appear as a witness in this case. He has also testified to the fact that both Suman Singh and Doodhnath were inimical towards Bablu alias Ranjeet Singh and he (Bablu-accused) has not killed Kailash Singh. A question put to this witness by asking that Doodhnath and Suman Singh were residing together as wife and husband prior to the occurrence, whereupon, he answered in his examination-in-chief in the affirmative. However, this question was objected by the prosecution as this question being a leading question should normally not to be asked by the counsel of the defence to its witness Mukur Dhan. Therefore, objection raised by the prosecution is liable to be sustained. It being leading question and not of introductory nature cannot be allowed as such. It is contentious on its face.

32. The testimony of D.W.-1 proceeds in the last two-three lines of his examination-in-chief, (as appears on page no.48 of the paper book) that living together of Doodhnath and Suman Singh was objected by the accused. The accused has been falsely implicated in this case.

33. However, in his cross examination, he has testified to the purport and import that he did not disclose this fact to anyone prior to his testimony being recorded in the Court. Therefore, the testimony of D.W.-1 would not lead us to reasonably infer that in fact there existed

any illicit relationship between the informant Suman Singh and her brother-in-law Doodhnath P.W.2 and they hatched a conspiracy and killed Kailash. Moreover, the prevailing and attendant facts and circumstances of this case do not whisper about any such position as has been claimed by the defence.

34. It is noticeable that in the statement of the accused under Section - 313 Cr.P.C., in reply to question no.16 also asserts the same on point of existing illicit relationship that there existed illicit relationship, when objected, the informant herself killed her husband. The informant was 20 years younger to her husband. However, except verbal claim and explanation regarding existing illicit relationship between the informant and Doodhnath, nothing concrete has emerged on the record, which may lead us to reasonably hold that the informant was acting in collusion with Doodhnath P.W.-2 and they jointly created the situation by thus eliminating Kailash and falsely implicating the accused in the offence.

35. P.W.-3 an independent witness of occurrence saw the appellant Bablu alias Ranjeet Singh son of Virendra Singh putting bamboo hurdle in front of door of house of Kailash and blocking access to it. When Kailash returned from his field, he began to remove the bamboo (hurdle), then Bablu alias Ranjeet Singh possessing Sabbal in his hand came out of his house and dealt a blow with Sabbal on the head of Kailash due to which, Kailash fell down and after that, another blow was dealt with the *''Sabbal'* by the accused. He proceeds with his testimony with assertion that wife of Kailash and Doodhnath also saw the occurrence. Thus, he substantiates presence of both P.W.-1 & P.W.-2 on the spot at the time of occurrence. He has been cross examined at length, wherein also he has substantiated his testimony as given in his examination-in-chief regarding the manner and style of occurrence. He has clarified as to how the Sabbal blow was caused on the deceased by the accused in detail, nothing adverse has emerged in his entire testimony, which may cast aspersion that this witness is not telling the truth or is a interested witness from any corner. On the contrary, his testimony being independent inspires confidence and gives further thrust to the testimony of the other two witnesses of fact P.W.1-Suman Singh and P.W.-2 Doodhnath Singh.

36. Insofar as the ocular testimony when read with the ante mortem injury noted in the post mortem examination report is concerned, we come across fact that the ocular testimony of the occurrence and the injuries caused by the accused commensurates with the description of ante mortem injuries and the piece of testimony of P.W.-4 Dr. P.K. Singh also gives further thrust to the prosecution case, when he testifies to the ambit that these injuries were sufficient in ordinary course of nature to cause death and injuries could have been caused around 09:00 a.m. on 10.06.2008. However, this particular piece of testimony emerging in the last paragraph of the examination-in-chief of the doctor has not been put to challenge even in the least by the defence. Therefore, this testimony regarding the time when injuries have been caused is unimpeachable testimony. Similarly, F.I.R. has been promptly lodged and the factum of F.I.R. being lodged by the informant Suman Singh at the police station has been substantiated by P.W.-5 Bhagwan Ram, who prepared the check F.I.R. and made a consequential entry in the concerned general diary at Serial No. 20 at

Police Station - Nagra on 10.06.2008 and has proved the Check F.I.R. as Ext. Ka-3 and the general diary entry, whereby the case was registered at Case Crime No. 93 of 2008, under Section - 304 I.P.C. as Ext. Ka-4. Learned *amicus curiae* also argued to the ambit that in this case the conviction of the appellant under Section - 302 I.P.C. is not justified.

37. In reply to the same, learned A.G.A. has stated that insofar as the act of the appellant is concerned, it was pre planned and it cannot be said that it was a case of sudden quarrel but the origin of the crisis was created by none other than the accused himself by putting hurdle in free passage from and to the house of deceased-Kailash by putting bamboo barrier in front of his house. That being the case under circumstances at that point of time, when the deceased was removing the bamboos, the offence was committed by the accused. The accused caused blow with Sabbal on the head and chest of the deceased. The doctor has rightly opined that the injury so caused was sufficient in the natural course to cause death. The reply so given is sustained.

38. Therefore, it cannot be said that it is a case of sudden quarrel as such the accused cannot get advantage of his own misdeed, which alone culminated into death of the deceased. Insofar as the investigation of the case is concerned, the investigating officer has also proved the site plan (Ext. Ka-5), whereby place "X' has been shown as the place where the *"Sabbal'* blow was stated to have been dealt by the accused on the deceased Kailash Singh. Apart from that, other places have also been spotted by the investigating officer and that being the case, we find no flaw in the investigation conducted by the investigating officer. The investigating officer has proved the charge sheet- Exhibit Ka-6.

39. Insofar as certain improvement/embellishments appearing in the testimony of prosecution witnesses of fact, particularly P.W.1- Suman Singh and P.W.-2 Doodhnath, are concerned, the same do not affect totality of the case but the same touch upon peripheral aspects of this case and the core substance stands proved by the prosecution beyond reasonable doubt, resultantly the finding of conviction recorded by the lower court against the appellant for committing offence under Section - 302 I.P.C. is liable to be sustained.

40. The above analysis of the facts and circumstances of the case on record goes to show that the trial court was justified in recording the finding of conviction thus imposing sentence of life imprisonment by the impugned judgment and order dated 01.05.2010.

41. Accordingly, we uphold judgement and order of conviction dated 01.05.2010 passed by the Special/Additional Sessions Judge, Ballia in Session Trial No.187 of 2008, arising out of Case Crime No.93 of 2008, under Section - 302 I.P.C., Police Station - Nagra, District - Ballia.

42. In the result, the instant appeal being devoid of merit is ***dismissed.***

43. In this case, the appellant is in jail. He shall serve out remaining part of sentence imposed upon him by the trial court.

44. Let a copy of this judgment/order be certified to the court concerned for necessary informant and follow up action.

(2023) 2 ILRA 668
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 1165 of 2013

Sarvajeet & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Manish Tiwary, Sri Ashwini Kumar Awasthi, Sri Ashok Kumar Singh, Sri Nirbhay Singh

Counsel for the Opposite Parties:
Govt. Advocate

Criminal Law - Criminal Procedure Code, 1973 - Sections 156(3), 161 & 319 - Indian Penal Code, 1860 - Sections 498-A & 306 - Criminal Revision against - order impugned by which - Court below on an application of prosecution, summoned the additional accused - Validity - Offences under section 498-A and 306 IPC - FIR - version of FIR that, being fed up with the torture of her husband victim jumped into well with her two minor sons to commit suicide - Name of proposed accused is not mentioned in FIR - Victim and informant had not implicated proposed accused in their St.ments - Proposed accused implicated for the first time in St.ments before court - court finds that, the learned trial court has materially erred in allowing the application u/s 319 CrPC - there is inherent contradictions in the prosecution case and trial Court had also failed to record its satisfaction required for summoning accused - hence, the impugned order for summoning the additional accused is not sustainable in the eyes of law - revision allowed. (Para - 9, 10)

Revision Allowed. (E-11)

List of Cases cited: -

1. Sunil Tyagi Vs Government of NCT of Dehi, (2021) 0 Supreme (Del) 831,

2. Pepsi Foods Ltd. & anr. Vs Special Judicial Magistrate & ors., (1998) 5 SCC 749,

3. Dhariwal Tobacco Products Ltd. & ors. Vs St. of Mah. & anr., (2009) 2 SCC 370,

4. Vishnu Agarwal Vs St. of U.P. & anr., (2011) 14 SCC 813,

5. Madhu Limaye & ors. Vs Unknown, (1969) 1 SCC 292,

6. Inder Mohan Goswami & anr. Vs St. of Uttaranchal, (2007) 12 SCC 1,

7. Adalat Prasad Vs Roopal Jindal & ors., (2004) 7 SCC 338,

8. K.M. Mathew Vs St. of Ker., (1992) 1 SCC 217,

9. Mohd. Zakir Vs Shabana & ors., (2018 Vol. 15 SCC 316),

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard learned counsel for the revisionists, learned AGA for the State.

2. None is present on behalf of opposite party no.2 despite service of notice.

3. This criminal revision is directed against the order dated 27.02.2013 passed by Additional Sessions Judge court no.24, Allahabad in S.T. No.755 of 2011 *(State vs. Ram Babu)*. By the impugned order, the learned trial court in exercise of powers U/s 319 Cr.P.C. On an application of prosecution has summoned the revisionist-accused to face trial for the offence U/s 498A & 306 IPC with co-accused Ram Babu.

4. The perusal of the record, transpires that an FIR was lodged on

05.06.2002 at 04:00 pm by Ramendra Singh, the brother of opposite party no.2 regarding the incident alleged to have taken place on 05.06.2002 at about 2:30 pm. It was alleged that the marriage of sister of the complainant was solemnized with Ram Babu Singh in the year 1993. As the complainant was poor person, sufficient dowry was not given. Since last two years years his sister being tortured making allegations of theft of a chain. She was beaten today due to which she with her two minor sons jumped into the well. Her both sons have died while the sister has been saved. In this FIR in question/answer, it is also mentioned that the name of the sister of the complainant is Tara and she was being tortured by her husband Ram Babu who abeted her to commit suicide with her two sons aged about five and three years named Golu and Molu. After investigation, charge-sheet was submitted against Ram Babu Singh. During the course of trial, an application U/s 319 Cr.P.C. was filed by the victim/ prosecution alleging therein that the marriage of the victim was solemnized with Ram Babu and two sons Golu aged about 5 years and Molu aged about 3 years were born out of their wedlock. She was being harassed and tortured by her husband Ram Babu, Dewar Shiv Babu, the parent-in-laws namely Sona Devi and Sarvajeet Singh for demand of dowry. On 05.06.2002 being fed up with the torture, she was leaving for her mayaka with her sons then her husband and mother-in-law tried to push her in the well while her father in law and dewar were exhorting them. She with her both sons fell in the well being pushed by her husband and mother-in-law. A case crime no.194 of 2002 U/s 498A and 306 IPC was registered at P.S. Sarai Inayat, District Allahabad regarding the aforesaid incident, in which it is mentioned that the parent-in-laws, husband and dewar were involved in the incident. This fact is further corroborated in the application moved U/s 156 (3) Cr.P.C. and statement of the victim recorded before the trial court. On the aforesaid ground, prayer was made to summon Sarvajeet Singh, Sona Devi and Shiv Babu. The learned trial court by the impugned order has allowed the application and summoned the revisionist-accused U/s 319 Cr.P.C.

5. Learned counsel for the revisionists contended that FIR was registered only against Ram Babu Singh the husband of Tara Devi and it was alleged that he was torturing his wife Tara Devi, due to his torture she with her two sons Golu and Molu jumped into a well. In the statement recorded U/s 161 Cr.P.C. the first informant Ramendra Singh as well as Tara Devi reiterated the aforesaid allegations of the FIR and have not taken the name of revisionists- accused. Charge-sheet was also submitted only against Ram Babu Singh. In the statements before the trial court, the first informant Ramendra Singh P.W.-1 and Tara Devi P.W.-2 have put up a different story implicating the revisionist-accused. In the previous statements, it is specifically mentioned that the victim Tara Devi with her husband Ram Babu Singh live separately. It is further contended that the impugned order, does not show that their exist any compelling reasons to summon the revisionist. The trial court has also not recorded its satisfaction that from the evidence the revisionists have committed the alleged offence. The impugned order has been passed in a routing manner. There is no credible evidence for their summoning and no offence is made out against them The order passed by the court below is wholly illegal, perverse and against the settled principle of law.

6. Learned AGA contended that although the revisionists were not named in the FIR but the complainant and the victim

in their statement before the court have implicated them. There are specific averments about their complicity in the offence. The learned trial court after analyzing the evidence on record has come to the conclusion that there is sufficient evidence and has passed the summoning order which is just and proper.

7. The Constitution Bench in the case of ***Hardeep Singh vs. State of Punjab AIR 2014 SC 1400*** has laid down the test for invoking powers U/s 319 Cr.P.C. The relevant paras are quoted below:

"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-facie case is to be established from the evidence 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. The Apex Court further in the case of ***Ramesh Chandra Srivastava vs. State of U.P. 2021 0 Supreme (SC) 519*** has held *"The test as laid down by the Constitution Bench of this Court for invoking power U/s 319 Cr.P.c. inter alia includes the principle that only when strong and cogent evidence occurs against a person from the evidence the power U/s 319 Cr.P.C. should be exercised. The power cannot be exercised in a casual and cavalier manner. the test to be applied, as laid down by this Court, is one which is more than prima facie case which is applied at the time of framing of charges."*

9. The FIR of this case has been lodged by Ramendra Singh- the brother of Tara Devi (victim) and there is no whisper about the involvement of revisionist-accused in the incident. According to version of FIR Tara Devi fed up with the torture of her husband jumped into the well with her minor sons to commit suicide. During the course of investigation the first informant Ramendra Singh and victim Tara Devi has made the similar statement. They have not implicated the revisionist accused. For the first time in their statement before the trial court developing a new story, they have implicated the revisionist-accused. The story as set up by the witnesses during their testimony before the trial court has come for the first time and which is against the allegations of the FIR and the previous statements of these witnesses.

10. Applying the law as laid down by the Apex Court on the facts of the case on hand, it is clear that the learned trial court has materially erred in allowing the application U/s 319 Cr.P.C. There is inherent contradictions in the prosecution case as unfolded in the FIR, as explained in the statement of witnesses examined U/s 161 Cr.P.C. and the statements recorded during the course of trial. The court below while deciding the application U/s 319 Cr.P.C. has completely ignored the aforesaid aspect of the matter and has failed to record his satisfaction which is required for summoning the accused U/s 319 Cr.P.C. The evidence led by prosecution is not cogent one and cannot be the basis of summoning the revisionist-accused who are neither named in the FIR nor in the previous statements of witnesses recorded U/s 161 Cr.P.C. The impugned order suffers from material illegality which has been passed in a cavalier manner and not sustainable in the eye of law.

11. Accordingly the revision is ***allowed***. The impugned order dated 27.02.2013 is hereby set aside.

(2023) 2 ILRA 671
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 4154 of 2022

Ibrar @ Raju ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Ram Bahadur, Sri Vishal Srivastava, Sri Anil Kumar (Sr. Advocate)

Counsel for the Opposite Parties:
G.A., Sri Manoj Kumar Bhatt, Sri Preet Pal Singh Rathore

Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 164 & 319 - Indian Penal Code, 1860 - Sections 354, 376-D, 452 & 506 - Criminal Revision - against, order impugned by which learned Trial court, on an application filed by the prosecution, summoned the revisionist - Validity - Offences of gang Rape - FIR - from the date of registration of FIR and till submission of Charge-sheet neither the revisionist was named nor any allegation was made against him - the power conferred under section 319 CrPC is an extraordinary power and it should be exercised sparingly and with conscious approach - Court finds that, trial court ignored the grounds on which the revisionist/accused was exonerated during investigation - the standard of evidence required for exercising the powers u/s 319 CrPC - hence, the impugned order is not sustainable in the eyes of law - revision allowed. (Para - 11, 12)

Revision Allowed. (E-11)

List of Cases cited: -

1. Ramesh Chand Srivastava VS St. of UP - Criminal Appeal No. 990/2021 decided on Dt. 13.09.2021,

2. Periyasami & ors. Vs Nallasamy (2019 vol. 4 SCC 342),

3. Hardeep Singh Vs St. of Pun. 2014 vol. 3 SCC 92,

4. Brijendra Singh & anr. Vs St. Of Raj. 2017 Vol. 7 SCC 706.,

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Mr Anil Kumar, learned Senior Advocate, assisted by Mr Ram Bahadur and Mr Vishal Srivastava, learned counsel for the revisionist, Mr Preet Pal Singh Rathore, learned counsel for opposite

party no.2 as well as the learned A.G.A. and perused the material placed on record.

2. The revisionist, by way of filing the present revision, has sought to quash the order dated 15.09.2022 passed by Additional Session Judge/Fast Track Court No.1, Allahabad in Sessions Trial No.132 of 2020 (State Vs. Mahfooz) arising out of Case Crime No. 331 of 2018 under Sections 354, 452, 376-D and 506 I.P.C., Police Station Nawabganj, District Allahabad. By the impugned order, learned trial court, on an application filed by the prosecution under Section 319 Cr.P.C., has summoned the revisionist to face trial.

3. An F.I.R. was lodged on 20.07.2018 by opposite party no.2 (prosecutrix) alleging therein that her neighbours Israr alias Raju son of Harun alias Babu and Mahfooz son of Shamum had evil eyes on her. On 05.07.2018 at about 2 p.m. when prosecutrix was returning home from Mansoorabad, they teased her in front of Fatehpur. The prosecutrix made a complaint on 100 Dial, but no action was taken. On 08.07.2018 at about 1.00 a.m. (in night) aforesaid two persons with two unknown companions entered into the house from the roof. The prosecutrix was sleeping opening the door due to hot weather. Meanwhile, all the four persons gagged her mouth and on point of country-made pistol, they all committed rape wit her. They also threatened her not to disclose it to anyone, otherwise she and her mother will be killed. The prosecutrix gave information of the incident in the morning at Police Station Nawabganj, but no action was taken, hence an application is being moved to Inspector General of Police, Allahabad. After investigation charge-sheet was submitted on 17.4.2019 against Mahfooz son of Shamum. Thereafter vide CD *Parcha* dated 11.08.2019, the two accused Israr alias Raju and Bablu alias Sharif were exonerated. During trial after statement of two witnesses, prosecutrix PW 1 and Anwari Bano PW 2, an application under Section 319 Cr.P.C. was filed by the prosecution alleging therein that the report of prosecutrix was not registered at Police Station Nawabganj, she moved an application dated 12.07.2018 to Inspector General of Police, Prayagraj and on this application Case Crime No. 331 of 2018 under Sections 354, 452, 376-D and 506 I.P.C. was registered against Israr alias Raju son of Harun alias Babu and Mahfooz son of Shamum. After narrating the averments of the F.I.R., it is further alleged that statement of the victim was recorded under Section 164 Cr.P.C. in which she has taken the names of Ibrar alias Raju son of Khalil alias Babu and Sharif alias Bablu son of Haneef. In statement recorded under Section 161 Cr.P.C. she has taken the names of the aforesaid accused persons. The applicant has also moved an application for amendment before the High Court. Her statement has been recorded by the trial court in which she has implicated Ibrar alias Raju and Sharif alias Bablu and has reiterated that they have committed rape with her. Statement of Anwari Bano was also recorded and she has also narrated the entire incident that Ibrar alias Raju son of Khalil alias Babu and Sharif alias Bablu son of Haneef have committed rape on her. On the aforesaid grounds, prayer was made to summon the accused. Learned trial court has allowed aforesaid application and summoned the revisionist-accused and Bablu alias Sharif.

4. It is contended by learned counsel for the revisionist that in the F.I.R. revisionist was not named. The F.I.R was

registered against Israr alias Raju son of Harun alias Babu and Mahfooz son of Shamum and their two unknown companions. The statement of the complainant was recorded under Section 161 Cr.P.C. in which she has reiterated the version of the F.I.R. and has named Israr alias Raju and Mahfooz son of Shamum as accused persons who have committed offence. The same statement has been reiterated by the prosecutrix in statement recorded under Section 164 Cr.P.C. When it came to the notice of the complainant that Israr alias Raju was not present in the village at the time of the incident and he was at Mumbai, then she falsely implicated Ibrar. The name of Ibrar has come for the first time in the statement of the prosecutrix recorded before the trial court. It is also contended that charge-sheet was submitted against Mahfooz son of Shamum. Co-accused Israr alias Raju and Sharif alias Bablu were not arrested during investigation and investigation was kept pending against them. The independent witnesses have stated that a dispute regarding drainage has taken place and the complainant called the police who pacified the parties. No other incident has happened. On 25.10.2019 last *Parcha* was prepared by the Investigating Officer with averment that during investigation complicity of Israr alias Raju and Bablu alias Sharif has been found false, hence no charge-sheet was submitted against them. It is also contended that learned trial court without taking into consideration that even from the date of registration of the F.I.R. and till submission of charge-sheet neither the revisionist was named nor any allegation was made against him. Whatsoever allegation is there, it is against only Israr alias Raju, but the trial court has summoned the revisionist. The impugned order is totally illegal, arbitrary and has been passed by the trial court without considering the evidence and material on record. It is next contended that revisionist and opposite party no.2 are neighbours and their houses are situated in front of each other. Because of village partibandi their relations are not cordial and due to this reason for the first time on 28.06.2022 the name of the revisionist has been disclosed after about three and half years of registration of the F.I.R. Learned counsel has further submitted that Apex Court in the case of **Ramesh Chandra Srivastava Versus State of U.P. in Criminal Appeal No.990 of 2021** vide order dated 13.09.2021 while adjudicating the powers of the court under Section 319 Cr.P.C. has held that:

"The test as laid down by the Constitution Bench of this Court for invoking power under Section 319 Cr.P.C. inter alia includes the principle that only when strong and cogent evidence occurs against a person from the evidence, the power under Section 319 Cr.P.C. should be exercised. The power cannot be exercised in a casual and cavalier manner. The test to be applied, as laid down by this Court, is one which is more than prima facie case which is applied at the time of framing of charges."

5. It is further contended that the Apex Court in **Periyasami and others Versus Nallasamy (2019) 4 SCC 342,** has held as follows:

"The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence. Under Section 319 of the Code additional accused can not be summoned only if there is more than prima facie case as is required at the time of framing of charge but which

is less than the satisfaction required at the time of conclusion of the trial convicting the accused."

6. It is also contended that learned trial court was under an obligation to go through the entire material and evidence collected by the Investigating Officer during the trial, and so far as the application filed by opposite party no.2 under Section 319 Cr.P.C. is concerned that should not have been taken into consideration which is contrary to the entire evidence. In absence of any credible evidence upto three and half years from the date of registration of the First Information Report, the revisionist-applicant can not be implicated in the present case only to satisfy the ego of the opposite party no.2. It is next contended that it is a clear case of false implication of the revisionist-applicant due to family dispute and partibandi of the village and in absence of any credible evidence, false implication of the applicant-revisionist cannot be ruled out. It is also contended that learned trial court while summoning the revisionist-applicant has not applied his judicial mind rather in a most mechanical manner summoned the revisionist. The learned trial court while summoning the revisionist has miserably failed to appreciate the fact that no offence is made out against the revisionist from the First Information Report as well as the statements recorded before it.

7. Learned counsel for the opposite party no.2 and learned A.G.A. appearing for State contended that revisionist-accused was named from very beginning. In the application dated 12.07.2018 addressed to Inspector General of Police, Ibrar alias Raju was named, but a confusion was created by the people of accused side and on their behest name of Ibrar was changed by Israr while nickname Raju was the same. It is further contended that Ibrar and Israr are actually one person. Raju the nickname is common and Babu the nickname of father is also common. Learned counsels also contended that police in collusion with the accused have developed the story that dispute between the parties is with regard of drainage on account of which false implication has been made which is highly improbable. A lady will not put her prestige on stake. It is also contended that revisionist and other co-accused and their associates were pressurizing the prosecutrix and her family members not to lodge the F.I.R. The prosecutrix came to her parental home just before few days of the incident. She knew the revisionist by his nickname Raju and father's nickname Babu and she was confused about his real name Ibrar or Israr. She moved application before higher authorities on 12.07.2018. The revisionist and other co-accused are very influential person. They adversely affected the investigation of the case. The prosecutrix preferred a Writ-C (Criminal) No. 24381 of 2018 before this Court for fair and impartial investigation. The Investigating Officer was not conducting fair investigation and prosecutrix has to move an application dated 23.01.2019 before the Circle Officer that revisionist and his father were named under their nicknames i.e. Raju and Babu that is why she has scribed their name in the F.I.R. Now they have prepared their Aadhar card under the name of Ibrar alias Raju son of Khalil alias Babu, so the name be corrected accordingly. Thereafter, the revisionist moved surrender application on 29.01.2019 before the court below under the name of Israr son of Khalil alias Babu. The police submitted a report on 02.02.2019 stating therein that

revisionist is wanted in aforesaid case. After seeing the report dated 02.02.2019, the revisionist did not appear before the court below, consequently, his surrender application was rejected vide order dated 02.03.2019. Thereafter, the complainant moved another application on 11.03.2019 before the Investigating Officer stating therein that correct name of accused is Ibrar alias Raju instead of Israr alias Raju. Despite this, Investigating Officer was not taking any action against the revisionist, then she preferred Criminal Misc. Application (U/S 482 Cr.P.C.) No.30986 of 2019 before this Court which was disposed of with a direction to the complainant to move an application before the Investigating Officer. Thereafter, she submitted complaint dated 03.10.2019 before the Investigating Officer but the Investigating Officer not complied with the order of this Court, then a contempt application was also moved. The revisionist was named in the F.I.R. since very beginning. He is also one of the main culprits. The error in his name has occurred only on account of confusion of name by which he is addressed in the village.It is further contended that the prosecutrix in her statement before the trial court has clearly implicated the revisionist showing his complicity in the incident. He is main culprit who has committed rape with the victim. Other witnesses produced before the trial court has also narrated entire evidence. From their testimony the involvement of the revisionist-accused is fully established. The trial court after considering evidence and material on record has found that there is sufficient and cogent evidence against the revisionist and has passed the summoning order. Therefore, there is no illegality in the the impugned summoning order.

8. The perusal of record transpires that in the F.I.R. one of the accused is named as Israr alias Raju son of Harun alias Babu while revisionist is Ibrar alias Raju son of Khalil Ahmad. From the allegations of the F.I.R. it is also clear that the complainant and accused are neighbours. There may be confusion in the name, Israr and Ibrar, but here in the case in hand there is also difference in the parentage. In the F.I.R., parentage of named accused Israr is Harun while parentage of revisionist Ibrar is Khalil Ahmed and not Harun. The difference of parentage is prominent one. There is no plausible explanation regarding this difference. After investigation charge-sheet was submitted against Mahfooz. During further investigation the Investigating Officer has recorded statements of a number of independent witnesses who have stated about the incident dated 05.07.2018 and have put up a different story. They have not corroborated the allegations of the F.I.R. in this respect. The name of revisionist Ibrar has been disclosed by the complainant and prosecutrix at a very late stage. The Investigating Officer has also observed that when it came to the notice of prosecutrix that at the alleged time of incident Israr was at Mumbai and he will be exonerated, then she changed the name and implicated Ibrar. In the F.I.R., in the statement recorded under Section 161 and in the statement under Section 164 Cr.P.C. the name disclosed is Israr alias Raju.

9. The Apex Court in ***Hardeep Singh Versus State of Punjab, 2014(3) SCC 92*** has held as follows:

"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.

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."

10. In ***Brijendra Singh and another Versus State of Rajasthan (2017) 7 SCC 706***, the Apex Court has made following observations:

"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."

11. The power conferred to the trial court to summon an accused under Section 319 Cr.P.C. is although a discretionary power, but it is an extraordinary power and it should be exercised sparingly and with cautious approach. There must be cogent and sufficient evidence. In the present case, the trial court has completely ignored the grounds on which the revisionist-accused was exonerated by the Investigating Officer. The revisionist-accused was not named in the F.I.R. His name also did not surface either in the statement of victim recorded under Section 161 Cr.P.C. or 164 Cr.P.C. At a very late stage, the name of revisionist-accused has been introduced while there is prominent difference in the parentage of the accused. The trial court

has committed illegality in allowing the application filed by the prosecution under Section 319 Cr.P.C. The standard of evidence required for exercising the powers under Section 319 Cr.P.C. is lacking. The trial court while deciding the application under Section 319 Cr.P.C. has completely ignored the material available on record. It is on account of above that trial court has failed to record some degree of satisfaction which is required to summon an accused under Section 319 Cr.P.C. Resultantly, court below has recorded an erroneous finding and has failed to exercise its jurisdiction in accordance with the parameters laid down by the Apex Court. The impugned order is not sustainable in the eye of law and, therefore, the impugned order is liable to be set aside.

12. Accordingly, this criminal revision is allowed. The impugned order dated 15.09.2022 passed by Additional Session Judge/Fast Track Court No.1, Allahabad in Sessions Trial No.132 of 2020 (State Vs. Mahfooz) arising out of Case Crime No. 331 of 2018 under Sections 354, 452, 376-D and 506 I.P.C., Police Station Nawabganj, District Allahabad is hereby set aside.

(2023) 2 ILRA 677
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.01.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 4894 of 2022

Bhura & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:

Sri MJ Akhtar, Sri Mohd. Akbar Shah Alam Khan, Sri Satya Dheer Singh Jadaun, Sri Uma Shankar Tiwari, Sri V.M. Zaidi (Sr. Advocate)

Counsel for the Opposite Parties:

G.A., Sri Jitendra Prasad Mishra

Criminal Law - Criminal Procedure Code, 1973 - Sections 161 & 319 - Indian Penal Code, 1860 - Sections 34, 302 & 452 - Criminal Revision - against, order impugned by which - trial court on an application moved on behalf of the prosecution, summoned the revisionists to face the trial - Offences of Murder - present revision, filed against, the order of conviction – Whether revision is maintainable – the scope and ambit of section 319 CrPC has been well settled by the Hon'ble Apex court vide Constitution Bench judgment in *Hardeep Singh' Case* - court finds that, arguments made on behalf of revisionists does not mention any reason why the informant instead of accusing the real accused involved in the murder of his brother, will name revisionists for his murder - in the light of law laid down by the Hon'ble Apex Court (supra), regarding the summoning of persons who have not been named in the Charge-sheet - present Revision is rejected with liberty - if the revisionists will apply for Bail within 30 days, no coercive action shall be taken against them till then - directions accordingly. (Para - 14, 19, 20)

Revision Rejected. (E-11)

List of Cases cited: -

1. Sagar Vs St. of U.P. & anr., Criminal Appeal No. 397 of 2022, arising out of SLP (Crl.) No. 7373 of 2021, dated 10.03.2022,

2. Ramesh Chandra Srivastava Vs St. of U.P. & anr., Criminal Appeal No. 290 of 2021, arising out of SLP (Crl.) No. 6381 of 2020, dated 13.09.2021,

3. Manjeet Singh Vs St. of U.P., Criminal Appeal No. 825 of 2021, decided on 24.08.2021,

4. Bholu Ram Vs St. of Pun. & anr., Criminal Appeal No. 1366 of 2008, arising out of SLP (Crl.) No. 39 of 2001,

5. Rajindra Singh Vs St. of U.P. & anr., AIR 2007 SC 2786,

6. Hardeep Singh Vs St. of Pun. & ors., (2014) 3 SCC 92,

7. S. Mohammad Ispahani Vs Yogendra Chandak, (2017) 16 SCC 226,

8. Rajesh Vs St. Of Har., (2019) 6 SCC 368.

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

Heard Sri V.M. Zaidi, learned Senior Advocate, assisted by Sri Satya Dheer Singh Jadaun, Sri Mohd. Akbar Shah Alam Khan and Sri Uma Shankar Tiwari, learned counsels for the revisionists, Sri Sunil Kumar Tripathi, learned A.G.A. for the State and Sri Jitendra Prasad Mishra, learned counsel for the opposite party no. 2.

2. The instant revision has been filed against the order dated 09.11.2022 passed by the Additional Sessions Judge, Deoband, District- Saharanpur in Sessions Trial No. 20 of 2022 (Old S.T. No. 1402 of 2022), "State of U.P. Vs. Rakib and others" arising out of Case Crime No. 14 of 2022, under Sections 302/34, 452/34 I.P.C., Police Station- Badgaon, District- Saharanpur.

3. By the impugned order, the trial court allowed Application No. 9Kha, under Section 319 Cr.P.C. presented by prosecution and summoned the revisionist no. 1, Bhura, revisionist no. 2, Lilla alias Mobin, both sons of Salamu, revisionist no. 3, Usman s/o Bhura, revisionist no. 4, Saleem s/o Lilla and revisionist no. 5, Inam s/o Khalil to face trial under Section 302/34, 452/34 I.P.C. along with other co-accused.

4. The revisionists have stated in their ground of revision that during investigation, the Investigating Officer found that due to village enmity, informant had named revisionists as accused in the FIR but since no evidence was available against them, the Investigating Officer did not submit charge sheet against them.

5. The Investigating Officer recorded the statement of eye-witnesses, Mursaleen, Ehsan and Arshe Alam on 05.03.2022. These eye witnesses specifically stated that accused, Rakib, Zulfequar Rana and Mobeen had committed the murder of Asif s/o Aas Mohammad. These accused also made confessional statements and recovery of weapon was made. The Investigating Officer charge-sheeted Rakib, Zulfequar Rana and Mobeen regarding involvement in the murder of Asif s/o Aas Mohammad. The learned Trial Court without considering the statement under Section 161 Cr.P.C. of eye-witnesses, Mursaleen, Ehsan and Arshe Alam, merely on the basis of examination-in-chief recorded on 08.09.2022 of PW-1 Rashid, summoned the revisionists for facing trial.

6. It has also been submitted by the revisionists that as per the law laid down by the Hon'ble Apex Court, the trial court should sparingly exercise its power under Section 319 Cr.P.C. for summoning an accused under Section 319 Cr.P.C. Higher quality of evidence is required than that of framing charge against accused but the trial court merely on the basis of examination of PW-1, Rashid, finding prima facie case, illegally summoned the accused.

7. It has been submitted that prior to the said incident, revisionist no. 1, Bhura, had lodged first information report against Rakib and others who happens to be the relative of present informant Rashid. That case is being tried by the learned trial court.

Revisionist nos. 2 to 5 are witnesses of the said incident, therefore, they have been falsely implicated in the present case.

8. The revisionist has relied on the following judgments of the Supreme Court in support of his contention:

1. Sagar vs. State of U.P. and another, Criminal Appeal No. 397 of 2022, arising out of SLP (Crl.) No. 7373 of 2021, date of decision 10.03.2022.

2. Ramesh Chandra Srivastava vs. State of U.P. and another, Criminal Appeal No. 290 of 2021, arising out of SLP (Crl.) No. 6381 of 2020, date of decision 13.09.2021.

9. Per contra, opposite party no. 2/informant, Rashid has opposed the revision and supported the impugned order stating that the trial court relying on the decisions of the Hon'ble Apex Court and on the basis of the evidence on record, has rightly summoned the revisionists to face trial in the case.

10. It has also been submitted that the informant, Rashid and witness, Wasim has named the revisionists in the FIR but due to extraneous consideration, the Investigating Officer did not rely on the statements of them and on the basis of the statements of Mursaleen, Ehsan and Arshe Alam, dropped the names of the accused in the FIR and illegally submitted charge-sheet against Rakib, Zulfequar Rana and Mobeen.

11. It has also been submitted that informant and eye-witness, PW-1 Rashid has supported the prosecution case as mentioned in the FIR in his statement in the Court and the trial court, relying on the evidence, has rightly summoned the revisionists to face trial.

12. The opposite party no. 2 has relied on the following decisions of the Hon'ble Supreme Court :

1. Manjeet Singh vs. State of U.P., Criminal Appeal No. 825 of 2021, decided on 24.08.2021.

2. Bholu Ram vs. State of Punjab and another, Criminal Appeal No. 1366 of 2008 , arising out of SLP (Crl.) No. 39 of 2001.

3. Rajindra Singh vs. state of U.P. and another, reported in AIR 2007 SC 2786

13. According to the prosecution case as mentioned in the FIR lodged by informant Rashid s/o Aas Mohammad r/o village- Nuna Badi, Police Station- Badgaon, District- Saharanpur, is to the effect that he had enmity due to litigation with Farrukh s/o Khalil. Accused, Bhura and Mobin alias Lilla sons of Salamu, Usman s/o Bhura, Saleem s/o Lilla and Inam s/o Khalil used to threaten him and his family members to take revenge due to enmity. On 02.02.2022 at about 4-5 a.m., informant Rashid along with Wasim s/o Tahir and Idrish was returning to his house after chasing out wild animals from the jungle. They saw Bhura and Mobin alias Lilla sons of Salamu, Usman s/o Bhura, Saleem s/o Lilla and Inam s/o Khalil who had blood-stained swords and knives in their hands, were talking amongst themselves that today they had taken the revenge for the murder of their brother. They have killed Asif. They threatened the informant and his companions that they would kill them also. Thereafter, the accused ran away from that place. When informant and his companion reached the compound (Gher) of his house, he saw his brother, Asif, lying dead in a pool of blood. The door of the compound was open.

14. The scope and ambit of Section 319 Cr.P.C. has been well-settled by the pronouncement of Constitution Bench of the Hon'ble Apex Court in ***Hardeep Singh Vs. State of Punjab and others, (2014) 3 SCC 92 and paras 105 and 106*** which are relevant for the purpose are reproduced hereunder :

"105. Power under Section 319 Cr.P.C, 1973 is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C., 1973. In Section 319 Cr.P.C., 1973, 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., 1973 to form any opinion as to the guilt of the accused."

15. In ***S. Mohammad Ispahani Vs. Yogendra Chandak (2017) 16 SCC 226,*** this Court has observed and held as under :

"35. It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 of the Cr.P.C. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused."

16. In the case of ***Rajesh Vs. State of Haryana (2019) 6 SCC 368,*** after considering the observations made by this Court in ***Hardeep Singh (supra)*** referred to hereinabove, this Court has further observed and held that even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in F.I.R. but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 Cr.P.c. and even those persons named in the F.I.R. but not implicated in charge-sheet can be

summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.

17. Heard learned counsels for the parties and perused the impugned order dated 09.11.2022 passed by the trial court, copy of the first information report, statement of informant PW-1 Rashid dated 08.09.2022 and other material relied upon by the appellant in this appeal.

18. From the above rulings of Hon'ble Supreme Court, it can be concluded that the trial court can summon persons who have been charge-sheeted as accused on the basis of examination-in-chief of a witness. It is not necessary that the witness should be cross-examined before such person can be summoned under Section 319 Cr.P.C. The evidence required for summoning such persons under Section 319 Cr.P.C. is more than prima facie case but it is short of such evidence which if not rebutted will result in conviction of the persons summoned for trial.

19. The informant, Rashid, had lodged the first information report against the revisionists on 02.02.2022 for the murder of his brother, Asif s/o Aas Mohammad. The Investigating Officer during the investigation on the basis of statement recorded under Section 161 Cr.P.C. of Mursaleen which was recorded on 05.03.2022, exonerated the revisionists/accused named in the first information report of the offence and on the basis of statement of Mursaleen, filed charge-sheet against Rakib, Zulfequar Rana and Mobeen for committing the murder of Asif whereas in their statement recorded under Section 161 Cr.P.C., informant Rashid and Wasim have supported the allegations made against the accused/revisionists mentioned in the first information report. The statement of Mursaleen was recorded after a delay of 1 month 2 days after the date of incident. The arguments made on behalf of revisionists does not mention any reason why the informant instead of accusing the real accused involved in the murder of his brother, will name revisionists for his murder.

20. Considering the impugned order in light of the statement of Rashid recorded in the court in the light of law laid down by the Hon'ble Apex Court regarding the summoning of persons who have not been named in the charge-sheet as accused under Section 319 Cr.P.C., I find no illegality, irregularity or jurisdictional error in the impugned order passed by the trial court.

21. The criminal revision is rejected, accordingly.

22. In case the revisionists, Bhura and Mobin alias Lilla sons of Salamu, Usman s/o Bhura, Saleem s/o Lilla and Inam s/o Khalil, surrender before the court concerned and apply for bail within 30 days from today, no coercive action shall be taken against them till then.

23. Let a copy of this order be sent to the court concerned for necessary action.

(2023) 2 ILRA 681
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.02.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482 No. 666 of 2023

Prem Narayan Pandey ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Rajendra Prasad Mishra

Counsel for the Opposite Parties:
G.A.

Criminal Law- Code of Criminal Procedure, 1973 - Section 321- Withdrawal of Prosecution- If the Public Prosecutor is able to show that he may not be able to produce sufficient evidence sustaining the charges, an application for withdrawal from the prosecution may be legitimately filed by him- The Public Prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also in order to further the broad ends of public justice which may include the social, economic and political purpose. The ultimate guiding consideration while granting the permission to withdraw from a prosecution must always be the interest of administration of justice. The learned trial court may not examine the purpose for what the application for withdrawal of the prosecution has been filed inasmuch as the withdrawal from a prosecution is an executive function of the Public Prosecutor. The court performs a supervisory function and has a special duty in granting its consent to the withdrawal. The courts duty is not to reappreciate the grounds which led the Public Prosecutor to request the withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent.

Where an application for withdrawing the prosecution is filed by the public prosecutor the court cannot examine the evidence or the purpose for filing the said application, but has only to see that the withdrawal of prosecution would be in public interest and as to whether the public prosecutor has applied his mind freely and without any duress or influence. (Para 15, 17, 18)

Criminal Application allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Sheonandan Paswan Vs St. of Bih. (1987) 1 SCC 288 (cited)

2. Punj. Vs U.O.I (1986) 4 SCC 335(cited)

3. Rajendra Kumar Jain Vs State (1980) 3 SCC 435(cited)

4. St. of Ker. Vs K. Ajith & ors. (2021) SCC OnLine SC 510

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Rajendra Prasad Mishra along with Sri Pradeep Kumar Shukla, learned counsels for the applicant and Sri Alok Saran with Sri Rajesh Kumar Singh, learned Additional Government Advocates for the State.

2. Sri Rajendra Prasad Mishra, learned counsel for the applicant has filed supplementary affidavit, today in the Court, the same is taken on record.

3. By means of this application/petition filed under Section 482 Cr.P.C., the applicant has prayed for the following reliefs:-

"(i) to quash the impugned judgment and order dated 04.11.2020, passed by the learned Additional Session Judge, Court No.3/ Special Judge (M.P./M.L.A.), Gonda in Crl. Case No.100 of 2019; State vs. Prem Narayan Pandey, arising out of Case Crime No.109 of 2003, under Section 60/72 of Excise Act, Police Station-Tarabganj, District-Gonda.

(ii) to allow the application filed by the Public Prosecutor under Section 321 Cr.P.C. bearing Application No.26Ka.

(iii) to quash the entire criminal proceedings of Crl. Case No.100 of 2019; State vs. Prem Narayan Pandey, arising out

of Case Crime No.109 of 2003, under Section 60/72 of Excise Act, Police Station-Tarabganj, District-Gonda pendng in the Court of learned Addl. Chief Judicial Magistrate, Court No.1/ Special Judge M.P./M.L.A., Gonda."

4. At the very outset, learned counsel for the applicant has drawn attention of this Court towards the order dated 04.02.2023 passed by the learned trial court rejecting the discharge application of the petitioner which was filed pursuant to the order dated 01.12.2022 passed by this Hon'ble Court in Crl. Misc. Application (U/S 482 Cr.P.C.) No.8615 of 2022 marked as 57Kha, as the order has been enclosed as Annexure No.SA-1 to the supplementary affidavit filed on 09.02.2023.

5. Learned counsel for the applicant has stated that a letter dated 14.11.2019 has been preferred from the office of the District Magistrate, Gonda addressing to the Joint Director, Prosecution, Gonda referring a letter dated 01.11.2019 for withdrawal of the prosecution against the present applicant (Annexure No.3). Pursuant thereof an application under Section 321 Cr.P.C. was filed on 23.11.2019 before the learned trial court concerned by the Assistant Public Prosecutor (Criminal).

6. Learned counsel for the applicant has stated that the learned trial court refused to allow the application filed under Section 321 Cr.P.C. only on the ground that no documentary material has been put forth demonstrating that such withdrawal is in the interest of public justice.

7. Learned counsel for the applicant has further stated that Section 321 Cr.P.C. clothes the Public Prosecutor to withdraw from prosecution of any person accused of an offence, both when no evidence was taken or even if entire evidence has been taken. The outer limit for the exercise of this power at any time before the judgment is pronounced. The caveat for moving the application under Section 321 Cr.P.C. is the Public Prosecutor has to make out some ground which would advance or further the cause of public justice. If the Public Prosecutor shows that he may not be able to produce sufficient evidence so sustained the charge, an application for withdrawal from prosecution may be legitimately made by him, as held in the case of ***Sheonandan Paswan vs. State of Bihar (1987) 1 SCC 288.***

8. Learned counsel for the applicant has further stated that the nature of the case which is sought to be withdrawn would not affect the society at large, thus, such withdrawal would not be against the public justice.

9. Learned counsel for the applicant has stated that in the case of State of ***Punjab vs. Union of India (1986) 4 SCC 335***, it has been held that the Public Prosecutor may withdraw from the prosecution of a case not merely on the ground of paucity of evidence but also in order to further the broad ends of public justice, which may include social, economic and political purpose. The ultimate guiding consideration while granting a permission to withdraw from the prosecution must always be the interest of administration of justice.

10. Learned counsel for the applicant has also submitted that the Apex Court in the case of ***Rajendra Kumar Jain vs. State (1980) 3 SCC 435*** has summarized the legal position for withdrawal of prosecution

and has held that the Public Prosecutor may withdraw from prosecution not merely on the ground of paucity of evidence but on other relevant ground as well as in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and political purpose.

11. Learned counsel for the applicant has also submitted that though after framing of the charge, the evidence of the witnesses of fact by prosecution has been examined but the application for withdrawal can be allowed at any stage before pronouncement of judgment, thus, even at this stage there is no prohibition for allowed application under Section 321 Cr.P.C.

12. Learned counsel for the applicant has stated that due to Covid-19 Pandemic period he could not challenge the order dated 04.11.2020 immediately after passing the said order. However, the Apex Court has extended the time in sou motu writ petition bearing Writ (Civil) No.03 of 2020 for challenging the orders which have been passed during Covid-19 Pandemic period.

13. Per contra, learned Additional Government Advocates, Sri Alok Saran and Sri Rajesh Kumar Singh, have submitted that pursuant to the directions being issued by this Court the applicant filed the discharge application and the same has been rejected by the learned trial court.

14. However, on being confronted the learned Additional Government Advocates as to whether the impugned order dated 04.11.2020 has been passed within the four corners of law as settled by the Apex Court, the learned Additional Government Advocates have fairly submitted that the learned trial court has erred in passing the impugned order by indicating that the prosecution could not file any document/ material to convince the court to withdraw the prosecution against the present applicant. They have further submitted that as per the settled law even after framing of the charges the application for withdrawal of the prosecution can be allowed at that stage, therefore, any appropriate order may be passed.

15. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that if the Public Prosecutor is able to show that he may not be able to produce sufficient evidence sustaining the charges, an application for withdrawal from the prosecution may be legitimately filed by him.

16. In the recent judgment of the Apex Court in para-26 rendered in the case in re: ***State of Kerala vs. K. Ajith and others*** reported in ***(2021) SCC OnLine SC 510*** observed as under:-

"26. The principles which emerge from the decisions of this Court on the withdrawal of a prosecution under Section 321 of the CrPC can now be formulated:

(i) Section 321 entrusts the decision to withdraw from a prosecution to the public prosecutor but the consent of the court is required for a withdrawal of the prosecution;

(ii) The public prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice;

(iii) The public prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution;

(iv) While the mere fact that the initiative has come from the government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to ensure that the public prosecutor was satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons;

(v) In deciding whether to grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature. Before deciding whether to grant its consent the court must be satisfied that:

(a) The function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes;

(b) The application has been made in good faith, in the interest of public policy and justice, and not to thwart or stifle the process of law:

(c) The application does not suffer from such improprieties or illegalities as would cause manifest injustice if consent were to be given;

(d) The grant of consent sub-serves the administration of justice; and

(e) The permission has not been sought with an ulterior purpose unconnected with the vindication of the law which the public prosecutor is duty bound to maintain;

(vi) While determining whether the withdrawal of the prosecution subserves the administration of justice, the court would be justified in scrutinizing the nature and gravity of the offence and its impact upon public life especially where matters involving public funds and the discharge of a public trust are implicated; and

(vii) In a situation where both the trial judge and the revisional court have concurred in granting or refusing consent, this Court while exercising its jurisdiction under Article 136 of the Constitution would exercise caution before disturbing concurrent findings. The Court may in exercise of the well-settled principles attached to the exercise of this jurisdiction, interfere in a case where there has been a failure of the trial judge or of the High Court to apply the correct principles in deciding whether to grant or withhold consent."

17. Besides, the Apex Court in catena of cases, some of them have been referred by the learned counsel for the applicant, held that the Public Prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also in order to further the broad ends of public justice which may include the social, economic and political purpose. The ultimate guiding consideration while granting the permission to withdraw from a prosecution must always be the interest of administration of justice. The learned trial court may not examine the purpose for what the application for withdrawal of the prosecution has been filed inasmuch as the withdrawal from a prosecution is an executive function of the Public Prosecutor. The discretion to withdraw from the prosecution is solely that of the Public Prosecutor and so he cannot surrender that discretion to someone else. Admittedly, the Public Prosecutor is an Officer of the Court and therefore, responsible to the Court. The court performs a supervisory function and has a special duty in granting its consent to the withdrawal. The courts duty is not to reappreciate the grounds which led the Public Prosecutor to request the withdrawal from the prosecution but to

consider whether the Public Prosecutor applied his mind as a free agent. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

18. Considering the settled legal position on the subject by the Apex Court and the facts and circumstances of the present case, I find that the impugned order dated 04.11.2020 suffers from apparent illegality and perversity so the same is liable to be set aside. Further, I find that it would be a futile exercise if the matter is remanded back to the learned trial court to pass appropriate order when the application filed under Section 321 Cr.P.C. fulfills all the required conditions.

19. Thus, the present petition is ***allowed*** and the impugned judgment and order dated 04.11.2020 (Annexure No.1), passed by the learned Additional Session Judge, Court No.3/ Special Judge (M.P./M.L.A.), Gonda in Crl. Case No.100 of 2019; State vs. Prem Narayan Pandey, arising out of Case Crime No.109 of 2003, under Section 60/72 of Excise Act, Police Station-Tarabganj, District-Gonda is hereby set aside and the application filed by the learned Public Prosecutor under Section 321 Cr.P.C. for withdrawal from the prosecution is hereby allowed.

20. Consequences to follow.

(2023) 2 ILRA 686
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.01.2023

BEFORE

THE HON'BLE SAMEER JAIN, J.

Application U/s 482 No. 28523 of 2022

Sadab ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Akhilesh Kumar Mishra

Counsel for the Opposite Parties:
G.A., Sri Syed Shahnawaz Shah

Criminal Law- Code of Criminal Procedure, 1973- Section-190(1)(b) Cr.P.C.- Magistrate is having authority to disagree with the police report and if from the perusal of the report submitted under Section 173(2) Cr.P.C. he arrives at the conclusion that an offence exclusively triable by the court of session is made out against the accused then he can commit the case to the Sessions Court after taking cognizance and Magistrate is not bound by the police report submitted under Section 173(2) Cr.P.C. - Magistrate can ignore the conclusion arrived at by the Investigation Officer and he should apply his mind independently to the facts emerging from the investigation -If a Magistrate can proceed against a person against whom charge-sheet has not been filed then it cannot be said that Magistrate is not empowered to take cognizance of an offence, in which, charge-sheet was not submitted although from the police report, such offence also discloses.

As the Magistrate is empowered to take cognizance against a person against whom chargesheet has not been submitted by the investigating agency, then the Magistrate can also take cognizance of an offence not mentioned in the chargesheet.

Precedent- Not Binding Precedent - Although, in the case of Girish Radhakrishnan Varde (supra), the two judges Bench of the Apex Court held that Magistrate is not empowered either to add or subtract section in the charge-sheet at the time of taking cognizance and he can take cognizance only of those offences, in

which, charge-sheet was submitted and only at the time of framing of charges he can add or subtract such sections but the judgment of Girish Radhakrishnan Varde (supra) was delivered on 25.11.2013 whereas the judgment of Constitution Bench of the Apex Court in the case of Dharam Pal (supra) was delivered on 18.07.2013 but in spite of that case of Dharam Pal (supra) could not be placed before the Apex Court, in case of Girish Radhakrishnan Varde (supra)-Neither the judgments of Minu Kumari (supra) nor Ajay Kumar Parmar (supra) were placed before the two judges Bench of the Apex Court, which decided Girish Radhakrishnan Varde case (supra), therefore, in view of the observation made by Constitution Bench in case of Dharam Pal (supra) as well as by the Apex Court in cases of Minu Kumari (supra) and Ajay Kumar Parmar (supra) the view expressed in Girish Radhakrishnan Varde (supra) does not prevail. Therefore, it cannot be held that Magistrate is not having any authority to take cognizance for the offences, in which, charge-sheet has not been submitted. As the Single Judge of this Court in case of Smt. Shalini Kashyap (supra) only after perusing the judgment of the Apex Court passed in Girish Radhakrishnan Varde (supra) held that Magistrate is not empowered to add or subtract any section in the charge-sheet, therefore, this case will be of no help for the applicant as at the time of making such observation, learned Single Judge of this Court did not discuss the law laid down by the Constitution Bench in the case of Dharam Pal (supra), Minu Kumari (supra), Balveer Singh (supra) and Ajay Kumar Parmar (supra). Although, Single Judge in later part of the judgment discussed the observation made by the Constitution Bench of Dharam Pal (supra) but with regard to different question to summon additional accused.

As the judgement of the Constitution Bench previously rendered in the case of Dharam Pal Singh as well as the judgements in the cases of Minu Kumari, Balveer Singh and Ajay Kumar Parmar , earlier delivered by the Supreme Court, were not noticed and considered by the Supreme Court while delivering the judgement in the latter case of Girish Radhakrishnan Varde and by the learned Single Judge in the case of Shalini Kashyap ,hence the judgement in the case of Girish Radhakrishnan Varde and the judgement in the case of Shalini Kashyap, held not to be good law and are not binding precedents. (Para 12, 15, 16, 20, 23, 24, 25, 26)

Criminal Application rejected. (E-3)

Case Law/ Judgements relied upon:-

1. State of Guj. Vs Girish Radhakrishnan Varde (2014) 3 SCC 659 (distinguished)

2. Smt. Shalini Kashyap & anr. Vs St. of U.P. & ors., Application U/S 482 No. 23830 of 2021(distinguished)

3. Dharam Pal & ors. Vs St. of Har. & anr. (2014) 3 SCC 306

4. Nahar Singh Vs St. of U.P & anr. 2022 Cri. L.J. 1787 (SC)

5. Ajay Kumar Parmar Vs St. of Raj. (2012) 12 SCC 406

6. Balveer Singh & anr. Vs St. of Raj. & anr. (2016) 6 SCC 680

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

1. Heard Sri Akhilesh Kumar Mishra, learned counsel for the applicant, Sri Syed Shahnawaz Shah, learned counsel for the opposite party no.2 and Sri Varun Kumar Agnihotri, learned Brief Holder for the State.

2. By way of present application, applicant made a prayer to quash the order dated 10.01.2022 passed by Civil Judge Junior Division FTC-II/Judicial Magistrate, Hapur passed in Case No. 14536 of 2021

arising out of Case Crime No. 264 of 2021, under Sections 498A, 323, 506, 376 IPC, Police Station Dhaulana, District Hapur by which, Magistrate summoned the applicant under Section 376 IPC too in spite of the fact that charge-sheet was submitted against him only under Sections 498A, 323, 506 IPC.

Factual Matrix

3.1 Applicant is brother-in-law (Devar) of opposite party no.2. On 29.06.2021 opposite party no.2 lodged FIR of the present case under Section 376, 323, 506, 498A IPC and ¾ The Muslim Women (Protection of Rights on Marriage) Act, 2019 at Police Station Dhaulana, District Hapur at Case Crime No. 0264 of 2021 against applicant and others including her husband and mother-in-law.

3.2 According to the FIR on 27.06.2021 at about 11 PM applicant entered into the room of opposite party no.2 and on the point of knife he committed rape with her in absence of her husband and when she made complaint with her husband and his family members then they along with the applicant assaulted her. It is further alleged in the FIR that the husband of opposite party no.2 also verbally gave her triple talaq.

3.3 After registration of the FIR, investigation was commenced and during investigation the statement of opposite party no.2, the victim of the case, was recorded under Section 161 Cr.P.C. and 164 Cr.P.C. and in both the statements she reiterated the version of the FIR and stated that applicant i.e. her brother-in-law (Devar) on 27.06.2021 at about 11 PM on the point of knife committed rape with her in her room in the absence of her husband.

3.4 Therefore, in the FIR as well as in the statements of victim (opposite party no.2) recorded under Section 161 Cr.P.C. and 164 Cr.P.C. there is allegation that applicant on 27.06.221 at about 11 PM on the point of knife committed rape with her.

3.5 During investigation, Investigating Officer recorded the statements of some other witnesses and thereafter on 28.11.2021 submitted charge-sheet against the applicant and other accused persons. The charge-sheet was filed against the applicant under Sections 323, 506, 498A IPC and no charge-sheet was filed against him under Section 376 IPC.

3.6 After submission of the charge-sheet, opposite party no.2, the informant and victim of the present case on 18.12.2021, moved an application before the Magistrate concerned with a prayer that in view of the FIR and her statements recorded under Sections 161 Cr.P.C. and 164 Cr.P.C. applicant should also be summoned under Section 376 IPC. On 10.01.2022, learned Magistrate allowed the application moved by opposite party no.2 and after taking cognizance summoned the applicant under Sections 498A, 323, 506, 376 IPC. Thus, learned Magistrate also summoned applicant under Section 376 IPC along with other offences although charge-sheet was not filed against him under Section 376 IPC.

3.7 Hence, the present application.

Submission on behalf of the applicant

4. Learned counsel for the applicant submits that the order dated 10.01.2022 passed by the Magistrate is illegal and without jurisdiction and he was not having any authority to either add or subtract any section in the charge-sheet. He placed reliance on the judgment of the Apex Court passed in the case of *State of Gujarat Vs.*

Girish Radhakrishnan Varde (2014) 3 SCC 659 and submitted that in view of the law laid down by the Apex Court in the case of Girish Radhakrishnan Varde (supra) applicant cannot be summoned under Section 376 IPC as no charge-sheet was filed against him under Section 376 IPC. He further submits, in view of the law laid down in Girish Radhakrishnan Varde case (supra), only at the time of framing of charge Magistrate can evaluate the evidence available on record whether any offence under Section 376 IPC against the applicant is made out and not at the time of taking cognizance.

5. Learned counsel for the applicant also placed reliance on the judgment of the co-ordinate Bench of this Court passed in the case of ***Smt. Shalini Kashyap and another Vs. State of U.P. and others passed in Application U/S 482 No. 23830 of 2021*** and submitted that after relying the judgment of the Apex Court in case of Girish Radhakrishnan Varde (supra), the co-ordinate Bench of this Court observed that Magistrate has committed error by adding section at the time of taking cognizance as well as by the revisional court.

6. He next submits, as Magistrate at the time of taking cognizance added Section 376 IPC and also took cognizance of offence under Section 376 IPC in spite of the fact that no charge-sheet was filed against the applicant under Section 376 IPC, therefore, in view of law laid down by the Apex Court in the case of Girish Radhakrishnan Varde (supra) and this Court in the case of Smt. Shalini Kashyap (supra), committed grave illegality. Thus, impugned order dated 10.01.2022 is illegal and is therefore liable to be set aside.

Submission advanced on behalf of the prosecution

7. Per contra, learned Brief Holder for the State and learned counsel for the opposite party no.2 opposed the submission advanced by learned counsel for the applicant and submitted that no illegality was committed by the Magistrate while passing the impugned order dated 10.01.2022. Both the counsels submitted that Magistrate is not a silent spectator and law by far is settled that Magistrate can disagree with the police report and on the basis of material available before him, he can even take cognizance for those offences, in which, charge-sheet was not submitted if from the police report such offences disclose.

8. Learned counsel for the opposite party no.2 placed reliance on the judgment of the Constitution Bench of the Apex Court in the case of **Dharam Pal and others Vs. State of Haryana** and **another (2014) 3 SCC 306 and Nahar Singh Vs. State of Uttar Pradesh and another 2022 Cri. L.J. 1787 (SC)** and submitted that as in the case of Dharam Pal (supra) Constitution Bench clearly observed that even if after investigation final report is submitted in favour of an accused but if Magistrate after perusal of the record finds that material is available against the accused, then he can also summoned him after taking cognizance, therefore, if Magistrate is empowered to summon the person against whom charge-sheet is not even submitted then it cannot be said that Magistrate cannot take cognizance for the offence, in which, charge-sheet has not been submitted if after perusing the record, it appears to him accused also committed such offence. The power of the Magistrate

cannot be restricted only up to offences in which charge-sheet was submitted.

9. He further submits that in case of Nahar Singh (supra), the Apex Court again reiterated the law after considering the judgment of the Constitution Bench of the Apex Court passed in Dharam Pal case (supra) and observed that even if a person is not having any place in the police report submitted under Section 173(2) Cr.P.C. but if after perusal of the material collected by the Investigating Officer during investigation, Magistrate arrives at the conclusion that against him also there is material to issue summons then after taking cognizance he can issue summons to him too, therefore, from the law laid down by the Apex Court in the case of Dharam Pal (supra) and Nahar Sing (supra), it is evident that Magistrate has ample power even to take cognizance for the offences in which, charge-sheet was not submitted and can summon the accused in the added section, therefore, impugned order dated 10.01.2022 cannot be said to be illegal and instant application is liable to be dismissed.

Analysis

10. The core issue in the present application is that whether Magistrate is empowered to add any section at the time of taking cognizance and can issue summons to accused for such offence along with the offence mentioned in the charge-sheet.

11. The power of the Magistrate to take cognizance is prescribed under Section 190 Cr.P.C., which reads as:-

"190. Cognizance of offences by Magistrates*. (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-*

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try."

12. According to Section 190(1)(b) Cr.P.C. a Magistrate is empowered to take cognizance of any offence upon a police report of such facts. Therefore, prima facie from the perusal of the Section 190(1)(b) Cr.P.C. it appears that Magistrate can take cognizance of "any offence" upon a police report submitted under Section 173(2) Cr.P.C.

13. The question with regard to power to take cognizance by a Magistrate has come up before the Apex Court in the case of *Minu Kumari and another Vs. State of Bihar and others (2006) 4 SCC 356* and the Apex Court observed as:-

"11. ..... 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 of his powers under Section 190(1)(b) and direct the issue of process to the accused."

14. The Apex Court in case of **Ajay Kumar Parmar Vs. State of Rajasthan (2012) 12 SCC 406** with regard to power of the Magistrate under Section 190 Cr.P.C. observed as:-

"18. .....The scheme of the Code simply provides that the Magistrate can determine, whether the facts stated in the report make out an offence triable exclusively, by the Court of Sessions. Once he reaches the conclusion that the facts alleged in the report, make out an offence triable exclusively by the Court of Sessions, he must commit the case to the Sessions Court."

15. Therefore, from the above authorities of the Apex Court, it appears that Magistrate is having authority to disagree with the police report and if from the perusal of the report submitted under Section 173(2) Cr.P.C. he arrives at the conclusion that an offence exclusively triable by the court of session is made out against the accused then he can commit the case to the Sessions Court after taking cognizance and Magistrate is not bound by the police report submitted under Section 173(2) Cr.P.C. Magistrate can ignore the conclusion arrived at by the Investigation Officer and he should apply his mind independently to the facts emerging from the investigation.

16. Further, the phrase "any offence" used in Section 190 (1) Cr.P.C. is significant. It implies that Magistrate can even take cognizance of the offence exclusively triable by the sessions court. As per section 190(1)(b) Cr.P.C. Magistrate can take cognizance of any offence upon a police report of such facts, therefore, as per Section 190(1)(b) Cr.P.C. if after perusal of the police report submitted under Section 173(2) Cr.P.C Magistrate arrives at the conclusion that an offence exclusively triable by the court of sessions is made out against an accused then he can take the cognizance of such offence and commit the case to the court of sessions even if no charge-sheet was submitted against the accused in such offence.

17. The Apex Court in the case of **Balveer Singh and another Vs. State of Rajasthan and another (2016) 6 SCC 680** also observed as:-

"13. A bare reading of Section 190 of the Code which uses the expression "any offence" amply shows that no restriction is imposed on the Magistrate that Magistrate can take cognizance only for the offence triable by Magistrate Court and not in respect of offence triable by a Court of Session. Thus, he has the power to take cognizance of an offence which is triable by the Court of Session."

18. Therefore, in view of Balveer Singh case (supra) too, the Magistrate is having all the authority to take cognizance of an offence which is exclusively triable

by the court of sessions if after perusal of police report i.e. charge-sheet he arrives at the conclusion that such offence also made out against the accused.

19. The power to take cognizance of a Magistrate under Section 190 Cr.P.C. was exclusively discussed and dealt with by the Constitution Bench of the Apex Court in the case of Dharam Pal (supra), though the matter before Constitution Bench of the Apex Court was little bit different with regard to proceed against a person against whom charge-sheet was not submitted but Constitution Bench of the Apex Court analysed the power of the Magistrate under Section 190 Cr.P.C. very elaborately and observed that even if charge-sheet was not submitted against an accused and his name disclosed in column 2 to the charge-sheet, then also Magistrate can proceed against him if there is material against him in the police report submitted under Section 173(2) Cr.P.C. and Magistrate after taking cognizance can commit the case. The Constitution Bench of the Apex Court with regard to power of the Magistrate under Section 190(1)(b) Cr.P.C. observed as:-

"35. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(3) Cr.P.C. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column no.2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter."

20. Therefore, from the Constitution Bench judgment of the Apex Court passed in the case of Dharam Pal (supra), it is evident that Magistrate may proceed against a person whose name was disclosed in column 2 to the police report i.e. charge-sheet and against whom charge-sheet was not filed if in view of the Magistrate material collected by the Investigating Officer during investigation prima facie discloses that he committed such offence. Therefore, if a Magistrate can proceed against a person against whom charge-sheet has not been filed then it cannot be said that Magistrate is not empowered to take cognizance of an offence, in which, charge-sheet was not submitted although from the police report, such offence also discloses.

21. We can analyse the situation from different angle too, if Magistrate is not empowered to take cognizance for offences, in which charge-sheet was not submitted including the offence triable by court of sessions and charge-sheet was submitted only in offences, which are triable by the Magistrate (as the present case) then Magistrate will have to wait till framing of charges even if police report discloses offence also exclusively triable by sessions court and only at the time of framing of charges case would be committed to the court of session as police report also disclosed offence exclusively triable by sessions court. Therefore, in such case ultimately the case has to commit before court of sessions and for that purpose Magistrate will have to wait till framing of charges, it appears to be improper as if police report disclosed such offences even at the time of taking

cognizance then why Magistrate should wait till framing of charges. This will also waste the valuable time of the court, therefore, from this point of view too, in my considered view, Magistrate should not wait till framing of charges and if at the time of taking cognizance he arrives at the conclusion that from the perusal of the police report submitted under Section 173(2) Cr.P.C. it appears that accused also committed an offence triable by the court of sessions then he can take cognizance for such offence and commit the case to the court of sessions.

22. The Supreme Court in the case of Nahar Singh (supra) also after discussing the judgment of the Constitution Bench of the Apex Court in case of Dharam Pal (supra) observed that even if a person has not been nominated in the charge-sheet i.e. police report submitted under Section 173(2) Cr.P.C. but if Magistrate after perusal of the report arrives at the conclusion that against him an offence is made out then he can take cognizance for such offences and can summon him.

23. Therefore, from the law laid down by the Constitution Bench of the Apex Court and above noted other judgments of the Apex Court it appears that Magistrate is having all the authority to take cognizance of any offence on the basis of the material collected by the Investigating Officer during investigation and if he arrives at the conclusion that an offence is also made out, in which, charge-sheet has not been submitted then he can take cognizance for such offence(s) too and can summon the accused and if any such offence is exclusively triable by the court of sessions then he shall commit the case before the court of sessions.

24. Although, in the case of Girish Radhakrishnan Varde (supra), the two judges Bench of the Apex Court held that Magistrate is not empowered either to add or subtract section in the charge-sheet at the time of taking cognizance and he can take cognizance only of those offences, in which, charge-sheet was submitted and only at the time of framing of charges he can add or subtract such sections but the judgment of Girish Radhakrishnan Varde (supra) was delivered on 25.11.2013 whereas the judgment of Constitution Bench of the Apex Court in the case of Dharam Pal (supra) was delivered on 18.07.2013 but in spite of that case of Dharam Pal (supra) could not be placed before the Apex Court, in case of Girish Radhakrishnan Varde (supra). Further, neither the judgments of Minu Kumari (supra) nor Ajay Kumar Parmar (supra) were placed before the two judges Bench of the Apex Court, which decided Girish Radhakrishnan Varde case (supra), therefore, in view of the observation made by Constitution Bench in case of Dharam Pal (supra) as well as by the Apex Court in cases of Minu Kumari (supra) and Ajay Kumar Parmar (supra) the view expressed in Girish Radhakrishnan Varde (supra) does not prevail. Therefore, it cannot be held that Magistrate is not having any authority to take cognizance for the offences, in which, charge-sheet has not been submitted.

25. Further, in the later judgment of the Apex Court in the cases of Balveer Singh (supra) the Apex Court after considering the dictum of Constitution Bench in the case of Dharam Pal (supra) clearly held that Magistrate is fully empowered to disagrees with the police report and he can independently apply his mind and can take cognizance even for

such offences, in which, charge-sheet was not submitted if from the perusal of the charge-sheet i.e. police report submitted under Section 173(2) Cr.P.C. he arrives at the conclusion that such offences also made out. Similar import is also of the judgment of the Apex Court in case of Nahar Singh (supra).

26. As the Single Judge of this Court in case of Smt. Shalini Kashyap (supra) only after perusing the judgment of the Apex Court passed in Girish Radhakrishnan Varde (supra) held that Magistrate is not empowered to add or subtract any section in the charge-sheet, therefore, this case will be of no help for the applicant as at the time of making such observation, learned Single Judge of this Court did not discuss the law laid down by the Constitution Bench in the case of Dharam Pal (supra), Minu Kumari (supra), Balveer Singh (supra) and Ajay Kumar Parmar (supra). Although, Single Judge in later part of the judgment discussed the observation made by the Constitution Bench of Dharam Pal (supra) but with regard to different question to summon additional accused.

27. Therefore, from the discussion made above, in my considered view, as from the perusal of the statement of opposite party no.2, the informant and victim of the case, recorded under Section 161 Cr.P.C. and 164 Cr.P.C. prima facie offence under Section 376 IPC is made out against the applicant, therefore, Magistrate did not commit any illegality in summoning him under Section 376 IPC in spite of the fact that no charge-sheet was submitted against the applicant under Section 376 IPC.

28. Accordingly, the instant application under Section 482 Cr.P.C. stands **dismissed.**

(2023) 2 ILRA 694
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.01.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Special Appeal Defective No. 30 of 2023

State of U.P. & Anr. ...Appellants
Versus
Dr. Rudra Pratap ...Respondent

Counsel for the Appellants:
C.S.C.

Counsel for the Respondent:
Sharad Bhatnagar

A. Service Law – Recovery from pension - Civil Service Regulations - Article 351-A(a)(ii) - Article 351A of Civil Service Regulations empowers the State Government to pass an order for recovery of any amount from the pension of an officer on account of losses found in judicial or departmental proceedings to have been caused to the Government by negligence or fraud of such officer during his service. (Para 12)

A bare perusal of the aforesaid provision of Article 351-A of the Civil Services Regulations shows that after retirement, withholding or withdrawing a pension and ordering the recovery from pension is permissible to be caused only by the Governor i.e. the State Government in terms of the Rules of Business, not only in case such employee is found causing pecuniary loss to the Government by his misconduct or negligence but also in a cases when the employee concerned is found guilty of grave misconduct. (Para 13, 14)

Article 351-A of Civil Services Regulations puts a prohibition of initiating the departmental proceedings in a case of

retired government servant. However, such proceedings are permissible to be instituted with the sanction of Governor, that too, in respect of an event which took place not more than four years before institution of such proceedings. The provision further provides that departmental enquiry in such an event shall be conducted by such authority and at such place as the Governor may direct and in accordance with the procedure applicable. (Para 15)

The Hon'ble Single Judge came to the conclusion that the inquiry has been proceeded against the respondent in gross violation of Article 351-A(a)(ii) and as such, the entire disciplinary proceedings are hit by the mandatory provisions of the said Article. The Hon'ble Single Judge set-aside the order of punishment dated 14.03.2022 and allowed the writ petition by means of the impugned order (dated 07.09.2022). (Para 19)

The respondent had attained the age of superannuation and retired from service on 30.06.2018. After obtaining permission from his excellency the Governor, charge-sheet was served upon the respondent on 25.10.2019, indicating the misconduct having been committed by him during 2013-14, which is admittedly more than four years prior to date of service of charge-sheet. (Para 16)

The Hon'ble Single Judge, after going through the record, noted the fact that appellants/respondents have not disputed the fact that **disciplinary proceedings are sought to be initiated against the writ petitioner/respondent after four years from the date when the charge-sheet was given to him.** The Hon'ble Single Judge, after going through the order dated 12.12.2017 (which took cognizance of the irregularities committed in the recruitment and selection process for the post of Pasudhan Prasar Adhikari (Veterinary Live Stock Officer) during the period 2013-14, and directed the State Government to initiate disciplinary proceedings and lodge FIR) passed in WP No. 19975 of 2015, noted the fact that 'From perusal of the entire order, **it could not be shown that this Court was informed of the fact that either the petitioner or other persons against whom disciplinary proceedings were initiated have retired**, had this fact been brought to the knowledge of this Court, they would have adhered to the provisions of Article 351-A of the Civil Service Regulations.' (Para 18, 20)

Special appeal dismissed. (E-4)

Present special appeal assails the judgment and order dated 07.09.2022 passed by the Hon'ble Single Judge in Writ-A No. 2854 of 2022, whereby the Hon'ble Single Judge allowed the said writ petition.

(Delivered by Hon’ble Ramesh Sinha, J.)

C.M. Application No. 1 of 2023 : Application for Condonation of Delay.

(1) This *intra Court* appeal is barred by limitation by 105 days.

(2) Heard Shri Ajay Kumar Singh, learned Standing Counsel for the appellants and Shri Sandeep Dixit, learned Senior Advocate assisted by Shri Sharad Bhatnagar, Advocate, appearing on behalf of the respondent/writ petitioner.

(3) Since cause shown in the affidavit filed in support of application for condonation of delay in filing the instant appeal is satisfactory, the aforesaid application for condonation of delay is **allowed**. Delay in filing the appeal is **condoned.**

Order on Memo of the Appeal

(4) The State and its authorities have filed this *intra Court* appeal, assailing the judgment and order dated 07.09.2022 passed by the Hon'ble Single Judge in Writ-

A No. 2854 of 2022 *: Dr. Rudra Pratap Vs. State of U.P. and others,* whereby the Hon'ble Single Judge allowed the said writ petition with the following observations/directions :-

"23. In the light of aforesaid discussion, this Court is of the considered view that inquiry in the present case has been proceeded against the petitioner in gross violation of Article 351-A (a) (ii), and consequently the entire disciplinary proceedings are hit by the mandatory provisions of Article 351-A of Civil Service Regulations. Hence, the impugned order dated 14.03.2022, passed by the State Government, is set aside.

24. The writ petition is **allowed.** Consequences to follow."

(5) Pursuant to the interim order dated 12.12.2017 issued by this Court in Writ-A No. 19975 of 2015 : *V.G. Rao Vs. State of U.P. and others*, an investigation with regard to irregularities committed in the recruitment for the post of Pasudhan Prasar Adhikari (Veterinary Live Stock Officer) during the period 2013-14 was entrusted to Special Investigation Team, which submitted its report on 11.12.2018, stating that there had been large scale irregularities in conducting the selections.

(6) Respondent/writ petitioner (Dr. Rudra Pratap) was discharging his duties on the post of the Director, Animal Husbandry at the relevant point of time and was also in-charge of the entire selection process, but as he retired from service on attaining the age of superannuation on 30.06.2018, hence after obtaining approval from His Excellency the Governor of State of U.P., a disciplinary inquiry was initiated against the respondent on the basis of the report of S.I.T. and a charge-sheet as well as report of S.I.T. was served upon the respondent on 25.10.2019. On receipt of the charge-sheet, the respondent submitted his reply on 16.12.2019, denying the charges levelled against him. The Enquiry Officer, after due enquiry, submitted its report dated 02.12.2020 to the Disciplinary Authority. A show cause notice dated 14.12.2020 along with a copy of the enquiry report dated 02.12.2020 was served upon the respondent. On receipt of the show cause notice, the respondent submitted his reply on 02.01.2021. By order dated 14.03.2022, punishment order was passed against the respondent, withdrawing his entire paid pension and also to not pay pension in future.

(7) Aggrieved by the aforesaid order of punishment dated 14.03.2022, the respondent has filed Writ-A No. 2854 of 2022 before this Court. By judgment and order dated 07.09.2022, Hon'ble Single Judge allowed the writ petition in the manner as stated in paragraph-4 hereinabove. The State and its authorities have filed the instant appeal, challenging the judgment and order dated 07.09.2022 passed by Hon'ble Single Judge.

(8) Challenging the impugned judgment and order dated 07.09.2022, learned Standing Counsel appearing on behalf of the State/appellants has submitted that grave irregularities in recruitment for the post of Pasudhan Prasar Adhikari (Veterinary Live Stock Officer) were committed by various persons, including the respondent/writ petitioner. This Court, while adjudicating Writ Petition No. 19975 of 2015, took cognizance of the said irregularities in the selection process and vide interim order dated 12.12.2017, directed the State Government to initiate disciplinary proceedings and lodge First

Information Report. In compliance thereof, the State Government had constituted a Special Investigation Team, which recommended to initiate disciplinary proceedings against various persons including the respondent.

(9) Shri Ajay Kumar Singh, the learned Standing Counsel has submitted that the entire disciplinary proceeding was initiated against the respondent/ writ petitioner in pursuance of the direction of this Court dated 12.12.2017, hence it cannot be said that the disciplinary proceedings initiated against the respondent are not in consonance with law and the same are in violation of the provisions of Article 351-A (a) (ii) of the Civil Service Regulations. Therefore, his submission is that the impugned judgment passed by Hon'ble Single Judge is liable to be set-aside.

(10) *Per contra*, Shri Shri Sandeep Dixit, the learned Senior Advocate assisted by Shri Sharad Bhatnagar, Advocate, appearing on behalf of the respondent/writ petitioner, has vehemently opposed the aforesaid submissions of the learned Standing Counsel and he has contended that once the respondent attained the age of superannuation and retired on 30.06.2018, for all purposes, relationship of employee and employer between the respondent and the State authorities got severed. He has submitted that the charge-sheet was served upon the respondent on 25.10.2019 levelling the charge of misconduct alleged to have been committed during the period 2013-14, which was more than four years prior to the date of service of the charge-sheet. Hence, the punishment order has been passed in violation of Article 351-A (a) (ii) of the Civil Services Regulations. Shri Dixit submits that Hon'ble Single Judge has rightly allowed the writ petition preferred by the respondent.

(11) We have examined the submissions advanced by the learned Counsel for the parties and gone through the impugned judgment passed by Hon'ble Single Judge as well as the material brought on record.

(12) Article 351A of Civil Service Regulations empowers the State Government to pass an order for recovery of any amount from the pension of an officer on account of losses found in judicial or departmental proceedings to have been caused to the Government by negligence or fraud of such officer during his service. Article 351-A of Civil Service Regulations reads as under : -

"351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused, pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement :

Provided that :

(a) Such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment :

(i) shall not be instituted save with the sanction of the Governor ;

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings, and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with Sub-clause (ii) (a), and

(c) the Public Service Commission, U.P., shall be consulted before final orders are passed.

Explanation. -- For the purposes of this article :

(a) departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him, or, if the officer has been placed under suspension from an earlier date, on such date ; and

(b) judicial proceedings shall be deemed to have been instituted :

(i) in the case of criminal proceedings, on the date on which a complaint is made, or a charge-sheet is submitted to a criminal court ; and

(ii) in the cases of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made, to a civil court.

Note. -- As soon, as proceedings or the nature referred to in this article are instituted, the authority which institutes such proceedings shall without delay intimate the fact to the Audit Officer concerned."

(13) A bare perusal of the aforesaid provision of Article 351-A of the Civil Services Regulations shows that once the Government Servant retires, it is the Governor who has the right of withholding or withdrawing the pension or any part of it, permanently or for a specified period. The Governor under the said provision has also the right to pass an order for recovery from the pension of the whole or part of any pecuniary loss caused to the Government, if the employee is found in departmental or judicial proceedings to have caused pecuniary loss to Government by misconduct or negligence during his service or he has been found guilty of gross misconduct.

(14) It is, thus, clear that after retirement, withholding or withdrawing a pension and ordering the recovery from pension is permissible to be caused only by the Governor i.e. the State Government in terms of the Rules of Business, not only in case such employee is found causing pecuniary loss to the Government by his misconduct or negligence but also in a cases when the employee concerned is found guilty of grave misconduct.

(15) The provision of first proviso appended to Article 351-A of the CSR clearly prohibits institution of departmental proceedings except with the sanction of Governor if such proceedings were not instituted while the employee was on duty either before retirement or during re-employment. Thus, Article 351-A of Civil Services Regulations puts a prohibition of initiating the departmental proceedings in a case of retired government servant. However, such proceedings are permissible to be instituted with the sanction of Governor, that too, in respect of an event which took place not more than four years before institution of such proceedings. The provision further provides that departmental enquiry in such an event shall be conducted by such authority and at such place as the Governor may direct and in accordance with the procedure applicable.

(16) Admittedly, the respondent had attained the age of superannuation and retired from service on 30.06.2018. After obtaining permission from his excellency the Governor, charge-sheet was served upon the respondent on 25.10.2019, indicating the misconduct having been committed by him during 2013-14, which is admittedly more than four years prior to date of service of charge-sheet.

(17) The Hon'ble Single Judge, after appreciating the submissions advanced by the learned Counsel for the parties and noting the provisions sub-clause (a) (ii) of Article 351-A of the Civil Services Regulations, has opined that *"the question which arises for consideration of this Court is as to whether the respondents were under duty to follow the provisions of Article 351-A (a) (ii) of Civil Service Regulations, or the disciplinary proceedings could have been conducted in violation of Article 351-A of CSR, in pursuance to the order of this Court'.*

(18) The Hon'ble Single Judge, after going through the record, noted the fact that appellants/respondents have not disputed the fact that disciplinary proceedings are sought to be initiated against the writ petitioner/respondent after four years from the date when the charge-sheet was given to him. The Hon'ble Single Judge, after going through the order dated 12.12.2017 passed in Writ Petition No. 19975 of 2015, *noted the fact that "From perusal of the entire order, it could not be shown that this Court was informed of the fact that either the petitioner or other persons against whom disciplinary proceedings were initiated have retired, had this fact been brought to the knowledge of this Court, they would have adhered to the provisions of Article 351-A of the Civil Service Regulations.'*

(19) Noting the aforesaid observations, the Hon'ble Single Judge came to the conclusion that the inquiry has been proceeded against the respondent in gross violation of Article 351-A (a) (ii) of the Civil Services Regulations and as such, the entire disciplinary proceedings are hit by the mandatory provisions of Article 351-A of the Civil Service Regulations. In these backdrops, the Hon'ble Single Judge set-aside the order of punishment dated 14.03.2022 and allowed the writ petition by means of the impugned order.

(20) The learned Standing Counsel also did not dispute before us that disciplinary proceedings initiated against the respondent arose out of incident that took place more than four years prior to institution of the proceedings.

(21) In view of the aforesaid observation, we are in full agreement with the view taken by the Hon'ble Single Judge and we do not find any reason to interfere with the same.

(22) The special appeal is, accordingly, **dismissed.** However, there will be no order as to costs under the facts and circumstances of the case.

(2023) 2 ILRA 699
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.02.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Special Appeal Defective No. 40 of 2023

Anjali Chaurasiya ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Avinash Chandra

Counsel for the Respondents:
C.S.C.

A. Service Law – Disciplinary Proceedings - Allahabad High Court Rules: Rule 5 of Chapter VIII; Code of Civil Procedure 1908: Section 2(9).

Maintainability - Impugned order dated 28.11.2022 granting liberty to respondents to proceed with the disciplinary proceedings and post the appellant at any place, tentamounts to a "judgment" within the meaning of Chapter VIII Rule 5 of the Rules of Court making it amenable to special appeal - In the instant case, it transpires from the impugned order that the direction given by the Hon'ble Single Judge in the impugned order, granting liberty to the respondents to continue disciplinary proceedings, has the traits and trappings of finality and also such a nature that would cause serious injustice to the appellant. Thus, the instant special appeal is maintainable and the preliminary objection raised by the learned Standing Counsel is not sustainable under the facts and circumstances of the case. (Para 13, 23)

B. The disciplinary proceedings against an officer cannot take place on information, which is vague and indefinite and suspicion has no role to play in such matters when the department has taken a conscious decision not to challenge the order passed by the appellant (which has formed the basis for her suspension and initiation of disciplinary proceedings against her) **and has allowed the same to attain finality.** The disciplinary proceedings against the appellant have been initiated merely because the assessee has deposited the penalty within a very short span of time which raised a suspicion w.r.t. the penalty order passed by the appellant. Prima facie, it appears at this stage that the disciplinary proceedings cannot be drawn against the appellant to punish her for having passed the aforesaid order. (Para 24, 26)

The respondents ought not to have been given liberty to proceed with the disciplinary proceedings against the appellant and to post her anywhere considering the facts that the disciplinary proceedings are pending against her. (Para 27)

C. Words and Phrases – "*Judgment*" - It would not be appropriate to project the definition appearing in S. 2(9) of CPC, 1908 into the meaning of that expression for the purposes of the Letters Patent and the word "judgment" for the purposes of Clause 15 of the Letters Patent should receive a wider and more liberal interpretation than the expression "judgment" in the CPC. It was further held that 'judgment' imports a concept of finality in a broader and not in a narrower sense and can be of three kinds:

(i) a final judgment;
(ii) a preliminary judgment; and
(iii) an intermediary or interlocutory judgment..

There may be such interlocutory orders which are not covered by Order XLIII Rule 1 C.P.C. but also possess a characteristic of finality. Every interlocutory order is not a judgment. Only certain categories of interlocutory orders can be regarded as judgments, which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. (Para 17)

Special appeal allowed.(E-4)

Precedent followed:

1. Ashutosh Shrotriya& ors. Vs Vice-Chancellor, Dr. B.R. Ambedkar University & ors., AIR 2015 All 187 (FB) (Para 5)

2. Prof. Y.C. Simhadri, Vice-Chancellor, B.H.U.& ors. Vs Deena Bandhu Pathak, Student, 2001 (4) A.W.C. 2688 (Para 6)

3. Hind Lamps Ltd. Vs Deputy Labour Commissioner, Agra & anr., 2002 (3) A.W.C. 1908 (Para 6)

4. Zunjarro Bhikaji Nagarkar Vs U.O.I. & ors., (1999) 7 SCC 409 (Para 10)

5. Shah Babulal Khimji Vs Jayaben D Kania, 1981 (4) SCC 8 (Para 17)

6. Central Mine Planning and Design Institute Ltd. VsU.O.I., 2001 (2) SCC 588 (Para 18)

7. Midnapore Peoples' Cooperative Bank Ltd. Vs Chunilal Nanda, 2006 (5) SCC 399 (Para 19)

Present special appeal assails the interim order dated 28.11.2022 passed by the Hon'ble Single Judge.

(Delivered by Hon'ble Ramesh Sinha, J.
&
Hon'ble Subhash Vidyarthi, J.)

C.M. Application No. 1 of 2023 : Application for Condonation of Delay

(1) This *intra Court* appeal has been filed beyond 25 days.

(2) Heard Shri Vivek Raj Singh, learned Senior Advocate assisted by Shri Avinash Chandra, learned Counsel appearing on behalf of the appellant and Shri V.P. Nag, learned Standing Counsel appearing on behalf of the State/respondents.

(3) Since cause shown in the affidavit filed in support of the aforesaid application is satisfactory, the application for condonation of delay is **allowed**. Delay in filing the instant appeal is condoned.

(Order on Memo of Appeal)

(4) Feeling aggrieved and dissatisfied with the direction given in paragraph-14 of the interim order dated 28.11.2022 passed by Hon'ble Single Judge in Writ-A No. 7888 of 2022 : *Anjali Chaurasia Vs. State of U.P. and 5 others,* whereby Hon'ble Single Judge granted liberty to the respondents/State to proceed with the disciplinary proceedings, without being influenced by the findings recorded in the order and also to post the writ petitioner at any place, considering the fact that disciplinary proceedings are pending against her, the appellant/writ petitioner has preferred the instant appeal.

(5) Placing reliance upon paragraphs 25, 27 and 36 of the Full Bench decision of this Court in **Ashutosh Shrotriya and others Vs. Vice-Chancellor, Dr. B.R. Ambedkar University and others :** AIR 2015 All 187 (FB), Shri V.P. Nag, learned Standing Counsel submits that the order under appeal passed by Hon'ble Single Judge does not fall within the meaning of "judgment' but it is an interlocutory order, therefore, in view of the provisions of Rule 5 of Chapter VIII of the Allahabad High Court Rules, the instant *intra Court* appeal filed by the writ petitioner/appellant against the impugned interim order passed Hon'ble Single Judge while exercising the powers under Article 226 of the Constitution of India, is not maintainable.

(6) Shri Vivek Raj Singh, learned Senior Advocate, appearing on behalf of the appellant/writ petitioner, on the other hand, has placed reliance upon judgment of Division Bench of this Court in **Prof. Y.C. Simhadri, Vice-Chancellor, B.H.U. and others Vs. Deen Bandhu Pathak, Student :** 2001 (4) A.W.C. 2688 and **Hind Lamps Limited Vs. Deputy Labour Commissioner, Agra and another** : 2002 (3) AWC 1908 and has submitted that the order under appeal passed by Hon'ble Single Judge has trappings of finality since the Hon'ble Single Judge has granted liberty to the respondents to continue the disciplinary proceedings and also to post the writ petitioner at any place. His submission is that if the disciplinary proceedings initiated in pursuance of the order dated 21.04.2022 on the basis of

anonymous complaint is completed and the appellant/writ petitioner is punished, the writ petition filed by the writ petitioner/appellant would ultimately become infructuous.

(7) Elaborating his submission, Shri Vivek Raj Singh has contended that on 19.11.2022, the appellant, while working as Assistant Commissioner, Commercial Tax, Mobile Squad, Barabanki, intercepted a vehicle, bearing registration No. HR38AA6286 and found that there was metallic scrap of 2.5 M.T. goods, which was held undisclosed in the garb of the plastic scraps being transported through the aforesaid vehicle and as such, the appellant has exercised its quasi judicial powers and after due process of law, levied penalty of Rs.90,000/-. Thereafter, one Raj Kumar has made an anonymous complaint, alleging that metallic scrap was being transported by the said vehicle, but the appellant only levied penalty treating that to be only 2.5 MT of goods of metallic scrap rather than imposing penalty on the entire goods as metallic scrap.

(8) Shri Singh has further submitted that except the name of the complainant, the complaint did not disclose any other particulars so as to ascertain the identity of the complainant. The respondents took cognizance on the said anonymous complaint and initiated disciplinary proceedings against the appellant and suspended the appellant vide order dated 21.04.2022, which was challenged by the appellant before this Court by means of Writ-A No. 7888 of 2022.

(9) Shri Singh submits that Government Orders dated 09.05.1997, 01.08.1997, 19.04.2012 and 06.08.2018 specifically provide that the purpose of issuance of these orders is not only to safeguard the government officers from unnecessary harassment but also to curb the tendency of making frivolous and anonymous complaint against the government servant. His submission is that the disciplinary proceedings initiated by the respondents on the basis of the said anonymous complaint are contrary to the aforesaid Government Orders.

(10) Shri Vivek Raj Singh has next contended that before the Hon'ble Single Judge, the appellant has placed reliance upon the decision of the Apex Court in **Zunjarrao Bhikaji Nagarkar Vs. Union of India and others** : (1999) 7 SCC 409, wherein the Apex Court held that the disciplinary proceedings cannot be initiated against an officer on information which is vague and indefinite and suspicion has no role to play in such matter. The Hon'ble Single Judge, while passing the impugned interim order, though noted the aforesaid dictum of the Apex Court but erred in issuing direction in paragraph-14 of the impugned interim order, granting liberty to the respondents to continue the disciplinary proceedings and to post the appellant at any place.

(11) Making the aforesaid submissions, Shri Vivek Raj Singh, the learned Senior Advocate appearing on behalf of the appellant prays that the instant special appeal is maintainable and direction contained in paragraph-14 of the impugned interim order dated 28.11.2022 is liable to be set-aside.

(12) We have examined the submissions advanced by the parties and gone through the impugned order as well as material brought on record.

(13) The core issue for consideration is whether the direction issued by Hon'ble Single Judge in paragraph-14 of the impugned order dated 28.11.2022, granting liberty to the respondents to proceed with the disciplinary proceedings and post the appellant at any place, tentamounts to a "judgment" within the meaning of Chapter VIII Rule 5 of the Rules of Court making it amenable to special appeal under Chapter VIII Rule 5 of the Rules of Court.

(14) Chapter VIII Rule 5 of the Rules of Court reads as under :

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

(15) A perusal of the aforesaid provision goes to show that appeal has been provided from a judgment or order of one judge of the High Court subject to excepted categories or exclusion where special appeal will not be maintainable. Thus, everything turns upon the meaning of expression "judgment" used in Chapter VIII Rule 5 of the Rules of Court.

(16) The issue as to what constitute a judgment so as to make it amenable to special appeal under Chapter VIII Rule 5 of the Rules of the Court is no longer *res integra.*

(17) The issue as to when a decision of the Hon'ble Single Judge could be regarded as a 'judgment' within the meaning and scope of Clause 15 of the Letters Patent of Bombay High Court came up for consideration before the Apex Court in the case of **Shah Babulal Khimji Vs. Jayaben D Kania** : 1981 (4) SCC 8, wherein the Apex Court has held that it would not be appropriate to project the definition appearing in Section 2 (9) of the Code of Civil Procedure, 1908 into the meaning of that expression for the purposes of the Letters Patent and the word "judgment" for the purposes of Clause 15 of the Letters Patent should receive a wider and more liberal interpretation than the expression "judgment" in the CPC. It was further held that "judgment' imports a concept of finality in a broader and not in a narrower sense and can be of three kinds :

(i) a final judgment;
(ii) a preliminary judgment; and
(iii) an intermediary or interlocutory judgment..

The Apex Court further went to observe that there may be such interlocutory orders which are not covered by Order XLIII Rule 1 C.P.C. but also possess a characteristic of finality. It was observed as under :

"(3) Intermediary or Interlocutory judgment.- Most of the interlocutory orders which contain the quality of finality are clearly specified in clause (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43 Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote."

The Apex Court further went to observe that every interlocutory order is not a judgment. Only certain categories of interlocutory orders can be regarded as judgments. In this connection, it was held as under :

"...every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned."

(emphasis supplied)

(18) In the case of **Central Mine Planning and Design Institute Ltd. Vs. Union of India:** 2001 (2) SCC 588 while laying down the test when interlocutory order would fall within the meaning of "judgment' for the purposes of Letters Patent, the Apex Court has observed as under :

"...to determine the question whether an interlocutory order passed by one Judge of a High Court falls within the meaning of "judgment" for purposes of Letters Patent the test is: Whether the order is a final determination affecting vital and valuable rights and obligations of the parties concerned. This has to be ascertained on the facts of each case."

(19) In **Midnapore Peoples' Cooperative Bank Ltd Vs Chunilal Nanda** : 2006 (5) SCC 399, the Apex Court has examined following two questions : -

(i) Where the High Court in a contempt proceedings renders a decision on the merits of a dispute between the parties, either by an interlocutory order or final judgment, whether that would be appealable under Section 19 of the Contempt of Courts Act, 1971 and if not, what would be the remedy to the person aggrieved; and

(ii) Where such a decision on merits is rendered by an interlocutory order of a learned Single Judge, whether an intra-court appeal would be maintainable under Clause 15 of the Letters Patent of the High Court of Calcutta.

The Apex Court, thus, observed that interlocutory or interim orders which are passed during the pendency of a case would fall under one or the other of the following categories :-

"(i) Orders which finally decide a question or issue in controversy in the main case;

(ii) Orders which finally decide an issue which materially and directly affects the final decision in the main case;

(iii) Orders which finally decide a collateral issue or question which is not the subject-matter of the main case;

(iv) Routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment;

(v) Orders which may cause some inconvenience or some prejudice to a party, but which do not finally determine the rights and obligations of the parties."

(20) In **Ashutosh Shrotriya and others Vs. Vice-Chancellor, Dr. B. R. Ambedkar University and others** (supra), upon which learned Standing Counsel has placed reliance, noticing conflict in two Division Bench's judgment, following questions were referred for decision to the Full Bench :

"(1) Where a learned Single Judge while hearing a writ petition calls for counter and rejoinder affidavits, but does not pass any order on the stay application either granting or refusing a stay, will the order amount to a refusal of interim relief to the petitioner either temporarily or impliedly and a 'judgment' within the meaning of Chapter VIII Rule 5 of the Rules of the Court, 1952;

(2) Does an order which adversely affects the valuable rights of a party by a temporary or implied refusal of interim relief have the trappings of a judgment."

(21) After discussing the law on the subject, Full Bench answered the questions as under :

"44. We, accordingly, are of the view that a direction issued by the learned Single Judge in the course of the hearing of a writ petition, calling for the filing of a counter and a rejoinder or, in other words, for the completion of pleadings is a direction of a procedural nature, in aid of the ultimate progression of the case. The object and purpose of such a direction is to enable the Single Judge to have the considered benefit of a response to the petition so as to enable the Court to deal with an application of an interlocutory nature upon a fair consideration of the rival perspectives and eventually for the purpose of the disposal of the case at the final stage. A purely procedural direction of this nature would ordinarily not be amenable to the remedy of a special appeal even if the consequence of the issuance of such a direction is to cause some inconvenience or prejudice to one or other party. The Court, in order to decide a lis, either at the interlocutory or at a final stage, would generally require the benefit of a response filed by a party which would be affected by the order which is sought and the reliefs which are claimed. Compliance with the principles of natural justice is as much a safeguard for the parties as it is for the Court of having considered the matter in all its perspectives before rendering a final decision. If a party to the proceeding seeks to press an application for ad interim relief even before a reply is filed on grounds of extreme urgency or on the ground that the situation would be irreversibly altered or that irretrievable injustice would result unless a protective order is passed, such a submission must be urged before the Single Judge. If such a submission is urged, it must be recorded and dealt with however briefly to obviate a grievance that an application for ad interim relief was pressed but not dealt with. A purely procedural direction of calling for a counter affidavit and rejoinder would not be amenable to a special appeal since it decides no rights and does not affect the vital and substantive rights of parties. However, the appellate court has the unquestioned jurisdiction to decide whether the direction is of a procedural nature against which a special appeal is not maintainable or whether the interlocutory order decides matters of moment or affects

vital and valuable rights of parties and works serious injustice to the party concerned. Where the Division Bench in a special appeal is of the view that the order of the learned Single Judge is not just a procedural direction but would result in a grave detriment to substantive rights of an irreversible nature, the jurisdiction of the Court is wide enough to intervene at the behest of an aggrieved litigant. The Rules of Court are in aid of justice. We, therefore, affirm the principle that a purely processual order of the nature upon which the reference is made would not be amenable to a special appeal not being a judgement. The Division Bench will have to decide in the facts of each case, the nature of the order passed by a Single Judge while determining whether the appeal is maintainable.

44. In view of the aforesaid discussions, we answer the question of law referred to the Full Bench by holding that, an order of a learned Single Judge upon a petition under Articles 226 or 227 of the Constitution only calling for counter and rejoinder affidavits is merely a procedural order in aid of the progression of the case. An order of this nature which is purely of a procedural nature in aid of the progression of the case and to enable the Court to form a considered view after a counter affidavit and a rejoinder are filed would not be amenable to a special appeal under Chapter VIII Rule 5. Such an order does not decide anything nor does it have the trappings of finality. If a party to the proceedings seeks to press an application for ad interim relief of a protective nature even before a counter affidavit is filed, on the ground that a situation of irretrievable injustice may result or that its substantive rights would be adversely affected in the meantime, such an argument must be addressed before the Single Judge. If such an argument is urged, it should be dealt with however briefly, consistent with the stage of the case, by the Single Judge. **It is for the Division Bench hearing the special appeal to consider whether the order decides matters of moment or is of such a nature that would affect the vital and valuable rights of the parties and causes serious injustice to the concerned party."**

(emphasis supplied)

(22) Keeping in mind the aforesaid settled law on the subject, what we find in the instant case is that a disciplinary proceeding under U.P. Government Servant (Discipline and Appeal) Rules, 1999 was initiated against the appellant by placing her under suspension by means of order dated 21.04.2022 on the pretext that the appellant, while working as Assistant Commissioner, Commercial Tax, Mobile Team Unit, Barabanki, has violated provisions of the Goods and Service Tax Act as she, by arranging wrong facts, evidences and fabricated documents at her own convenience as well as with the collusion of traders, declared less valuable and less taxable plastic scraps in place of more valuable and more taxable metal/non-metal items and deposited very less amount in the State treasury instead of required tax/penalty, which causes revenue loss to the Government. The appellant has challenged the aforesaid order of suspension dated 21.04.2022 by filing Writ-A No. 7888 of 2022. By means of the impugned order, Hon'ble Single Judge, after noting the submissions advanced by the learned Counsel for the parties as well as judgment of the Apex Court in **Zunjarrao Bhikaji Nagarkar (supra)** relied by the appellant/writ petitioner, stayed the operation and implementation of the order of suspension dated 21.04.2022,

however, liberty has been granted to the respondents to proceed with the disciplinary proceedings.

(23) In the instant case, it transpires from the impugned order that the direction given by the Hon'ble Single Judge in paragraph-14 of the impugned order, granting liberty to the respondents to continue disciplinary proceedings, has the traits and trappings of finality and also such a nature that would cause serious injustice to the appellant. Thus, the instant special appeal is maintainable and the preliminary objection raised by the learned Standing Counsel is not sustainable under the facts and circumstances of the case.

(24) The Hon'ble Single Judge has recorded that in case where there is no infirmity in the order of penalty, weight etc., or it lacked in quantum of quality of the goods, the respondents should have adhered to the provisions of the U.P. Goods and Services Tax Act and revised the said order in accordance with Section 108 of the U.P. Goods and Service Tax Act. However, the order passed by the appellant, which has formed the basis for her suspension and initiation of disciplinary proceedings against her, has not been revised or cancelled by the respondents. Rather, a conscious decision was taken not to take any action against the order passed by the appellant. When the respondents themselves have allowed the order passed by the appellant to attain finality and they have taken a conscious decision not to challenge the order, the disciplinary proceedings initiated on the basis of a mere suspicion raised on the basis that the assessee has deposited the penalty within a very short span of time after passing of the order, appears to be no good ground for initiation of disciplinary proceedings against the appellant.

(25) The Hon'ble Single Judge has quoted the following passage from the case of **Zunjarrao Bhikaji Nagarkar Vs. Union of India** and others (supra) :-

"41. When penalty is not levied, the assessee certainly benefits. But it cannot be said that by not levying the penalty the officer has favoured the assessee or shown undue favour to him. There has to be some basis for the disciplinary authority to reach such a conclusion even prima facie. Record in the present case does not show if the disciplinary authority had any information within its possession from where it could form an opinion that the appellant showed 'favour' to the assessee by not imposing the penalty. He may have wrongly exercised his jurisdiction. But that wrong can be corrected in appeal. That cannot always form basis for initiating disciplinary proceedings for an officer while he is acting as quasi judicial authority. It must be kept in mind that being a quasi judicial authority, he is always subject to judicial supervision in appeal.

42. Initiation of disciplinary proceedings against an officer cannot take place on an information which is vague or indefinite. Suspicion has no role to play in such matter. There must exist reasonable basis for the disciplinary authority to proceed against the delinquent officer. Merely because penalty was not imposed and the Board in the exercise of its power directed filing of appeal against that order in the the Appellate Tribunal could not be enough to proceed against the appellant. There is no other instance to show that in similar case the appellant invariably imposed penalty.

43. If, every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quasi judicial officers like the appellant. Since in sum and substance misconduct is sought to be inferred by the appellant having committed an error of law, the charge-sheet on the face of it does not proceed on any legal premise rendering it liable to be quashed. In other words, to maintain any charge-sheet against a quasi judicial authority something more has to be alleged than a mere mistake of law, e.g., in the nature of some extraneous consideration influencing the quasi judicial order. Since nothing of the sort is alleged herein the impugned charge-sheet is rendered illegal. The charge- sheet, if sustained, will thus impinge upon the confidence and independent functioning of a quasi judicial authority. The entire system of administrative adjudication whereunder quasi judicial powers are conferred on administrative authorities, would fall into disrepute if officers performing such functions are inhibited in performing their functions without fear or favour because of the constant threat of disciplinary proceedings."

(26) The disciplinary proceedings against the appellant have been initiated merely because the assessee has deposited the penalty within a very short span of time which raised a suspicion with regard to the penalty order passed by the appellant. In **Zunjarrao Bhikaji Nagarkar (Supra),** the Hon'ble Supreme Court has categorically held that the disciplinary proceedings against an officer cannot take place on information, which is vague and indefinite and suspicion has no role to play in such matters when the department has taken a conscious decision not to challenge the order passed by the appellant and has allowed the same to attain finality. *Prima facie*, it appears at this stage that the disciplinary proceedings cannot be drawn against the appellant to punish her for having passed the aforesaid order.

(27) In view of the aforesaid discussion, we are of the view that the respondents ought not to have been given liberty to proceed with the disciplinary proceedings against the appellant and to post her anywhere considering the facts that the disciplinary proceedings are pending against her.

(28) Accordingly, the instant special appeal is **allowed**. The order dated 28.11.2022 passed by the Hon'ble Single Judge in Writ-A No. 7888 of 2022 : *Anjali Chaurasia Vs. State of U.P. and 5 others, so far as it provides that "Respondents are at liberty to proceed with the disciplinary proceedings, without being influenced by the findings recorded in this order. The respondents are also at liberty to post the petitioner at any place, considering the fact that disciplinary proceedings are pending against her"* is hereby set-aside.

(29) It is clarified that while deciding the case on merits, Hon'ble Single Judge shall not be guided or influence by any observations made hereinabove, which have been made only for the purposes of disposal of the instant appeal.

(2023) 2 ILRA 708
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2023

BEFORE

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

Special Appeal Defective No. 122 of 2022

C/M, Gandhi Rashtriya Vidyalaya, Rath, Dist. Hamirpur & Anr.
...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Prabhakar Awasthi, Sri Saurabh Tripathi

Counsel for the Respondents:
Sri A.K. Roy,(Addl. C.S.C.), Sri Harindra Prasad, Sri Krishna Kant Dwivedi, Sri Ankit Gaur (S.C.), Sri Brijesh Dubey

A. Societies/Election Law – The Societies Registration Act, 1860 - A dispute is raised that the General Body of the Society and the Committee of Management are very different. This fact would have to be asserted by looking into the by-laws of the Society and the scheme of management of the Institution. There is also a thick dispute about the enrollment of members to the General Body of the Society, the membership whereof has been modified a number of times and approved by the Assistant Registrar, Firms, Societies and Chits. **The issue is one relating to elections to the Committee of Management of the Institution with involvement of the parent body, that is to say, the Society.** The learned Single Judge has allowed the writ petitions without affidavits being exchanged between parties. (Para 11)

In original writ petitions involving factual disputes of this complexity, the better course of action to follow is to permit parties to exchange affidavits and then hear the matter. This matter should go back to the learned Single Judge with a direction to permit parties to put in their affidavits and decide the matter afresh after hearing all parties concerned. (Para 12)

Special appeal allowed. Impugned judgment and order dated February 24, 2022 is set aside. All the three writ petitions shall stand restored to the file of the learned Single Judge for hearing and decision afresh in accordance with law. (E-4)

Present special appeal assails the judgment and order dated 24.02.2022 passed by the learned Single Judge.

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

on **Civil Misc. Application for Leave to Appeal No. 2 of 2022**

1. The leave application is allowed. The appellants/ applicants are permitted to appeal from the impugned judgment and order dated February 24, 2022 passed by the learned Single Judge.

on **Civil Misc. Exemption Application No. 3 of 2022**

2. The exemption application is allowed.

on the **Memo of Appeal**

3. This special appeal is directed against a judgment and order of the learned Single Judge dated February 24, 2022 allowing Writ-C Nos. 703 of 2022, 3056 of 2021 and 30573 of 2021.

4. By the impugned judgment, the learned Single Judge, amongst others, has quashed the order dated December 5, 2019 and October 30, 2021 passed by the Assistant Registrar, Firms, Societies and Chits, Jhansi Region, Jhansi. By the order dated December 5, 2019, the Assistant Registrar had approved the addition of 307 members to the General Body of the Society at the time, comprising 1397 members. By the other order dated October 30, 2021, the Assistant Registrar issued a revised and rectified list of members of the General Body of the Society, numbering 1025.

5. The learned Judge has further quashed all consequential proceedings that would follow consequent upon determination of membership of the General Body of the Society by the

Assistant Registrar. Another impact of the judgment passed by the learned Single Judge is that the elections to the Committee of Management of the Society held on January 16, 2022 and registered by the Assistant Registrar on January 18, 2022 headed by the appellants would also stand set aside.

6. The dispute involved in the writ petitions giving rise to this appeal relates to Shri Gandhi Rashtriya Vidyalaya, Rath, District Hamirpur, a Society registered under the Societies Registration Act, 1860 (for short, 'the Society'). The Society has established an educational institution, known as Gandhi Rashtriya Vidyalaya, Rath, District Hamirpur (for short, 'the Institution'). The undisputed elections to the Committee of Management authorized to govern the Institution were held in the year 2000 and then again in the year 2003. Later on, the membership of the General Body increased.

7. It is the appellants' case that on April 20, 2018, the Assistant Registrar approved a list of 1397 members, including some 307 members, who were approved by the order dated December 18, 2014. On the basis of the said list, elections to the Committee of Management of the Institution were held on February 3, 2019. On December 5, 2019 some 307 members were approved as members of the General Body, over and above the 1397.

8. The order dated December 5, 2019 was challenged by the appellants *vide* Writ-C No. 30573 of 2021. By a subsequent order dated October 30, 2021, the Assistant Registrar issued a rectified list, excluding members, whose term of three years had come to an end. This order was challenged *vide* Writ-C No. 30956 of 2021, again by the appellants here. It appears that an interim order was passed in this petition on an undertaking by respondent No.5 to the writ petition that no elections to the Committee of Management of the Institution were being held on the basis of the order dated October 30, 2021 passed by the Assistant Registrar and elections to the Committee of Management of the Society alone had been notified.

9. The Court passed an interim order, therefore, that the respondents are restrained from interfering in the peaceful functioning of the petitioner's Society as approved on March 6, 2019 on the basis of elections held on February 3, 2019. This order was corrected by a subsequent order dated December 22, 2021 to mention for "the petitioners' Society" in the interim order "the Committee of Management of the College". Elections to the Committee of Management of the Society were held on January 16, 2022, wherein appellant No. 2 was returned elected as the Secretary/ *Sabhapati.*

10. On February 14, 2022, it appears that a meeting of the General Body of the Society was held, where name of 477 members of the General Body, who were dead, were scored out and another 103 were enrolled. The Assistant Registrar approved the list of 651 members of the General Body of the Society under Section 4-B of the Societies Registration Act, 1860. At this juncture, 56 members of the General Body challenged the order dated October 30, 2021 passed by the Assistant Registrar *vide* Writ-C No. 703 of 2022. All the three writ petitions were tagged and heard by the learned Single Judge, who has allowed them by the impugned judgment, quashing the two orders above detailed and issuing various directions.

11. Upon hearing the learned Counsel for parties, we find that a dispute is sought to be raised that the General Body of the Society and the Committee of Management are very different. This fact would have to be asserted by looking into the by-laws of the Society and the scheme of management of the Institution. There is also a thick dispute about the enrollment of members to the General Body of the Society, the membership whereof has been modified a number of times and approved by the Assistant Registrar, Firms, Societies and Chits. The issue is one relating to elections to the Committee of Management of the Institution with involvement with of the parent body, that is to say, the Society. The learned Single Judge has allowed the writ petitions without affidavits being exchanged between parties.

12. We are of opinion that in original writ petitions involving factual disputes of this complexity, the better course of action to follow is to permit parties to exchange affidavits and then hear the matter. We, therefore, think that this matter should go back to the learned Single Judge with a direction to permit parties to put in their affidavits and decide the matter afresh after hearing all parties concerned.

13. We, accordingly, allow this appeal, set aside the impugned judgment and order dated February 24, 2022. All the three writ petitions shall stand restored to the file of the learned Single Judge for hearing and decision afresh in accordance with law. We request the learned Single Judge to expedite hearing.

14. There shall be no order as to costs.

(2023) 2 ILRA 711
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: LUCKNOW 03.02.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
HON'BLE SUBHASH VIDYARTHI, J.

Writ A No. 1051 of 2023

Awanish Kumar Pandey & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Vyas Narayan Shukla, Raghvendra Ojha, Shiv Kumar Soni

Counsel for the Respondents:
C.S.C.

A. Service Law – Constitutionality of Rule 17 - Uttar Pradesh Police Computer Staff (Non-Gazetted) Service Rules 2011 - Uttar Pradesh Government Department Electronic Data Processing (Grade-C) Cadre Service Rules, 2016: Rule 18; Constable and Head Constable Service Rules, 2015: Rule 17; U.P. Sub-Inspector and Inspector (Civil Police) Service Rules, 2015: Rule 17; U.P. Police Radio Subordinate Service Rules, 2015; U.P. Police Ministerial Accounts and Confidential Assistants Cadre Service Rules, 2015; U.P. Pradeshik Armed Constabulary Subordinate Officers Service Rules, 2015; Right to Information Act 2005; Police Act, 1861: Section 46(2)(c) r/w Section 2.

No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, com-posed as they are of the representatives of the people, are sup-posed to know and be aware of the needs of the people and what is good and bad

for them. The court cannot sit in judgment over their wisdom. (Para 10)

The petitioners have contended that Rule 17 of the Rules of 2011 is *ultra vires* and violative of Article 14 of the Constitution of India on the ground that in U.P. Police Radio Subordinate Service Rules 2015, U.P. Police Ministerial, Accounts and Confidential Assistants Cadre Service Rules 2015 and in U.P. Pradeshik Armed Constabulary Subordinate Officers Service Rules 2015 do not contain any provision for holding departmental examination for making promotions and, therefore, Rule 17 of the Rules 2011, so far as it contains a provision for holding a departmental examination for making promotions is ultra vires the provisions of Article 14 of the Constitution of India. (Para 16)

All the aforesaid Rules referred by the petitioner deal with the service conditions of employees, which form a particular class of the employees and all the classes of employees are different and distinct from each other. No other rule contains a provision for making promotions of the persons who may be said to be belonging to a class similar to the class of Grade-A Computer Operators in U.P. Police. The Computer Operators perform duties, which are technical in nature and which require special skills in computer operation. **If the Government has decided to hold a written examination for making promotions of Computer Operators, Grade-A to Computer Operators, Grade-B, for ascertaining suitability of the candidates, it cannot be said that the decision to hold a written-examination has no reasonable nexus to the objective sought to be achieved.** (Para 17)

B. Merely because the State Government is contemplating to make amendments in the Rule, the Rules cannot be declared ultra vires. Petitioners have challenged the validity of the Rules also on the ground that the State Government itself is contemplating amendment in the procedure for making promotion of Computer Operators, Grade-A to Computer Operators, Grade-B by departmental seniority, instead of conducting a departmental examination. The State Government was well within its authority to make the Rules and it has the authority to make amendments in the Rules. (Para 18)

The State Government has already framed Rules governing the field. The State has acted within its competence in framing the Rules. **The Rules are not ultra vires any provision of the constitution of India and this Court has no reason to interfere in the Rules.** (Para 19)

Writ petition dismissed. (E-4)

Precedent followed:

1. Pravin Sinh Inrasinh Mahida Vs St. of Guj., 2021 SCC Online Guj. 1293 (Para 8)

2. Subramanian Swami Vs Director, Central Bureau of Investigation & anr., (2014) 8 SCC 682 (Para 9)

3. Public Services Tribunal Bar Association Vs St. of U.P. (2003) 4 SCC 104 (Para 9)

4. St. of A.P. & ors. Vs McDowell & Co. & ors., (1996) 3 SCC 709 (Para 9)

5. Shayara Bano Vs U.O.I., (2017) 9 SCC 1 (Para 12)

Present petition challenges the validity of the Uttar Pradesh Police Computer Staff (Non-Gazetted) Service Rules 2011 (hereinafter referred as "the Rules of 2011") and they have sought issuance of a writ of Mandamus directing the opposite parties to amend the aforesaid Rules to the extent it contains a provision for conducting a departmental examination for making promotions from the post of Computer Operator, Grade-A to the post of Computer Operator Grade-B.

(Delivered by Hon'ble Ramesh Sinha, J.
&
Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri Shiv Kumar Soni, the learned counsel for the petitioner and Sri V. P. Nag, the learned Standing Counsel for the State-Respondent and perused the record.

2. By means of the instant writ-petition the petitioners have challenged the validity of the Uttar Pradesh Police Computer Staff (Non-Gazetted) Service Rules 2011 (hereinafter referred as "the Rules of 2011") and they have sought issuance of a writ of Mandamus directing the opposite parties to amend the aforesaid Rules to the extent it contains a provision for conducting a departmental examination for making promotions from the post of Computer Operator, Grade-A to the post of Computer Operator Grade-B.

3. The petitioners have contended that in several other Rules governing promotions of the Government Employees, there is no provision for conducting an examination, as is there in Rule 17 of the Rules of 2011.

4. Rule 18 of the Uttar Pradesh Government Department Electronic Data Processing (Grade-C) Cadre Service Rules 2016, which contains the procedure for recruitment by promotion for the post of Computer Operator, Grade-B and Computer Operator, Grade-C, and Rule 17 of the U.P. Constable and Head Constable Service Rules 2015, which contains the provision for promotion to the post of Head Constable, and Rule 17 of the U.P. Sub-Inspector and Inspector (Civil Police) Services Rules 2015, which contains provision for promotion to the post of Sub-Inspector, do not contain any provision conducting an examination for making promotions.

5. It has further been stated in the writ petition that the U.P. Police Radio Subordinate Service Rules 2015, U.P. Police Ministerial Accounts and Confidential Assistants Cadre Service Rules 2015 and the U.P. Pradeshik Armed Constabulary Subordinate Officers Service Rules 2015 also do not contain any provision for conducting written examination for making promotions.

6. It has been stated in the writ petition that in reply to a letter seeking information under the Right to Information Act 2005, U.P. Police Computer Center has given information that the procedure for making amendments to the Rules of 2011, for replacing the departmental examination with seniority, is pending before the Government.

7. On the basis of the aforesaid facts, Shiv Kumar Soni, the learned counsel for the petitioners has submitted that since no other Rule lays down a requirement for conducting a written-examination for making promotions, the requirement of conducting a written-examination contained in Rule 17 of the aforesaid Rules 2011, is discriminatory and violative of Article 14 of the Constitution of India.

8. In support of his contention, he has relied on the decision of the Hon'ble Gujarat High Court in **Pravin Sinh Inrasinh Mahida v. State of Gujrat,** 2021 SCC Online Guj. 1293, wherein it was held that: -

"74(13) It is, thus, beyond any pale of doubt that the justiciability of particular Notification can be tested on the touchstone of Article 14 of the Constitution. Article 14, which is treated as basic feature of the Constitution, ensures equality before the law or equal protection of laws. Equal protection means the right to equal treatment in similar circumstances, both in the priviliges conferred and in the liabilities imposed. Therefore, if the two persons or two sets of persons are similarly

situated / placed, they have to be treated equally. ***At the same time, the principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position. It would mean that the State has the power to classify persons for legitimate purposes. The legislature is competent to exercise its discretion and make classification. Thus, every classification is in some degree likely to produce some inequality but mere production of inequality is not enough. Article 14 would be treated as violated only when equal protection is denied even when the two persons belong to same class/category Therefore, the person challenging the act of the State as violative of Article 14 has to show that there is no reasonable basis for the differentiation between the two classes created by the State. Article 14 prohibits class legislation and not reasonable classification.***

(Emphasis Supplied)

9. Per contra, Sri V. P. Nag, the learned Standing Counsel has submitted that all the aforesaid Rules referred by the petitioners deal with promotion to separate and distinct posts and the Government has framed separate Rules keeping into consideration the peculiar circumstances relating to each set of posts. He has submitted that the provisions contained in any specific Rules governing promotions to any of the other posts cannot be treated as a yardstick for laying down the procedure for making promotions to the post in question. In support of his contention, Sri. Nag has placed reliance upon the decisions of the Hon'ble Supreme Court in Subramanian Swami versus Director, Central Bureau of Investigation and another, (2014) 8 SCC 682, Public Services Tribunal bar Association versus State of U.P., (2003) 4 SCC 104 and State of A.P. and others versus Mcdowell & Co. and others, (1996) 3 SCC 709.

10. In **State of A.P. v. McDowell & Co.,** (1996) 3 SCC 709, he Hon'ble Supreme Court held that: -

"43. ...The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground.....by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them.

The court cannot sit in judgment over their wisdom."

11. In **Public Services Tribunal Bar Assn. v. State of U.P.,** (2003) 4 SCC 104, the Hon'ble Supreme Court reiterated the aforesaid principles. Again, in **Subramanian Swamy v. CBI**, (2014) 8 SCC 682, in Hon'ble Supreme Court held that: -

"49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the58. The Constitution permits the State to determine, by the process of classification, what should be regarded as a class for purposes of legislation and in relation to law enacted on a particular subject. There is bound to be some degree of inequality when there is segregation of one class from the form of delegated legislation or by way of conferment of authority to pass administrative orders--if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is.

* * *

58. The Constitution permits the State to determine, by the process of classification, what should be regarded as a class for purposes of legislation and in relation to law enacted on a particular subject. There is bound to be some degree of inequality when there is segregation of one class from the other. *However, such segregation must be rational and not artificial or evasive. In other words, the classification must not only be based on some qualities or characteristics, which are to be found in all persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. Differentia which is the basis of classification must be sound and must have reasonable relation to the object of the legislation. If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial.*

* * *

96....Moreover, ***where challenge is laid to the constitutionality of a legislation on the bedrock or touchstone of classification, it has to be determined in each case by applying well-settled two tests: (i) that classification is founded on***

intelligible differentia, and (ii) that differentia has a rational relation with the object sought to be achieved by the legislation. Each case has to be examined independently in the context of Article 14 and not by applying any general rule." (Emphasis supplied)

12. In **Shayara Bano v. Union of India,** (2017) 9 SCC 1, the Hon'ble Supreme Court held that *"a statutory provision can be struck down on the ground of manifest arbitrariness, when the provision is capricious, irrational and/or without adequate determining principle, as also if it is excessive or disproportionate."*

13. The general principles of law explained by the Hon'ble Supreme Court in the above referred cases, will also apply to the matters involving a challenge to subordinate legislations, including the U. P. Police Computer Staff (Non-Gazetted) Service Rules, 2011. In light of the law referred to above, we have to examine whether the contention of the petitioners that Rule 17 of the Rules of 2011 is *ultra vires* to the extent it contains a provision for holding a departmental examination for making promotions from Computer Operators Grade A to Computer Operators Grade B.

14. Rule 17 of the aforesaid Rules of 2011 is being reproduced below for ready reference:

*"**Rule 17. Procedure for recruitment through promotion-** Procedure for recruitment of Computer Operator Grade-B by promotion.*

(1) Promotion of Computer Operator Grade-A to Computer Operator Grade- B will be done on the basis of the departmental examination conducted by the Selection Committee constituted by the Uttar Pradesh Police Recruitment and Promotion Board, Lucknow.

(2) Written examination shall be of objective type. Examination shall be of total 200 marks. The written examination paper shall consist of questions related to General Knowledge, Mental Ability, Reasoning and Computer Science. The level of question paper shall be according to the level of minimum required educational qualification for the post of Computer Operator Grade-A

(3) Minimum 40 per cent marks are must in the written examination. The candidates who are unable to get 40 per cent marks in the written examination will not be eligible for promotion.

(4) Marks on the basis of service records shall be of 50 marks and shall be awarded to each candidate which will be as follows:

(a) the maximum marks for the length of service shall be 10. (Maximum 10 marks).

(b) the maximum 5 marks for the graduation and above educational qualification and 5 marks for the Technical Computer Course in addition to the educational qualification. (Maximum 10 marks).

(c) 3 marks for training (training should be for the minimum period of 3 days or above) subject to maximum 15 marks. (Maximum 15 marks).

(d) 15 marks for Annual Remark. (Maximum 15 marks).

For every major punishment 3 marks, for every minor punishment 2 marks and for every adverse entry and petty punishment 1 mark shall be deducted. For this purpose the service record of last 10 years shall be taken into consideration.

The service records shall also be examined keeping in view whether the

candidate has been punished for such type of punishment which renders him unsuitable for promotion. Any candidate whose integrity was withheld even once, within the last five years shall not be eligible for promotion.

(5) The Board after due consideration of the norms specified in Rule 6 prepare a list of successful candidates in order of merit as disclosed by the aggregate of marks obtained by them in the written examination and service records and forward the same to the Appointing Authority."

15. The aforesaid Rules have been framed by the Government in exercise of statutory powers conferred by Section 46 (2) (c) read with Section 2 of the Police Act, 1861, with a view to regulating recruitment and the conditions of service of persons of the Uttar Pradesh Police Computer Staff (Non-Gazetted) Service, which has been declared to be a part of the police force under the provisions of the Police Act vide Government Order dated 26.09.2011.

16. The petitioners have contended the aforesaid Rules to be *ultra vires* and violative of Article 14 of the Constitution of India on the ground that in U.P. Police Radiio Subordinate Service Rules 2015, U.P. Police Ministerial, Accounts and Confidential Assistants Cadre Service Rules 2015 and in U.P. Pradeshik Armed Constabulary Subordinate Officers Service Rules 2015 do not contain any provision for holding departmental examination for making promotions and, therefore, Rule 17 of the Rules 2011, so far as it contains a provision for holding a departmental examination for making promotions is *ultra vires* the provisions of Article 14 of the Constitution of India.

17. All the aforesaid Rules referred by the petitioner deal with the service conditions of employees, which form a particular class of the employees and all the classes of employees are different and distinct from each other. No other rule contains a provision for making promotions of the persons who may be said to be belonging to a class similar to the class of Grade-A Computer Operaters in U.P. Police. The Computer Operators perform duties, which are technical in nature and which require special skills in computer operation. If the Government has decided to hold a written examination for making promotions of Computer Operators, Grade-A to Computer Operators, Grade-B, for ascertaining suitability of the candidates, it cannot be said that the decision to hold a written-examination has no reasonable nexus to the objective sought to be achieved.

18. The learned counsel for the petitioners has challenged the validity of the Rules also on the ground that the State Government itself is contemplating amendment in the procedure for making promotion of Computer Operators, Grade-A to Computer Operators, Grade-B by departmental seniority, instead of conducting a departmental examination. The State Government was well within its authority to make the Rules and it has the authority to make amendments in the Rules. Merely because the State Government is contemplating to make amemdments in the Rule, the Rules cannot be declared *ultra vires*.

19. So far as the prayer made by the petitioners seeking a writ of Mandamus for directing the State to amend Rule 17 of the Rules of 2011 is concerned, suffice it to say that the State Government has already

framed Rules governing the field. The State has acted within its competence in framing the Rules. The Rules are not *ultra vires* any provision of the constitution of India and this Court has no reason to interfere in the Rules. However, the State is well within its authority to make amendments to the Rule and even if the State is contemplating making any such amendment(s), the court cannot issue a Mandamus to the State to make amendment in the Rules.

20. For the aforesaid reasons, we do not find any merit in the writ petition. The writ petition is, accordingly, **dismissed.**

(2023) 2 ILRA 718
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.02.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ A No. 2000686 of 2015

U.P.S.R.T.C. ...Petitioner
Versus
Sri Pal Singh ...Respondent

Counsel for the Petitioner:
Prabhu Ranjan Tripathi

Counsel for the Respondent:
Mayankar Singh, Pradeep Kumar Sharma

A. Service Law – Pension - Road Transport Corporation Act, 1950 - Section 45(2)(c) - The Road Transport Corporation Employees (other than officers) Service Regulations 1981: Regulation 4, 39; U.P. State Roadways Organization (Abolition of Posts & Absorption of Employees) Rules, 1982 - Having accepted the terms and conditions of the employment as employees of the Corporation, they cannot be allowed to turn around after their retirement and claim applicability of the service conditions as Government servants on deputation with Corporation. (Para 27)

The right of each individual provident fund retiree is crystallized on his retirement after which no continuing obligation remains, while on the other hand, there is a continuing obligation of the State in respect of pension retirees. (Para 27)

As the respondent was working on a non-pensionable post of conductor at the time of his absorption in the Corporation, his services remained non-pensionable. The respondent was rightly treated to have been appointed in the Corporation on a non-pensionable post and he continued to contribute towards E.P.F. till his retirement and, accordingly, after his retirement, he was paid the E.P.F. amount, alongwith the employer's contribution, which was accepted by the respondent without any demur. It was for the first time in the year 2001, i.e. seven years after his retirement, that the respondent claimed payment of pension by filing a Claim Petition in the year 2001. (Para 26)

The Tribunal allowed the Claim Petition on an unfounded assumption that prior to his appointment on deputation in the Corporation, the respondent was working on a pensionable post whereas the respondent was working in the Corporation on a post of conductor, which was a non-pensionable post. (Para 31)

B. A Circular cannot override the provisions of Statutory Regulations - When the services of the respondent were not pensionable as per the provisions contained in Regulation 39 of the Regulations of 1981, the same could not have been made pensionable merely by a Circular issued by the Corporation. (Para 32)

The Tribunal wrongly held that the provision of pension was introduced in the Corporation by means of a GO dated 03.02.1994 whereas the document relied upon by the Tribunal as a GO was merely a Circular issued by the Corporation and it did not introduce the provision of pension, rather it merely asked the officers of

the Corporation to ensure communication of the relevant GOs regarding payment of pension to the employees of the Corporation. (Para 31)

Writ petition allowed. (E-4)

Precedent followed:

Ram Chandra Pathak Vs. State of U.P. and others, (2003) ILR 2 All 379 (Para 25)

Precedent distinguished:

1. Badri Prasad Dubey Vs Managing Director, U.P. State Road Transport Corp. Lucknow & ors., 2012 (2) LBESR 299 (All) (Para 9)

2. Badri Prasad Dubey Vs Managing Director, U.P. State Road Transport Corp., (2011) 89 ALR 832 (Para 29)

Present petition challenges the judgment and order dated 16.09.2014, passed by the State Public Services Tribunal allowing Claim Petition No. 1482 of 2001, for payment of pension instead of Employees Provident Fund (E.P.F.).

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Mr. Prabhu Ranjan Tripathi Advocate, the learned counsel for the petitioner as well as Mr. Mayankar Singh Advocate, the learned counsel for the respondent.

2. The instant Writ Petition has been filed by the petitioner Uttar Pradesh Road Transport Corporation (which will hereinafter be referred to as "the Corporation') challenging the judgment and order dated 16.09.2014 passed by the State Public Services Tribunal allowing Claim Petition No. 1482 of 2001, which was filed by the respondent claiming payment of pension instead of Employees Provident Fund (E.P.F.).

3. Briefly stated, facts of the case are that the respondent was initially appointed on 22.04.1960 on the post of Cleaner-cum-conductor in the erstwhile U. P. State Roadways. He was promoted to the post of Conductor on 18.06.1961 and his services on the post of Conductor were confirmed on 01.04.1972. Thereafter the Corporation came into being and the petitioner was appointed in it on deputation in terms of a Government Order dated 05.07.1972. On 13.04.1984, the respondent was promoted to the post of Assistant Traffic Inspector and thereafter on 30.06.1989 he was promoted to the post of Traffic Inspector. The respondent retired on 28.02.1994 while he was working on the aforesaid post. The respondent was treated as working on non-pensionable posts and after his retirement, he was paid the E.P.F. amount, along with the employer's contribution.

4. It was for the first time in the year 2001 that the respondent gave a representation after expiry of a period of seven years since his retirement, claiming payment of pension and thereafter he filed Claim Petition No. 1482 of 2001 before the Tribunal claiming payment of pension. The Corporation filed a written statement disputing the respondent's claim.

5. The Tribunal allowed the Claim Petition holding that prior to his appointment on deputation in the Corporation, the respondent was working on a pensionable post and thereafter he was promoted to the post of Assistant Traffic Inspector, which post was inter-changeable with the post of Station-in-charge and, therefore, was pensionable. The Tribunal held that by means of a Government Order dated 19.06.1981 it was provided that the service conditions of the employees of the Corporation will not be fixed below the conditions will not be lower than those on which they were working previously. The Tribunal further held that the provision of

pension was introduced in the Corporation by means of a Government Order dated 03.02.1994 providing that the employees who had retired and had taken E.P.F. benefit, would be entitled to get pension after repaying the E.P.F. amount. However, no intimation was given to the respondent in terms of the aforesaid G.O. that he had an option to get pension instead of E.P.F. benefit and no option was taken from him. The Tribunal also noted that one Bhagwan Das, who was a black-smith in the Corporation was initially refused pension but subsequently upon a representation made by him, he was given pension. The Tribunal held that the respondent had retired from a pensionable post and he cannot be denied pension merely because he could not exercise his option for want of information. The Tribunal directed the Corporation to pay pension to the respondent after adjusting the amount paid to him as E.P.F.

6. The Corporation has challenged the Tribunal's Order mainly on the grounds that the respondent was not working on any pensionable post while he was in Government Service and, therefore, he was not entitled to get pension; that the respondent was absorbed in the Corporation in the year 1982, he accepted the terms of appointment in the Corporation under which his service was non-pensionable and till his retirement, he did not raise any objection or claim that his service ought to be made pensionable; that the respondent was entitled to E.P.F. benefit, which benefit had been availed by him upon his retirement in the year 1994 and the Claim Petition claiming pension was filed after a period of seven years since availing the E.P.F. benefit.

7. The respondent has filed a Counter Affidavit stating that by means of an Office Memorandum dated 13.02.1979, the Corporation had clarified that the posts of Junior Station-in-charge and Traffic Inspector Grade I were equivalent and inter-changeable, the post of Junior Station-in-charge is pensionable and, therefore, the equivalent post of Traffic Inspector Grade I will also be pensionable.

8. Sri. Prabhu Ranjan Tripathi, the learned Counsel for the Corporation has submitted that the Tribunal wrongly referred to the Circular dated 03.02.1994 issued by the Corporation as a Government Order, which circular merely stated that Government Orders had been issued on 07.01.1984, 22.06.1991 and 19.08.1993 for payment of pension to the employees / officers of the erstwhile U. P. State Roadways, who were working on any pensionable post before 28.07.1982. The circular stated that some persons who were working on non-pensionable post prior to 01.06.1972, would have been promoted to pensionable post by 28.07.1982 and such persons might have retired prior to issuance of the aforesaid Government Orders and they might not be knowing about the Government Orders. The Circular directed the authorities to prepare a list of the employees / officers would be beneficiaries of the Government Orders and to intimate them that in case they wanted to get pension after repaying the E.P.F. and the excess amount of gratuity, they should fulfill the formalities. The Circular further directed the authorities to obtain a written declaration from the persons who did not want to get pensionary benefit.

9. Per Contra, Sri. Mayankar Singh Advocate, the learned Counsel for the respondent has submitted that the respondent was working on the post of Traffic Inspector, which was equivalent to

and inter-changeable with Junior Station-in-charge and as the latter post is pensionable, the post of Traffic Inspector would also be a pensionable post. He has relied upon a Single Bench decision in the case of Badri Prasad Dubey versus Managing Director, U. P. State Road Transport Corporation Lucknow and others, 2012 (2) LBESR 299 (All).

10. We have considered the facts and circumstances as evident from the material available on record and the submissions of the learned Counsel for the parties.

11. U. P. Government Roadways was established by the State Government as a temporary department in the year 1947, to run its own transport service. On 16.9.1960, a Government order was issued laying down revised terms and conditions of temporary employees of the Roadways. The Government Order dated 16.9.1960 reads as under:

"G.O. No. 3014 D/XXX-135/59 dated Sept. 16, 1960

Subject: ***Terms and conditions of service of temporary employees in the U.P. Roadways - Revisions of.***

I am directed to say that the question of revising the terms and conditions of service of the Roadways employees, which is a nationalized commercial undertaking and has to work in conditions different from those prevailing in regular government offices, has been under the consideration of Government for some time past.

The passenger and goods services have to run irrespective of the fact whether it is a Sunday or a festival. The schedule of passenger services run by the State Undertaking cannot be altered off and on. In order to keep the Roadways services going, the maintenance and repairs of vehicles has to be attended to even at odd hours at the workshops. At present the conditions of service of the employees of the U.P. Government Roadways and the Central Workshop, Kanpur are governed by the various rules and standing orders of Government applicable to other temporary government servants under the rule making powers of the Governor. In view of the special service conditions of employees of the Roadways it seems necessary to evolve a new set of service conditions for its employees, which may be compatible with the nature of work and functions of the organization. Accordingly, in supersession of all previous orders on the subject, the Governor has been pleased to pass the following orders prescribing revised terms and conditions of service of temporary employees of the U. P. Roadways, including those detailed in para 2 below. The revised terms and conditions of service shall be applicable to all future entrants in the Roadways organization and shall be enforced in the manner mentioned hereinafter in the case of temporary employees including those on the work charge strength and paid on monthly basis.

All temporary employees except those referred to in para 2 shall get one day's rest in every period of seven days in accordance with the rules to be framed by Government. In case the employees is deprived of any of the days or rest, he shall be allowed within the same or following month compensation holidays of equal number of the days of rest so lost.

They shall be entitled to get one days paid holidays for every 20 days of work performed by them during the previous calendar year, subject to the condition that the employee has worked for a period of 240 days or more during the previous calendar year. In case the

employees is not able to avail of full or part of the leave admissible to him during the calendar year, it will be carried over to the following year, subject to a maximum of 30 days.

They shall get five days festival holidays in a calendar year as prescribed by Government and subject to the rules to be framed for the purpose.

They shall be paid extra wages at the rate of twice of ordinary rate of wages in respect of work performed by them beyond the prescribed hours of work.

Their services are liable to termination on one month's notice on either side, or one month's pay in lieu thereof.

In other respect the conditions of service will remain the same as at present.

2. The revised terms and conditions of services mentioned in para 1 above shall not apply to the following category of employees:-

All employees working in the offices establishment of the Asstt. General Manager, General Manager, Service Manager, Chief Mechanical Engineer, Roadways Central Workshop, Kanpur and the Head Quarter Office of the Transport Commissioner.

Supervisory staff of the rank of Junior Station Incharge and above on the traffic side;

Technical staff of the rank of Junior Foreman and above on the engineer side;

The above three categories of Roadways staff will continue to be treated as regular government servants and will be entitled to the benefits admissible to any other government servant of the same category.

3. The Roadways and Central Workshop employees to whom the revised service rules are being made applicable shall be entitled to the provident fund benefits according to the provisions of the Employees Provident Fund Act. For this necessary orders have already been issued separately in G.O. No. 1488-D/XXX 2198/59 dated July, 29, 1960. Immediate step may please be taken for the implementation of the orders issued in the above G.O. The employees governed by the new terms and conditions of service will continue to get facilities for medical treatment so far enjoyed by them. All future entrants shall also be entitled to facilities for medical treatment admissible to Government servants. The canteen and rest house facilities as may be prescribed by government shall also be made available to them in course of time.

4. ***These order shall come into force w.e.f. October 1, 1960 and shall apply to all future entrants in the service of the Roadways organization and also the existing temporary employees who accept to continue to work on the revised terms and conditions of service. The status of Roadways employees already made permanent remains unaffected. All the existing temporary employees except those mentioned in para 2 above may be asked to indicate in writing if the new service conditions mentioned above are acceptable to them. Those who accept the new terms and conditions of service will be required to fill in a separate acceptance for which will be kept with their service records. If, however, any of the employees do not accept the new terms their services are to be terminated in accordance with the terms of their employment.*** *I am to suggest that the implications of the revised orders may be explained to all concerned by the General Managers and Asstt. General Mangers and Chief Mechanical Engineer and that necessary action may please be intimated forthwith in order to implement the above orders."*

12. On 28.10.1960, the following Government order was issued declaring certain posts in transport and roadways department as pensionaable posts: -

"In continuation of Government order No. 31040/XXX-135V/1959, dated September 16, 1960, I am directed to say that the question of declaring the permanent posts in the Roadways Organisation (including the Roadways Central Workshop, Kanpur) as pensionable has been under the consideration of Government for some time past. In this connection, the Governor has been pleased to order that the permanent gazetted and non-gazetted incumbents of the following three categories would be entitled to the contributory provident fund-cum-pension rules:

The employees working in the office establishment of the Assistant General Manager, General Manager, Service Manager, Chief Mechanical Engineer, Roadways Central Workshop, Kanpur and the Headquarter office of the Transport Commissioner.

Supervisory staff of the rank of Junior Station Incharge and above on the traffic side.

Technical staff of the rank of Junior Foremen and above on the engineering side; ''rank' means position/status but no post.

The Governor has been further pleased to order, under note 3 below Article 350 of the Civil Services Regulation that the rest of the permanent nongazetted Roadways employees both in the traffic and Engineering sections of the organisation, would be treated as non-pensionable. The incumbents of the permanent non-pensionable posts referred to above will be eligible for provident fund benefits in accordance with the provisions of the Employees Provident Fund Act.

I am. also to add that Temporary Employment of the categories mentioned in para 1 above will be entitled to provident fund benefits as provided under the Employees Provident Funds Act. As and when they became, permanent, they will have the option to elect the contributory provident fund cum pension benefits in lieu of Employees Provident Fund.

As regards the grant of provident fund benefits to other temporary and work-charged employees of the Roadways Organisation necessary orders have already been conveyed to you in Government order No. 1488/XXX-219/50 dated 29.7.1960."

(Emphasis supplied)

13. On 21.4.1961, another Government order was issued by which posts mentioned in para 1 of the Government order dated 28.10.1960 were treated to be pensionable, with effect from the date they were converted into permanent post. Yet another Government order dated 08.09.1961 provided that the permanent roadways employees mentioned in para 2 of the Government order dated 28.10.1960 will be treated as non-pensionable and they will be eligible for provident fund in accordance with the provisions of Employees Provident Fund and Misc. Provisions Act.

14. The State Government had issued two Government Orders dated 07.06.1972 and 05.07.1972, providing that all the employees of the erstwhile Government Roadways holding permanent pensionable posts were entitled to the same benefits whereas employees who were working on

daily wages; appointed on ad hoc basis; those who had not completed the minimum prescribed period of service on the post, entitling them to pensionary benefits; those who held posts which were not declared pensionable and those who had not been removed from service after domestic enquiry are not entitled to draw those benefits.

15. Subsequently, in exercise of power conferred under section 45(2)(c) of the Road Transport Corporation Act, 1950, the Road Transport Corporation Employees (other than officers) Service Regulation 1981 (hereinafter referred to as the "Regulations of 1981") were framed. Regulations 4 and 39 of the Regulations of 1981 provide as under: -

*"**4. Option by the employees of the erstwhile Government Roadways Department and other employees. -** (1) An employee of the erstwhile U.P. Government Roadways Department who was placed on deputation with the Corporation and who has or is deemed to have offered for absorption in the Service of the Corporation in accordance with Rule 4 of the Uttar Pradesh State Roadways Organisation (Abolition of Posts and Absorptions of Employee) Rules, 1982 (hereinafter referred to as the said, Rules), shall with effect from August 28, 1982, sand so absorbed, and shall, accordingly cease to be an employee of the State Government with effect from the said date.*

Provided that the terms and conditions of service of the employees so absorbed in the Service of the Corporation shall, subject to the provisions of G.O. No. 3414/XXX-2-170-N-72, dated July 5, 1972 and the said rules be governed by these regulations.

Existing employees, who are not covered by sub-regulation (1) or those who are not exempted under Regulation 2, shall within one month of the commencement of these regulations, inform the appointing authority or such authority as the General Manager may in this behalf appoint whether or not they want to be governed by these regulations.

(ii) If they opt or fail to exercise their option for being governed by these regulations, their terms and conditions of appointment, so far as they are inconsistent with these regulations, shall stand rescinded:

Provided that, in respect of workmen where any of the provisions of these regulations is less favourable than the provisions of the U.P. Industrial Disputes Act, 1947, the Payment of Wages Act, 1936, the Minimum Wages Act, 1948, the Factories Act, 1948 or of any other Act applicable to them, the provisions of such Act shall apply.

(iii) If such persons do not opt for being governed by these regulations, their services may be terminated in accordance with the terms of their appointment."

"39. Pension and other retirement benefits-(1)

Subject to the provisions of clause (ii) of this sub-regulation, an employee of the Corporation shall not be entitled to pension, but he shall be entitled to the retirement benefits mentioned in sub-regulation(2).

(ii) A person, who was the employee of the State Government in the erstwhile U.P. Government Roadways and has opted for the service of the Corporation, shall be entitled to pension and other retirement benefits in terms of the G.O. No. 3414/302-170-N-72, dated July 5, 1972.

(2) Without prejudice to the provisions of sub-regulation (1) an employee (including an employee who was in the service of the State Government in the erstwhile U.P. Government Roadways Department), shall be entitled to the following retirement benefits:

Employees Provident Fund or the General Provident Fund, as the case may be;

(ii) Gratuity in accordance with the Payment of Gratuity Act, 1972 or the relevant Government Rules, as may be applicable;

(iii) Amount due under Group Insurance Scheme, 1976;

(iv) One free family pass in a year for journey within the State;

(v) A free family pass for his return to his home from the place of posting at the time of retirement in case he does not accept railway fare;

(vi) Any other benefit that may be allowed by the Corporation from time to time."

16. Later on, the State Government framed rules known as U. P. State Roadways Organization (Abolition of Posts & Absorption of Employees) Rules, 1982 in exercise of the power under Article 309 of the Constitution (for short, the "Rules of 1982'), which was notified on 28.4.1982. Rule (2) (ii) deals with "Employee', which means the Government Servant employed in the U.P. State Roadways Organization and working on deputation with the Corporation. Rule 4 of the Rules of 1982 provides that on expiry of three months from the date of notification of the rules, service under the State Government of the employees on deputation with the Corporation will become employees of the Corporation and their relevant post in the roadways would stand abolished. In case any person intimated to the Government that he was not willing to be absorbed, his services would be dispensed with after giving him three months' notice and the notice period would be one month in case of temporary employees. If no such intimation was given, the employee was to be deemed to have been absorbed. The relevant Rule 4 of the Rules of 1982 reads as under: -

"4(1) An employee of the U.P. State Roadways Organization, who was placed on deputation with the Corporation and who does not wish to be absorbed in the service of the Corporation shall, within 3 months from the notification of these Rules in the Gazette, intimate the Secretary to Government in the Transport Department that he does not wish to be so absorbed.

(2) Every other employee who does not given an intimation, in accordance with sub-rule (1), shall be deemed to have exercised his option for absorption in the service of the Corporation.

(3) An employee, who is deemed to have opted for absorption in the service of the Corporation, in accordance with sub-rule (2), shall stand to absorbed with effect from the date of expiry of three months from the date of notification of these rules and his service under the State Government shall with effect from the same date cease."

17. Sub-clause 1 (ii) of Regulation 39 of the Regulations of 1981 makes it clear that an employee of the State Government in the erstwhile U. P. Government Roadways who has opted for the service of the Corporation, shall be entitled to pension and other retiral benefits in terms of Government order dated 05.07.1972. The Government Order dated 05.07.1972

protects all benefits including pensionary and retiral benefits, which were available to the employees of the erstwhile Roadways, even after being sent on deputation in the Corporation.

18. The respondent was initially appointed on 22.04.1960 on the post of Cleaner-cum-conductor in the erstwhile U. P. State Roadways, and on the date of issuance of the Government Order dated 16.09.1960 which came into force on 01.10.1960, he was working as a temporary employee. On 28.10.1960, another Government Order was issued declaring certain posts in transport and roadways department as pensionary posts and the said Government Order provided that the rest of the permanent non-gazetted Roadways employees both in the traffic and Engineering sections of the organisation, would be treated as non-pensionable. The incumbents of the permanent non-pensionable posts referred to above will be eligible for provident fund benefits in accordance with the provisions of the Employees Provident Fund Act.

19. Thereafter, the respondent was promoted to the post of Conductor on 18.06.1961 and his services on the post of Conductor were confirmed on 01.04.1972.

20. Prior to the confirmation of his services on 01.04.1972, the respondent was working on temporary basis and his services were not pensionable for this reason. Even after his confirmation, the respondent was working on the post of conductor, which was a non-pensionable post.

21. While he was working on a non-pensionable post of conductor in the erstwhile State Roadways Department, the respondent was appointed in the Corporation on deputation in terms of a Government Order dated 05.07.1972.

22. The Government Orders dated 05.07.1972, as modified by the Government Order dated 07.06.1972, provided that all the employees of the erstwhile Government Roadways holding permanent pensionable posts were entitled to same benefits whereas the employees who were working on posts which were not declared pensionable are not entitled to draw the benefit of pension. Therefore, the respondent was not entitled to get pension under the aforesaid Government Orders.

23. On 13.04.1984, the respondent was promoted to the post of Assistant Traffic Inspector and thereafter on 30.06.1989 he was promoted to the post of Traffic Inspector. The respondent retired on 28.02.1994 while he was working on the aforesaid post.

24. Regulation 39 of the Regulations of 1981 provides that except the persons who were entitled to get pension in terms of the G.O. dated July 5, 1972 as amended the Government order dated 7.6.1972, employees of the Corporation shall not be entitled to pension, but they shall be entitled to the other retirement benefits, including E.P.F.

25. In **Ram Chandra Pathak vs. State of U.P. and Ors., (2003) ILR 2 All 379,** a Single Bench of this Court considered the similar issue and held that: -

"19. The assurance given in para 4 of the Government order dated June 7, 1972 to all the officers/employees of the State Road Organisation that in the event of the provisions of absorption to be made in

service regulations their service conditions, under the Corporation, shall in no case be inferior to the conditions as were available under the Government immediately before their absorption and that their tenure of Government service shall be considered for their seniority, promotion, pay fixation, entitlement for leave and for the benefits of retirement in the same way as would have been under the Government service, and so far as the pension is concerned fructified into statutory Regulation 39 (1) (ii) of the Service Regulation of 1981 notified on 19.6.1981. It is provided that a person who was employed in the erstwhile Government and has opted in the service of Corporation shall be entitled to pension and other retiral benefits in the terms of Government order dated 5.7,1972, it is found that whereas it amended the Government order dated 7.6.1972 by deleting all the paras except para 1 (1) (ka) providing for considering all officers and staff relating to the work on Roadways of the Transport Commissioner, Head Office on deputation under the existing terms and conditions of their service, an assurance was given that whenever service regulation shall be framed, the conditions of service shall not be inferior to those which were applicable to the Government servants prior to their absorption and that same conditions of service with regard to their seniority, promotion, pay fixation and other financial benefits shall be applicable as they would have received if they were in the Government service. It is admitted that all the petitioners were absorbed in the service of the Corporation. Under the conditions of their service, the employees who were not holding pensionable posts and were contributing to Employees Provident Fund, continued to subscribe to the fund even after their absorption. They became the employees of the Corporation and their service conditions were regulated by the U. P. State Road Transport Corporation Employees (Other than Officers) Service Regulations, 1981. ***As Corporation employees, they were not entitled to pension. Petitioners at the time of absorption in service, as the employees of the U. P. Roadways on deputation with Corporation, were not holding pensionable posts and thus it cannot be said that upon their absorption, the service condition with regard to the fact that they were not entitled to pension was less advantageous than it was applicable to the Employees of Roadways before their absorption.***

20. The Government order did not have the effect of legislation by reference. The intention of the Government order dated 5.7.1972 was not to continue the rules applicable to Government service applicable to the employees of Corporation holding nor pensionable service. Having been absorbed as employees of the Corporation, the service regulation applicable to the Corporation became applicable to such employees. The assurance given in the Government order dated July 5, 1972, was subject to the regulations to be framed for the employees of the Corporation, and thus the later portion of the assurance that their service conditions shall not be less advantageous, was applicable until the service rules were framed by the Corporation with regard to conditions of their service. ***In case Service Regulation, 1981, were not acceptable to such employees, they could have opted out from the service of the Corporation under Regulation 4 (1) (iii) of the Service Regulations, 1981.***

(Emphasis supplied)

26. As the respondent was working on a non-pensionable post of conductor at the

time of his absorption in the Corporation, his services remained non-pensionable. The respondent was rightly treated to have been appointed in the Corporation on a non-pensionable post and he continued to contribute towards E.P.F. till his retirement and, accordingly, after his retirement, he was paid the E.P.F. amount, alongwith the employer's contribution, which was accepted by the respondent without any demur. It was for the first time in the year 2001, i.e. seven years after his retirement, that the respondent claimed payment of pension by filing a Claim Petition in the year 2001.

27. In this regard, it was held in **Ram Chandra Pathak** (Supra) that: -

"22. There is yet another aspect of the matter that almost all petitioners have retired long ago. For example in Writ Petition No. 2603 of 2001, petitioner retired on 30.5.1994 as Senior Station Incharge of the Corporation, FazalganJ Depot, Kanpur ; in Writ Petition No. 2604 of 2001 petitioner retired from the post of Driver on 28.2.1986 working under Regional Manager of the Corporation, Allahabad Region, Allahabad and in Writ Petition No. 19726 of 2000 petitioner retired on 30.6.1997 from Varanasi Gramin Depot. All the petitioners have received retiral benefits including the entire amount of employees provident fund, gratuity and other benefits. They were absorbed in the service of the Corporation in the year 1982 and thereafter till the date of their retirement, they did not make any protest with regard to the applicability of the Regulations. ***Having accepted the terms and conditions of the employment as employees of the Corporation, they cannot be allowed to turn around after their retirement and claim applicability of the service conditions as Government servants on deputation with Corporation.*** *In State of Rajasthan v. Rajasthan Pensioners Samaj 1991 Supp (2) SCC 141, Supreme Court upheld the judgment of Constitution Bench in Krishna Kumar v. Union of India (1990) 4 SCC 207, explained and clarified the judgment of Apex Court in D.S. Nakara's case, (1983) 1 SCC 305 and held that contributory provident fund retirees are not entitled to claim a right to switch over from Provident Fund Scheme to pension scheme on the ground of violation of Article 14 of the Constitution of India. It was found that widows of Jodhpur C.P.F. retirees and pension retirees do not form one homogeneous class but form two different classes and, therefore, the widows of C.P.F. retirees are not entitled to opt for pension scheme, as the right to opt for pension scheme cannot be inherited or exercised by the widows of the retirees.*

23. ***It was held in Krishna Kumar's case that the right of each individual provident fund retiree is crystallized on his retirement after which no continuing obligation remains, while on the other hand, there is a continuing obligation of the State in respect of pension retirees. In the present case on the absorption of an employee holding non-pensionable posts in the Corporation, obligation of the State Government came to an end. These employees became employees of the Corporation and started subscribing to the Employees Provident Fund after transfer of the fund, from their account of Employees Provident Fund. They became members of the employees provident fund. The State Government was not required to contribute towards their pension fund as in the case of employees who were holding pensionable posts. Their rights as such crystallized on the date of their absorption in the***

Corporation in the year 1982. Now after their retirement, having received the retiral benefits and having ceased the relationship as employees of the Corporation, they cannot agitate their rights after a long period of time. They form a different class than the employees of the State Government holding pensionable posts on the date of absorption.

(Emphasis supplied)

28. We are in agreement with the law laid down by the above mentioned law laid down by the Hon'ble Supreme Court and followed by the Hon'ble Single Judge.

29. **Badri Prasad Dubey v. Managing Director, U.P. State Road Transport Corporation** (2011) 89 ALR 832, relied upon by the learned Counsel for the respondent was filed by a person who was appointed as an Assistant Traffic Inspector in the erstwhile U.P. Government Roadways on 18.8.1964 and thereafter was also confirmed on the said post. Upon creation of the Corporation w.e.f. 1.6.1972, he was sent on deputation where he was absorbed w.e.f. 28.7.1982. Subsequently he was posted as Junior Station Incharge and thereafter as Senior Station Incharge and then promoted to the post of Traffic Superintendent vide order dated 29.9.1995 and on this post he worked till he retired on 31.7.2001. He claimed pension and the claim was rejected primarily on the ground that the post of Traffic Inspector Grade-I was a non pensionable post under the Government as per the Government order dated 28.10.1960 and the employer's share demanded and taken by the Regional Manager, Allahabad was by mistake. This Court held that: -

"4. The question whether on the date of his absorption the petitioner was holding a pensionable post under the Government is no longer in dispute as this Court in the case of Ram Singh Singraur v. State of U.P. [2007 (7) ADJ 137.] , has held that since the post of Assistant Traffic Inspector had been upgraded as Traffic Inspector Grade-I w.e.f. 5.5.1978 and which post was equivalent to the post of Junior Station Incharge and they being interchangeable, it held that persons holding post of Assistant Traffic Inspector on the date of absorption were entitled to pension. The aforesaid decision has been affirmed in appeal."

30. However, the petitioner was appointed in the earstwhile Government Department of U.P.S.R.T.C. on the post of Conductor which was a non-pensionable post and on the date of his absorption in the Corporation also, he was working on the aforesaid non-pensionable post of Conductor, therefore, the decision in the case of **Badri Prasad Dubey** (supra) who had been appointed on the post of Assistant Traffic Inspector and was holding the said post when he was absorbed in the Corporation, would not apply to the facts of the present case.

31. The Tribunal allowed the Claim Petition on an unfounded assumption that prior to his appointment on deputation in the Corporation, the respondent was working on a pensionable post whereas we have noted above that the respondent was working in the Corporation on a post of conductor, which was a non-pensionable post. The Tribunal wrongly held that the provision of pension was introduced in the Corporation by means of a Government Order dated 03.02.1994 whereas the document relied upon by the Tribunal as a Government Order was merely a Circular issued by the Corporation and it did not

introduce the provision of pension, rather it merely asked the officers of the Corporation to ensure communication of the relevant Government Orders regarding payment of pension to the employees of the Corporation.

32. Even otherwise, when the services of the respondent were not pensionable as per the provisions contained in Regulation 39 of the Regulations of 1981, the same could not have been made pensionable merely by a Circular issued by the Corporation as a Circular cannot override and the provisions of Statutory Regulations.

33. Therefore, we are of the considered view that the Tribunal has erred in holding that the services of the respondent have to be treated as pensionable and the judgment and order passed by the Tribunal is not sustainable.

34. In view of the aforesaid discussion, the instant Writ Petition stands **allowed.** The Judgment and order dated 16.09.2014, passed by the State Public Services Tribunal allowing Claim Petition No. 1482 of 2001 is hereby quashed and the Claim Petition is dismissed.

(2023) 2 ILRA 730
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.01.2023

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 482. No. 655 of 2023

Nanku @ Nankulal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Shailendra Kumar Dubey, Ram Krishna Pratap Singh, Sant Prasad Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law- Code of Criminal Procedure, 1973- Section 202 (1)- No inquiry has been done by the magistrate prior to issuance of process and even the magistrate did not direct the police officer for investigation in the matter. While passing the impugned summoning order by the magistrate, he did not apply his judicial mind- Neither the Magistrate in the proceeding under Sections 200 and 202 Cr.P.C. tried to inquire regarding the issue of territorial jurisdiction nor he has separately done any inquiry or directed for any investigation-The mandate of provision of Section 202 (1) of Cr.P.C. has clearly been violated and thus, the order impugned is not tenable.

The amendment to sub-section (1) of section 202 CrPc makes it mandatory for the Magistrate to apply his judicial mind and conduct either an enquiry himself or through an investigating officer or any other person, before summoning an accused who is residing beyond his territorial jurisdiction. (Para 11, 12, 12)

Criminal Application allowed. (E-3)

Case Law/ Judgements relied upon:-

Mahboob & ors Vs St. of U.P. & anr. 2017 (98) ACC 593

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Heard learned counsel for the applicants, learned A.G.A. and perused the record.

2. In view of order proposed to be passed, issuance of notice to opposite party no.2 is dispensed with.

3. The present application under Section 482 Cr.P.C. has been filed with the prayer to quash the impugned summoning order dated 18.2.2021, U/s 323,504,506 IPC, Police Station- Chinhat, District- Lucknow issued by the ACJM-I, Lucknow in Criminal Misc./Complaint Case No. 1571/2019 and also revisional order dated 19.9.2022 passed by the Sessions Judge, Lucknow in Criminal Revision No. 488/2022.

4. Learned counsel for applicants has submitted that the opposite party no.2 moved an application U/s 156(3) CrPC alleging therein that on 22.2.2019 at 7.30 pm when the complaint was returning after running practice for the recruitment in the police force, then suddenly accused-applicants reached G.S. Lawn and started beating him by kicks and fists. It is also submitted that the accused-applicants have looted Rs. 1800, one ring and one Nokia Mobile having mobile No. 7518452656 from the complainant. The complainant stated that he immediately informed the police station Chinhat about the said incident and to the SSP, Luckow on 25.2.2019 for lodging of the FIR against the applicants. But the FIR was not registered. Thus this application U/s 156(3) CrPC has been treated as a complaint case. Thereafter, the statement of opposite party no.2 and two witnesses namely, Suresh Kumar Yadav and Mahesh Singh were recorded U/s 200 & 202 CrPC on 30.7.2019 and 12.1.2021 respectively. Thereafter, on the basis of statements of the opposite party no.2 and witnesses recorded u/s 200 & 202 CrPC respectively, the trial court without applying judicial mind wrongly summoned the applicants.

5. The counsel for the applicants is assailing the summoning order dated 18.2.2021 on the ground that the ACJM 1st, Lucknow while passing the impugned summoning order without application of judicial mind has recorded a wrong finding that the wife of the complainant was beaten by the applicants and she has got injury but the case of complainant case was not as such. On perusal of the statement of the complainant and the witnesses recorded U/s 200 and 202 CrPC respectively, it reflects that the applicants inflicted injury to complainant. But there is no whisper regarding the presence of the wife of opposite party no.2 at place of occurrence. Thus, the findings recorded by the trial court is perverse and as such the summoning order is itself liable to be set aside. Being aggrieved with the summoning order, the applicants filed revision but the same was rejected by the learned revisional court in limine without any speaking order. Thus, it is also liable to be set aside.

6. Learned counsel for the applicants submitted that as per provision of Section 202(1) CrPC, as soon as a complaint is given before the magistrate, he shall either inquire into the case or pass order for investigation, if the accused is residing outside the territorial jurisdiction of the magistrate concerned. But in the complaint case, no investigation has been made by any of the above authorized persons.

7. The provisions of Section 202 Cr.P.C. read as under:-

"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 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.

2. In an inquiry under sub- section (1), the Magistrate may, if he thinks fit, take evidence of witnesses 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."

8. In support of his submissions, learned counsel for the applicants placed reliance on a judgment of this court in the case of ***Mahboob and others Vs. State of U.P. and another 2017 (98) ACC 593.*** The relevant paragraphs of the said judgment are given below:-

(6) In the case of Sonu Gupta versus Deepak Gupta (2015) Vol.3 SCC 424*, it was held by the Hon'ble Apex Court that :-*

"At the stage of cognizance and summoning the Magistrate is required to apply his judicial mind only with a view to take cognizance of the offence, or in other words, to find out whether prima facie case has been made out for summoning the accused persons. At this stage, the Magistrate is not required to consider the defence version or materials or arguments nor is he required to evaluate the merits of the materials or evidence of the complainant, because the Magistrate must not undertake the exercise to find out at this stage whether the materials will lead to conviction or not. (Para 8) "

(7) In a recent judgment delivered by Hon'ble the Apex Court on 14.12.2016 in ***Criminal Appeal No.1225 of 2016 (arising out of SLP(Crl.) No.9318 of 2012) Abhijit Pawar vs. Hemant Madhukar Nimbalakar & Anr.*** *It was held that the admitted position in law is that in those cases where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, it is mandatory on the part of the Magistrate to conduct an inquiry or investigation before issuing the process. Section 202 of the Cr.P.C. was amended in the year by the Code of Criminal Procedure(Amendment) Act, 2005, with effect from 22nd June, 2006 by adding the words that ''and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction'. There is a vital purpose or objective behind this amendment, namely, to ward off false complaints against such persons residing at a far off places in order to save them from unnecessary harassment. Thus, the amended provisions casts an obligation on the Magistrate to conduct inquiry or direct investigation before issuing the*

process, so that false complaints are filtered and rejected.

(8) Referring the case law in Vijay Dhanuka vs. Najima Mamtaj (2014) 14 SCC 638;

"11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23.6.2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far off places in order to harass them. The note for the amendment reads as follows:

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be , by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression"shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate."

(9) In Mehmood UI Rehmand vs. Khazir Mohammad Tund (2016) 1 SCC (Cri) 124; *it was held as under :*

"20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in Pepsi Foods Ltd [Pepsi Foods Ltd. v. Judicial Magistrate, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400] to set in motion the process of criminal law against a person is a serious matter.

22. The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would prima facie, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 CrPC when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure or mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment.

"Emphasis added."

(10) Hon'ble Apex Court has further dealt with the nature of inquiry which is required to be conducted by the Magistrate and referring the case of Vijay Dhanuka (supra) it was held as under:

"14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry " has been defined under Section 2(g) of the Code, the same reads as follows:

"2. (g) "inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court,"

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code."

9. Learned A.G.A. vehemently opposed the prayer made by the learned counsel for the applicants and submitted that it is the discretionary power of the trial court to pass the summoning order and

thus, the impugned summoning order has been passed by the magistrate after applying judicial mind.

10. I have heard learned counsel for the applicants and learned AGA appearing for the State and perused the record.

11. From bare perusal of the summoning order dated 18.2.2021 as well as statements of the opposite party no.2 and other witnesses recorded U/s 200 & 202 CrPC, it emerges that no inquiry has been done by the magistrate prior to issuance of process and even the magistrate did not direct the police officer for investigation in the matter. While passing the impugned summoning order by the magistrate, he did not apply his judicial mind and in summoning order the magistrate indicated that due to incident the wife of the complainant had got injury, but this is not the case of the prosecution. Thus, on this ground the summoning order passed by the magistrate is bad in law.

12. Emphasis was also laid that since the proceedings under Sections 200 is qua an inquiry proceeding under Section 202 (1) and therefore if a Magistrate has proceeded or inquired during the investigation under Sections 200 and 202 of Cr.P.C., separate proceeding for inquiry or investigation is not required. In the instant matter, neither the Magistrate in the proceeding under Sections 200 and 202 Cr.P.C. tried to inquire regarding the issue of territorial jurisdiction nor he has separately done any inquiry or directed for any investigation.

13. This Court is of the considered opinion that it is a settled law that if a thing is to be done in a manner prescribed in a statue, then that has to be done in the same manner not otherwise. In the instant matter, it is, prima facie, a case where the mandate of provision of Section 202 (1) of Cr.P.C. has clearly been violated and thus, the order impugned is not tenable.

14. Consequently, the instant application is **allowed** and the impugned summoning order dated 18.2.2021 passed in the Complaint Case No. 1571 of 2019 as well as the revisional order dated 19.9.2022 is hereby set aside.

15. Learned Magistrate is hereby directed to pass a fresh summoning order within a period of two months from the date of production of this order before him in the light of observations made herein above.

(2023) 2 ILRA 735
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.01.2023

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Application U/S 482. No. 1319 of 2023

Shyam Babu Sharma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Ms. Mamta Singh

Counsel for the Opposite Parties:
G.A., Sri Amit Daga

Criminal Law- Code of Criminal Procedure, 1973- Sections 437 & 439- Criminal Misc. Application U/S 482 Cr.P.C No. 18472 / 2022 was disposed of by a co-ordinate bench of this Court on the request of learned counsel for the applicant therein on his undertaking that he shall surrender

before the Trial Court within three weeks from the date of the said order and file an appropriate application which shall be decided in terms of the judgement passed in the case of Satendra Kumar Antil and for a period of three weeks the non-bailable warrants issued against him were directed to be kept in abeyance. The accused - applicant then filed an application for bail through his lawyer which was disposed of by the Trial Court vide order dated 07.12.2022 on the ground that the accused has not filed any application for surrender and is not personally/physically present in Court- A bail application would not lie unless the accused is in custody- The filing of a bail application through lawyer is not sufficient personal presence of the applicant in Court and the Court cannot proceed to hear and decide the same if he is not physically / personally present before it. The situation is different in case of anticipatory bail filed under Section 438 Cr.P.C. as the same lies on an apprehension of arrest.

Settled law that a bail application will not be maintainable unless the accused is in custody and no bail application will lie through a lawyer as the same will not amount to the personal presence of the accused before the court. (Para 23)

Criminal Application rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Satendra Kumar Antil Vs CBI & anr., (2021) 10 SCC 773 (cited)

2. Aman Preet Singh Vs C.B.I. thru Director, AIR 2021 SC 4154 (cited)

3. Niranjan Singh Vs Prabhakar Rajaram Kharote, (1980) 2 SCC 559

4. Sunita Devi Vs St. of Bih. (2005) 1 SCC 608

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

1. List revised.

2. Heard Ms. Mamta Singh, learned counsel for the applicant, Mr. Amit Daga, learned counsel for Opposite Party No.2 and Mr. B. B. Upadhyay learned AGA for the State and perused the record.

3. The name of Mr. Amit Daga, Advocate is printed in the cause-list as the learned counsel for opposite party No.2. His Vakalatnama is not on record which he states to have filed in the office on 16.01.2023. The office is directed to trace out the same and place it on record and make a note in the order sheet about it.

4. At the very outset, learned counsel for the applicant states that due to inadvertence, an order dated 19.11.2022 which was to be filed as Annexure 8 to the affidavit has been wrongly filed as the same should have been the order of the said date passed in Criminal Misc. Application U/S 482 Cr.P.C. No. 18472 / 2022 (Shyam Babu Sharma Vs. State of U.P. & another).

5. Sri Amit Daga, learned counsel for the Opposite Party No. 2 has produced before the court three orders which are taken on order and are:

(i) Order dated 19.11.2022 passed in Criminal Misc. Application U/S 482 Cr.P.C. No. 11061 / 2022 (Shyam Babu Sharma & another Vs. State of U.P. & another),

(ii) Order dated 25.02.2022 passed in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 1425 / 2022 (Shyam Babu Sharma Vs. State of U.P. & another); and

(iii) Order dated 19.11.2022 passed in Criminal Misc. Application U/S

482 No. 18472 / 2022 (Shyam Babu Sharma Vs. State of U.P. & another).

6. The present application under Section 482 Cr.P.C. has been filed with the following prayers:

"It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to allow this application and to quash the impugned order dated 07.12.2022 passed by learned court of Additional Civil Judge (Senior Division) / Additional Chief Judicial Magistrate, Court No. 2, Mathura in Case Crime No. 229/2019 (State Vs. Rameshwar) under Section 406 IPC, Police Station- Goverdhan, District Mathura.

May further be pleased to stay the operation and effect of impugned order dated effect and operation of the aforesaid order dated 07.12.2022 passed by learned court of Additional Civil Judge (Senior Division) / Additional Chief Judicial Magistrate, Court No. 2, Mathura in Case Crime No. 229/2019 (State Vs. Rameshwar) under Section 406 IPC, Police Station- Goverdhan, District Mathura during the pendency of the present application."

7. The dispute in the present case which crops up in the present case and is to be decided is in a narrow compass and to be crystallized is whether the filing of a bail application through lawyer is sufficient personal presence of the applicant in Court or not and the Court could proceed to hear and decide the same even though he is not physically / personally present before it in view of sub - para (e) of para 3 of the judgement in the case of **Satendra Kumar Antil Vs. Central Bureau of Investigation and Anr. : (2021) 10 SCC 773.**

8. The facts of the case being the prosecution case are not been dilated as the same have no relevance in the present matter. Reference are being given to only the facts which relate to the present petition for the prayers and the issue as stated above.

9. The applicant filed a Criminal Misc. Application U/S 482 Cr.P.C. 18472 / 2022 (Shyam Babu Sharma Vs. State of U.P. and another) for quashing of the order dated 13.06.2022 passed by the Additional Civil Judge (Senior Division) / Additional Chief Judicial Magistrate Court No. 2, Mathura. The said petition was heard and the learned counsel appearing on behalf of the applicant after arguing it for some time, on instructions, submitted that the applicant seeks some time to appear before the trial Court and requested that non-bailable warrant issued against him be kept in abeyance for a period of three weeks. The said petition stood disposed of by a Co-ordinate Bench of this Court considering the undertaking given by the applicant directing that the non-bailable warrant issued against him be kept in abeyance for a period of three weeks as a one time measure and it was further directed that in the meanwhile, the applicant shall surrender before the trial Court and file appropriate application and the trial Court was directed to decide the same in terms of judgment and order passed by the Hon'ble Supreme Court in **Satendra Kumar Antil Vs. Central Bureau of Investigation and Anr., (2021) 10 SCC 773** if there is no other legal impediment. The said order is extracted here-in-below:-

"1. Heard Sri V.P. Srivastava, learned Senior Advocate assisted by Sri Hridai Narain Pandey, learned counsel for applicant, learned AGA for State and Sri Amit Daga, Advocate for Opposite Party No. 2.

2. The present application under Section 482 Cr.P.C. has been filed for

quashing of order dated 13.06.2022 passed by Additional Civil Judge (Senior Division)/ Additional Chief Judicial Magistrate, Court No. 2, Mathura in Criminal Case No. 21925 of 2021 (196/21), arising out of Case Crime No. 0229 of 2019, under Sections 406, 420, 409 IPC, Police Station Govardhan, District Mathura.

3. Learned Senior Advocate appearing for applicant, after arguing for some time, on instruction, submits that applicant seek some time to appear before Trial Court and requested that non-bailable warrant issued against him be kept in abeyance for a period of three weeks from today.

4. Learned A.G.A. appearing for State and Sri Amit Daga, Advocate for Opposite Party No. 2, have no objection against the aforesaid prayer.

5. Accordingly the prayers made in this application are rejected. However, considering the undertaking given by applicant, the non-bailable warrant issued against him is kept in abeyance for a period of three weeks from today, as a one time measure. Meanwhile, applicant shall surrender before Trial Court and file appropriate application and Trial Court is directed to decide the same in terms of the judgment passed by Supreme Court in Satender Kumar Antil vs. Central Bureau of Investigation and another, (2021) 10 SCC 773 if there is no other legal impediment. In case of default, Trial Court is at liberty to execute non-bailable warrant in accordance with law.

6. With the aforesaid directions, this application is disposed of."

10. Another Criminal Misc. Application U/S 482 Cr.P.C. No. 11061 / 2022 (Shyam Babu Sharma and another Vs. State of U.P. and another) was filed which is stated to be against the charge-sheet which was dismissed as not pressed vide order dated 19.11.2022.

11. An anticipatory bail being Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 1425 / 2022 (Shyam Babu Sharma Vs. State of U.P. and another) was filed before this Court which stood rejected vide order dated 25.02.2022 passed by the co-ordinate Bench of this Court.

12. Subsequently, in compliance of the order dated 19.11.2022 passed in Criminal Misc. Application U/S 482 Cr.P.C. No. 18472 / 2022, the applicant filed a bail application before the trial Court (although the copy of the same has not been annexed with the present petition) but the same stood disposed of vide order dated 07.12.2022 passed by the Additional Civil Judge (Senior Division / Chief Judicial Magistrate Court No. 2, Mathura, with the observation that the accused Shyam Babu Sharma has filed the bail application through his lawyer, he has not filed any application for surrender and neither is he present personally in the court. As per the directions of the Apex Court in the case of Satendra Kumar Antil Vs. Central Bureau of Investigation, he is directed to appear personally before the court at the time of hearing of his bail application and as such the said bail application was disposed of.

Present petition under section 482 Cr.P.C. has thus been filed against the said order dated 07.12.2022 which is impugned herein.

13. Learned counsel for the applicant has argued that the order dated 07.12.2022 passed by the trial court is illegal and

arbitrary inasmuch as the presence of the applicant was there before the said court through his lawyer who had appeared and had filed his bail application. It is argued that the compliance of the order dated 19.11.2022 of this Court passed in 482 Cr.P.C. petition was done as a bail application was filed through lawyer and as such, the same was sufficient of appearance of the applicant before the said court. Learned counsel has placed before the court judgment of the Apex Court in the case of **Satendra Kumar Antil Vs. Central Bureau of Investigation and Anr. : (2021) 10 SCC 773** and while placing paragraph 3 of the same argued that amongst the categories / type of offences the offence of the present matter falls in Category A which is an offence punishable with imprisonment of seven years or less and not falling under category B & D. Further while placing Category A in the said paragraph learned counsel has placed sub - para (e) of the same which reads as following:-

"(e) Bail applications of such accused on appearance may be decided without the accused being taken in physical custody or by granting interim bail till the bail application is decided."

It is argued that the directions of the bail applications to be decided clearly goes to show that it is mentioned therein that bail applications of such accused on appearance may be decided without the accused being taken in physical custody and in the present case accused had appeared before the trial Court as is evident from the fact that he was represented through his lawyer and as such his personal/physical presence was not needed. It is further argued while reading further in the same that even the Apex Court has held that such bail application may be decided without the accused being taken into physical custody which would go to mean that surrender is not required.

14. Learned counsel has further placed before the court the judgment of Apex Court in the case of **Aman Preet Singh Vs. C.B.I. through Director : AIR 2021 SC 4154** and while placing paragraph 11 of the same has argued that it has been held in the same that it is appropriate that the accused is released on bail and the circumstances of his having not been arrested during investigation or not was produced in custody is itself sufficient to release him on bail. It is further argued while placing the same that it has been held in the said judgment that if a person has not been arrested during investigation then to suddenly direct his arrest and to be incarcerated merely because charge-sheet has been filed would be contrary to the governing principle for grant of bail and the situation in the present case is alike as the applicant has filed a bail application and is represented through lawyer before the court and, as such, his presence physically is not needed and further since he was not arrested during investigation and had co-operated in the investigation, the said directions of the Apex Court would be of help to the applicant. It is argued that the present offence is punishable with less than seven years. The presence of the applicant is not required at the time of hearing of bail application. The trial court should have decided the bail application which has been filed through counsel of the applicant without pressing for his physical/personal presence before it. Therefore, the impugned order is bad in the eye of law and as such, deserves to be set aside and appropriate directions be issued to the trial court to decide the bail application without the

personal and physical presence of the applicant in the court.

15. *Per contra*, learned counsel for opposite party No.2 opposed the prayer made in the petition and also the arguments so advanced by the counsel for the applicant and submitted that the trial court has not committed any error in passing the impugned order. It has not overstepped its jurisdiction and the settled law while passing the impugned order. It is argued that the bail of an accused has to be heard necessarily in his presence before the trial Court. Personal/physical presence of the accused at the time of hearing of the bail application is a must and a pre-condition for deciding the bail of an accused by the trial court. It is argued that even in the case of Satendra Kumar Antil (supra) in paragraph 3 in Category A in sub - para (e) it is specified that bail application of such accused on appearance may be decided. This leaves with no doubt but to only a rational conclusion that the physical presence of the accused is needed, the same cannot be through his lawyer. The only rider is that the same may be decided without him being taken into physical custody but the presence of the accused at that point of time is required and is a must. It is argued that further in the order dated 19.11.2022 passed by the co-ordinate Bench of this court in Criminal Misc. Application U/S 482 Cr.P.C. No. 18472 / 2022 the undertaking of the learned counsel for the applicant was to the effect that he seeks some time to appear before the trial Court and as such the matter was disposed of on the said undertaking which has also been observed in paragraph 5 of the same. It is argued that even in the said paragraph, there is a specific direction that the applicant shall surrender before the trial court which would mean that he shall appear personally and physically before the trial Court. It is further argued that the applicant is avoiding appearance before the trial court which is evident from the fact that this is the third application under Section 482 Cr.P.C. being filed by him. In the meantime, even his anticipatory bail application stood rejected by this Court which was filed after filing of charge-sheet. It is argued that looking to the aforesaid facts and circumstances of the case, the present application is devoid of any merit and deserves to be dismissed.

16. Learned AGA for the State has also adopted the arguments of learned counsel for the Opposite Party No. 2.

17. After hearing learned counsel for the parties, perusing the records and the law on the issues, it is evident that the Criminal Misc. Application U/S 482 Cr.P.C No. 18472 / 2022 (Shyam Babu Sharma Vs. State of U.P. and another) was disposed of by a co-ordinate bench of this Court vide order dated 19.11.2022 on the request of learned counsel for the applicant therein on his undertaking that he shall surrender before the Trial Court within three weeks from the date of the said order and file an appropriate application which shall be decided in terms of the judgement passed in the case of Satendra Kumar Antil and for a period of three weeks the non-bailable warrants issued against him were directed to be kept in abeyance. The accused - applicant then filed an application for bail through his lawyer which was disposed of by the Trial Court vide order dated 07.12.2022 on the ground that the accused has not filed any application for surrender and is not personally/physically present in Court.

18. Section 437 Cr.P.C. relates to grant of bail by courts other than High

Court and a Court of Sessions whereas Section 439 Cr.P.C. applies to High Court and a Court of Session.

19. The person who is an accused of any non - bailable offence when is arrested or detained without warrant or is brought before a court, may be released on bail as per Section 437 Cr.P.C.

20. The issue involved in the present matter in no more res-integra.

21. In the case of **Niranjan Singh Vs. Prabhakar Rajaram Kharote : (1980) 2 SCC 559** it has been held that a bail application would not lie unless the accused is in custody. It has been held as follows:

"6. Here the respondents were accused of offences but were not in *custody*, argues the petitioner so no bail, since this basic condition of being in jail is not fulfilled. This submission has been rightly rejected by the courts below. We agree that, in one view, an outlaw cannot ask for the benefit of law and he who flees justice cannot claim justice. But here the position is different. The accused were not absconding but had appeared and surrendered before the Sessions Judge. Judicial jurisdiction arises only when persons are already in custody and seek the process of the court to be enlarged. We agree that no person accused of an offence can move the court for bail under Section 439 CrPC unless he is in custody.

7. When is a person in *custody*, within the meaning of Section 439 CrPC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in *custody* for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

8. Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court."

22. Further in the case of **Sunita Devi Vs. State of Bihar : (2005) 1 SCC 608** it has again been held that a bail application would not lie unless the accused is in custody. It has been held as follows:

"14. The crucial question is when is a person in custody, within the meaning of Section 439 of the Code? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical

dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. The word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law.

15. Since the expression "custody" though used in various provisions of the Code, including Section 439, has not been defined in the Code, it has to be understood in the setting in which it is used and the provisions contained in Section 437 which relate to jurisdiction of the Magistrate to release an accused on bail under certain circumstances which can be characterised as "in custody" in a generic sense. The expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which the Magistrate can entertain a bail petition of an accused. Section 437 envisages, inter alia, that the Magistrate may release an accused on bail, if such accused appears before the Magistrate. There cannot be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the court of the Magistrate.

16. In *Black's Law Dictionary* by Henry Campbell Black, MA (6th Edn.), the expression "custody" has been explained in the following manner:

"The term is very elastic and may mean actual imprisonment or physical detention.... Within statute requiring that petitioner be "in custody' to be entitled to federal habeas corpus relief does not necessarily mean actual physical detention in jail or prison but rather is synonymous with restraint of liberty. ... Accordingly, persons on probation or parole or released on bail or on own recognizance have been held to be "in custody' for purposes of habeas corpus proceedings.""

23. From the above authorities it is clear that for maintaining an application for bail the accused has to be in custody. The filing of a bail application through lawyer is not sufficient personal presence of the applicant in Court and the Court cannot proceed to hear and decide the same if he is not physically / personally present before it.

The situation is different in case of anticipatory bail filed under Section 438 Cr.P.C. as the same lies on an apprehension of arrest.

24. Thus from the above discussion and in view of the law on the issue, no case for interference is made out. The order impugned dated 07.12.2022 is a just, proper and legal order calling for no interference. The present application under section 482 Cr.P.C. is devoid of any merit and is thus dismissed.

(2023) 2 ILRA 742
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Application U/S 482. No. 21765 of 2022

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

Counsel for the Applicants:
Sri Sheshadri Trivedi

Counsel for the Opposite Parties:
G.A., Sri Ghanshyam Das Mishra

Criminal Law- Code of Criminal Procedure, 1973- Section 173(8)- Further Investigation- In respect of an offence where a police report under sub section (2) has been filed, the officer in charge of the police station can make further investigation and when there is clear provision that the police officer can do a further investigation, the argument of the learned counsel for the applicants that without order of the Magistrate the police can not do a further investigation is against law. While there is clear provision under section 173(8) of Cr.P.C. that the officer in-charge of the police station shall not be deemed to be precluded from further investigation, where he obtains further evidence, oral or documentary, he shall forward to the Magistrate further report or reports regarding such evidence in the form prescribed -The conclusion recorded by the trial court is not preceded by the discussion of the evidence recorded by the first Investigating Officer and the statements recorded by the last and third Investigating Officer.

As the investigating agency has been conferred with the power to conduct further investigation u/s 173(8) of the Code, there is no requirement under law for the investigating officer to seek prior permission of the Magistrate before conducting further investigation.

Criminal Law - Code of Criminal Procedure, 1973- Section 173(8) - The trial court has not even recorded its prima facie satisfaction regarding the grounds of summoning the accused. The final report filed by the first Investigating Officer is not even mentioned in the order. Thus, in compliance of the finding of the judgment in Luckose Zachariah @ Zak Nedumchira Luke and others (supra), the Magistrate concerned has not read conjointly both, the final report and the charge sheet, to determine that there is prima facie ground for believing that the accused has committed the offence-Both the final report and the charge sheet filed in same case need to be read conjointly, to determine if there exists a prima facie ground for summoning or not summoning the accused persons.

Settled law that where the investigating agency files a police report/ Chargesheet u/s 173(2) CrPc as well as a Final report after conducting further investigation, then it is incumbent upon the Magistrate to consider both the reports conjointly before summoning the accused. (Para 15, 16, 18, 24, 25)

Criminal Application allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Vinay Tyagi Vs Irshad Ali @ Deepak, (2013) AIR SCW 220

2. Luckose Zachariah @ Zak Nedumchira Luke & ors. Vs Joseph Joseph & ors. in Crl. Appeal No. 256 of 2022 (SC)

3. Ed. - Investigating agency to seek prior approval of Magistrate before conducting further investigation, see Vinubhai Haribhai Malaviya Vs St. of Guj. AIR 2019 SC 5233, para 49.

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard learned counsel for the applicants, learned counsel of the opp. Party no. 2 and perused the record.

2. By means of this application under section 482 CrP.C. the applicant seeks to invoke the inherent jurisdiction of this court to quash the summoning order dated 18.4.2022 passed by learned Chief Judicial Magistrate, Bareilly in case no. 5136 of 2022, State of U.P. Vs. Ram Mohan Sharma and others, the impugned chargesheet/ police report under section 173(2) Cr.P.C. dated 10.10.2021 arising out of case crime no. 76 of 2021, under sections 420, 467, 468, 471, 447, 386, 120-

B I.P.C. police station Prem Nagar, District Bareilly as well as entire proceeding of case no. 5136 of 2022 pending before C.J.M. Bareilly.

3. Vide summoning order dated 18.4.2022 C.J.M. Bareilly summoned above three applicants along with other co accused persons to face trial under sections 420, 467, 468, 471, 447, 386, 120-B I.P.C.

4. Learned counsel for the applicants submits that on 11.2.2021 a first information report was lodged by Abhaychand Kankan against 19 named accused persons under sections 420, 467, 468, 471, 447, 386, 120-B I.P.C. alleging all the named accused persons including the applicants to be bhumafias that they were misappropriating the land belonging to Kunwar Daya Shankar Edward Memorial Intermediate College, Bareilly by making forged sale deed. They were also giving threats to the college staff and demanding ransom also. While on the basis of the donation papers this land was donated to the college for making hostel for the students in the year 1920 by some rich persons of Bareilly City, in the name of the college, which is mentioned in the revenue record till date.

5. Previously Sub Inspector Pradeep Kumar vide final report no. 41 /21 dated 12.3.2021 closed the investigation in the present matter. On this final report, the court took cognizance also. When the first informant came to know about this final report, an application was made before the Additional Director General of Police, (Addl. D.G.P.) Zone Bareilly for further investigation by police of some other police station. Who made an order for further investigation under section 173(8) Cr.P.C. for further investigation to be done by Crime Branch Moradabad. Further investigation was started by Inspector Sanjeev Kumar. He received necessary documents from the court and submitted 8 papers of supplementary case diary but due to his personal grievance, the investigation was transferred by Circle Officer crime branch, Moradabad to Mahesh Babu Sharma, the then Sub Inspector Crime Branch, Moradabad, who after receiving the necessary documents, going through the whole case diary and other documents, after recording the statements of the witnesses filed charge sheet dated 10.10.2021 against 16 accused persons including the above three applicants to face trial under sections 420, 467, 468, 471, 447, 386, 120-B I.P.C.

6. After receiving the charge sheet, the trial court passed the impugned summoning order dated 18.4.2022 and summoned the present applicants and rest co accused persons to face trial under the above mentioned sections.

7. The arguments of the learned counsel for the applicants are of three fold; (i) that the dispute was purely civil, so the FIR under criminal sections was not maintainable, (ii) when the final report was submitted by the first Investigating Officer then without the orders by the Magistrate, no further investigation could be done and (iii) when there were final report and charge sheet both before the Magistrate concerned, he was under obligation to consider the both documents before passing the impugned cognizance order/ summoning order.

8. It is claimed that the Magistrate concerned neither considered the final report and discussed the previous evidence on record nor recorded his prima facie

satisfaction to summon the accused persons including the present applicants, nor discussed the supplementary case diary or the charge sheet filed by the later Circle Officer, hence, the prayer is made to quash the summoning order, charge sheet and the entire proceedings of the aforesaid case.

9. Learned counsel for the opp. party no. 2 submitted that apart from civil cases the applicants, accused persons have some criminal litigation also. They are giving threats to officials/ officers of the college / school and are trying to misappropriate and sell the property of the college/ school. They are demanding ransom from them. They have also executed forged sale deeds regarding the property of the college/school. Now they are trying to take forcible possession over the property in dispute, hence, apart from civil liability the applicants are also criminally liable for the acts done by them.

10. It is further argued by the learned counsel for the opposite party that so far as the question of further investigation is concerned, the opening lines of section 176(8) of the CR.P.C. itself authorize the officer in charge of the police station to make further investigation.

11. Learned counsel for the opp. Party also argued that apart from the present three applicants and five other co accused persons also moved an application under section 482 Cr.P.C. with the same prayer that has been rejected by this court.

12. This argument is replied by the learned counsel for the applicants that there is no parity of the rejection order.

13. If we go through the FIR, the opp. party no. 2 has alleged the applicants to be bhumafias who have misappropriated the properties of various persons and now by executing forged sale deed they are trying usurp the property of the college/school, which is still in the name of the college/school, for the hostel of the children given in donation by some wealthy persons of Bareilly city. It has also been alleged that revenue record regarding the disputed property has been manipulated by the applicants and co accused persons and on the basis of forged sale deed they are giving threats to dispossess the school authorities from the dispute land. They are demanding ransom in this regard. Admittedly civil suits are pending between the parties

14. In the opinion of the court, all the above mentioned acts impose criminal liability upon the persons who committed the same. Admittedly, the first Investigating Officer had filed a final report in this matter. It is alleged by the opp. party no. 2 that the final report was filed on the ground that the dispute is purely civil. The said final report is not before the court. Whatever the ground may be of filing the final report, it is admitted fact that the final report was submitted and it was only on the application of the opp. party no. 2 the official of the school that the Additional Director General of Police, (Addl. D.G.P.) Zone Bareilly under section 173(8) Cr.P.C. made order for further investigation.

15. So far as the argument of the learned counsel for the applicants that without order of the Magistrate, no further investigation can be done is concerned, section 173 (8) of the Cr.P.C. is apposite to mention here;

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)."

16. It has categorically mentioned in the sub section (8) of Section 173 Cr.P.C. above that in respect of an offence where a police report under sub section (2) has been filed, the officer in charge of the police station can make further investigation and when there is clear provision that the police officer can do a further investigation, the argument of the learned counsel for the applicants that without order of the Magistrate the police can not do a further investigation is against law. Otherwise, also in judgment **Vinay Tyagi Vs. Irshad Ali alias Deepak, (2013) AIR SCW 220,** the Apex Court defined the word 'investigation'. "Initial investigation', "further investigation' and "re investigation', it was made clear by the Apex Court that 'further investigation' is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the court in terms of section 173 (8) of the Cr.P.C. It is the continuation of a previous investigation and therefore, is understood and described as a "further investigation'. The scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the court even if they are discovered at a subsequent stage to the primary investigation. The further investigation does not have the affect of wiping out directly or impliedly the initial investigation conducted by the Investigating agency. This is a kind of continuation of previous investigation'.

17. It is further opined by the Apex court that in the case of "fresh investigation' 're investigation' or "denovo investigation', there has to be a definite order of the court. The order of the court ambiguously should state as to whether the previous investigation, for reasons to be recorded is incapable of being acted upon. It was held by the Apex court that the "fresh investigation', 're investigation' or 'denovo investigation' can be ordered by the higher judiciary only and the cases where such directions can be issued are few and far between. Though the Apex Court has held that the Magistrate has power to direct further investigation after filing of a police report but the power of the police cannot be said to be restricted.

18. While there is clear provision under section 173(8) of Cr.P.C. that the officer in-charge of the police station shall not be deemed to be precluded from further investigation, where he obtains further evidence, oral or documentary, he shall forward to the Magistrate further report or reports regarding such evidence in the form prescribed, thus, the arguments of the learned counsel for the applicants against this provision fail.

19. It is further argued by the learned counsel for the applicants that before filing of chargesheet dated 10.10.2021 the court had already taken cognizance on the final report on 25.3.2021. A misc. case no. 82 of 2021 was registered issuing notice to Opp.

Party no. 2. This version of the applicants' counsel shows that after receiving final report only notices were issued to opp. Party no. 2 and issuing notice to the first informant cannot be said of taking cognizance on final report. Thus, the argument of the applicants' counsel that after taking cognizance on final report charge sheet could not be filed, fails.

20. So far as the last argument of the learned counsel for the applicants is concerned that at the time of taking cognizance/ passing summoning order, the court concerned had to take into consideration final report and charge sheet both, which is not done by the court concerned. This argument advanced by the learned counsel for the applicants has substance.

21. Admittedly, in the present case final report was submitted by Sub Inspector Pradeep Kumar on 12.3.2021 and after further investigation charge sheet was submitted by other Investigating Officer Mahesh Babu Sharma, Crime Branch, Moradabad on 10.10.2021. In judgment Vinay Tyagi Vs. Irshad Ali (Supra), the Apex Court held that

"the further investigation whether ordered by the Magistrate or done by the police on his own accord may lead to filing of a supplementary report. Such supplementary report shall be dealt with as a part of primary report. Further in para graph 32 the Apex Court held that "both these reports have to be read conjointly and it is the cumulative effect of the reports and the documents annexed thereto to which the court would be expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence. If the answer is in the negative, on the basis of these reports, the court shall discharge an accused in compliance with the provisions of section 227 of the code.

Following the same view, the Apex Court in judgment of **Luckose Zachariah @ Zak Nedumchira Luke and others Vs. Joseph Joseph and others** in Criminal Appeal No. 256 of 2022 vide judgment dated 18.2.2022, held that "the positive and negative reports submitted under sub sections (2) and (8) of section 173 Cr.P.C. respectively must be read conjointly to determine if there is prima facie ground for believing that the accused has committed the offence. The reports do not have a separate existence."

22. In the case in hands the first Investigating Officer Pradeep Kumar submitted final report on 12.3.2021, thus prima facie no case involving the commission of the offence was established, but after further investigation the Investigating Officer Mahesh Babu Sharma vide order dated 10.10.2021 filed charge sheet on the basis of evidence on the record, finding the applicants and co accused persons prima facie guilty of committing offence under sections 420, 467, 468, 471, 447, 386, 120-B I.P.C.

23. Admittedly, previously the notice was issued by the Magistrate on the final report, thus, no cognizance was taken on final report till date of filing charge sheet. By the impugned order dated 18.4.2022 the trial court took cognizance against the present applicants and other co accused persons by summoning them to face trial under sections 420, 467, 468, 471, 447, 386, 120-B I.P.C.

24. If we go through the impugned order dated 18.4.2022 passed by the Chief

Judicial Magistrate, Bareilly, it is a cryptic order. The conclusion recorded by the trial court is not preceded by the discussion of the evidence recorded by the first Investigating Officer and the statements recorded by the last and third Investigating Officer. The trial court has not even recorded its prima facie satisfaction regarding the grounds of summoning the accused. The final report filed by the first Investigating Officer is not even mentioned in the order. Thus, in compliance of the finding of the judgment in **Luckose Zachariah @ Zak Nedumchira Luke and others (supra),** the Magistrate concerned has not read conjointly both, the final report and the charge sheet, to determine that there is prima facie ground for believing that the accused has committed the offence.

25. Thus, where the arguments of the learned counsel for the applicants that the dispute is mere civil or that the police officer had no right, without an order of the Magistrate, to make further investigation have no force, the court is convinced with the argument of the applicants' counsel that both the final report and the charge sheet filed in same case need to be read conjointly, to determine if there exists a prima facie ground for summoning or not summoning the accused persons, C.J.M. Bareilly has not read both final report and the charge sheet conjointly to reach at the conclusion. It is explicitly clear that the impugned cognizance/ summoning order passed by C.J.M. Bareilly is a cryptic order wherein the officer has not followed the mandate of law laid down by the Apex Court in the various judgments discussed above. The impugned order dated 18.4.2022 being against the mandate of law is hereby set aside. The trial court is directed to pass a fresh summoning/cognizance order following the law laid down above.

26. Application u/s 482 Cr.P.C. is allowed to the above extent.

(2023) 2 ILRA 748
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.01.2023

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Criminal Appeal No. 221 of 1988

Munna @ Om Prakash ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Subodh Kumar Shukla, Ashok Kumar Verma, R.P. Pandey

Counsel for the Respondent:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 3- Case of circumstantial evidence- The apex court in various decisions has held that the nature, character and essential proof required in a criminal case, which rests on circumstantial evidence alone, are (i) the circumstances from which the conclusion of guilt is to be drawn should be fully established; and (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused.

Settled law that in a case resting on circumstantial evidence it is incumbent upon the prosecution to prove and link each of the circumstances in a single chain which leads to the only inescapable conclusion of the guilt of the deceased.

Indian Evidence Act, 1872-Section 3- Proving of Corpus delicti- As per prosecution, complainant and father of the deceased had disclosed that they had identified the body of the Vishwanath on the basis of clothes which were allegedly to be found lying near the skeleton- Merely, recognizing clothes will not establish that the said skeleton is of Vishwanath. The proper course available to the prosecution was to conduct the DNA test of the skeleton and get the same matched with the father or any other member of the family to establish beyond doubt that it was the dead body of Vishwanath alone and none else- A mere suspicion, however, strong it may be, cannot be a substitute for acceptable evidence.

Mere suspicion is not enough to prove the corpus delicti, on the basis of the alleged clothes of the deceased, where the prosecution has failed to identify the deceased by conducting a DNA test.

Indian Evidence Act, 1872- Section 3- Last seen evidence- (P.W.-2) can be described as partisan and chance witness whose testimony could not be treated as credible and he cannot be termed as trustworthy witness- Ram Kishore, who is alleged to be in the company of (P.W.-2), has not been produced to corroborate the version as given by Chanda (P.W.-2)- The conviction cannot be based only on the circumstance of last seen together with the deceased- Last seen theory comes into play where the time gap between the point when the accused and the deceased were last seen alive and when the deceased is found dead is so narrow that possibility of any person other than the accused being the author of crime becomes impossible.

Conviction cannot be secured only on the basis of last seen evidence, which is neither trustworthy and nor without any corroboration, as the evidence of last seen should not only be credible but also the time gap between the points when the deceased was last seen in the company of the accused and when he was found dead should be so narrow so as to rule out participation of any other person in the commission of the offence.

Indian Evidence Act, 1872-Section 8- Motive in the present case could not be proved by the prosecution. Although, motive may pale into insignificance in a case involving eyewitnesses, however it may not be so when an accused is implicated based upon the circumstantial evidence.

Although motive pales into insignificance in a case of direct evidence but in a case of circumstantial evidence motive is relevant and forms one of the links which have to be proved by the prosecution.(Para 22, 32, 33, 37, 43, 44)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Padala Veera Reddy Vs St. of A.P. AIR 1990 SC 79

2. St. of U.P. Vs Ashok Kumar Srivastava : [1992] 1 SCR 37

3. Sharad Birdhichand Sarda Vs St. of Maha. : 1984 Cri. L.J. 178

4. Sanatan Naskar & anr. Vs St. of W.B, (2010) 8 SCC 249

5. Sampath Kumar Vs Inspr. of Police Krishnagiri 2010 Cri. L.J. 3889 (SC)

6. Bhagwan Jagannath Markad Vs St. of Maha.: (2016) 10 SCC 537

7. Chandrakant Ganpat Sovitkar Vs St. of Maha, (1975) 3 SCC 16

8. Ram Prakash @ Jalim Vs St. of Chattis.(Crl. Appl. No. 462 of 2016 dec. on 12.05.2016, SC)

9. Ram Pratap Vs St. of Har.(Crl. Appl. No. 804 of 2011) dec. on 1.12.2022

10. Tarsem Kumar Vs Delhi Admin. (1994) Supp 3 SCC 367

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

1. The present criminal appeal has been filed assailing the judgment and order dated 02.05.1987 passed by II Additional District & Sessions Judge, Hardoi in Session Trial No. 144 of 1986 arising out of Case Crime No. 134 of 1985 under Section 419/420/364/302/201/411 IPC Police Station Pihani, District Hardoi, whereby the appellant has been convicted under Section 302/201 IPC and sentenced to undergo imprisonment for life and acquitted under Section 404 IPC.

2. Shorn of irrelevant details, the facts of the case are that the complainant Shyam Rastogi (PW-1) was having a shop in Pihani town where he used to provide loudspeaker on rent. On 06.06.1985 at about 4 P.M the appellant Munna came to the shop of the complainant and booked a loudspeaker for 10th June, 1985 for two days for Rs. 105/- as rental charges and deposited Rs. 10/- as advance. The set was booked for being taken from village Dhobia to village Gajua Khera for a marriage party in his relation. It is said that appellant Munna mentioned his name as Ram Prasad son of Chhotey Lal Yadav resident of Village Khakra, P.S. Maigalganj, District Kheri.

3. On 10.6.1985, Munna came to the shop of the complainant at about 4.30 P.M. when the complainant handed over the loudspeaker set to his Operator Vishwanath (deceased), who went with the appellant Munna to Village Gajua Khera on a bicycle belonging to the complainant. On 10.6.1985 in the evening at about 5.00 P.M. Munna (appellant) and Operator Vishwanath were seen at Shahadat Nagar Bus Stand along with cycle and loudspeaker by Chanda (PW-2) and one Ram Kishore. However, when Vishwanath did not return on 12.6.1985, the complainant made search of the operator and loudspeaker set. During search he came to know from village Gajua Khera and village Dhobia that no such Barat had come, then the complainant went to village Khakra and came to know about correct name and address of Munna. The complainant mentioned in the F.I.R. that till now he could not know the whereabouts of Vishwanath (operator) and sound system. In the report, he showed suspicion that Munna has made Vishwanath disappeared and took his cycle and set.

4. In the morning of 15.6.1985, the complainant Shyam Rastogi prepared a written report (Ex. Ka-1) and at 8 A.M. handed it over to the police authorities of Police Station Pihani. The Head Moharrir Jagdish Sara of Pihani police station scribed FIR (Ex. Ka-11) and registered a case under Section 419/420/364 IPC vide G.D. report no. 12 dated 15.6.1985 against the appellant Munna. The investigation of the case was entrusted to SI Suresh Chandra Gautam.

5. It is said that in the evening of 15.6.1985 itself, the police spotted skeleton of an unknown person in the east of village Bahadurnagar from the sugarcane field of Ram Sagar. The Sub Inspector prepared inquest report (Ex. Ka-14), challan of dead body (Ex. Ka-15), sketch map of dead body (Ex. Ka-16), two letters to CMO (Ex. Ka-17 and Ka-18) and letter to RI (Ex. Ka-19). The skeleton was sealed in a cloth and the sample seal is Ex. Ka-20. The skeleton was sent for postmortem examination through Constable Harish Chandra (PW-5) and village Chaukidar Raja Ram of village Luhar Khera. The SI also took the clothes

of the deceased in custody and prepared a memo thereof (Ex. Ka-20).

6. On 16.5.1985 at 5.50 pm Dr M L Tandon, Medical Officer, District Hospital, Hardoi (PW-4) conducted postmortem on the unidentified body of the deceased, who was assessed to have died 5-6 days ago. It was a skeleton of an adult. Vertebra, skull bone and the bone of left hand were not present. Large number of bones were found missing. The Medical Officer noted the following ante mortem injuries on the dead body:

1. Cut mark on 4th cervical vertebra in front with sharp cuts and dried blood present on margins.

2. Cut mark in the middle of mandible and on its base.

7. In the opinion of the doctor, death had taken place due to shock and hemorrhage as a result of ante mortem injuries. The postmortem report is marked as Ex. Ka-5.

8. The police got the clothes of the deceased identified by Ram Dayal (PW-3) father of the deceased and also by the complainant. They identified the clothes recovered to be those of the deceased Vishwanath. Thereafter, the case was converted into a case under Section 419, 420, 364, 302, 201 and 411 IPC on an assumption that Vishwanath was murdered and the investigation of the case was taken over by SO Shyam Singh Parihar (PW-7) on 18.6.1985.

9. On 18.6.1985, Investigating Officer, SO Sri Parihar recorded the statement of Ram Sagar and conducted inspection of the spot from where the dead body was recovered. He prepared site plan (Ex. Ka-6). He attempted search of the appellant 7.7.1985, 12.7.1985, 19.7.1985, 3.8.1985, 9.8.1985, 2.8.1985, 25.8.1986 and 17.10.1985 but could not succeed. On 10.12.1985, when the Investigating Officer accompanying with the complainant Shyam Rastogi and police force while proceeding towards Maigalganj in search of the appellant Munna, at about 1 P.M. when the Investigating Officer reached at a place where Jahanikhera joins Shahjahanpur-Sitapur road with Pihani road, He saw the accused Munna coming from bicycle from Shahahanpur on Shahanpur-Sitapur road. The complainant is said to have identified the accused. The witness Ram Sewak (PW-6) and Pradeep Kumar Tandon were present on the said T-point. Chasing for about 20 paces towards east, appellant Munna was arrested and a cycle of "Avon' brand bearing no. 403288 (Ext.-5) was recovered from his possession (Ex. ka-3). On enquiry being made, the appellant told that loudspeaker was kept by him with one Bheem (co-accused) in village Khakhra. Thereafter the Investigating Officer along with Munna and the witnesses reached village Khakhra at the house of Bheem. Two persons, namely, Chandra Pal and Moti Lal were called from the house of Bheem who witnessed the recovery of internal part of record player and seven records. The IO then inspected the place of recovery of these articles and prepared site plan (Ex. Ka-7) and recorded the statement of accused Bheem and witnesses Shyam Rastogi and Ram Sewak and went to village Jahani Khera Tiraha where he prepared site plan in respect of the recovery of cycle. The IO reached the police station Pihani and kept the recovered articles in police *''Malkhana'* and accused persons in *''hawalaat'* (lock-up). An entry to this effect was made in GD report no. 30, a copy of which is Ext. ka-9.

10. The IO after conducting due investigation and necessary formalities, submitted charge sheet in Court. After committal proceeding, the case came to be tried in Sessions court in which charges were framed on 23.8.1986 against the accused-appellant Munna alias Om Prakash and Bheem for offences under 302, 201 and 404 IPC.

11. The accused persons abjured their guilt pleading innocence and claimed to be tried.

12. The prosecution, in order to prop up its case, examined in all 7 witnesses. (PW 1) Shyam Rastogi is the complainant, (PW 2) Chanda, (PW 3) Ram Dayal, (PW 4) as witnesses of fact. Dr M.L. Tandon (PW 5), Constable Harish Chandra Misra, (PW 6) Ram Sewak and (PW 7) SO S.S. Parihar are the formal witnesses of the case.

13. The prosecution got the documents i.e. written report (Ext. Ka-1), recovery memo of clothes of the deceased (Ex. Ka-2), recovery memo of cycle (Ex. Ka-3) and recovery memo of record player and records (Ex. Ka-4) proved by the complainant. The complainant also proved record player without cabinet (Ex.-1), seven records (Ext. 2/1 to 2/7), Kurta of the deceased (Ex.-3), trouser of the deceased (Ex.-4) and cycle (Ex.-5). Dr M.L. Tandon (PW-4) proved postmortem report (Ex. Ka-5), PW-7 IO Sri Parihar proved site plan of the place of recovery of dead body (Ex. Ka-6), site plan of the place of recovery of cycle (Ex. Ka-8), copy of GD report no. 30 (Ex. Ka-2) and charge sheet (Ex. Ka-10).

14. The statement of accused appellant was recorded under Section 313 Cr.P.C. wherein he denied the case set up by the prosecution. He stated that he used to work in a hotel in Maigalganj town. Shyam Rastogi had taken meals in that hotel where altercation with regard to payment of bill took place and as such he bore grudge and has falsely implicated him in this case. The accused Bheem stated that nothing was recovered from his house. He stated that he and complainant Shyam Rastogi used to do business of renting out loudspeakers and there was professional jealousy against them which has resulted in his implication. He stated that he purchased the loudspeaker in dispute from Lallu Ram for Rs. 10000/-. The IO had taken away the articles from his house and he was also kept at the police station for two days and thereafter was challaned.

15. **The accused persons have been charged for committing murder of the deceased Vishwanath under Section 302 IPC, for removing the evidence of crime under Section 201 IPC and for misappropriation of property possessed by the deceased at the time of his death under Section 404 IPC.**

16. The Sessions Judge after scrutinizing and appraisal of evidence, recorded the verdict of conviction against the appellant, as stated supra. However, the co-accused Bheem was acquitted holding that prosecution has not been able to prove charge against him and gave him benefit of doubt.

17. The learned counsel for the appellants challenged the findings recorded by the trial court submitting that the findings are repleted with infirmities and the same are not based on correct appreciation of the evidence.

18. Learned counsel for the appellant has strenuously argued that the finding of guilt recorded by the Sessions Judge are wholly erroneous and unjustified. There is no direct evidence on record to establish that the appellant had committed murder of the deceased. As a matter of fact, none has seen the commission of offence in question. From the facts of the case it can easily be inferred that it is a case of circumstantial evidence and without there being a complete chain of events, the appellant has been convicted and sentenced to life imprisonment.

19. It is further submitted that the court below laid too much emphasis on the testimonies of the prosecution witnesses overlooking the fact that there are major contradictions and omissions which diminish the case as set up by the prosecution. As a matter of fact, the appellant has been falsely implicated by the complainant due to previous enmity as some altercation had taken place with the appellant with regard to payment of bill when he was working in a hotel at Maigalganj. Lastly, it has been argued that on the same set of evidence co-accused Bheem has been acquitted whereas appellant has been convicted. In the circumstances, the impugned judgment is liable to be set aside.

20. Refuting the assertions made by learned counsel for the appellants, learned AGA has submitted that the impugned judgement of conviction passed by the court below is a well discussed and reasoned order based on correction appreciation of the evidence on record.

21. It is further submitted that undisputedly, the case is of circumstantial evidence but it is incorrect to say that the chain of evidence is not complete. Sessions Judge while bringing home the guilt, has recorded sufficient findings on the basis of clinching evidence available on record and the same are corroborated by the medical evidence. Therefore, the appeal is liable to be dismissed.

22. Having considered the submissions made by the parties and perusing the material on record, one thing is crystal clear that there is no direct evidence in this case and it is a case of circumstantial evidence. The apex court in various decisions has held that the nature, character and essential proof required in a criminal case, which rests on circumstantial evidence alone, are (i) the circumstances from which the conclusion of guilt is to be drawn should be fully established; and (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, i.e. to say should not be explainable on any other hypothesis except that the accused is guilty, the circumstances should be of a conclusive nature and tendency, that should exclude every possible hypothesis except the one to be proved and there must be a chain of evidence so complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and must show that in all human probabilities the act must have been done by the accused.

23. In this regard, it would be useful to refer the guiding principle on the subject propounded by the Hon'ble Supreme Court in the case of **Padala Veera Reddy v. State of A.P.** AIR 1990 SC 79, wherein the Hon'ble Supreme Court laid down the guiding principle with regard to appreciation of circumstantial evidence:-

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

24. Similarly, in the case of ***State of U.P. v. Ashok Kumar Srivastava*** : [1992] 1 SCR 37, the apex court pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

25. As regard the appreciation of circumstantial evidence, the Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda Vs. State of Maharshtra*** : 1984 Cri. L.J. 178 was pleased to observe in paras-150 to 158, which are quoted below:-

"150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

26. Likewise, in the case of ***Sanatan Naskar and Anr. v. State of West Bengal*** reported in (2010) 8 SCC 249, the apex court propounded as under:-

"There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eye witness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye witness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of accepted principles in that regard."

27. As regard the motive, the Hon'ble Supreme Court in the case of ***Sampath Kumar v. Inspector of Police Krishnagiri*** 2010 Cri. L.J. 3889 (SC), observed in paragraph 15 as under:-

"15. ..... One could even say that the presence of motive in the facts and

circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt."

28. Apart from above, it would be useful to refer to the decision rendered by the Hon'ble Supreme Court in the case of ***Bhagwan Jagannath Markad v. State Of Maharashtra***: (2016) 10 SCC 537 wherein the apex court summarized the principles for the appreciation of the credibility of witness where there are discrepancies or infirmaries in the statement. The relevant paragraph 19 is reproduced as under:

"19. While appreciating the evidence of a witness, the Court has to assess whether read as a whole, it is truthful. in doing so the court has to keep in mind the deficiencies, drawback and infirmaries to find out whether such discrepancies shake the truthfulness. ..Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence.. ...The Court has to sift the chaff from the grain and find out the truth. A statement may be partly partly rejected or partly accepted."

29. **Bearing in mind the aforementioned factual and legal position in these type of the cases, the first question that requires to be answered is as to whether the prosecution was successful to prove the corpus delicti and secondly, inferential evidence was such that the doctrine of last seen could be applied in a manner that it satisfies the principle of proof beyond a reasonable doubt.**

30. As regards the proving of Corpus delicti, a perusal of the FIR reveals that the complainant has alleged that the deceased had left with Munna (appellant) on 10.06.1985 at about 04:00 PM but he did not return till 12.06.1985. The complainant has also alleged that he tried his best to know the whereabouts of Vishwanath (deceased) but when he failed, he lodged the report. Vishwanath was missing since 12.06.1985 but the complainant lodged the report after three days on 15.06.1985 at about 08:00 AM at Police Station Pihani, District Hardoi. In the FIR, the complainant has not mentioned the date on which he was told that Chanda and Ram Kishore had seen the deceased. In order to fill this laucnae, an improvement has been made in the statement before the court that on 13.06.1995 Chanda and Ram Kishore had seen him at the Bus Station Surprisingly. Here, it may be recalled that in FIR, the Complainant has not given the description of clothes of Vishwanath or the specific time when he left the shop for going to Gajua khera along with Munna.

31. It may be pointed out that as per prosecution, complainant and father of the deceased had disclosed that they had identified the body of the Vishwanath on the basis of clothes which were allegedly to be found lying near the skeleton.

32. Merely, recognizing clothes will not establish that the said skeleton is of Vishwanath. The proper course available to the prosecution was to conduct the DNA test of the skeleton and get the same matched with the father or any other member of the family to establish beyond doubt that it was the dead body of Vishwanath alone and none else. The Investigating Officer did not take any attempt to conduct DNA analysis of bones to prove that the recovered skeleton was that of Vishwanath. In short, the prosecution has failed to prove the death of

Vishwanath either being homicidal or otherwise. It is an admitted case of the prosecution that Vishwanath had gone to village Gajua Khera on 10.06.1985 and alleged skeleton claimed to be of Vishwanath was found on 15.06.1985, the date on which FIR came into existence. The postmortem of an unidentified human skeleton was conducted on 16.06.1985 at 5:50 P.M. and the doctor has mentioned in the postmortem report regarding receiving of *"Skeleton of unknown human being"*. Thus, till the time of postmortem it was not established that Skeleton was of deceased Vishwanath. Shyam Rastogi (P.W.-1) in his Statement has testified that he had recognized the clothes of Vishwanath on 17.06.1985 which were also recognized by Ram Dayal and there after recovery memo was prepared. Surprisingly, no such statement has been given by Ram Dayal before the court, when in the court, he saw the clothes. He is stated to have only uttered that Vishwanath had gone wearing these clothes.

33. Apparently, the trial court has proceeded on a mere suspicion that since the clothes belonged to the deceased, the skeleton also was of the deceased, without any rational and in the absence of any scientific prove. However, this court cannot subscribe to the view of the trial court as the settled position of law is no longer res integra that a mere suspicion, however, strong it may be, cannot be a substitute for acceptable evidence, as also held by the apex court in the case of **Chandrakant Ganpat Sovitkar v. State of Maharashtra,** (1975) 3 SCC 16.

"16. .....It is well settled that no one can be convicted on the basis of mere suspicion, however strong it may be....."

34. Ram Dayal (PW-3) is the father of the deceased, who deposed before the court that his son used to work at the shop of the Shyam Rastogi. On 10.06.1985 he had gone to repair the sound system and did not return. He has further deposed that Vishwanath was wearing *kurta* and *pyjama* (Ex. Ka 3 & 4).

35. One of the glaring discrepancies and contradictions which makes the story doubtful is regarding colour of the clothes of the deceased, which he was wearing when last seen. Shyam Rastogi (P.W.-1) before the court has stated that when Vishwanath left the shop, he was wearing brown colour kurta with embroidery and white pyjama (lower). Whereas, Panchnama (Ex. ka-14) shows recovery of white colour "कुर्ता कलीदार सफेद मिट्टी में सना हुआ व फटा हुआ व पैजामा सफेद"। In view of the discrepancies and shortcoming cited above, in our considered opinion, the trial court has erred in believing that the alleged Skeleton was of Vishwanath, particularly in absence of DNA analysis having being conducted.

36. Here, it is relevant to point out that the prosecution is silent as to why Ram Dayal, whose son was missing since 12.06.1985 had not come forward to inform the Police regarding missing of his son or to lodge report and even made no effort to trace his son as emerges out from his deposition. Ram Dayal (P.W.-3) had also not disclosed as to when and how he came to know about the death of his son. As per the version of Shyam Rastogi (PW-1), he and Ram Dayal (father of the deceased) had recognised the clothes of Vishwanath on 17.06.1985. Again, it is not clear as to how and on whose information he reached at the Police Station on 17.06.1985.

37. As regard, the last seen evidence, the prosecution case is that complainant had stated that Chanda (P.W.-2) and Ram Kishore had seen the deceased along with Munna at Shahadat Nagar Bus Stand on 10.06.1985. He told this fact to the complainant on 13.06.1985 when they met him, as Chanda was known to him. On the contrary, Chanda (P.W.-2) in his statement before the court had deposed that on Monday when he went along with Ram Kishore to Shahdat Nagar market, at about 5:30 P.M. He had seen Vishwanath (deceased) and appellant Munna. Vishwanath was carrying loudspeaker set on the cycle. In his cross-examination, (PW-2) Chanda gave altogether a different story and said that he had gone to Shahadat Nagar to see Dr. Moharram Ali but had not disclosed this fact to Sub-Inspector. He had gone to Shahadat Nagar by bus from Pihani. He further stated that when he was coming back after meeting the doctor, he met Ram Kishore in the market and he came to Pihani by cycle along with Ram Kishore. At the bus-station they had stopped to drink water where he saw Vishwanath (deceased), who was known to him from much before. This witness had admitted that he used to take loudspeaker on rent. However, he denied the suggestion that he used to take set from Shyam Rastogi and was giving false testimony on his saying. Thus, at the best, Chanda (P.W.-2) can be described as partisan and chance witness whose testimony could not be treated as credible and he cannot be termed as trustworthy witness. The court below fell into error in relying heavily on the testimony of Chanda (P.W.-2). Moreover, there is one more glaring feature which makes the prosecution story doubtful viz. Ram Kishore, who is alleged to be in the company of (P.W.-2), has not been produced to corroborate the version as given by Chanda (P.W.-2).

38. One more fact which needs to be noticed is that shop of Shyam Rastogi where deceased was working is situated in Pihani town. The sound system was said to be booked for 10.06.1985 which was to be taken from village Dhobia to village Gajua Khera. Neither the Complainant nor any other witness has deposed that Shahadat Nagar Bus Stand will fall in the way while going from Pihani town to Gajua Khera via village Dhobia. Such statement was vital to prove the presence of deceased at Shahadat Nagar Bus Stand.

39. Apart from above discrepancies it would be useful to point out that with respect to the recovery of sound system and loudspeaker, PW-7 Station Officer Sri Ram Singh Parihar had stated that accused Munna had disclosed that loudspeaker and other articles are kept in the house of Bheem in village Khakra. On this information, he along with police personnel and witnesses went to the house of accused Bheem. However, in the cross-examination the Station Officer admitted that he has not taken the witnesses from Village Khakra but had taken Chandra Bhan and Motilal who were passers-by. Thus, it is clear that no witness adjoining to the house of Bheem or any other witness belonging to village Khakra was present at the time of recovery of sound system and other articles from the house of Bheem.

40. As regard the arrest of the accused (appellant), Shyam Rastogi (PW-1) stated that on 10.12.1985 i.e after a lapse of six months the Station Officer, Pihani along with him went in search of Munna from Pihani to Sitapur. Munna was seen on the cycle and the complainant told the Station Officer that he is the same person who had taken the sound system. Thereafter, accused was arrested. He also identified

that the cycle which Vishwanath was carrying belongs to him. On the other hand, in his cross-examination this witness deposed that on the day of arrest he went to the Police Station at about 11:00 AM. from where, two Sub-Inspectors and four constables went in a jeep and when they reached at a T-point, the accused had suddenly appeared who was traced by the police personnel and was arrested. It is very surprising that for a long period of six months, the police continued to remain in hectic search to arrest the accused and it creates some doubt when the arrest of the appellant has been shown in the same area without any specific information.

41. At this juncture, we would like to refer the case of ***Ram Prakash @ Jalim Vs State of Chattisgarh*** *(Criminal Appeal No. 462 of 2016 decided by the Hon'ble Supreme Court on 12.05.2016)* which has been relied upon by the Counsel for the appellant wherein the prosecution case was that some skeleton remains alleged to be of one Ram Sewak were found, who had gone with the appellant Ram Prakash @ Jalim on 07.10.1992. This case was also of circumstantial evidence. The Hon'ble Supreme Court after scrutinizing the evidence on record held as under:-

"It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstances of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused."

42. In the case of ***Ram Pratap Vs State of Haryana*** *(Criminal Appeal No. 804 of 2011)* decided on 1.12.2022 by the Hon'ble Supreme Court the accused-appellant was convicted under Section 302 IPC by the trial court, which was confirmed by the High Court. When the matter reached to the Supreme Court, it held that it is a case of circumstantial evidence and while acquitting-appellant observed in paragraph 9 as under -

"It has been held by this Court in a catena of cases including Sharad Birdhichand Sard vs. State of Maharastra reported at (1984) 4 SCC 116, that suspicion, howsoever strong, cannot substitute proof beyond reasonable doubt. This Court has held that there is not only a grammatical but also a legal distinction between "may' and "must'. For proving a case based on circumstance beyond reasonable doubt, and further, that the circumstances so proved must from a complete chain of evidence so as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show, in all human probability, that the act has been done by the accused. Further, it has been held that the facts so established must exclude every hypothesis except the guilt of the accused."

43. In the backdrop of the aforesaid factual and legal position, the conviction cannot be based only on the circumstance of last seen together with the deceased. Last seen alone will not complete the chain of circumstances in order to record the finding

that it is consistent only with the hypothesis of the guilt of accused-appellant. Needless to say, that last seen theory comes into play where the time gap between the point when the accused and the deceased were last seen alive and when the deceased is found dead is so narrow that possibility of any person other than the accused being the author of crime becomes impossible.

44. Moreover, the trial court missed on the aspect that motive in the present case could not be proved by the prosecution. Although, motive may pale into insignificance in a case involving eyewitnesses, however it may not be so when an accused is implicated based upon the circumstantial evidence. This position of law has been dealt with by the Apex Court in the case of ***Tarsem Kumar v. Delhi Administration*** *(1994) Supp 3 SCC 367* in the following terms:

"8. Normally, there is a motive behind every criminal act and that is why investigating agency as well as the court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. It has been repeatedly pointed out by this Court that where the case of the prosecution has been proved beyond all reasonable doubts on basis of the materials produced before the court, the motive loses its importance. But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. Of course, if each of the circumstances proved on behalf of the prosecution is accepted by the court for purpose of recording a finding that it was the accused who committed the crime in question, even in absence of proof of a motive for commission of such a crime, the accused can be convicted. But the investigating agency as well as the court should ascertain as far as possible as to what was the immediate impelling motive on the part of the accused which led him to commit the crime in question. ....."

45. Lastly, we may add that there is unexplained delay in lodging the FIR, which has been lodged by the owner of the shop where deceased was said to be working after three days of incident. Surprisingly, Ram Dayal (P.W.-3) who is the father of the deceased, did not make any attempt to search his son Vishwanath and inform the police about his missing which itself creates doubt on the prosecution story. Moreover, the complainant's testimony as regards the implication of Bheem was disbelieved, hence he had lost the credibility of being a reliable witness.

46. In view of the aforesaid detail discussions, the impugned judgement and order of Conviction dated 02.05.1987 passed by II Additional Session Judge, Hardoi is hereby set-aside. The appellant is on bail. The appellant need not surrender and his bonds are cancelled and sureties discharged.

47. The appeal stands allowed accordingly.

48. Let a copy of this order be sent to the Court concerned for information and compliance.

(2023) 2 ILRA 759
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.02.2023

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 386 of 2014

Puttan Yadav @ Vipin ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Nikhil Kumar, Sri Jitendra Singh, Sri Lalji Yadav, Sri Sudhakar Yadav, Sri Yashpal Yadav

Counsel for the Respondent:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 3- The medical evidence is a crucial and significant piece of evidence which, if corroborates the prosecution version, and eye-witness account, the prosecution would certainly succeed in proving its case- The injuries found on the body of the deceased by the doctor would have been caused in the same manner as deposed by PW-2- The injuries caused to the poor child were sufficient in the ordinary course of business to cause her death and the prosecution story as such is fully corroborated by the medical evidence.

Where the ocular evidence is corroborated by the medical evidence, then conviction can be secured on that basis.

Criminal Law- Indian Evidence Act, 1872- Section 134- It is transpired from the close scrutiny of entire testimony of PW-2 that her evidence is quite innocent and trustworthy and she is wholly reliable witness. Her deposition in its continuity is quite instinctive and bears no contradiction in material particulars such as to the manner of assault, place of occurrence, author of crime and all other related factors. Her presence over the place of occurrence at the time of incident is quite natural- Her deposition is free from all infirmities and she is proved to be a reliable and natural witness and conviction can safely be recorded on the basis of statement of such witness - and further gets corroboration from the medical evidence.

Conviction of an accused can be secured even upon the testimony of a solitary witness where such testimony is truthful, creditworthy and corroborated with the medical evidence, as it is the quality of the evidence and not the quantity, which is important.

Criminal Law- Indian Evidence Act, 1872- Section 3- 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 the testimony of such related witness.

Settled law that where the court, after exercising abundant caution, finds that the testimony of a related witness is trustworthy and credible and her presence is natural, then the same is wholly reliable.

Quantum of Punishment- Doctrine of Proportionality- Section 304 (Part-I) IPC- life imprisonment has been awarded by learned trial court- Appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of the offence and the manner in which it was executed or committed. It is the obligation of the Court to constantly remind itself that the right of the victim, and be it said, on certain occasions the person aggrieved as well as the society at large can be victims, never be marginalised. The measure of punishment should be proportionate to the gravity of the offence- Keeping in view the reformative theory of punishment and "doctrine of proportionality", it appears to us that the sentence of life imprisonment awarded under Section 304 (Part-I) IPC by learned trial Court to the appellant is too harsh and severe- Since the appellant has already served-out more than ten years jail sentence, the sentence of life imprisonment under Section 304 (Part-I) IPC is converted into the sentence already undergone, which would meet the ends of justice.

As the judicial trend in the country is reformative and not retributive hence in view of the facts and circumstances of the case and period of incarceration undergone by the accused, the sentence awarded modified to the period undergone. (Para 26, 28, 29, 40, 42, 45, 47, 48, 60, 61)

Criminal Appeal partly allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Raj Narain Singh Vs St. of U.P. 2010 AIR SCW 521

2. Kusti Mallaiah Vs St. of A.P (2013) 12 Supreme Court Cases 680

3. Amar Singh Vs State (NCT of Delhi) (2020) 19 SCC 165

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

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

6. Hema Vs State, (2013) 81 ACC 1 (SC)

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

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

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

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

11. Guru Basavraj Vs St. of Kar., (2012) 8 SCC 734

12. Sumer Singh Vs Surajbhan Singh & ors, (2014) 7 SCC 323

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

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

15. Sham Sunder Vs Puran (1990) 4 SCC 731

16. M.P. Vs Saleem, (2005) 5 SCC 554

17. Ravji Vs St. of Raj., (1996) 2 SCC 175

18. G. V. Siddaramesh Vs St. of Kar., 2010 (87) AIC 43 (SC)

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

1. Present criminal appeal has been preferred by the appellant Puttan Yadav @ Vipin against the judgement and order dated 20.1.2014 passed by the Sessions Judge, Kanpur Dehat in Sessions Trial No.91 of 2013 (State vs. Puttan Yadav @ Vipin), arising out of case crime no. 638 of 2012, convicting and sentencing the appellant for the offence punishable under Section 304 (Part-I) IPC to undergo life imprisonment and a fine of Rs. 5,000/- with stipulation of default clause.

2. Brief facts of the case, as culled out from the record, are that a written report was submitted by the complainant Gore Lal son of Ram Nath, resident of village Chakeri, Police Station Chakeri, District Kanpur Nagar at Police Station- Akbarpur, District- Kanpur Dehat in which averments were made that Km. Laxmi, niece (bhanji) of the informant, aged about two years, had sustained injuries and she was hospitalized at Kabir Hospital, Kanpur Nagar by the appellant and his family members. She expired during treatment. Anita, sister of the informant, was also harassed by the accused persons.

3. On the basis of the written report (Ext. ka-1), Death Information Report (Ext. ka-2) was registered at Police Station concerned on 30.10.2012 at 9.15 a.m., mentioning all the details as described in Ext. Ka-1. After post mortem and enquiry, a G.D. entry for registration of the case was also made, which is Ext. Ka-3.

4. Investigation of the case proceeded. The Investigating Officer recorded the statements of the witnesses, inspected the spot and prepared site plan. He also prepared the inquest report of the deceased and papers relating to post mortem.

5. Post mortem of the dead body of the deceased was performed and Autopsy report (Ext. ka-4) was prepared by Dr. Sanjeev Kumar on 30.10.2012 at 2.30 p.m. On examination of the dead body of the deceased, following ante-mortem injuries were found:

"(1). Abrasion - 3 cm X 2 cm over Right side of fore head approx 3 cm above Right eye brow.

(2) Abrasion - 2 cm X 1 cm over left side of fore head, approx 4 cm above Left eye brow.

(3) Contusion - 2 cm X 2 cm, at vertex (Top of scalp).

(4) Contusion - Swelling - 4 cm X 4 cm, over occipital region.

(5) Contusion - 5 cm X 4 cm, over right cheek.

(6) Contusion - 3 cm X 3 cm, over left cheek."

6. In the opinion of the doctor, death was caused by reason of shock due to injuries on vital parts (Head Injury).

7. After completing the investigation, charge-sheet (Ext. ka-12) against the accused appellant was filed. Concerned Magistrate took the cognizance and the case, being exclusively triable by Sessions Court, was committed to the Court of Sessions.

8. Accused appeared before the trial court and charge under Section 304 IPC was framed against him. Appellant denied the charge and claimed his trial.

9. Trial proceeded and to bring home the charge against the accused / appellant, prosecution has examined in all five witnesses, who are as follows:

1	Gore Lal	PW-1 (informant)
2	Smt. Anita	PW-2 (mother of the deceased)
3	Head Constable Ram Autar	PW-3 (scribe of G.D.)
4	Dr. Sanjiv Kumar	PW-4 (who performed the autopsy of the deceased)
5	Adhya Prasad Verma	PW-5 (Investigating Officer)

10. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1	Written report	Ext. A-1
2	Death information G.D.	Ext. A-2
3	Registration G.D.	Ext. A-3
4	Post mortem report	Ext. A-4
5	Inquest Report	Ext. A-5
6	Letter to C.M.O.	Ext. A-6
7	Challan Nash	Ext. A-7
8	Letter to C.M.O.	Ext. A-8
9	Letter to R.I.	Ext. A-9
10	Photo Nash	Ext. A-10
11	Site plan	Ext. A-11
12	Charge sheet	Ext. A-12

11. After conclusion of evidence, statement of accused appellant was recorded under Section 313 CrPC, wherein he pleaded *inter alia* his false implication, as his relations with his wife and in-laws were not cordial. He further stated that while he was climbing stairs with her daughter, she tripped and sustained injuries.

12. In support of its case, defence has examined DW-1 Ravindra and DW-2 Shivnath Pal. However, no documentary evidence was produced.

13. PW-1 and PW-2 are the witnesses of fact.

14. P.W-1, namely, Gore Lal in his oral testimony has stated that her sister was married with the appellant (Vipin @ Puttan Yadav), resident of village Chiraura, Police Station Akbarpur, District Kanpur Dehat. Deceased was his niece (Bhanji). On 29.10.2012, telephonic information was received from the in-laws of her sister that his brother-in-law Vipin @ Puttan after beating his niece, hospitalized her at Kabir Hospital, Yashoda Nagar, Kanpur Nagar. When the informant reached the hospital, he found her niece dead. Thereafter, he came to police chauki Raniya alongwith the dead body of his niece to lodge F.I.R.. He has further stated that the relations between his sister and brother-in-law were not cordial and he used to beat her.

15. P.W.-2 Anita, is the wife of the appellant. She has stated that she was married with the appellant eight years ago. Three children were born-out from their wedlock, but two had expired. Laxmi was aged about 2 years. On the road situated in front of her house, she (deceased) started pooping. Angered with this, appellant rushed towards the house of his brother, scolding and dragging her. She also followed him. In the house of his brother, he slammed her to the ground due to which her head banged against the wall. Thereafter, she along with her father-in-law and cousin of appellant, proceeded to Kabir Hospital for treatment, where her daughter succumbed to her injuries.

16. PW-3 to PW-5 are the formal witnesses.

17. PW-3 - Constable Ram Autar, is scribe of F.I.R., who has proved Death Information Report Ext. ka-2 and registration of G.D. Ext. ka-3.

18. PW-4 Dr. Sanjiv Kumar, has performed the autopsy of the deceased and prepared the Autopsy Report Ext. ka-4.

19. PW-5 Sub-Inspector Adhya Prasad Verma, is the Investigating Officer of the case, who has proved the proceeding of investigation in his testimony and also the inquest and various papers relating to post mortem as Ext. ka-5 to Ext. ka-10. Site plan Ext. ka-11 and charge sheet Ext. ka-12 were also proved by PW-5.

20. On the basis of aforesaid oral and documentary evidence, learned trial court recorded the conviction of the accused and sentenced him, as mentioned herein-above.

21. Heard Shri Sudhakar Yadav, learned counsel for the appellant and Shri Nitin Kesarwani, learned AGA and Ms. Mayuri Mehrotra for the State.

22. The impugned judgment and order has been assailed on various grounds by the learned counsel for the appellant. It has been argued that the appellant being the real father of the deceased, had no motive, at all, to do away with the deceased. There is no independent eye witness of the occurrence and the appellant has been falsely implicated in this matter, as he had strained relations with his wife Anita and her brother, the informant. It was just an accidental death and the appellant had no role in commission of crime. It has also been submitted that the wife of the

appellant was insisting to live with her parents and also asked the appellant to live with her in her parents' house after selling the fields, but the appellant had denied. It is further submitted that the medical evidence does not support the prosecution version and the investigation is faulty.

23. On the aforesaid grounds, prayer for setting aside the impugned judgment and order has been made by allowing the present appeal.

24. Per contra, the learned AGA has vehemently opposed the appeal and submitted that the impugned judgment is based on cogent and reliable evidence and there is no infirmity in the same. It is a case of eye witness account and the deposition of eye-witness / PW-2 is reliable and finds corroboration from the medical evidence. There was no possibility of false implication of accused appellant and no material omission or irregularity is found in the investigation of the case. On the basis of aforesaid grounds, it has been prayed that the appeal is devoid of merits and is liable to be dismissed.

25. In light of the rival contentions of both the sides, we have gone through the entire oral and documentary evidence on record.

26. The medical evidence is a crucial and significant piece of evidence which, if corroborates the prosecution version, and eye-witness account, the prosecution would certainly succeed in proving its case.

27. This theory leads us to sift the medical evidence on record in light of the oral ocular evidence.

28. PW-4 - Dr. Sanjeev Kumar, has performed the autopsy of the deceased, who was a small girl aged about two years only. The ante mortem injuries found at the time of post mortem were abrasion and contusion, as deposed by PW-4. It is important to note that the doctor - PW-4, who has proved the autopsy report Ext. ka-4, has found clotted blood in scalp beneath the injuries described externally and fracture of both parietal bones with suture loosening under vertex was also found and clotted blood was also found present under meninges and meningeal space. The immediate cause of death was shock due to the injuries on vital parts i.e. the head injury which was sufficient to cause death. The injuries of abrasion and contusion were also found in the area of forehead scalp and cheek. Now if we pay attention to the prosecution version, as also explained by PW-2 in her deposition, deceased was firstly dragged by the accused and slammed to the ground as a result of which, her head banged against wall and fatal injury was caused to her, we have no hesitation to hold that the injuries found on the body of the deceased by the doctor would have been caused in the same manner as deposed by PW-2.

29. The analysis of medical evidence takes us through the inquest report, which has been proved by the PW-5 as Ext. ka-5 wherein the panchas have also opined that the death of the deceased Laxmi seems to be a result of assault. It is also to be noted that in the inquest report itself, the injuries found on the body of the deceased have been mentioned. The occurrence is said to be committed on 29.10.2012, as stated by the PW-1, the inquest report has been prepared on 30.10.2012 and the autopsy was also performed on 30.10.2012 itself. We are of the considered view that the injuries caused to the poor child were sufficient in the ordinary course of business to cause her death and the prosecution story

as such is fully corroborated by the medical evidence.

30. It has been further submitted by the learned counsel for the appellant that the ocular testimony of PW-2 only, the wife of the appellant, is available on record, who had strained relations with her husband, the appellant. It is argued that it is a case of false implication and whole testimony of PW-2 is concocted and fabricated. To give force to his contention, learned counsel for the appellant has also impressed upon the defence evidence which, according to him, bears the true story of the incident.

31. The aforesaid argument of learned counsel for the appellant takes us through the evidence rendered by the accused and other evidence available on record.

32. DW-1 Ravindra, is said to be the neighbour and brother of the appellant. He has deposed that the deceased was his niece and at the time of occurrence, Anita, the wife of the accused appellant, was present in his house. When they heard the shrieks of Laxmi, they ran towards the house of accused and found that when the appellant was climbing the stairs alongwith his daughter, suddenly she slipped and sustained injuries. She was taken to Kabir Hospital but during treatment she died. He has also explained that the wife of the appellant was willing to live with her parents and to sell out the land of the accused but when he was not ready to do so, he was falsely implicated in this case. In his cross-examination, DW-1 has stated that when he reached the spot, Laxmi was already injured and she had got injuries over her head, cheek and scalp. The aforesaid statement of DW-1 is sufficient to show that he was not present on the spot at the time of occurrence and when he reached the spot, occurrence had already happened. Hence, he is not the eye-witness to the incident.

33. DW-2 Shivnath Pal is the neighbour of accused appellant. He has stated that on 20.10.2012 at about 3.30 p.m. he had seen that Puttan Yadav was climbing over his roof through wooden ladder alongwith his daughter Laxmi and suddenly she tripped and sustained injuries. He ran to the spot and meanwhile Puttan's brother Ravindra, his wife, wife of Puttan and other villagers also reached there and Laxmi was taken to the hospital. In his cross-examination, DW-2 has stated that his house is situated only at the distance of 10 steps from the house of the accused appellant.

34. With a view to properly scrutinize and analyze the evidence on record, we have gone through the site plan Ext. ka-11 proved by PW-5, which contains the clear topography of the place of occurrence. A perusal of site plan Ext. ka-11 shows that no-where any house of Shivnath Pal DW-2 near the place of occurrence has been shown therein, which is a proof of the fact that DW-2, the so-called eye witness, adduced by the defence, was not the neighbour of the convict and was not an eye-witness to the occurrence, as well.

35. The deposition of DW-1 also reflects that the place of occurrence was the house of the convict, whereas in the site plan Ext. ka-11 the place of occurrence has been shown at the house of DW-1 / Ravindra itself. PW-2 / Anita also does not make any statement in consonance with DW-1 as she states in very clear terms that the accused dragged the child from the road to the house of his brother Ravindra and

there the incident happened. In her cross-examination, she has explained that the accused had slammed her daughter outside the house of Ravindra on the ground. She has admitted this fact that, at that time, she was present in the house of her brother-in-law (Jeth) Ravindra but her deposition is specific on this point that the occurrence happened at the house of Ravindra and not inside the house of accused-appellant himself. PW-2 has made some reliable statements also. Significantly she has clarified that there is no ladder to go to the roof in the house of Ravindra and even in the house of her in-laws. This statement is corroborated from the site plan Ext. ka-11 as well. From a careful perusal of the Ext. ka-11, we find that no ladder has been shown in the house of DW-2 Ravindra and that of the convict - appellant himself.

36. It is noteworthy that the Investigating Officer / PW-5 has not been confronted by the defence side in respect of non-mentioning the ladder in the house of the accused. PW-5 has made a specific statement that the place of occurrence is the house of Ravindra and the field of Subedar exists in between the house of the appellant and that of Ravindra. The site plan has been prepared on the pointing out of Anita Devi - PW-2, who is the mother of the deceased.

37. On the basis of aforesaid discussions, the story that the incident occurred in the house of appellant himself at the time when he was climbing the stairs alongwith his daughter, the deceased, as put forth by the defence, comes to an end and was rightly rejected by the learned trial Court.

38. It has been further argued by learned counsel for the appellant that there is no independent witness to the occurrence. PW-2 / Anita is the mother of the deceased and is an interested witness. It is further argued that death of the deceased has been caused in a residential area but no person of the said vicinity has come out to depose in favour of the prosecution and the sole evidence of PW-2 is available on record.

39. To meet out this contention made by the learned counsel for the appellant, we have to sift the deposition of PW-2. PW-2, in her examination-in-chief, states in clear terms that when the appellant slammed the deceased, she made shouts but no one came there upon her shrieks. It is important to mention that no cross-examination has been made by the defence side over this point from the PW-2. Now the question arises before us whether non-examination of other witnesses, except the sole eye witness, by the prosecution, vitiates the prosecution story. This issue needs to be examined in light of the legal position and evidence available on record. We find, on the basis of testimony of PW-2, that no person of the vicinity came to the place of occurrence, except her.

40. We have to keep in mind that it is an established principle of law that to prove a given fact, particular number of witnesses need not be examined. In Section 134 of the Indian Evidence Act it has been provided that "No particular number of witnesses shall in any case be required for the proof of any fact." Reference can be placed on the decision of the Hon'ble Apex Court in **Raj Narain Singh Vs. State of U.P. 2010 AIR SCW 521,** wherein it has been held that it is not necessary that all those persons, who were present at spot, must be examined. It is quality of evidence which is required to be taken note of by the Courts and not the quantity. It is transpired

from the close scrutiny of entire testimony of PW-2 that her evidence is quite innocent and trustworthy and she is wholly reliable witness. Her deposition in its continuity is quite instinctive and bears no contradiction in material particulars such as to the manner of assault, place of occurrence, author of crime and all other related factors. Her presence over the place of occurrence at the time of incident is quite natural, as she was sitting in the house of Ravindra, the real brother of the appellant, nearby her own house, where the incident occurred. It is very significant to note that PW-2, in the concluding part of her cross-examination, has stated that appellant had also killed her first daughter by pouring hot water upon her, however, she did not make any complaint to anyone regarding the same. Besides it, we cannot ignore the fact that PW-2, despite being the mother of the poor deceased, is the wife of the appellant also. She had got no occasion to falsely implicate her own husband for the murder of her daughter. Though a plea has been taken by the defence that PW-2 was insisting upon her husband to sell the agricultural field and to live with her in her parental house, yet we do not find any reliable evidence to this effect on record. Even DW-1 Ravindra, real brother of the appellant, states that Anita / PW-2 returned back to her matrimonial home from her parents' house two months before the occurrence alongwith the deceased child and from that day till the fateful day, no quarrel took place between the appellant and PW-2 / Anita. This statement also rules out any possibility of false implication of the appellant by the informant side.

41. We note that PW-1 is not the witness of fact prevailing in the present case. Admittedly, he was not present at the time of occurrence and he reached the hospital after receiving the information of death of her niece. He is the brother of PW-2 and proves the written report Ext. ka-1 in his deposition and also states that the written report is based upon the information given by Anita to him. He also states that the behaviour of the appellant was not good to his sister and he used to beat her. PW-2 has denied the fact that she ever insisted upon her husband to live separately with her at Kanpur City.

42. After carefully scrutinising and analysing the evidence of PW-2, we find no inconsistent statement or embellishment in her testimony. Her deposition is free from all infirmities and she is proved to be a reliable and natural witness and conviction can safely be recorded on the basis of statement of such witness, though she is the sole witness of the occurrence.

43. The Hon'ble Supreme Court in **Kusti Mallaiah Vs. State of Andhra Pradesh (2013) 12 Supreme Court Cases 680** has laid down as follows:

"23. It has been held in catena of decisions of this Court that there is no legal hurdle in convicting a person on the sole testimony of a single witness if his version is clear and reliable, for the principle is that the evidence has to be weighed and not counted. In ***Vadivelu Thevar v. The State of Madras AIR 1957 SC 614,*** *it has been held that if the testimony of a singular witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof. In the said pronouncement it has been further ruled that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court*

may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. Similar view has been expressed in ***Lallu Manjhi and another v. State of Jharkhand (2003) 2 SCC 401, Prithipal Singh and others v. State of Punjab and another (2012) 1 SCC 10 and Jhapsa Kabari and others v. State of Bihar (2001) 10 SCC 94.***

44. The same view has been reiterated in **Amar Singh Vs. State (NCT of Delhi) (2020) 19 Supreme Court Cases 165** wherein it has been held as follows:

....As a general rule the Court can and may act on the testimony of single eye witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony Courts will insist on corroboration. It is not the number, the quantity but quality that is material. The time honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise (see ***Sunil Kumar V/s State (NCT of Delhi) (2003) 11 SCC 367).***

45. Upon the analysis of evidence of PW-2, we find that her evidence is cogent and trustworthy and further gets corroboration from the medical evidence. Her testimony leads us to the conclusion that PW-2 is a reliable and natural witness and minor discrepancies, if any, found in her evidence are ignorable.

46. In **Ashok Kumar Chaudhary. Vs. State of Bihar 2008 (61), ACC 972 (SC)** it has been categorically held that if the testimony of an eyewitness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected because certain insignificant, normal or natural contradictions have been appeared into his testimony. If the inconsistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are only normal and not material, in nature, then the testimony of an eyewitness has to be accepted and acted upon. Distinctions between normal discrepancies and material discrepancies are that while normal discrepancies do not corrode the credibility of a party's that the case, material discrepancies do so.

47. The evidence of PW-2 has also been assailed on the ground that she is the real mother of the deceased and as such, she is an interested witness and her evidence cannot be accepted as a gospel truth.

48. So far as the submission of PW-2 being an interested and relative witness is concerned, in this context the Hon'ble Apex Court in **Bhagwan Jagannath Markad Vs. State of Maharastra (2016) 10 SCC** 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 the testimony of such related witness.

49. The investigation of the case has also been assailed by learned counsel for the appellant, who vehemently submits that the investigation is faulty and there are several discrepancies in the investigation. However, from a perusal of the record, it is apparent that the present is a case based on eye-witness account and the eye-witness / PW-2 has given a cogent and reliable description of the incident. Her statement finds full corroboration from the medical evidence. The Investigating Officer has found the place of occurrence the same as has been narrated by PW-2. We find no material irregularity or omission / negligence in the investigation of the case. Moreover, since the prosecution case is well established and proved by ocular evidence supported with medical evidence, negligence or omission, if any, on the part of the Investigating Officer, does not adversely affect the prosecution version at all.

50. In **Hema Vs. State, (2013) 81 ACC 1 (Supreme Court),** it has been held by the Hon'ble Apex Court that any irregularity or deficiency in investigation by Investigating Officer need not necessarily lead to rejection of the case of prosecution when it is otherwise proved. The only requirement is use of extra caution in evaluation of evidence. A defective investigation cannot be fatal to prosecution when ocular testimony is found credible and cogent.

51. It may be reiterated, at the cost of repetition, that the investigation in the present case does not suffer from any material irregularity. At the same time, F.I.R. and registration of G.D. has been proved by PW-3, whereas PW-1 proves the written report. Inquest report and relevant papers relating to autopsy have been properly proved by PW-5.

52. Considering the oral evidence of the witnesses, the documentary evidence 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, as concluded by the trial court after meticulous analysis of the evidence on record. We concur with the same and, accordingly, confirm the conviction of the appellant under Section 304 (Part-I) IPC.

53. Learned counsel for the appellant, in the course of his argument, has further requested that the sentence recorded by the learned trial court is too severe and harsh and submits that the convict / appellant had no intention to do away with the deceased. He was the real father of the deceased and had no motive to kill her own daughter and in a spur of moment, the occurrence happened. He was a young man at the time of incident and has already spent more than ten years of incarceration and must be a repenting man.

54. Now it takes us to the quantum of sentence, specifically under Section 304 (Part-I) IPC, where life imprisonment has been awarded by learned trial court. For awarding the sentence, we have to keep in mind the theories of punishment in our country.

55. Discouraging the retributive theory, the reformative theory of the sentence has been impressed upon by the Hon'ble Apex Court ***in Mohd. Giasuddin***

Vs. State of AP, AIR 1977 SC 1926. It has been observed by the Hon'ble 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."

56. On the other hand, in ***Deo Narain Mandal Vs. State of UP, (2004) 7 SCC 257,*** it was observed that while determining the quantum of sentence, the Court should bear in mind the 'principle of proportionality'.

57. If we translate the legal theories rendered by the Hon'ble Apex Court in various judgments, such as, ***Ravada Sasikala vs. State of A.P., AIR 2017 SC 1166, Jameel vs State of UP, (2010) 12 SCC 532, Guru Basavraj vs. State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, State of Punjab vs. Bawa Singh, (2015) 3 SCC 441, Raj Bala vs. State of Haryana, (2016) 1 SCC 463, Sham Sunder vs. Puran (1990) 4 SCC 731, M.P. vs. Saleem, (2005) 5 SCC 554*** and ***Ravji vs. State of Rajasthan, (1996) 2 SCC 175,*** the settled legal position, which emerges out before us, is that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of the offence and the manner in which it was executed or committed. It is the obligation of the Court to constantly remind itself that the right of the victim, and be it said, on certain occasions the person aggrieved as well as the society at large can be victims, never be marginalised. The measure of punishment should be proportionate to the gravity of the offence. Object of sentencing should be to protect society and to deter the criminal in achieving the avowed object of law. Further, it is expected that the Courts would operate the sentencing system, so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. The Court will be failing in its duty, if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant, but it should conform to and be consistent with the atrocity and brutality in which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'.

58. In view of the above propositions of law, the paramount principle that should be the guiding laser beam is that the

punishment should be proportionate to the gravity of the offence.

59. The Apex Court in the case of ***G. V. Siddaramesh Versus of State of Karnataka, 2010 (87) AIC 43 (SC),*** where appeal was filed by convict husband in a dowry death case, while deciding the appeal of the appellant, modified the sentence. Paragraph 31 of the said judgment is reproduced below:

"31. In conclusion, we are satisfied that in the facts and circumstances of the case, the appellant was rightly convicted under Section 304-B I. P. C. However, his sentence of life imprisonment imposed by the Courts below appears to us to be excessive. The appellant is a young man and has already undergone 6 years of imprisonment after being convicted by the Additional Sessions Judge and the High Court. We are of the view, in the facts and circumstances of the case, that a sentence of 10 years' rigorous imprisonment would meet the ends of justice. We accordingly, while confirming the conviction of the appellant under Section 304-B, I. P. C., reduce the sentence of imprisonment for life to 10 years' rigorous imprisonment. The other conviction and sentence passed against the appellant are confirmed."

60. Applying the principles laid down by the Apex Court in the aforesaid judgements and having regard to the totality of the facts and circumstances of the case, particularly, the fact that no minimum sentence has been provided for the offence under Section 304 IPC, it appears to us from a perusal of the 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. Adopting the same reformative approach, we consider that no accused person is incapable of being reformed and, therefore, all measures should be applied in order to bring them in the social stream.

61. Keeping in view the reformative theory of punishment and "doctrine of proportionality", it appears to us that the sentence of life imprisonment awarded under Section 304 (Part-I) IPC by learned trial Court to the appellant is too harsh and severe. The appellant is in jail since 12.11.2012 i.e. for the last more than ten years. This fact is also admitted by learned AGA.

62. Hence, we are of the considered view that since the appellant has already served-out more than ten years jail sentence, the sentence of life imprisonment under Section 304 (Part-I) IPC is converted into the sentence already undergone, which would meet the ends of justice.

63. The appeal is, accordingly, **partly allowed**, subject to the above modification of sentence.

64. Registry is directed to transmit the record to the Court below for necessary compliance.

(2023) 2 ILRA 771
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.12.2022

BEFORE

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

Criminal Appeal No. 1213 of 2020

Mithlesh ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

Sri Suraj Kumar Singh, Sri Arvind Kumar Singh, Sri Noor Mohammad, Sri Sunil Kumar Srivastava

Counsel for the Opposite Party:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 32- No tutoring in the whole process of recording of dying declaration and Ex.Ka-13 is a genuine and innocent statement. P.W.10 R.K. Singh, Tehsildar/ Executive Magistrate is a responsible officer and not a interested witness -No material circumstance is found from the analysis of the evidence on record to establish that the Tehsildar had any orientation against the accused.

The dying declaration cannot be said to be tutored where the Magistrate has recorded it in a proper manner and the court finds the same to be natural and truthful.

Criminal Law- Indian Evidence Act, 1872- Section 32-Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable- In case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. The reliability of dying declaration in absence of doctor's certification is not fatal if person recording it was satisfied that the deceased was in a fit state of mind.

Settled law that conviction can solely be based ,without any further corroboration and despite the absence of a doctor's certificate, upon a dying declaration where the same is found to be natural, credible and trustworthy.

Criminal Law- Indian Penal Code, 1860- Sections 300, 302 &304 -The offence would be one punishable under Section 304 part-I of the IPC-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- The role of the appellant that is clear from the dying declaration and other records and we also keep in mind that the deceased had survived for 5 days after the occurrence and ultimately died of septicaemia- The conviction of the appellant under Section 302 I.P.C. is required to be converted to that under Section 304 Par I of I.P.C.

Where the accused had committed the offence without pre-meditation or prior intention and the deceased had expired after several days due to septicaemia, then instead of the offence of murder, the accused would be liable to be convicted for the offence of culpable homicide not amounting to murder punishable under section 304 Part- I of the IPC. (Para 37, 39, 47 51, 56)

Criminal Appeal partly allowed. (E-3)

Case Law/ Judgements relied upon:-

1. St. Vs Veer Pal & ors. (2022) 2 SCC (Crl) 224

2. Lakhan Vs St. of M.P ,(2010) 8 SCC 514

3. Krishan Vs St. of Har. (2013) 3 SCC 280

4. Gulzari Lal Vs St. of Har. (2016) 4 SCC 583

5. Sher Singh Vs St. of Punj. (2008) 4 SCC 265

6. Sudhakar Vs St. of M.P. (2012) 7 SCC 569

7. B. Sanghikala Vs St. of A.P, 2005 SCC (Crl) 171

8. Tukaram & ors. Vs St. of Maha. (2011) 4 SCC 250

9. B.N. Kavatakar & anr. Vs St. of Kar. 1994 SUPP (1) SCC 304

10. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300

11. St. of U.P Vs Mohd. Iqram & anr, (2011) 8 SCC 80

12. Bengai Mandal @ Begai Mandal Vs St. of Bih. (2010) 2 SCC 91

13. Maniben Vs St. of Guj.(2009) 8 SCC 796

14. Pawan Kumar Vs St. of U.K. (2021) 11 SCC 53

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

1. The Court of Additional Sessions Judge, Court No.3, Saharanpur recorded conviction of the present appellant Mithlesh under Section 302 I.P.C. in Sessions Trial No. 520 of 2015 (State Vs. Mithlesh) arising out of Case Crime No. 38/2015, P.S.- Titro, District- Saharanpur and sentenced her for life imprisonment and fine to a tune of Rs.20,000/- and to undergo 6 months additional simple imprisonment in case of default of payment of fine, hence this appeal.

2. The prosecution case as culled out from the FIR is that the informant and the accused had some land dispute. On 9.4.2015 Devendra, son of informant cut down some trees from that land and a complaint was made by the accused in the police station. When the Devendra aforesaid was going to the police station, accused Smt. Mithlesh who was standing outside the police station, with intention to kill, set ablaze Devendra by pouring petrol over him. The occurrence was witnessed by the informant, his son Ravindra and Ranpal son of Mehar Chand. Injured was taken for treatment and written report Ex.Ka-1 was given to the police station on the basis of which chick FIR Ex.Ka-2 under Section 307 I.P.C. was lodged and entry was made in the relevant G.D. Ex.Ka-3. The injured was referred to District Hospital, Saharanpur and subsequently to the higher centre. He was admitted in Safdarjang Hospital, Delhi on 10.04.2015 where during treatment he succumbed to the injuries on 14.4.2015. At District Hospital Saharanpur injured Devendra was medically examined by Dr. Pravin Kumar, who found superficial deep burn over the body except both elbow, waist and scalp. It was found by the doctor that the injuries might have been caused by setting ablaze with aid of petrol or kerosene oil and Medico Legal Report Ex.Ka-11 was prepared. When the injured was brought to Safdarjang Hospital, Delhi, he was medically examined by Dr. Akshat Vahan, who found 85% burn injuries over his body and he was admitted into I.C.U and Medico Legal Report Ex.Ka-5 was prepared.

3. After the death of the deceased the case was converted into Section 302 I.P.C. and his autopsy was performed by Dr. Mukesh Kumar Bansal who found as herein under:

"EXTERNAL EXAMINATION (Injuries etc):

Infected epidermal to dermal thermal burn injuries present all over the body except lower part of abdomen, back of right forearm and right hand, both palms, both sole. Skin Peeled off at places revealing yellowish green foul smelling pus covering necrotic base. Blackening of skin present at places. Singeing of hair present at places. Total area of burn is approximately 85% of total body surface area".

4. It was opined by doctor that death was due to septicaemic shock as a result of

infected ante mortem flame thermal burn injuries involving about 85% of total body surface area and accordingly, autopsy report Ex.Ka-12 was prepared. The Investigation of the case was conducted firstly by Sri Viresh Pal Giri, who recorded the statement of witnesses and after inspection of the spot site plan Ex.Ka-9 was also prepared by him and semi burn clothing, plain soil and stony part of road was also seized and memo Ex.Ka-10 was prepared. The I.O. also recorded statement of injured Devendra, whose fitness to give statement was certified by Dr. Sarseej Sharma through fitness certificate Ex.Ka-4. However, after alteration of the case under Section 302 I.P.C. investigation was taken by S.H.O. Kapil Gautam, who performed the rest proceedings of the investigation and after finding sufficient evidence charge sheet under Section 302 I.P.C. Ex.Ka-8 was submitted to the Court. However, on 14.04.2015 the dying declaration of aforesaid Devendra was recorded by Shri R.K. Singh, Tehsildar, who prepared dying declaration Ex.Ka-13, which was recorded at Safdarjang Hospital, Delhi. The accused appeared before the Court and the case being exclusively triable by the Sessions Court was committed to the Court of Session. Charge under Section 302 I.P.C. was framed against the accused to which he pleaded not guilty and claimed to be tried.

5. The prosecution in order to prove its case relied upon oral and documentary evidence.

6. In oral evidence as many as 11 witnesses have been examined, who are as follows:

1	Vijay Pal, informant, father of the deceased	PW1
2	Ravindra, eye-witness	PW2
3	HCP Ghaseetu, scribe of the FIR	PW3
4	Dr. Anwar Ansari, medical examination of injured at CHC, Gangoh, Saharanpur	PW4
5	Dr. Akshat Vahan, witness of Medico Legal Report, death summery and death report	PW5
6	Inspector Kapil Gautam, second I.O	PW6
7	S.I. Viresh Pal Giri, first I.O	PW7
8	Dr. Pravin Kumar, witness of medical examination	PW8
9	Dr. Mukesh Kumar Bansal, witness of the autopsy report	PW9
10	R.K. Singh, Tehsildar, witness of the dying declaration	PW10
11	Dr. Sarseej Sharma, witness of fitness certificate of injured Devendra	PW11

7. To support the oral the oral evidence following documentary evidence has been filed by the prosecution:

1	Written Report	Ex.Ka-1
2	Chik FIR	Ex.Ka-2
3	Registration G.D.	Ex.Ka-3
4	Emergency Register at CHC Gangoh	Ex.Ka-4
5	Medical Report of Safdarjang Hospital, Delhi	Ex.Ka-5
6	Death Summery	Ex.Ka-6
7	Death Report	Ex.Ka-7
8	Charge Sheet	Ex.Ka-8

9	Site Plan	Ex.Ka-9
10	Memo of Recovery	Ex.Ka-10
11	Medical Report of District Hospital, Saharnpur	Ex.Ka-11
12	Autopsy Report	Ex.Ka-12
13	Dying Declaration	Ex.Ka-13
14	FSL report	Paper No.86-Ka

8. After the evidence was over, the incriminating circumstances and evidence were put to the accused, who claimed the whole evidence to be false and took defence of false implication due to enmity in respect of some land dispute. Claiming his innocence, the accused also examined D.W.1 Billu and D.W.2 Nafee Singh.

9. P.W.1 Vijay Pal is the informant and father of the deceased Devendra Singh, who in his statement corroborated the prosecution version and has stated that at the time of occurrence, the accused was standing in front of the gate of the police station and threw petrol or kerosene oil or any flammable article over Devendra and set him ablaze by match stick. The incident was witnessed by his brother Pala Ram and Madan also, who came on the spot along with him. His son was taken to Gangoh Hospital and then to District Hospital, Saharanpur from where he was referred to Delhi, where he died on 14.04.2015. He has proved written report Ex.Ka-1 and has also stated that a civil litigation had been pending between the parties since 1992. However, there occured some contradictions between his statement before the Court and that of given to the I.O but the contradictions are not material and does not hit at the very root of the prosecution case. The contradictions, as we note, are minor and ignorable, as such.

10. P.W.2 Ravindra is said to be the eye-witness of the occurrence, who has deposed that he had not seen the accused pouring any inflammable article over the body of Devendra but had seen her setting ablaze him. The factum of enmity in respect of some land dispute between the parties has also been affirmed by this witness. The deposition of this witness is clearly natural and trustworthy and no material contradictions is found in his deposition.

11. P.W.3 HCP Ghaseetu has proved chick FIR Ex.Ka-2 and case registration G.D. Ex.Ka-3 and has stated that the FIR was lodged on the basis of the written report given by the informant Vijaypal.

12. P.W.4 Dr. Anwar Ansari has examined the injured Devendra at C.H.C. Gangooh, however, according to this witness after giving first aid to the injured, he referred him to S.B.D. Hospital, Saharanpur. He has proved emergency register Ex.Ka-4.

13. P.W.5 Dr. Akshat Vahan had stated that he had admitted the injured in the hospital, who was 85% burned at that time. He was admitted in I.C.U. where during treatment he died on 14.04.2015. This witness has proved the Medico Legal Report, death summary and death report of Devendra as Ex.Ka-5, Ex.Ka-6 and Ex.Ka-7 respectively.

14. P.W.6 S.H.O. Kapil Gautam is the second I.O of the case, after its alteration into Section 302 I.P.C. He has proved the proceedings of investigation and also charge sheet Ex.Ka-8.

15. P.W.7 S.I. Vireshpal Giri, the first I.O. has proved the proceeding of the investigation, site plan Ex.Ka-9 and seizure memo Ex.Ka-10. He has also stated that he had taken statement of injured Devendra at Safdarjang Hospital, Delhi on 13.4.2015.

16. P.W.8 Dr. Pravin Kumar has stated that he had medically examined Devendra at S.B.D. Hospital, Saharanpur. Medico Legal Report Ex.Ka-11 has been proved by this witness and he had found it a burn case.

17. P.W.9 Dr. Mukesh Kumar, who performed autopsy of the deceased and post mortem report Ex.Ka-12 has been proved by this witness.

18. P.W.10 R.K. Singh, Tehsildar has stated in his deposition that on 14.04.2015 on the instructions of S.D.M., he recorded the dying declaration and proved the same as Ex.Ka-13.

19. P.W.11 Dr. Sarseej Sharma has proved this fact that when the statement of injured was recorded by the I.O. Viresh Pal Giri on 13.04.2015, he had given fitness certificate for the condition of the injured, which he has proved as Ex.Ka-14.

20. Two defence witnesses have also been examined by the accused. D.W.1, Billo has proved this fact that his shop is situated near police station Gangooh. On the date of occurrence, he had seen Devendra entering into the police station and after one or two minutes he came out, he was ablaze and fell down before his shop.

21. D.W.2 Nafee Singh has proved CD Material Ex.Ka-1 and has stated before the Court that he has visualized the CD wherein Devendra was speaking that he himself set him ablaze.

22. On the basis of the aforesaid evidence and facts and circumstances of the case and also after hearing the rival submissions of both the sides, learned trial Court recorded the conviction under Section 302 I.P.C. and sentenced him accordingly.

23. Learned counsel for the appellant has submitted that the allegations against the appellant are totally false and there is no cogent and reliable evidence to support the charge levelled against the appellant. None of the witnesses of fact are reliable and the dying declaration does not inspire confidence. The investigation is faulty and from the evidence on record the case of false implication emerges out.

24. Per contra, learned A.G.A. has contended that the present case rests upon the eye-witness account. P.W.1 and P.W.2, who are the eye-witnesses are reliable and natural witnesses. The prosecution case is supported by the medical evidence as well. There is no material irregularity or lacuna in the investigation of the case. On the basis of the eye-witness account, no possibility of false implication of the accused is found. On the aforesaid grounds, the dismissal of this appeal has been prayed for.

25. From perusal of the entire evidence, at the very outset, we find that the lady, who is the appellant was well aware of the fact that the parties were called before the police but her presence over there with a cane of kerosene itself shows her animus towards the deceased. She is alleged to have been poured the kerosene over the deceased and this fact is

fully established by the ocular evidence of P.W.1 and P.W.2 and analysis of the depositions of both the witnesses take us to this logical conclusion that it was the accused, and accused only, who set ablaze the deceased by pouring kerosene oil upon him.

26. We find that the evidence of P.W.1 and P.W.2 coupled with the dying declaration Ex.ka13 would go to show that it was nothing else but a homicidal death corroborated by the autopsy report and also by the medical report available on record.

27. The veracity of the dying declaration has been assailed by the learned counsel for the appellant but we cannot ignore this fact that the dying declaration was recorded by Tehsildar/ Executive Magistrate P.W.10, who has categorically stated that at the time of giving the statement Devendra was conscious and was in a condition to give statement. A perusal of the dying declaration Ex.Ka-13 shows that at the end of the statement it has been signed and dated by the giver. Shri R.K. Singh, Tehsildar/ Executive Magistrate has also put his signature at the end of the statement along with the date and time Ex.Ka.13 also bears the seal of Shri R.K. Singh, which is reproduced herein below:

बयान

बयान दर्ज किया मैं देवेन्द्र पुत्र श्री विजयपाल, गॉव तबर्रकपुर थाना तितरो जिला सहारनपुर उ0प्र0 का रहने वाला हूँ। मैं दिनांक 09.04.2015 को अपने खेत से सफेदा का पेड़ काटकर घर ला रहा था कि रास्ते में पुलिस ने रोक लिया और उसने कहा कि यह पेड़ किसी और का है जिसका नाम मिथलेश नाम एक औरत ही है। इसे थाने ले चलो। मैं टैक्टर को थाने ले जा रहे थे कि रास्ते में टेक्टर पलट गया और उसके बाद मैं गॉव के प्रधान के पास गया। उसने मुझे कोई सहायता करने से मना कर दिया फिर मैं थाना पहुँचा। वहॉ पर मिथलेश नाम की औरत बैठी थी। मैं पुलिस वालों से बात ही कर रहा था कि उस औरत ने मेरे ऊपर मिट्टी का तेल डाल दिया और माचीस की तिल्ली जला कर मुझे डराने लगी। इसी बीच उसके हाथ से जलती हुई तिल्ली छूट कर मेरे ऊपर आ गया। जिससे मैं जलने लगा। मुझे सामने चाय वाला श्री बिल्लू ने आग बुझाई और उसके बाद घर के लोगो ने गंगो अस्पताल पहुँचाया। इस घटना के समय वहॉ पर दो पुलिस वाले भी थे जिसको मैं सामने आने पर पहचान सकता हूँ। मैं यह बयान अपने होशो हवाश में दे रहा हूँ। यह बयान मैं सुन लिया और समझकर हस्ताक्षर कर रहा हूँ।

अटेस्टेड
अपठित हस्ताक्षर
14.04.2015
टाईम 12.30 से 1.05 ए0एम0
आर0के0सिंह0
तहसीलदार/एक्जीक्यूटिव मजिस्ट्रेट(बसंत बिहार)
न्यू देहली डिस्ट्रिक्ट

28. The whole prosecution story has been summed up in the aforesaid statement. The background of the incident and the author of the crime i.e. accused, the manner of crime and the place of occurrence including name of witnesses, all the relevant facts find place in the aforesaid statement Ex.Ka-13.

29. The learned counsel for the appellant has vehemently argued that the dying declaration in this case is not a valid piece of evidence. It has not been corroborated by any cogent evidence. On the other hand the learned AGA has relied upon the law laid down by the Hon'ble Apex Court in **State v. Veer Pal and Others (2022) 2 SCC (Criminal) 224** which is as under :-

16 Now, on the aspect, where in the absence of any corroborative evidence, there can be a conviction relying upon the dying declaration only is concerned, the decision of this Court in ***Munnu Raja (Munnu Raja vs. State of M.P., (1976) 3 scc 104: 1976 SCC (Cri) 376)*** *and the subsequent decision* ***in Paniben vs. State of Gujrat [Paniben v. State of Gujarat,***

(1992) 2 SCC 474: 1992, SCC (Cri) 403] *are required to be referred to. In the aforesaid decisions, it is specifically observed and held that there is neither a rule of law nor of prudence to the effect that a dying declaration cannot be acted upon without a corroboration. It is observed and held that if the Court is satisfied that the dying declaration is true and voluntary it can base its conviction on it, without corroboration. Similar view has also been expressed in* ***State of U.P. Vs. Ram Sagar Yadav [State of U.P. vs. Ram Sagar Yadav] (1985) 1 SCC 552; 1985 ACC (Cri) 127] and Ramawati Devi vs. State of Bihar. [Ramwati Devi vs. State of Bihar] (1983) 1 SCC 211: 1983 SCC (Cri) 169].*** *Therefore, there can be a conviction solely based upon the dying declaration without corroboration.*

30. From the statement of P.W.10 it is absolutely clear that there is no tutoring in the whole process of recording of dying declaration and Ex.Ka-13 is a genuine and innocent statement. P.W.10 R.K. Singh, Tehsildar/ Executive Magistrate is a responsible officer and not a interested witness. We note that no material circumstance is found from the analysis of the evidence on record to establish that the Tehsildar had any orientation against the accused, hence, question of doubt on declaration recorded by P.W.10 does not arrive at all.

31. Our attention is drawn towards one more ancillary fact that P.W.7, who is the first I.O. of the case has also recorded the statement of Devendra, then injured, at Safdarjang Hospital on 13.4.2015. At the time of recording of the evidence the patient was in a fit mental condition, a certificate of this effect was given by P.W.11 Dr. Sarseej Sharma, senior resident, department of burn and plastic surgery, Safdarjang, Hospital, New Delhi, which is proved by him as Ex.Ka-14.

32. A plea has been raised on behalf of the appellant that since two dying declarations are on record, the court must verify the veracity of such statements and also to find out as to which of the statement is reliable.

33. In the backdrop of this argument and after going through the statement of P.W.7, we find that what statement, the injured had given to P.W.7, is no where mentioned in the whole testimony of P.W.7. Moreover, the said statement was not put before P.W.7 and the extract of such statement has not been exhibited, meaning thereby the said dying declaration has not been proved as per law of Evidence. Hence we are not inclined to accept the statement of the injured Devendra recorded by P.W.7 as a dying declaration. It remains a simple statement recorded under Section 161 Cr.P.C. and no reliance can be placed upon this statement, however, as concluded earlier in this judgement dying declaration Ex.Ka-13 is a valid and reliable peace of evidence and we rely upon the same.

34. The trial Court has also relied upon the dying declaration Ex.Ka-13 and has analysed the surrounding evidence thoroughly. It was correctly opined by the learned trial Court that no certificate of doctor was required prior to rely upon such dying declaration.

35. Learned counsel for the appellant has argued that dying declaration is doubtful and not corroborated by witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying

declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble Apex Court has summarized the law regarding dying declaration in ***Lakhan vs. State of Madhya Pradesh*** [(2010) 8 Supreme Court Cases 514]. In this case, Hon'ble Apex Court held that "the doctrine of dying declaration is enshrined in the legal maxim *nemo moriturus praesumitur mentire*, which means, "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be direct, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases".

36. On reliability of dying declaration and acting on it without corroboration, Hon'ble Apex Court held in ***Krishan vs. State of Haryana [(2013) 3 Supreme Court Cases 280]*** that "it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration".

37. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble Apex Court in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

38. So as to the omission to take a certificate from a doctor regarding the fitness of the maker of the dying declaration by the Tehsildar/ Executive Magistrate in the present case is concerned, we take note of and follow the law laid down in ***Gulzari Lal Vs. State of Haryana (2016) 4 SCC 583*** wherein it has been held that a valid dying declaration may be made without obtaining a certificate of fitness of declarant by a medical officer. Likewise in

Sher Singh Vs. State of Punjab (2008) 4 SCC 265 it was held that the reliability of dying declaration in absence of doctor's certification is not fatal if person recording it was satisfied that the deceased was in a fit state of mind.

39. In the facts and circumstances of the present case, we can safely rely upon ***Sudhakar Vs. State of M.P. (2012) 7 SCC 569*** wherein it was clarified that " Dying declaration" is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations, courts attach intrinsic value of truthfulness to such statement- Once such statement has been made voluntarily, it is reliable and is not an attempt by deceased to cover up truth or falsely implicate a person, then courts can safely rely on such dying declaration and it can form the basis of conviction- More so, where version given by deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for courts to doubt truthfulness of such dying declaration.

40. Learned counsel for the appellant submitted that the medical evidence shows that the deceased died due to Septicaemic shock after about five days from the date of occurrence and, therefore, it cannot be said that the deceased was done to death and was murdered.

41. While replying to the submission of the learned counsel for the appellant that since the death was caused due to septicaemia and it took place after about five days from the date of occurrence, dying declaration is not reliable and inadmissible, the learned AGA has relied upon the case of ***B. Sanghikala v. State of Andhra Pradesh, 2005 SCC (Criminal) 171,*** wherein it has been held that there is no legal requirement that dying declaration could be admissible in evidence only when made under expectation of death.

42. All these facts coupled with the fact that we have hold that it was a homicidal death, we concur with the learned trial Court on the same aspect.

43. The evidence of D.W.1 and D.W.2 have been relied upon by the learned counsel for the appellant. D.W.1 has narrated that the deceased was set ablaze in the police station itself. In this regard the learned counsel for the appellant has drawn our attention to the statement of Dr. Akshat Vahan P.W.5 who has stated in his statement that the patient had told him that he was burn in the police station by the police.

44. So far as the statement of P.W.5 is concerned that it was a police officer who set the deceased ablaze, it does not find support from any other evidence on record, particularly from the ocular evidence, which is reliable and trustworthy. The learned trial Court has also discussed this issue in the impugned judgment and has found that the aforesaid statement of P.W.5 is not trustworthy in the facts and circumstances of this case and we agree with the same.

45. So far as the evidence of D.W.2 is concerned, the CD allegedly containing the video recording of the statement of the deceased Devendra has not been proved, according to law before the Court and this fact has also been highlighted by the learned trial Court, which accordingly did

not rely upon the aforesaid CD. We also find ourselves in full agreement with the learned trial Court, also keeping in view the provisions of Section 65A and 65B of the Evidence Act and find that the electronic evidence has not been proved in consonance with the aforesaid legal provisions.

46. So far as the deposition of D.W.1 is concerned, his deposition also does not inspire confidence specially in the light of the dying declaration Ex.Ka-13 and also in the light of the trustworthy and cogent ocular evidence. In the site plan Ex.Ka-9, the place of occurrence has been shown by letter "x" which situates outside the police station, which is the case of the prosecution. P.W.7 has proved this site plan in his evidence. Hence, the oral evidence adduced by the defence is not reliable.

47. From the upshot of the aforesaid discussion, we find that the finding of fact regarding the presence of witnesses, place of occurrence etc. cannot be faulted with the death of the deceased was a homicidal death, however, it appears that the death caused by the accused was not premeditated and he had no intention to cause death of the deceased and this fact takes this Court to the most vexed question where it would fall within the four corners of the murder or culpable homicide not amounting to murder, therefore, we are considering the question whether it would be a murder or culpable homicide not amounting to murder and punishable under Section 304 I.P.C.

48. While considering the conclusion arrived at by the learned Trial court and the sentence imposed upon by it, we would have to see as to whether the deceased was done to death, however, the cause of death due to Septicaemic Shock will not take out from the purview of Section 300 IPC.

49. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer to Section 299 of the Indian Penal Code, 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."

50. 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	Subject to certain exceptions culpable homicide is murder is the act by which

caused is done-	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.

51. 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. Also 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. (2011) 5 SCR 300** which have to be also kept in mind.

52. In ***State of Uttar Pradesh vs. Mohd. Iqram and another,*** [(2011) 8 SCC 80], the Apex Court has made the following observations in paragraph 26, therein:

"26. Once the prosecution has brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought-forth suggestions as to what could have brought them to the spot in the dead of night. The accused were apprehended and, therefore, they were under an obligation to rebut this burden discharged by the prosecution and having failed to do so, the trial-court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable."

53. In **Bengai Mandal alias Begai Mandal vs. State of Bihar** [(2010) 2 SCC 91], incident occurred on 14.7.1996, while

the deceased died on 10.8.1996 due to septicaemia caused by burn injuries. The accused was convicted and sentenced for life imprisonment under Section 302 IPC, which was confirmed in appeal by the High Court, but Hon'ble The Apex Court converted the case under Section 304 Part-II IPC on the ground that the death ensued after twenty-six days of the incident as a result of septicaemia and not as a consequence of burn injuries and, accordingly, sentenced for seven years' rigorous imprisonment.

54. In ***Maniben vs. State of Gujarat*** [(2009) 8 SCC 796], the incident took place on 29.11.1984. The deceased died on 7.12.1984. Cause of death was the burn injuries. The deceased was admitted in the hospital with about 60 per cent burn injuries and during the course of treatment developed septicaemia, which was the main cause of death of the deceased. Trial-court convicted the accused under Section 304 Part-II IPC and sentenced for five years' imprisonment, but in appeal, High Court convicted the appellants under Section 302 IPC. Hon'ble The Apex Court has held that during the aforesaid period of eight 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. Accordingly, judgment and order convicting the accused under Section 304 Part-II IPC by the trial-court was maintained and the judgment of the High Court was set aside.

55. In the almost similar circumstances, the conviction of the accused under Section 302 I.P.C. was modified from the rigorous imprisonment for life to rigorous imprisonment for 10 years under Section 304 Part I of I.P.C. by the Hon'ble Apex Court in **Pawan Kumar Vs. State of Uttarakhand (2021) 11 Supreme Court Cases 53** and we can safely rely upon that verdict.

56. On the overall scrutiny of the facts and circumstances of the case, we have come to the irresistible conclusion with the role of the appellant that is clear from the dying declaration and other records and we also keep in mind that the deceased had survived for 5 days after the occurrence and ultimately died of septicemia and that is why we are of the considered opinion that the conviction of the appellant under Section 302 I.P.C. is required to be converted to that under Section 304 Par I of I.P.C.

57. In view of the above, the appeal is **partly allowed** and the sentence of the accused is reduced to the period of 10 years with remission. The period already undergone can be sustained in the full period of incarceration. The fine is reduced to Rs.10,000/- to be paid to the original complainant. The default sentence would be the same and will run after completion of 10 years of incarceration. The accused is said to be in jail since 2015 and at least had suffered for about 7 years of imprisonment and must have repented to her act which was out of anger.

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

(2023) 2 ILRA 783
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2022

BEFORE

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

Criminal Appeal No. 2203 of 2016

Dharmendra Singh ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ram Janam Shahi, Sri Rajesh Kumar Mishra

Counsel for the Opposite Party:
G.A.

Criminal Law - Indian Evidence Act, 1872- Section 154-Trial court has held in impugned judgement that prosecution could not prove the case for the offences u/s 498A, 304B IPC and u/s 4 Dowry Prohibition Act. Accused-appellant is convicted for the offence u/s 302 IPC on the basis of alternative charge with the aid of Section 106 of Indian Evidence Act- All the witnesses of fact, namely, PW1, PW2, PW4 and PW5 have turned hostile- The law regarding the hostility of the witness is clear that the testimony of any witness cannot be discarded as a whole on the basis of hostility.

Settled law that, that part of the testimony of a hostile witness can be read in evidence which supports or corroborates the story of the prosecution.

Criminal Law - Indian Penal Code, 1860- Section 300- Section 302- Section 304 Part- I- The prosecution witnesses as well as medical evidences proved that it was a homicidal death which had occurred due to asphyxia. The accused though had knowledge and intention that his act would cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC- Above offence committed will fall under Section 304 Part-I.

Where the death is homicidal but there is no prior intent or pre-meditation then the offence will fall under section 304 Part- I of the IPC instead of section 302 of the IPC.

Quantum of sentence-Proportionality of Punishment- 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. Undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system. The conviction of the appellant and conviction of appellant is converted from Section 302 IPC into 304 (Part I) IPC and the appellant is awarded rigorous imprisonment for 10 years and fine of Rs.5,000/-.

As the criminal jurisprudence of our Country is reformative and not retributive hence undue harshness should be avoided, hence sentence of the appellant modified accordingly. (Para 11, 12, 15, 16, 17, 21, 22, 23, 24)

Criminal Appeal partly allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Tukaram & ors. Vs St. of Maha. (2011) 4 SCC 250

2. B.N. Kavatakar & anr. Vs St. of Kar., 1994 SUPP (1) SCC 304

3. Veeran & ors. Vs St. of M.P., (2011) 5 SCR 300

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

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

6. Ravada Sasikala Vs State of A.P. AIR 2017 SC 1166

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

1. By way of this appeal the appellant Dharmendra Singh has challenged the judgement and order dated 17.03.2016 and order dated 18.03.2016 passed by learned Additional Sessions Judge/ FTC (Women Criminal Case) Court No.13, Shahjahanpur in Session Trial No.330 of 2012 (State Vs. Dharendra Singh & others) arising out of Case Crime No.175 of 2012, under Sections 498A, 304B IPC and 3/4 Dowry

Prohibition Act, Police Station- Tilhar, District- Shahjahanpur, whereby accused/appellant was convicted and sentenced under Section 302 IPC for a rigorous life imprisonment with the fine of Rs.20,000/- and in default of payment of fine, the appellant shall further undergone for five months simple imprisonment.

2. The brief facts of the case as culled out from the record are that a first information report was filed by informant Dhakan Lal at Police Station- Tilhar, District- Shahjahanpur with the averments that the marriage of his daughter, aged 25 years, was solemnized with Dharmendra before two years, in which he has given dowry as per his financial condition, but after marriage Dharmendra and his parents started demanding a motorcycle as additional dowry. Due to non-fulfilment of the aforesaid demand, they started torturing his daughter. Today morning, he had information that Dharmendra and his parents have killed his daughter for want of additional dowry. On this information, the informant went to the matrimonial home of his daughter and found that his daughter's dead body was lying on the cot. A Case Crime No.175 of 2012 was registered at Police Station- Tilhar, District- Shahjahanpur u/s 304B, 498A IPC and u/s 3/4 Dowry Prohibition Act.

3. The law set into motion and investigation started. The dead body of the deceased was sent to post mortem after conducting the inquest proceedings. Doctor conducted the post mortem and prepared post mortem report. During the course of investigation, I.O. recorded the statements of witnesses u/s 161 of Cr.P.C. After completion of investigation, a charge sheet was submitted against the accused Dharmendra Singh, Mahesh Pal and Smt. Premwati u/s 304B, 498A IPC and 3/4 Dowry Prohibition Act and in alternative u/s 302 IPC and further u/s 4 Dowry Prohibition Act. Accused persons denied the charges and claimed to be tried.

4. The prosecution examined the following witnesses:

1	Dhakan Lal	PW1
2	Kalawati	PW2
3	Dr. Manoj Kumar	PW3
4	Komil Prasad	PW4
5	Usha Devi	PW5
6	Jhandu Ram	PW6
7	Bhagwandas Kathoriya	PW7

5. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading oral evidence:

1	FIR	Ext. Ka-8
2	Written report	Ext. Ka-1
3	P.M. Report	Ext. Ka-2
4	Panchayatnama	Ext. Ka-3
5	Charge sheet	Ext. Ka-5
6	Site plan	Ext. Ka-7

6. After completion of prosecution evidence, the statements of accused persons, namely, Dharmendra and Smt. Premwati were recorded under Section 313 Cr.P.C. Accused Mahesh Pal Singh passed away during the course of trial. No defense witness was produced by accused persons.

7. Learned trial court after hearing the both the parties acquitted accused Smt. Premwati from all the charges levelled against her and convicted the appellant-accused Dharmendra Singh for alternative charge u/s 302 IPC and sentenced for life

imprisonment and fine of Rs.20,000/-. Hence, this appeal by appellant-Dharmendra Singh.

8. Heard Shri Rajesh Kumar Mishra learned counsel for the appellant, Shri Patanjali Mishra, learned AGA for the State and perused the record.

9. Learned counsel for the appellant first of all submitted that this is a case of no evidence and appellant has been convicted without evidence on record. It is further submitted that witnesses of fact were examined by prosecution, namely, PW1 Dhakan, who is father of the deceased and PW2 Smt. Kalawati, who is mother of the deceased. Both these witnesses have not supported the prosecution case and they have turned hostile. Apart from these witnesses, PW4 Komil Prasad and PW5 Usha Devi are also examined by the prosecution as witnesses of fact, but they both have turned hostile and have not supported the prosecution case. Hence, there is no evidence on record that any additional dowry was demanded by appellant from the deceased or his parents and also there is no evidence on record that the deceased was subjected to cruelty in connection with demand of additional dowry. But learned trial court has convicted the appellant u/s 302 IPC with the aid of Section 106 of Indian Evidence Act, which has no applicability in this case because prosecution has failed to prove that at the time of alleged occurrence appellant was inside the house. It is also contended that learned trial court has also reached to the conclusion that no offence u/s 498A and 304B IPC is made out against the appellant.

10. Learned AGA opposed the submissions made by learned counsel for the appellant and submitted that there is ample evidence on record that the deceased was done away by the appellant only. The appellant is husband of the deceased and the dead body of the deceased was found in the house of the appellant. Hence, it was burden on the shoulders of the appellant to prove that he has not committed the offence but he has offered no explanation in this regard. It is further submitted by learned AGA that medical evidence corroborates the prosecution story and the prosecution witnesses, relating to the fact, have not supported the case because they were won over by the appellant. Even then PW1, father of the deceased, has supported the prosecution version in his examination-in-chief. It was a case of death due to asphyxia and the learned trial court has rightly taken the recourse of Section 106 of Indian Evidence Act. It is proved beyond reasonable doubt that the death of the deceased was caused by the appellant and by none-else. Hence, there is no illegality or infirmity in the impugned judgement which calls for any interference by this Court.

11. It is admitted position on record that learned trial court has held in impugned judgement that prosecution could not prove the case for the offences u/s 498A, 304B IPC and u/s 4 Dowry Prohibition Act. Accused-appellant is convicted for the offence u/s 302 IPC on the basis of alternative charge with the aid of Section 106 of Indian Evidence Act.

12. Although, all the witnesses of fact, namely, PW1, PW2, PW4 and PW5 have turned hostile and have not supported the prosecution version. In fact PW1, father of the deceased, has supported the prosecution version in his examination-in-chief but during the course of cross-examination he has resiled from his

previous statement and has not supported the prosecution case. The law regarding the hostility of the witness is clear that the testimony of any witness cannot be discarded as a whole on the basis of hostility. "Falsus in uno, falsus in omnibus" is not applicable in India. It is the duty of the Court to separate the grain from chaff. Hence, on the basis of evidence on record, we are of the definite opinion that death of the deceased was homicidal and we are not convinced that appellant is innocent. But on the basis of evidence available on record, since the demand of additional dowry is not proved, we have considered the case from the angle where the death of the deceased was murder or culpable homicide not amounting to murder.

13. 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."*

14. 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 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.

15. 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 it was a case of homicidal death not amounting to murder.

16. The prosecution witnesses as well as medical evidences proved that it was a homicidal death which had occurred due to asphyxia.

17. From the upshot of the aforesaid discussions, it appears that the accused though had knowledge and intention that his act would cause bodily harm to the deceased but did not want to do away with the 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.

18. This takes us to the alternative submission of learned counsel for the appellants that the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

19. 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."

20. '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.

21. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,** the Supreme Court referred the judgments in **Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana,**

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

22. 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.

23. 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.

24. Hence, we modify the conviction of the appellant and conviction of appellant is converted from Section 302 IPC into 304 (Part I) IPC and the appellant is awarded rigorous imprisonment for 10 years and fine of Rs.5,000/-. The appellant shall undergo simple imprisonment of six months in case of default of fine. The fine shall be paid by the appellant within four weeks after releasing from jail and jail authority shall ensure that appellant shall be put into re-incarceration in case fine is not paid within the aforesaid period.

25. Accordingly, the appeal is **partly allowed** with the modification of sentence, as above.

26. Record and proceedings be sent back to the lower court.

(2023) 2 ILRA 790
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.01.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 3592 of 2010

Amit Kumar Dubey ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Sudeep Dwivedi, Sri Dinesh Kumar Yadav, Sri A.R. Nadiwal

Counsel for the Opposite Party:
G.A.

Criminal Law- Quantum of Punishment-Doctrine of Proportionality-While considering the evidence of witnesses and the Postmortem report which states that the injuries on the body of the deceased would be the cause of death and that it was homicidal death, we concur with the finding of the Court below. The criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system-All measures should be applied to give them an opportunity of reformation in order to bring them in the social stream-'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.

As the criminal jurisprudence of our Country is reformative and not retributive hence undue harshness should be avoided, hence sentence of the appellant modified accordingly.

Criminal Appeal partly allowed. (E-3)

Case Law/ Judgements relied upon:-

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

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

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

(Delivered by Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. Heard Sri Sudeep Dwivedi, learned counsel for the appellant and learned A.G.A. for the State.

2. The present appeal challenges the judgment and order dated 28.04.2010 passed by Additional Sessions Judge/Fast Track Court No. 1, Mirzapur in Sessions Trial No. 148 of 2009 (State Vs. Amit Kumar Dubey) convicting and sentencing the appellant alone under Section 498-A of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') for three years simple imprisonment with fine of Rs.5,000/-, further sentenced him under Section 304-B IPC for life imprisonment and also sentenced him under Section 4 of Dowry Prohibition Act with fine of Rs. 10,000/-. In case of default of payment of fine, further to undergo imprisonment for 6-6 months additional imprisonment.

3. Factual data as culled out from the record is that a First Information Report

being Case Crime No. 45 of 2009 was lodged on 13.03.2009 at Police Station Padari, District Mirzapur on the complaint made by one Uma Shanker, resident of Village Mahdauri, Police Station Padari, District Mirzapur, who stated that his daughter namely Sunita Kumari was married to Amit Kumar s/o Hajara, resident of Ratnabo Chhitam Patti, Police Station Padari, Mirzapur six years ago according to Hindu Rites and Ritual. In the F.I.R. it was mentioned that after three years of the marriage, the husband of the deceased was demanding a sum of Rs.50,000/- and golden chain time and again and when his demands were not fulfilled, his daughter was being harassed and after beating her, she was sent to parental home. His daughter told regarding demand of Rs. 50,000/- by her husband. Thereafter on the assurance of informant, her daughter was taken away to his house by son-in-law. It is further mentioned that the deceased was harassed by his son-in-law. On being called by her daughter, informant went to her house and his daughter stated that in case she will not take away to her home, they will kill her. The informant taken away her daughter to his home. In the year 2008 on the occasion of Dhanteras, when the informant went to the shop of his son-in-law, he demanded the aforesaid money from the informant and when the informant asked some time, he was assaulted by knife and he was injured. This incident was registered at the police station. His daughter was residing at his house. It is further stated that on 13.12.2008, on the pressure and assurance made by the Station Officer, Police Station Padari that his daughter shall be secured, his daughter was sent with his son-in-law. On 10.03.2009, his son Kamlesh went to meet his sister on the occasion of Holi where Amit Kumar and his grandmother met him but he was refused to meet his sister and after saying that she went to take medicine at Ganga, his son Kamlesh was returned. On 12.03.2009 again his son Kamlesh went to the house of his sister to meet her where he was informed by Amit Kumar and his grandmother that his sister did not return to home. On 13.03.2009 at about 11.00 A.M., informant and his sons namely Kamlesh and Suresh went to the house of Amit Kumar and asked about his daughter, the same fact was told. Then the informant asked from neighbourer about his daughter and he came to know that they heard shrieks on being beaten by Amit and after some time, she became mum. Thereafter he alongwith his sons went to the room of deceased where door was locked and some smelling was coming out. On the request of telephonic message, two constables came on the spot and lock was broken then it was found that his daughter was kept dead in nagged condition. Thereafter F.I.R. was lodged against Amit Kumar and his grandmother.

4. On the aforesaid F.I.R., the investigation was moved into motion. The dead body was sent for postmortem and wherein it was opined that the cause of death was shock and hemorrhage due to Ante mortem injuries and throttling. The Investigation Officer recorded the statements of several witnesses under Section 161 of Cr.P.C. and submitted the charge-sheet against the accused-appellant under Sections 498A, 304 B of I.P.C. and 3/4 of Dowry Prohibition Act.

5. The accused were facing charges which were exclusively triable by the Court of Sessions, hence, the case was committed to the Court of Sessions, where it was registered as S.T. No. 148 of 2009.

6. The learned Sessions Judge charged the accused/appellant under Sections 498A, 304B I.P.C. and Section 3/4 Dowry Prohibition Act. The accused/appellant pleaded not guilty and claimed to be tried. Hence, the trial started. The prosecution examined about 6 witnesses as follows:

1	Umashankar	PW1
2	Sunita Dubey	PW2
3	Dr. H.R. Maurya	PW3
4	Shiv Shankar Singh	PW4
5	Mahesh Singh Rana	PW5
6	Nanhe Lal Sangma	PW6

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

1	F.I.R.	Ex.Ka.14
2	Written Report	Ex.Ka.1
3	Kayami G.D.	Ex. Ka. 6
4	Sample Seal	Ex. Ka. 7
5	Letter to C.M.O.	Ex. Ka. 8
6	Photo Lash	Ext. Ka 9
7	Request letter of Police for postmortem	Ext. Ka 10
8	Request letter of Tehsildar for postmortem	Ext. Ka 11
9	Rapat No. 17 Time 14.00	Ext. Ka 15
10	Ravangi of Constable HC 38 Nanhe Lal	Ext. Ka 16
11	Postmortem Report	Ext. Ka 3
12	Panchayatnama	Ext. Ka 4
13	Site Plan	Ext. Ka 12
14	Charge sheet	Ext. Ka 13

8. 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 as mentioned above.

9. Learned counsel for the appellant has submitted that the appellant has been falsely implicated by the informant as there was no demand of additional dowry on the part of the appellant.

10. While taking us through the judgment, when the Court was of this view that the death was a homicidal death looking to the medical evidence, learned counsel requested for showing leniency in the matter and seeks for lesser punishment as the accused-appellant is in jail for more than 13 years. Learned counsel for the appellant has relied on the decision of this Court in Criminal Appeal No. 2895 of 2015 **(Manoj Sharma vs. State of U.P.)** decided on 9.12.2022.

11. As against this, learned A.G.A. states that this is a gross case where the deceased was done to death by the accused-appellant. There were 21 injuries found on the body of the deceased. Hence, no leniency can be shown to the accused-appellant by this Court.

12. While considering the evidence of witnesses and the Postmortem report which states that the injuries on the body of the deceased would be the cause of death and that it was homicidal death, we concur with the finding of the Court below. However it is to be seen whether the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

13. 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."

14. '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.

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

disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

16. 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.

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

18. In view of the above, the findings of facts by the Court below are not disturbed. However, as far as punishment is concerned, we substitute the same to 10 years' rigorous imprisonment. Sentence under Section 498A of IPC and Section 4 of Dowry Prohibition Act has already been completed by the accused-appellant. Fine and default is maintained. As 10 years' imprisonment is already over, the accused-appellant be set free forthwith, if not wanted in any other case. He will deposit the fine within four weeks from the date of release and in case fine is not deposited he will be re-incarcerated for the period of default sentence.

19. In view of the above, the appeal is **partly allowed**. Judgment and order passed by the learned Sessions Judge shall stand modified to the aforesaid extent. Record be sent back to the Court below forthwith.

(2023) 2 ILRA 794
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.01.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 7783 of 2010

Dharmendra & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri S.C. Tiwari, Sri Swatashwa Agarwal, Sri Swayamanand Sisodiya, Sri Kamlesh Kumar Tripathi

Counsel for the Opposite Party:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 32- Multiple Dying Declarations- The husband has taken her to the hospital and even her dying declaration dated 1.5.2008 before the Naib Tehsildar has been believed by the trial court. There is no allegation against the mother-in-law and father-in-law and even the husband. However, in the second dying declaration, allegation has been levelled against the

husband, mother-in-law and father-in-law.The same casts doubt. Even if we accept the second dying declaration which is contrary to the first dying declaration, the husband having taken the deceased to the hospital will not permit us to concur with the learned Judge. 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 accused-appellant No.1. However, as there is no overt act to the father-in-law and mother-in-law and there are general allegations levelled against them and hence they are acquitted.

As there are no allegations against the father-in-law and mother-in-law of the deceased in any of the dying declarations, hence the conviction of the father-in-law and mother-in-law is unsustainable.

Quantum of Punishment- Doctrine of Proportionality- 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. 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.

As the criminal jurisprudence of our country is reformative and not retributive and undue harshness should be avoided in sentencing the accused, hence under the facts and circumstances of the case the sentence of the Appellant no.1 modified to the period already undergone. (Para 12, 13, 18, 19, 20)

Criminal Appeal partly allowed. (E-3)

Case Law/ Judgements relied upon:-

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

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

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

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

1. This appeal challenges the judgment and order dated 03.11.2010 passed by Additional Sessions Judge, Court No.1, Ramabai Nagar, Kanpur Dehat, in Sessions Trial No.114 of 2009 (State Vs. Dharmendra and others) arising out from case Crime No.89 of 2008, under Sections 498A/304B IPC and Section ¾ D.P. Act, Police Station Sikandra, District Ramabai Nagar (Kanpur Dehat) convicting the appellants under Section 498A/304B IPC and Section 4 D.P. Act and sentencing appellant no.1 under Section 304B IPC for life imprisonment and Section 498A of IPC for rigorous imprisonment of 3 years and fine of Rs. 5,000/- and Section 4 of D.P. Act for rigorous imprisonment of 2 years and fine of Rs. 5,000/- and in default of payment of fine the appellant no.1 convicting under Section 498A IPC for additional rigorous imprisonment of 6 months and Section 4 of D.P. Act, additional rigorous imprisonment of 6 months, appellant no.2 - Ansho Devi convicting under Section 304B for rigorous imprisonment of 6 years, under Section 498A IPC for rigorous imprisonment of 2 years and fine of Rs. 3,000/- and Section 4 of D.P. Act for rigorous imprisonment of one year and fine of Rs. 2,000/- and in

default of payment of fine the appellant no.2 under Section 498A IPC additional rigorous imprisonment of 3 months and Section 4 of D.P. Act additional rigorous imprisonment of 2 months and appellant no.3 - Ram Kishun under Section 304B for rigorous imprisonment of 7 years and under Section 304B IPC for rigorous imprisonment of one year and fine of Rs. 2,000/- and Section 4 of D.P. Act for rigorous imprisonment of 6 months and fine of Rs.1,000/- and in default of payment of fine, the appellant no.3 convicting under Section 498A additional rigorous imprisonment of 2 months and Section 4 of D.P. Act additional rigorous imprisonment of 1 month and all the sentences shall run concurrently.

2. The facts in brief is that Smt Sita Devi, the daughter of the complainant Gorelal, was got married to the accused Dharmendra s/o Ram Kishun on 10-05-07 as per Hindu rituals. Shortly after the marriage, Dharmendra and his father Ram Kishun as also Ram Kishun's wife Smt Ansho Devi started physically assaulting the daughter of the complainant and used to demand a motor cycle and gold chain otherwise they would kill her some day. On 30-4-08 at about 12.00 in the night the above accused poured kerosene oil on the daughter of the complainant and set her on fire and the information of which was received by the complainant through certain reliable sources on 1.5.08 at 4.00 in the morning. The complainant immediately rushed to her daughter's place with several persons where he came to know that her daughter was completely burnt and she was got admitted in hospital in Kanpur. The incident was witnessed by several villagers. The complainant is of firm belief that the accused have burnt his daughter to death as the dowry demand could not be fulfilled.

3. Investigation was moved into motion. After recording statements of various persons, the investigating officer submitted the charge-sheet. 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 9 witnesses who are as follows:

1	Gorey Lal	PW1
2	Rani Devi	PW2
3	Gopi Shyam	PW3
4	Dr. R.K. Chaudhary	PW4
5	Karamveer Singh	PW5
6	Chandra Shekhar Verma	PW6
7	Hari Singh	PW7
8	Ayodhya Prasad Sachan	PW8
9	Dr. Anil Kumar Shukla	PW9

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

1	F.I.R.	Ex.Ka.2
2	Written Report	Ex.Ka.1
3	Panchayatnama	Ex. Ka.15
4	Postmortem Report	Ex.Ka.6
5	Site Plan	Ex.Ka.11
6	Charge-sheet	Ex.Ka.5

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 as mentioned aforesaid.

7. Heard Sri Swayamanand Sisodiya assisting Sri Kamlesh Kumar Tripathi for the appellants and learned A.G.A. for the State and perused the record.

8. Learned counsel for the appellant has submitted that the appellant has been falsely implicated by the informant as there was no demand of additional dowry on the part of the appellant.

9. It is further submitted that there is no overt act on the part of father-in-law and mother-in-law and they have been falsely implicated in the present case and only general allegations have been levelled against them.

10. While taking us through the judgment, when the Court was of this view that the death was a homicidal death looking to the medical evidence, learned counsel requested for showing leniency in the matter and seeks for lesser punishment as the accused-appellant No.1 (husband) is in jail for more than 17 years. Learned counsel for the appellant has relied on the decision of this Court in Criminal Appeal No. 2895 of 2015 **(Manoj Sharma vs. State of U.P.)** decided on 9.12.2022.

11. As against this, learned A.G.A. states that this is a gross case where the deceased was done to death by the accused-appellants. Looking to the gruesomeness of the offence, no leniency can be shown to the accused-appellant by this Court.

12. The appellant No.1 is in jail since 17 years. The husband has taken her to the hospital and even her dying declaration dated 1.5.2008 before the Naib Tehsildar has been believed by the trial court. There is no allegation against the mother-in-law and father-in-law and even the husband. However, in the second dying declaration, allegation has been levelled against the husband, mother-in-law and father-in-law. The multiple dying declaration, according to the Counsel, cannot be accepted. The same casts doubt. Even if we accept the second dying declaration which is contrary to the first dying declaration, the husband having taken the deceased to the hospital will not permit us to concur with the learned Judge.

13. 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 accused-appellant No.1. However, as there is no overt act to the father-in-law and mother-in-law and there are general allegations levelled against them and hence they are acquitted.

14. Now we move to the alternative submission of learned counsel for the appellant that the punishment of life imprisonment is too harsh which requires to be reduced looking to the facts and circumstances of the case more particularly the dying declarations which are contradictory to each other.

15. However it is to be seen whether the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

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

"Crime is a pathological aberration. The criminal can ordinarily be

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

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

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

also be avoided keeping in view the reformative approach underlying in our criminal justice system.

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

20. 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, the conviction of accused-appellants under Section 304B is maintained. However, as far as punishment is concerned, we substitute the same to 10 years' rigorous imprisonment as far as accused-appellant No.1 is concerned. The accused-appellant No.1 be freed immediately without seeking any bail. We are dismayed that despite the fact that 17 years have elapsed, the case of the accused has not been considered for remission though it is not a heinous crime. Rather no case of 304 part B is even made out from the dying declaration of the deceased against the mother-in-law and father-in-law. They are acquitted and as they are already on bail, they need not surrender. Their bail bonds are cancelled.

22. Appeal is partly allowed. Record and proceedings be sent back to the Court below forthwith. The impugned judgment and order shall stand modified to the aforesaid extent.

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

(2023) 2 ILRA 799
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.02.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Habeas Corpus Writ Petition No. 103 of 2022

Mohd. Sheebu @ Sheebu Chaudhary ...Petitioner

Versus

U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sarvesh Kumar Pandey, Sushil Kumar Singh, Trishita Singh

Counsel for the Respondents:
A.S.G.I., Dr. Pooja Singh, G.A.

Criminal Law - Constitution of India, 1950 - Article - 22, 22(5) & 226 - National Security Act, 1980 - Sections 3(2), 3(3) & 8 - Criminal Law Amendment Act, - Section - 7,- - General Clauses Act, - Section- 21, - Indian Penal Code, 1860 - Sections 124-(A), 153-(A), 294, 295-(A), 298, 354-(KA) & 505-(2), - Information and Technology Act, - Section - 67 - Writ of Habeas Corpus - against detention order - representation - rejected - maintainability -

Violation of provisions of section - he has emphasized primarily on ground that there has been undue delay in disposal of the representation made by detenue against order of detention by the St. Government inasmuch as that after receipt of representation the D.M. failed to furnish the same to St. Government with due diligence – Held, Detention order passed by detaining authority, if is approved by the St. Government, merges with the order of approval of the St. Government which renders detaining authority functus officio - court finds that, if in terms of the provisions of section 21 of General Clauses Act, power to undo or rescind detention order is extended to detaining authority even after approval of such detention order by St. Government, that may give rise to a very anomalous situation where D.M. in case on consideration of representation of detenue allows same and sets aside detention order - D.M. has St.d that he took some time to decide representation preferred by petitioner which was rejected by him - Such an exercise undertaken by the D.M. was completely uncalled for and unwarranted and time devoted by him for undertaking such exercise could have easily been saved and utilized in furnishing petitioner's representation to St. Government - hence, Habeas Corpus petition is allowed.(Para - 40, 41, 43)

Writ Petition Allowed. (E-11)

List of Cases cited: -

1. Harish Pawha Vs St. of U.P. & ors., AIR 1981 SC 1126

2. Rajammal Vs St. of T.N. & anr., (1999) 1 SCC 417

3. K.M. Abdulla Kunhi Vs U.O.I., (1991) 1 SCC 476 : 1991 SCC (Cri) 613

4. Mohd. Faiyyaz Mansuri Vs U.O.I. & ors., Habeas Corpus No.23475/2020, decided on 07.09.2021

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. These proceedings under Article 226 of the Constitution of India have been instituted by the detenue-Mohd. Sheebu @ Sheebu Chaudhary through his brother and next friend Mubarak Ahmad praying for issuing a writ of Habeas Corpus setting the detenue free from detention as directed by the District Magistrate, Sitapur by means of an order dated 08.03.2022 after quashing the same.

2. Heard Shri Sushil Kumar Singh, learned counsel for the petitioner, learned Additional Government Advocate representing the State-respondents and Ms. Pooja Singh, learned counsel representing the Union of India and perused the records available before us on this writ petition.

3. As observed above, the order impugned herein is dated 08.03.2022 passed by the District Magistrate, Sitapur (hereinafter referred to 'the detention order') whereby the detenue has been ordered to be detained in preventive detention at District Jail, Sitapur in terms of the provisions contained in section 3(2) and 3(3) of the National Security Act, 1980 (hereinafter referred to as 'NSA').

4. Though various grounds impeaching the impugned detention order have been urged by the learned counsel for the petitioner, however, he has emphasized primarily on the ground that there has been undue delay in disposal of the representation made by the detenue against the order of detention by the State Government inasmuch as that after receipt of the representation the District Magistrate failed to furnish the same to the State Government with due diligence, which is fatal and consequently vitiates the detention of the petitioner. It has, thus, been argued by the learned counsel for the petitioner that such delay on the part of the District Magistrate in furnishing the representation

to the State Government has resulted in denial of the right of the petitioner to be afforded the earliest opportunity to make representation against the order to the appropriate Government as envisaged by Section 8 of the NSA and as mandated by Article 22 (5) of the Constitution of India. His submission, thus, is that the delay at the end of the District Magistrate in referring the representation to the State Government not only infringes right of the petitioner as available to him under section 8 of the NSA and Article 22(5) of the Constitution of India but also that it is fatal to the extent that the order of detention is not tenable.

5. On the other hand, learned counsel representing the State-respondents has submitted that sufficient explanation has been provided in the supplementary counter affidavit filed by the District Magistrate for the alleged delay in furnishing the representation of the petitioner to the State Government and in view of the fact that the delay has appropriately been explained, the question of violation of the provisions of section 8 of NSA and Article 22(5) of the Constitution of India, in the facts of the present case, does not arise at all. His submission is that the arguments made by the learned counsel for the petitioner are, thus, highly misconceived and the writ petition deserves to be dismissed.

6. Learned counsel representing the Central Government/Union of India has submitted that so far as the Union of India is concerned, there has not been any delay in disposal of the representation made by the detenue against the detention order; neither is there any such pleadings in the writ petition. She has, thus, argued that the writ petition deserves to be dismissed.

7. We have consciously considered the competing submissions made by the learned counsel for the respective parties. The issue, which, in the facts of the case and also on the basis of the respective submissions made by the learned counsel for the parties, arises for our consideration is as to whether the delay at the end of the District Magistrate in furnishing the representation made by the detenue against the detention order to the State Government is unexplained and reflects callousness and indifference on the part of the District Magistrate which is fatal to sustain the impugned detention order.

8. For appropriately deciding the issue as culled out above, we proceed to note certain facts, which are not disputed between the parties.

9. The impugned detention order passed by the District Magistrate under section 3 (2) and 3(3) of the NSA is founded on a First Information Report lodged against the petitioner at Case Crime No.309 of 2021, under sections 153-A, 505(2), 294 of I.P.C. and section 67 of Information Technology Act. The said F.I.R. was lodged on 21.08.2021 at Police Station-Mahmoodabad, District-Sitapur and offences under section 124-A, 295-A, 298 and 354(Ka) of I.P.C. and section 7 of Criminal Law Amendment Act were subsequently added.

10. In connection with the aforesaid First Information Report, the petitioner was arrested and was lodged in jail since 22.08.2021, however, he was ordered to be enlarged on bail vide order dated 02.03.2022 passed by this Court in Criminal Misc. Bail Application No.1499 of 2022. Before the petitioner could be released pursuant to the said order dated 02.03.2022 passed by this Court granting

bail, the District Magistrate passed the detention order on 08.03.2022.

11. The detention order dated 08.03.2022 passed by the District Magistrate was approved by the State Government by means of the order dated 15.03.2022.

12. As admitted by the District Magistrate in his supplementary counter affidavit dated 14.10.2022 the petitioner moved separate representations dated 16.03.2022 to the Secretary, Department of Home, Government of Uttar Pradesh, to the U.P. State Advisory Board and also to the Secretary, Ministry of Home, Government of India, New Delhi, which were received in the office of District Magistrate on 16.03.2022 as sent by the Superintendent of Jail, Sitapur by means of his letter dated 16.03.2022.

13. So far as the representation made by the petitioner to the Central Government is concerned, it is on record that the said representation dated 16.03.2022 was examined by the appropriate authority of the Central Government and the same was rejected. Such rejection was communicated by means of the wireless message dated 11.04.2022.

14. The matter was considered by U.P. Advisory Board on 01.04.2022 where the petitioner was personally heard and a report accordingly was sent by the Advisory Board whereupon the State Government took a decision to confirm the detention order and also to keep the petitioner under detention for a period of three months on 13.04.2022.

15. The Court while considering this writ petition passed an order on 11.10.2022 directing the learned State Counsel to file a supplementary counter affidavit by the District Magistrate in respect of the delay on his part in furnishing the representation received from jail authorities on 16.03.2022 for furnishing the same onward to the State Government/Central Government. The order dated 11.10.2022 passed by this Court is extracted herein below:-

"As prayed by Sri Tilhari, learned A.G.A., put up this case on 18.10.2022 to enable the District Magistrate to file supplementary counter affidavit in the matter with regard to the delay on his part in sending the representation, received from jail authorities in his office on 16.03.2022, onward to the State Government / Central Government as the case may be as is being argued by learned counsel for the petitioner."

16. In compliance of the order dated 11.10.2022, the District Magistrate has filed a supplementary counter affidavit wherein an attempt has been made by him to explain the delay which occurred on his part in furnishing the representation of the petitioner, which was received in the office of District Magistrate on 16.03.2022, to the State Government. The District Magistrate in the said supplementary counter affidavit has narrated and admitted the following facts:

(a) Against the detention order dated 08.03.2022 the petitioner moved separate representations to the State Government, to the Central Government and to U.P. State Advisory Board on 16.03.2022 which was received in the office of District Magistrate on the same day i.e. 16.03.2022 through a letter of the

said date of the Superintendent, District Jail, Sitapur.

(b) From 17.03.2022 Holi vacation commenced which ended on 20.03.2022.

(c) On 21.03.2022 the representation dated 16.03.2022 was marked to the Additional District Magistrate, Sitapur for necessary action.

(d) On 22.03.2022 the District Magistrate forwarded the representations to the Superintendent of Police for his comments.

(e) The Superintendent of Police vide letter dated 24.03.2022 forwarded his comments which were received in the office of District Magistrate, Sitapur on 26.03.2022.

(f) The District Magistrate then considered the representation himself and rejected the same by means of the order dated 26.03.2022.

(g) The rejection of the representation by the District Magistrate was communicated to the petitioner on 26.03.2022 through the Superintendent, District Jail, Sitapur and thereafter the District Magistrate sent the representation of the petitioner vide his letter dated 26.03.2022 to the Home Department, Government of U.P., which was received in the office of the Secretary of the Home Department on 27.03.2022. The representation of the petitioner was also sent through registered post on 27.03.2022 to the Ministry of Home, Government of India.

17. In paragraph 6 of the counter affidavit filed on behalf of the State of Uttar Pradesh which is sworn in by the Under Secretary, Home (Confidential) Department, however, it has been stated that the representation dated 16.03.2022 along with comments was received in the concerned section of the State of U.P. on 28.03.2022 along with the letter of the District Magistrate, Sitapur, dated 26.03.2022.

18. The State Government in its counter affidavit has further stated that the representation of the petitioner was examined by the Under Secretary in the Home Department, on 29.03.2022 and that it was examined by the Joint Secretary and the Special Secretary as well on the same day i.e. 29.03.2022. According to the State Government's counter affidavit, the representation of the petitioner was examined by the Additional Chief Secretary on 30.03.2022 and the file was submitted for final orders to the higher authorities and the representation was rejected on 31.03.2022 and accordingly it was communicated to the petitioner through the District authorities by the State Government vide radiogram dated 01.04.2022.

19. In the light of the aforesaid facts, it has been submitted by the learned State-respondents that there has been no delay in disposal of the representation and the delay in furnishing the representation made by the petitioner against his detention order passed by the District Magistrate to the State Government has sufficiently and appropriately been explained.

20. The bone of contention in this case, thus, between the parties is as to whether the delay which occurred in sending the representation of the petitioner to the State Government by the District Magistrate has appropriately been explained so as to conclude that such delay was not fatal to vitiate the detention of the petitioner.

21. Before giving our conclusion as to the delay, we may examine the relevant law

in this regard. Article 22, which falls in Part III of the Constitution of India containing fundamental rights, provides certain protection against arrest and detention in certain cases. Clause 5 of Article 22 is in relation to detention in pursuance of an order made under any law providing for preventive detention. It casts two duties on the authority making detention order, which are as follows:-

(i) The authority making detention order is duty bound to communicate the person so detained the grounds on which the order has been made, as soon as may be, and

(ii) Detaining Authority shall afford him the earliest opportunity of making a representation against the detention order.

22. In tune with the provisions of Article 22(5) of the Constitution of India, section 8 of the NSA also provides that the detaining authority as soon as may be, but ordinarily not later than five days (in exceptional circumstances and for the reasons to be recorded in writing, not later than ten days) from the date of detention shall communicate to the detenue the grounds on which the order has been made and it shall also afford him the earliest opportunity of making a representation against the order to the appropriate Government. Article 22(5) of the Constitution of India is extracted herein below:-

"22. Protection against arrest and detention in certain cases.-(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

23. Section 8 of the National Security Act is also quoted hereunder:-

"8. Grounds of order of detention to be disclosed to persons affected by the order.--(1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than 1 [fifteen days] from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government. (2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose."

24. Hon'ble Supreme Court as far back as in the year 1981 in the case **of Harish Pawha vs. State of U.P. and others**, reported in **AIR 1981 SC 1126** has held that it is the duty of the State to proceed to determine representation of the detenue with utmost expedition which means that the matter must be taken up for consideration as soon as such a representation is received and dealt with continuously unless it is absolutely necessary to wait for some assistance, until a final decision is taken and communicated to the detenue.

25. Hon'ble Apex Court in the case of **Rajammal vs. State of Tamil Nadu and**

another, reported in **(1999) 1 SCC 417** has reiterated the aforesaid legal position in paragraphs 6, 7 and 8 which are quoted as under:-

"6. Learned counsel also cited an earlier two-Judge Bench decision of this Court in Raghavendra Singh v. Supdt., District Jail, Kanpur [(1986) 1 SCC 650 : 1986 SCC (Cri) 60] in which similar delay of a few days in considering the representation was found to have vitiated the detention. That is a case where delay was held to be "wholly unexplained". A three-Judge Bench of this Court in Rumana Begum v. State of A.P. [1993 Supp (2) SCC 341 : 1993 SCC (Cri) 551] disapproved the delay in considering the representation on the mere ground that the representation was not addressed to the Chief Secretary. That was a case where representation was sent to the Governor. Hence it was found that there was unexplained and unreasonable delay and consequently the detention was held vitiated. We are reminded of the following observations made by this Court in Kundanbhai Dulabhai Sheikh v. District Magistrate, Ahmedabad [(1996) 3 SCC 194 : 1996 SCC (Cri) 470 : JT (1996) 2 SC 532] : (SCC p. 203, para 21)

"21. In spite of law laid down above by this Court repeatedly over the past three decades, the Executive, namely, the State Government and its officers continue to behave in their old, lethargic fashion and like all other files rusting in the Secretariat for various reasons including red-tapism, the representation made by a person deprived of his liberty, continue to be dealt with in the same fashion. The Government and its officers will not give up their habit of maintaining a consistent attitude of lethargy. So also, this Court will not hesitate in quashing the order of detention to restore the ''liberty and freedom' to the person whose detention is allowed to become bad by the Government itself on account of his representation not being disposed of at the earliest."

7. It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. Though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation, the words "as soon as may be" in clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest. But that does not mean that the authority is pre-empted from explaining any delay which would have occasioned in the disposal of the representation. The court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. This position has been well delineated by a Constitution Bench of this Court in K.M. Abdulla Kunhi v. Union of India [(1991) 1 SCC 476 : 1991 SCC (Cri) 613] . The following observations of the Bench can profitably be extracted here: (SCC p. 484, para 12)

"It is a constitutional mandate commanding the authority concerned to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words ''as soon as may be' occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no

period prescribed either under the Constitution or under the detention law concerned, within which the representation should be dealt with. The requirement, however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal."

8. The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation, such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned."

26. From the judgment in the case of ***Rajammal (supra)*** we gather a cue as to what delay will amount to adversely affecting further detention of a detenue detained under any law of preventive detention. Hon'ble Apex Court has clearly held that if delay is caused on account of any indifference or lapse in considering the representation, such delay will adversely affect further detention of the detenue. It has further been held that it is for the authority concerned to explain the delay and also that it is not the duration of delay which is the test; rather the test is how such a delay is explained by the authority concerned. Hon'ble Supreme Court has also held that there should not be supine indifference, slackness or callous attitude in consideration of representation and that any unexplained delay will be in breach of the constitutional mandate which will render the continued detention to be illegal.

27. A Constitutional Bench judgment of Hon'ble Supreme Court in the case of **K.M. Abdulla Kunhi and another vs. Union of India and others,** reported in **(1991) 1 SCC 476** has outlined two rights of the detenue under Article 22(5) of the Constitution of India, which we have already mentioned above.

28. Para 7 of the judgment in the case of **K.M. Abdulla Kunhi** (supra) is extracted herein below:

"7. The detenu has two rights under clause (5) of Article 22 of the Constitution: (i) to be informed, as soon as may be, of the grounds on which the order of detention is based, that is, the grounds which led to the subjective satisfaction of the detaining authority, and (ii) to be afforded the earliest opportunity of making a representation against the order of detention".

29. It has also been held by Hon'ble Supreme Court in the said Constitutional Bench Judgment that right of consideration of representation of the detenue by the Government is independent of consideration of detenue's case and his representation by the Advisory Board under Article 22(4) of the Constitution of India. Para 11 of the judgment in the case of **K.M. Abdulla Kunhi** (supra) is relevant at this juncture to be quoted which runs as under:-

"11. It is now beyond the pale of controversy that the constitutional right to make representation under clause (5) of Article 22 by necessary implication

guarantees the constitutional right to a proper consideration of the representation. Secondly, the obligation of the government to afford to the detenu an opportunity to make representation and to consider such representation is distinct from the government's obligation to refer the case of detenu along with the representation to the Advisory Board to enable it to form its opinion and send a report to the government. It is implicit in clauses (4) and (5) of Article 22 that the government while discharging its duty to consider the representation, cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. The obligation of the government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing the references. The government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient case for detention. The consideration by the Board is an additional safeguard and not a substitute for consideration of the representation by the government. The right to have the representation considered by the government, is safeguarded by clause (5) of Article 22 and it is independent of the consideration of the detenu's case and his representation by the Advisory Board under clause (4) of Article 22 read with Section 8(c) of the Act. (See: Sk. Abdul Karim v. State of W.B. [(1969) 1 SCC 433] ; Pankaj Kumar Chakrabarty v. State of W.B. [(1969) 3 SCC 400 : (1970) 1 SCR 543] ; Shayamal Chakraborty v. Commissioner of Police, Calcutta [(1969) 2 SCC 426] ; B. Sundar Rao v. State of Orissa [(1972) 3 SCC 11] ; John Martin v. State of W.B. [(1975) 3 SCC 836 : 1975 SCC (Cri) 255 : (1975) 3 SCR 211] ; Sk. Sekawat v. State of W.B. [(1975) 3 SCC 249 : 1974 SCC (Cri) 867 : (1975) 2 SCR 161] and Haradhan Saha v. State of W.B. [(1975) 3 SCC 198 : 1974 SCC (Cri) 816 : (1975) 1 SCR 778])"

30. Emphasizing that representation under Article 22(5) of the Constitution of India relates to liberty of an individual which is a highly cherished right enshrined in Article 21 of the Constitution of India, it has been held by Hon'ble Supreme Court in the case of **K.M. Abdulla Kunhi** (supra) that Article 22(5) thus provides a legal mandate to the Government to consider the representation as early as possible. It has further been held that the phrase "as soon as may be" occurring in Article 22(5) reflects the concern of the Framers of the Constitution that the representation should be expeditiously considered and disposed of with a sense of urgency without an unavoidable delay. It has been held that though there is no period prescribed under the Constitution or under the concerned detention law within which the representation should be dealt with, the requirement, however, is that there should not be supine indifference, slackness or callous attitude in considering the representation.

31. Para 12 of the case in **K.M. Abdulla Kunhi** (supra) is extracted herein below:-

"12. The representation relates to the liberty of the individual, the highly cherished right enshrined in Article 21 of our Constitution. Clause (5) of Article 22

therefore, casts a legal obligation on the government to consider the representation as early as possible. It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal. This has been emphasised and re-emphasised by a series of decisions of this Court. (See: Jayanarayan Sukul v. State of W.M. [(1970) 1 SCC 219] ; Frances Coralie Mullin v. W.C. Khambra [(1980) 2 SCC 275 : 1980 SCC (Cri) 419] ; Rama Dhondu Borade v. V.K. Saraf, Commissioner of Police [(1989) 3 SCC 173 : 1989 SCC (Cri) 520] and Aslam Ahmed Zahire Ahmed Shaik v. Union of India [(1989) 3 SCC 277 : 1989 SCC (Cri) 554] .)"

32. Similar view has been expressed by a Division Bench of this Court in the case of **Mohd. Faiyyaz Mansuri vs. Union of India and others,** decided on 07.09.2021 (Habeas Corpus No.23475 of 2020) wherein plea of the petitioner that there was delay in forwarding his representation has been found to carry substance and on the said ground alone, the impugned detention order was quashed.

33. In the light of the afore-referred legal position, what is unambiguous in our mind is that the detaining authority is under obligation to afford the detenue the earliest opportunity of making representation against the detention order. The relevant clause occurring in sub clause 5 of Article 22 is *"shall afford him the earliest opportunity of making a representation against the order".* The provisions of section 8 of the NSA are in complete sync with Article 22 (5) of the Constitution of India and the relevant phrase occurring therein is *"shall afford him the earliest opportunity of making a representation against the order to the appropriate Government".* In our considered opinion affording the detenue the earliest opportunity of making a representation against the detention order will not mean and meaning of the said phrase cannot be confined to making aware the detenue of his right to make representation against the detention order at the earliest, rather it would extend to a duty of the detaining authority to forward and furnish the representation which may be made by the detenue against the detention order to the authorities concerned, namely, the State Government, the Central Government and the Advisory Board at the earliest as per the scheme of the National Security Act.

34. The fact situation where after passing of the detention order the detaining authority though apprises the detenue of his right to make representation without loss of

any time but, however, fails to forward such representation at the earliest to the State Government or to the Central Government or to the Advisory Board, in our opinion will not suffice to fulfill the requirement of Article 22(5) of the Constitution of India as also section 8 of the National Security Act.

35. When we examine the admitted facts in the light of the aforementioned legal position, what we find is that the representation against the detention by the petitioner was made on 16.03.2022 which was received in the office of the District Magistrate on the same day along with letter of the Superintendent, District Jail, Sitapur, dated 16.03.2022, however, it was sent to the State Government only on 26.03.2022. In other words, the District Magistrate took ten long days in forwarding the representation dated 16.03.2022 submitted by the detenue against his detention order.

36. The explanation offered in the supplementary counter affidavit filed by the District Magistrate dated 14.10.2022, in our considered opinion cannot be said to be sufficient or appropriate. The representation dated 16.03.2022 of the petitioner is said to have been marked to the Additional District Magistrate on 4th day i.e. on 21.03.2022, though it has been stated that there was Holi vacation between 17.03.2022 and 20.03.2022. The representation is thereafter said to be marked to the Superintendent of Police on 22.03.2022 asking for his comments, which in our opinion could have been marked to the Superintendent of Police on 21.03.2022 itself if not before that. If the representation could be marked to the Additional District Magistrate on 21.03.2022 why could it not be marked to the Superintendent of Police on the same day i.e. 21.03.2022 remains unexplained. Once the representation was marked to the Superintendent of Police on 22.03.2022 he is said to have reverted with his comments to the District Magistrate vide his letter dated 24.03.2022 which was received in the office of District Magistrate on 26.03.2022. At the District Headquarters the office of District Magistrate and Superintendent of Police cannot be located at such a far place so that the comments/letter dated 24.03.2022 from the Superintendent of Police would take so much of time to reach the office of the District Magistrate on 26.03.2022.

37. It is also to be noticed that it is on 26.03.2022 when the District Magistrate rejected the representation of the detenue and forwarded the representation of the petitioner to the State Government which as per the supplementary counter affidavit filed by the District Magistrate was received in the office of the State Government on 27.03.2022, however, as per the counter affidavit filed by the State Government it was received on 20.03.2022.

38. The undisputed facts as chronologically narrated above, in our considered opinion, lead to the conclusion that delay in forwarding the representation of the petitioner against the detention order by the District Magistrate to the State Government was, in this case, precipitated on account of callous and indifferent attitude on the part of the District Magistrate to the fundamental rights of the petitioner under Article 22(5) of the Constitution of India as also to his right under section 8 of the NSA.

39. There is yet another aspect which we would like to reflect upon. In the short counter affidavit dated 14.10.2022 filed by

the District Magistrate he has stated that the representation dated 16.03.2022 of the petitioner was sent to the Additional District Magistrate and to the Superintendent of Police and thereafter on receipt of the report/comment of the Superintendent of Police vide his letter dated 24.03.2022 the District Magistrate considered the representation of the petitioner and rejected the same by passing an order on 26.03.2022. A copy of the said order dated 26.03.2022 has been enclosed as annexure-SCA 4 to the said supplementary counter affidavit. The question, which arises here is as to whether the exercise undertaken by the District Magistrate in considering and rejecting the representation by the petitioner, was under the scheme of NSA, warranted at all keeping in view the fact that the detention order dated 08.03.2022 was already approved by the State Government by means of the order dated 15.03.2022.We are conscious of the provisions of section 21 of the General Clauses Act which is quoted hereunder:

"21. Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws- *Where, by any Central Act or Regulations a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to like sanction and conditions, if any, to add, to amend, vary or rescind any notifications, orders, rules or bye-laws so issued."*

40. Thus, no doubt, by virtue of section 21 of the General Clauses Act the detaining authority may have the power to rescind the detention order on the representation of the detenue, however, this power can be exercised only before the order of detention passed by the detaining authority under section 3(3) is approved by the State Government in terms of the requirement of section 3(4). In fact, once the detaining authority passes detention order under section 3(3), it is to operate for not more than 12 days or 15 days as the case may be, unless in the meantime it is approved by the State Government. Such detention order passed by the detaining authority, if is approved by the State Government, merges with the order of the approval of the State Government which renders the detaining authority functus officio. If in terms of the provisions of section 21 of the General Clauses Act, power to undo or rescind the detention order is extended to the detaining authority even after approval of such detention order by the State Government, that may give rise to a very anomalous situation where the District Magistrate in case on consideration of the representation of the detenue allows the same and sets aside the detention order. The anomaly in such a situation would be that despite the District Magistrate having set aside the detention order the order of approval of detention order accorded by the State Government will still be in existence. Accordingly, in our opinion the provisions of section 21 of the General Clauses Act cannot be taken aid of by the detaining authority to consider and decide the representation which may be made by the detenue against his detention order after the detention order is approved by the State Government.

41. In this case while attempting to give an explanation for delay in forwarding the representation of the petitioner to the State Government, the District Magistrate has stated that he took some time to decide the representation preferred by the petitioner which was rejected by him. Such

an exercise undertaken by the District Magistrate was completely uncalled for and unwarranted and time devoted by him for undertaking such exercise could have easily been saved and utilized in furnishing the petitioner's representation to the State Government.

42. For the discussion made and reasons given above, we are of the opinion that the detention of the petitioner is liable to be quashed.

43. Resultantly, the instant Habeas Corpus petition is **allowed**. The impugned order of detention dated 08.03.2022 passed by the District Magistrate, Sitapur and all subsequent consequential orders are hereby quashed.

44. The detenue-petitioner is ordered to set at liberty by the respondents forthwith unless he is required to be detained in connection with any other case.

45. There will be no order as to costs.

(2023) 2 ILRA 811
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2023 & 15.02.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 576 of 2023

Smt. Kiran Sonkar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Harish Chandra Dwivedi

Counsel for the Respondents:
C.S.C., Sri Iqbal Hussain, Sri Nikhil Mishra

A. Service Law – Pension - U.P. Retirement Benefit Rules, 1961 - Rule 3(v) - After death, gratuity, pension and terminal benefits shall be paid strictly in accordance with Rule 3(3), Rule 5(1) & Rule 6 of Rules, 1961 and any nomination made in service book contrary to the Rules, 1961 cannot be accepted. Petitioner being legally wedded wife is fully entitled for terminal benefits. (Para 22)

In the present case, facts are not disputed. Nomination has been made in favour of brother for Gratuity, Leave Encashment and other terminal benefits, which is not permissible under Rule 3(3), Rule 5(1) & Rule 6 of Rules, 1961 in light of definition of family. Brother below the age of 18 years may be entitled for pensionary benefits in case other members of family mentioned in Rule 3(i)(ii)(iii) & (iv) of Rules, 1961 are not available. **Civil Litigation or matrimonial dispute between husband and wife cannot be a ground to exclude the wife from terminal benefits. Even, if nomination has been made in favour of some other person or any reference has been made w.r.t. a legal or matrimonial dispute with wife in service book**, that cannot be a ground for excluding the wife for gratuity, pension & other terminal benefits, **unless a valid divorce decree has been passed between husband and wife.** No such decree of divorce is on record between deceased employee and his wife, petitioner before this Court. (Para 21)

B. Words & Phrases – *"Family"* – Rule 3 deals with "Family" and reads as - " "Family" means the following relatives of an officer: (i) wife, in the case of any male officer;.... (ix) children of a pre-deceased son" (Para 11)

Writ petition allowed. (E-4)

Precedent followed:

1. Gangubai Bhagwan Salawade & ors. Vs Smt. Chimanabai Suryabhan Salawade & ors., 2004 Vol. 106 (4) Bombay (Para 16)

2. Ram Chander Talwar & anr. Vs Devendra Umar Talwar, 2011 (2) AWC 1576 (SC) (Para 17)

3. Virendra Kumar Srivastava & anr. Vs The Hon'ble High Court of Judicature at Allahabad through Re, Service Single No. 2532 of 2014 (Para 19)

4. Chandra Kali Vs St. of U.P. & ors., Writ A No. 3288 of 2017, decided on 31.07.2019 (Para 20)

Present petition has been filed to issue a writ of mandamus for a direction upon the Municipal Commissioner Nagar Nigam, Varanasi to grant/release the pension in favour of petitioner.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Rejoinder affidavit filed today, is taken on record.

2. Heard learned counsel for the petitioner, Sri Govind Narayan Srivastava, learned standing counsel for respondent no. 1 and Sri Iqbal Hussain, learned counsel for respondent nos. 2 to 4.

3. Present petition has been filed to issue a writ of mandamus for a direction upon the Municipal Commissioner Nagar Nigam, Varanasi to grant/ release the pension in favour of petitioner.

4. With the consent of the parties, petition is being decided at the admission stage itself without calling for counter affidavit.

5. Learned counsel for the petitioner submitted that petitioner is legally wedded wife of deceased Sanjay Kumar Sonkar, who was working on the post of Sanitary Supervisor, Health Department, Nagar Nigam, Varanasi and died on 5.10.2020. After his death, petitioner is fully entitled for all teminal benefits.

6. Case was heard on 12.01.2023 and Court had directed the Municipal Commissioner, Nagar Nigam, Jhansi-respondent no. 2 to file personal affidavit as to why petitioner's pension as admissible under the Rules has not been paid to her. Upon which, personal affidavit of respondent no. 2 has been filed with the specific averment that in service book of deceased employee, nomination has been made in favour of his son, for the purpose of appointment on compassionate ground and brother, for other terminal benefits. It is also mentioned in the service book that deceased employee is having legal dispute with his wife.

7. Today, learned counsel for the petitioner submitted that terminal benefits of petitioner is governed by the provisions of U.P. Retirement Benefit Rules, 1961 (in short "Rules, 1961"), which clearly provides that for the purpose of family pension, nomination can be made only in favour of one or more family members and beyond family members, no nomination can be made. He next submitted that as per the definition given in Rules, 1961, brother below the age of 18 years is entitled for terminal benefits at Serial No. (5) as provided in Rule 3(v) of Rules, 1961 in the order of hierarchy. In the present case, undisputedly, petitioner is wife of deceased employee placed at Serial No. 1 as provided in Rule 3(i) of Rules, 1961 also having a son and she has never been legally separated. In support of his contention, he relied upon certain judgments of Apex Court, this Court as well as other Court on the same issue. Lastly, he submitted that a direction may be issued to respondents to

pay all terminal benefits to the petitioner forthwith.

8. Sri Khalid Mahmood, advocate holding brief of Sri Iqbal Hussain, learned counsel for respondent nos. 2 to 4 reiterated that in service book, nomination of deceased employee has been made in favour of his son for the purpose of appointment on compassionate ground and brother for other terminal benefits, but about legal submission, he could not dispute the same.

9. I have considered the rival submissions raised by learned counsel for the parties and perused the record as well as judgment relied upon.

10. Before dealing with the aforesaid issue, it would be useful to reproduce certain definitions as given in Rules, 1961 for proper adjudication of the case.

11. Rule 3 deals with **Family** and reads as under;

"(3) "Family" means the following relatives of an officer:

(i) wife, in the case of any male officer;

(ii) husband, in the case of a female officer;

(iii) sons (including step-children and adopted children)

(iv) unmarried and widowed daughters. (Including step-children and adopted children)

(v) brothers below the age of 18 years and unmarried and widowed sisters (including step-brothers and step-sisters);

(vi) father;

(vii) mother;

(viii) married daughters (including step-daughters), and

(iv) children of a pre-deceased son"

12. Rule 5 deals with **Death-cum-retirement Gratuity** and reads as under;

"(1) .....

(2) if an officer dies while in service a gratuity, the amount of which shall, subject to a minimum of 12 times and a maximum of 16½ times the emoluments, be an amount equal to one-fourth of the emoluments of the officer multiplied by the total number of six monthly periods of qualifying service, shall be paid to the person or persons on whom the right to receive the gratuity is conferred under sub-rules (1) to (8) of Rule 6 and if there is no such person, it shall be paid in the manner indicated in sub-Rule (9) of that rule."

13. Rule 6(1) deals with the **nomination** and reads as under;

*"**Nomination-(1).** A Government servant shall, as soon as he acquires or if he already holds a lien on a permanent pensionable post, make a nomination conferring on one or more persons the right to receive any gratuity that may be sanctioned under sub-rule (2) or sub-rule (3) of the rule 5 and gratuity which after becoming admissible to him under sub-rule (1) of that rule is not paid to him before death.*

Provided that if at the time of making the Notification the officer has a family the nomination shall not be in favour of any person other than one or more of the members of his family."

14. Rule-7 deals with the **Family Pension,** which reads as under;

"Family Pension -(1). The family pension not exceeding the amount specified

in sub-Rule (2) below may be granted for a period of ten years to the family of an officer who dies, whether after retirement or while still in service after completion of not less than 20 years qualifying service.

Provided that the period of payment of family pension shall in no case extend beyond a period of five years from the date on which the deceased officer reached or would have reached the age of compulsory retirement."

15. From the perusal of Rule 6 of Rules, 1961, it is apparently clear that in case, the officer is having a family, nomination shall not be made in favour of any other person except family members. In present case, undisputedly, deceased employee was having his family members and also he has made nomination for compassionate appointment in favour of his son, but for terminal benefits, it has been made in favour of his brother, which is not permissible in case his wife is alive as provided in Rule 3(3) & Rule 6 of Rule, 1961, which defines the family, nomination and hierarchy of entitlement.

16. In the case of ***(Gangubai Bhagwan Salawade & others vs. Smt. Chimanabai Suryabhan Salawade & others) reported in 2004 Vol. 106(4) Bombay,*** it has been held that at the time of making nomination, it must be made in favour of one of the members of his family. Relevant paragraph 5 of the judgment reads as under:-

"It is no doubt true that once there is a nomination, the amounts must be paid over to the nominee under the Payment of Gratuity Act. A nominee can be any person who belongs to the family of the deceased. Section 6 of the Act makes it clear that if the employee has a family at the time of making nomination, the nomination must be made in favour of one of the members of his family. Any nomination made by the employee in favour of a person who is not a member of his family is void. If the employee at the time of making a nomination has no family but subsequently acquires a family, the nomination made earlier becomes invalid and a fresh nomination must be made by the employee in favour of the members of his family. "Family" has been defined under section 2(h) of the Act. In relation to a male employee the word includes his wife, his children whether married or unmarried, his dependent parents and the dependent parents of his wife and the widow and children of his predeceased son."

17. In ***Ram Chander Talwar and another vs. Devender umar Talwar and others; 2011 (2) AWC 1576 (SC),*** the Apex Court, while dealing with Section 45 ZA of the Banking Regulation Act, has held that nominee of depositor has right to receive money lying in account of depositor after his death but he is not owner of money, so received. In this context paragraph 5 of the aforesaid judgment is being reproduced as under:-

" Section 45 ZA (2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of

succession. All the monies receivable by the nominee by virtue of Section 45 ZA (2) would, therefore, form part of the estate of the deceased depsoitor and devolve according to the rule of succession to which the depositor may be governed."

18. Even, in case of nomination as per law laid down by the Apex Court, which authorized the person to only receive the benefits from such membership in the event of death of the person, who had nominated him. In fact, nomination does not create any right or title in the property and it is only to provide for the interregnum between the death and the full administration of the estate and does not confer any permanent right to the property forming part of estate of the deceased.

19. The similar dispute was again before this Court in ***Service Single No. 2532 of 2014 (Virendra Kumar Srivastava & Another Vs. The Hon'ble High Court of Judicature at Allahabad Through Re)*** dealing with the case in detail and Court has dismissed the petition vide order dated 07.04.2015 with following observations;

"As far as the appointment under Dying in Harness Rules is concerned, it is established from the documents brought on record by the official respondents that Smt. Vinita Srivastava and Km. Shilpi Srivastava are the wife and daughter of the deceased. Furthermore, the petitioner do not fall within the definition of "family" under the 1974 Rules. Therefore, the action of the official respondents cannot be said to be unreasonable or legally unjustified.

It may be added that during the course of arguments, it has been brought to the notice of the court that the petitioners have entered into a compromise with the wife of deceased Arvind Nath Srivastava, who is private respondent in the present proceedings. As per compromise, all post death beneifits of Late Arvind Nath Srivastava shall be paid in equal share to the petitioners. The wife-respondent shall receive family pension and the petitioners and other private respondents would have no objection with regard to compassionate appointment to Km.Shilpi Sriavasta.

Having examined the matter in the light of the relevant Rules, referred to above, the compromise said to have been entered into between the parties, cannot be said to be a valid document in the eyes of law, as the same is against the provisions of law because in presence of real daughter and wife of the petitioner, the court cannot direct the official respondents to make payment of post death benefits in favour of the petitioners. Needless to say, that the court cannot go contrary to rule to recognize the compromise. In other words, by consent or agreement, parties cannot achieve what is contrary to law and the court is not bound to accept the compromise entered into between the parties to the legal proceedings.

In view of the aforesaid detail discussions, the petitioner is not entitled for any relief and the writ petition is hereby dismissed. The official respondents shall make the payment of post death benefits, family pension and dealt the matter of compassionate appointment strictly in accordance with relevant rules."

20. In case of ***Chandra Kali Vs. State of U.P. and 7 others*** passed in Writ A No. 3288 of 2017 decided on 31.07.2019, Court has held that pension is to be disbursed as per provisions of Rules, 1961. The Rules clearly states that only eligible persons as defined in definition of "*family*" shall be entitled to receive family pension and member out of family member as defined

in Rules, 1961 is not entitled for pension. Relevant paragraph of aforesaid judgment is quoted below;

"As regards, eligibility to family pension, the pension is to be disbursed as per the provisions of the Rules, 1961. The Rules clearly state that only eligible person is entitled to receive family pension but where pension awarded ceases to be payable on the death or marriage of the recipient or for any other reason, it will be regranted to the persons next lower in the order mentioned in sub-rule (4) of Rule 7. The Hindu second wife would not be eligible for family pension as long as the first wife is alive and has not remarried. There is no provision in the Rules for relinquishment of family pension in favour of another person. The eighth respondent would not fall within the definition of ''family' of the employee. The sixth and seventh respondent being sons of the deceased employees brother are also not family of the employee within the definition of ''family' under the Rules, 1961."

21. In the present case, facts are not disputed. Nomination has been made in favour of brother for Gratuity, Leave Encashment and other terminal benefits, which is not permissible under Rule 3(3), Rule 5(1) & Rule 6 of Rules, 1961 in light of definition of family. Brother below the age of 18 years may be entitled for pensionary benefits in case other members of family mentioned in Rule 3(i)(ii)(iii) & (iv) of Rules, 1961 are not available. Civil Litigation or matrimonial dispute between husband and wife cannot be a ground to exclude the wife from terminal benefits. Even, if nomination has been made in favour of some other person or any reference has been made with regard to a legal or matrimonial dispute with wife in service book, that cannot be a ground for excluding the wife for gratuity, pension & other terminal benefits, unless a valid divorce decree has been passed between husband and wife. No such decree of divorce is on record between deceased employee and his wife, petitioner before this Court.

22. Therefore, after death, gratuity, pension and terminal benefits shall be paid strictly in accordance with Rule 3(3), Rule 5(1) & Rule 6 of Rules, 1961 and any nomination made in service book contrary to the Rules, 1961 cannot be accepted. Petitioner being legally wedded wife is fully entitled for terminal benefits.

23. Accordingly, petition is **allowed**.

24. A writ of mandamus is issued directing the respondent no. 2 - Municipal Commissioner, Nagar Nigam, Jhansi to pay all the terminal benefits to the petitioner within a period of two months from the date of production of certified copy of this order after completing all the formalities required under the Rules.

25. No order as to costs.

Civil Misc. Correction Application No. 2 of 2023

1. Heard learned counsel for the applicant as well as learned standing counsel and perused the record.

2. The correction application is allowed.

3. In view of the submission made by learned counsel for the applicant, following correction is being incorporated in the order dated 6.2.2023:-

4. In second line of paragraph 6 and second line of last paragraph of the order dated 6.2.2023, in place of 'Nagar Nigam, Jhansi', it should be read as 'Nagar Nigam, Varanasi'.

(2023) 2 ILRA 817
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.01.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 6616 of 2007

Subhash Chandra ...Petitioner
Versus
District Basic Education Officer, Barabanki & Anr. ...Respondents

Counsel for the Petitioner:
Ved Prakash Nag, Abhinav Nath Tripathi, Amrendra Nath Tripathi

Counsel for the Respondents:
Prashant Arora, Rahul Shukla

A. Service Law – Compassionate Appointment - Payment of Salaries Act, 1978 - U.P. Basic Education Act, 1972 - U.P. Recognized Basic Schools (Junior High Schools) (Recruitment And Conditions Of Service Of Teachers) Rules, 1978 - Dying-in-Harness Rules, 1974 - Merely bringing the institution on the grant-in-aid list (with effect from 01.12.2006) after the date of death of petitioner's father (his father died on 10.12.2001, i.e. prior to 01.12.2006) does not bar the claim of the petitioner for being considered for the appointment on compassionate grounds. (Para 10, 11)

The compassionate appointment in the Primary School as well as in the Junior Basic School is made under the GO adopting the Dying-in-Harness Rules, 1974. The GO does not create any discrimination amongst the claims raised by the candidates whether the institution is receiving aid from the State Government or it is recognized institution under the provisions of U.P. Basic Education Act, 1972. It is not the case of the District Basic Education Officer that the institution was not recognized under the provisions of U.P. Basic Education Act, 1972 at the relevant point of time. (Para 11)

Writ petition allowed. (E-4)

Present petition assails order dated 21.09.2007, and further prays for consideration of claim for appointment on compassionate grounds on Class IV post.

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Anas Sherwani, learned Advocate holding brief of Shri Amrendra Nath Tripathi, learned counsel for the petitioner and Shri Rahul Shukla, learned counsel for the respondent no.1.

2. None has put in appearance for the respondent no.2 in spite of notice issued to the respondent no.2.

3. By means of the present writ petition, the petitioner has prayed for issuance of a writ in the nature of Certiorari quashing the impugned order dated 21.9.2007 (Annexure-9 to the writ petition) with further prayer to issue a writ in the nature of Mandamus commanding the respondents to consider the petitioner's claim and give appointment on compassionate grounds on Class IV post.

4. Factual matrix of the case is that father of the petitioner died while in service working on the post of Assistant Teacher in the School. At the time of death of the father of the petitioner he was getting scale of trained teacher. The petitioner is fully dependent on his father. The petitioner had completed intermediate education at the

time of death of his father and moved application on 9.5.2002 for giving appointment on compassionate grounds. The application of the petitioner was received by the Manager of the School and was duly forwarded to the respondent no.1 where the application was received on 11.9.2002. The petitioner also submitted his application on prescribed format, but nothing was done by the District Basic Education Officer on his application.

When the respondents did not consider the claim of the petitioner for appointment on compassionate grounds, the petitioner filed a writ petition bearing Writ Petition No.1432 (SS) of 2007 before this Court. Vide order dated 21.3.2007 this Court directed the respondent no.1 to pass an order for appointment on compassionate grounds. The petitioner, due to non-compliance of the said order, filed Contempt Petition No.1869 of 2007 in which notice was issued to District Basic Education Officer (respondent no.1) fixing 24.9.2007. The District Basic Education Officer has now passed an order on 21.9.2007 whereby the claim of the petitioner has been rejected on the ground that the institution in question was brought within purview of Payment of Salaries Act, 1978 with effect from 1.12.2006 and the father of the petitioner died on 10.12.2001, therefore the claim of the petitioner cannot be considered for the grant of appointment on compassionate ground.

5. Submission of learned counsel for the petitioner is that the assumption drawn by the District Basic Education Officer is wholly erroneous in nature. The institution is recognized under the provisions of the U.P. Basic Education Act, 1972 and teachers and other employees are granted appointment after due approval of the District Basic Education Officer in the institution. The institution if taken grant-in-aid list, the liability for the payment of salary arose on the shoulder of the State Authority.

6. Learned counsel for the petitioner next submits that the impugned order is wholly illegal and is liable to be quashed by this Court. There is no rider under the U.P. Basic Education Act, 1972 or there is any provision under the Basic Education Act to make appointment on compassionate ground in case the institution is not receiving aid from the State Government. He next submits that the impugned order dated 21.9.2007 is per se illegal and cannot be sustained and therefore, is liable to be set aside.

7. On the other hand, Shri Rahul Shukla, learned counsel for respondent no.1, in support of the impugned order, submits that the same does not suffer from infirmity or illegality and is just and valid order. He next submits that the institution was not receiving aid from the State Government, therefore under bonafide belief the claim of the petitioner was rejected on the ground that no appointment can be made in the institution which is not receiving aid from the State Government.

8. Learned counsel for the respondent no.1 next submits that the writ petition is devoid of merits and is liable to be set aside with heavy cost.

9. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

10. On perusal of the impugned order it is evident that the only ground has been taken in the impugned order that father of

the petitioner died on 10.12.2001 and the institution was brought within the purview of Payment of Salaries Act with effect from 1.12.2006, therefore the institution being not received aid from the State Government no appointment on compassionate ground can be made. It is also evident that the District Basic Education Officer has recorded no finding in regard to grant of approval to the appointment made in the institution duly recognized under the provisions of U.P. Basic Education Act, 1972 and provision of the U.P. Recognised Basic Schools (Junior High Schools) (Recruitment And Conditions Of Service Of Teachers) Rules, 1978 does not contain bar in making compassionate appointment in case institution is not receiving aid from the State Government.

11. The compassionate appointment in the Primary School as well as in the Junior Basic School is made under the Government Order adopting the Dying-in-Harness Rules, 1974. The Government Order does not create any discrimination amongest the claims raised by the candidates whether the institution is receiving aid from the State Government or it is recognized institution under the provisions of U.P. Basic Education Act, 1972. It is not the case of the District Basic Education Officer that the institution was not recognized under the provisions of U.P. Basic Education Act, 1972 at the relevant point of time. Mere bringing the institution on the grant-in-aid list with effect from 1.12.2006 does not bar the claim of the petitioner for being considered for the appointment on compassionate grounds.

12. Considering the fact that the impugned order does not record cogent reason in rejecting the claim of the petitioner, the impugned order dated 21.9.2007 is hereby quashed. The District Basic Education Officer, Barabanki is directed to consider the claim of the petitioner for the appointment on compassionate grounds in the light of the observations made above and appropriate order in this regard shall be passed within a period of six weeks from the date of production of a certified copy of this order.

14. In the result, the writ petition is **allowed**.

(2023) 2 ILRA 819
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 22728 of 2005

Shivram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.C. Verma, Sri Murtuza Ali, Sri Devesh Kumar Verma

Counsel for the Respondents:
C.S.C.

क. आव यक वस्तु अधिनियम, 1955 – धारा 11 – भाासनादे ा दिनांक 03.07.1990 – खण्ड (7.1) – उचित मूल्य की दुकान – अनुबन्ध–पत्र का निरस्तीकरण – आव यक वस्तुओं के वितरण में प्रधान द्वारा अनियमितता का आरोप – भाासनादे ा दिनांक 03.07.1990 के अंतर्गत निरस्तीकरण के पूर्व प्रारंभिक जांच एवं सुनवाई का आवसर आव यक – जबकि भाासनादे ा दिनांक 29.07.2007 द्वारा सुनवाई का अवसर सीमित किया गया – प्रभाव – अभिनिर्धारित किया गया – खण्डन जब का है, उस समय वितरण आदे ा 2004 प्रयोज्य था तथा भाासनादे ा दिनांकित 29.07.2004 भी लागू था।

अतः यह पाया जाता है कि विपक्षीगण द्वारा सरसरी तौर पर ग्राम–प्रधान/प्रधान–पति के ि ाकायत पर कार्य करते हुए प्र नगत दुकान को निलम्बित एवं अनुबन्ध–पत्र को खण्डित करने का आदे ा पारित किया गया है। यद्यपि बाद में भाासनादे ा दिनांकित 29.07.2007 तथा कंट्रोल आदेश के अनुसार सुनवाई का अवसर सीमित हो गया है परन्तु तत्समय पवृत्त विधियों के अनुसार पारद ि ार्शिता पूर्ण ढंग से जांच कर आदे ा पारित किया जाना एवं अपील को निस्तारित किया जाना साबित नहीं होता – हाईकोर्ट ने आक्षेपित आदे ा को निरस्त किया। (पैरा 18 एवं 22)

रिट याचिका स्वीकृत (E-1)

उल्लेखित पूर्व निर्णयों की सूचीः–

1. अबु बकर बनाम उत्तर प्रदे ा राज्य; 2010 (80) ए.एल.आर. 769
2. रिट सी संख्या 47073/2013; कोतवाल सिंह बनाम उत्तर प्रदे ा राज्य एवं दो अन्य में पारित आदे ा दिनांक 04.01.2016
3. पूरन सिंह बनाम उत्तर प्रदे ा राज्य एवं अन्य; 2010 (3) ए.डी.जे. 659 **(पूर्णपीठ)**
4. रिट सी संख्या 15420/2020; नजाकत अली बनाम उत्तर प्रदे ा राज्य एवं 4 अन्य में पारित आदे ा दिनांक 22.10.2021

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

1. यह याचिका विपक्षी संख्या -3 उप-जिलाधिकारी, अमृतपुर, जिला फर्रुखाबाद आदेश दिनांकित 21.09.2004 संलग्नक 4 तथा अपर आयुक्त (खाद्य) कानपुर मण्डल, कानपुर के द्वारा अपील संख्या 289/2004 शिवराम बनाम उप-जिलाधिकारी अमृतपुर जिला फर्रूखाबाद में पारित आदेश दिनांकित 21 फरवरी, 2005 संलग्नक 7 को खण्डित करने के लिए प्रस्तुत किया गया है जिसके द्वारा उप-जिलाधिकारी अमृतपुर ने याची द्वारा अधिसूचित वस्तुओं के वितरण में अनियमितताएं कारित करने के कारण उसका अनुबन्ध पत्र खण्डित कर दिया गया था तथा उस आदेश के विरुद्ध प्रस्तुत अपील को भी खण्डित कर दिया गया था।

2. संक्षेप में पत्रावली के तथ्य यह हैं कि आवश्यक वस्तु अधिनियम की धारा 11 के अन्तर्गत अपने शक्ति का प्रयोग करते हुए उत्तर प्रदेश निश्चित वस्तु वितरण आदेश 1990 के अन्तर्गत उत्तरदाता संख्या 1 द्वारा जारी सरकारी आदेश दिनाँकित 3 जुलाई, 1990 के अनुसार याची को ग्राम सभा चाचूपुर, ब्लाक राजेपुर, तहसील अमृतपुर जिला फर्रुखाबाद में उचित मूल्य की दुकान की अनुज्ञप्ति प्रदान की गई एवं तभी से वह उक्त दुकान का संचालन कर रहा है तथा ग्राम चाचूपुर के किसी भी अवैध कार्डधारक द्वारा उसके विरुद्ध कोई शिकायत नहीं की गई है। ग्रामसभा चाचूपुर, जटपुरा का ग्राम प्रधान चुनावी रंजिश और गाँव की पार्टीबन्दी के कारण याची से दुश्मनी रखता है और इसलिए उसने डिप्टी कलेक्टर अमृतपुर को पूर्णतया झूठी और दुर्भावनापूर्ण शिकायत किया है तथा झूठा आरोप लगाया है कि याची ने मिट्टी का तेल और आवश्यक वस्तुओं का वितरण नहीं किया है उसने अपनी ही पार्टी के लोगों और समर्थकों के लोगों के नाम का उल्लेख किया है कि उनके राशन कार्डों में आवश्यक वस्तुओं का वितरण समुचित ढंग से नहीं किया गया है जबकि ग्रामसभा की अधिकृत प्रशासनिक समिति निश्चित वस्तुओं के वितरण से सर्वथा संतुष्ट है तथा अगले महीने का कोटा प्रशासनिक समिति के प्रमाणीकरण के बाद ही उठाया जा सकता है। उक्त लोगों के राशन कार्ड याची को प्रदान नहीं किये गए थे। शासनादेश दिनाँक 03.07.1990 के खण्ड (7.1) के अनुसार यदि निश्चित वस्तुओं के वितरण में अवैधता एवं अनियमितता कारित किया जाता है तो ग्रामसभा उचित मूल्य की दुकान को निलम्बित या रद्द करने, का प्रस्ताव कर सकती है तथा जनसभा का ऐसा संकल्प कलेक्टर /उप-जिलाधिकारी के समक्ष अग्रिम कार्यवाही हेतु रखा जाना चाहिए परन्तु ग्रामसभा चाचूपुर ने ग्राम प्रधान/प्रधान-पति रमेशचन्द्र के द्वारा व्यक्तिगत हैसियत से किये गए शिकायत पर निलम्बन या रद्द करने की कोई कार्यवाही करने के लिए प्रस्ताव पारित नहीं किया है।

3. शासनादेश दिनांकित 29.07.2004 के खण्ड 2 के अनुसार उचित मूल्य की दुकान के निलम्बन या निरस्तीकरण के किसी भी आदेश को पारित करने के पूर्व जाँच कराना अनिवार्य है तथा यदि प्रारम्भिक या औचक जाँच में अनिश्चित वस्तुओं के वितरण में कोई गम्भीर अवैधता या अनियमितता पाई जाती है तभी ऐसी दुकान के निलम्बन का आदेश कानूनी रूप से पारित किया जा सकता है तथा दुकानदार को कारण बताओ नोटिस जारी किया जा सकता है। प्रारम्भिक जाँच के आधार पर उसके विरुद्ध लगाए गए आरोपों के सम्बन्ध में कारण बताओ नोटिस और सुनवाई का पूर्ण अवसर दिया जाना चाहिए। डिप्टी कलेक्टर अमृतपुर ने सत्ताधारी पार्टी के वर्तमान ग्राम प्रधान / प्रधान-पति के राजनीतिक दबाव के अन्दर उपखण्ड (2) के अन्तर्गत कोई प्रारम्भिक जाँच नहीं किया तथा ग्राम प्रधान / प्रधान-पति की झूठी और दुर्भावनापूर्ण शिकायत के आधार पर याची के दुकान के अनुज्ञप्ति को

दिनाँक 17.08.2004 का निलम्बन आदेश पारित कर दिया।

4. कारण बताओ नोटिस प्राप्त करने के उपरान्त याची ने दिनाँक 15.09.2004 को लिखित उत्तर दिया कि मिट्टी का तेल तथा अन्य अधिसूचित वस्तुएँ निरन्तर वितरित की गई हैं तथा ग्रामसभा के उप-प्रधान के नेतृत्व में गठित प्रशासकीय समिति द्वारा नियमानुसार सत्यापित की गई है एवं उसके उपरान्त अगले माह का सामान उठाया गया है। तमाम राशन कार्डों को ग्राम प्रधान द्वारा अपनी अभिरक्षा में लेकर उन्हें याची के समक्ष प्रस्तुत नहीं किया गया है तथा ऐसा मात्र शिकायत का आधार बनाने के लिए किया गया। यद्यपि अपने स्पष्टीकरण के साथ याची ने ग्राम प्रधान /प्रधान-पति द्वारा लिये गए कार्डधारकों के प्रमाण पत्र / घोषणा पत्र भी प्रस्तुत किया गया जो संलग्नक 3 के रूप में है।

5. याची का लिखित उत्तर / स्पष्टीकरण प्राप्त करने के उपरान्त उप- जिलाधिकारी अमृतपुर ने सुनवाई की कोई तिथि नहीं नियत किया तथा अवैध एवं मनमाने तौर पर दिनाँक 31.09.2004 को याची का उचित दर की दुकान की अनुज्ञप्ति खण्डित कर दी जब कि ऐसा आदेश मात्र जाँच करने के उपरान्त तथा सुनवाई एवं साक्ष्य प्रस्तुत करने का पूर्ण अवसर डीलर को प्रदान करने के उपरान्त ही पारित किया जा सकता है। अतः आदेश दिनांकित 31.09.2004 उप खण्ड शासनादेश 29.07.2004 के खण्ड (4) के आदेशात्मक प्रावधान के उल्लघंन में पारित किया गया है जो संलग्नक 4 के रूप में है।

6. आदेश निरस्तीकरण आदेश दिनांकित 31.09.2004 से स्पष्ट है कि उप-जिलाधिकारी ने न तो कोई जांच किया न ही याची को सुनवाई का उचित अवसर प्रदान किया तथा झूठे एवं आधारहीन शिकायतों पर विश्वास करके प्रश्नगत आदेश पारित कर दिया। उक्त आदेश किसी ग्राह्य साक्ष्य अथवा ठोस या स्वीकार्य साक्ष्य पर आधारित नहीं है। याची द्वारा प्रस्तुत साक्ष्य अखण्डनीय था।

7. आदेश दिनांकित 31.09.2004 से क्षुब्ध होकर शासनादेश 03.07.1990 के खण्ड 11 के अन्तर्गत याची ने अपील दिनांकित 29.09.2004 को प्रस्तुत किया जो संलग्नक 5 के रूप में है तथा नोटरी शपथ पत्र दिनाँकित 18.10.2004 भी प्रस्तुत किया कि अधिसूचित वस्तुओं का वितरण पूर्णतया सिद्ध है तथा वितरण प्रमाणन के आधार पर अगले माह का कोटा भी नियमानुसार उठाया गया है। विभिन्न कार्डधारकों के बयान/घोषणापत्र के आधार पर यह भी कथन किया कि ग्राम प्रधान/प्रधान पति ने अवैध रूप से उक्त व्यक्तियों के राशन कार्डों को रोक रखा है तथा इनका कोई खण्डन नहीं किया जा सका है। ग्राम प्रधान /प्रधान पति ने शपथ पत्र दिनाँक 18.10.2004 का कोई खण्डन नहीं किया तथा उप-जिलाधिकारी ने दिनाँक 21.09.2004 दुकान के अनुज्ञप्ति का निरस्तीकरण का आदेश खण्डित शपथपत्रों के आधार पर पारित किया है। उप कमिश्नर खाद्य ने भी उक्त अखण्डित शपथपत्रों की उपेक्षा किया तथा अवैध रूप से तकनीकी तौर पर उप जिलाधिकारी के आदेश को पुष्ट करते हुए अपील को आदेश दिनांकित 21.02.2005 संलग्नक 7 के द्वारा खारिज कर दिया। नोटरी शपथपत्र संलग्नक 6 रिट याचिका के साथ संलग्न है। प्रश्नगत आदेश ग्राम प्रधान पति के शिकायत पर आधारित है तथा किसी ठोस एवं ग्राह्य साक्ष्य पर आधारित नहीं है जिससे यह सिद्ध होता है कि याची के विरुद्ध ग्राम प्रधान/प्रधान पति द्वारा झूठे एवं दुर्भावनापूर्ण आरोप लगाया गया है। प्रश्नगत आदेश अवैध, मनमाना, विकृत एवं अन्यायपूर्ण है तथा अधिकार- क्षेत्र के प्रकट त्रुटि से ग्रस्त है। अतः प्रश्नगत आदेश निरस्त किया जाए। विपक्षीगण की तरफ से कोई प्रतिशपथ पत्र प्रस्तुत नहीं किया गया। उभयपक्षों को सुना तथा पत्रावली का अवलोकन किया।

8. खाद्य एवं रसद अनुभाग-6, लखनऊ दिनांक 29.07.2004 के शासनादेश को संलग्नक 1 के रूप में प्रस्तुत किया है। संलग्नक 2 उप-जिलाधिकारी अमृतपुर द्वारा निर्गत कारण बताओ नोटिस दिनांकित 17.08.2004 है जिसमें याची द्वारा प्रस्तुत त्रुटियों को अंकित करते हुए स्पष्टीकरण एक सप्ताह के अन्दर माँगा गया है तथा तीन माह के अन्दर समस्त आवश्यक वस्तुओं के स्टॉक / वितरण रजिस्टर की भी माँग की गई है। संलग्नक-3 के अनुसार दिनाँक 15.09.2004 को स्पष्टीकरण प्रस्तुत किया गया कि आरोप पत्र में वर्णित सभी राशन कार्ड ग्राम प्रधान/प्रधान पति के पास काफी समय से जमा हैं जिन्हें कार्डधारकों को नहीं दिया गया। उक्त कार्डों पर देय आवश्यक वस्तुएं ग्राम प्रधान/प्रधान पति प्राप्त करने के लिए उस पर दबाव डालता है तथा ग्राम प्रधान /प्रधान पति के पास जमा कार्डों पर एक साथ आवश्यक वस्तुएं निर्गत न करने के कारण ग्राम प्रधान /प्रधान पति द्वारा शिकायत की गई है उसके विरुद्ध किसी भी कार्डधारक द्वारा कभी कोई शिकायत नहीं की गई है न ही समय-समय पर अधिकारियों द्वारा किये गए जाँच में भी कोई शिकायत ग्रामवासियों द्वारा की गई है।

9. संलग्नक 4 में उप जिलाधिकारी अमृतपुर द्वारा पारित आदेश दिनांकित 21.09.2004 की प्रति संलग्न की गई है, जिसमें उप जिलाधिकारी ने विक्रेता का कथन निराधार एवं असत्य होना कहा तथा राशन कार्ड प्रधान अपने पास जमा किए हुए है को स्वीकार नहीं किया तथा यह तर्क दिया कि जाँच के दौरान कार्डों का अवलोकन

करने पर आवश्यक वस्तुओं का वितरण अंकित होना नहीं पाया गया तथा विक्रेता द्वारा विक्रय अभिलेख प्रस्तुत न करना भी इसकी पुष्टि करता है कि उसके द्वारा अनिश्चित वस्तुओं के वितरण में अनियमितताएं की गई है तथा उन्हें छिपाने के लिए ही जान बूझकर बिक्री/स्टॉक रजिस्टर प्रस्तुत नहीं किये गए हैं। उप जिलाधिकारी के अनुसार चुनावी रंजिश के कारण शिकायत किया जाना मात्र पेशबन्दी में कहा गया है जिस पर विश्वास नहीं किया जा सकता है। अतः स्पष्टीकरण संतोषजनक नहीं मानते हुए विक्रेता द्वारा निष्पादित अनुबन्ध पत्र तत्काल प्रभाव से निरस्त करने का आदेश पारित किया गया।

10. सहायक आयुक्त खाद्य कानपुर मण्डल, कानपुर की अपील में पारित आदेश दिनांकित 31.02.2005 पत्रावली पर विद्यमान है जिसमें अपीलीय न्यायालय ने अंत्योदय कार्डधारकों जगदीश, श्री बालकराम, मुंशीलाल, जगदेव, सलीम, संतराम, जगदीश, रामकिशोर, धर्म नारायण, रामदेवी, राम कुमारी, रामसहाय एवं महीनदास आदि के राशन कार्डों के पड़ताल के आधार पर यह अवधारित किया कि इनमें से विभिन्न व्यक्तियों को तथा कुछ व्यक्तियों को 6 माह से अधिक समय से खाद्यान्न का वितरण नहीं किया गया।

11. अपीलीय न्यायालय ने इस तथ्य का भी संज्ञान लिया कि अपीलार्थी याची द्वारा इसी प्रकार की अनियमितताएं वर्ष 2003 में की गई थीं जिसके लिए पाँच सौ रुपए का अर्थदण्ड लगाते हुए उसका अनुबन्ध पत्र बहाल किया गया था। इस प्रकार अपीलार्थी अनियमितताएं कारित करने का आदी है। आवश्यक वस्तुओं का वितरण न करना गम्भीर अनियमितता है तथा ऐसे व्यक्तियों के साथ अनुबन्ध बनाए रखना सार्वजनिक वितरण प्रणाली के उद्देश्यों के विपरीत है। उपरोक्त आधारों पर अपीलीय न्यायालय ने अवर न्यायालय के आदेश को सही मानते हुए अपील को बलहीन कहते हुए निरस्त कर दिया जिससे क्षुब्ध होकर यह याचिका प्रस्तुत की गई है।

12. अपीलार्थी द्वारा **अबु बकर बनाम उत्तर प्रदेश राज्य 2010 (80) ए०एल०आर० 769 इलाहाबाद उच्च न्यायालय एकलपीठ** के आदेश पर बल दिया, जिसमें उचित मूल्य के दुकान के अनुज्ञप्तिधारी पर बी० पी०एल० एवं अंत्योदय कार्डधारकों से आवश्यक वस्तुओं की बिक्री के लिए निर्धारित से अधिक धनराशि वसूली करने के आधार पर अनुबन्ध निरस्त करने का आदेश पारित किया गया था। एकल न्यायालय द्वारा यह अवधारित किया गया कि याची को साक्षी से प्रतिपरीक्षा करने का कोई अवसर प्रदान नहीं किया गया। साक्ष्यों के बयान की प्रतियाँ एवं संख्या प्रदान नहीं की गई तथा पीठ पीछे दर्ज किये गए बयान के आधार पर दण्डित किया गया जो प्राकृतिक न्याय के सिद्धान्तों के विरुद्ध है, अतः पुनः सुनवाई का अवसर देकर आदेश पारित करने का आदेश पारित किया गया। इस निर्णय वाले बाद में दिनाँक 23.12.2005 को अपील खण्डित की गई थी।

13. याची द्वारा **कोतवाल सिंह बनाम उत्तर प्रदेश राज्य एवं दो अन्य रिट-सी संख्या 47073/2013** के मामले में इसी न्यायालय के कक्ष संख्या 38 द्वारा पारित आदेश दिनाँकित 04.01.2016 पर स्वयं को आधारित किया गया कि जाँच कार्यवाही **पूरन सिंह बनाम उत्तर प्रदेश राज्य एवं अन्य 2010 (3) ए०डी०जे० 659 (पूर्णपीठ)** के निर्णय के अनुसार पूर्ण जाँच के निर्देश के बिना एक तिथि खोज कर जाँच के आधार पर पारित किया गया था। उत्तर प्रदेश शासन के शासनादेश दिनाँकित 29.07.2004 में उचित मूल्य की दुकान की अनुज्ञप्ति निरस्त करने की जाँच की प्रक्रिया वर्णित है। राज्य सरकार के उक्त शासनादेश के पैरा 4 एवं 5 के अनुसार अनुज्ञप्ति रद्द करने के लिए कारण बताओ नोटिस एवं मामले में अन्तिम निर्णय के अनुसार एक पूर्ण जाँच की आवश्यकता है। इस निर्णय में रिट-सी संख्या 12737/2013 में पारित एकल न्यायाधीश के निर्णय एवं आदेश दिनाँकित 28.11.2014 का भी उल्लेख किया गया है जिसमें पूरन सिंह उपरोक्त के निर्णय का अनुसरण किया गया, यह पाया गया कि याची को आरोप पत्र भी प्रदान नहीं किया गया था ताकि वह स्पष्टीकरण अथवा उत्तर दे सके, न ही उसे सुनवाई की तिथि की सूचना दी गई थी। इस निर्णयज विधि में यह पाया गया कि उक्त मामले में मात्र प्रारम्भिक प्रकृति की जाँच की गई तथा अनुतोष दिनाँकित 29.07.2014 के आलोक में पूर्ण जाँच किए बगैर आदेश पारित किया गया, जो प्राकृतिक न्याय के सिद्धान्त के विपरीत है।

14. प्रस्तुत मामले में याची को दिनाँक 03.07.1990 के प्रश्नगत दुकान की अनुज्ञप्ति प्रदान की गई थी। याची ने अपनी याचिका में कहीं भी इस तथ्य का उल्लेख नहीं किया है कि उसे पूर्व में वर्ष 2003 में अनियमितता बरतने के कारण उसे पाँच सौ रुपए के अर्थदण्ड से दण्डित किया गया था।

15. वर्ष 2004 में ग्राम प्रधान ने यह शिकायत प्रस्तुत किया था कि बालकराम को दिसम्बर 2003 से जुलाई 2004 तक, मुंशीलाल को किसी भी वस्तु का राशन वितरण न करने, जगदेश पुत्र मकरन्द को वर्ष 2003 से जुलाई 2004 तक, नेकराम को जुलाई 2003 से जुलाई 2004 तक, सलीम को जुलाई 2003 से जुलाई 2004 तक, संतराम को जुलाई 2003 से जुलाई 2004 तक, राधेश्याम को जुलाई 2003 से जुलाई 2004 तक कोई भी वस्तु वितरित करने का अंकन नहीं है। जगदीश के राशन कार्ड

पर कोई भी वस्तु वितरित करने का अंकन नहीं है। रामकिशोर को दिसम्बर 2003 से जुलाई 2004 तक, धर्म नारायण को जुलाई 2003 से जुलाई 2004 तक, रामदेवी को जुलाई 2003 से जुलाई 2004 तक, राम कुमारी को दिसम्बर 2003 से जुलाई 2004 तक, रामसहाय को दिसम्बर 2003 से जुलाई 2004 तक एवं महीनदास को दिसम्बर 2003 से जुलाई 2004 तक आवश्यक वस्तुओं के वितरण का अंकन नहीं है।

16. याची ने संलग्नक 3 के रूप में स्पष्टीकरण के साथ कुछ व्यक्तियों का स्पष्टीकरण प्रस्तुत किया है कि उन्हें या तो आवश्यक वस्तुओं का वितरण होता रहा अथवा ग्राम प्रधान उनका कार्ड माँग कर ले गए तथा वापस नहीं दिए । उक्त व्यक्तिओं की सूची निम्नवत है-

17. राम सहाय की पत्नी का यह बयान अंकित है कि प्रधान-पति उसका कार्ड कई महीनों से उसके घर से माँग कर ले गए तथा अगस्त में दिया तथा इसके पूर्व कोटेदार हर माह राशन देता रहा।

18. बालकराम की पत्नी ने भी इसी प्रकार का बयान दिया है- बालकराम की पत्नी तथा जगदेव की माँ एवं रामदेवी तथा भगवान देवी विधवा रामचन्द्र एवं जगदीश, सूरजपाल, रामकिशोर, संतराम, श्री रामश्री, सूरजमुखी, जगदीश, सुशीला देवी, सलीम, श्रीदेवी एवं मुंशीलाल ने भी इसी आशय का बयान दिया कि उनका कार्ड प्रधान पति के पास जमा था जो बहुत बाद में प्राप्त हुआ। सुशीला देवी विधवा राम प्रसाद के अनुसार उसका अंत्योदय का राशन कार्ड गुम हो गया था तथापि कोटेदार बिना कार्ड उसे हर माह राशन देते थे। नेकराम, राधेश्याम एवं धर्म नारायण, महीनदास एवं राम कुमारी के अतिरिक्त ऐसा अन्य कोई कार्डधारक नहीं है जिसको खाद्यान्न प्रदान न किया गया हो। याची ने शपथ पत्र भी प्रस्तुत किया था जिसके खण्डन हेतु कोई शपथ पत्र प्रस्तुत नहीं किया गया है। यह खण्डन जब का है, उस समय वितरण आदेश 2004 प्रयोज्य था तथा शासनादेश दिनाँकित 29.07.2004 भी लागू था। अतः यह पाया जाता है कि विपक्षीगण द्वारा सरसरी तौर पर ग्राम प्रधान/ प्रधान-पति के शिकायत पर कार्य करते हुए प्रश्नगत दुकान को निलम्बित एवं अनुबन्ध-पत्र को खण्डित करने का आदेश पारित किया गया है। यद्यपि बाद में शासनादेश दिनाँकित 29.07.2007 तथा कंट्रोल आदेश के अनुसार सुनवाई का अवसर सीमित हो गया है परन्तु तत्समय प्रवृत्त दोनों विधियों के अनुसार पारदर्शितापूर्ण ढंग से जाँच कर आदेश पारित किया जाना एवं अपील को निस्तारित किया जाना साबित नहीं होता।

19. अपर मुख्य शासकीय अधिवक्ता की तरफ से **रिट-सी संख्या 15420/2020 नजाकत अली बनाम उत्तर प्रदेश एवं 4 अन्य** में पारित आदेश दिनाँकित 22.10.2021 पर बल दिया गया, जिसकी परिस्थितियाँ प्रस्तुत वाद के तथ्यों एवं परिस्थितियों से भिन्न है, अतः इस निर्णयज विधि में प्रतिपादित सिद्धांत इस याचिका में प्रयुक्त नहीं किये जा सकते हैं।

20. पूरनसिंह के उपरोक्त आदेश में यह अवधारित किया गया था कि निलम्बन का आदेश पारित करने के पूर्व सुनवाई का अवसर दिया जाना आवश्यक है तथा ऐसा न करने पर निलम्बन का आदेश निरस्त किये जाने योग्य होगा। इसी प्रकार अनुबन्ध पत्र/अनुज्ञप्ति-पत्र के खण्डित किये जाने की दशा में भी सुनवाई का अवसर दिया जाना आवश्यक होगा।

21. यद्यपि अभिलेखों को देखने से ऐसा प्रतीत होता है कि उप-जिलाधिकारी तथा उप-कमिश्नर ने दोनों अवसरों पर प्रार्थी को सुनवाई का सम्पूर्ण अवसर प्रदान किया परन्तु उक्त दोनों आदेश सर्वांग नहीं हैं वरन् अपूर्ण हैं जैसे जब उप-जिलाधिकारी ने दिनांक 21.09.2004 को आदेश पारित किया, के समय उन्होंने रिटकर्ता द्वारा प्रस्तुत कार्डधारकों के इस बयान को विचार में नहीं लिया कि ग्राम-प्रधान/प्रधान-पति ने विभिन्न कार्डधारकों के कार्डों को माँग कर कई माह से अपने पास रख लिया था जिसके कारण याची उन पर सामग्रियों के वितरण का अंकन नहीं कर सका। इस प्रकार उप-जिलाधिकारी का आदेश एकांगी एवं पूर्वाग्रह से ग्रस्त होना साबित होता है। इसी प्रकार अपीलीय न्यायालय ने सिवाय इस तथ्य के अंकन के वर्ष 2003 में अनियमितता बरतने के कारण याची पर पाँच सौ रुपए का अर्थदण्ड का दण्ड अधिरोपित किया गया था, शेष तथ्यों के सम्बन्ध में अपने अपील के निर्णय को उप-जिलाधिकारी के निर्णय पर ही आधारित करते हुए पारित किया है तथा ऐसा प्रतीत नहीं होता है कि स्वतंत्र एवं निष्पक्ष रूप से एक अपीलीय न्यायालय द्वारा आदेश पारित किया गया है। ऐसी दशा में प्रश्नगत दोनों आदेश तथ्यतः एवं विधितः सही एवं वैध नहीं पाए जाते हैं तथा निरस्त किये जाने योग्य हैं।

आदेश

यह दीवानी रिट याचिका स्वीकार की जाती है तथा उत्तरदाता संख्या 3 द्वारा पारित आदेश दिनाँकित 21.09.2004 तथा विपक्षी संख्या 2 द्वारा पारित आदेश दिनाँकित 21.02.2005 खण्डित किये जाते हैं। विपक्षी संख्या 3 उप-जिलाधिकारी अमृतपुर को आदेशित किया जाता है कि वह इस आदेश की एक प्रति प्रस्तुत करने के उपरान्त पुनः याची शिवराम के उचित मूल्य की दुकान के सम्बन्ध में याची एवं राज्य सरकार के मध्य निष्पादित अनुबन्ध-पत्र /अनुज्ञप्ति-पत्र के सम्बन्ध में प्रधान पति द्वारा लगाए आरोपों के आलोक में उभय पक्षों द्वारा प्रस्तुत समस्त

साक्ष्यों के आधार पर इस न्यायालय के इस आदेश से प्रभावित हुए बगैर स्वतंत्र एवं निष्पक्ष रूप से पुनः आदेश पारित करे।

(2023) 2 ILRA 824
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.02.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Matter Under Article 227 No. 181 of 2023

Smt. Sharda Devi & Anr. ...Petitioners
Versus
D.J. Hardoi & Ors. ...Respondents

Counsel for the Petitioners:
A.Z. Siddiqui, Sunny Singh

Counsel for the Respondents:
Sanjay Kumar Srivastava

Civil Law – Constitution of India, 1950 - Article - 227, - U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 - Sections 3(a), 3(j), 14, 21, 21(1), 21(1)(a)& 21(1)(b), - Transfer of Property Act,1882 - Sections 9, 54, 106 & 109 - Registration Act, 1908 - Section - 17 - Misc**.** Petition – against impugned proceeding of ejectment & for arrears of rent - Rights of lesser over the property - Sale of immovable property - Petitioners (dependents) receive notice under Section 106 of Transfer of Property Act sent by opposite party no. 3 (plaintiff) indicating therein that he is the owner in possession of the property concerned requiring ejectment and arrears of rent and damages from the petitioner – objected on the ground of declaration of title - court finds that, once opposite party-landlord had been able to prima facie satisfy his status as landlord of the building, there was no question of returning the plaint for declaration of title - and held that, - Tenant or any member of his family who has been normally residing with or is wholly dependent on him has built or has otherwise acquired in a vacant St. or has got vacated after acquisition, a residential building in the same city - Claiming through purchased a residential accommodation in same city - Evident that no objection by petitioner as tenant to application filed by answering opposite party-landlord was entertainable as has been rightly held in impugned orders – Petition being devoid of merit, hence dismissed. (Para – 33, 35, 39, 40)

Petition Dismissed. (E-11)

List of Cases cited: -

1. Mahabir Prasad & ors. Vs Ram Phal, reported in (1988) 4 SCC 194

2. Naeem Ahmad Vs Yash Pal Malhotra & anr. (2012, vol. 9 AD (Delhi) 138),

3. Gopi @ Goverdhannath (d) by LRs & ors. Vs Sri Ballabh Vyas, [SLP No.27679 of 2018, decided on 22.09.2022],

4. Om Prakash Yadav Vs Bal Deo Dass Yadav, reported in MANU/UP/3190/2011,

5. Dharam Das Gupta Vs VIIIth Additional D.J., Varanasi & ors. reported in 1992 S.C.D. 381,

6. Ram Swaroop Vs D.J., Hardoi & ors., reported in 1985 AWC 434,

7. Appolo Zipper India Ltd. Vs W. Newman & Co.Ltd., reported in (2018) 6 SCC 744,

8. T. Anjanappa & ors. Vs Somalingappa & anr., reported in (2006) 7 SCC 570.

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

1. Heard Mr. A.Z. Siddiqui, learned counsel for petitioners and Mr. Sanjay Kumar Srivastava, learned counsel for opposite party no.3.

2. Vide order date 17.01.2023, notices to opposite parties 1, 2 & 4 to 9 being merely proforma in nature was dispensed with.

3. By consent of learned counsel for parties and since pleadings are already complete, petition is being decided at the admission stage itself.

4. Petition under Article 227 of the Constitution of India has been filed assailing judgment and order dated 26.05.2022 passed in P.A. Suit No.01 of 2015 instituted by opposite party no.3 against petitioners for ejectment and arrears of rent and damages. The appellate judgment dated 15.12.2022 passed in Misc. Civil Appeal (Rent) No.13 of 2022 whereby the judgement of Prescribed Authority has been upheld is also under challenge.

5. Learned counsel for petitioner submits that the property in question which was residential in nature was earlier in the coparcenership of one Bhola Nath, Smt. Raj Rani and Prahlad Prasad. It is submitted that during the life time of Bhola Nath, the parties were settled in their own portion of the aforesaid property and the predecessor in interest of petitioners, Jai Narain Singh Kushwaha was inducted into the property. It is submitted that there never existed any Landlord-Tenant relationship between Bhola Nath and Jai Narain Singh Kushwaha. It is further submitted that subsequently in 1958, predecessor in interest of petitioners, Jai Narain Singh Kushwaha purchased the property in question from Bhola Nath by means of an oral sale and ever since, the predecessor-in-interest of the petitioners is in possession of the property in question as owner.

6. It is submitted that subsequently, the petitioners were surprised to receive notice under Section 106 of the Transfer of Property Act sent by opposite party no.3 indicating therein that he is the owner in possession of the property concerned requiring ejectment and arrears of rent and damages from the petitioner. It is also submitted that subsequently application under Section 21 (1) (a) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as U.P. Act No.13 of 1972) was filed by opposite party no.3 against petitioners seeking release of the property on the ground of bonafide need. It is submitted that petitioners put in appearance in the aforesaid proceedings and filed their written statement specifically denying any Landlord-Tenant relationship between the petitioners and opposite party no.3. Attention has been drawn to additional plea taken in written statement to the effect that the property in question was in possession of Late Mr. Jai Narain Singh Kushwaha and after his demise, petitioners being his heirs are in possession over the property concerned in succession. Plea with regard to oral sale of the property between Bhola Nath and Jai Narain Singh Kushwaha has also been adverted to. Learned counsel has also drawn attention to the pleadings taken in written statement to the effect hat an alternative plea of adverse possession has also been taken by petitioners in the written statement.

7. Learned counsel for petitioner as such submits that once a specific plea has been taken by petitioner-defendants that they were not tenants in the property in question and were in fact owners of the property, the appropriate action required to be taken by Prescribed Authority was to have returned the plaint for presentation in appropriate proceedings before competent court. It is also submitted that the Prescribed Authority as well as appellate authority were required to have addressed the issue of title as claimed by petitioner-

defendants as incidental to the main issue but issue regarding Landlord-Tenant relationship has been decided in a cursory manner by the courts only basing their decision on the alleged sale deed dated 01.10.1986 said to have been executed in favour of opposite party no.3-plaintiff without any adjudication with regard to Landlord-Tenant relationship between the two. It is also submitted that in terms of Section 3(j) of U.P. Act No.13 of 1972, the concept of ?landlord? is entirely different from the concept of owner of the property and as such the authorities while delivering the judgments were required to address the said issue raised by petitioner-defendants. It has also been submitted that the alternative plea of adverse possession has also been decided in a cursory manner.

8. Learned counsel for petitioner has also laid emphasis to the fact that issues numbered 2 and 3 framed by the Prescribed Authority pertaining to bonafide need of the landlord and comparative hardship have also not addressed the pleadings and grounds raised by petitioner-defendants. Learned counsel has adverted to a decision of Hon'ble the Supreme Court in **Mahabir Prasad and others v. Ram Phal,** reported in (1988) 4 SCC 194 and a Division Bench judgment of Delhi High Court in **Naeem Ahmed v. Yash Pal Malhotra (Deceased) through LR's and another**, reported in (2012) 9 AD (Delhi) 138 to buttress his submissions.

9. Learned counsel appearing on behalf of the answering opposite party has refuted the submissions advanced by learned counsel for petitioner with submission that in the application filed under section 21(1)(a) of U.P. Act No. 13 of 1972, a specific plea has been taken that petitioner-defendants were tenants of the property in question since the time of Bhola Nath whereafter a suit for partition numbering Regular Suit 6 of 1960 was filed between the co-parceners of the property in which preliminary decree was also issued on 24.04.1961 with final decree being passed on 27.04.1974. It is submitted that at the time of passing of the preliminary decree, the said Bhola Nath was very much alive and was a party to the proceedings and has never mentioned the fact that he has ever executed any oral sale of property in question in favour of Jain Narain Singh Kushwaha. It is further submitted that in pursuance of the final decree dated 27.04.1974, the portion of property in question was partitioned and fell in share of Smt. Raj Rani who by means of a registered sale deed dated 01.10.1986 transferred the aforesaid property in favour of answering opposite party-plaintiff. It is also submitted that neither final decree dated 27.04.1974 nor the registered sale deed dated 01.10.1986 has ever been challenged by anyone and the same has therefore attained finality.

10. Learned counsel as such submits that it is in terms of Section 109 of the Transfer of Property Act that answering opposite party-plaintiff has derived not only ownership but also rights of lessor over the property in question and would therefore be deemed to be a ?landlord? in terms of Section 3(j) of U.P. Act No.13 of 1972. It is also submitted that in terms of the Transfer of Property Act, there cannot be any sale of immovable property by an oral sale and as such also the courts below have correctly held that the petitioner-defendants have failed to prove any oral sale said to have been executed in favour of their predecessor-in-interest in year 1958. In the alternative, it is submitted that even otherwise a sale deed of immovable

property is compulsorily required to be registered under Section 17 of Registration Act, failing which no such deed can be taken into evidence. Learned counsel has further submitted that the petitioner-defendants have also failed to prove their alternative plea of adverse possession and in such circumstances, the courts below were right in holding a Landlord-Tenant relationship between the two as well as finding recorded on bonafide need and comparative hardship since the petitioner-defendants were already in possession of an alternative accommodation in the same city. Learned counsel has adverted to the judgment of Hon'ble Supreme Court in **Gopi @ Goverdhannath (d) by LRs & ors v. Sri Ballabh Vyas,** [SLP No.27679 of 2018, decided on 22.09.2022] decisions of this Court in **Om Prakash Yadav v. Bal Deo Dass Yadav**, reported in MANU/UP/3190/2011; **Dharam Das Gupta v. VIIIth Additional District Judge, Varanasi and others** reported in 1992 S.C.D. 381; and **Ram Swaroop v. District Judge, Hardoi and others**, reported in 1985 AWC 434 to buttress his submissions.

11. Upon consideration of submissions advanced by learned counsel for petitioner and upon perusal of material on record, it appears that the aforesaid Application under Section 21(1)(b) of U.P. Act No. 13 of 1972 has been filed by opposite party no.3 claiming to be landlord of the property in question and describing petitioner-defendants as tenants in the property. As indicated herein above, the answering opposite party-plaintiff has claimed that the property in question was in coparcenership and suit for partition was filed in year 1960 whereafter a final decree was passed on 27.04.1974 whereafter the property in question fell in the share of Smt. Raj Rani who subsequently executed a registered sale deed in favour of answering opposite party-plaintiff on 01.10.1986.

12. The Prescribed Authority framed three issues for determination with issue no.1 pertaining to question of Landlord-Tenant relationship between the two; issue no.2 pertaining to bona fide need of applicant and issue no.3 pertaining to comparative hardship. All three issues have been decided in favour of plaintiff.

13. From a perusal of judgment and order dated 26.05.2022, it is evident that the Prescribed Authority has held the answering opposite party-plaintiff to be owner in possession of the property in question in pursuance to the registered sale deed dated 01.10.1986 and on that basis it has derived a conclusion that the answering opposite party-plaintiffs would be deemed to be landlord of the property. Issue of the petitioner-defendants being tenants in the property in question has been dealt with in the manner that first there could not have been any oral sale deed as claimed in 1958 particularly since petitioner-defendants has failed to prove any such alleged sale; and secondly, on the ground that admittedly the predecessor in interest of the petitioner-defendants was inducted into property in question by Bhola Nath and the petitioner-defendants have failed to indicate the capacity in which they were inducted in the property in question and has therefore drawn an inference that the predecessor in interest of petitioner-defendants could have been inducted in the property in question only as tenant and therefore tenancy as such would devolve upon the petitioners. The Prescribed Authority has also recorded a finding that the petitioner-defendants have been unable to prove their case of adverse possession.

14. With regard to bonafide need, the Prescribed Authority has recorded a finding that as defendants in their written statements have clearly admitted the fact that defendant no.2 has already purchased a residential house in the same city, therefore they would be precluded from challenging the bonafide need of plaintiff-opposite party. Once the bonafide need was found to be in favour of plaintiff-opposite party, the aspect of comparative hardship has also been decided in his favour.

15. The appellate court in in its judgment and order also framed the same points of determination as the Prescribed Authority with additional point as to whether the judgment and decree passed by the court below required any modification or change. A reading of the judgment indicates that the reasoning given by the Prescribed Authority in its judgment and order has been virtually followed by the appellate court.

16. From a perusal of aforesaid factors, the following questions which arise for determination are as follows:-

(a) Whether there existed any Landlord-Tenant relationship between the answering opposite party-plaintiff and petitioner-defendants or the plaintiff-defendants had an independent right of ownership over the property in question as also the issue pertaining to adverse possession?

(b) Whether the courts below have decided the issue pertaining to bonafide need and comparative hardship in the correct perspective and as per U.P. Act No.13 of 1972?

Question (a)

Whether there existed any Landlord-Tenant relationship between the answering opposite party-plaintiff and petitioner-defendants or the plaintiff-defendants had an independent right of ownership over the property in question as also the issue pertaining to adverse possession?

17. With regard to aforesaid question, it is noticed that in the plaint, it has been specifically averred that the predecessor in interest of petitioners, i.e. Raj Narain Singh Kushwaha was a tenant in the property in question and paying a rent of Rs.33/- per month to Smt. Raj Rani and upon his demise petitioner-defendants succeeded to the tenancy and continued in possession over the property in question in the same capacity. It has also been stated that plaintiff-answering opposite party attained ownership over the property in question by means of registered sale deed dated 01.10.1986 executed by Smt. Raj Rani in their favour. In written statement, while it has been admitted that the predecessor in interest of petitioner-defendants Jai Narain Singh Kushwaha was in possession of the property in question and after his demise, the petitioner-defendants succeeded to possession over the property in question but the aspect of their being tenants in the property has been denied and in fact it has been stated that erstwhile owner of the property Bhola Nath had inducted Jai Narain Singh Kushwaha over the property in question since they were great friends and subsequently an oral sale deed was executed between Bhola Nath and Jai Narain Singh Kushwaha whereby predecessor in interest of petitioners obtained ownership rights over the property in question. The aspect of execution of registered sale deed dated 01.10.1986 has been denied and in the alternative a plea

has been taken with regard to adverse possession over the property in question vis-a-vis plaintiff-opposite parties.

18. With regard to aspect of determination of ownership over the property in question, Hon'ble the Supreme Court in **Appolo Zipper India Ltd. v. W. Newman & Company Limited**, reported in (2018) 6 SCC 744 has held that in proceedings under Rent Control, the aspect of title over the property cannot be decided as a main issue although the same may be seen as incidental for determination of the question of landlord of the property. It is in keeping with this aspect that the courts below have adverted to submissions of petitioner-defendants claiming ownership rights over the property in question.

19. Section 54 of the Transfer of Property Act, 1882 clearly defines 'sale' as well as the aspect as to how a sale is required to be made and clearly indicates that a sale as contemplated under Section 54 of the Act of 1882 can be only by means of a registered instrument in case of a immovable property. The concept has also been defined as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. As such, it is evident that for a sale to have taken place in terms of Section 54 of the Act, there should not only be a registered instrument but there should be adequate consideration also paid for transfer of ownership in terms thereof.

20. Section 17 of the Registration Act,1908 particularly provides the manner in which an instrument of transfer of immovable property is required to be made. The said provision also contemplates that an instrument not duly stamped and registered in terms thereof would be inadmissible as evidence.

21. In contemplation of the aforesaid aspect, it is evident that a sale of immovable property can take place only by means of a registered instrument duly executed between the parties for a valid consideration. In the present case, the aspect of ownership has been taken as a plea by petitioner-defendants on the ground of verbal sale having been executed between Bhola Nath and Jai Narain Singh Kushwaha. Such a concept of transfer of property by sale is alien to Section 54 of the Transfer of Property Act and as as such in the considered opinion of this Court, prescribed as well as appellate authority cannot be said to have erred in recording a finding that petitioner-defendants have failed to prove their prima facie title or ownership over the property in question while plaintiffs were able to do so. Until and unless the petitioner-defendants could have prima facie substantiated their pleading of title as per law, there was no occasion for the prescribed Authority to have returned the plaint for declaration of title.

22. The only provision which permits oral transfer of property is indicated in Section 9 of the Transfer of Property Act but the same states that the transfer of property may be made without writing in every case in which a writing is not expressly required by law. In the present case, it is evident that by virtue of Section 54 of the Transfer of Property Act, a specific transfer of property by means of a registered instrument is mandatory and therefore the provisions of oral transfer as envisaged under Section 9 of the Transfer of Property Act would be inapplicable.

23. Learned counsel for petitioner has laid much emphasis on the fact that title or ownership of the property in question would not automatically result in the aspect of plaintiff becoming a landlord of the property since the two concepts are different in nature and has particularly submitted that since the plaintiffs failed to provide any rent receipt executed between plaintiffs and defendants or predecessor in interest of defendants, there cannot be any Landlord-Tenant relationship between them. It has also been submitted that the aspect of Landlord-Tenant relationship as envisaged under Section 3(j) of U.P. Act No.13 of 1972 has not been considered by the courts concerned.

24. With regard to aforesaid submissions, it does not appear that any rent receipts were produced during course of proceedings by plaintiffs. Nonetheless, the aspect of plaintiffs being landlord over the property in question is required to be considered in terms of Section 3(j) of U.P. Act No.13 of 1972, which is as follows:

"S.3(j) "landlord", in relation to a building, means a person to whom its rent is or if the building were let, would be, payable and includes, except in clause (g), the agent or attorney, of such person"

25. A perusal of the aforesaid definition clearly indicates that landlord in relation to a building would be a person to whom rent is or would be payable and includes the agent or attorney of such person. The concept of landlord as such is quite distinct from that of owner of the property in question. Upon applicability of definition of landlord in the present case, would indicate that it is admitted between the parties that Bhola Nath was a coparcener of the property in question. It is also evident from record that a partition suit had been instituted in 1960 between coparceners of the property in question including Bhola Nath which resulted in final decree dated 24.04.1974 having been passed whereunder, property in question is said to have come into share of Smt. Raj Rani. The petitioner-defendants have not denied the aspect of aforesaid suit having been instituted and resulting in final decree so passed. It is also admitted that there was no challenge raised to the registered sale deed dated 01.10.1986 executed by said Smt. Raj Rani in favour of plaintiffs.

26. Section 109 of the Transfer of Property Act, 1882 pertains to rights of lessor-transferee in the following terms :-

"Section 109 - Rights of lessor?s transferee. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such

determination may be made by any court having jurisdiction to entertain a suit for the possession of the property leased."

27. The provisions of Section 109 of Transfer of Property Act particularly with regard to rights of transferee as a landlord has been dealt with by Hon'ble the Supreme Court in **Gopi @ Goverdhannath (d) by LRs & ors**(Supra) in the following manner:-

"27. .....A bare perusal of Section 109 of the Transfer of Property Act would reveal that if a landlord transfers the property leased out or any part of it, the transferee, in the absence of any contract to the contrary, shall possess all the rights of the landlord. Hence, the impact of Ext.P3, in the absence of any contract to the contrary, is that the respondent herein has stepped into the shoes of Smt. Phool Kumari. In terms of Section 109 of the Transfer of Property Act it is clear that attornment by the lessee is not necessary for the transfer of the property leased out to him. Thus, the inevitable consequence of transfer of a leased-out property by the landlord in accordance with law to a third party, in the absence of a contract to the contrary, is that the third party concerned would not only become its owner having title but also would step into the shoes of the vendor as the landlord in relation to the lease holder at the relevant point of time. In such circumstances, the findings of the courts below that there exists jural relationship of landlord and tenant between the respondent and the appellants can only be held as the correct and lawful conclusion in the light of the evidence on record based on the legal position."

28. It is the admitted case of petitioner-defendants that they are claiming through late Jai Narayan Singh Kushwaha who in turn is said to have been inducted into property by Bhola Nath. There is no averment by petitioner-defendants as to the capacity in which they were inducted into the property in question.

29. Since there is no denial that U.P. Act No.13 of 1972 would be applicable in the present case, the status of petitioner with regard to his occupation of the premises in dispute is required to be seen in terms of such statutory provisions.

Section 3(a) defines tenant in relation to a building, as meaning a person by whom its rent is payable.

30. The relevant aspect of definition of tenant as such is a person from whom rent is payable whether or not it is actually paid. Petitioner has not been able to indicate capacity in which his predecessor in interest is said to have been inducted but his status would thereafter be covered by virtue of Section 14 of the Act of 1972 which reads as follows:-

S.14 "Regularisation or occupation of existing tenants - Notwithstanding anything contained in this Act or any other law for the time being in force, any licensee (within the meaning of Section 2-A) or a tenant in occupation of a building with the consent of the landlord immediately before the commencement of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) (Amendment) Act, 1976, not being a person against whom any suit or proceeding for eviction is pending before any Court or authority on the date of such commencement shall be deemed to be an authorised licensee or tenant of such building."

31. A reading of aforesaid Section makes it evident that any licensee or a tenant in occupation of a building with the

consent of landlord immediately before commencement of the Act would be deemed to be an authorized licensee or tenant of such building. It is evident that with the advent of Section 14 of the Act of 1972, the status of petitioner would be that of an authorized licensee or tenant of the building.

32. Once petitioner would be deemed to be a statutory tenant in terms of Section 14 of the Act of 1972, necessarily proceedings for release of building under occupation of tenant in terms of Section 21 of the Act would be maintainable.

33. Considering aforesaid aspects, it is evident that opposite party-landlord was clearly able to make out a prima facie case of being owner-landlord of the premises in question in which petitioner was in occupation as a tenant. Therefore, once opposite party-landlord had been able to prima facie satisfy his status as landlord of the building, there was no question of returning the plaint for declaration of title. Submissions advanced by learned counsel for petitioner contrary thereto are therefore rejected.

34. Even with regard to aspect of adverse possession, Hon'ble the Supreme Court in T. Anjanappa and others v. Somalingappa and another, reported in (2006) 7 SCC 570 has indicated conditions for applicability of such a proposition in the following terms:-

"20.It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

35. Upon applicability of aforesaid proposition of law, it would be evident that there is no pleading by petitioner as to when he claimed title adverse to that of answering opposite party and which was brought to notice of landlord. As such, it cannot be said that stand of petitioner of acquisition of title by adverse possession was in any way in denial of the title of landlord and more so that such adverse title was peaceful, open and continuous or that the hostile possession was in the knowledge of the landlord.

36. In view of aforesaid, the submissions on behalf of petitioner with regard to adverse possession of the property also fails and is liable to be rejected.

37. In view of aforesaid discussions, Question (a) is answered negatively against petitioner-tenant.

Question (b)

Whether the courts below have decided the issue pertaining to bonafide need and comparative hardship in the correct perspective and as per U.P. Act No.13 of 1972?

38. With regard to aforesaid question formulated, it is relevant that Section 21 in its explanation (i) to Section 21(1) of the Act of 1972 clearly indicates as follows:-

" S.21 - Proceedings for release of building under occupation of tenant -

(1) .....

(a) .....;

(b) .....

Provided that .....

Provided further that .....;

Provided also that .....–

(i) .....;

(ii) .....;

(iii) .....

Provided also that .....

Explanation.–In the case of a residential building:–

(i) where the tenant or any member of his family who has been normally residing with or is wholly dependent on him has built or has otherwise acquired in a vacant state or has got vacated after acquisition, a residential building in the same city, municipality, notified area or town area, no objection by the tenant against an application under this sub-section shall be entertained;

***Note** - For the purposes of this clause, a person shall be deemed to have otherwise acquired a building if he is occupying a public building for residential purposes as a tenant, allottee or licensee. "*

39. In the written statement filed by petitioner before the Prescribed Authority, in paragraph 31, it has been specifically admitted that defendant no.2 (petitioner no.2 herein) who is also claiming through late Jai Narain Singh Kushwaha, has purchased a residential accommodation in the same city in Civil Lines, Hardoi and is the owner in possession thereof. It has been further stated that defendants 1 to 3 & 5, i.e. all the tenants in common are living with him in the said accommodation in Civil Lines, Hardoi.

40. In view of Explanation (i) to Section 21(1) of the Act of 1972, it is evident that no objection by petitioner as tenant to the application filed by answering opposite party-landlord was entertainable as has been rightly held in impugned orders.

41. Considering aforesaid, Question (b) is also answered in negative against petitioner-tenant.

42. Resultantly, the petition being devoid of merit is **dismissed.** The parties to bear their own cost.

43. Learned counsel for petitioner(s) prays for some time to hand over vacant possession of the property in question to answering opposite party.

44. In view of such prayer being made, it is directed that petitioner(s) shall hand over peaceful and vacant possession of the premises in question to opposite party no.3-landlord within a period of four months, i.e. by 02.06.2023 positively. In case of failure to do so, opposite party-landlord is granted liberty to approach this Court again by filing an appropriate application in this petition.

(2023) 2 ILRA 833
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Matter Under Article 227 No. 7928 of 2022(Criminal)

Jage Ram Bhati ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Kamlesh Kumar Dwivedi

Counsel for the Respondents:
G.A., Sri Dharmendra Dhar Dubey, Sri R.P. Pandey

Criminal Law – Constitution of India, 1950 - Article - 227 - The Code of Criminal Procedure, 1973 - Sections 145, 145(1), 146, 146(1), 397, 403 & 482 - Appointment of Receiver - question of maintainability of Revision against impugned orders passed under section 145(1) or 146(1) which are interlocutory orders simplicitor - in the light of judgment of a Full bench rendered in the case of Munna Singh's the revision petition would be maintainable and the impugned orders in question cannot be termed as an interlocutory order - hence, present writ petition is dismissed - direction issued, for expedite disposal of revision petition, accordingly.(Para – 7, 8, 10, 13)

Petition Dismissed. (E-11)

List of Cases cited: -

1. Munna Singh @ Shivaji Singh & ors. Vs St.of UP & anr. (2011 (3) JIC 628 (All) FB),

2. Indramohan Gautam Vs St. of UP & ors. (2018 1 ADJ 550),

3. Ashok Kumar Vs St. of Uttrakhand & ors. (Criminal Appeal No. 2038/2012 arising out of SLP No. 3932 of 2012.

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

1. Heard learned counsel for the petitioner and Sri Dharmendra Dhar Dubey, learned counsel for the respondent and Sri R.P. Pandey assisted by Manoj Mishra, learned AGA for the State.

2. Present petition under Article 227 of the Constitution of India is filed by the petitioner against the impugned order dated 30.8.2022 passed by learned Additional Sessions Judge, court no. 2, Ghaziabad in Application 30-kh dated 17.8.2022 filed by the petitioner in Criminal Revision no. 387 of 2022 (Raj Bhati vs. Jage Ram Bhati and another) under Section 146(1) Cr.P.C., P.S. Loni Border, District Ghaziabad. By the impugned order learned Additional Sessions Judge has rejected the application 30-kh moved by opposite party no. 1, who is petitioner before this Court, in application 30-kh and opposite party before the Revisional court had challenged the maintainability of revision preferred against the impugned order dated 20.7.2022 passed by learned Magistrate under Section 146 Cr.P.C., while rejecting the application 30-kh learned Revisional court has observed that question of maintainability of revision would be decided with the revision petition. Feeling aggrieved by the impugned order passed by Revisional court present petition is filed wherein main ground has been taken that the impugned order is illegal and contrary to the law, as question of maintainability of revision may not be decided at the time of disposal of revision and Revisional court is bound to decide the same at the preliminary stage.

3. In application 30-kh, applicant, who is petitioner before this court, has stated that impugned order passed by learned Executive Magistrate on 20.7.2022 in the case under Section 146 Cr.P.C. was an interlocutory order against which revision is not maintainable.

4. Learned counsel for the petitioner submits that learned Executive Magistrate has passed the order under Section 145 Cr.P.C. on 24.11.2020 in which a finding was recorded that there was sufficient ground to proceed in the case under Section 145 Cr.P.C. where dispute of a house lying in an agricultural plot was involved

between the parties and the parties were directed to appear before the court alongwith their respective evidence/ clarification. Subsequently, case u/s 145 Cr.P.C. was decided vide order dated 20.7.2022 under Section 146(1) Cr.P.C. wherein learned Magistrate has passed an order for attachment of the disputed property in exercise of power vested to him u/s 146(1) Cr.P.C. and SHO, concerned, was directed to appoint a receiver, who will take the property in his custody and keep it under attachment until any party moves regarding ownership or possession with respect to property in question.

5. Learned counsel for the petitioner cited Full Bench judgement of this Court in the case of **Munna Singh @ Shivaji Singh and others vs. State of U.P. and another, reported in 2011 (3) JIC 628 (All) (FB)** as well as subsequent judgement of Single Bench of this Court in the case of **Indramohan Gautam vs. State of U.P. and others reported in (2018) 1 ADJ 550.**

6. Per contra, learned counsel for the respondents submits that petition is misconceived and as per law of this Court in the said Full Bench decision, impugned order against which revision is filed by the respondent before the court of Session Judge, cannot be held as an interlocutory order and revision is maintainable against the impugned order passed under Section 146(1) Cr.P.C. Learned counsel has cited judgement of Hon'ble Apex court in **Ashok Kumar vs. State of Uttrakhand and others decided in Criminal Appeal No. 2038 of 2012 arising out of SLP No. 3932 of 20212.**

7. I have gone through the various judgements of this Court cited by learned counsel for the petitioner and perused the material on record. This Court has held in the Full Bench judgement in **Munna Singh (supra)** the question was referred "where the orders passed by the Magistrate under Section 145(1) of the Code are interlocutory order simplicitor and no revision petition under Section 397 or 403 of the Code or petition under Section 482 of the Code is maintainable against the same".

8. The reference was answered in para-41 of the judgement of Full Bench, wherein, it is held "our answer to the question referred would be therefore in the negative and we hold that orders passed under Section 145(1) and 146(1) of the Code are not in every circumstance, orders simplicitor, and therefore a revision would be maintainable in the light of observations made in this judgement depending on the facts involved in each case.

9. Above precedent of Full Bench was relied upon by Single Judge of this Court in **Indramohan Gautam vs. State of U.P. and another reported in (2018) 1 ADJ 550** wherein this Court observed in para 6 and 7 as under:

It is settled principle of law that title of a property may only be decided by the competent Civil Courts and under the provisions of Sections 145 and 146 Cr.P.C., the Executive Magistrate may take action in respect of a dispute only about actual possession over the property, where there is apprehension breach of peace due to above dispute. Prior to 2011 in a number of cases, it was held that an order of attachment under Section 146(1) Cr.P.C. is an interlocutory order against which revision is not maintainable under the provisions of Section 397 Cr.P.C. However, in due course of time, the matter of maintainability of

revision was referred to full Bench and the full Bench of this Court in the case of Munna Singh @ Shivji Singh and others Vs. State of U.P. 2011 (9) ADJ 1998 held that

"An order of attachment under Section 146(1) Cr.P.C. is an order of movement which has effect on the right of party in possession-cannot therefore, be said to be mere interlocutory order so as to bar revisional jurisdiction of High Court.

Invoking of the emergency powers under Section 146(1) Cr.P.C. is dependent on satisfaction of Magistrate-When none of parties are in possession, or Magistrate is unable to decide as to which of the parties was in possession, exercise of emergency power can be resorted to.

Where rights of parties affected, that is not an interlocutory order of attachment and depends upon facts of each particular case.

Order under Sections 145(1) & 146(1) Cr.P.C. are not in every circumstance, orders simplicitor- therefore a revision would be maintainable depending on facts involved in each case."

In view of the law laid down by the full Bench of this Court, the contention of learned A.G.A that impugned order is an interlocutory order and revision against the same is not maintainable may not be accepted and the revision may not be dismissed as not maintainable. In view of above case law by Full Bench, the judgment passed in the case of Yaqub Ali (supra) by a single judge of Rajasthan High Court has no force.

10. Considering the submissions of learned counsel for the parties and on perusal of materials available on record including impugned judgement and order of learned Magistrate, this Court is of the opinion that learned Sessions Judge had committed no illegality or infirmity while passing the impugned order dated 30.8.2022 and judgement of learned Magistrate dated 20.7.2022 against which revision was preferred by present respondent no. 3, cannot be termed as an interlocutory order in the light of the judgement of this Court cited as above.

11. The petition is devoid of merits and is liable to be dismissed.

12. The writ petition is dismissed accordingly.

13. The Revisional court is directed to decide the revision petition expeditiously in accordance with law after giving due opportunity of hearing to the parties.

(2023) 2 ILRA 836
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matter Under Article 227 No. 11711 of 2022(Civil)

Smt. Rashida Begum & Ors. ...Petitioners
Versus
Arshad Hussain & Ors. ...Respondents

Counsel for the Petitioner:
Sri Akhilesh Chandra Shukla, Sri Jitendra Pratap Shahi

Counsel for the Respondents:
Sri Namit Srivastava, Sri Kshitij Shailendra

Civil Law – Constitution of India, 1950 - Article - 227, - The Code of Civil Procedure, 1908 - Section – 47 - Order XXI - Rule 15, 16 - Suit for Specific performance - appeal - second appeal - Execution of decree - - during appellate stage a substitution application to substitute the legal

heirs of first and second party, allowed - at the stage of admission of execution proceeding - objection u/s 47 CPC - rejected - revision - dismissed - draft deed - assignment of their rights - there is a procedure prescribed for assignment of decree - assignee cannot get the decree executed in his favour unless and until following the provisions contained under Order XXI Rules 16 of CPC in the light of Supreme court Judgment rendered in case of **Dhani Ram Gupta's** - Enlargement of an existing right in an un-partitioned property of a family member at the end of a co-sharer is not a conveyance and so does not required registration - court finds that, a deed of assignment is something different from relinquishment deed - Former is in the category of transfer to a third party that should precede by a notice to the judgment debtor but later is not such as a case in the light of the law discussed - therefore the judgement in the case of **Dhani Ram Gupta's** would not apply to the facts of the case in hand - hence, petition lacks merit and is dismissed.(Para – 6, 13, 14, 15)

Petition Dismissed. (E-11)

List of Cases cited: -

1. Dhani Ram Gupta & ors. Vs Lala Sri Ram & anr. (AIR 1980 SC 157),

2. St. of U.P. Vs Dharam Pal & anr. (2008 10 ADJ 604),

3. Raghvendra Jeet Singh Vs Board of Revenue, Allahabad & ors. (2015 4 ADJ 53),

4. Smt. Balwant Kaur & ors. Vs St. (AIR 1984 INOC) 107 (ALL),

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

1. Heard Sri Akhilesh Chandra Shukla, learned counsel for the petitioners, Sri Kshitij Shailendra, learned counsel appearing for contesting respondent no. 1, Sri Namit Srivastava, learned counsel appearing for contesting respondent no. 8 and perused the record.

2. The petitioners before this Court are judgment debtors of judgment and decree dated 25th of March, 1994 passed in a suit being O.S. No. 993 of 1985 for specific performance of contract.

3. The suit was unsuccessfully appealed against by the present petitioners before the First Appellate Court and then before the Second Appellate Court. It transpires from the record that the appellants moved a substitution application to substitute the legal heirs of Shamima Begam, who died issue-less and accordingly, the heirs of husband's brother were brought on record.

4. A counter affidavit was filed on behalf of the heirs of late Shamima Begum sworn by Fakhruddin in second appeal wherein it was stated that Shamima Begum and Aliya Begum have died. This counter affidavit was accompanied by a document of family settlement wherein it was stated that Saleha Begum died during the pendency of appeal and her legal representatives were substituted and in order to avoid dispute amongst the members of the family an oral settlement was reached between the parties whereunder the heirs of first and second party, i.e., Shamima Begum and Aliya Begum, relinquished their claim for 3rd and 4th parties in their favour having obtained money from them and now they are not interested in pursuing the matter. When the execution came to be filed after dismissal of the second appeal, an objection was filed under Section 47 of CPC by the judgment debtor which was rejected on 15th of January, 2018. The same was unsuccessfully challenged in revision before 7th Additional District Judge, Allahabad and revision petition came to be dismissed vide judgment and order dated

25th February, 2019. It is stated at bar that the said order has been challenged before this Court in a petition under Article 227 bearing No. 3543 of 2019 in which this Court did not pass any interim order and merely parties were directed to exchange their pleadings. Learned counsel for the petitioners does not dispute that the matter is pending simply at the stage of admission.

5. It appears that after the draft deed was submitted before the executing court that an objection came to be filed by the present petitioner taking a ground that the heirs of Saleha Begum could not have presented a draft of sale deed in respect of the entire property which was subject matter of decree and to which Shamima Begum and Aliya Begum were equally entitled to but heirs of Shamima Begum having not come forward, the decree holder, namely, the heirs of Saleha Begum were entitled for execution of sale deed to the extent of share of Saleha Begum only. It is argued that no assignment of their rights as such could have been made by the heirs of Shamima Begum and Aliya Begum. However, their objections came to be dismissed by the executing court vide order dated 29.7.2022 against which the revision has been dismissed vide order dated 10.06.2022 and even the review petition came to be dismissed on 10.12.2022and now the petitioners are before this Court challenging all the above three orders in this petition, filed under Article 227 of the constitution.

6. The arguments advanced by learned counsel for the petitioners is that there is a procedure prescribed for assignment of decree and unless and until there is proper assignment of decree, assignee cannot get the decree executed in his favour. He submits that mere filing of an affidavit before the Court of appeal would not construe a valid assignment within the meaning of provisions contained under Order XXI Rule 16 of CPC. He submits that the assignment has to be in writing and is also required to be registered one as it deals with transfer of rights by way of assignment of a movable property and, therefore, such assignment stands governed by the provisions of the Transfer of Property Act, 1982. In support of his argument, learned counsel for the petitioner has relied upon a judgment of Supreme Court in the case of ***Dhani Ram Gupta and others vs. Lala Sri Ram and another; AIR 1980 SC 157***. He has placed reliance upon para-4 of the said judgment which runs as under:-

"We are unable to read Order XXI Rule 16 as furnishing any foundation for the basic assumption of the learned counsel for the respondent that property in a decree does not pass to the transferee under the assignment until the transfer is recognised by the Court. Property in a decree must pass to the transferee under a deed of assignment when the parties to the deed of assignment intend such property to pass. It does not depend on the Court's recognition of the transfer. Order XXI Rule 16 neither expressly nor by implication provided that assignment of a decree does not take effect until recognised by the Court. It is true that while Order XXI Rule 16 enables a transferee to apply for execution of the decree, the first proviso to Order XXI Rule 16 enjoins that notice of such application shall be given to the transferor and the judgment-debtor and that the decree shall not be executed until the Court has heard their objections, if any, to its execution. It is one thing to say that the decree may not be executed by the transferor until the objections of the transferor and the

judgment-debtor are heard, it is an altogether different thing to say that the assignment is of no consequence until the objections are heard and decided. The transfer as between the original decree-holder and the transferee is effected by the deed of assignment. If the judgment debtor has notice of the transfer, he cannot be permitted to defeat the rights of the transferee by entering into an adjustment with the transferor. If the judgment debtor has no notice of the transfer and enters into an adjustment with the transferor before the transferee serves him with notice under Order XXI Rule 16, the judgment-debtor is protected. This in our view is no more than plain good sense. In Dwar Buksh Sirkar v. Fatik Jali, the decree holder represented to the Court that the judgment debtor had satisfied the decree by payment and wanted his execution application to be disposed of accordingly. Before satisfaction could be recorded a transferee of the decree from the original decree-holder intervened and claimed that satisfaction could not be recorded as there was a valid transfer of the decree in his favour prior to the alleged payment by the judgment debtor to the original decree holder. The argument before the High Court was that the assignee could not prevent the recording of the satisfaction of the decree as he had not filed an execution application and got the assignment in his favour recognised. The High Court of Calcutta observed:

"The only provision in the Code referring expressly to the assignment of a decree is contained in section 232, and that no doubt contemplates a case in which the assignee applies for execution. In such a case the Court may, if it thinks fit, after notice to the decree-holder and the judgment-debtor, allow the decree to be executed by the assignee. If, how ever, there is an assignment pending proceedings in execution taken by the decree-holder, I see nothing in the Code which debars the Code from recognising the transferee as the person to go on with the execution. The recognition of the Court is no doubt necessary before he can execute the decree, but it is the written assignment and not the recognition which makes him the transferee in law. The omission of the transferee, if it was an omission, to make a formal application for execution, was merely an error of procedure and does not affect the merits of the..... ***It is argued for the respondent that the transferee's title was not complete as express notice of the transfer had not been given to the judgment-debtor. As already observed, the transfer, as between transferor and the transferee, is effected by the written assignment. If the judgment-debtor had no notice of the transfer and being otherwise unaware of it paid the money to the decree-holder, the payment was, of course, a good payment, and he cannot again be held liable to the transferee".***

We express our agreement with the observations made by the Calcutta High Court. (emphasis added)"

7. Thus, it is argued by learned counsel for the petitioners that both the courts below have manifestly erred in law in rejecting the objection of the petitioner with regard to draft deed submitted for execution of sale deed. He submits that the rights, if were not properly assigned in respect of the suit property which was subject matter of suit for specific performance of sale, would automatically get reverted back to the defendants of the suit/judgment debtor and the decree holder, namely, the heirs of Saleha Begum or even Aliya Begum, if she is alive, would not be benefited by way of execution of the sale

deed of the entire land which includes the share of Shamima Begum. Thus, according to learned counsel for the petitioners, it has become imperative for this Court to arrest the miscarriage of justice by invoking its supervisory jurisdiction under Article 227 of the Constitution.

8. Per contra, Sri Khistij Shailendra and Sri Namit Srivastava, learned counsel appearing for the contesting respondents caveator has argued that the draft deed that was presented before the executing court by the heirs of late Saleha Begum and Aliya Begum herself and so the argument that Aliya Begum had not come forward would have no merit. A photocopy of the draft deed has been produced before the Court which is taken on record. It is further argued that provisions of Order XXI Rule 16 would not be attracted in the present case for the simple reason that this is an assignment of decree by the decree holder to a third party so as to attract the provisions. It is argued that the heirs of late Shamima Begum were very much party in the second appeal and they have expressed their relinquishment by filing an affidavit along with counter affidavit which was never objected to and the second appeal was dismissed affirming the judgment and decree of the trial court. It is submitted that the relinquishment of rights by the decree holder in favour of joint decree holder would be taken to be within the meaning of relinquishment deed which is not require to be registered either under the Indian Registration Act as it is not a case of transfer of immovable property which is required otherwise to be a deed of registry instituted by sale under the Transfer of Property Act. In this regard, he has placed reliance upon a judgment of this Court in the case of ***State of U.P. vs. Dharam Pal and another; 2008 10 ADJ 604, Raghvendra Jeet Singh vs. Board of Revenue, Allahabad and other; 215 4 ADJ 53 and Smt. Balwant Kaur and others vs. State; 1984 ALL. L. J. 305.***

9. Having heard the arguments advanced by learned counsel for the respective parties across the bar, the undisputed fact that emerges out is that draft deed for execution of registered sale deed has been presented by the heirs of Late Saleha Begum and Alia Begum. There is also no dispute that to the agreement for sale Smt. Saleha Begum, Shamima Begum and Alia Begum were beneficiaries and their suit being O.S. No.495 of 1981 was decreed against Mohammad Ahmad vide judgment dated 25.3.1994 and judgment debtor lost his Second Appeal also. In the second appeal, appellant himself moved a substitution application seeking substitution of Late Shamima Begum. The heirs of Late Shamima Begum filed counter affidavit annexing therein a notary affidavit in which it was stated that Shamima Begum and Alia Begum got their money earlier paid to Mohammad Ahmad back from third and fourth party i.e. heirs of Saleha Begum and fifth and sixth party also relinquished their claim in favour of 3rd and 4th party. The third and fourth party to the family settlement reached, were heirs of Saleha Begum. Neither this settlement deed of relinquishment of rights was questioned in appeal nor, any amendment was sought to raise any ground that any such settlement was illegal. The appeal was dismissed on merits and all the rights got crystalised into a decree. It is this decree which has been put to execution. Objection filed under Section 47 C.P.C. was also dismissed and possibly this was not raised any issue. And now the draft is being questioned on the ground that relinquishment deed amounted to transfer of intent in an immovable

property and so required to be registered and then on owner can not get the decree executed as per Order XXI Rule 15 CPC.

10. The second issue does not arise as it is not a case of assignment of decree to a third party. It is a case of relinquishment of right to execution in form of other decree holder and so third party assignment of decree does not arise.

11. In so far as registration of of relinquishment deed is concerned, I find merit in the submission advanced by Sri Kshitij Shailendra, learned counsel for the respondents.

12. A Full Bench of this Court in the case of **Smt. Balwant Kaur and others vs. State; AIR 1984 (NOC) 107 (ALL)** held that within the family, if settlement results in relinquishment of right by one co-owner in favour of the other, with whom title also vests, such relinquishment would be release and not a conveyance as such. Vide Paragraphs- 12 and 13 the Court held thus:-

" 12. We are unable to accept the submission that under the law it is not open to a co-owner to renounce his rights in favour of another co-owner. In the case of Board of Revenue v. V. M. Murugesa Mudaliar, AIR 1955 Mad 641 (FB), the executants of a deed were three persons who along with two persons in whose favour the deed was executed were partners of a registered firm. The executants had ceased to be partners of the firm from and after 12-4-1949. The preamble of the deed recited that the releasors, that is, executants were co-owners of the immovable property described in the Schedule to the document as house and ground bearing Door No. 47 in Coral Merchant Street, G. T., Madras, entitled to 3/5 share therein. They desired to renounce all interest in the said property by deed receiving the proportionate value of the share in cash. The operative portion of the deed ran thus:

"This deed witnesseth that, in consideration of the sum of Rs. 9,858-9-7 (Rs. nine thousand eight hundred and fifty-eight, annas nine and pies seven) receipt whereof on or before the date of these presents through adjustment of accounts the releasors hereby release, extinguish, abandon, cancel and otherwise relinquish all their respective rights, claims, demands or interest, in any manner or to any extent, in respect of the property set out and fufly described in the Schedule hereunder."

Clearly in this case releasors owned the concerned properties in which they were seeking to release their interests as co-owners and not as joint-owners. It was conceded before the Madras High Court that had the executants been joint-owners as distinguished from co-owners, the document of the nature executed in that case could have been considered to be a deed of release. It was argued that the document having been executed by a co-tenant (co-owner) the objective thereof could only be achieved by conveying executants' title and as such that document could not be considered to be a deed of release. Rajamannar, C. J., speaking for Full Bench of the Court observed that in that case it was not the case of any one that there was a division of the property by metes and bounds and in accordance with the said shares. In such circumstances the document in and by which the co-owner purported to abandon or relinquish his claim to the share to which he would be entitled would be in the nature of release. According to this decision it is open to a co-owner of a property which does not stand partitioned by metes and bounds, to

relinquish or renounce his claim to the property and if he does so then as a matter of law the interest of the remaining co-owners gets augmented. Law countenances that the object that some of the co-owners of an unpartitioned property should be enabled to enjoy the property without any let or hindrance or claim made by other co-owners can be achieved by such other co-owners executing a release deed and that if such co-owners set out to achieve that object by executing a release deed, there is no reason why such release deed should be construed as a deed of conveyance merely because such objective could also be achieved by executing a deed of conveyance.

13. Following observations made by the Supreme Court in the case of Kuppuswami Chettiar v. A.S.P.A. Arumugam Chettiar, AIR 1967 SC 1395, also go to support the conclusions arrived at by Rajamannar, C. J., in the case of Board of Revenue v. V.M. Murugese Mudaliar (AIR 1955 Mad 641) (at p. 1397):--

"Now it cannot be disputed that a release can be usefully employed as a form of conveyance by a person having some right of interest to another person having limited estate, for example, by a remainder-man to a tenant for life and the release then operates as an enlargement of the limited estate."

It is true that in the case of Kuppuswami Chettiar v. A.S.P.A. Arumugam Chettiar (supra) the question that came up for consideration before the Supreme Court was whether a document styled as a document of release was to be treated as a document conveying title. ***The Supreme Court eventually came to the conclusion that the said document was a deed of conveyance; but that was because it found that, the said deed had been executed in favour of person who had absolutely no interest in the properties released. In the instant case, however, it cannot be said that the mother and brother of the two executants who were co-owners of the property had no interest in the property.***

(Emphases added)"

13. So the principle of law that emerges is that a surrender of right in favour of a co-owner in a joint property would be a release whereas a surrender of right in favour of a third party, having no right in the property which is surrendered then such surrender will be a conveyance. Enlargement of an existing right in an unpartitioned property of a family member at the end of a co-sharer, therefore, is not a conveyance and so does not require registration as such. Summarizing the principle vide Paragraph 16 and 17 the Full Bench held thus:-

"16. It is thus clear that under the law it is open to a person holding property as a tenant-in-common to execute a release deed in favour of the other co-owner renouncing his claim to interest in the unpartitioned property and for this purpose it is not necessary for him to execute a deed of conveyance. Accordingly, where in fact such a deed is executed whereby the person in whose favour the property has been released is given a right to enjoy the property without any let or hindrance or claim to be made by the persons so releasing the property, there will be no justification in reading or construing the said document as a deed of conveyance.

17. So far as the instant case is concerned, the recitals made by the two sisters in the document dated 9th March, 1970, clearly Amount to renunciation of their interest in

the properties left by their deceased father. They do not contain any stipulation where-under they seek to convey their title to their mother and brother. The two sisters were fully competent to release 'heir undivided interest in the property in favour of their mother and brother. When their objective could be achieved merely by executing a release deed, there is no reason to think that they in fact were executing a deed of conveyance misdescribing it as a release deed. Question No. 2, therefore, has to be answered by saying that on plain interpretation, the document dated 9th March, 1970 was a deed of release and not a conveyance deed within the meaning of the Indian Stamp Act.

(Emphasis added)"

14. This judgment was later on followed by the Co-ordinate Benches of this Court in **State of U.P. vs. Dhanpal and another; 2008 10 ADJ 604 and Raghvendra Jeet Singh vs. Board of Revenue Allahabad and others; 2015 4 ADJ 2015**. A deed of assignment is something different from relinquishment deed. Former is in the category of transfer to a third party that should precede by a notice to the judgment debtor but later is not such as a case in the light of the law discussed above and, therefore, the judgment in the case of Dhani Ram Gupta and others vs. Lala Sri Ram and another (supra) would not apply to the facts of the case in hand.

15. In view of the above, I do not find any fault in the orders passed by the Courts below, impugned herein this petition. Petition lacks merit and is accordingly, dismissed, consigned to record.

16. There will be no order as to cost.

(2023) 2 ILRA 843
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Matter Under Article 227 No. 12244 of 2022(Criminal)

Bharat Singh Chauhan ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Saurabh Singh

Counsel for the Respondents:
G.A., Sri Raj Kumar Kesari

Criminal Law – Constitution of India, 1950 - Article - 227, - Negotiable Instruments Act, 1881 - Sections 138 & 139 - Dishonour of cheque - Quashing of Summoning order as well as order of revision court - Even 'stop of payment' instructions issued to bank are held to make a person liable for offence punishable under S. 138 - Question whether any money is paid by the accused to the complainant had discharged its obligations is a matter of evidence - Accused has ample opportunity to Probabilise his defence - Impugned orders cannot be quashed under the petition preferred under Article 227 - hence, dismissed.(Para – 8, 9)

Petition Dismissed.(E-11)

List of Cases cited: -

1. M/s Indus Airways Pvt. Ltd. & ors. Vs M/s Magnum Aviation Pvt. Ltd. & anr. (2014 12 SCC 539),

2. Pulsive Technologies Prvt. Ltd. Vs St. of Guj. (2014 (13) SCC 18).

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

1. Heard Sri Saurabh Singh, learned counsel for the petitioner, Sri Raj Kumar Kesari, learned counsel for the complainant, learned A.G.A. for the State and perused the material on record.

2. The present petition under article 227 of the Constitution of India has been filed by the petitioner in Complainant Case No. 895 of 2021 having its Computer No. 1240 of 2021 (Sushil Kumar Vs. Bharat Singh Chauhan) under Section 138 of the N.I. Act, Police Station Hapur Nagar, District- Hapur, pending in the court of Chief Judicial Magistrate, Hapur for quash the summoning order dated 16.9.2021 passed by the Chief Judicial Magistrate, Hapur as well as the impugned order dated 22.07.2022 passed by the Sessions Court, Hapur in Criminal Revision No. 146 of 2021 whereby the summoning order passed by the learned Magistrate has been affirmed.

3. The factual matrix of the case are that the complainant/respondent no.2 Sunil Kumar Chauhan filed a complaint to the court below under section 138 of the N.I. Act with the averment that the opposite parties had issued a cheque of Rs. 2 lacs in his favour in discharge of debt received by opposite party from the complainant in March, 2016. The complainant had lent Rs. 2 lacs to opposite party on his request, he had withdrawn the same from the account of his wife Sunita Chauhan from two different dates. The complainant had presented the said cheque to his banker on 29.12.2020 but the cheque was dishonoured with the advise of banker with endorsement "Payment stop by withdrawn". The complainant has informed the accused about this, he again presented the cheques on 19.01.2021 at S.B.I. Hapur Branch before his banker but same was again dishonoured with endorsement "Payment stop by the drawer". Thereafter, he issued notice to the accused demanding payment of the amount of cheque but accused did not pay any heed and the complaint was filed within statutory period.

4. The trial court has passed impugned summoning order dated 16.09.2021, placing reliance on statement of the complainant under section 200 Cr.P.C. and statement of witness under section 202 Cr.P.C. as well as documents available on record. The said summoning order section 200 Cr.P.C. was challenged by accused/opposite party before Sessions Court. However, Sessions Court dismissed the revision filed against the summoning order dated 22.07.2022 and affirmed the summoning order passed by the learned trial judge in the present petition. Opposite party-accused has challenged the orders of both the court.

5. Learned counsel for the petitioner submitted that the facts giving rise to the instant application are that the applicant (Bhatija) and the opposite party no. 2 (Chacha) are related as uncle and nephew and had cordial relationship. He further submitted that there was an on-going family dispute between the opposite party no. 2 and the father of the applicant regarding some property and bank locker. As such, the opposite party no. 2 for the reason of getting out of the dispute amicably, demanded an amount to the tune of Rs. 2,00,000/- (Two Lakh) and in pursuance of the same, promised to stay out of the disputed shares in favour of applicant's father namely Ashish Singh Chauhan. He submitted that for the reason aforesaid, applicant provided a signed cheque dated 22.12.2020 bearing cheque no. 000001 of HDFC Bank, Branch- Opp

BSA College, Gaushala Road, Mathura of Rs. 2,00,000/- to the opposite party no. 2. But, after receiving the aforesaid cheque the intention of the opposite party no. 2 changed drastically and an undue demand of more money and share in the property was made by him. He submitted that the applicant being aware about the evil intentions of the opposite party no. 2 moved an appropriate application before his concerning HDFC bank and got the payment of the aforesaid Cheque stopped. It is further submitted that the parties are close relatives and the said cheque was issued by the petitioner to the respondent no. 2 as a security, pursuant to some compromise entered between the parties regarding division of family property but complainant failed to honour the said compromise and by that reason the payment of cheque was stopped by the petitioner with bona fide intention. Learned counsel for the petitioner has cited Section 138 N.I. Act under Chapter XVII.

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 19 [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, 20 [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.]

6. He lastly submitted that dishonour of cheque on the ground that drawer has stopped payment of cheque and that is not included in section 138 of the N.I. Act as a ground for initiating prosecution and said cheque was not issued in discharge of any debt or other liability which is precondition for initiating prosecution under section 138 of the Act.

7. Per contra, learned counsel for the complainant/respondent no. 2 submitted that dishonour of cheque due to stoppage of payment instructed to the banker is included as a ground for prosecution under section 138 of the Act. Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of the cheque of the nature referred

to in section 138 for the discharge, in whole or in part, to any debt or other liability.

He further submitted that there is no illegality or irregularity or jurisdictional error in the impugned orders passed by the learned trial court as well as learned Revisional Court and disputed question of fact cannot be gone into while deciding the petition under Article 227 of the Constitution of India.

8. **M/s. Indus Airways Pvt. Ltd. & Ors Versus M/s. Magnum Aviation Pvt. Ltd. & Anr. (2014) 12 SCC 539** has inter-alia held that it is settled proposition of law, if no legal liability exists on the date of cheque was issued then offence under Section 138 of the N.I. Act would not be attracted with respect to the said cheque. The explanation appended to Section 138 explains the meaning of the expression 'debt or other liability' for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonour of cheque due to default of drawer, as an offence, if the cheque has been issued in discharge of any debt or other liability incurred by him. The explanation leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is sine qua non for bringing home an offence under Section 138 in ***Pulsive Technologies P.Ltd Vs. State Of Gujarat & Ors*** Hon'ble Supreme Court on 22.08.2014 observed that Even "stop payment" instructions issued to the bank are held to make a person liable for offence punishable under Section 138 of the NI Act in case cheque is dishonoured on that count. Once the cheque is issued by the drawer, a presumption under *Section 139* must follow and merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment, it will not preclude an action under *Section 138* of the NI Act by the drawee or the holder of the cheques in due course, if the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop-payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus, a court cannot quash a complaint on this ground. Whether any money is paid by the accused to the complainant is a matter of evidence. The accused has ample opportunity to probabilise his defence.

9. In the light of above discussions and observation of judgments of the Hon'ble Supreme Court the present petition under Article 277 of the Constitution of India is devoid of merit or any force is liable to be dismissed.

10. The petition is ***dismissed*** and the impugned order is affirmed accordingly.

(2023) 2 ILRA 846
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.02.2023

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 1181 of 2003

Shailendra Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
R.B.L. Shukla, Neeraj Sahu, S.H. Ibrahim

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Indian Penal Code,1860 - Sections 324 & 307 - voluntarily causing hurt by dangerous means or weapons - Criminal Procedure Code,1973 - Section 357 - Probation of the Offenders Act, 1958 - Section 5 - Power of court to require released offenders to pay compensation and costs - On 29.3.1992 accused opened fire, due to which the first informant & other persons got injuries on the body - Court convicted & sentenced the appellant u/s 307 I.P.C. to undergo 5 years rigorous imprisonment - *Held* - In the supplementary report doctor opined that all the injured got gun shot injuries by some fire weapon but injuries were simple in nature - All the injuries were inflicted on non vital part of the body - injuries were not life threatening - conviction of appellant altered from Section 307 I.P.C. to Section 324 I.P.C. - appellant had no previous criminal history - appellant neighbour of the injured - matter pertained to the year, 1992 thus, 31 years passed - appellant and injured well rooted in the society - no useful purpose would be served to send the appellant in jail again - appellant deserves for probation - compensation awarded to the injured persons - compensation of Rs. 40,000/- imposed upon the appellant and out of Rs. 40,000/-, Rs. 10,000/- be paid to the each injured persons (Para 11, 17)

Allowed. (E-5)

List of Cases cited:

Ankush Shivaji Gaikwad Vs St. of Mah. (2013) 6 SCC 770

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Heard Mr. S.H. Ibrahim, learned counsel for the appellant, learned A.G.A. for the State as well as perused the record.

2. The present appeal has been preferred against the judgment and order dated 26.7.2003 passed by the Additional Sessions Judge Court No. 7, Lucknow in S.T. No. 584 of 1998 arising out of crime no. 151 of 1992 concerning Police Station-Hasanganj, District- Lucknow convicting and sentencing the appellant under Section 307 I.P.C. to undergo 5 years rigorous imprisonment and fine of Rs. 5000/- in default of payment of fine to undergo 2 months simple imprisonment.

3. The brief facts of the present case emerges as such F.I.R. of the alleged incident has been lodged by first informant, Raj Kumar Singh with the allegation that on 29.3.1992 at about 9:30 p.m. some persons had come at the house of informant for celebrating 'Holi' festival. After celebrating the Holi when first informant and his elder brother were going to see off then on the way son of Shiv Raj Singh opened fire from Awasthi Jee's roof with intention to kill. Due to the alleged incident of firing, the first informant, his elder brother and other persons have got several injuries on the body. On the basis of above allegations, the F.I.R. was lodged against Shailendra Singh(the present appellant), s/o Shiv Raj Singh under Sections 324/307 I.P.C.

4. Investigation of the present case was entrusted to the Investigating Officer. During the course of investigation, the name of Shailendra Singh(the present appellant), s/o Shiv Raj Singh first time came into light. Chiranjeet Lal, Mahendra Pratap Singh, K.K. Singh and R.K. Singh have got injuries in the present incident. During the course of the investigation, Investigating Officer collected the injury report of all the injured persons and prepared site map of incident. The

Investigating Officer also recorded the statement of witnesses and after completing the formalities of the investigation filed charge sheet against the appellant under Section 307 I.P.C. Charge-sheet was submitted in the Magistrate Court wherein the case was committed to the court of sessions on 16.4.1998 where it was registered as S.T. No. 584 of 1998. The charges were framed against the appellant under Section 307 I.P.C. on 15.6.1998. The charges were read over to the appellant in Hindi. The appellant denied the charges levelled against him and claimed to be tried.

5. During the course of the trial following witnesses were examined by the prosecution, which are read as under:-

(i) P.W.-1 Raj Kumar Singh, who is complainant and also injured, has substantiated the entire version of the prosecution. Thus, the prosecution fully established the case against the appellant. P.W.-1 has proved the written report as Ext. Ka-1.

(ii) P.W.-2-Krishna Kumar Singh is also another injured eye-witness.

(iii) P.W.-3 - Mahendra Pratap Singh is also another injured eye- witness.

(iv) P.W.-4-Om Prakash Srivastava, who is also radiologist, has proved the X-ray report of Mahendra Pratap Singh as Ext. Ka-2, X-ray report of Krishna Kumar Singh as Ext. Ka-3 and X-ray report of Raj Kumar Singh as Ext. Ka-4.

(iv) P.W.-5- N.K. Kapil, the Investigating Officer, who proved the site plan as Ext. Ka-5, charge-sheet as Ext. Ka-6, chik F.I.R. as Ext. Ka-7 and G.D. No. 62 as Ext. Ka-8.

Injury report and supplementary affidavit of the injured was also admitted by the prosecution under Section 294 Cr.P.C. The medical report of Chiranjeet Lal was Ext. Ka-9, medical report of Mahendra Pratap Singh was Ext. Ka-10, medical report of Krishna Kumar Singh was Ext. Ka-11, medical report of R.K. Singh was Ext. Ka-12. X-ray report of the Chiranjeet Lal was Ext. Ka-13, supplementary report of Krishna Kumar Singh was Ext. Ka-14 and supplementary report of Raj Kumar Singh was Ext. Ka-15.

Thus, the prosecution relied upon oral evidences of P.W.-1 to P.W.-5 and relied upon documentary evidence of Ext. Ka-1 to Ext. Ka-15.

6. After recording the testimony of the witnesses, the statements of the accused/appellant was recorded under Section 313 Cr.P.C. by the trial court explaining the entire evidence and other incriminating circumstances against the appellant. In the statement recorded under Section 313 Cr.P.C. , the appellant denied the entire prosecution story in toto he has stated that the appellant has been falsely implicated by the first informant due to personal vengeance. He also denied open fire in order to commit murder. But he did not choose to lead any evidence in his defence.

7. After hearing learned counsel for both the parties and appreciating the oral and documentary evidence available on record, the learned trial court convicted the accused/appellant as aforesaid. Being aggrieved with the order dated 26.7.2003, the present appeal has been filed by the appellant.

8. Learned counsel for the appellant submitted that in this matter four persons have got injuries, which shall be established by supplementary report of Ext.

Ka-14 and Ext. Ka-15. In the supplementary affidavit doctor opined that all the injured have got gun shot injuries by some fire weapon and clearly stated that in supplementary report that injuries was simple in nature. As per injury report only metallic density was found. So, learned counsel for the appellant argued that in this matter four persons have got injuries but Chiranjeet Lal,who was also injured, was not produced by the prosecution to prove its case. Learned counsel for the appellant also argued that prosecution miserably failed to establish the motive. He further submitted that occurrence has taken place in the night and there is no source of light is mentioned in the F.I.R., so the identity of the appellant is also doubtful. Learned counsel for the appellant submitted that if the court came to the conclusion that the alleged injuries was caused by the appellant then leniency be shown in favour of the appellant. Lastly, learned counsel for the appellant submitted that the appellant is neighbour of the injured and the matter is pertained to the year, 1992 and thus, 31 years have passed.

9. Learned counsel for the appellant further submitted that the injuries, which were inflicted to the injured, are simple in nature. All the injuries which were inflicted to the injured are on non vital part of the body. The injuries were not life threatening. If the case of the prosecution is accepted as such, the offence does not travel beyond the scope of Section 324 I.P.C. Learned counsel for the appellant submitted that benefit of probation be given to the appellant, therefore, he prays to release the appellant on probation.

10. Learned A.G.A. vehemently opposed and submitted before the Court that the prosecution has fully established the charges against the appellants. Therefore, learned trial court after appreciating the evidence available on record rightly convicted the appellants.

11. Considering the nature of injuries, which were inflicted to the appellant, I am of the considered opinion that injuries caused to the appellant by the fire arm were simple in nature. As per supplementary report of the injuries, I am also of the considered opinion that offence does not travel beyond Section 324 I.P.C. Therefore, the conviction of appellant is altered from Section 307 I.P.C. to Section 324 I.P.C. Thus, the conviction of the appellant under Section 324 I.P.C. is hereby confirmed. It is also an admitted fact that period of incarceration of the appellant is three months. The appellant has no previous criminal history. Presently, the appellant and injured are well rooted in the society. 31 years had already passed and no useful purpose will be served to send the appellant in jail again. **Therefore, considering the entire facts and circumstances, appellant deserves for probation.**

12. Since learned counsel for the appellant restricted his arguments to grant benefit of probation, therefore, in these circumstances, It would be appropriate to quote Section 360 Cr.P.C., 361 Cr.PC. reads as follows:-

Section 360 Cr.P.C. reads as follows:

"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 subsection 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 recognisance, 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 warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and 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 1951), 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."

Section 361 Cr.P.C. reads 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.

Section 3, 4 and 5 of the Probation of First Offenders Act reads as under:-

Section 3- Power of court to release certain offenders after admonition.

When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him 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 so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4, release him after due admonition.

Explanation.--For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4.

Section 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.

Section 5-Power of court to require released offenders to pay compensation and costs.

(1) The court directing the release of an offender under section 3 or section 4, may, if it thinks fit, make at the same time a further order directing him to pay--

(a) such compensation as the court thinks reasonable for loss or injury caused to any person by the commission of the offence; and

(b) such costs of the proceedings as the court thinks reasonable.

(2) The amount ordered to be paid under sub-section(1) may be recovered as a fine in accordance with the provisions of sections 386 and 387 of the Code.

(3) A civil court trying any suit, arising out of the same matter for which the offender is prosecuted, shall take into account any amount paid or recovered as compensation under sub-section (1) in awarding damages.

13. There are other legislative requirements that need to be kept in mind. The Probation of Offenders Act provides, in Section 5 thereof for payment of compensation to the victim of a crime (as does Section 357 of the Code of Criminal Procedure). Yet, additional changes were brought about in the Code of Criminal Procedure in 2006 providing for a victim compensation scheme and for additional rights to the victim of a crime, including the right to file an appeal against the grant of inadequate compensation. How often have the Courts used these provisions?

14. In ***Ankush Shivaji Gaikwad v. State of Maharashtra MANU/SC/0461/2013: (2013) 6 SCC 770 and Jitendra Singh v. State of U.P. MANU/SC/0679/2013 : (2013) 11 SCC 193*** the Court held that consideration of grant of compensation to the victim of a crime is mandatory, in the following words taken from Ankush Shivaji Gaikwad:

"While the award or refusal of compensation in a particular case may be within the court's discretion, there exists a

mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation."

15. Section 357 Cr.P.C. and Section 5 of the Offenders Act empowers the Court to award compensation to the victim(s) of the offence in respect of the loss/injury suffered. The object of the section is to meet the ends of justice in a better way. This section was enacted to reassure the victim that he is not forgotten in the criminal justice system. The amount of compensation to be awarded under Section 357 Cr.P.C. depends upon the nature of crime, extent of loss/damage suffered and the capacity of the accused to pay, which the Court has to conduct a summary inquiry as well as considering the submission of learned counsel for appellant as earlier, this Court is of the view that benefit of Section 4 of the Probation of First Offender Act, 1958 should be provided to the appellants.

16. **Thus the *appeal is partly allowed*. The conviction as directed by trial court is altered from 307 I.P.C. to 324 I.P.C. and on the point of sentence it is directed to be released the appellant on probation** and under section 4 of the U.P. of the Probation of Offenders Act with stipulated condition that he will keep peace and good conduct for one year subject to furnishing personal bond of Rs.40,000/- and two sureties of the like amount before the Court.

17. Considering the law propounded by Hon'ble Apex Court and as per provisions of Section 357 Cr.P.C. and Section 5 of the Probation of the Offenders Act, 1958, I am of the view that compensation should be awarded to the injured persons, namely, Raj Kumar Singh, Krishna Kumar Singh, Mahendra Pratap Singh and Chiranjeet Lal. So the compensation of Rs. 40,000/-is imposed upon the appellant and out of Rs. 40,000/-, Rs. 10,000/- be paid to the each injured persons, namely , Kumar Singh, Krishna Kumar Singh, Mahendra Pratap Singh and Chiranjeet Lal. In case of death of any injured persons, same shall be payable to legal heirs of the injured persons. **If the appellant fails to pay alleged amount within fifteen days from the date of production of certified copy of this order, then he shall undergo simple imprisonment of one year.**

18. Thus, the appeal is dismissed on the point of conviction and partly allowed on the point of sentence.

19. Office is directed to communicate this order to the trial court concerned. The trial court record be sent back.

(2023) 2 ILRA 853
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 4093 of 2018

Zakir Hussain ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Virendra Kumar Gupta, Sri Lal Mani Singh, Sri Noor Mohammad, Sri Irshad Mohammad

Counsel for the Respondent:
A.G.A., Sri Brijesh Nath Rai, Sri Rahul Mishra

Indian Penal Code,1860 – Sections 53 & 302 - Proper Sentence - Modification of - 'Reformative & corrective theory of punishment' - It is necessary to impose punishment keeping in view the 'doctrine of proportionality' - Sentence should not be either excessively harsh or ridiculously low - 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 - undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system - Every accused person is capable 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 (Para 16, 18, 19)

Indian Penal Code,1860 – Section 302 - Dowry Death - marriage of deceased solemnised with the accused appellant on 3.4.2021 - Appellant and his other family members were not satisfied with the given dowry and were demanding additional dowry and due to non-fulfilment whereof, the deceased was tortured and ultimately in the night of 9/10.4.2015 she was set on fire and on 6.5.2015 during treatment she succumbed to the burn injuries - Dying declaration of the deceased was against the appellant/husband, which was recorded by Naib Tehsildar after fitness certificate was given by the doctor that she was fully conscious and fit to give her St.ment - deceased was done to death within seven years of marriage in her matrimonial home - It was pleaded that the accused/appellant very poor person & was only the bread winner in his family and was in jail for more than seven years - findings of facts recorded by the Court below not disturbed - However the Court substituted the punishment to 10 years' rigorous imprisonment with remission (Para 20)

Partly Allowed. (E-5)

List of Cases cited:

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

2. Jameel Vs St. of U.P. [(2010) 12 SCC 532]

3. Guru Basavraj Vs St. of Karn., [(2012) 8 SCC 734]

4. Sumer Singh Vs Surajbhan Singh, [(2014) 7 SCC 323]

5. St. of Pun. Vs Bawa Singh, [(2015) 3 SCC 441]

6. Raj Bala Vs St. of Har., [(2016) 1 SCC 463]

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

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

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

1. This appeal has been filed challenging the judgment and order dated 02.06.2018 passed by Session judge, Mahoba in Session Trial No.108 of 2015, arising out of Case Crime No.260 of 2015, under Section 302 I.P.C., Police Station Mahoba, district Mahoba, whereby convicting the appellant under Section 302 I.P.C. and awarded the sentence for life imprisonment and a fine of Rs.10,000/- and in default of payment of fine 4 months additional simple imprisonment.

2. The prosecution story in brief is that the informant Sattar Khan @ Bhure had solemnized marriage of his daughter Nazreen with the accused Zakir on 3.4.2021 according to Muslim rights as per his status and given adequate dowry but the husband of the daughter of the informant and his other family members were not satisfied with the given dowry and they were demanding Rs. 2,00,000/- cash and a

car as an additional dowry and due to non-fulfillment whereof, the daughter of the informant was tortured and maltreated by them in her matrimonial home and ultimately in the night of 9/10.4.2015 she was set on fire and on 6.5.2015 during treatment she succumbed to the burn injuries.

3. The investigation of the case was entrusted to the Circle Officer, Sadar, who inspected the place of occurrence and prepared the site plan and recorded the statement of witnesses. After completion of investigation, the Investigating Officer has submitted charge-sheet only against the accused-appellant Zakir Hussain, under Sections 498-A, 304-B I.P.C. and Section ¾ Dowry Prohibition Act on 27.06.2015 and the cognizance was taken by the Magistrate and considering that the case was triable by the Session Judge and it was committed to the court of session and the Session Court charged the accused under Sections 498-A, 304-B I.P.C. and Section ¾ Dowry Prohibition Act.

4. In order to prove its case the prosecution has examined eight witnesses, who are as follows :

1	Sattar Khan	PW1
2	Zunaid Khan	PW2
3	Prabudh Singh	PW3
4	Afsari Khatun	PW4
5	Rajendra Kumar	PW5
6	Vimal Kumar	PW6
7	Dr. K.K.Suller	PW7
8	Sandeep Singh	PW8

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

1	F.I.R.	Ex.Ka.9
2	Written Report	Ex.Ka.1
3	Dying Declaration	Ex.Ka.7
4	P.M. Report	Ex. Ka. 10
5	Panchayatnama	Ex. Ka.2
6	Charge Sheet	Ex.Ka.12
7	Site Plan with Index	Ex. Ka.11

6. The prosecution laid the evidence against the accused and the court after prosecution evidence examined the accused under Section 313 Cr.P.C. and the accused submitted that he has been falsely implicated in the present case with ulterior intention of harassing him. He pleaded not guilty and claimed to be tried. The learned Sessions Judge framed charges under Sections 498-A, 304-B of I.P.C. and Section ¾ of D.P. Act.

7. After considering the evidence available on record the trial court convicted the accused as aforesaid. Being aggrieved by the conviction judgment and order this appeal has been filed.

8. Heard Sri Irshad Mohammad, assisting Sri Noor Mohammad, learned counsel for the appellant on modification of sentence and learned A.G.A. for the State.

9. Learned counsel for the accused/appellant submits that the appellant has been falsely implicated by the informant as there was no demand of additional dowry on the part of the appellant. When the alleged incident is said to have taken place the accused was not present at the spot. He further submits that the incident occurred due to burst of stove on which she was cooking food. She burnt

accidentally and in the process her clothes caught fire, causing serious injuries to her. After hearing the alarm raised by the deceased, the in-laws of the deceased reached at the spot and tried to save her and in this process they also received burn injuries. No one had set her ablaze but the prosecution has tried to give in a colour of dowry death. There is no dying declaration of the deceased. He also submits that as per postmortem report the deceased has died due to ante-mortem injuries as a result of shock and septicemia. He lastly submits that the accused/appellant in a poor person he is only the bread winner in his family.

10. Learned A.G.A. has submitted that the accused and his other family members have committed the murder of the deceased after pouring kerosene oil on her. The deceased has died within seven years of marriage.

11. At the end of the trial and 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 as mentioned above.

12. While taking us through the judgment, when the Court was of his view that the death was a homicidal death looking to the medical evidence, learned counsel requested for showing leniency in the matter and seeks for lesser punishment as the accused/appellant is in jail for more than seven years, Learned counsel for the appellant has relied on the decision of this Court in **Criminal Appeal No.2895 of 2015 (Manoj Sharma Vs. State of U.P.) decided on 09.12.2022**.

13. As against this, learned A.,G.A. states that the deceased was done to death within seven years of marriage in her matrimonial home, hence, no leniency can be shown to the accused/appellant by this Court.

14. While considering the evidence of witnesses and the Postmortem report which states that the injuries on the body of the deceased would be the cause of death and that it was homicidal death, we concur with the finding of the court below. However, it is to be seen whether the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

15. 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."

16. '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.

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

18. 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.

19. 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.

20. In view of the above, the findings of facts by the Court below are not disturbed. However, as far as punishment is concerned, we substitute the same to 10 years' rigorous imprisonment with remission. Fine and default sentence is maintained. If the accused/appellant has undergone the period of incarceration, the accused/appellant be set forthwith, if not wanted in any other case. The default sentence to start after ten years' of incarceration with remission.

21. In view of the above, the appeal is partly allowed. Judgment and order passed by the learned Sessions Judge shall stand modified to the aforesaid extent. Record be sent back to the Court below forthwith.

(2023) 2 ILRA 858
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.02.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Criminal Misc. Writ Petition No. 481 of 2023

David Mario Denis ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Rajat Gangwar, Ashmita Singh

Counsel for the Respondents:
A.S.G.I., Deepanshu Dass, G.A., Shiv P. Shukla

Criminal Law - Constitution of India,1950 - Article - 21, 32, 166, 226, - Prevention of Corruption Act, 1947 - Sections 7, 7(a) & 13 - Indian Penal Code, 1860 - Sections 120-(B), 342, 386, 409, 411, 420, 467, 468, 471, 504 & 506, - Delhi Special Police Establishment Act, 1942 - Sections 3, 5 & 6 - Writ Petition – challenging the validity of Notification issued by Govt. of India & consent of St. of UP – Powers & Jurisdiction - petitioner who is complainant - First Information Report registered in UP - However, Investigation of reported offence may travel to the territories of other St.s - court finds that, in the case of 'Committee for Protection of Democratic Rights' the Hon'ble Supreme Court held that power to extent the jurisdiction of C.B.I. to investigate a reported crime in other St.s can be exercised by the Central Government - question is not as to whether an accused or victim has any right to seek transfer reported crime; rather the point is that the reported crime should be investigated in most fair and impartial manner - nothing has been brought on record to substantiate that transfer of F.I.R. in this case for investigation to CBI has been made to derail investigation – St. Government along with its consent to Central Government for making an order extending powers and jurisdictions of CBI to investigate F.I.R. in case is proper – Writ petition fails - and is dismissed.(Para - 30, 36, 44, 46, 47)

Writ Petition Dismissed. (E-11)

List of Cases cited: -

1. Kanwal Tanuj Vs St. of Bihar & ors. (2020 vol. 20 SCC 531),

2. St. of W.B. & ors. Vs Committee for Protection of Democratic Rights, W.B. & ors. (2010 Vol. 3 SCC 571),

3. Anand Agarwal Vs U.O.I. & ors. (2018 SCC OnLine Del. 11713).

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. By instituting these proceedings under Article 226 of the Constitution of

India the petitioner, who is the complainant/informant of the First Information Report bearing No.0310 of 2022 lodged on 29.10.2022 at Police Station-Indira Nagar, District-Lucknow, under sections 342, 386, 504, 506 of I.P.C. and section 7 of Prevention of Corruption Act (offences under sections 409, 411, 420, 467, 468, 471 & 120-B of I.P.C. and sections 7A, 8 and 13 of Prevention of Corruption Act have been subsequently added during course of investigation), assails the validity of consent accorded by the State of Uttar Pradesh under section 6 of Delhi Special Police Establishment Act, 1942 (hereinafter referred to as 'DSPE Act') by means of an order dated 29.12.2022 for investigation of the said F.I.R. by Central Bureau of Investigation (herein after referred to as 'the CBI').

The petitioner has also challenged the notification/order issued by the Government of India under section 5 of the DSPE Act whereby the powers and jurisdiction of the members of Delhi Special Police Establishment have been extended to the whole of State of Uttar Pradesh for investigating into the F.I.R. No.0310 of 2022, dated 29.10.2022.

Another prayer made in this petition is that the State-respondents may be directed to get the investigation of the F.I.R. dated 29.10.2022 conducted by the Special Task Force, Uttar Pradesh.

Heard Shri Ajay Tiwari, learned Senior Advocate assisted by Shri Rajat Gangwar and Ms. Ashmita Singh, Advocates for the petitioner, Shri S. B. Pandey, learned Deputy Solicitor General of India, assisted by Shri Deepanshu Dass for the Union of India, Shri Kuldeep Pati Tripathi, leaned Additional Government Advocate for the State of Uttar Pradesh and Shri Shiv P. Shukla, learned counsel representing the CBI. We have also perused the records available before us on this petition.

2. Before delving into the competing arguments made by the learned counsel representing the respective parties, it would be appropriate to note certain facts which have led to filing of the instant writ petition. On 29.10.2022 an F.I.R. bearing No.0310 of 2022 was lodged by the petitioner against two accused persons, (i) Vinay Pathak, the then Vice Chancellor, Dr. Bhimrao Ambedkar University, Agra (hereinafter referred to as 'University') and (ii) Ajay Mishra, the Proprietor of a Company known as XLICT. The allegations in the First Information Report as can be gathered from a perusal of the same are that the petitioner is the Managing Director of M/s DIGITEXT Technologies India Private Ltd. and has been executing certain works related to pre and post examination conducted by the University since the year 2014-2015 and that certain bills of the petitioner were pending for the work said to have been executed by him for the academic years 2020-2021, 2021-2022. As per further recital made in the First Information Report, the petitioner made a request personally to the then Vice Chancellor of the University for clearing the pending bills on which the Vice Chancellor asked him to come to his residence at Kanpur University where he met the Vice Chancellor in the month of February, 2022 and was told that the Vice Chancellor gets 15% commission against the payment of bills and that he will pass the bills only once he is paid 15% amount as commission. The First Information Report further mentions that the petitioner was further told that if he did not make payment of the commission amount his company shall be removed from the works

related to Agra University and other Universities as has been done in Kanpur University. The F.I.R. also states that the Vice Chancellor further told the petitioner that it is he who has been instrumental in appointment of the Vice Chancellors of eight Universities and that he had to pass on money to the top and that he threatened the petitioner on account of which he agreed to pay 15% bill amount as commission. In the F.I.R. it has further been recited that the Vice Chancellor thereafter gave him telephone number of the other accused person, Ajay Mishra and told him that after payment against the bills are made he should deliver the amount of commission to Ajay Mishra and it is only then that petitioner's company shall be engaged further. The petitioner in the F.I.R. further stated that the Vice Chancellor made the petitioner to speak to the other accused, Ajay Mishra through Apple Mobile and told him that the petitioner shall contact him and further that he must tell the petitioner as to how the amount of commission was to be paid.

3. Further allegation in the F.I.R. is that the petitioner thereafter contacted the co-accused-Ajay Mishra who told him that the bills have been cleared by the Vice Chancellor and the amount has also been credited in his account and that he must now pay the commission. Petitioner further stated in the F.I.R. that he paid some amount to the co-accused, however, in the month of April, 2022 the Vice Chancellor again told the petitioner that he should meet Ajay Mishra and deliver the amount of commission and thereafter on the asking of the co-accused Ajay Mishra the petitioner transferred three amounts of Rs.51,62,500/- ,Rs.11,80,000 and Rs.10,98,875/- through electronic mode in the bank account of another firm, namely, International Business Forms, Alwar, Rajsthan. The allegation in the F.I.R. further is that the petitioner paid the co-accused Ajay Mishra Rs.20 lakh and Rs.15,55,000 in cash. As per the F.I.R., on account of the fact that the petitioner failed to meet further demand of bribe, his company was disengaged and in place of his company the work was awarded to co-accused Ajay Mishra through UPDESCO.

4. On 29.10.2022 itself by means of an order passed by the Additional Director General of Police (Law and Order), Uttar Pradesh investigation of F.I.R. No.310 of 2022 was transferred to STF, Uttrar Pradesh after seeking approval from the competent authority as is disclosed by the said order which has been annexed as annexure-5 to the writ petition.

5. The accused-Vinay Pathak instituted the proceedings of Crminal Misc. Writ Petition No.8079 of 2022 with the prayer to quash the First Information Report dated 29.10.2022, however, the said writ petition was dismissed by this Court by means of an order dated 15.11.2022.

6. It has been submitted on behalf of the petitioner that the investigation of the F.I.R. was going on appropriately and the State of Uttar Pradesh while opposing the Criminal Misc. Writ Petition No.8079 of 2022 filed by the accused-Vinay Pathak for quashing of the First Information Report, in its counter affidavit had clearly stated that during course of investigation clinching evidence had been collected against the accused persons by the Investigating Agency, namely, Special Task Force which established their involvement in the reported crime. Various paragraphs of the counter affidavit filed by the State in Writ petition No.8079 of 2022 have been

extracted in the writ petition and our attention has been drawn on behalf of the petitioner that the State in the proceedings of the said writ petition had clearly apprised this Court of the fact inter alia that investigation was being conducted by the Investigating Officer in a fair manner and that evidence collected and the recovery of money from the co-accused established the allegations made in the F.I.R. against the petitioner of the said writ petition (Vinay Pathak).

7. The investigation of the F.I.R. was being conducted by STF, Uttar Pradesh, however, the State Government vide order dated 29.12.2022 accorded its consent for extension of powers and jurisdiction of C.B.I. for investigation of F.I.R dated 29.10.2022. On the aforesaid consent accorded by the State Government, the Central Government has extended the powers of C.B.I. to the whole of State of Uttar Pradesh for investigating the F.I.R. dated 29.10.2022 by passing/issuing an order/notification dated 06.01.2023. It is the consent order dated 29.12.2022 of the State Government under section 6 of DSPE Act and the order dated 06.01.2023 of the Government of India under section 5 of the said Act which have been challenged in these proceedings.

8. Shri Ajay Tiwari, learned counsel appearing for the petitioner has vehemently argued that once the STF, Uttar Pradesh was conducting the investigation of the F.I.R. appropriately, which fact was admitted by the State of Uttar Pradesh in the proceedings of Writ Petition No.8079 of 2022 filed by the accused, Vinay Pathak with the prayer to quash the F.I.R, there was no occasion for the State of Uttar Pradesh to have consented for transfer of investigation to the C.B.I.; neither was there any such occasion for the Government of India to extend the powers and jurisdiction of C.B.I. to investigate the F.I.R. It has been contended on behalf of the petitioner that the consent accorded by the State of Uttar Pradesh and the order passed by the Government of India whereby the investigation of the F.I.R. has been transferred from STF, Uttar Pradesh to C.B.I. are devoid of relevant material consideration and further that such an action on the part of the respondents does not have any rationale. He has further stated that the material available on record does not manifest any legally tenable reason for transferring the F.I.R. and in fact the impugned action on the part of the respondents is against the federal scheme of the Constitution.

9. Drawing our attention to Entry II of List 2 in the Seventh Schedule and entry 80, List I in the said the Schedule of the Constitution, it has been submitted by the learned counsel for the petitioner that the policing is a State subject and accordingly in a situation where the investigation of the F.I.R, which is lodged in Lucknow and relates to certain transactions in connection with the payment of bills raised by the petitioner for executing certain works awarded to him by Agra University at Agra, was being conducted in right direction, transferring the investigation to C.B.I. without there being any legally tenable reason is absolutely arbitrary and hence the consent accorded for the said purpose by the State Government and the order passed by the Government of India in this regard are liable to be set aside. Certain other grounds have also been taken in the writ petition regarding the order dated 29.12.2022 of the State Government being in violation of Article 166 and the notification dated 06.01.2023 of

Government of India in violation of Article 77 of the Constitution of India.

10. The argument challenging the impugned action on the part of the respondents has, however, been primarily premised on the ground that the impugned action is in fact a manifestation of colourable exercise of power for the reason that the power and jurisdiction of transferring the investigation of the F.I.R. in this case has not been exercised for the purpose for which it is available to the Government of India. The other ground taken, which has been emphasized on behalf of the petitioner, is that in absence of any cogent reason for transferring the investigation to the C.B.I. consent of the State Government has been accorded for the said purpose only with a view to extend unlawful benefit to the accused-persons and since the allegation against one of the accused, Vinay Pathak, who is the former Vice Chancellor of Agra University, is that he had told the petitioner that he had to give money to his superiors, as such the entire impugned exercise of transferring the investigation to C.B.I. has been undertaken to stall, manipulate and derail the investigation with the connivance of the accused-Vinay Pathak.

11. Submission further on behalf of the petitioner is that it is only in rare and exceptional circumstances that any matter in respect of which jurisdiction is that of the State Government to investigate the F.I.R, should be transferred to the C.B.I. for investigation and that the State cannot have unbridled or unchannalized powers to grant its consent under section 5 of DSPE Act otherwise every day the federal structure of our Constitution shall be dented.

12. On behalf of the petitioner it has also been contended that the matter at hand since does not have any international or inter-State ramifications as such transfer of investigation in this case is unwarranted and legally not tenable. On the basis of the aforesaid submissions, it has been argued by Shri Tiwari, learned counsel representing the petitioner that the impugned consent of the State Government and the notification issued by the Government of India extending the powers and jurisdiction to the members of Delhi Special Police Establishment to investigate the F.I.R. deserves to be quashed and further that since the investigation of the F.I.R. was being conducted appropriately by the STF, Uttar Pradesh, a direction may be issued to the said Investigating Agency to conduct and conclude the investigation.

13. The prayers made in the writ petition have been opposed in unison by the learned counsel representing the Union of India, learned State Counsel and learned counsel representing the C.B.I. It has been submitted by Shri S. B. Pandey, learned counsel representing the Union of India that on 29.12.2022 a reference was received from the Government of Uttar Pradesh for C.B.I. investigation of the F.I.R. which was made in the proforma prescribed for the said purpose as per the guidelines issued by the government of India, Department of Personnel and Training vide its letter dated 22.11.2018.

14. Drawing our attention to the said circular/letter dated 22.11.2018, it has been submitted on behalf of the Government of India that the said circular was issued for the purposes of introducing Single Window System in the Department of Personnel and Training for receiving proposals for C.B.I. investigation and according to the said circular, the State Governments for the said purpose are required to make the reference

in a prescribed proforma which provides for furnishing the relevant information and documents so that appropriate decision on such reference may be taken by the Government of India. The said proforma enclosed with the circular dated 22.11.2018 issued by the Department of Personnel and Training, Government of India requires the State Government to furnish various informations and details and also justification for transferring any criminal matter to CBI for investigation which included information as to whether the matter has inter-State or transnational ramifications.

15. Shri Pandey has stated that reference made by the State Government was received which contained the requisite informations along with the consent as per the requirement of section 6 of DSPE Act. He has further stated that the justification for referring the matter to the C.B.I. as mentioned by the State Government in its reference to the Government of India was that the case has inter-state spread and ramification as out of two companies of accused, Ajay Mishra one i.e. XLICT is situated in Lucknow, Uttar Pradesh and the other, SOLITAIRE PRINTOTECH is situated in Faridabad, Hariyana. It is also stated in the said reference that the company IBF of another co-accused Ajay Jain is located in Alwar, Rajsthan and that XLICT has been found to be printing question papers of Munger University, Bihar, CSJM University, Kanpur, Lucknow University, Jamsedpur Women's University, Khwaja Moinuddin Chisti Bhasa University, Lucknow, SGGU, Sarguja, Chattisgarh, MSU, Azamgarh, LNMMU, Darbhanga, Bihar without any authorization. Reference further stated that the actual contract was with Solitaire Printotech, Faridabad. It has been argued on behalf of the Union of India that the reference made by the State of U.P. was forwarded to the C.B.I. by the Government of India vide letter dated 05.01.2023 seeking its comments regarding feasibility of undertaking the investigation of the case and that the C.B.I. vide its letter dated 06.02.2023 submitted its feasibility for taking up the investigation of the case and requested the Department of Personnel and Training, Government of India to issue notification under section 5 of the DSPE Act. It has, thus, been stated and argued on behalf of the Government of India that on consideration of relevant factors including the feasibility expressed by the CBI to undertake the investigation and justification provided by the State of Uttar Pradesh for transferring the investigation to the CBI, the Government of India issued the notification dated 06.01.2023 under section 5 of the DSPE Act and that there is no illegality in the said notification for the reason that all relevant factors have been taken into account before issuing the notification. Submission, thus, on behalf of the Union of India is that the writ petition is liable to to be dismissed at its threshold.

16. Shri Shiv P. Shukla, learned counsel representing the CBI has admitted that the CBI submitted its feasibility to the Government of India for taking up the investigation of the F.I.R. and that once the investigation has been handed over to the CBI, the CBI has re-registered the F.I.R. on 07.01.2023, under sections 386, 342, 504, 506, 409, 420, 467, 468, 471, and 120B of I.P.C and section 7 of Prevention of Corruption Act. The place of occurrence as described therein are Agra, Kanpur, Lucknow and other places. It has, thus, been stated that on re-registration of the

F.I.R. and the matter having been validly transferred to the C.B.I., it is investigating the reported crime.

17. On behalf of State of U.P. the prayers made in the writ petition have been opposed and it has been stated that having inter-State ramification of the reported crime, the State Government thought it proper to make a request to the Central Government to hand over the investigation to the CBI and accordingly on relevant considerations it accorded its consent under section 6 of the DSPE Act on the basis of which the Government of India issued notification under section 5 of the said Act and the matter is under investigation at present by the CBI. Submission further on behalf of the State of U.P. is that no one has got any legal right to insist that investigation of any reported crime be conducted by a particular or specific investigating agency and accordingly the writ petition is misconceived which is liable to be dismissed.

18. Shri Ajay Tiwari, learned counsel representing the petitioner in rejoinder has refuted the aforesaid submissions made by the learned counsel representing the respondents and has submitted vehemently that even if it is a case which bears inter-State ramification, the C.B.I. cannot proceed to investigate the matter in absence of consent of the respective States as per the requirement of section 6 of DSPE Act. He has further stated that there is nothing on record which reveals that the States other than the State of Uttar Pradesh have given their consent under section 6 of the DSPE Act and accordingly assumption of investigation by the CBI is bad in law which cannot be permitted to proceed any further.

19. We have anxiously considered the rival submissions made by the learned counsel representing the respective parties and have also perused the records available on record of this writ petition as also certain documents produced before us by the learned counsel representing the Government of India which will form part of record of the writ petition.

20. The issue, which emerges on the basis of pleadings available on record as also on the basis of submissions made by the leaned counsel representing the respective parties, for our reconsideration and answer are (i) as to whether in the facts of the case consent accorded by the State Government under section 6 of the DSPE Act is vitiated, (ii) as to whether there exists any justifiable/cogent reason which justifies the notification issued by the Government of India under section 5 of the DSPE Act and (iii) as to whether consent of the States other than the State of U.P. under section 6 of the DSPE Act is mandatorily required before the CBI assumes jurisdiction to investigate the F.I.R. on the basis of the order issued by the Government of India on 06.01.2023.

21. Under the scheme of our Constitution there may be some debate about the basic character of our constitution, whether it is federal or quasi federal (quasi unitary), however, the legislative and executive powers of the States and the Union of India which are co-extensive are governed by the Seventh Schedule appended to the Constitution of India. It contains three lists, namely, List-I-Union List, List II-State List and List III-Concurrent List. Depending upon the subject matter falling in either of these three lists, the Parliament and the respective State Legislatures are competent to legislate on the subjects assigned to them and accordingly the Central Government

and the State Governments are also empowered to exercise their executive powers/authority. Entry-2 of List II mentions police (including railway and village police) subject to provisions of entry 2A of List 1. Entry 2A of List I pertains to deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of members of such forces while on such deployment. Entry 80 of List I mentions extension of powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of powers and jurisdiction of members of a police force belonging to any State to railway area outside that area.

22. We have to understand the scheme of the DSPE Act, 1946 in the light of the aforesaid entries in List-I and List-II of the Seventh Schedule. Section 5 of DSPE Act reads as under:-

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) [in [a State, not being a Union territory]] the power 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 to any orders which the Central Government may make in this behalf, discharge the functions of police officer in that area and shall, while so discharging such functions, be deemed to be a member of the 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) Where any such order under sub-section (1) is made 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.]"

Section 6 of DSPE Act is also extracted herein below for ready reference:-

"[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 [a State, not being a Union territory or railway area], without the consent of the Government of that State.]"

23. As has been held by Hon'ble Supreme Court in the case of ***Kanwal Tanuj vs. State of Bihar and others,*** reported in ***(2020) 20 SCC 531, DSPE*** Act makes a provision for establishing a Special Police Force in Delhi for the investigation of certain offences in

the Union Territories and also for extension to other areas of the powers and jurisdiction of its members in regard to investigation of certain offences. The DSPE Act is applicable to the entire India. Section 3 of the Act enables the Central Government to specify the offences or classes of offences which are to be investigated by members of this Force.

Section 5 enables the Central Government to extend the powers and jurisdiction of the members of DSPE for investigation of any offence specified in the notification issued under section 3 in a State not being a Union Territory. In keeping tune with the federal structure of the Constitution, consent of such a State has been made essential, as per requirement of section 6 of DSPE Act for extending the powers and jurisdiction of the members of this force in respect of specified offences said to be committed outside jurisdiction of the Union Territory.

24. Paragraphs 16 and 18 of the judgment in the case of ***Kanwal Tanuj (supra)*** are quoted herein below:-

"16. The 1946 Act has been enacted to make provision for constitution of a Special Police Force in Delhi for the investigation of certain offences (committed) in the Union Territories, for the superintendence and administration of the said force and for the extension to other areas of the powers and jurisdiction of the members in regard to the investigation of the said offences. This Act applies to the whole of India. Section 2 of the 1946 Act enables the Central Government to constitute a special force to be called DSPE for the investigation in any Union Territory of specified offences notified under Section 3. Section 3 of the 1946 Act enables the Central Government, by notification in the Official Gazette to specify the offences or classes of offences which are to be investigated by DSPE. It is not in dispute that the offences referred to in the subject FIR are so specified by the notification issued under Section 3.

18. The purport of Section 5 of the 1946 Act is to enable the Central Government to extend the powers and jurisdiction of members of the DSPE for the investigation of any offence or class of offences specified in the notification under Section 3, in a State not being a Union Territory. Such extension of powers and jurisdiction of members of the Special Police Force becomes necessary in respect of specified offences "committed outside the jurisdiction of the Union Territory" referred to in Sections 2 and 3 of the 1946 Act. However, in keeping with the federal structure of the Constitution which is fundamental to the Constitution, consent of such a State has been made essential, as predicated in Section 6 of the 1946 Act."

25. Hon'ble Supreme Court in the said case of ***Kanwal Tanuj (supra)*** has also opined that consent in terms of section 6 may not be necessary in respect of any investigation by the members of DSPE in relation to specified offences committed within the Union Territory. Hon'ble Supreme Court has further held that it may be so even if one of the accused involved in a given case may be residing or employed outside the Union Territory, including in connection with the affairs of the State/local body/corporation or a company or a bank of the State or controlled by the State/institution receiving financial aid from the State Government. It has further

been held that taking any other view will require completion of formality of taking consent for investigation even in relation to specified offence committed within the Union Territory from the State concerned merely because of the fortuitous situation that part of the associated offence is committed in the other State. Their Lordships in the said case have further held that such interpretation would result in an absurd situation especially keeping in view the fact that the DSPE Act extends to the whole of India and the DSPE has been constituted with a special purpose. The relevant extract occurring in paragraph 19 of the said judgment in the case of ***Kanwal Tanuj (supra)*** is also extracted herein below:-

"Such a consent may not be necessary regarding the investigation by the Special Police Force (DSPE) in respect of specified offences committed within the Union Territory and other offences associated therewith. That may be so, even if one of the accused involved in the given case may be residing or employed in some other State (outside the Union Territory) including in connection with the affairs of the State/local body/corporation, company or bank of the State or controlled by the State/institution receiving or having received financial aid from the State Government, as the case may be. Taking any other view would require the Special Police Force to comply with the formality of taking consent for investigation even in relation to specified offence committed within the Union Territory, from the State concerned merely because of the fortuitous situation that part of the associated offence is committed in other State and the accused involved in the offence is residing in or employed in connection with the affairs of that State. Such interpretation would result in an absurd situation especially when the 1946 Act extends to the whole of India and the Special Police Force has been constituted with a special purpose for investigation of specified offences committed within the Union Territory, in terms of notification issued under Section 3 of the 1946 Act."

26. Thus, when we examine the provisions of sections 3, 5 and 6 of the DSPE Act as interpreted by Hon'ble Supreme Court in the case of **Kanwal Tanuj (supra)** what we find is that scheme therein does not in any manner inpinge upon the federal policy as envisaged by our Constitution.

27. It is in the light of the aforesaid legal principle that we need to address the grounds raised by the petitioner impugning the notification of the Government of India extending the powers and jurisdiction of Central Bureau of Investigation to investigate the F.I.R. and also the consent given for the said purpose by the State of Uttar Pradesh.

28. It is true that prior to transfer of the investigation to the C.B.I. with the consent of the State Government the F.I.R. was being investigated by the Special Task Force, Uttar Pradesh under the orders passed by the Additional Director General of Police (Law and Order), however, it appears that the State Government made a reference to the Central Government for extending the powers and jurisdiction of CBI to investigate the F.I.R. in this case considering various aspects, one of which is that the reported crime has inter-State ramifications. In the reference made by the

State Government on 29.12.2022 enclosing therewith the consent as per requirement of section 6 of DSPE Act, it has clearly been stated that the case has inter-State spread and ramification. The exact phrase occurring in the reference made by the State Government is "*the case has inter-State spread and ramification"*.

29. The reference made by the State Government further states that out of two companies of Ajay Mishra one XLICT is situated in Lucknow U.P. & other SOLITAIRE PRINTOTECH is in Faridabad Haryana and that the company IBF of co-accused Ajay Jain is located in Alwar, Rajsthan. It also mentions that Ajay Mishra's company XLICT was found to be printing question papers of Munger University, Bihar, CSJM University, Kanpur, Lucknow University, Jamsedpur Women's University, Khwaja Moinuddin Chisti Bhasa University, Lucknow, SGGU, Sarguja, Chattisgarh, MSU, Azamgarh, LNMMU, Darbhanga, Bihar without any authorization and that the actual contract was with Solitaire Printotech, Faridabad.

30. Thus, the reason given by the State Government in its reference made to the Central Government while giving its consent is that the case at hand has inter-State ramification. Hon'ble Supreme Court in the case of ***State of West Bengal and others vs. Committee for Protection of Democratic Rights, West Bengal and others, reported in (2010) 3 SCC 571*** has drawn certain conclusions in the context of the Constitutional Scheme and one of such conclusions is that in terms of Entry 2 of List II of the Seventh Schedule on the one hand and Entry 2-A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned. Hon'ble Supreme Court in the said case was dealing with the jurisdiction of Constitutional Courts under Article 32 and 226 of the Constitution of India and has held that the very width of the power under Articles 32 and 226 of the Constitution of India requires caution in its exercise. In so far as question of issuing direction to C.B.I. to conduct investigation in a case is concerned, it has further been held that such power under Articles 32 and 226 of the Constitution must be exercised sparingly, cautiously and in exceptional circumstances and that such power can be exercised where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Taking a clue from what has been held by Hon'ble Supreme Court in the case of ***Committee for Protection of Democratic Rights, West Bengal and others (supra)*** it can safely be held that power to extend the jurisdiction of C.B.I. to investigate a reported crime in other States can be exercised by the Central Government in certain circumstances, one of which is where the reported crime has national, international or inter-state ramifications.

31. In this case, we have already noticed that the State Government while making the reference to the Central Government for handing over the investigation of the F.I.R. has clearly stated that the matter at hand has inter-state ramifications and has given reasons therefor. The consent granted by the State Government and the order issued by the Central Government for extending the power and jurisdiction of the C.B.I. to investigate the F.I.R. in this case unless is found to be vitiated on account of some mala fide, we are of the view that the

consent of the State Government and the order passed by the Central Government cannot be said to be legally untenable.

32. A submission has been made by the learned counsel for the petitioner that the State Government has abdicated its power to the Government of India which impinges upon the federal scheme of our Constitution for the reason that policing is primarily a State subject. In this regard we may notice that no such objection regarding interference in the jurisdiction of the State Government to investigate a reported crime touching upon the federal structure has been made on behalf of the State of Uttar Pradesh before us. In absence of any such objection by the State Government and also taking into consideration the fact that it was on the reference made by the State Government on 29.12.2022 that the Central Government took a decision thereafter on 06.01.2023, that too, after procuring the feasibility of investigation from the Central Bureau of Investigation, we are unable to agree with this submission made by the learned counsel for the petitioner. We also notice that the reference made by the State Government on 29.12.2022 was in tune with the guidelines issued by the Department of Personnel and Training, Government of India vide its circular dated 22.11.2018 and the proforma enclosed therewith.

33. it is not a case where the State Government has expressed its consent on the asking of the Central Government or any other authority; rather the process appears to have been initiated by the State Government itself by making a reference on 29.12.2022 whereby the reasons for handing over the investigation to the CBI were furnished to the Central Government along with its consent, which culminated in passing of the order by the Central Government on 06.01.2023 on relevant considerations including consideration of the feasibility communicated to the Central Government by the CBI for investigation of the F.I.R.

34. As noticed above, it has been argued on behalf of the petitioner that the impugned action which has resulted in transfer of investigation of the F.I.R. to the CBI is devoid of relevant material considerations and is without any rationale or legally tenable satisfaction. Such submission, in the facts of the case as narrated above, are not tenable. The relevant material as furnished by the State Government seeking transfer of investigation to the CBI were provided by it in its reference made to the Central Government vide letter dated 29.12.2022 which inter alia stated that the case at hand has inter-state ramification.

35. Taking into consideration the law laid down by Hon'ble Supreme Court in the case of ***Committee for Protection of Democratic Rights, West Bengal and others (supra)*** we are of the opinion that in a situation where the reported crime has inter-state ramifications, the same will be a relevant material for the Central Government to exercise the powers under section 5 of the DSPE Act. The rationale seeking transfer of the F.I.R. in this case is mentioned in the reference made by the State Government to the Central Government vide its letter dated 29.12.2022. Thus, submission that the transfer of investigation in this case does not have any rationale, in our considered opinion, merits rejection.

36. So far as the argument raised by the learned counsel for the petitioner that

the power to transfer the F.I.R. to the CBI in this case has been exercised in a colourable manner is concerned, we may only note that in absence of any material to substantiate such submissions, this ground fails. As already observed above, the primary reason, which appears to us, for the Central Government to have extended the powers and jurisdiction of CBI to investigate the F.I.R. in this case is the inter-state ramification of the reported crime which is reflected from the reference made by the State Government by means of its letter dated 29.12.2022.

37. Lastly, it has been argued on behalf of the learned counsel for the petitioner very vehemently that even if the reported crime in this case has inter-state ramification, unless and until the consent in terms of section 6 of the DSPE Act is given by all the States concerned, the CBI can not be legally permitted to assume the jurisdiction to investigate the F.I.R. in this case.

38. For considering the aforesaid submissions raised on behalf of the petitioner we may again refer to the judgment of Hon'ble Supreme Court in the case of ***Kanwal Tanuj (supra)***. The facts of this case are that the appellant therein (Kanwal Tanuj) was named as an accused along with one Shri C. Sivakumar, CEO, Bhartiya Rail Bijli Company Ltd., Nabinagar, District-Aurangabad, Bihar on the basis of the F.I.R. registered by the CBI pursuant to information received by it. The matter related to large scale corruption and siphoning off Government funds in land acquisition for the plant of Bhartiya Rail Bijli Company Ltd. by its officials in criminal connivance with Local District Administration of District Aurangabad, Bihar. Kanwal Tanuj filed a writ petition before Hon'ble Patna High Court for quashing of the F.I.R. registered by the CBI and also sought a declaration that since the F.I.R. was lodged against him, who was State Government employee, without prior permission of the State Government, thus, in violation of section 6 of DSPE Act, 1946 the F.I.R. was registered without jurisdiction.

39. Hon'ble Patna High Court considered the matter and also noticed the fact that Bhartiya Rail Bijli Company is affiliated/associated to National Thermal Power Corporation Ltd. and the Railways respectively and that registered office of Bhartiya Rail Bijli Company was in Delhi and the allegations regarding defrauding the company and siphoning off funds had occurred in Delhi and as such the CBI was competent to register the F.I.R. at Delhi and to carry on the investigation in that regard. The High Court, thus, did not agree with the submissions of ***Kanwal Tanuj*** in the light of the said facts and dismissed the writ petition. The matter was carried to ***Hon'ble Supreme Court by the appellant therein and the Hon'ble Supreme Court in its judgment inter alia concluded that requiring the C.B.I. to take consent in relation to specified offence committed within the Union Territory at Delhi from the State concerned merely because of the fortuitous situation that part of the associated offence is committed in other State and the accused involved in the offence is residing in or employed in connection with the affairs of that State would result in an absurd situation keeping in view the fact that DSPE extends to whole of India.***

(Emphasis by the Court)

40. The relevant observations made by Hon'ble Supreme Court in para 19 in the

case of ***Kanwal Tanuj (supra)*** have already been extracted above. The Hon'ble Supreme Court in the said case of ***Kanwal Tanuj (supra)*** has also noticed that the offence was committed at Delhi, for which reason the Delhi Courts will have the jurisdiction to take cognizance thereof and further that the investigation of the stated offence may incidentally transcend to the territory of the State of Bihar because of the acts of commission and omission of the appellant who was a resident of Bihar and employed in connection with the affairs of the State of Bihar and as such the said reason will not come in the way of CBI from investigating the offence. Hon'ble Supreme Court has further observed that ***"if the State police has had no jurisdiction to investigate the offence in question, as registered, then, seeking consent of the State in respect of the State in respect of such offence does not arise. Any other approach would render the special provisions of the the 1946 Act otiose."*** Thus, one of the tests laid down by the Hon'ble Supreme Court in the case of ***Kanwal Tanuj (supra)*** is that in case any State does not have any jurisdiction to investigate the reported crime, consent of such a State in respect of such an offence for investigation by C.B.I. will not be required, otherwise the provisions of DSPE Act will be rendered unworkable.

41. We may also refer to a Division Bench judgment of Hon'ble Delhi High Court in the case of ***Anand Agarwal vs. Union of India and others,*** reported in ***(2018) SCC Online Del 11713.*** In the background facts of the said case it has been held that while consent of the State Government might be necessary for registration of a case in that particular State, however, to say that the C.B.I. must seek prior consent of every State where the investigation is to be conducted, would make the scheme of sections 5 and 6 of DSPE Act unworkable. Hon'ble Delhi High Court in the said case of ***Anand Agarwal (supra)*** has noticed the view taken by Hon'ble Patna High Court in ***Kanwal Tanuj (supra)*** in respect of which the Hon'ble Supreme Court decided the appeal by means of the judgment report in ***(2020) 2 SCC 531***. The observations made and law laid down by Hon'ble Supreme Court in the case of ***Kanwal Tanuj (supra)*** has already noticed by us above.

42. If we have a re-look to the facts of this case we find that the F.I.R. has been registered in Uttar Pradesh and the State Government in its reference sent to the Central Government for transferring the investigation to the C.B.I. has stated that the case has inter-state ramification, that is to say, it has ramification in State of U.P., State of Bihar, State of Rajsthan, State of Haryana and State of Chhattisgarh. However, if we consider the nature of allegations contained in the First Information Report, we do not find it a case where except for the State of U.P., any other State will have jurisdiction to investigate the F.I.R. and hence in view of the law laid down by the Hon'ble Supreme Court in the case of Kanwal Tanuj (supra), in our opinion, for this reason as well no consent of other States in this case is required.

43. Paragraph 24 of the judgment in the case of ***Kanwal Tanuj (supra)*** is extracted herein below:

"24.Indisputably, the registered office of Brbcl is within the jurisdiction of the Union Territory of Delhi (National Capital Territory of Delhi) and allegedly the offence has been committed at Delhi,

for which reason the Delhi Court will have jurisdiction to take cognizance thereof. To put it differently, the offence in question has been committed outside the State of Bihar. The investigation of the stated offence may incidentally transcend to the territory of the State of Bihar because of the acts of commission and omission of the appellant who is resident of that State and employed in connection with the affairs of the State of Bihar. That, however, cannot come in the way of Special Police Force (DSPE) from investigating the offence committed at Delhi and has been so registered by it and is being investigated. Had it been an offence limited to manipulation of official record of the State and involvement of officials of the State of Bihar, it would have been a different matter. It is not the case of the appellant or the State of Bihar that even an offence accomplished at Delhi of defrauding of the Government of India undertaking (having registered office at Delhi) and siphoning of the funds thereof at Delhi can be investigated by the State of Bihar. If the State police has had no jurisdiction to investigate the offence in question, as registered, then, seeking consent of the State in respect of such offence does not arise. Any other approach would render the special provisions of the 1946 Act otiose."

44. From the submissions made by the learned counsel appearing for the Union of India, what we find is that though the F.I.R. has been registered in U.P., however, investigation of the reported offence may travel to the territories of other States, as observed above. At the cost of repetition, however, we may note that having regard to the recitals and accusations made in the F.I.R., we are of the considered opinion that the offence mentioned therein can be investigated by an Investigating Agency of the State of Uttar Pradesh and not by investigating agencies of other States for the reason that the investigation into the F.I.R. in this case may travel to other States only incidentally as the alleged crime as disclosed in the First Information Report is said to have been committed in the State of U.P. Thus, the other States will have no jurisdiction to investigate the F.I.R. and accordingly no consent of other States in terms of section 6 of the DSPE Act is required for issuing an order extending the powers and jurisdiction of C.B.I. to investigate the F.I.R. in this case.

45. Learned counsel representing the respondents have also argued that there cannot be any insistence on the part of the accused persons of a crime to get the investigation conducted by an Investigating Agency of their choice. In this respect we may only observe that it cannot be any specific choice of any accused to get the investigation conducted by a particular investigating agency, however, as held by Hon'ble Supreme Court in the case of ***Committee for Protection of Democratic Rights, West Bengal and others (supra)*** Article 21 of the Constitution of India in its application takes within its fold enforcement of rights of both, the victim and the accused as well. It has further been held that the State has the duty to enforce right of every citizen by providing for fair and impartial investigation against any person accused of commission of a cognizable offence. The Apex Court has gone to the extent of observing that in certain situations witness to the crime may also seek for and shall be granted protection. Conclusion (ii) drawn by

Hon'ble Supreme Court, has been mentioned in paragraph 68 of the report which is extracted herein below:-

"(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State."

46. Thus, the question is not as to whether an accused or victim has any right to seek transfer of a reported crime; rather the point is that the reported crime should be investigated in the most fair and impartial manner.

47. In this regard, however, it is also to be noticed that the petitioner has not been able to demonstrate as to what prejudice will be caused to him in case the F.I.R. is investigated by the CBI. Except for stating that the F.I.R. reveals allegations against the accused -Vinay Pathak that he had told the petitioner that he had to give money in bribe to his superiors, nothing has been brought on record to substantiate that the transfer of the F.I.R. in this case for investigation to the CBI has been made to derail the investigation. The reason for transfer, as discussed above, are available in the reference made by the State Government along with its consent to the Central Government for making an order extending the powers and jurisdictions of CBI to investigate the F.I.R. in this case.

48. For the discussion made and reasons given above, we are unable to persuade ourselves to subscribe to the arguments made by the learned counsel for the petitioner.

49. Resultantly, the writ petition fails which is hereby **dismissed**.

50. There will, however, be no order as to costs.

(2023) 2 ILRA 873
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.02.2023

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Misc. Writ Petition No. 7522 of 2022

Gyanendra Maurya @ Gullu ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Gyanendra Singh

Counsel for the Respondents:
A.S.G.I.

(A) Criminal Law – Constitution of India, 1950 - Article 226, – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Sections 3(2)(v), 4(2)(e), – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 - Rules 5, 7(2), – Indian Penal Code, 1860 - Sections 376-D & 506, – Criminal Procedure Code, 1973 - Sections 4, 156, 156(3) & 190: –Writ Petition - for declaring the Section 4(2)(e) of SC/ST Act, read with Rule 7(2) of SC/ST Rules

ultra-vires - statutory provision for filing of charge-sheet – cannot be read, understood and applied in an unreasonable manner so as to lead to absurdity and/or to violate fundamental rights of a citizen – Provisions do not necessarily mandate Investigating Officer to file a charge-sheet in each and every case where an FIR has been lodged alleging commission of offence under Act 1989, but it only enjoins upon him to file such charge-sheet where, based on evidence collected during investigation, offence is made out – accordingly relief for declaring ultra-vires is rejected. (Para - 6, 7)

(B) Criminal Law – Constitution of India, 1950 - Article 226, – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Sections 3(2)(v) & 4(2)(e), – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 - Rules 5, 7(2), – Indian Penal Code, 1860 - Sections 376-D & 506, – Criminal Procedure Code, 1973 - Sections 4, 156, 156(3) & 190 – writ petition - challenging the power of Exclusive Special Court, specified under SC/ST Act, ordered to lodging an FIR and investigation in respect thereof as is prescribed under section 156(3) of Cr.P.C. - there is no exclusion of powers prescribed under Section 156(3) of Code 1973 for such Courts established under Act 1989 – Once such Courts have power to take cognizance of an offence which is referable to Section 190 of Code 1973, directly, then, in view of language used in Section 156 of Code 1973 they can order lodging of FIR and investigation into an offence under Act 1989 in exercise of powers under Section 156(3) of Code 1973 - certain provisions of Cr.P.C. have specifically been excluded from their application to proceedings under the SC/ST Act – Authority to lodge an FIR is distinct from authority to take cognizance for dereliction of duty under Section 4 of Act 1989 – Exclusive Special Court or Special Court exercise original criminal jurisdiction – All offences under Act 1989 are to be tried by such Courts under Act 1989 and no other Court has jurisdiction in this regard – they can also take cognizance of an offence directly - hence impugned order is not without jurisdiction - relief claimed in writ petition is not liable to be granted.

(Para 23, 25, 33, 34, 36, 40)

(C) Criminal Law – Constitution of India, 1950 - Article 226, – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Sections 3(2)(v) & 4(2)(e), – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 - Rules 5, 7(2), – Indian Penal Code, 1860 - Sections 376-D & 506 – Criminal Procedure Code, 1973 - Sections 4, 156, 156(3) & 190 –writ petition - challenging the impugned order on the ground the petitioner would be punished for the same offence under two provisions - Offence of gang-rape, as is alleged in FIR, is referable to Section 376-D IPC and carries a sentence which shall not be less than 12 years, which may extend to life, which shall mean imprisonment for remainder of that person's natural life and with fine, clearly an offence of gang-rape is referable to Section 3(2)(v) of Act 1989 - Section 506 IPC, as is alleged in FIR, is referable to schedule read with 3(2)(v) of Act 1989 – hence, both these offences are referable to Act 1989 and also amenable to jurisdiction of Exclusive Special Courts or Special Courts under said Act - punishment shall be as specified in the IPC for such offences and shall also be liable to fine - Thus, plea of penalised under two provisions is incorrect - writ petition is dismissed.(Para - 41, 42, 43)

Writ Petition Allowed. (E-11)

List of Cases cited: -

1. Shantaben Burabhai Bhuriya Vs Anand Athabhai Chaudhari (2021 SSC Online SC 974)

2. Ramveer Upadhyay & anr. Vs St. of UP & anr. (2021 SC Online SC 484).

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard.

2. The petitioner has sought following reliefs in this petition filed under Article 226 of the Constitution of India:

"i). Issue a writ order or direction declaring the Section 4(2)(e) of the

Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 and Rule 7(2) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities Rules) 1995, ultra- vires to Part III of the Constitution of India upto the extent they both necessarily directs for filing of 'charge sheet'.

ii) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 02.03.2022 (contained as annexure no. 3 to the writ petition), passed by the Exclusive Special Court, Pratapgarh, with all consequential proceedings, or,

iii). issue a writ, order or direction commanding the opposite parties no. 2 and 3 to delete the Section 376-D and 506 I.P.C. from the FIR No. 100 of 2022 registered at P.S. Maheshganj, District Pratapgarh, under Sections 376-D, 506 IPC and 3(2)(v) & 3(2)(va) of the Act 1989."

3. Vide Relief No. 1, he has sought a declaration that Section 4(2)(e) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 (for short 'the Act 1989) and Rule 7(2) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities Rules) 1995 (for short 'the Rules of 1995') be declared ultra vires Part III of the Constitution of India to the extent the said provisions necessarily direct for filing of charge sheet.

4. In order to consider this issue and relief prayed for, we need refer to Section 4 including sub-Section (2)(e) of the Act 1989 which reads as under:

*"**4. Punishment for neglect of duties.** (1) Whoever, being a public servant but not being a member of a Scheduled Caste or a Scheduled Tribe, wilfully neglects his duties required to be performed by him under this Act and the rules made thereunder, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to one year.*

(2) The duties of public servant referred to in sub-section (1) shall include-

(a) to read out to an informant the information given orally, and reduced to writing by the officer in charge of the police station, before taking the signature of the informant;

(b) to register a complaint or a First Information Report under this Act and other relevant provisions and to register it under appropriate sections of this Act;

(c) to furnish a copy of the information so recorded forthwith to the informant;

(d) to record the statement of the victims or witnesses;

(e) to conduct the investigation and file charge sheet in the Special Court or the Exclusive Special Court within a period of sixty days, and to explain the delay if any, in writing; to correctly prepare, frame and translate any document or electronic record;

(g) to perform any other duty specified in this Act or the rules made thereunder:

Provided that the charges in this regard against the public servant shall be booked on the recommendation of an administrative enquiry.

(3) The cognizance in respect of any dereliction of duty referred to in sub-section (2) by a public servant shall be taken by the Special Court or the Exclusive Special Court and shall give direction for penal proceedings against such public servant."

Rule 7 of the Rules of 1995 including sub-Rule (2) thereof, vires of which has been challenged, reads as under:

*"**7. INVESTIGATING OFFICER.-** (1) An offence committed under the Act*

shall be investigated by a police officer not below the rank of a Deputy Superintendent of Police. The investigating officer shall be appointed by the State Government/Director General of Police/Superintendent of Police after taking into account his past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time.

(2) The investigating officer so appointed under sub-rule (1) shall complete the investigation on top priority, submit the report to the Superintendent of Police, who in turn will immediately forward the report to the Director General of Police or the Commissioner of Police of the State Government, and the Officer incharge of the concerned police station shall file a charge sheet in the Special Court or the Special Court within a period of sixty days (the period is inclusive of investigation and filing of charge-sheet).

(2-A) The delay, if any, in investigation or filing of charge-sheet in accordance with sub-rule (2) shall be explained in writing by the investigating officer.

(3) The Secretary, Home Department and the Secretary, Scheduled Castes and Scheduled Tribes Development Department (the name of the Department may vary from State to State) of the State Government or Union Territory Administration, Director of Prosecution, the officer in-charge of Prosecution and the Director General of Police or the Commissioner of Police incharge of the concerned State or Union Territory shall review by the end of every quarter the position of all investigations done by the investigating officer."

5. In this context, the contention of learned counsel for the petitioner was that the language used in the aforesaid two provisions leaves no scope for the Investigating Officer to file a final report in a case where no offence is made out under the Act 1989, meaning thereby he has necessarily and mandatorily to file a charge-sheet in every case in which an FIR is lodged alleging an offence under the Act. In this context, he further submitted that the word used in the aforesaid provisions is 'file charge-sheet' and not 'file a police report'. Under Section 173 of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Code 1973'), the term used is police report which may be in the form of a charge-sheet or a final report, the former to be filed in a case where the offence is made out based on the evidence collected and the latter in case where the offence is not made out, but, distinct from the language used in Section 173 of Code 1973, the provision contained in the Act 1989 and the Rules of 1995 mention the word 'charge-sheet'. He submitted that this makes the provision unreasonable and hit by Articles 14 and 21 of the Constitution of India.

6. The apprehension in the mind of the petitioner seems to have arisen on account of use of the word 'charge-sheet' instead of 'police report' in the above quoted provisions. The provisions have to be read and understood in a reasonable manner. What the aforesaid two provisions mean is that wherever the offence is made out as having been committed under the Act 1989 based on evidence collected during investigation, a charge-sheet is required to be filed as is mentioned therein. If the suggestion or argument of learned counsel for the petitioner is accepted that even if no offence is made out, the charge-sheet has necessarily to be filed or in every case where an FIR alleging the offence under the Act 1989 is lodged, the Investigating Officer is bound to file a

charge-sheet with the Special Court or the Exclusive Special Court, it would be apparently unreasonable, absurd and hit by Articles 14 and 21 of the Constitution of India. Statutory provisions cannot be read, understood and applied in an unreasonable manner so as to lead to absurdity and/or to violate fundamental rights of a citizen. Our understanding and interpretation of this provision as mentioned hereinabove is the correct understanding of law and the argument of learned counsel for the petitioner is misconceived.

7. In view of the above, it is held that the aforesaid provisions do not necessarily mandate the Investigating Officer to file a charge-sheet in each and every case where an FIR has been lodged alleging commission of offence under the Act 1989, but it only enjoins upon him to file such charge-sheet where, based on evidence collected during investigation, the offence is made out. Relief No. 1 is accordingly rejected.

8. Vide Relief No. 2, petitioner has challenged the order dated 02.03.2022 passed by the Special Court, Pratapgarh.

9. The impugned order dated 02.03.2022 has been passed by a Court of Sessions which has been specified as Special Judge (SC/ST Act), Pratapgarh.

10. The contention was that the Exclusive Special Court/Special Court, Pratapgarh does not have power to order lodging of FIR and investigation in respect thereof as is prescribed under Section 156 (3) of Code 1973 In this context reliance was placed upon the definition "Exclusive Special Court" contained in Section 2(bd) which has been been defined to mean the Exclusive Special Court established under sub-Section (1) of Section 14 of the Act 1989 to exclusively try the offences under the Act 1989. It was submitted that such Court is established **to try the offences under the Act 1989**. Trial commences only after charge is framed and not prior to it. The process under Section 156(3) of Code 1973 is a pre-trial stage, therefore, in view of aforesaid provision the Exclusive Special Court does not have the power prescribed under Section 156(3) of Code 1973. The term Special Court is defined under Section 2(d) of the Act 1989 to mean a Court of Sessions specified as a Special Court in Section 14. As per the proviso to Section 14(1) Special Courts are also specified to try the offences under the Act 1989.

11. Section 14 of the Act 1989 reads as under:

*"**14. Special Court and Exclusive Special Court.** (1) For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish an Exclusive Special Court for one or more Districts:*

Provided that in Districts where less number of cases under this Act is recorded, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for such Districts, the Court of Session to be a Special Court to try the offences under this Act:

Provided further that the Courts so established or specified shall have power to directly take cognizance of offences under this Act.

(2) It shall be the duty of the State Government to establish adequate number of Courts to ensure that cases under this

Act are disposed of within a period of two months, as far as possible.

(3) In every trial in the Special Court or the Exclusive Special Court, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Special Court or the Exclusive Special Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded in writing:

Provided that when the trial relates to an offence under this Act, the trial shall, as far as possible, be completed within a period of two months from the date of filing of the charge sheet."

12. The submission based on the aforesaid provisions was, as already mentioned earlier, such Courts are only empowered to try the offences under the Act 1989 that is to hold trial in respect thereof, but not to exercise any other power.

13. Learned counsel for the petitioner also submitted that while the power to take cognizance of a case directly has been conferred upon the Exclusive Special Court/Special Court in the second proviso to Section 14(1), no such power as is prescribed in Section 156(3) of Code 1973 to order lodging of FIR and investigation has been conferred upon the said Courts. In this context, learned counsel for the petitioner invited our attention to Rule 5 of the Rules of 1995 to contend that Rule 5(3) of the Rules of 1995 is pari materia to Section 154(3) of Code 1973 and it provides a remedy/recourse to aggrieved person before the concerned official if FIR is not lodged by the officials of the concerned Police Station.

14. Rule 5 of the Rules of 1995 reads as under:

"5. INFORMATION TO POLICE OFFICER IN-CHARGE OF A POLICE STATION:-*(1) Every information relating to the commission of an offence under the Act, 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 persons giving it, and the substance thereof shall be entered in a book to be maintained by that police station.*

(2) A copy of the information as so recorded under sub-rule (1) above shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer incharge of a police station to record the information referred to in sub-rule (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who after investigation either by himself or by a police officer not below the rank of Deputy Superintendent of Police, shall make an order in writing to the officer in-charge of the concerned police station to enter the substance of that information to be entered in the book to be maintained by that police station."

15. He further invited our attention to Section 4 of the Act 1989 pertaining to punishment for neglect of duties under which if the duties mentioned therein, which includes registration of a complaint or an FIR under the Act 1989 and other relevant provisions, are not performed by the concerned official, cognizance in respect of such dereliction of duty referred to in sub-Section 2 of Section 4 of the Act 1989 by a public servant shall be taken by the Special Court or the Exclusive Special

Court and it shall give direction for penal proceedings against such public servant.

16. He submitted that though power of taking cognizance of such dereliction of duty and also ordering penal proceedings have been conferred upon the Special Court, but no provision has been made empowering them to order lodging of an FIR and investigation in terms of Section 156(3) of Code 1973. The Legislator in its wisdom has stopped short of saying so and has stopped at the stage of Section 154(3) of Code 1973 by incorporating a similar provision in rule 5 of the Rules of 1995, but has not incorporated any such provision analogous to Section 156(3) of Code 1973 in the Act 1989 or the Rules of 1995. Based on it, he submitted that this itself makes the intention of the Legislator and the Rule making authority very clear that no such power has been vested with the Exclusive Special Court or the Special Court.

17. In this context, he also invited attention of the Court to Section 18A of the Act 1989 which has been inserted by Act No. 27 of 2018 w.e.f. 20.08.2018 by which preliminary inquiry is not required for registration of First Information Report against any person nor approval for arrest is required. The contention of learned counsel for the petitioner was that this provision makes registration of FIR mandatory without any preliminary inquiry.

18. It was also the contention of learned counsel for the petitioner that the word used in Section 156 is Magistrate, which, the Exclusive Special Court or the Special Court is not. In the case at hand, the order has been passed by a Court of Sessions which is referred as Special Court and not by the Magistrate.

19. The argument of learned counsel for the petitioner as noticed earlier appeared quite attractive at first blush, however, we find that as far as the definition of Exclusive Special Court and Special Court under the Act 1989 read with Section 14 of the said Act are concerned, no doubt on a reading of it the said Courts had been established for trying the offences committed under the Act 1989, but, by the Act No. 1 of 2016, amendments have been made in Section 14, by which, inter alia, a second proviso to Section 14(1) has been added. Courts so established or so specified under Section 14(1) have been given the power to directly take cognizance of the offence under the Act 1989. Taking of cognizance is a pre-trial stage, therefore, the contention that such Courts are only empowered to try cases is incorrect.

20. Now, we may consider the applicability of Code of Criminal Procedure before the Exclusive/Special Court under the Act 1989.

21. In the Act 1989 or the Rules of 1995, the procedure to be followed by these Courts under the Act 1989 has not been prescribed. Such procedure has been prescribed in the Code 1973 which contains the general law relating to criminal procedure.

22. In this context it is relevant to refer to Section 4 of the Code 1973 which reads as under:

*"**4. Trial of offences under the Indian Penal Code and other laws.** (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.*

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

Section 5 of the Code 1973 reads as under:

"5. Saving. Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

23. As per Sections 4 and 5 of Code 1973 all offences under any other law (which shall include the Act 1989) shall be investigated, inquired, tried and otherwise dealt with according to the Code of Criminal Procedure subject to there being any enactment on the subject containing a specific provision to the contrary. We find that certain provisions of the Code 1973 have specifically been excluded from their application to the proceedings under the Act 1989. Section 18 of the Act 1989 excludes the application of Section 438 of Code 1973 regarding anticipatory bail. Sections 18 and 18A of the Act 1989 exclude any preliminary inquiry before registration of a First Information Report contrary to the provisions contained in Sections 154 and 156 of Code 1973 Section 19 excludes applicability of Section 360 of the Code 1973. The applicability of other provisions of the Code 1973 have not been excluded specifically or generally, therefore, it leads us to reasonably infer that other provisions of the Code 1973 will apply to the Courts established and specified under the Act 1989, subject to Section 20 thereof.

Section 20 of the Act 1989 provides as under:

"20. Act to override other laws.--*Save as otherwise provided in this Act, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law."*

24. As per Section 20 of the Act 1989 save as otherwise provided in the Act 1989, the provisions of the said Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law. Thus, subject to any inconsistency between the Act 1989 and the Code 1973, the said Code 1973 would apply unless it has been otherwise provided in the Act 1989 itself. This would obviously refer to the exclusion from applicability of Section 438 of Code 1973, etc. as referred in Sections 18, 18A and 19 of the Act 1989. Apart from these three provisions, there is no other provision in the Act 1989 excluding the applicability of the Code 1973 to the proceedings under the Act 1989 which is also indicative of applicability of other provisions of the Code 1973 including Section 156(3) of Code 1973, to proceedings under the Act 1989. Sections 4(2) and 5 of the Code 1973 support this reasoning.

25. The provisions of Section 4 of the Act 1989 and Rule 5 of the Rules of 1995 do not persuade the Court to hold that as nothing has been said beyond the said

provisions specially empowering the Courts under the Act 1989 to order lodging of FIR and investigation, this power cannot be exercised by such Courts. Section 4 of the Act 1989 or Rule 5 of the Rules of 1995 which are being relied by the petitioners' counsel, do not answer the situation where the concerned Police Officer does not register the FIR and the Superintendent of Police also after being informed in terms of Rule 5 of the Rules of 1995 does not take any action. It is here that the Courts come into picture as a victim cannot be left remediless. Section 4 of the Act 1989 does not answer or remedy this situation. The authority to lodge an FIR is distinct from the authority to take cognizance for dereliction of duty under Section 4 of the Act 1989. To say that the Exclusive Special Court or Special Court has the power to take cognizance of dereliction of duty in this regard under Section 4 and also to direct penal proceedings but not to order lodging of FIR and investigation appears unreasonable and incongruous and it defeats the very object of the Act 1989.

26. The question is what happens after non-compliance of Rule 5(3) of the Rules of 1995 i.e., if the Officer-in-Charge/SHO of PS concerned refuses to lodge the FIR and an application is submitted before the higher Officer that is Superintendent of Police, but he also does not take any action? of what use would be the proceedings under Section 4 of the Act 1989 which empowers the Exclusive Special Court or the Special Court to take cognizance of dereliction of duty on the part of the said Officers that is the Officer-in-Charge/SHO and Superintendent of Police in not lodging the FIR, if there is no power with the Exclusive Special Court or the Special Court to order lodging of such FIR? There is nothing in the Act 1989 or the Rules made thereunder to exclude the applicability of Section 156(3) of Code 1973 to investigation of offences under the Act 1989.

27. After all why the Legislator specifically excluded only few provisions of the Code 1973 from their application to proceedings under the Act 1989. The Act 1989 or the Rules of 1995 do not provide the procedure to be followed by such Courts under the Act 1989, therefore, such procedure has to be as per the Code 1973 which is the general law applicable relating to criminal procedure in all Courts exercising criminal jurisdiction. We may in this context again refer to Section 4(2) of the Code 1973 according to which all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions (Code of 1973), but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. We have already noticed that there is nothing inconsistent in the Act 1989 or the Rules of 1995 viz-a-viz the provision contained in Section 156(3) of Code 1973 which obviously has to be applied after the contingencies mentioned in Rule 5 of the Rules of 1995 are satisfied. Rule 5 of course is analogous to Section 154 of Code 1973 Section 4 of the Act 1989 is an additional provision to fix accountability on the officials who are liable for dereliction of duties by not registering any case, but, this provision will not exclude the powers of the Exclusive Special Court/Special Court to order registering of FIR and its investigation in view of Sections 4 and 5 of the Code 1973 read with Section 20 of the Act 1989 according to which, as discussed, Section 156(3) of the Code 1973 will apply.

28. In view of the above discussions in the context of Sections 4 and 5 of the Code 1973 read with Section 20 of the Act 1989, in matters of investigation of an offence under the Act 1989, Section 156(3) of the Code 1973 shall apply.

29. We may now consider Sections 156(3) and 190 of the Code 1973.

Section 190 of the Code 1973 reads as under:

"190. Cognizance of offences by Magistrates*. (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-*

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try."

30. Considering the issue involved in this case, we may now refer Section 156 of the Code 1973 which reads as under:

"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."

31. Under Section 156(3) of the Code 1973, any Magistrate empowered under Section 190 may order such an investigation as is mentioned in Section 156 quoted hereinabove.

32. The second proviso to Section 14(1) of the Act 1989 provides that the Courts so established or specified shall have power to directly take cognizance of the offences under the Act 1989, meaning thereby such Courts can exercise powers of taking cognizance of an offence under the Act 1989 which as per the Code of 1973 is a pre-trial stage and is referable to Section 190 thereof. The Code of 1973 is an Act to consolidate and amend the law relating to criminal procedure. Taking cognizance of an offence is dealt with under the said Code in Section 190. As per the said provision the power to take cognizance of any offence vests with the Magistrate. According to Section 193, except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Sessions shall take cognizance of any offence as a Court of original jurisdiction unless a case has been committed to it by the Magistrate under this Code. Special Court under Section 14 of the Act 1989 is a Court of Sessions. However, the second proviso to Section 14 (1) vests the power of taking cognizance of an offence under the Act 1989 upon an Exclusive Special Court or a Special Court

(which is a Court of Sessions) directly without the case being required to be committed by the Magistrate concerned to it after its cognizance by the latter. Section 190 of Code 1973 has therefore to be applied to Exclusive Special Court/Special Court under the Act 1989 mutatis mutandis, meaning thereby, reference therein to Magistrate will have to be understood as a reference to these Courts under the Act 1989. Reading of Section 190 of Code 1973 conjointly with second proviso to Section 14(1) of the Act 1989 will make it clear that the Exclusive Special Court or the Special Court which is a Court of Sessions is empowered to directly take cognizance of an offence, thus, it exercises powers of a Court of original criminal jurisdiction and the exercise of its jurisdiction in this regard is not fettered by the provisions of Section 193 of Code 1973. Thus, in view of second proviso to section 14 of the Act 1989 the power exercisable under Section 190 of Code 1973 by the Magistrate are exercisable by the Exclusive Special Court or Special Court as has already been discussed.

33. The fact that there is no specific provision in the Act 1989 empowering the Exclusive Special Court or the Special Court to order lodging of an FIR and to investigate the offence mentioned therein is irrelevant, as the second proviso to Section 14(1) of the Act 1989 leaves no doubt that such Courts exercise original criminal jurisdiction. All offences under the Act 1989 are to be tried by such Courts under the Act 1989 and no other Court has jurisdiction in this regard. They can also take cognizance of an offence directly. Now, such cognizance of an offence can be taken on a private complaint also in view of Section 190 of Code 1973, application of which is not excluded to the proceedings under the Act 1989.

34. We have already held that Section 156(3) of Code 1973 will apply to investigation of an offence under the Act 1989 and as per Section 156(3) of Code 1973 a Magistrate empowered under Section 190 of Code 1973 can order such investigation and as, in view of proviso to Section 14 of the Act 1989 read with Section 190 of Code 1973, it is the Courts established or specified under the Act 1989 which can take cognizance directly in respect of an offence under the Act 1989, therefore, the Magistrate can not and should not take cognizance of an offence under the Act 1989 as such power when specifically vested with the Special Courts under the Act 1989 should be exercised by the latter as held in ***Shantaben Burabhai Bhuriya vs. Anand Athabhai Chaudhari***1, therefore, this power under Section 156(3) of Code 1973 has to be exercised by such Exclusive or Special Courts and not the Magistrate.

35. It would have been better if the Legislator would have specifically provided for such powers to be exercised by the Exclusive Special Court or the Special Court, but the fact of the matter is that there is no specific exclusion of the power under Section 156(3) of Code 1973 from being exercised by the Courts established or specified under Section 14 of the Act 1989 and in view of the second proviso to Section 14 of the Act 1989 as these Courts have the power to take cognizance of an offence directly and also to entertain a complaint directly as per Section 190 of Code 1973, then, the Magistrate would not have the power to exercise jurisdiction under Section 190 in respect of an offence under the Act 1989 and this power should only be exercised by these Special Courts, although, if the Magistrate in a given case erroneously takes cognizance of an offence under the

Act 1989 and then commits the case to the Special Court, this by itself will not vitiate the proceedings/trial as has been held by the Supreme Court in ***Shantaben Burabhai Bhuriya (supra) and Ramveer Upadhyay & Anr. Vs. State of U.P. & Anr.***2. In view of Section 156(3) of Code 1973 thy can also order lodging of FIR and investigation where the offence alleged is under the Act 1989.

36. Even at the cost of repetition, there is no exclusion of the powers prescribed under Section 156(3) of Code 1973 for such Courts established under the Act 1989. Once such Courts have power to take cognizance of an offence which is referable to Section 190 of Code 1973, directly, then, in view of the language used in Section 156 of Code 1973 they can order lodging of FIR and investigation into an offence under the Act 1989 in exercise of powers under Section 156(3) of Code 1973

37. The word Magistrate under Section 156(3) of Code 1973 does not mean that the Exclusive Special Court or the Special Court which is a Court of Sessions will not have the power under the said provision, as, in the absence of any specific exclusion, the provision will apply mutatis mutandis.

38. In fact, exercise of such powers by the Exclusive Special Court or the Special Court is also necessary so as to achieve the object of the Act 1989 and ensure speedy justice to the victim as these are Courts exclusively established or specified to deal with offences under the Act 1989.

39. A Full Bench of this Court has recently held vide judgment and order dated 17.10.2022 in a bunch of Applications under Section 482 of Code 1973 leading case being ***Application under Section 482 No. 14443 of 2022; Naresh Kumar Valmiki vs. State of U.P. and others*** that the Exclusive Special Court or the Special Court under the Act 1989 can treat the application under Section 156(3) of Code 1973 as a complaint and proceed with it accordingly.

40. In view of the above discussion, the order passed by the Special Court dated 02.03.2022 is not without jurisdiction. We are of the opinion that the Relief No. 2 is not liable to be granted.

41. As regards Relief No. 3, we find that the offences under the Act 1989 are such which are referred to as atrocity in Section 2(a) which has been defined to mean an offence punishable under Section 3. Now, in Section 3 of the Act 1989 various offences are mentioned. Section 3(2)(v) provides that whoever not being a Member of the Scheduled Caste or Scheduled Tribe commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine. Now, the offence of gang-rape, as is alleged in the FIR, is referable to Section 376-D IPC and carries a sentence which shall not be less than 12 years, which may extend to life, which shall mean imprisonment for the remainder of that person's natural life and with fine, therefore, clearly an offence of gang-rape is referable to Section 3(2)(v) of the Act 1989. Section 506 IPC, as is alleged in the FIR, is referable to schedule read with 3(2)(v) of the Act 1989, therefore,

both these offences are referable to the Act 1989 and also amenable to the jurisdiction of the Exclusive Special Courts or the Special Courts under the said Act.

42. Section 3(2)(va) provides for punishment of an offence specified in the schedule to the Act 1989 subject to contingencies mentioned therein. The punishment shall be as specified in the Indian Penal Code for such offences and shall also be liable to fine. Thus, it is incorrect to say that the petitioner would be penalised under two provisions. It would not be so.

43. In any case grounds (gg) and (hh) in the writ petition can be raised/seen at the appropriate stage before the Court concerned and as of now it cannot be said that the petitioner would be punished for the same offence under two provisions.

44. In view of above discussion, we see no reason to grant Relief No. 3.

45. All this is of course without prejudice to the rights of the petitioner in the pending investigation or before the Trial Court, if the occasion so arises.

46. Subject to above, the petition is ***dismissed***.

(2023) 2 ILRA 885
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Habeas Corpus Writ Petition No. 381 of 2022

Dr. Surekha Saxena & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Krishna Kant Vishwakarma, Sri Rajesh Kumar Singh

Counsel for the Respondents:
G.A., Sri Deepak Kumar Srivastava, Sri Indra Bhahadur Yadav

(A) Civil Law - Constitution of India,1950 - Article 226, - Hindu Marriage Act, Section - 9 - Civil Procedure Code, 1908 - Section - 44(a) - Writ of Habeas Corpus - against Illegal custody – Minor child - Petition filed by the Grandparents of Corpus, seeking a writ of habeas corpus - maintainability – court finds that, for the custody of the child, in ordinary remedy, matter would normally lie under provision of Hindu Minority and Guardianship Act, 1956 and Wards Act, 1890 depending on facts situation of the case - however, in the fact and circumstances of the present case, this court if the balance is to be struck between mother and grandmother, the balance would certainly tilt in favour of mother - custody of corpus with his mother can in no way be said to be illegal, unlawful - Held, the prayer of transfer of custody of corpus, who is eight year old child of respondent no. 4, in favour of his grandmother, is declined and refused - However, court directs to respondent no. 4 to provide right to meet the corpus to petitioners on regular basis, directions issued accordingly - Petition disposed of.(Para - 21, 22,)

Writ Petition Disposed of. (E-11)

List of Cases cited: -

1. Cox Vs Hates, (1890) 15 AC 506 (HL),

2. Barnardo Vs Ford, (1862) AC 326,

3. R. Vs Secy. of St. for Home Affairs (1941) 3 All ER 104, 105,,

4. Kanu Sanyal Vs D.M., Darjeeling & ors., (1973) 2 SCC 674,

5. Nithya Anand Raghavan Vs St. of NCT of Delhi & ors. (2017) 8 SCC 454,

6. Syed Saleemuddin Vs Dr. Rukhsana & ors., (2001) 5 SCC 247,

7. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors., (2019) 7 SCC 42,

8. Yashita Sahu Vs St. of Raj.n & ors., (2020) 3 SCC 67,

9. Kanu Sanyal Vs D.M., Darjeeling & ors., (2001) 5 SCC 247

(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. Instant writ petition has been filed by the petitioners seeking a writ of habeas corpus with averment that petitioner no. 1 is grandmother of corpus (Ankur) on whose behalf petition has been filed.

3. Pleadings have been exchanged between the parties.

4. It is submitted by learned counsel for the petitioners that respondent no. 4 is mother of petitioner no. 2 (corpus). The corpus is son of respondent no. 4 namely Rimjhim w/o Amit Saxena. The corpus is born out of wedlock of respondent no. 4 and her husband Amit Saxena. The corpus born on 24.8.2014 in Singapur in presence of his parents who was named as Ankur. The marriage of Amit Saxena, who is s/o petitioner no. 1, and respondent no. 4 was arrange marriage which was solemnized on 30.1.2013 after the couple embarked on honeymoon and first visited Bankok and subsequently Singapur where corpus took birth. After birth of child, the couple return to India on 4.10.2014. Their return ticket to Singapur was scheduled for 15.11.2014 but respondent no. 4 did not join her husband in return journey to Singapur. Her ticket was extended twice but she refused to go back to Singapur to live along with son of petitioner no. 1 and retained the corpus in her custody as she refused to go back to Singapur along with corpus to join her husband and custody of corpus become illegal on that count. Thereafter relations between husband and wife became strained. Husband of the respondent no. 4 came to India on 24.8.2015 and persuaded respondent no. 4 to come along with Ankur to her parental place to celebrate birthday of corpus but she refused. Matter between husband and wife was referred to mediation. A suit for dissolution of marriage was filed by husband of respondent no. 4 in Family Court, Singapur in which decree for dissolution of marriage was passed on 28.11.2017. The husband of respondent no. 4 was directed to pay regular maintenance to the corpus on monthly basis. Joint custody of the corpus was ordered by Family Court, Singapur in favour of both the biological parents. As decree was not complied by respondent no. 4, her husband filed an execution petition before Indian Court under Section 44-A C.P.C. seeking an execution of decree passed by Singapur court. However, in which respondent no. 4 appeared and said execution was dismissed on 30.7.2019 in default. In 2020, marriage of brother of respondent no. 4 Rajat Mowar took place in which proximity of respondent no. 4 with one Abhishek Chaudhary (respondent no. 7) was observed in some photographs provided by Priya Chaudhary, who has been junior to Rimijhim while her studies in S.R.M. Institute and Engineering College, Chennai, in B.Tech/Bio-tech course. In fact Rimjhim solemnized second marriage with said Abhishek Chaudhary on 1.12.2020 in Lucknow and reception was

organized on 3.12.2020 at S.S. Palace, Gorakhpur. As the mother of corpus has entered in second marriage, the welfare of corpus in custody of his biological mother is not safe and Priya Chaudhary, bhabhi of respondent no. 4, had witnessed that corpus is being ill-treated by respondents. These facts are narrated by her in a petition filed under Section 9 of Hindu Marriage Act for restitution of conjugal rights before Family Court, Delhi on 10.9.2021. Despite the fact that father of corpus is paying Rs. 16,500/- approximate to the corpus for maintenance as per decree of Singapur Court, however, corpus is not being educated by the respondents in proper manner and he has been admitted in poor standard school in Kanpur. On account of strained relations between respondent no. 4 and her husband, bright prospect of corpus is in peril and in absence of custody of corpus, his grandmother, who is highly educated and resourceful old lady, is helpless to extend helping hand to him. The corpus is even unable to recognize his grandparents and he is deprived of the love and affection of his grandparents at the instance of respondents. The corpus is aged about 8 years of age and keeping his age, he is not in dire need of protection by biological mother. Petitioner no. 1 is his grandmother and physically fit and economically well off to take him into her custody and take care of his educational and other needs, therefore it is prayed that a writ order or direction in the nature of habeas corpus be issued directing the State-respondents to set free the corpus from private respondents and hand him over to custody of petitioner no. 1, keeping in view the paramount consideration of welfare of corpus.

5. On the other hand prayer made in the petition has been vehemently opposed by private respondents and submitted that respondent no. 4, who is mother of corpus, has never contracted second marriage with Abhishek Chaudhary i.e. respondent no. 7, who is her familiar friend and not her second husband. Respondent no. 4 has not decided till date to marry with respondent no. 7 or any person. Respondent no. 4 being mother of corpus is her natural guardian and is able to take full care of her son. Dr. Ashok Kumar Saxena, husband of petitioner no. 1, has filed a false complaint before S.S.P., Agra against respondent no. 4 with a view to harass her. Corpus is being extremely well accordingly and in his co-curricular activities under guidance of his mother, who is respected teacher in Kanpur. Corpus is not in illegal custody of private respondents. It is further submitted that marriage of parents of corpus took place on 30.1.2013. Respondent no. 4 was working in Multi National Company. At that time she was harassed by petitioner no. 1 and her husband for demand of additional dowry. When couple were in Singapur after marriage, respondent no. 4 came to know that her husband was in relation with some lady and when she raised her concern about that, she was physically abused by her husband. Petitioner no. 1 also visited Singapur and physically abused the respondent no. 4 and threatened her. She was constantly tortured by her parents-in-law and by her husband just after marriage due to which she was compelled to live in company of her husband and at present she is residing in Kanpur at her paternal place. The corpus is making good progress in academic and other activities in his school at Kanpur. These facts are elaborately stated in counter affidavit.

6. Learned counsel for the private respondents and learned A.G.A. submitted that as the corpus is lying in custody of his mother, it cannot be said illegal custody

and claim of petitioner no. 1 being grandmother of corpus for transfer of custody from his mother to her is unfounded and without any legal justification. The alternative prayer of petitioner no. 1 for visitation rights of the corpus is also not liable to be granted to her in the facts and circumstances, keeping in view the status of petitioner no. 1 with the child and fact that she is residing in Agra, which is away from the place where corpus is residing. Welfare of the minor may be jeopardized even if the visitation rights are granted to petitioner no. 1. She is having great animosity with the mother of the child.

7. Habeas corpus "ad subjiciendum" means "that you have the body to submit or answer" which is called as Festinum Remedium - A speedy remedy, which has been sought by the petitioner in this instant case.

8. Habeas Corpus is Latin for "you have the body". The writ is referred to in full in legal texts as habeas corpus ad subjiciendum or more rarely ad subjiciendum et recipiendum. It is sometimes described as the "great writ". It is considered as a most expeditious remedy available under the law.

9. The meaning of the term habeas corpus is "you must have the body". Halsbury in his **Laws of England,** 4th Edition, observed as follows:-

"The writ of habeas corpus ad subjiciendum which is commonly known as the writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from the unlawful or unjustifiable detention whether in prison or in private custody. It is a prerogative writ by which the queen has a right to inquire into the laws for which any of her subjects are deprived of their liberty."

10. In Corpus **Juris Secundum**, the nature of the writ of habeas corpus is summarized thus:-

"The writ of habeas corpus is a writ directed to the person detaining another, commanding him to produce the body of the prisoner at a designate time and place with the day and cause of his caption and detention to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf. 'Habeas corpus' literally means "have the body". By this writ, the court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal. Such is the predominant position of the writ in the Anglo-Saxon Jurisprudence."

11. Lord Halsbury LC in **Cox v. Hates, (1890) 15 AC 506,** held that "the right to an instant determination as to lawfulness of an existing imprisonment" is the substantial right made available by this writ.

12. Likewise in **Barnardo v. Ford, (1862) AC 326**, the writ of habeas corpus has been described as a writ of right which is to be granted ex debito justitiae. Though a writ of right, it is not a writ of course. The applicant must show a prima facie case of his unlawful detention. Once, however, he shows such a case and the return is not good and sufficient he is entitled to this writ as a matter of right.

13. In **R. v. Secy. of State for Home Affairs (1941) 3 All ER 104, 105**, it has

been held that a person is not entitled to be released on a petition of habeas corpus if there is no illegal restraint. "The question for a habeas corpus court is whether the subject is lawfully detained. If he is, the writ cannot issue, if he is not, it must issue."

14. Likewise in **Cox v. Hakes, (1890) 15 AC 506 (HL)**, it has been held that the writ of habeas corpus is an effective means of immediate release from unlawful detention, whether in prison or private custody. Physical confinement is not necessary to constitute detention. Control and custody are sufficient.

15. A Constitution Bench judgment of the Supreme Court in the matter of Kanu Sanyal v. District Magistrate, Darjeeling and others, (1973) 2 SCC 674, traced the history, nature and scope of the writ of habeas corpus. It has been held by Their Lordships that it is a writ of immemorial antiquity whose first threads are woven deeply "within the seamless web of history and untraceable among countless incidents that constituted a total historical pattern of Anglo-Saxon jurisprudence". Their Lordships further held that the primary object of this writ is the immediate determination of the right of the applicant's freedom and that was its substance and its end. Their Lordships further explaining the nature and scope of a writ of habeas corpus held as under: -

"The writ of habeas corpus 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. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in the order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restrain". But the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness. The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ, that is its substance and end. The production of the body of the person alleged to be wrongfully detained is ancillary to this main purpose of the writ. It is merely a means for achieving the end which is to secure the liberty of the subject illegally detained."

16. Therefore, on the basis of above cited judicial precedents, it can be said that habeas corpus is not liable to be issued. As a matter of course, it is a writ of right, it is not a writ of course and the applicant must show prima facie case of his unlawful detention. The writ can only be issued on establishing clear and specified grounds which are legally tenable. Writ of habeas corpus is a process by which a person, who is confined without legal justification may secure a release from his confinement. The writ is, in form, an order issued by the High Court calling upon the person by whom a person is alleged to be kept in confinement

to bring such person before the court and to let the the court know on what ground the person is confined. If the petitioner succeeds to convince the court that there is no legal justification for detention, the person will be ordered to be released, however, the production of the body (corpus) of the person alleged to be unlawfully detained is not essential before final hearing and disposal of a petition for issuing writ of habeas corpus.

17. In ***Nithya Anand Raghavan v. State of NCT of Delhi and others (2017) 8 SCC 454***, it has been observed by the Apex Court:

"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 & Ors., (2001) 5 SCC 247, 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 Saleemmuddin v. Dr. Rukhsana and Ors., (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 the case of Mrs. Elizabeth (supra), 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 (see Paul Mohinder Gahun Vs. State of NCT of Delhi & Ors., (2004) 113 Delhi Law Time 823, relied upon by the appellant). It is not necessary to multiply the authorities on this proposition.

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."

18. Further, in ***Syed Saleemuddin v. Dr. Rukhsana and Ors., (2001) 5 Scc 247***, it has been observed by the Supreme Court:

"11. From the principles laid down in the aforementioned cases 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. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

19. Learned counsel for the private respondent cited a pronouncement of Hon'ble Apex Court in **Tejaswini Gaud and others Vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42**, where it was held that petition of habeas corpus would be maintainable where detention by parents or others is found to be illegal and without any authority of law and extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective. The relevant observations of the Apex Court in this judgment are extracted as under:-

"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

xxxx

19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the

writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

20. Learned counsel for the petitioner in support of the averments made in petition and his statements cited, has placed reliance in the judgment of Hon'ble Apex Court in ***Yashita Sahu Vs. State of Rajasthan and Others, (2020) 3 SCC 67***, in which Hon'ble Apex Court in an inter country custody case of minor child where wife brought her minor child to India from U.S.A. in violation of U.S.A. court's order, it was held that the custody of child cannot be said to be strictly legal. However, in opinion of Hon'ble Apex Court, High Court could not have directed the appellant wife to go to the U.S.A.. The wife is an adult and no court can force her to stay at a place where she does not want to stay. Custody of child is a different issue, but even while deciding the issue of custody of a child, no direction can be issued to the adult spouse to go and live with the other strained spouse in writ jurisdiction.

Welfare of child is the paramount consideration

While deciding matters of custody of child, primary and paramount consideration is welfare of child. If welfare of the child so demands, then technical objections cannot come in the way. However, while deciding the welfare of the child, it is not the view of one spouse alone which has to be taken into consideration. Courts should decide the issue of custody only on the basis of what is in the best interest of the child.

(Para 20

The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very vary of what is said by each of the spouses.

(Para 21)

A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her

basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every re-union may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must havesufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights. The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As observed earlier, a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

(Para 22 and 23)

Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks, and holidays. In cases like the present one where the parents are in two different continents effort should be made to give maximum visitation rights to the parent who is denied custody.

(Para 24)

21. On given thoughtful consideration of above cited judicial precedents, it cannot be stated on facts and circumstances of the case that petitioner no. 1 has successfully established a prima facie case that the detention of corpus with his mother is illegal or unlawful and the legal position is that only on establishment of proximity fact that detention of the corpus in the hand of respondent is unlawful, the applicant would become entitled to the writ of habeas corpus filed for custody of corpus, in most of the cases a minor child. The principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful, illegal and also whether child should be handed over in the care and custody of someone else. The prerogative writ of habeas corpus, is in the nature of extraordinary remedy and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective. It is apparent that remedy in child custody matters would normally lie under provisions of Hindu Minority and Guardianship Act, 1956 and Wards Act, 1890 depending on facts situation of the case.

22. In the facts and circumstances of the present case, in considered opinion of this Court if the balance is to be struck

between mother (respondent no. 4) and grandmother (petitioner no. 1), the balance would certainly tilt in favour of mother, who is respondent no. 4. However, I may not be mis-understood that the grandmother may not take proper care of minor, who is her grand son, therefore, custody of corpus with his mother can in no way be said to be illegal, unlawful and the child has always been remained with the custody of his mother and was never at any point of time in the custody of petitioner no. 1, therefore, no case of transfer of custody from mother of the corpus to his grandmother is made out. However, in the totality of the facts and circumstances and keeping in view the aspirations and expectations of grandmother to visit and see her grand child and shower her love and affection on him, cannot be ignored and the same must be dealt with a humanitarian hand in respect of the fact that allegation and counter allegations are made by petitioner no. 1 and respondent no. 4 against each other and father of the child is some what out of picture in present petition. Thus, although the prayer of petitioner no. 1 for issuing writ of habeas corpus against respondents and transfer of custody of corpus, who is eight year old child of respondent no. 4 and her husband, in favour of his grandmother, is declined and refused by this Court on the basis of discussion mentioned above. In my considered opinion, petitioner no. 1 shall have a visitation rights over the child (petitioner no. 2). However, this Court directs respondent no. 4 to provide a right to meet the corpus to petitioner no. 1, who is his grandmother on regular basis preferably once in a month subject to convenience of the child, on a holiday, with prior arrangement made by respondent no. 4, by way of telephonic consultation with petitioner no. 1, who is her mother-in-law, at the place of choice of respondent no. 4. The period of meeting of each day may include a period of three to six hours at a time, however, the meeting in a month may be postponed if the examinations of child are underway or on card. The meeting may be supervised by respondent no. 4 to her discretion.

23. With the above observations, petition is finally **disposed of.**

(2023) 2 ILRA 894
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.06.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE RAJIV JOSHI, J.

Special Appeal (D) No. 27 of 2021

State of U.P. ...Appellant
Versus
M/S S.J.P. Infra. Ltd. & Anr. ...Opp. Parties

Counsel for the Appellant:
Sri Sanjay Goswami

Counsel for the Opp. Parties:
Ms. Shreya Gupta, Sri Ravi Anand Agrawal, Sri Ramendra Pratap Singh, Sri Shashi Nandan(Sr. Advocate)

A. Revenue/Tax Law – Refund of the Stamp Duty - Schedule 1-B of the Stamp Act: Article 23(a), 35(b) - Indian Stamp Act, 1899 - Section 3(aa), 49(d)(1) (2) and (5); Seventh Schedule of the Constitution of India: Entry 44 of List III (Concurrent List) - The legal position is:

(i) Stamp Act is a taxing statute;
(ii) in construing taxing statutes equity and hardship are not relevant, one has to strictly look at the words/language used and there is no room for searching intendment or of drawing any

presumption while construing the provisions of a taxing statute;
(iii) in case of ambiguity in charging provisions, the benefit must necessarily go in favour of subject/assessee, but in case of ambiguity in an exemption provision, the benefit of ambiguity must be strictly interpreted in favour of the Revenue/St.. However, if, by a strict construction of the exemption clause, the ambiguity is resolved and the subject falls within the exemption clause then to give full play to the exemption clause a liberal construction may be made. (Para 12)

B. The stamp duty paid by the writ petitioner was not in excess than what was payable on the lease instrument as per the charging section. A plain reading of the extracted charging provision would reflect that the stamp duty is payable as per the value of the premium or advance set forth in the lease instrument. There is no dispute *inter se* parties that the stamp duty paid on the lease instrument is as per the value of the premium set forth in the lease instrument. Importantly, the correction deed, dated 7th February 2013, which has been brought on record, though reduces the area of land leased out, also does not make any indication w.r.t. reduction of the premium payable. Rather, the correction deed, after making a declaration w.r.t. reduction in the area of land leased out, declares that "except as hereinafter varied/modified the original lease deed dated 15.11.2010 which was duly registered in the office of Sub-Registrar Gautam Budh Nagar registered on 16.11.2010 Bahi No. 1, Gild No. 7558 Page No. 77 to 110 on Sl. No. 23383 shall continue to have full force and effect. Plot number, location and boundaries are same. Consequently credibility of stamp duty remains unaffected." Once this is the position, the stamp duty paid on the lease instrument read with the deed of correction was as per the provisions of the Stamp Act, and it was not over paid, particularly, when, according to the charging provision, stamp duty is payable on value of premium set forth in the lease instrument. **Under these circumstances, even if by a subsequent letter GNIDA had reduced the premium, as is the case of the first respondent, there would be no impact on the stamp duty leviable as that would be on the premium set forth in the lease instrument, which remained unchanged.** (Para 8(i), 13, 15)

C. Legal principles deducible from the decision of the Apex Court, are as follows:

(i) where the instrument is rendered unfit for the purpose for which it was executed, the claimants can seek refund u/s 49(d)(2) read with S. 50(3) of the Stamp Act;
(ii) where an instrument is executed under order of the Court and by the order of the Court the instrument is cancelled with liberty to seek refund of the stamp duty paid, benefit of refund is not to be denied on technical grounds of limitation more so because an act of the Court is to prejudice none; and
(iii) where a case for refund of stamp duty can be brought u/s 49(d)(2) read with Section 50(3), an interpretation which advances the cause of justice and is based on principle of equity, should be preferred. (Para 25)

D. The claim of the first respondent for allowance (refund of the stamp duty which it had paid for lease of that portion of the land which it had to surrender**) is neither sustainable under sub-clause (1) nor sub-clause (2) or sub-clause (5) of clause (d) of Section 49 of the Stamp Act.** When we read the extracted provision as a whole, what is noticeable is that allowance available under sub-clause (2) of clause (d) of Section 49 of the Stamp Act is for impressed stamps spoiled to execute an instrument which has been afterwards found unfit, by reason of any error or mistake therein, for the purpose originally intended. **By virtue of Section 13(2) of the General Clauses Act, 1897, singular shall include plural, and vice versa, therefore, the word stamp used in clause (d) would include stamps. Whether an allowance would be admissible for any part of the stamps spoiled to execute an instrument which fails in part, that is whether allowance could be claimed for bad part only, is an issue which has not been specifically addressed by the provisions of Section 49(d) of Stamp Act.**

The provisions of the Stamp Act, at least those that have been placed before us, are silent for such an eventuality. **In absence of clarity in the provisions of the Stamp Act w.r.t. admissibility of an allowance where the instrument fails in part, the claim for allowance would have to be rejected by keeping in mind the general legal principle that in case of ambiguity in an exemption provision, the benefit of ambiguity must be strictly interpreted in favour of the Revenue/St..** An allowance though, strictly, cannot be equated with an exemption but for interpretation of an allowance strict rule of interpretation would have to be applied at the threshold to find out whether the subject falls within its ambit or not because the initial burden is on the subject who seeks allowance to make out a case for allowance. **Section 49(d) does not contemplate allowance for spoliation of stamps, where a composite instrument embodying rights and liabilities fails only in part and is good for the remaining part. Otherwise also, on simple logic, an instrument executed by spoiling several impressed stamps cannot be dissected to sever out the bad part from the good, so as to enable use of the good.** In the instant case, part of the lease instrument remained operative therefore the instrument did not fail the purpose originally intended. (Para 8(ii), 12, 28)

E. In tax matters equity has a limited role. Doctrine of unjust enrichment is based on equitable principles and has statutory recognition in Sections 65 & 72 of the Contract Act. As tax is compulsory exaction of money by a sovereign with the sanction of law and is not payment for services rendered or to be rendered, a refund of the tax or the duty paid under a fiscal statute is not to be made unless and until the duty paid is found not payable. The stamp duty paid was as per the tenor of the instrument hence, there was no unjust enrichment of the St. because the stamp duty paid to it was as per the provisions of the Stamp Act. No doubt, the Stamp Act provides for allowances, but, as already held above, the case of the writ petitioner does not fall within the purview of those allowances. (Para 8(iii), 29)

F. A writ Court must not ordinarily set aside an order the consequence of which would be to revive an illegal order or perpetuate illegality. The claim for allowance was not sustainable under the provisions of the Stamp Act (i.e. Section 49(d)), setting aside the order of the Principal Secretary, with direction to comply with the order of the Joint Secretary, would be to perpetuate illegality. Though the order of the Principal Secretary was in effect a review of the earlier order passed by the Joint Secretary and, therefore, was not proper, but, the order of the Joint Secretary dated 28.2.2019 was not correct in law and, therefore, a direction to ensure its compliance would be an exercise to perpetuate 'illegality. Hence, no direction ought to have been issued for compliance of the order of the Joint Secretary. (Para 8(iv), 8(v), 30)

In the instant case, the exercise for allowance started on an application moved by the writ petitioner before the Principal Secretary. When it did not culminate in an order, a writ petition was filed wherein direction was issued to decide the claim. Pursuant to which, when application was given, information was received by the writ petitioner that the matter was already decided and the claim had been rejected by the Principal Secretary. Challenging the rejection of the claim, a fresh writ petition was filed, which was allowed and the Joint Secretary was directed to pass a fresh order. Following this, the Joint Secretary passed the order dated 28.2.2019. On 28.5.2019, the Principal Secretary passed a contrary order. Interestingly, the order dated 28.5.2019 does not take note of the order of the Joint Secretary dated 28.2.2019. It seems to us that since, earlier, the direction of the Court was to the Principal Secretary he may have passed the order dated 28.5.2019 in good faith. But as in the meantime the Joint Secretary had already passed the order on 28.2.2019, pursuant to subsequent order of this Court, **the order of the Principal Secretary was improper as was rightly held by the learned Single Judge.** In case the Principal Secretary was alone competent to pass the order, the appropriate course for the St. was to move a correction or clarification application seeking clarification/correction in the order. (Para 30)

At this stage, it would be sufficient to observe that since stamp duty was not collected by GNIDA, a claim for refund of stamp duty as against it would not be sustainable. But whether GNIDA is liable for damages/loss, is a question left open for the first respondent to raise at the appropriate stage in an appropriate proceeding before the appropriate forum in accordance with the law. (Para 8(vi), 31)

Special appeal allowed. (E-4)

Precedent followed:

1. S.N. Mathur Vs Board of Revenue & ors., (2009) 13 SCC 301 (Para 6(i))

2. Mohd. Mustafa Ali Khan Vs Raj Rajeshwari Devi, AIR 1959 Allahabad 583 (SB) (Para 6(ii))

3. Commissioner of Sales Tax, U.P. Vs Modi Sugar Mills Ltd., AIR 1961 Supreme Court 1047 (Para 6(iii))

4. Government of Andhra Pradesh & others Vs P. Laxmi Devi (Smt.), (2008) 4 SCC 720 (Para 9)

5. CIT Vs V.M R P Firm Muar, AIR 1965 SC 1216 (Para 9)

6. Govind Saran Ganga Saran Vs CST, 1985 Supp SCC 205 (Para 10)

7. Commissioner of Customs (Import), Mumbai Vs Dilip Kumar & Co., (2018) 9 SCC 1 (Para 11)

8. Chief Controlling Revenue Authority, Board of Revenue, Madras Vs B.P. Eswaran & ors., AIR 1970 Madras 349 (FB) (Para 20)

Precedent distinguished:

1. The Committee GIFL Vs Libra Buildtech Pvt. Ltd. & ors., (2015) 16 SCC 31 (Para 2(iv))

2. ITC Ltd. Vs St. of U.P. & ors., (2011) 7 SCC 493 (Para 6(iv))

Present special appeal assails the judgment and order dated 01.12.2020, passed by Hon'ble Single Judge.

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

1. This intra court appeal arises from a judgment and order of a Single Judge, dated 01.12.2020, in Writ-C No.17744 of 2020, allowing the writ petition of the first respondent.

FACTS GIVING RISE TO THE APPEAL

2. A brief narration of the facts giving rise to this appeal would be apposite to have a clear understanding of the issues involved in this appeal. These facts are as below:

2(i) The first respondent, namely, the writ petitioner, being a company engaged in the business of developing and marketing of housing projects including plots etc., was allotted a parcel of land, measuring 198135.62 square meter, by the second respondent (the Greater Noida Industrial Development Authority - GNIDA), vide allotment letter dated 30.08.2010. Pursuant thereto, an instrument of lease, dated 15.11.2010, was executed and registered on 16.11.2010 where under plot of land, bearing No.GH-05 in Sector 16-B, Greater Noida, measuring 198135.62 square meter, was leased out to the first respondent for a period of 90 years by GNIDA at a premium of Rs.228,94,57,090 (Two Hundred Twenty Eight Crore Ninety Four Lac Fifty Seven Thousand Ninety only), with yearly rent @ 1% of the premium, for first 10 years, enhanceable by 50% after every 10 years. On the instrument of lease, stamp duty amounting to Rs.12,70,64,900/- (Twelve Crores Seventy Lakh Sixty Four Thousand Nine Hundred Only) was paid by the first respondent. Later, on 26.07.2011, GNIDA issued letter, followed by another letter dated 29.07.2011, requiring the first

respondent to surrender possession of an area of 71833.62 square meter of the leased land on the ground that the acquisition of that portion of land, made in favour of GNIDA, was quashed by the High Court vide order dated 12.05.2011 which was upheld by the Apex Court vide order dated 06.07.2011. As a result, the first respondent had to surrender possession of 71833.62 square meter of land and, in witness whereof, a deed of correction, dated 07.02.2013, was executed whereunder the demised area (viz. 198135.62 square meter) was reduced by 71833.62 square meter to 126302 square meter.

2(ii) On reduction of the demised area, the first respondent, who had borne the stamp duty, made a representation to the Principal Secretary, Stamp and Revenue, State of U.P., Lucknow (for short the Principal Secretary) for refund of that amount of the stamp duty which related to the area that the first respondent had to surrender. This representation was made by invoking the provisions of Section 49(d) (1) (2) and (5) of the Indian Stamp Act, 1899 (for short the Stamp Act).

2(iii) When a decision on the said representation was not taken, Writ-C No.3183 of 2018 was filed by the first respondent seeking a direction upon the State authorities to decide the representation. This petition was disposed off, vide order dated 24.01.2018, requiring the Principal Secretary to examine the matter and take a decision in accordance with law within a specified period. But, before the first respondent could serve the order of this Court dated 24.01.2018 (supra), vide letter dated 08.02.2018 the first respondent was intimated that by order dated 14.08.2017 its claim for refund has already been rejected.

2(iv) Aggrieved with the order dated 14.08.2017, as communicated by letter dated 08.02.2018, the first respondent, placing reliance on a judgment of the Apex Court in the case of ***The Committee GFIL Vs. Libra Buildtech Private Limited and others, (2015) 16 SCC 31,*** filed Writ-C No.16639 of 2018. On this petition, the writ court took the view that a fresh consideration was required in the light of the decision of the Apex Court in **Libra Buildtech case (supra)**. Accordingly, vide order dated 28.05.2018, Writ-C No.16639 of 2018 was allowed and a direction was issued to the Joint Secretary, Government of U.P., Lucknow to decide the matter afresh.

2(v) Pursuant to the order of the writ court, dated 28.05.2018 (supra), a fresh representation was submitted by the first respondent before the Joint Secretary, Stamp & Registration, Anubhag-2, Government of U.P., Lucknow (for short Joint Secretary) on 09.08.2018. Upon receipt of which, the Joint Secretary (supra), by order dated 28.02.2019, after noticing that the area of land leased out to the first respondent got reduced on account of decision of the High Court, took the view that the first respondent is entitled to refund of the excess stamp duty paid by it. Accordingly, he directed refund of the stamp duty to the extent it was paid for lease of the land which the first respondent had to surrender consequent to loss of title of its lessor (GNIDA). This refund was, however, subject to deduction of 10% of the amount refundable. But before this order of the Joint Secretary could be implemented, on 28.05.2019 the Principal Secretary passed another order thereby holding that the principle of law laid down by the Apex Court in **Libra Buildtech case (supra)** would not be applicable to sustain a claim against the State and since the claim for refund was not within the purview of allowances admissible in

respect of spoiled stamps, the State cannot be fastened with liability to refund the stamp duty though it was open for the first respondent to make a claim against GNIDA.

2(vi) Acting on the order dated 28.05.2019, the first respondent made a representation to GNIDA for refund. But before any decision could be taken thereon, the first respondent filed Writ-C No.17744 of 2020 before a Single Judge Bench of this Court. The learned Single Judge, vide impugned judgment and order dated 01.12.2020, allowed the writ petition, quashed the order dated 28.05.2019, imposed cost of Rs.25,000/- on the State, and directed the State to comply with its earlier order dated 28.02.2019. Aggrieved therewith, this intra-court appeal has been filed by the State.

3. We have heard Sri Sanjay Goswami, Additional Chief Standing Counsel, for the appellant; and Sri Shashi Nandan, learned Senior Counsel, assisted by Sri Ravi Anand Agrawal, for the first respondent.

4. Before we proceed to notice the submissions made before us by the learned counsel for the parties, it would be useful to notice the reasoning of the learned Single Judge in the impugned judgment. From a perusal of the impugned judgment it appears that before the learned Single Judge, on behalf of the State (appellant herein), it was argued: that allowance for spoiled stamps is admissible only if a case falls within the purview of the provisions of Chapter V of the Stamp Act; that the provisions of Chapter V, in particular Section 49 (d) (1) and (2) of the Stamp Act, on which the writ petitioner (the first respondent herein) based his claim, were not applicable on the facts of the case as the original lease deed was neither absolutely void from the beginning nor was unfit for the purpose originally intended, as it remained operable, albeit, for a reduced area of 126302 square meter; and that, even otherwise, the allowances are subject to the Stamp Rules where under it is required that the spoiled stamps be presented for endorsement, whereas, here, the impressed stamp of the instrument of lease was neither submitted nor could be submitted for endorsement, because the lease continued to operate, though for reduced area. The learned Single Judge took the view that once the acquisition proceeding to the extent of 71833.62 square meter of land leased out to the first respondent stood quashed under a judicial order, the instrument of lease to that extent was rendered void and, therefore, a case for refund of stamp duty to that extent was made out. The learned Single Judge also took the view that as the State Government, through its Joint Secretary, had already taken a decision to refund, vide order dated 28.02.2019, in compliance of the direction issued by this Court dated 28.05.2018, there was no scope for a review at the level of the Principal Secretary of the State. Otherwise also, it was the State that had collected the stamp duty hence no liberty could have been given to the writ petitioner to make a claim against GNIDA. Consequently, the learned Single Judge allowed the writ petition, quashed the order dated 28.05.2019 and issued a direction upon the State Government to implement its earlier order dated 28.02.2019 within a specified period.

SUBMISSIONS ON BEHALF OF THE APPELLANT (STATE OF UP)

5. Sri Sanjay Goswami, appearing on behalf of the State (appellant), submitted

that the Stamp Act is a taxing statute. Being a taxing statute, equitable considerations are relegated to the background. What is to be considered is whether the stamp duty imposed on the instrument is valid. If so, whether, under the provisions of the Stamp Act, there could be a refund of stamp duty to the first respondent. According to him, by Section 3 of the Stamp Act stamp duty is chargeable on the instrument at the rate specified in the Schedule. In the State of Uttar Pradesh, vide section 3 (aa) of the Stamp Act, on an instrument of lease, stamp duty chargeable is as specified in Article 35 of Schedule 1-B. Article 35 (b) of Schedule I-B of the Stamp Act becomes applicable where the lease is granted for a fine or premium or for money advanced and where no rent is reserved; and Article 35 (c) of Schedule I-B becomes applicable where the lease is granted for a fine or premium or for money advanced in addition to rent reserved. On instruments contemplated under Article 35 (b) or Article 35 (c) of Schedule 1-B, the stamp duty is payable as on a deed of conveyance under Article 23 (a) of Schedule 1-B either on the premium set forth in the lease or on the market value of the subject of the lease. The original lease instrument dated 15.11.2010 between GNIDA and the first respondent specified the premium as Rs.228,94,57,090/- and stamp duty was paid accordingly. The rectification deed dated 07.02.2013 between GNIDA and the first respondent though reduces the area leased out from 198135.62 square meter to 126302 square meter but does not amend the premium set forth in the original lease instrument. Thus, no excess stamp duty has been paid. Otherwise also, there is no challenge by the writ petitioner (first respondent herein) as to the correctness of the stamp duty charged on the instrument of lease dated 15.11.2010 or the deed of rectification dated 07.02.2013. Under these circumstances, the claim for refund of excess stamp duty paid is misconceived. In so far as the claim for allowances in respect of alleged spoiled stamps is concerned, the same is not maintainable because the provisions relating to such allowances are not attracted. According to him, the provisions of Section 49 (d) (1) & (2) of the Stamp Act are not applicable as the instrument of lease is not completely void from the beginning nor it has been rendered unfit for the purpose originally intended as the demise made by it continues to operate albeit for a reduced area. He submitted that the Apex Court's judgment in **Libra Buildtech case (supra)** is not applicable on the facts of this case as that was a case where the instrument chargeable to stamp duty was executed under orders of the court and it was cancelled by order of the court. Thus, there the instrument was rendered unfit for the purpose originally intended. Whereas here the instrument of lease remains operable. He submitted that even if it is assumed that the Principal Secretary had no power to review, the earlier order passed by the Joint Secretary was ex facie illegal and, therefore, the writ court ought not to have issued a direction to enforce the order which had no sanctity in law. He, thus, prayed that the judgment and order of the learned Single Judge being not legally sustainable be set aside. In the alternative, it was urged by him that if the petitioner had suffered any loss on account of the conduct of GNIDA it could proceed against it, as per law, but claim for refund against the State is not sustainable.

6. In support of his submissions, Sri Goswami cited following authorities:

(i) (2009) 13 SCC 301 : S N Mathur Vs. Board of Revenue and others -- *In this*

decision, the apex court with respect to the scheme of the Stamp Act observed as follows: (a) that the object of the Stamp Act is generation of revenue, it is therefore a fiscal enactment and has to be interpreted accordingly; (b) that stamp duty is levied with reference to the instrument and not in regard to the transaction, unless otherwise specifically provided in the Act; (c) that stamp duty is determined with reference to the substance of the transaction as embodied in the instrument and not with reference to the title, caption or nomenclature of the instrument; (d) that for classification of an instrument, that is to determine whether an instrument comes within a particular description in an article in the Schedule to the Act, the instrument should be read and construed as whole; (e) where an instrument falls under two or more descriptions in the Schedule to the Act, instrument shall be chargeable with only one duty, that is the highest of the duties applicable to different description. But where an instrument relates to several distinct matters, it shall be chargeable with the aggregate amount of duties to which separate instruments would be chargeable.

(ii) ***AIR 1959 Allahabad 583 (SB): Mohd. Mustafa Ali Khan Vs. Raj Rajeshwari Devi*** *-- In this decision, a Special Bench of this Court, comprising three judges, inter alia, reiterated the legal principle that the stamp duty payable upon an instrument must be determined by referring to the terms of the instrument, and that the Court is not entitled to take into consideration evidence de hors the instrument itself.*

(iii) ***AIR 1961 Supreme Court 1047, Commissioner of Sales Tax, U.P. Vs. Modi Sugar Mills Limited.*** *-- In this case a Constitution Bench of the Apex Court, comprising five judges, inter alia, held that: in interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency.*

(iv) ***(2011) 7 SCC 493 : ITC LTD. Vs. State of U.P. and others****. -- In this case, the Apex Court upon finding that NOIDA had charged less towards premium for lease, to save the demise, even after execution and registration of the lease instrument, gave opportunity to the allottee (lessee) to make good the deficiency within a specified period. In the alternative, it was directed that if the allottee was not interested in retaining the lease by making good the deficient amount, it was entitled to receive back the money already paid by it, including stamp duty paid on the instrument of lease, from NOIDA. This decision has been cited to demonstrate that the court had not fastened liability on the State, but on NOIDA, to refund the stamp duty.*

SUBMISSIONS ON BEHALF OF THE FIRST RESPONDENT (WRIT PETITIONER)

7. Per contra, Sri Shashi Nandan, learned senior counsel appearing for the first respondent, submitted that the case of the first respondent for refund of the excess stamp duty charged is squarely covered by the provisions of Section 49 (d) (1) (2) & (5) of the Stamp Act, inasmuch as, (a) the stamped lease instrument to the extent of the excess area was void thereby entitling allowance under sub-clause (1) of clause

(d) of section 49 of the Stamp Act; (b) the lease instrument was rendered unfit for the purpose originally intended as the acquisition of a portion of the demised land failed thereby entitling allowance under sub-clause (2) of clause (d) of section 49 of the Stamp Act; and (c) the lessor refused to act under the original lease instrument to the extent of the area demised therein, therefore sub-clause (5) of clause (d) of section 49 of the Stamp Act also applies. To explain the aforesaid contentions, he submitted that originally the intention of the instrument was to grant lease of land measuring 198135.62 square meter whereas the instrument remained operable for 126302 square meter only thus it failed to serve the purpose originally intended. Moreover, the premium charged for the originally demised area was rateably reduced by a separate letter, dated 17.04.2012, issued by GNIDA amending the payment plan to make it in consonance with the reduced area. He submitted that the total premium payable for the lease, originally, was Rs.228,94,57,090 but, later, on the reduced area of 126302 square meter, as per letter dated 17.04.2012, the premium payable was Rs. 145,94,19,610. Thus, the stamp duty charged on the original premium, as mentioned in the original lease instrument, was refundable to the extent the premium got reduced. Sri Shashi Nandan submitted that, no doubt, stamp duty, though, is chargeable on an instrument but the provisions of Section 49 (d) are to provide allowances for spoiled stamps so that there is no unjust enrichment, or retention of stamp duty paid, if, after the charging event, on account of certain events, the instrument is found void or unfit or could not be acted upon. The purpose of these allowances is to ensure that there is no unjust enrichment of the State at the cost of the hapless taxpayer and, therefore, keeping in mind the spirit of Article 265 of the Constitution of India, a wider interpretation is to be accorded to these beneficial provisions as held in the case of **Libra Buildtech (Supra).** The Joint Secretary therefore rightly directed refund of the amount whereas the Principal Secretary without jurisdiction passed a contrary order. Thus, under any circumstances, the order impugned in the writ petition was without jurisdiction and was rightly set aside by the learned Single Judge. He therefore prayed that the appeal be dismissed.

ISSUES THAT ARISE FOR OUR CONSIDERATION

8. Upon examination of the facts and the submissions made by the learned counsel for the parties, following issues arise for our consideration:

(i) Whether the writ petitioner (first respondent herein) paid stamp duty in excess than what was payable on the lease instrument dated 15.11.2010 as corrected by instrument dated 07.02.2013? If so, its effect?

(ii) Whether, on account of subsequent decision of the High Court annulling acquisition of land constituting part of the leased area, the writ petitioner was entitled to the allowances for spoiled stamps or refund of part of the stamp duty in view of the provisions of Section 49 (d) (1) or Section 49 (d) (2) or Section 49 (d) (5) of the Stamp Act?

(iii) Whether the writ petitioner is entitled to refund of any part of the stamp duty on equitable principles such as principle of restitution or doctrine of unjust enrichment?

(iv) Whether the order of the Principal Secretary dated 28.05.2019 is void? If so, its effect?

(v) Whether the order of Joint Secretary was contrary to law and, therefore, no direction ought to have been issued by the learned Single Judge for its enforcement?

(vi) Whether the writ petitioner, if not entitled to relief against the State Government, on the facts of the case, could seek refund of the excess stamp duty paid from GNIDA in writ jurisdiction?

ANALYSIS

9. Before we dwell on the issues framed by us, it would be apposite to examine the nature of the Stamp Act and the rules of interpretation that would apply to have a clear understanding of its provisions. With regard to the nature of the Stamp Act, there is no shadow of doubt that it is a fiscal / taxing statute framed under Entry 44 of List III (Concurrent List) of the Seventh Schedule of the Constitution of India {**vide S.N. Mathur versus Board of Revenue & others, (supra)**}. Stamp Duty is nothing but a form of tax, the object of which is to generate revenue. In **Government of Andhra Pradesh & Others versus P. Laxmi Devi (Smt)., (2008) 4 SCC 720**, the Apex Court in paragraph 19 of its judgment observed: "*It is well settled that stamp duty is a tax, and hardship is not relevant in construing taxing statutes which are to be construed strictly. As often said, there is no equity in a tax vide CIT v. V.M R P Firm Muar , AIR 1965 SC 1216. If the words used in a taxing statute are clear, one cannot try to find out the intention and the object of the statute. Hence, the High Court fell in error in trying to go by the supposed object and intendment of the Stamp Act, and by seeking to find out the hardship which will be caused to a party by the impugned amendment of 1998."*

10. When a statute levies a tax it does so by inserting a charging section by which liability is created or fixed and then proceeds to provide the machinery to make liability effective. It, therefore, provides the machinery for assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. The components which enter into the concept of a tax are: (1) the character of the imposition known by its nature which prescribes the taxable event attracting the levy; (2) a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax; (3) the rate at which the tax is imposed; ((4) the measure or value to which the rate will be applied for computing the tax liability **(vide Govind Saran Ganga Saran V. CST, 1985 Supp SCC 205, para 6)**. In the context of the Stamp Act (vide charging Section 3), the taxable event is the execution of an instrument specified in the Schedules. Stamp duty is levied with reference to the instrument and not the transaction, unless otherwise specifically provided. The stamp duty is levied at the rate specified in the Schedules and the person who is liable to pay the stamp duty is specified in Section 29 of the Stamp Act.

11. As to how provisions of a taxing statute are to be construed, there is a plethora of authorities. To avoid burdening this judgment by referring to several of them, it would be apposite to refer to a recent Constitution Bench decision of the Apex Court. In **Commissioner of Customs (Import), Mumbai versus Dilip Kumar**

& Co., (2018) 9 SCC 1, a Constitution Bench of the Apex Court in paragraph 29 of its judgment observed as under:

"... it is well settled that in a taxing statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a taxing statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute."

In paragraph 53 of the judgment, after taking a conspectus of the various authorities, the Apex Court held as under:

".....we would be more than justified to conclude and also compelled to hold that every taxing statute including charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in charging provisions, the benefit must necessarily go in favour of subject/ asessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State."

In paragraphs 58, 59 and 60 of the judgment, the Apex Court by taking note of earlier decisions clarified the position by observing that if a subject falls within the exemption clause, after employing the strict rule of interpretation, Court may thereafter construe it liberally. The relevant observations are contained in paragraphs 59 and 60 of the judgment extracted below:

"59.....The question whether a subject falls in the notification or in the exemption clause, has to be strictly construed. When once the ambiguity or doubt is resolved by interpreting the applicability of the exemption clause strictly, the Court may construe the notification by giving full play bestowing wider and liberal construction. The ratio of Parle Exports case {CCE v. Parle Exports (P) Ltd.(1989) 1 SCC 345} deduced as follows:

(Wood Papers case {Union of India V. Wood Papers Ltd., (1990) 4 SCC 256, p. 262, para 6}

"6. .....Do not extend or widen the ambit at stage of applicability. But once that hurdle is crossed, construe it liberally"

60. We do not find any strong and compelling reasons to differ, taking a contra view, from this. We respectfully record our concurrence to this view which has been subsequently, elaborated by the Constitution Bench in Hari Chand case {CCE V. Hari Chand Sri Gopal, (2011) 1 SCC 236}."

12. From the law noticed above, the legal position that emerges is as follows: (i) Stamp Act is a taxing statute; (ii) in construing taxing statutes equity and hardship are not relevant, one has to strictly look at the words/ language used and there is no room for searching intendment or of drawing any presumption while construing the provisions of a taxing statute; (iii) in case of ambiguity in charging provisions, the benefit must necessarily go in favour of subject / assessee, but in case of ambiguity in an exemption provision, the benefit of ambiguity must be strictly interpreted in favour of the Revenue/ State. However, if, by a strict construction of the exemption clause, the ambiguity is resolved and the subject falls within the exemption clause

then to give full play to the exemption clause a liberal construction may be made.

ISSUE No.(i)

13. Now we take up the issue whether the writ petitioner paid stamp duty in excess to what was payable on the lease instrument. Before we proceed to examine the relevant clauses of the instrument, it would be relevant to have a look at the charging provision. Section 3 of the Stamp Act is the charging section. In the State of Uttar Pradesh (for short U.P.), an instrument of lease is subject to stamp duty as provided in Article 35 of Schedule I-B of the Stamp Act. Clause (c) of Article 35 of Schedule I-B of the Stamp Act, as applicable in the State of Uttar Pradesh, is to be applied for determining the stamp duty payable on an instrument of lease where the lease is granted for a fine or premium or for money advanced in addition to rent reserved. The instrument of lease executed by GNIDA in favour of the writ petitioner (first respondent herein) is of that nature and, therefore, stamp duty payable thereon is to be determined as per the provisions set out in Article 35 (c) of Schedule I-B. Article 35(c) of Schedule I-B of the Stamp Act is extracted below:-

(c) Where the lease is granted for a fine or premium or for money advanced in addition to rent reserved -	
(i) where the lease purports to be for a term not exceeding thirty years.	The same duty as a Conveyance [no. 23 clause (a)] for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease, in addition to the duty which would have been payable on such lease, if no fine or premium or advance had been paid or delivered. Provided that in a case when an agreement to lease is stamped with the ad valorem stamp required for lease, and a lease in pursuance of such agreement is subsequently executed, the duty on such lease shall not exceed fifty rupees.
(ii) where the lease purports to be for term exceeding thirty years.	The same duty as a Conveyance No. 23 clause (a) for a consideration equal to market value of the property which is the subject of the lease.

For easy reference, the provisions of Article 23(a) of Schedule I-B is also extracted below:-

23. Conveyance [as defined by Section 2(10) not being a Transfer charged or exempted under No.62 -	
(a) if relating to	Sixty rupees.

immovable property where the amount or value of the consideration of such conveyance as set forth therein or the market value of the immovable property which is the subject of such conveyance, whichever is greater does not exceed Rs. 500.	
Where it exceeds Rs. 500 but does not exceed Rs. 1,000. One hundred and twenty-five rupees.	
and for every Rs. 1,000 or part thereof in excess of Rs. 1,000. One hundred and twenty-five rupees.	Provided that the duty payable shall be rounded off to the next multiple of ten rupees.

It may be observed that in the extracted provision it is possible that there might have been some statutory amendments with regard to the rate but that is not relevant for the controversy in issue.

14. The subject lease instrument dated 15.11.2010, which is on record as Annexure 2 to the writ petition, reflects that the lease was granted for a premium in addition to the rent reserved.

The relevant clause in the lease instrument in respect of the premium payable is extracted below:

"That total premium of 198135.62 square meter is Rs.228,94,57,090.00 (Rs. Two Hundred Twenty Eight Crore Ninety Four Lac Fifty Seven Thousand Ninety Only) out of which approx. Rs. 22,93,6,140.00 (Rupees Twenty Two Crore Ninety Three Lac Sixteen Thousand One Hundred Forty Only) which have been paid by the Lessee to the Lessor (the receipt whereof the Lessor doth hereby acknowledge). There shall be moratorium of 24 months from the date of allotment and only the interest @ 12% per annum compounded half yearly, accrued during the moratorium period, shall be payable in equal half yearly instalments. After expiry of moratorium period, the balance approx 90% premium i.e. Rs.206,01,40,950 (Rupees Two Hundred Six Crore One Lac Forty Thousand Nine Hundred Fifty Only) of the plot along with interest will be paid in 16 half yearly instalments in the following manner:-

..... (omitted as not relevant for the purposes of this case)

In case of default in depositing the instalments or any payment, interest @ 15% compounded half yearly shall be leviable for defaulted period on the defaulted amount.

All payment should be made through a demand draft / pay order drawn in favour of Greater Noida Industrial Development Authority and payable at any Scheduled Bank located in New Delhi/ Greater Noida. The Lessee should clearly indicate his name and details of plots applied for/ allotted on the reverse of the demand draft/ pay order.

Premium referred to in this document means total amount payable to the Lessor for the allotted plot.

All payments should be remitted by due date. In case the due date is a bank holiday then the lessee should ensure remittance on the previous working day.

The payment made by the lessee will first be adjusted towards the interest due, if

any, and thereafter the balance will be adjusted towards the premium due and the lease rent payable.

In case of allotment of additional land, the payment of the premium of the additional land shall be made in lump sum within 30 days from the date of communication of the additional land.

The amount deposited by the lessee will first be adjusted against the interest and thereafter against allotment money, instalment and lease rent respectively. No request of the Lessee contrary to this will be entertained.

In addition to the premium payable, the rent and other charges payable as per lease instrument are extracted below:

"AND THE LESSEE DOTH HEREBY DECLARE AND COVENANTS WITH THE LESSOR IN THE MANNER FOLLOWING:

a) Yielding and paying therefore yearly in advance during the said term unto the Lessor yearly lease rent indicated below:-

(i) Lessee has paid Rs.2,28,94,571 as annual lease rent being 1% of the plot premium for the first 10 years of lease period.

(ii) The lease rent may be enhanced by 50% after every 10 years i.e. 1.5 times of the prevailing lease rent.

(iii) The lease rent shall be payable in advance every year. First such payment shall fall due on the date of execution of lease deed and thereafter, every year, on or before the last date of previous financial year.

(iv) Delay in payment of the advance lease rent will be subject to interest @ 15% per annum compounded half yearly on the defaulted amount for the defaulted period.

(v) The Lessee has to pay lease rent equivalent to 11 years @ 1% of the premium of the plot as "One Time Lease Rent" phase wise before getting permission to execute Tripartite Sub-Lease Deed in favour of their prospective buyers unless the Lessor decides to withdraw this facility. On payment of One Time Lease Rent, no further annual lease rent would be required to be paid for the balance lease period. This option may be exercised at any time during the lease period, provided the lessee has paid the earlier lease rent due and lease rent already due paid will not be considered in One Time Lease Rent option.

b) The Lessee shall be liable to pay all rates, taxes, charges and assessment leviable by whatever name called for every description in respect of the plot of land or building constructed thereon assessed or imposed from time to time by the Lessor or any Authority/ Government. In exceptional circumstances the time of deposit for the payment due may be extended by the Lessor. But in such case of extension of time an interest @ 15% p.a. compounded every half yearly shall be charged for the defaulted period. In case Lessee fails to pay the above charges it would be obligatory on the part of its members/ sub lessee to pay proportional charges for the allotted areas.

....."

15. A plain reading of the extracted charging provision would reflect that the stamp duty is payable as per the value of the premium or advance set forth in the lease instrument. There is no dispute inter se parties that the stamp duty paid on the lease instrument is as per the value of the premium set forth in the lease instrument. Importantly, the correction deed, dated 7th February 2013, which has been brought on record as Annexure 5 to the writ petition, though reduces the area of land leased out, also does not make any indication with regard to reduction of the premium

payable. Rather, at page 179 of the paper-book of the appeal, the correction deed, after making a declaration with regard to reduction in the area of land leased out, declares that "*except as hereinafter varied/ modified the original lease deed dated 15.11.2010 which was duly registered in the office of Sub-Registrar Gautam Budh Nagar registered on 16.11.2010 Bahi No.1, Gild No.7558 Page No.77 to 110 on Sl No.23383 shall continue to have full force and effect. Plot number, location and boundaries are same. Consequently credibility of stamp duty is remains unaffected."* Once this is the position, the submission of Sri Goswami that the stamp duty paid on the lease instrument read with the deed of correction was as per the provisions of the Stamp Act, and it was not over paid, appears correct, particularly, when, according to the charging provision, stamp duty is payable on value of premium set forth in the lease instrument. Under these circumstances, even if by a subsequent letter GNIDA had reduced the premium, as is the case of the first respondent, there would be no impact on the stamp duty leviable as that would be on the premium set forth in the lease instrument, which remained unchanged. It is thus held that the stamp duty paid by the writ petitioner was not in excess than what was payable on the lease instrument as per the charging section. That takes us to issue no.(ii) formulated above.

ISSUE No.(ii)

16. While addressing issue no. (ii), we have to determine whether in view of reduction of the demised area and the developments that took place after execution of the lease instrument, by virtue of the provisions of the Stamp Act contained in Section 49 (d) (1) (2) and (5), the first respondent is entitled to refund of the stamp duty which it had paid for lease of that portion of the land which it had to surrender. As we have already noticed that in a taxing statute equity has no place, the Court has to find out whether upon construction of the provisions of the Stamp Act a case for making allowance for impressed stamps spoiled in making the lease instrument of that excess area is made out or not.

17. The first respondent has based its claim on the provisions of Clause (d) (1), (2) and (5) of Section 49 of the Stamp Act. The relevant provisions are extracted below:

"49. Allowance for spoiled stamps. -- Subject to such rules as may be made by the State Government as to the evidence to be required, or the enquiry to be made, the Collector may, on application made within the period prescribed in section 50, and if he is satisfied as to the facts, make allowance for impressed stamps spoiled in the cases herein after mentioned, namely: --

(a) .....
(b) .....
(c) .....
(d) the stamp used for an instrument executed by any party thereto which-
(1) has been afterwards found to be absolutely void in law from the beginning:
(2) has been afterwards found unfit, by reason of any error or mistake therein, for the purpose originally intended:
(3) .....
(4) .....
(5) by reason of the refusal of any person to act under the same, or to advance any money intended to be thereby secured, or by the refusal or non-acceptance of any

office thereby granted, totally fails of the intended purpose: "

18. Before we proceed further to examine whether the relevant clauses extracted above would be applicable to make out a claim for refund in favour of the first respondent, we may observe that clauses (a) and (b) of Section 49 of the Stamp Act refer to cases of stamps being spoiled or rendered useless before execution, and clause (c) refers to bills of exchange and promissory notes. Hence, the provisions contained in clauses (a), (b) and (c) of Section 49 are not relevant to the controversy in issue and, therefore, they have not been extracted. Likewise, sub-clauses (3), (4), (6), (7) and (8) of clause (d) of Section 49 are not relevant to the facts of the case hence we have not extracted those provisions. But, briefly, we may mention that sub-clauses (3) and (4) of clause (d) of Section 49 refer to cases where execution of the instrument is not complete by reason of the death or incapacity of a necessary party or by refusal of such a person to execute or act under the instrument. Sub-clause (6) refers to a case of an instrument superseded by the execution of another between the same parties and bearing a stamp of not less value. Sub-clause (7) refers to a new instrument being executed because the first was under-stamped. Sub-clause (8) refers to a case where the stamp is spoiled after execution, and the parties execute another instrument in substitution which is duly stamped.

19. We shall now examine whether a case for allowance / refund has been made out under sub-clause (1) of clause (d) of Section 49 of the Stamp Act. On a plain reading of the provision it would appear that for applicability of sub-clause (1) of clause (d) of Section 49 following conditions must be satisfied: (a) that the impressed stamp must be used for executing an instrument; (b) that the instrument must be executed by any party thereto; and (c) that afterwards the instrument must have been found absolutely void in law from the very beginning. The key to applicability of sub-clause (1) of clause (d) of section 49 lies in the phrase "absolutely void in law from the beginning". In the instant case, the lease instrument is partly void, that is, to the extent of an area of 71833.62 square meter consequent to subsequent quashing of the land acquisition notification, and not absolutely void from the beginning.

20. Before the Madras High Court in the case of ***Chief Controlling Revenue Authority, Board of Revenue, Madras Vs. B.P. Eswaran and others, AIR 1970 Madras 349 (FB)*** a question arose before the Full Bench of the Court whether Section 49 (d) of the Stamp Act contemplates allowance where the composite instrument embodying rights and liability fails only in part and is good for the remaining part. The facts of that case were that a deed of conveyance of a property was executed while asserting that the title was with the vendor and if any right in respect of the property was found to inhere in a third party the vendor would make himself liable for the loss ensuing therefrom and such a loss the purchaser could recover entire from the other properties of the vendor. The deed of conveyance of the property was found absolutely void as the vendor had no title to the property covered by the document and, therefore, a claim was made for refund of the stamp duty by placing reliance on Section 49 (d) of the Stamp Act. The Full Bench held that notwithstanding the fact

that the conveyance, which was of course the main purpose of the instrument, has failed, the instrument as a whole is not absolutely void from the beginning. The Full Bench observed that if it is a case of a mere conveyance without covenants for indemnity and the conveyance failed, case for allowance might have been made out. But where the instrument provided for liquidated damages or the mode of recovery or indicated the source from which the loss could be reimbursed, those stipulations notwithstanding the failure of the conveyance for want of title would still be valid and would be actionable. With that reasoning, the Full Bench concluded that the instrument in question as a whole was not absolutely void from the beginning. The Full Bench concluded thus: *Section 49 (d) does not contemplate allowance for spoilation of stamps, where a composite instrument embodying rights and liabilities fails only in part and is good for the remaining part.*

21. Having examined the conditions that must co-exist for applicability of sub-clause (1) of clause (d) of Section 49 of the Stamp Act and the Full Bench decision (supra) of the Madras High Court and upon finding that the subject lease instrument is not absolutely void in law from the beginning, we are of the considered view that the first respondent has not been able to make out a case for allowance/ refund under sub-clause (1) of clause (d) of Section 49 of the Stamp Act.

22. Similarly, sub-clause (5) of clause (d) of Section 49 of the Stamp Act would also not help the cause of the first respondent as the subject lease instrument failed in part, and not totally, of the intended purpose. For applicability of sub-clause (5) of clause (d) of Section 49, one of the essential conditions is that by reason of the refusal of any person to act under the instrument, the instrument totally fails of the intended purpose. In the instant case, even if we assume that GNIDA refused to act under the instrument in so far as the excess area of the land was concerned, the instrument did not fail in totality as the demise continued to operate in part. We thus hold that a case for allowance/ refund under sub-clause (5) of clause (d) of Section 49 of the Stamp Act is also not made out.

23. Now, we shall examine whether the claim of the first respondent (writ petitioner) for allowance /refund of the stamp duty paid by it for the surrendered area would be covered by the provisions of Section 49 (d) (2) of the Stamp Act. Before we proceed further on this issue, we must notice the decision of the Apex Court in **Libra Buildtech (supra),** on which the learned counsel for the first respondent has heavily relied to support his claim. In **Libra Buildtech's case (supra)**, the facts were as follows: "A company was under liquidation. A committee was appointed under orders of the court to dispose off the properties of the company. Sale deeds were executed by that committee. But despite payment and execution of sale deeds, the committee could not handover the possession of the properties to the purchasers. Consequently, by order of the court, the sale was annulled. The sale consideration was directed to be refunded and liberty was given to the purchasers to seek refund of the stamp duty paid on those sale deeds. The SDM before whom application for refund of the stamp duty was made, rejected the application on ground that it was barred by limitation. On behalf of the purchasers (i.e. claimants before the Apex Court), three submissions

were advanced: (a) when, admittedly, the purpose for which the applicants had deposited the money-sale consideration, as per the direction of the Court, had failed and the court, as a consequence whereof, directed refund of the sale consideration, a fortiori, the claimants were entitled to refund of the entire stamp duty from the State Exchequer; (b) a direction to refund the amount of stamp duty could always be issued against the State Government by taking recourse to powers contained in Sections 49 and 50 of the Stamp Act read with Section 65 of the Contract Act, 1872, more so, when an act of the court is to prejudice no man and there being no fault of the claimants in the entire transaction; and (c) the SDM was not justified in rejecting the claim for refund on the ground of limitation because the right to claim refund arose only when the court directed the Committee to refund the sale consideration due to failure on the part of the Committee to place the purchaser in possession of the properties sold.

24. On the above facts, the Apex Court, in paragraphs 24 to 32 of its judgment, observed as follows:-

"24. In our considered opinion, keeping in view the undisputed facts mentioned above, the applicants are also entitled to claim the refund of entire stamp duty amount of Rs.6.22 crores from the State Exchequer, which they spent for execution of sale deeds in their favour in relation to the properties in question. This we say for the following reasons.

25. In the first place, admittedly the transaction originally intended between the parties, i.e., sale of properties in question by GFIL-Committee to the applicants was not accomplished and failed due to reasons beyond the control of the parties. Secondly, this Court after taking into consideration all facts and circumstances also came to the conclusion that it was not possible for the parties to conclude the transactions originally intended and while cancelling the same directed the seller (GFIL-Committee) to refund the entire sale consideration to the applicants and simultaneously permitted the applicants to claim refund of stamp duty amount from the State Government by order dated 26.09.2012. Thirdly, as a result of the order of this Court, a right to claim refund of amount paid towards the stamp duty accrued to the applicants. Fourthly, this being a court monitored transaction, no party was in a position to take any steps in the matter without the permission of the Court. Fifthly, the applicants throughout performed their part of the contract and ensured that transaction in question is accomplished as was originally intended but for the reasons to which they were not responsible, the transaction could not be accomplished. Lastly, the applicants in law were entitled to claim restoration of all such benefits/advantages from the State once the transaction was cancelled by this Court on 26.09.2012 in the light of the principle contained in Section 65 of the Contract Act which enable the party to a contract to seek restoration of all such advantage from other party which they took from such contract when the contract is discovered to be void or becomes void. This was a case where contract in question became void as a result of its cancellation by order of this Court dated 26.09.2012 which entitled the applicants to seek restitution of the money paid to the State for purchase of stamp papers.

26. In our considered opinion, while deciding a case of this nature, we have to also bear in mind one maxim of equity, which is well settled namely "actus curiae

neminem gravabit" meaning - An Act of the Court shall prejudice no man. In Broom's Legal Maxims 10th edition, 1939 at page 73 this maxim is explained saying that it is founded upon justice and good sense and afforded a safe and certain guide for the administration of law. This maxim is also explained in the same words in Jenk. Cent.118. This principle is fundamental to any system of justice and applies to our jurisprudence. (See: Busching Schmitz (P) Ltd. v. P.T. Menghani & Anr. and Raj Kumar Dey & Ors. vs. Tarapada Dey & Ors.

27. It is thus a settled principle of law based on principle of equity that a person cannot be penalized for no fault of his and the act of the court would cause no prejudice to any of his rights.

28. In our considered opinion, the aforesaid maxim would apply with full vigour in the facts of this case and if that is the position then applicants, in our opinion, are entitled to claim the refund of entire amount of stamp duty from the State Government which they spent in purchasing the stamp duty for execution of sale deed in relation to the properties in question. Indeed in the light of six reasons set out supra which, in our considered opinion, in clear terms attracts the principle contained in the aforesaid maxim, the State has no right to defend the order of SDM for retaining the amount of stamp duty paid by the applicants with them. The applicants' bona fide genuine claim of refund cannot be denied on such technical grounds.

29. This case reminds us of the observations made by M.C. Chagla, C.J. in Firm Kaluram Sitaram vs. The Dominion of India. The learned Chief Justice in his distinctive style of writing observed as under in para 19:

"19..... we have often had occasion to say that when the State deals with a citizen it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent Judges, as an honest person."

We are in respectful agreement with the aforementioned observations, as in our considered opinion these observations apply fully to the case in hand against the State because except the plea of limitation, the State has no case to defend their action.

30. Even apart from what we have held above, when we examine the case of the applicants in the light of Sections 49 and 50 of the Act, we find that the case of the applicants can be brought under Section 49 (d)(2) read with Section 50(3) of the Act to enable the State to entertain the application made by the applicants seeking refund of stamp duty amount. The interpretation, which advances the cause of justice and is based on the principle of equity, should be preferred. We hereby do so.

31. As mentioned above, it is not in dispute that this Court on 26.09.2012 cancelled the transaction in question, and hence by reason of the orders of this Court, the stamps used for an instrument executed by the applicants were found unfit thereby defeating the purpose originally intended. This occurred either due to some error or mistake therein. Since the execution of sale deeds and its implementation was subject to the orders of the court, the parties were required to apply the court for appropriate orders for every step. It is due to this reason, the right to claim the refund of the amount of stamp duty arose for the first time in applicants' favour on 26.09.2012. The applicants had accordingly filed their applications within 6 months from the date of this order, as provided in Section 50. In the light of these facts, the applications

should have been entertained treating the same to have been filed under Section 49 (d)(2) read with Section 50 of the Act for grant of refund of stamp duty amount claimed therein by the applicants.

32. In our considered opinion, even if we find that applications for claiming refund of stamp duty amount were rightly dismissed by the SDM on the ground of limitation prescribed under Section 50 of the Act yet keeping in view the settled principle of law that the expiry of period of limitation prescribed under any law may bar the remedy but not the right, the applicants are still held entitled to claim the refund of stamp duty amount on the basis of the grounds mentioned above. In other words, notwithstanding dismissal of the applications on the ground of limitation, we are of the view that the applicants are entitled to claim the refund of stamp duty amount from the State in the light of the grounds mentioned above."

25. Some of the legal principles deducible from the decision of the Apex Court, noticed above, are as follows:-

(a) where the instrument is rendered unfit for the purpose for which it was executed, the claimants can seek refund under Section 49 (d) (2) read with Section 50 (3) of the Stamp Act;

(b) where an instrument is executed under order of the court and by the order of the court the instrument is cancelled with liberty to seek refund of the stamp duty paid, benefit of refund is not to be denied on technical grounds of limitation more so because an act of the court is to prejudice none; and

(c) where a case for refund of stamp duty can be brought under Section 49(d)(2) read with Section 50(3), an interpretation which advances the cause of justice and is based on principle of equity, should be preferred.

26. The factual matrix of **Libra Buildtech's case (supra)** is a whole lot different from the present case. In **Libra Buildtech's case (supra)** the sale deed was executed under order of the court, by a court appointed Committee. After execution of the sale deed, the purchaser could not be placed in possession due to some mistake or error. There, under the order of the court, the sale deed was cancelled and a direction was issued for refund of the sale consideration to the purchaser with liberty to him to move an application for refund of the stamp duty paid. In that background, the Apex Court directed for refund of the stamp duty by making certain observations noticed above. In the instant case, firstly, the lease instrument was neither executed nor cancelled under the orders of the court. Thus, the principle that an act of court must harm no one would not apply here. Secondly, the purpose of the lease originally intended was not completely frustrated because the instrument continued to operate albeit for a lesser area. Importantly, the Apex Court in **Libra Buildtech's case (supra)** had no opportunity to comment as to whether the provisions of sub-clause (2) of clause (d) of Section 49 would apply even to a case where the instrument fails in part only.

27. To have a better understanding of the true import of sub-clause (2) of Clause (d) of Section 49 of the Stamp Act, it would be useful to read it conjointly with the opening part of Section 49 minus the other parts of the section. The same would read as under:

"Subject to such rules as may be made by the State Government, as to the evidence to be required, or the enquiry to be made, the Collector may, on application made

within the period prescribed in section 50, and if he is satisfied as to the facts, make allowance for impressed stamps spoiled in the cases hereinafter mentioned, namely:- (d) the stamp used for an instrument executed by any party thereto which-- (2) has been afterwards found unfit, by reason of any error or mistake therein, for the purpose originally intended:"

28. When we read the extracted provision as a whole, what is noticeable is that allowance available under sub-clause (2) of clause (d) of Section 49 of the Stamp Act is for impressed stamps spoiled to execute an instrument which has been afterwards found unfit, by reason of any error or mistake therein, for the purpose originally intended. At this stage, we may observe that though clause (d) uses the word stamp, which is singular, but, by virtue of Section 13 (2) of the General Clauses Act, 1897, singular shall include plural, and vice versa, therefore, the word stamp used in clause (d) would include stamps. Thus, once the allowance is for impressed stamps spoiled to execute an instrument, executed by any party thereto, which has been afterwards found unfit for the purpose originally intended, the allowance is for the stamps spoiled to execute that instrument. Whether an allowance would be admissible for any part of the stamps spoiled to execute an instrument which fails in part, that is whether allowance could be claimed for bad part only, is an issue which has not been specifically addressed by the provisions of Section 49 (d) of Stamp Act. Can in such circumstances under clause (d) of Section 49 allowance be claimed for the bad part only? The answer to it would have to be rendered upon construction of the provision with reference to the principles governing the rules of interpretation of a taxing statute inasmuch as it is well settled that Stamp Act is a taxing statute. The principles governing interpretation of a taxing statute have already been noticed by us above, and the same are recapitulated below: (i) in construing taxing statutes equity and hardship is not relevant, one has to strictly look at the words/ language used and there is no room for searching intendment or of drawing any presumption while construing the provisions of a taxing statute; (ii) in case of ambiguity in charging provision, the benefit must necessarily go in favour of subject / assessee but, in case of ambiguity in an exemption provision, the benefit of ambiguity must be strictly interpreted in favour of the Revenue/ State. However, if, by a strict construction of the exemption clause, the ambiguity is resolved and the subject falls within the exemption clause then to give full play to the exemption clause a liberal construction may be made. In the instant case, we have already found above, there is no excess payment of stamp duty on the instrument of lease. Here, after execution of the lease instrument, on account of failure of the demise in part, allowance has been sought. The provisions of the Stamp Act, at least those that have been placed before us, are silent for such an eventuality. In our view, in absence of clarity in the provisions of the Stamp Act with regard to admissibility of an allowance where the instrument fails in part, the claim for allowance would have to be rejected by keeping in mind the general legal principle that in case of ambiguity in an exemption provision, the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State. An allowance though, strictly, cannot be equated with an exemption but for interpretation of an allowance strict rule of interpretation would have to be applied at the threshold to find out whether the subject falls within its

ambit or not because the initial burden is on the subject who seeks allowance to make out a case for allowance. For all the reasons recorded above, we respectfully agree with the view of the Full Bench of the Madras High Court in the case of ***Chief Controlling Revenue Authority, Board of Revenue, Madras Vs. B.P. Eswaran and others (supra)*** that Section 49 (d) does not contemplate allowance for spoilation of stamps, where a composite instrument embodying rights and liabilities fails only in part and is good for the remaining part. Otherwise also, on simple logic, an instrument executed by spoiling several impressed stamps cannot be dissected to sever out the bad part from the good, so as to enable use of the good. The decision of the Apex Court in **Libra Buildtech's case (supra)** does not come to the rescue of the first respondent because in that case the entire instrument was found unfit for the purpose originally intended and was thus cancelled. In the instant case, part of the lease instrument remained operative therefore the instrument did not fail the purpose originally intended. As a result of the discussion made above, we hold that the claim of the first respondent for allowance is neither sustainable under sub-clause (1) nor sub-clause (2) or sub-clause (5) of clause (d) of Section 49 of the Stamp Act. The view to the contrary taken by the learned Single Judge is set aside. Issue No. (ii) is decided accordingly.

ISSUE No.(iii)

29. In respect of the third issue formulated by us, suffice to say that in tax matters equity has a limited role. Doctrine of unjust enrichment is based on equitable principles and has statutory recognition in Sections 65 and 72 of the Contract Act. As tax is compulsory exaction of money by a sovereign with the sanction of law and is not payment for services rendered or to be rendered, a refund of the tax or the duty paid under a fiscal statute is not to be made unless and until the duty paid is found not payable. It may be recapitulated that the stamp duty is payable on the instrument; that, as per the charging provision, stamp duty is payable on the premium set forth in the lease instrument; that while deciding issue no.(i), it has already been found that stamp duty was paid not in excess of what was payable on the premium set forth in the instrument; and in the subsequent correction/ rectification deed there was no mention in respect of reduction of the premium. Under these circumstances, the stamp duty paid was as per the tenor of the instrument, hence, there was no unjust enrichment of the State because the stamp duty paid to it was as per the provisions of the Stamp Act. No doubt, the Stamp Act provides for allowances, but, as already held above, the case of the writ petitioner does not fall within the purview of those allowances. Thus, the argument that the writ petitioner was entitled to relief on equitable considerations has no legs to stand. Issue No.(iii) is decided accordingly.

ISSUE Nos.(iv) & ((v)

30. The issues (iv) & (v) formulated above are inter related therefore are being dealt with simultaneously. Issue no.(iv) is whether the order of the Principal Secretary dated 28.5.2019 is void. The argument of the learned counsel for the writ petitioner, which has been accepted by the learned Single Judge, is that once the Joint Secretary had already taken his decision vide order dated 28.02.2019 the Principal Secretary had no power to pass a fresh order as there exists no power of review. To have a clear understanding on this issue it

would be useful to recapitulate the facts. In the instant case, the exercise for allowance started on an application moved by the writ petitioner before the Principal Secretary. When it did not culminate in an order, a writ petition was filed wherein direction was issued to decide the claim. Pursuant to which, when application was given, information was received by the writ petitioner that the matter was already decided and the claim had been rejected by the Principal Secretary. Challenging the rejection of the claim, a fresh writ petition was filed, which was allowed and the Joint Secretary was directed to pass a fresh order. Following this, the Joint Secretary passed the order dated 28.2.2019. On 28.05.2019, the Principal Secretary passed a contrary order. Interestingly, the order dated 28.5.2019 does not take note of the order of the Joint Secretary dated 28.2.2019. It seems to us that since, earlier, the direction of the Court was to the Principal Secretary he may have passed the order dated 28.05.2019 in good faith. But as in the meantime the Joint Secretary had already passed the order on 28.02.2019, pursuant to subsequent order of this Court, the order of the Principal Secretary was improper as was rightly held by the learned Single Judge. In case the Principal Secretary was alone competent to pass the order, the appropriate course for the State was to move a correction or clarification application seeking clarification/ correction in the order. However, nothing much turns on that because what is important is that a writ court must not ordinarily set aside an order the consequence of which would be to revive an illegal order or perpetuate illegality. As we have already found that the claim for allowance was not sustainable under the provisions of the Stamp Act (i.e. Section 49(d)), setting aside the order of the Principal Secretary, with direction to comply with the order of the Joint Secretary, would be to perpetuate illegality. More so, when it has been found by us that neither the provisions of the Stamp Act nor the judgment of the Apex Court in **Libra Buildtech's case (supra)** would be of help to sustain the claim of the writ petitioner. We thus hold that though the order of the Principal Secretary was in effect a review of the earlier order passed by the Joint Secretary and, therefore, was not proper, but, we simultaneously hold, the order of the Joint Secretary dated 28.02.2019 was not correct in law and, therefore, a direction to ensure its compliance would be an exercise to perpetuate illegality. Hence, no direction ought to have been issued for compliance of the order of the Joint Secretary. Issues (iv) and (v) are decided accordingly.

ISSUE No.(vi)

31. Whether in the facts of the case the petitioner is entitled to relief against GNIDA for refund of stamp duty paid for the surrendered area is a complex issue because the principle of restitution embodied in Section 65 of the Contract Act would not apply to it as GNIDA is not the authority which received any benefit under a void contract. Whether the petitioner is entitled to damages from GNIDA on that count would involve investigation into facts, particularly, to ascertain whether there was any misrepresentation on the part of GNIDA or suppression of material facts by them with regard to any pending litigation dealing with acquisition of land. All these complex facts are not before us to enable a decision on that count and, otherwise also, the claim of the writ petitioner is pending before GNIDA. Therefore, at this stage, it would be sufficient to observe that since stamp duty

was not collected by GNIDA, a claim for refund of stamp duty as against it would not be sustainable. But whether GNIDA is liable for damages / loss, is a question left open for the first respondent to raise at the appropriate stage in an appropriate proceeding before the appropriate forum in accordance with the law. The judgment of the Apex Court in ITC Ltd. (supra) where option was given to make a claim for refund of stamp duty from Development Authority cannot be taken as a precedent laying down any binding principle of law. The Apex Court to do substantial justice between the parties has power under Article 142 of the Constitution of India, which is not available to us. The issue no.(vi) is decided accordingly.

32. For all the reasons recorded above, we are unable to agree with the view taken by the learned Single Judge. The appeal is consequently **allowed**. The impugned judgment and order of the learned Single Judge, dated 01.12.2020, is set aside. The writ petition of the first respondent, subject to above, is dismissed. There is no order as to costs.

(2023) 2 ILRA 917
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2023

BEFORE

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

Special Appeal No. 576 of 2022

The Development Commisioner & Ors. ...Appellants

Versus

Dr. Alok Kumar & Anr. ...Respondents

Counsel for the Appellants:
Sri Ashok (Sr. Advocate), Sri Shashi Shankar Tripathi

Counsel for the Respondent:
Sri R.K. Ojha(Sr. Advocate), Sri Shivendu Ojha, Sri Prateek Rai, Sri Sanjay Kumar Om.

A. Service Law – Temporary/Regular Appointment - IICT Service Rules, 2016: Rule 8.2 of the General Service Rule falling under Chapter-II - **No party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate.** One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. (Para 9)

Acquiescence would mean a tacit or passive acceptance. When acquiescence takes place, it presupposes knowledge against a particular act. From the knowledge comes passive acceptance, therefore instead of taking any action against any alleged refusal to perform the original contract, despite adequate knowledge of its terms, and instead being allowed to continue by consciously ignoring it and thereafter proceeding further, acquiescence does take place. As a consequence, **it reintroduces a new implied agreement between the parties. Once such a situation arises, it is not open to the party that acquiesced itself to insist upon the compliance of the original terms. Hence, what is essential, is the conduct of the parties. When acquiescence is followed by delay, it may become laches.** (Para 9)

In the case in hand, respondent no.1 accepted the terms of his appointment and thereafter joined as Director, hence, he cannot be allowed to approbate and reprobate. Even no issue was raised by him immediately after joining as Director with reference to his terms of appointment. The issue was not raised even till the completion of his initial term of appointment i.e. three years which expired on March 31,

2022. Six months' extension was granted. Even at that stage, no issue was raised. It is only when fresh advertisement for recruitment on the post of Director was published, respondent no.1 raised the issue, hence, the petition filed by respondent no.1 was barred on account of delay and laches also. (Para 10)

B. The definition of direct recruitment would mean recruitment through a process stipulated under the Rules. Therefore, by no stretch of the imagination, one can interpret that all direct recruitments are to be made by regular employment. Therefore, direct recruitment can also be made for filling up the post on a tenure basis. Hence, in the absence of any statutory bar under the Rules, a tenure appointment made through direct recruitment by following the due procedure cannot be termed as contrary to law. In a direct recruitment, the appointment on a regular or tenure basis is the discretion of the employer, especially when the Rules do not prohibit. A court of law cannot give a different status to an employee than the one which was conferred and accepted especially when the same is not prohibited under the Rules. (Para 11)

None of the Rules cited by respondent no.1 will confer any right on him as there is no bar therein for appointment on temporary basis or for a fixed tenure. (Para 11)

Special appeal allowed. (E-4)

Precedent followed:

U.O.I. & ors. Vs N. Murugesan & ors., (2022) 2 SCC 25 (Para 4)

Precedent distinguished:

1. Somesh Thapliyal Vs Vice Chancellor, H.N.B. Garhwal University, (2021) 10 SCC116 (Para 5)

2. Krishna Rai & ors. Vs Banaras Hindu University & ors., AIR 2022 SC 2924 (Para 5)

Present special appeal assails the judgment and order dated 14.10.2022 passed by the learned Single Judge.

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

ORDER

1. Order dated October 14, 2022 passed by the learned Single Judge has been challenged by filing the present intra-Court appeal.

2. It is a case in which respondent no.1, who was a regular employee working with U.P. Textile Technology Institute, Kanpur (hereinafter referred to as "Institute') as a Professor, was appointed as the Director of the Indian Institute of Carpet Technology (hereinafter referred to as "IICT') vide order dated November 15, 2018. It was for a period of three years or on his attaining age of 60 years, whichever is earlier. Respondent no.1 accepting the terms of the appointment, joined on the post and worked till the expiry of three years. Thereafter, vide letter dated April 1, 2022, he was granted extension for a period of six months i.e. upto September 30, 2022. A writ petition was filed in this Court for quashing the advertisement dated August 19, 2022 published for selection to the post of Director, IICT; order dated July 6, 2022 vide which direction was issued for initiating process of selection of new Director of IICT, Bhadohi; order dated July 26, 2022 vide which request was made for publishing advertisement for the post of Director, IICT in the employment newspaper and for allowing respondent no.1 to continue on the post, till he attains the age of superannuation.

3. Learned Single Judge while quashing the orders dated July 6 and July 27, 2022 and also the advertisement dated August 19, 2022 declared that the respondent no.1 is entitled to work on the

post of Director, IICT, till he attains the age of superannuation in terms of Rule 8.2 of the General Service Rule falling under Chapter-II of IICT Service Rules, 2016 i.e. 65 years.

4. The argument raised by learned counsel for the appellants is that in pursuance of the advertisement issued, respondent no.1, working with the Institute as a Professor, applied for the post. He was selected and appointed on purely temporary basis for a period of three years or on his attaining age of 60 years, whichever is earlier. Further extension was to be considered by the Executive Committee depending upon his performance and suitability for the post. Respondent no.1 had consciously and unconditionally accepted the terms of appointment and joined. Respondent no. 1 is a well educated person and the case does not involve unequal bargaining power. Respondent no.1, having accepted the terms of appointment, continued working without raising any issue for a period of three years. As process for regular selection to the post of Director got delayed, he was granted extension for a period of six months vide letter dated April 1, 2022, which was to expire on September 30, 2022. Before expiry of aforesaid period, an advertisement was issued on August 19, 2022 for selection to the post of Director, IICT. It was at this stage that respondent no.1 filed writ petition, which was too late and barred by principles of acquiescence and estoppel. In fact, after expiry of the extension granted to respondent no.1, he had handed over charge of the post on September 30, 2022 and thereafter he had joined his parent Department i.e. U.P. Textile Technology Institute, Kanpur. At this stage, this is too late for respondent no.1 to have claimed that he should be allowed to continue as the Director of the Institute. The Institute is merely a society. The rules or instructions issued by it as such have no force of law as these are not framed under Article 309 of the Constitution of India. The appointment of respondent no.1 being temporary, as it was specifically mentioned in the appointment letter, will not confer any right on him for treating him a Director appointed on regular basis. In support of the arguments, reliance has been placed on the judgment of Hon'ble the Supreme Court in **Union of India and others vs. N. Murugesan and others**1.

5. On the other hand, learned counsel for respondent no.1 submitted that as the advertisement did not mention that appointment of respondent no.1 will be on temporary basis for a fixed tenure, the condition put in the appointment letter was totally illegal. The fact that even the probation period was mentioned in the appointment letter shows that the intention of the appointing authority was to offer regular appointment to respondent no.1, otherwise in a tenure post probation period is never mentioned. In support of argument, reliance has been placed on judgments of Hon'ble the Supreme Court in **Somesh Thapliyal vs. Vice Chancellor, H.N.B. Garhwal University**2 and in **Krishna Rai and others vs. Banaras Hindu University and others**3.

6. Heard learned counsel for the parties and perused the paper book.

7. What emerges from the facts on record are that respondent no. 1 was working as a Professor in the Institute. An advertisement was issued by IICT for appointment as Director of IICT on November 15, 2018. Respondent no.1

being successful was appointed. The letter of appointment clearly stated that the same was on purely temporary basis for a tenure of three years, which may be extended, in case, his work is found to be satisfactory.

8. The terms of appointment also provided that there would be probation of two years. Respondent no.1 specifically accepting the terms on which he was offered appointment, joined on the post and worked for three years. As the process of recruitment could not be initiated, respondent no.1 was granted extension for a period of six months on April 1, 2022. The same was to expire on September 30, 2022. Still without raising any finger, respondent no.1 continued on the post accepting the terms for extension of service. An advertisement was issued in Employment News, August 13-19, 2022 for recruitment to the post of Director, IICT. It was at this stage that respondent no.1 approached this Court raising the issue that his appointment at the initial stage should have been treated as regular appointment and not temporary or one for a fixed tenure. As on date, the fact remains that after expiry of extended period of six months on September 30, 2022, respondent no.1 had already relinquished his charge as Director of IICT and has returned back to his parent cadre in the Institute and joined there. Respondent no.1 had consciously accepted the terms of appointment and joined. It may be out of place, if not mentioned here, that respondent no.1 is not an illiterate employee where bargaining power was not there. He is a well educated person, who was already working in the Institute as a Professor and was offered appointment as Director of IICT. His case is not of unequal bargaining power.

9. The facts of the present case are identical to the case of **N.Murugesan and others' case (supra)**. In the aforesaid case before Hon'ble the Supreme Court, an advertisement was made to fill up the post of Director General of Central Power Research Institute (CRPI), either by direct recruitment or on deputation as per the Rules. The respondent therein applied for the post on direct recruitment. An order of appointment was issued by the Ministry of Power, which was accepted by the respondent. The respondent went on performing his part of duties without any demur. On finding his tenure coming to an end, he submitted a representation taking a stand that since his appointment was made by way of direct recruitment, he should be treated as regular employee and, therefore, is entitled to continue till the date of his superannuation. However, the extension of term of respondent was not found in the interest of the Institute and another person was recruited and selected as the new Director General. Aggrieved, the respondent filed two writ petitions before the High Court of Karnataka questioning the relieving order given to him and also to the advertisement issued for recruitment of new Director General. The Single Judge dismissed the writ petitions on the ground of delay and laches. The appeals filed by the respondent before the Division Bench was allowed without granting an order of reinstatement by compensating the respondent. The other relief sought by the respondent was also not considered and granted. The said order of the Division Bench was the bone of contention before Hon'ble the Supreme Court. While dismissing the appeal, Hon'ble the Supreme Court in **N.Murugesan and others' case (supra)** opined that such cases are governed by principles of delay, laches, acquiescence followed by approbation and reprobation. Relevant paragraphs 25, 26, 37 and 38 are being reproduced hereinbelow :

"25. Acquiescence would mean a tacit or passive acceptance. It is implied and reluctant consent to an act. In other words, such an action would qualify a passive assent. Thus, when acquiescence takes place, it presupposes knowledge against a particular act. From the knowledge comes passive acceptance, therefore instead of taking any action against any alleged refusal to perform the original contract, despite adequate knowledge of its terms, and instead being allowed to continue by consciously ignoring it and thereafter proceeding further, acquiescence does take place. As a consequence, it reintroduces a new implied agreement between the parties. Once such a situation arises, it is not open to the party that acquiesced itself to insist upon the compliance of the original terms. Hence, what is essential, is the conduct of the parties. We only dealt with the distinction involving a mere acquiescence. When acquiescence is followed by delay, it may become laches. Here again, we are inclined to hold that the concept of acquiescence is to be seen on a case-to-case basis.

26. These phrases are borrowed from the Scots law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the Contract Act concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally.

x x x x

37. We have already dealt with the principles of law that may have a bearing on this case. There is no element of an unequal bargaining power involved. Nobody has forced the respondent to enter into a contract. He indeed was an employee of the society for 23 years. We do not wish to go into the question as to whether it is a case of re-employment or not, as the fact remains that the respondent wanted the job, which is why there was an unexplained and studied reluctance to raise the issue of him being a permanent/regular employee, but only at the fag end of his tenure.

38. The first of the representations was made on 30.12.2014, followed by others. The conduct speaks for itself. Hence, on the principle governing delay, laches and acquiescence, followed by approbation and reprobation, respondent no. 1 ought not to have been granted any relief by invoking Article 226 of the Constitution of India. On the interpretation of the rules, we have already discussed that there is no prohibition in law for a tenure appointment. We are dealing with a post that stands at the top realm of the administration. There is an intended object and rationale attached to the post. It is the incumbent of the post who has to carry forward the object and vision in the field of research. As noted earlier,

there is certainly an overwhelming public interest involved. The employer, has a load of discretion available. In the absence of any arbitrariness, one cannot question its wisdom. After all, a decision has been taken at the highest level. We cannot infer that materials have not been placed before taking the decision. The Division Bench was not right in holding that the highest constitutional authority on the executive side was misled by the lower officials. We find no place for such an inference. A conscious decision has been made to go for a tenure appointment in the interest of society. Similarly, a conscious decision was also made to go for a fresh recruitment."

10. In the case in hand, respondent no.1 accepted the terms of his appointment and thereafter joined as Director, hence, he cannot be allowed to approbate and reprobate. Even no issue was raised by him immediately after joining as Director with reference to his terms of appointment. The issue was not raised even till the completion of his initial term of appointment i.e. three years which expired on March 31, 2022. Six months' extension was granted. Even at that stage, no issue was raised. It is only when fresh advertisement for recruitment on the post of Director was published, respondent no.1 raised the issue, hence, the petition filed by respondent no.1 was barred on account of delay and laches also.

11. None of the Rules cited by respondent no.1 will confer any right on him as there is no bar therein for appointment on temporary basis or for a fixed tenure. Hon'ble the Supreme Court in **N.Murugesan and others' case (supra)** has held in paragraph 32 as follows :

"32. The Rules per se do not prohibit a tenure appointment. The definition of direct recruitment would mean recruitment through a process stipulated under the Rules. Therefore, by no stretch of the imagination, one can interpret that all direct recruitments are to be made by regular employment. Therefore, direct recruitment can also be made for filling up the post on a tenure basis. Hence, in the absence of any statutory bar under the Rules, a tenure appointment made through direct recruitment by following the due procedure cannot be termed as contrary to law. In a direct recruitment, the appointment on a regular or tenure basis is the discretion of the employer, especially when the Rules do not prohibit. Rule 48 speaks of the age of superannuation for a regular employee, which will be the completion of sixty years. There is no difficulty in appreciating the said rule, which deals with a regular employee alone and therefore can have no application while dealing with an appointment made on a tenure basis. After all, a court of law cannot give a different status to an employee than the one which was conferred and accepted especially when the same is not prohibited under the Rules."

12. As far as judgment in **Somesh Thapliyal's case (supra)** is concerned, the same has been considered by Hon'ble the Supreme Court in **N.Murugesan and others' case (supra)**. The concept of bargaining power applied by Hon'ble the Supreme Court in **Somesh Thapliyal's case (supra)** is also missing in the present case. As far as judgment in Krishna Rai's case (supra) is concerned, it was reiterated that there can be no estoppel against law. The said case was with respect to interpretation of statutory Rules framed under Article 309 of the Constitution of India. In the present case, there are no such Rules framed under Article 309 of the

Constitution of India and, as such, the theory of no estoppel against statute is not applicable.

13. For the reasons mentioned above, in our view, the impugned order dated October 14, 2022 passed by the learned Single Judge cannot be legally sustained. The same is hereby set aside and as a consequence, the writ petition filed by respondent no.1 is dismissed.

14. The Special Appeal is, accordingly, allowed.

(2023) 2 ILRA 923
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.02.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-A No. 8155 of 2022
along with other connected Cases

C/m Intermediate College Natauli & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Rakesh Chandra Tewari

Counsel for the Respondents:
C.S.C., Rishabh Tripathi

A. Education Law – Appointment/ Selection - U.P. Intermediate Education Act, 1921 - The Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982 - Sections 2(a), 2(1), 10, 11, 12, 16, 34 & 35 - The Uttar Pradesh Secondary Education Services Selection Board Rules, 1998 - Rules 10, 11, 12, 12(6), 12(8) & 13 - The U.P. Secondary education Services Selection Board (Procedure and Conduct of Business) First Regulations, 1998 - Regulation 8(6) - **It is well settled that the requirement of eligibility is to be satisfied as on the cut off date prescribed in the advertisement and subsequently acquired qualification would not make a person eligible.** (Para 65)

In present case, the eligibility for consideration in terms of the Advertisement No. 03 of 2013 has to be the eligibility as on the last date prescribed in the advertisement and subsequently acquired qualification would not make the person eligible for consideration for selection. The steps taken by the Board in March, 2022 whereby it called the list of two senior most teachers of the various institutions with a view to give them a chance to participate in the selection process in terms of the right vested in them by virtue of Rule 12(6) of the 1998 Rules, were nothing but a band aid solution on a deep wound and were bound to fail as the said teachers, did not have the eligibility as they were admittedly not the senior most teachers in terms of the requirement as specified in the Advertisement No. 03 of 2013. (Para 39, 67)

Criteria for selection cannot be altered by the authorities in the middle or after the process of selection has commenced and the only proper recourse was to recall the foregoing advertisement and issue a fresh advertisement as per the Rules. (Para 48)

B. The Board has clearly restricted the pool of available candidates available for selection and has not followed the mandate as prescribed u/s 11 of the 1982 Act of conducting the written examination as soon as they are notified. (Para 66)

Rule 13 makes it mandatory for the Inspector to make the appointments immediately after the selection is done. From the scheme of the Act and the Rules framed thereunder, it is clear that the powers conferred upon the Board for making the selection to the post of Headmaster have to be initiated by issuance of an advertisement and has to culminate in the selections made by the Board after following the mandatory provisions as contained in Rule 12. **The said exercise has to be conducted by the Board <u>as soon as</u> the vacancies notified u/s 10(1) of the 1982 Act,** which

also have a direct relation with the year of recruitment as defined u/s 2(l) to the said Act. Thus **in terms of the mandate of the Act and the 1998 Rules time is of some essence.** (Para 36)

In the present case admittedly the advertisement was issued in the year 2013, that being step taken by the Board in terms of Rule 12 after the notification of vacancies u/s 10 of the 1982 Act. For no good reasons, the Board did not take any steps which they were required to do u/s 11 of the 1982 Act and continued to wait for about 9 years for holding the examination. (Para 37)

The result of delay in taking steps u/s 11 is that various candidates who were found eligible and had applied in terms of Advertisement No. 03 of 2013 either became uninterested or otherwise became ineligible, did not participate in the interview. The 2 senior most teachers of the institutions who had a vested right of being considered for selection in terms of the right vested in them by virtue of Rule 12(6) of the 1998 Rules and were eligible in terms of the Advertisement also got adversely affected as the senior most teachers had either retired or lost interest in the process on account of inordinate delay. Thus **the pool from which the selection were to be made got shrunk considerably.** (Para 38)

The delay caused by the Board clearly defied the very object of enactment of the Act as it made the field of selection restricted. **The delay caused by the Board in making appointments has promoted *ad hocism* prescribed u/s 18 which prevailed in all these years.** It was clearly contrary to the mandate cast on the Board by virtue of Section 11 of making the process of holding written examination as soon as the vacancies are notified, the said action also violates the powers conferred upon the Board to make effort for appointment so as to attract the best possible talent. (Para 40, 41)

C. Constitution of India: Article 14 and 16 - The rights of the citizen u/Article 14 and Article 16 are required to be protected in the event the action of the St. or its instrumentality is found to be not in consonance with the mandate of Articles 14 and 16. It is well settled that although the St. has the freedom to take decision for selection of the candidates, however, it does not confer any unbridled powers on the St. to do so without following the procedural requirement as specified or at the cost of fair play and on the grounds of arbitrariness. (Para 43, 44)

Article 14 of the Constitution of India repels any action of the St. which is arbitrary and not in consonance with the substantive or procedural due process. Article 14 is the genus of which Article 16 is the species. **Article 16 casts a duty on the St. or its instrumentality to ensure that there is an equality of opportunities to all the citizen** (of course subject to they possessing the qualification) **in matters relating the employment and appointment to any office under St. without any discrimination subject to the powers conferred upon the St.** of making provisions as prescribed u/Article 16(4), Article 16(4)(a) and Article 16(4)(b). (Para 42, 43)

An eligible candidate has a fundamental right to lay his claim for consideration in his own right for recruitment to an office or post under the St. u/Article 16(1) of the Constitution. The process of selection not being taking place due to non-notification by the appropriate authority, is having a deleterious effect on the psyche of the people. The dereliction of duty is seriously eroding the constitutional rights u/Article 16(1) and is a source to circumvent due process of selection. (Para 54)

The action of the Board in making the recruitment after nine years is violative of Article 14 of the Constitution of India. (Para 68)

D. Words and Phrases – "as soon as may be" i.e. within the time which was reasonably convenient or requisite - The definition of the phrase "as soon as may be" i.e. within the time which is reasonably requisite would apply with full vigour to the interpretation of Section 11(1) of the 1982 Act. The expression "as soon as" cannot be interpreted to mean that the action is taken after nine years, although no time limit is fixed, the phrase "as soon as" has to be interpreted to be within a reasonable time

in the context of recruitment to be made, the year of recruitment and the intent for which the advertisement is issued. (Para 66)

The selections so made have clearly deprived the eligible candidates (two senior most teachers) of their rights under Rule 12(6) of the 1998 Rules and also the candidates who acquired qualifications after 2014 as they are deprived of being considered only on account of delay by the Board. The rights of the petitioners have also been violated, as the appointment through the direct recruitment is indirectly an avenue of promotion available to the senior most teachers which is otherwise not available in terms of Rule 10 of 1998 Rules. The entire process of selection is also bad as the pool from which the selection are to be made by the Board has got shrunk only on account of inordinate delay in completing the process of appointment and has thus resulted in violation of Article 16 of the Constitution of India. (Para 69)

Writ petitions allowed. (E-4)

Precedent followed:

1. Chandgi Ram Vs University of Raj., (2001) 10 SCC 556 (Para 46)

2. Madan Mohan Sharma Vs St. of Raj., (2008) 3 SCC 724 (Para 48)

3. Maharashtra St. Road Transport Corp. & ors. Vs Rajendra Bhimrao Mandve & ors., (2001) 10 SCC 51 (Para 48)

4. Balprit Singh & anr. Vs Chandigarh Administration & ors., 2016 SCC OnLine P&H 9902 (Para 49)

5. Syed Mehedi Vs Government of NCT of Delhi & ors., 2019 SCC OnLine Del 9015 (Para 50)

6. Naushad Anwar & ors. Vs St. of Bihar & ors., (2014) 11 SCC 203 (Para 51)

7. Renu & ors. Vs District and Session Judge Tis Hazari Courts, Delhi & anr., (2014) 14 SCC 50 (Para 52)

8. K. Shekhar Vs V. Indiramman & ors., (2002) 3 SCC 586 (Para 53)

9. Pradip Gogoi & ors. Vs St. of Assam & ors., (1998) 8 SCC 726 (Para 54)

10. Jagdish Prasad Vs St. of Rajasthan & ors., (2011) 7 SCC 789 (Para 55)

11. Sachin Kumar & ors. Vs Delhi Subordinate Service Selection Board (DSSSB) & ors., (2021) 4 SCC 631 (Para 55)

12. Dr. Ms. O.Z. Hussain Vs U.O.I., 1990 Supp SCC 688 (Para 56)

13. F.C.I. & ors. Vs Parashotam Das Bansal & ors., (2008) 5 SCC 100 (Para 56)

14. Deepak Agarwal & anr. Vs St. of U. P. & ors., 2011) 6 SCC 725 (Para 56)

15. Abdul Jabar Butt Vs St. of J.&K., 1957 SCR 51 (Para 66)

Precedent distinguished:

1. Vivek Kumar Upadhyay Vs St. of U.P. & ors., Writ-A No. 364 of 2022, decided on 25.02.2022 (Para 11, 57)

2. Mohan Singh & ors. Vs St. of U.P. & anr., Writ-A No. 700 of 2022, decided on 20.06.2022 (Para 58)

3. Manish Kumar Tripathi Vs St. of U.P. & anr., Writ-A No. 14975 of 2019 (Para 59)

4. St. of Har. & ors. Vs Ajay Walia (Ms), (1997) 6 SCC 255 (Para 60)

5. Ramesh Chandra Shah & ors. Vs Anil Joshi & ors., Civil Appeal Nos. 2802-2804 of 2013 arising out SLP (C) Nos. 30581 – 30583 of 2012, decided on 03.04.2013] (Para 61)

6. Sankar Mondal Vs The St. of West Bengal & ors., Civil Appeal No. 1924 of 2010, decided on 15.02.2022 (Para 62)

7. U.O.I. & ors. Vs N. Murugesan & ors., (2022) 2 SCC 25 (Para 63)

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. This bunch of petitions have been filed raising various grounds to the

appointments made in terms of the Advertisement No.03 of 2013 published by the respondent no.2 for filling up the posts of Principals in the recognized Intermediate Colleges and the High Schools recognized under the provisions of The U.P. Intermediate Education Act, 1921 and in terms of the powers conferred upon the Board by virtue of The Uttar Pradesh Secondary Education (Services Selection Boards) Act, 1982 (in short 'the 1982 Act') read with The Uttar Pradesh Secondary Education Services Selection Board Rules, 1998. In the various writ petitions, there are numerable grounds of challenge to the selections made, however, there is one common thread running across all the writ petitions being the filling up the vacancies initiated by the Advertisement No.03 of 2013 and culminating in the appointments made in the year 2022 after about 9 years is itself arbitrary and violative of Articles 14 and 16 of the Constitution of India. I propose to decide this common question that has arisen in all the writ petitions pertaining to the selections made in pursuance to the Advertisement No.03 of 2013, as such, all the writ petitions are being decided by means of this common order.

2. For the sake of brevity, the averments as made in leading Writ-A No.1612 of 2022 are being referred.

3. The petitioner in the said writ petition claims to be appointed in the institution known as Rajarshi Tandon Inter College, Ram Nagar, Athgawan, District Pratapgarh which is a recognized institution under the provisions of U.P. Intermediate Education Act and drawn salary on the post of teacher. The respondent no.2 issued an Advertisement No.03 of 2013 intending to fill up the post of Principal in the added intermediate colleges. The said advertisement is appended as Annexure-1 to the writ petition. In terms of the said advertisement, applications were invited from the eligible candidates upto 31.01.2014. It is informed that the said date was subsequently extended to February, 2014. The name of the institutions where the posts of Principals were vacant are also appended along with Annexure No.1.

4. It is stated that despite issuing an advertisement no steps were being taken by the respondent no.2 and suddenly in the year 2022, a decision was taken to call for two senior most teachers to fill their details on the online portal. After 10.01.2022, the manner in filling up the form etc. was also notified through an advertisement which is appended as Annexure No.5 to the writ petition. It is claimed by some of the petitioners that the petitioners names were sent by the Committee of Management, and the petitioners were called for interview, however, they were denied the permission to undergo the interview which led to the filing of the writ petition being Writ-A No.372 of 2022. The said writ petition was decided along with other writ petitions by means of a common judgment dated 25.02.2022, whereby the High Court framed two issues on the pleadings and the submissions made by the parties which are as follows:

"1. Whether the petitioners were eligible and within the zone of consideration for selection and appointment on the post of Principal which fell vacant in their Institution under Rule 11-(2)(b) of the U.P. Secondary Education Services Selection Board, Rules, 1998 and were advertised in pursuance to the Advertisement No. 1 of 11 or Advertisement No. 3 of 2013, as the case may be ?

2. Whether the eligibility of petitioners and their claim to be in the zone of consideration for selection and appointment as Principal under Rule 11(2)(b) of the Rules, 1998 is to be considered with respect to the date fixed for calling the candidates for interview in pursuance to the Advertisement No. 1 of 2011 or 3 of 2013, as the case may be, if not; whether the petitioners have locus standi to maintain these writ petitions staking their claim for being considered in pursuance to the said Advertisements for appointment under Rule 11(2)(b) of the Rules, 1998 on the post of Principal of the Institution wherein they claim to be working as Ad-hoc Principal as of now ?"

5. This Court ultimately decided the aforesaid issues against the petitioners therein holding that the petitioners were neither the senior most teachers of the institution at the time of advertisement nor they were having the requisite qualification on the date of advertisement and thus, the writ petitions were dismissed, however, after dismissing the writ petition, considering the eligibility of the petitioners, this Court proceeded to record as under:

"In view of the above discussion, this Court is of the opinion that none of the petitioners were amongst the two senior most teachers of the institution as per Rule 11(2)(b) of the Rules, 1998 at the relevant time of sending requisition hence they were not within the zone of consideration for the post of Principal or Headmaster advertised vide Advertisement No. 1 of 2011 or 3 of 2013. They did not fulfill the requisite qualification or experience at the relevant time. Their eligibility and claim of being within zone of consideration is not to be fixed on the basis of date of Interview in respect of Advertisement No. 01 of 2013 or 03 of 2013. Therefore, they do not have any locus standi to maintain these writ petitions in their present form, especially as, they have not challenged the said advertisements on the ground of inordinate delay of about 10 or more years in holding the selections, except in Writ - A No. 317 of 2022, where, Advertisement No. 3 of 2013 has been challenged but not on this ground and bereft of this ground, the challenge is not maintainable at the behest of said petitioners, for the reasons already given, as already discussed above.

All the questions framed are answered accordingly.

The petitioners may if otherwise permissible in law and if there is no order or direction of the Courts for completing the selection process pertaining to Advertisement No. 03 of 2013 and if the selection has not been completed as yet in the sense Interview etc. has not been held, raise a challenge on the ground of long delay in completing the same if they are otherwise eligible for the posts in question, subject of course to the rights of opposite parties to raise the plea of delay and laches , if any etc., in this regard. As regards Advertisement No. 01 of 2011 the selection is over with regard to petitioners institution, therefore, it is too late in the day for them.

This apart, it is also for the State Government and/or the Board to consider as to how far it is justified and reasonable to keep a recruitment process pending for almost 10 or more years, during which many of the candidates whether they be from one source or another, for direct recruitment, may have become ineligible for various reasons such as exceeding maximum age or having retired etc. and whether in such a scenario if the recruitment process is not completed within reasonable period of 2 or 3 years, should

not the advertisement be cancelled and vacant posts be re-advertised so that others who may have become eligible for consideration from either source of recruitment in the interregnum, may also participate therein? Appropriate measures should be taken in this regard for the future."

6. In the light of the said liberty and the observations made by the High Court in the judgment dated 25.02.2022, the petitioners have filed the present petitions challenging the advertisement itself on various grounds including the ground of inordinate delay in making appointments after issuance of advertisement.

7. The submission of Sri Sharad Pathak, the Counsel for the petitioners is based upon the interpretation of the provisions of the U.P. Secondary Education (Services Selection Board) Act, 1982 and the Rules framed in pursuance to Section 35 of the 1982 Act (U.P. Act No.5 of 1982) known as "The Uttar Pradesh Secondary Education Services Selection Board Rules, 1998'. The Counsel for the petitioners takes this Court through the provisions of the 1982 Act particularly Sections 2(a), 2(l), 10, 11, 12, 16 of the 1982 Act. He also draws my attention to the Rules 10, 11 and 12 framed by virtue of powers conferred under Section 35 of the Act.

8. The first submission of the Counsel for the petitioners is that delaying the appointment in pursuance to the advertisement for the period of more than 9 years itself is fatal to the entire selection process and is contrary to the mandate of the Act for which the Act was enacted and is violative of Articles 14 and 16 of the Constitution of India.

9. The Counsel for the petitioners next submits that even otherwise the mandatory provisions contained in Rules 11 and 12 particularly Rules 12(6) and 12(8) have not been followed while making the selections in pursuance to the advertisement. He thus argues that the advertisement and the selections made in pursuance thereof are liable to be quashed.

10. Sri R.K. Singh Suryvanshi, learned Counsel appearing on behalf of Board places reliance on the counter affidavit wherein he draws my attention to justify the delay in making the selection after the issuance of the advertisement in the year 2013. The relevant paragraph no.3 of the counter affidavit, justifying the long delay, filed by the respondent no.2 reads as under:

"3. That the brief facts of the case are as follows for kind consideration of this Hon'ble Court: -

1. That an advertisement (Advertisement No. 03/2013) was published by the Board for the appointment on the post of Principal of the institution which was modified on 06.02.2014 and the last date for submission of the application form was 25.02.2014 but the selection for the post of Principal pursuant to the Advertisement No. 01/2011 was challenged in Writ Petition No. 6550/2014 in which an interim order was passed on 03.02.2014 which has been modified on 28.11.2018.

II. That the order passed by the Hon'ble Single Judge dated 24.10.2018 has been challenged in Special Appeal No.1289 of 2019 which was disposed of by this Hon'ble Court on 08.01.2019 therefore after selection proceeding pursuant to the advertisement no.01/2011 has been finalized. It is relevant to point out here that due to the pendency of the writ petition, the selection proceeding pursuant to the advertisement no.01/2011 could not

be completed and after completion of the selection process, final result was published by the Board in which some of the selected candidates have attained the age of superannuation. It is further brought to the notice of the Hon'ble Court that the selection process with respect to the Advertisement No. 01/1999-2000 was not able to attain fruition in the stipulated timeline for the reason of the matter being under consideration before the Hon'ble Court and the Hon'ble Apex Court and after the decision of the Hon'ble Apex Court in the case of Balbeer Kaur dated 16-05-2008, the selection process with regard to the said advertisement was finally completed. Similarly, the selection for Advertisement No. 01/2011 could only be completed after the decision of the Hon'ble Court in Writ Petition No. 6550/2014 (Harish Chandra Dixit & others versus State of U.P. & others) in which an interim order was passed on 03.02.2014 which has been modified on 28.11.2018 and order dated 18-10-2019 passed in Special Appeal Defective No.1289/2018 (Prem Chandra Tripathi & others versus State of U.P. & others). ***It is further brought to the notice of the Hon'ble Court that Advertisement No. 02/2013 and 03/2013 could not attain finality in the stipulated time as the written examination and Interview for the post of Lecturer was ongoing and the members of the Board, including the Chairman were not present from 2017 for a period of around one and a half year and therefore the process for recruitment for the Advertisement No.03/2013 could not be completed within the stipulated time. It is most humbly submitted before the Hon'ble Court that the delay that has happened in the selection process in due to the circumstances and the situation prevailing at the particular time and there has been not wilful neglect or delay in the entire proceedings, rather it is only for the reasons as explained above that the selection process was not able to be finished within the stipulated time.***

III. That in respect of the advertisement no.03/ 2013, a writ petition being Writ-A No.10609/ 2021 was filed by Dr. Dileep Kumar Awasthi and others vs State of U.P. and others) which was disposed of on 07.10.2021 with a direction to exclude the candidates who have attained the age of superannuation.

IV. That for completion of selection pursuant to the advertisement no.03/2013, a Writ Petition bearing Writ-A No.14975/2019 was filed before this Hon'ble Court which was disposed of on 30.09.2019 with a direction to the Board to take appropriate steps for completion of the selection pursuant to the advertisement no.03/2013. In compliance of the order passed by this Hon'ble Court dated 30.09.2019, the Board had decided to complete the selection process by 31.01.2022. It is further stated that for non-compliance of the order passed by this Hon'ble Court dated 30.09.2019 a Contempt Petition No.3069/2021 has been filed in which the Hon'ble Court has passed a detail order for completion of the selection process and in compliance of the aforesaid order. the Board has issued the necessary instruction by order dated 02.01.2022 by which the District Inspector of Schools and the management were directed to submit the relevant papers of two senior most teachers who were eligible on the last date for submission of the application form i.e. 25.02.2014 through online mode."

11. Sri R.K. Singh Suryvanshi further draws my attention to argue that once the issue has been decided by this Court in the case of Vivek Kumar Upadhyay vs State of

U.P. and others [Writ-A No.364 of 2022), nothing remains to be adjudicated by this Court.

12. Sri Ranvijay Singh, learned Standing Counsel adopts the arguments of Sri Suryvanshi and justifies the appointments made in pursuance to the Advertisement No.03 of 2013 despite the long delay.

13. Sri Som Kartik Shukla, learned Counsel appearing for some of the selected candidates justifies the appointments and adopts the arguments advanced by the Counsel for the Board. He also argues that the petitioners have no right to file the petitions after the issues were decided by this Court in *Vivek Kumar Updhyay (Supra)*.

14. Sri G.C. Verma and Sri B.K. Singh besides adopting the arguments as raised by Sri Sharad Pathak have pointed out certain other discrepancies in the appointments made in pursuance to the Advertisement No.03 of 2013; like the Board not following the statutory period of 21 days for issuing interview letter by registered post as provided under Regulation 8(6) of The U.P. Secondary Education Services Selection Board (Procedure and Conduct of Business) First Regulations, 1998. The Board not publishing the new list of senior most teachers after their requisition of 16.03.2022. The portal for scrutinizing of the credential of the candidates on the Board's website was closed on 16.01.2022 and thus, the petitioners were deprived and prevented their rights to scrutinize the details as the requisition itself was made on 16.03.2022.

15. It was further argued that the Board undertook the process of selection from 24.03.2022 to 12.04.2022, the date on which some of the petitioners were discharging their duties being in-charge of the examinations being held which prevent them from appearing in the interview. It was further argued that the Chairman of the Board alone has undertaken the entire recruitment process and there was no member in the Board duly appointed at the time of recruitment, contrary to the requirement of statutory strength under Section 4 of the 1982 Act as amended.

16. As already recorded above, I proposed to decide the writ petitions on the common question that has arisen across the writ petitions, *that being whether the process of selection initiated by issuance of Advertisement No.03 of 2013 and culminating in the selections made in the year 2022 will stand the scrutiny of Articles 14 and 16 of the Constitution of India on the ground of inordinate delay.*

17. To appreciate the issue that has arisen for decision it is essential to look into the provisions of the statutory enactment through which the selections have been made.

18. The State of U.P. with an intent to regulate the educational institutions at the intermediate stage promulgated the Uttar Pradesh Intermediate Education Act, 1921. The said act has undergone various amendments from time to time in terms of the provisions contained in the said Act. The State of U.P. enacted and proposed to establish a Board to take place of the Allahabad University in regulating and supervising the system of the high school and the intermediate educations in the Uttar Pradesh and for prescription of the courses. Subsequent thereto in the year 1982, the State of U.P. promulgated the Act known as 'The Uttar Pradesh Secondary Education

(Services Selection Boards) Act, 1982' being U.P. Act No.05 of 1982 for establishing the Services Selection Board for the selection of teachers in the institutions recognized under the Uttar Pradesh Intermediate Education Act. The statement and objects for promulgation of the said Act is as under:

"The appointment of teachers in secondary institutions recognised by the Boad of High School and Intermediate Education was governed by the Intemediate Education Act, 1921 and regulations made thereunder. It we felt that the selection of teachers under the provisions of the said Act and the regulations was some times not free and fair. Besides, the field of selection was also very much restricted. This adversely affected the availability of suitable teachers and the standard of education. It was therefore, considered necessary to constitute Secondary Education Service Commission at the State level, to select Principals, Lecturers, Head-masters and L.T. Grade teachers, and Secondary Education Selection Boards at the regional level, to select and make available suitable candidates for comparatively lower posts in C.T./J.T.C./ B.T.C. Grade for such institutions."

19. By means of the said 1982 Act, a 'Board' was established for selecting the teachers and the principals or headmasters. The definition of 'Teachers' as contained in Section 2(k) of the 1982 Act is as under:

"(k). 'Teacher' means a person employed for imparting instruction in an institution and includes a Principal or a Headmaster."

20. In sub-section (l) of Section 2 of the 1982 Act, the 'Year of recruitment' is defined, which is as under:

"(l). 'Year of recruitment' means a period of twelve months commencing from first day of July of a calendar year."

21. The Board established under Section 3 of the said 1982 Act is conferred with the powers and duties as defined under Section 9, one of them being to take decision on matters relating to method of direct recruitment of teachers. The said 1982 Act by virtue of Section 10 provides for the procedure and selection by direct recruitment, which is quoted hereinbelow:

"10. Procedure of selection by direct recruitment. (1) For the purpose of making appointment of a teacher, by direct recruitment, the management shall determine the number of vacancies existing or likely to fall vacant during the year of recruitment and in the case of a post other than the post of Head of the Institution, also the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, the Scheduled Tribes and other Backward Classes of citizens in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and notify the vacancies to the Board in such manner and through such officer or authority as may be prescribed.

(2) The procedure of selection of candidates for direct recruitment to the post of teachers shall be such as may be prescribed:

Provided that the Board shall, with a view to inviting talented persons, give wide publicity in the State to the vacancies notified under sub- section (1)."

22. After taking the steps as recorded under Section 10, the Board is saddled with making the selection by preparation of

panel of candidates as enumerated under Section 11, which is quoted hereinbelow:

*"**11. Panel of candidates.** (1) The Board shall, as soon as may be, after the vacancy is notified under sub-section (1) of Section 10, hold examinations, where necessary, and interviews, of the candidates and prepare a panel of those found most suitable for appointment.*

(2) The panel referred to in sub-section (1) shall be forwarded by the Board to the officer or authority referred to in sub-section (1) of Section 10 in such manner as may be prescribed.

(3) After the receipt of the panel under sub-section (2), the officer or authority concerned shall in the prescribed manner intimate the Management of the Institution the names of the selected candidates in respect of the vacancies notified under sub-section (1) of Section 10.

(4) The management shall, within a period of one month from the date of receipt of such intimation, issue appointment letter to such selected candidate.

(5) Where such selected candidate fails to join the post in such institution within the time allowed in the appointment letter or within such extended time as the Management may allow in this behalf," or where such candidate is otherwise not available for appointment, the officer or authority concerned may, on the request of the Management, intimate, in the prescribed manner, fresh name or names from the panel forwarded by the Board under sub-section (2)."

23. Till the Board was to make the selection in terms of the mandate of Sections 10 and 11, the provisions with regard to the filling up the posts of ad hoc Principals or Headmasters is elaborated under Section 18 of the 1982 Act, which is quoted hereinbelow:

*"**18. Ad hoc Principals or Headmasters. (**1) Where the Management has notified a vacancy to the Board, in accordance with sub- section (1) of Section 10 and the post of the Principal or the Headmaster actually remained vacant for more than two months, the management shall fill such vacancy on purely ad hoc basis by promoting the seniormost teacher.*

(a) in the lecturer's grade in respect of a vacancy in the post of the Principal.

(b) in the trained graduate's grade in respect of a vacancy in the post of the Headmaster.

(2) Where the Management fails to promote the seniormost teacher under sub-section (1) the inspector shall himself issue the order of pro- motion of such teacher and the teacher concerned shall be entitled to get his salary as the Principal or the Headmaster, as the case may be, from the date he joins such post is pursuance of such order of promotion.

(3) Where the teacher to whom the order of promotion is issued under sub-section (2) is unable to join the post of the Principal or the Headmaster, as the case may be, due to any act or omission on the part of the management, such teacher may submit his joining report to the Inspector, and shall thereupon be entitled to get his salary as the Principal or the Headmaster, as the case may be, from the date he submits the said report.

(4) Every appointment of an ad hoc Principal or Headmaster under sub-section (1) or sub-section (2) shall cease to have effect from when the candidate recommended by the Board joins the post."

24. Section 34 of the 1982 Act empowers the Board with the prior

approval of the State Government to make regulations prescribing fees for holding selections, for holding interviews and laying down the procedure to be followed by the Board for discharging its duties and performing its functions under the Act. Section 35 confers the powers upon the State Government to make rules for carrying out the purposes of the Act.

25. In terms of the powers conferred by virtue of Section 35 of the 1982 Act, the State Government notified the Rules known as 'The Uttar Pradesh Secondary Education Services Selection Board Rules, 1998' (hereinafter referred to as "the 1998 Rules').

26. Part-II of the said Rules provides for the necessary qualifications which are required for direct recruitment to a post of teacher. Part-III of the said Rules specifically provides for recruitment of teachers in different categories. Rule 10(a) of Part-III provides that the Principal of an intermediate college or Headmaster of high school can be appointed only by direct recruitment, whereas for the teachers of lecturer grade and the teachers of trained graduate category, in the said recruitment was different and for teachers attached primary section, the method of recruitment is different. Rule 10 is quoted hereinbelow:

"10. Source of recruitment.-Teachers will be recruited in different different categories through following sources:

(a) Principal of an Intermediate College or Headmaster of a High School	By direct recruitment
(b) Teachers of lecturer's grade	(i) 50 per cent by direct recruitment; (ii) 50 per cent by promotion from amongst substantively appointed teachers of the trained graduates grade.
(c) Teachers of trained graduates category by direct recruitment	Provided that such intermediate colleges and high schools where attached primary teachers are receiving salary under provisions of the Uttar Pradesh High School and Intermediate Colleges (payment of Salaries of Teachers and other employees) Act, 1971, 75 per cent of the posts will be filled by direct recruitment and the rest of the 25 per cent of the posts will be filled through promotion of those trained graduate teachers of attached primary section who have completed satisfactory services of five years: Provided further that where there is no eligible candidate available for recruitment through promotion in any recruitment

	year, the posts may be filled through direct recruitment: Provided also that while calculating the percentage of different posts under the same recruitment, if a fraction occurs, the fraction of direct recruitment will be excluded and the fraction of posts to be filled through promotion will be increased by one to create one post.
(d) Teachers of attached primary section cent per cent by direct recruitment.	Note- For the recruitment of the teachers of attached primary section, the minimum qualification shall be in accordance with National Council for Teacher Education. Recruitment will be excluded and the fraction of posts to be filled through promotion will be increased by one to create one post.

27. Rule 11 of the 1998 Rules provides for determination and notification of vacancies. Rule 12, which is very relevant for the present case, lays down the procedure to be followed by the Board for direct recruitment. Rule 12 in its entirety is quoted hereinbelow:

*"**12. Procedure for direct recruitment.** (1) The Board shall, in respect of the vacancies to be filed by direct recruitment, advertise the vacancies including those reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes and other reserved categories as applicable to Government service from time to time, in at least two daily newspapers, having wide circulation in the State and call for the applications for being considered for selection in the pro forma published in the advertisement. For the post of Principal of an Intermediate College or the Headmaster of a High School, the name and place of the institution shall also be mentioned in the advertisement and the candidates shall be required to give the choice of not more than three institutions in order of preference and if he wishes to be considered for any particular institution or institutions and for no other institution, he may mention the fact in his application.*

(2) The Board shall scrutinize the applications and in respect of the post of teacher in lecturers, trained graduates grade and attached primary section shall conduct written examination. The written examination shall consist of one paper of general aptitude test of two hours, based on the subject. The centres for conducting written examination shall be fixed in district headquarters only and the investigators shall be paid honorarium at such rate as the Board may like to fix.

(3) The Board shall evaluate the answer sheets through examiner to be appointed by the Board or through Computer and the examiner shall be paid honorarium at the rate to be fixed by the Board.

(4) The Board shall prepare list for posts of Lecturers on the basis of marks obtained in the written examination and marks for special merits as follows -

(a) 85 per cent marks on the basis of written examination;

(b) 10 per cent marks on the basis of interview which shall be divided in the following manner namely:

(i) 4% marks on the basis of general knowledge;

(ii) 3% marks on the basis of personality test;

(iii) 3% marks on the basis of ability of expression.

(c) 5 per cent marks on the basis of following special merits, namely:

(i) 2% marks for having Doctorate Degree;

(ii) 2% marks for having Master of Education (M.Ed.) degree;

(iii) 1% marks for Bachelor of Education (B.Ed.) degree:

Provided that no marks under this clause shall be awarded to a candidate who has obtained marks under sub-clause (ii),

(iv) 1% marks for the participation in any national level sports competition through State team.

(5) The Board shall hold interview of the candidates and 15% marks shall be allotted for interview. Marks in the interview shall be divided in the following manner :

(a) 6% marks on the basis of subject/general knowledge;

(b) 4% marks on the basis of personality test;

(c) 5% marks on the basis of ability of expression.

(6) The Board, having regard to the need for securing due representation of candidates belonging to the Scheduled Castes/ Scheduled Tribes and Other Backward Classes of citizens in respect of the post of teacher in lecturers and trained graduates grade, shall call for interview such candidates who have secured the maximum marks under sub-clause (4) above/ and for the post of Principal/Headmaster, shall call for interview such candidates who have secured maximum marks under sub-clause (5) above in such manner that the number of candidates shall not be less than three and not more than five times of the number of vacancies:

Provided that in respect of the post of the Principal or Headmaster of an institution the Board shall also in addition call for interview two seniormost teachers of the institution whose names are forwarded by the management through Inspector under clause (b) of sub-rule (2) of Rule 11.

(7) The marks obtained in the quality points as referred to in sub-rule (5) by the eligible candidates shall not be disclosed to the members of the interview board.

(8) The Board then, for each category of post, prepare panel of those found most suitable for appointment in order of merit as disclosed by the marks obtained by them after adding the marks obtained under sub-clause (4) or sub-clause (5) above, as the case may be, with the marks obtained in the interview. The panel for the post of Principal or Headmaster shall be prepared institution-wise after giving due regard to the preference given by a candidate, if any, for appointment in a particular institution whereas for the posts in the Lecturers and trained graduates grade, it shall be prepared subject-wise and group-wise respectively. If two or more candidates obtain equal marks, the name of the candidate who has higher quality points shall be placed higher in the panel and if the marks obtained in the quality points are also equal, then the name of the candidate

who is older in age shall be placed higher. In the panel for the post of Principal or Headmaster, the number of names shall be three- times of the number of the vacancy and for the post of teachers in the lecturers and trained graduates grade, it shall be larger (but not larger than twenty-five per cent) than the number of vacancies.

Explanation-For the purposes of this sub-rule the word 'group-wise' means in accordance with the groups specified in the Explanation to sub-rule (2) of Rule 11.

(9) In the case of Lecturer grade, the Board shall at the time of interview after showing the lists of institutions which have notified the vacancy to it, require the candidates to give, if she/he so desires, the choice of not more than five, such institutions in order of preference where if selected, he/she may wish to be appointed and in the case of teachers in trained graduate grade and attached primary teachers such choices shall be given to candidates after preparation of merit list on the basis of written examination by the board.

(10) The Board shall after preparing the panel in accordance with sub-rule (8), allocate the institutions to the selected candidates in respect of the posts of teachers in lecturers and trained graduates grade in such manner that the candidate whose name appears at the top of the panel shall be allocated the institution of his first preference given in accordance with sub-rule (9). Where a selected candidate cannot be allocated any of the institutions of his preference on the ground that the candidates placed higher in the panel have already been allocated such institutions and there remains no vacancy in them, the Board may allocate any institution to him as it may deem fit.

(11) The Board shall forward the panel prepared under sub-rule (8) along with the name of the institutions allocated to selected candidates in accordance with sub-rule (10) to the Inspector with a copy thereof to the Joint Director and also notify them on its notice board."

28. Rule 13 of the aforesaid 1998 Rules mandates for the inspector to notify the panel so selected by the Board for allocation of the institution under Rule 12. Rule 13 is quoted below:

*"**13. Intimation of names of selected candidates.** (1) The Inspector shall, within 10 days of the receipt of the panel and the allocation of institution under Rule 12,-*

(i) notify it on the notice board of his office;

(ii) intimate the name of selected candidate to the Management of the institution which has notified the vacancy, with the direction that on authorisation under resolution of the management, an order of appointment, in the proforma given in Appendix 'E' be issued to the candidate by registered post within 15 days of the receipt of the order or within such extended time, as may be allowed to him by the management, and also intimating him that on his failure to join within the specified time, his appointment will be liable to be cancelled;

(iii) send an intimation to the candidate, referred to in clause (ii), with the direction to report to the Manager within fifteen days of the receipt of the order of appointment by him from the Manager or within such extended time as may be allowed to him, by the Management.

(2) The Management shall comply with the directions, given under sub- rule (1) and report compliance thereof to the Board through the Inspector.

(3) Where the candidate, referred to in sub-rule (1) fails to join the post within the time allowed in the letter of appointment or

within such extended time as the Management may allow in this behalf or where such candidate is otherwise not available for appointment, the Inspector may, on the request of the Management, intimate fresh name or names standing next in order of merit on the panel, under intimation to the Joint Director and the Board, and the provisions of sub-rules (1) and (2) shall mutatis mutandis apply.

(4) The Joint Director shall monitor and ensure that the candidates selected by the Board joins the institution in the specified time and for this purpose, he may issue such direction to the inspector he thinks proper.

(5) Where a candidate selected by the Board could not join in an allocated institution due to non-availability of vacancy or for any other reason, the District Inspector of School shall recommend to the Board for the adjustment of such candidate against any other vacancy notified to the Board in any other institution. On receipt of the recommendation of the District Inspector of School the Board shall allocate such candidate to another institution in a vacancy notified to the Board."

29. The other Rules need not detain this Court, as the same are not concerned with the issues to be decided by this Court as framed hereinabove.

30. From the plain reading of the statement of objects, sections of the 1982 Act as well as the 1998 Rules framed thereunder, it can be easily deciphered that the intent and object of setting up the Board for making recruitment is to ensure

(i) that the selection of the teachers is free and fair,

(ii) is not restricting; and

(iii) to make suitable teachers available in a time bound manner so as to promote the main objective of imparting quality educations.

The ills that were prevalent in recruitment prior to establishing the Board, thus, the recruitment to be made by the Board in respect of the principals of the institution with which we are concerned in the present case, enjoins upon the Board a duty to ensure that the selection of the principal is very fair, timely and not restricted so as to attract the best talent available for the job.

31. The duties conferred upon the Board for making the direct recruitment that flow from Section 10 of the said 1982 Act makes it very clear that the Board shall initiate the process of recruitment with a view to inviting talented persons and for that purpose to give wide publication in the State in respect of the vacancies which are notified under sub-section (1). Section 11 of the said Act and further makes it mandatory for the Board to take steps for appointment of the candidates found suitable for appointment as soon as may be after the vacancies notified under Section (1) of Section 10. A conjoint reading of Sections 10 and 11 of the 1982 Act make it mandatory and casts a duty upon the Board to ensure that the selections should be done as soon as the vacancies are notified.

32. It is interesting to note that the sources of recruitment of Principals as specified in Rule 10 of the 1998 Rules makes it clear that the Principal of an intermediate college or Headmaster of a high school can be appointed only by direct recruitment.

33. In the hierarchy of the teachers working in any institution, there are two categories, one being the lecturers, whose

appointment is 50% by direct recruitment, and 50% by promotions from amonst the substantively appointed trained graduate teachers.

34. The recruitment of teachers under "trained graduate category' is further to be done in the ratio 75% by direct recruitment and 25% through promotion of trained graduate teachers of the attached primary section who have completed satisfactory services of 5 years. Thus on a plain reading of Rule 10, it becomes clear that the avenues of promotion are closed after the teacher having become the lecturer and thus with a view to provide an avenue to promotion, provisions was made in Rule 12 giving opportunities to 2 senior most teachers of the institution to be called for interview along with the persons who have applied for the direct recruitment and who have to undergo written examination, from a plain reading of Rule 12 of the Rules 1998, it is clear that the posts of the Headmaster is to be filled up through direct applicants who have to undergo written examination and who have to compete with 2 senior most teachers of the institutions whose names are to be forwarded by the Management through Inspector under Rule 11(2)(b) of the 1998 Rules.

35. With the objective of attracting the best talent in terms of the mandate of the Act, there is a provision contained in Rule 12(a) making it obligatory for the Board to send the names for appointment to the post of Principal and Headmaster which should be three times of the numbers of the vacancies.

36. It is essential to note that the Rule 13 makes it mandatory for the Inspector to make the appointments immediately after the selection is done. From the scheme of the Act and the Rules framed thereunder, it is clear that the powers conferred upon the Board for making the selection to the post of Headmaster have to be initiated by issuance of an advertisement and has to culminate in the selections made by the Board after following the mandatory provisions as contained in Rule 12. The said exercise has to be conducted by the Board as soon as the vacancies notified under Section 10(1) of the 1982 Act, which also have a direct relation with the year of recruitment as defined under Section 2(l) to the said Act. Thus in terms of the mandate of the Act and the 1998 Rules time is of some essence.

37. In the present case admittedly the advertisement was issued in the year 2013, that being step taken by the Board in terms of Rule 12 after the notification of vacancies under Section 10 of the 1982 Act. For no good reasons, the Board did not take any steps which they were required to do under Section 11 of the 1982 Act and continued to wait for about 9 years for holding the examination. The defence taken for the delay as argued by Sri Suryvanshi is that certain litigation from the recruitment proposed by the earlier Advertisement No.01 of 2011 were pending, as such, no steps were taken by the Board for selecting the candidates in terms of the mandate of clause upon the particular Board by virtue of Section 11 of the 1982 Act or the Rules 12 of the 1998 Rules, merits rejection as being wholly arbitrary, moreso, as there was no order by any court in respect of appointments to be made under Advertisement No.03 of 2013. This Court cannot lose sight of the facts that there is no defence taken by the State or the Board that there was any interim order passed by any Court of law preventing the Board from taking the steps under Section 11 for

holding the examination or for finalizing the select list in terms of mandate cast under Rule 11.

38. The result of delay in taking steps under Section 11 is that various candidates who were found eligible and had applied in terms of Advertisement No.03 of 2013 either became uninterested or otherwise became ineligible, did not participate in the interview. The 2 senior most teachers of the institutions who had a vested right of being considered for selection in terms of the right vested in them by virtue of Rule 12(6) of the 1998 Rules and were eligible in terms of the Advertisement No.03 of 2013 also got adversely affected as the senior most teachers had either retired or lost interest in the process on account of inordinate delay. Thus the pool from which the selection were to be made got shrunk considerably.

39. The steps taken by the Board in March, 2022 whereby it called the list of two senior most teachers of the various institutions with a view to give them a chance to participate in the selection process in terms of the right vested in them by virtue of Rule 12(6) of the 1998 Rules, were nothing but a band aid solution on a deep wound and were bound to fail as the said teachers, did not have the eligibility as they were admittedly not the senior most teachers in terms of the requirement as specified in the Advertisement No.03 of 2013. This fact got fortified by the decision of this Court in the case of ***Vivek Kumar Upadhyay vs State of U.P. and others [Writ-A No.364 of 2022; decided on 25.02.2022 along with other connected petitions]*** wherein this Court found that the eligibility for consideration in terms of the Advertisement No.03 of 2013 has to be the eligibility as on the last date prescribed in the advertisement and subsequently acquired qualification would not make the person eligible for consideration for selection and the same would also led to dismissal of writ petition by this Court vide judgment dated 25.02.2022.

40. The result of the delay caused by the Board without there being any justifiable reason was that the direct recruits for making the selections as prescribed under Rule 12(1) got shrunk because of either the person losing interest or otherwise becoming ineligible and the pool under Rule 12(6) comprising of two senior most teachers also either got shrunk or totally evaporated as the two senior most teachers who were eligible at the time when the Advertisement No.03 of 2013 was issued, either superannuated or had lost interest somehow. The said delay caused by the Board has resulted in making selections from the depleted pool, as noted above. The said action of he Board clearly defied the very object of enactement of the Act as it made the *field of selection restricted.* The delay caused by the Board in making appointments has promoted ad hocism prescribed under Section 18 which prevailed in all these years.

41. It was also clearly contrary to the mandate cast on the Board by virtue of Section 11 of making the process of holding written examination as soon as the vacancies are notified, the said action also violates the powers conferred upon the Board to make effort for appointment so as to attract the best possible talent. The said action of the Board causing inordinate delay in making the selection has to be testified by this Court on the anvil of the mandate cast by virtue of Articles 14 and 16 of the Constitution of India.

42. Article 14 of the Constitution of India repels any action of the State which is arbitrary and not in consonance with the

substantive or procedural due process. Article 14 is the genus of which Article 16 is the species. Article 16 casts a duty on the State or its instrumentality to ensure that there is an equality of opportunities to all the citizen in matters relating the employment and appointment to any office under State without any discrimination subject to the powers conferred upon the State of making provisions as prescribed under Article 16(4), Article 16(4)(a) and Article 16(4)(b).

43. The rights of the citizen under Article 14 and Article 16 are required to be protected in the event the action of the State or its instrumentality is found to be not in consonance with the mandate of Articles 14 and 16. Article 16 also casts a duty on the State to provide for equality and opportunity in the service of the State to all its citizen (of course subject to they possessing the qualification). Any action which denies the equality of opportunity to all the citizen would thus be clearly violative of Article 16.

44. It is well settled that although the State has the freedom to take decision for selection of the candidates, however, it does not confer any unbridled powers on the State to do so without following the procedural requirement as specified or at the cost of fair play and on the grounds of arbitrariness. It is equally true that any action of the State which results in unfairness would have to be held as unjust and in violation of Articles 14 and 16 of the Constitution of India.

45. In the said background, I propose to deal with the judgments referred by the Counsel for the parties.

46. The Hon'ble Supreme Court in the case of ***Chandgi Ram vs University of Rajasthan; (2001) 10 SCC 556*** considered the effect of delay in completion of a recruitment process and the intervention permissible by the courts and recorded as under in para 7 of the said judgment:

"7. However, after hearing learned Counsel for the parties, we do not feel it appropriate on the facts of this case to await any response from the State Government. We heard learned Counsel for the parties at length. We find such problems, as in the present case, arises quite often when delay is made in making the regular selection. If the authorities fill up these vacancies at the earliest, this culture of ad hocism cannot develop. This deteriorates the fibre of the institution effecting the very foundation of our culture specially when it is in the educational field. Even Section 3(3) of the Act does permit ad hoc appointment but only for a short period, not to continue for years. Institutions not filling vacancies for a long time develop the culture of ad hocism. Some time not filling is for a coloured purpose to favour one or the other. This has to be denounced. This not only permits irregular appointees to continue for long but thwarts a regularly competent appointees to come in, deteriorating the very standard of the institution. This brings in internal struggle to appoint or continue one or other ad hoc appointees leading to inter se contest in courts, as in the present case, taking a large cake of time in the courts. However, aforesaid facts reveal that the post for which there is a contest, has already been advertised for its filling as far back in the year 1998, yet the process did not progress further. It is now not in dispute that this post is a sanctioned post for which the University has already issued the aforesaid advertisement. The only difficulty felt by the University though belated, is the

Memorandum of Understanding [MOU] issued by the State Government to the University of Rajasthan which is annexed along with the affidavit of one Rajendra Babo Srivastava, Assistant Registrar (Estt. II), University of Rajasthan. The submission is, under it the University of Rajasthan can neither create any new post nor fill up any vacant post without obtaining permission of the Government of Rajasthan. The short question for our consideration is, whether on the facts and circumstances of this case, this MOU could be an obstacle in the way of the University to fill up the aforesaid vacant post. We do not find this to be any obstacle in the way of the University. We firstly want to record, the University created all this situation by not filling up these vacant posts for a long number of years and now is taking a defence under the garb of this MOU. We find this stand of MOU is taken now before this Court as no such stand was taken earlier before the High Court. Even this MOU is annexed without any date with an affidavit without stating when and how this MOU was communicated to the University. It is however not disputed that this MOU, if it existed, was born after the aforesaid advertisement for filling up the posts. Without going into the merit of this MOU on admitted facts when the process of filling up of the vacancies started long before this MOU was born, this MOU could not be any impediment to fill up these posts."

47. The Hon'ble Supreme Court further in exercise of powers prescribed under Article 142 issued certain directions for holding the interview and permitting the candidates after issuing directions for fresh advertisement, the said directions are contained in para 9 of the Chandgi Ram's case (supra), which is as under:

"9. We also make it clear that apart from the candidates who are entitled to participate in this selection in pursuance to the said earlier advertisement, a fresh advertisement in accordance with rule, if any, be also made by the University within three weeks from today, entitling fresh candidates also to apply for the same. During this interregnum, the University will take expeditiously all proceedings for the due Constitution of the Selection Committee including obtaining nominations from the State Government, if any required. Since the State Government has already been served in this matter, we direct the State Government to nominate one, if any required for the Constitution of the Selection Committee, so that no delay is caused in making selection within the aforesaid timetable. We would not have given this timetable to expedite the selection but for the inordinate delay caused by the University in making this selection. We deprecate this culture of ad hocism and hope in future it is only used for a stopgap arrangement i.e. for a short period."

The observations made by the Hon'ble Supreme Court and recorded above apply with full vigour in the present case as the delay caused has promoted the culture of ad hocism.

48. The next judgments in the case of ***Madan Mohan Sharma vs State of Rajasthan; (2008) 3 SCC 724*** and in the case of ***Maharashtra State Road Transport Corporation and others vs Rajendra Bhimrao Mandve and others; (2001) 10 SCC 51*** wherein the Hon'ble Supreme Court held that criteria for selection cannot be altered by the authorities in the middle or after the process of selection has commenced and the only proper recourse

was to recall the foregoing advertisement and issue a fresh advertisement as per the Rules.

49. The judgment of the Hon'ble Supreme Court rendered in the case of *Chandgi Ram (supra)* was followed by the High Court of Punjab and Haryana while delivering the judgment of ***Balprit Singh and another vs Chandigarh Administration and others; 2016 SCC OnLine P&H 9902*** wherein a period of three years delay was held to be an inordinate delay and the Court was also swayed by the fact that on account of such delay certain person had become eligible.

50. Some of the similar issues was also considered by the High Court of Delhi in the case of ***Syed Mehedi vs Government of NCT of Delhi and others; 2019 SCC OnLine Del 9015*** wherein the High Court had the occasion to consider the aspect of delay and had directed for granting age relaxation to various persons in the context of the dispute raised before it.

51. The Counsel for the petitioners has placed reliance in the case of ***Naushad Anwar and others vs State of Bihar and others; (2014) 11 SCC 203*** wherein the Hon'ble Supreme Court on the allegations of inordinate delay of four years in the process of recruitment had issued directions to the following effect:

*"**19.** We are anguished by the very thought of the selection process dragging on for as long as four years between 2008 and 2012. Such inordinate delay and indolence is totally undesirable not only because it violates the fundamental rights of candidates who have qualified for appointment during the intervening period but also because it depicts a complete failure on the part of all concerned in regulating the selection and appointment process with a view to ensuring that the same is fair, objective and transparent. We cannot help saying that several questions have bothered us in regard to the selection process itself which leaves much to be desired but since there is no challenge to the selection or the appointments made pursuant thereto, we refrain from making any observation in regard to those aspects. All that we need say is that the selection and appointment of such a large number of employees under the local bodies ought to have been conducted in a more orderly fashion and more importantly the same should have been completed within the time-frame stipulated for the purpose of such reasonable extension thereof as may have become absolutely inevitable. A selection process that lingers on for years can hardly measure up to the demands of objectivity, fairness and transparency especially when the method by which inter se merit of candidates was determined is neither stipulated in the Rules nor any guidelines issued for the selection Committee to follow have been placed before us."*

52. The next judgment cited by the Counsel for the petitioners is in the case of ***Renu and others vs District and Sessions Judge, Tis Hazari Courts, Delhi and another; (2014) 14 SCC 50*** wherein the Hon'ble Supreme Court while considering the issue of employment had made the following observations:

*"**16.** Another important requirement of public appointment is that of transparency. Therefore, the advertisement must specify the number of posts available for selection and recruitment. The qualifications and other eligibility criteria for such posts*

should be explicitly provided and the schedule of recruitment process should be published with certainty and clarity. The advertisement should also specify the rules under which the selection is to be made and in absence of the rules, the procedure under which the selection is likely to be undertaken. This is necessary to prevent arbitrariness and to avoid change of criteria of selection after the selection process is commenced, thereby unjustly benefiting someone at the cost of others."

53. The Counsel for the petitioner cited the judgment in the case of ***K. Shekar vs V. Indiramman and others; (2002) 3 SCC 586*** wherein the Hon'ble Supreme Court had made the following observations:

"29. However the appellants are correct in their submission that the High Court should not have directed the selection of an Assistant Professor on the basis of the 1989 advertisement. That advertisement related to appointments in the Deaddiction Unit. NIMHANS's statement that the setting up of the Deaddiction Unit in NIMHANS had been abandoned because of lack of funds has been categorically refuted by respondent 1. Without going into the controversy having regard to the lapse of several years on account of the pendency of the litigation before different Courts, it would not be appropriate to direct the process initiated in 1989 to be completed more than 11 years later. The vacancy created by the setting aside the appellant's appointment will have to be filled and a fresh advertisement will have to be issued by NIMHANS in accordance with its Cadre and Recruitment Rules. The unfortunate consequence that the appellant will suffer by reason of the setting aside of his appointment as Assistant Professor in NIMHANS cannot be avoided on any equitable considerations although the harshness may be mitigated to some extent."

54. The next judgment cited by the Counsel for the petitioners is the case of ***Pradip Gogoi and others vs State of Assam and others; (1998) 8 SCC 726*** wherein the Hon'ble Supreme Court had made the following observations by passing the orders in paras 1 and 2, which are as under:

"1. It is distressing to note a common feature that after making advertisement and recruitment conducted, the vacancies that arose thereafter though existing, no action was being taken to have them notified through the Public Service Commission and recruitment made so that all the eligible candidates would have opportunity to apply for recruitment as per the rules and their claim considered. The story is repeated in this case. Though advertisement was made in 1991, on 19-11-1993, after select list was prepared, appointments were made, but vacancies existing thereafter could not be filled in. Consequentially people, including the petitioners, had approached the High Court for their appointment. The High Court, following the judgment of this Court reported in State of Bihar v. Secretariat Asstt. Successful Examinees Union 1986, has directed to fill up the vacancies existing up to the date of recommendation by the Public Service Commission from the waiting list. Preparation of waiting list became a spinning ground for corruption and denial of constitutional right to equality to eligible candidates awaiting recruitment. It has become an endemic spectacle to witness. It is settled law that even an eligible candidate has a fundamental right to lay his claim for consideration in his own right for recruitment to an office or post under the

State under Article 16(1) of the Constitution. The process of selection not being taking place due to non-notification by the appropriate authority, is having a deleterious effect on the psyche of the people. The dereliction of duty is seriously eroding the constitutional rights under Article 16(1) and is a source to circumvent due process of selection.

2. Though Mr Goswamy, learned counsel appearing for the petitioners, is right in contending that opportunity should be given to such people and the petitioners too would have had also applied for appointment having considered their cases awaiting for such an appointment since their cases were tested by the Public Service Commission and kept in the waiting list, omission to appoint them affects their rights seriously under Article 16(1) of the Constitution. We cannot give a direction to consider their cases for appointment from the wait list. The sympathetic vibrations are also responsible for this sagging problem and moral degeneration. Under these circumstances, we are constrained not to accede to the persuasive request made by Mr Goswamy. However, the authorities are directed to notify forthwith vacancies to the Public Service Commission and the Public Service Commission would take necessary expeditious action for recruitment and recommend the names to the authorities expeditiously, so that the existing vacancies would be filled up and the petitioners and all eligible candidates would also be eligible to apply."

55. The Counsel for the petitioners has further relied upon the judgment of the Hon'ble Supreme Court in the case of ***Jagdish Prasad vs State of Rajasthan and others; (2011) 7 SCC 789*** wherein the selection process was held to be bad as it violated the Rules as well as the judgment in the case of ***Sachin Kumar and others vs Delhi Subordinate Service Selection Board (DSSSB) and others; (2021) 4 SCC 631.***

56. The Counsel for the petitioners has also cited judgments rendered by the Hon'ble Supreme Court in the cases of ***Dr. Ms. O.Z. Hussain vs Union of India; 1990 Supp SCC 688, Food Corporation of India and others vs Parashotam Das Bansal and others; (2008) 5 SCC 100 and in the case of Deepak Agarwal and another vs State of Uttar Pradesh and others; (2011) 6 SCC 725***.to argue that the promotional avenues are must in the government service.

57. On the other hand, the Counsel for the respondent Sri Suryvanshi has relied upon the judgment rendered in the case of ***Vivek Kumar Upadhyay vs State of U.P.*** (Writ-A No.364 of 2022, decided on 25.02.2022 along with other connected writ petitions) wherein the petitioners had challenged the non-consideration of their claim arising out of the same Advertisement No.03 of 2013. The Court found them to be ineligible in terms of the requirements as were prescribed under the Advertisement No.03 of 2013, however, the issue with regard to the delay in making the process of appointment by virtue of the said advertisement was left open and the relevant paras of the said judgment have already been incorporated hereinabove.

58. The next judgment cited by the Counsel for the respondent Sri Suryvanshi is in the case of ***Mohan Singh and others vs State of U.P. and another*** (Writ-A No.700 of 2022, decided on 20.06.2022) wherein the petitioners were found to be ineligible on the basis of their qualification as on the date of advertisement. The special appeal preferred against the said judgment

being Special Appeal No.515 of 2022 (decided on 18.08.2022) also came to be dismissed.

59. The Counsel for the respondent Sri Suryvanshi has also cited an order dated 30.09.2019 passed in ***Writ-A No.14975 of 2019 (Manish Kumar Tripathi vs State of U.P. and another***) wherein directions were given to the petitioner therein to approach the Board. It is not understandable as to how the said order is of any relevance to the present case.

60. The Counsel for the respondents Sri Suryvanshi has further cited the judgment in the case of ***State of Haryana and others vs Ajay Walia (Ms); (1997) 6 SCC 255.*** The said case was dismissed on the ground of laches.

61. The Counsel for the respondent has further relied upon the judgment in the case of ***Ramesh Chandra Shah and others vs Anil Joshi and others*** [Civil Appeal Nos.2802-2804 of 2013 arising out of SLP (C) Nos.30581-30583 of 2012, decided on 03.04.2013] wherein the Hon'ble Supreme Court repelled the challenge to the recruitment on the behest of the candidates who had participated in the recruitment and have waived their rights to question to the advertisement. The said judgment would have not applicability to the facts of the present case as the petitioners were held to be ineligible to participate in terms of the Advertisement No.03 of 2013.

62. The next judgment cited by the Counsel for the respondent Sri Suryvanshi is in case of ***Sankar Mondal vs The State of West Bengal and others*** (Civil Appeal No.1924 of 2010, decided on 15.02.2022) wherein the issue of police verification was the issue, the Supreme Court did not interfere in his favour as the recruitment process should be completed and the petitioners have waited for seven long years in raising the grievances.

63. The next judgment cited by the Counsel for the respondents Sri Suryvanshi is in the case of ***Union of India and others vs. N. Murugesan and others; (2022) 2 SCC 25***. In the said case, the petitioner was denied the relief merely on the ground of delay and laches.

64. In the present case, the judgments cited by the Counsel for the respondents could not be of any help as the cause of action giving rise to the petitioners to approach this Court flew from the action of the Board of inviting the list of two senior most teachers in the year 2022 itself and the Court holding them to be illegible for consideration in the case of *Vivek Kumar Upadhyay (supra)* and giving them liberty to challenge on limited ground of inordinate delay. The other judgments cited by the Counsel for the respondents pertain to the requirement of qualification at the time of issuance of advertisement which issue has attained finality.

65. It is well settled that the requirement of eligibility is to be satisfied as on the cut off date prescribed in the advertisement and subsequently acquired qualification would not make a person eligible, however, in the present case, we are concerned with the delay in the process of recruitment and whether the said delay would satisfy the test of Articles 14 and 16 of the Constitution of India. It is relevant to note that this Court had entertained writ petitions arising out of the same advertisement in Writ-A No.20668 of 2022 Brij Pal Singh vs U.P. Secondary Education Service Selection Board wherein this Court

had granted an interim order, however, as I am deciding the entire writ petitions, the interim order would not have any effect on the decision.

66. In the light of the arguments raised at the bar, it stands established that the Board has clearly restricted the pool of available candidates available for selection and has not followed the mandate as prescribed under Section 11 of the 1982 Act of conducting the written examination as soon as they are notified. The expression "as soon as" cannot be interpreted to mean that the action is taken after nine years, although no time limit is fixed, the phrase "as soon as" has to be interpreted to be within a reasonable time in the context of recruitment to be made, the year of recruitment and the intent for which the advertisement is issued. The scope and the ambit of the phrase "as soon as may be" was considered by a constitution bench of the Supreme Court in the case of ***Abdul Jabar Butt vs State of J&K; 1957 SCR 51*** as under,

"6....The question is -- what is the span of time, which is designated by the words "as soon as may be"? The observations of Dysant, J. in King's Old Country, Ltd. v. Liquid Carbonic Can. Corpn., Ltd. [(1942) 2 WWR 603, 606] quoted in Stroud's Judicial Dictionary 3rd Edn., Vol. 1, p. 200 are apposite. Said the learned Judge, "to do a thing "as soon as possible' means to do it within a reasonable time, with an understanding to do it within the shortest possible time". Likewise to communicate the grounds "as soon as may be may well be said to mean to do so within a reasonable time with an understanding to do it within the shortest possible time. What, however, is to be regarded as a reasonable time or the shortest possible time? The words "as soon as may be" came for consideration before this Court in Ujagar Singh v. State of the Punjab [1951 SCC 170 : (1952) SCR 756] . At pp. 761-62 this Court observed that the expression meant with a "reasonable despatch" and then went on to say that "what was reasonable must depend on the facts of each case and no arbitrary time limit could be set down". In Keshav Nilakanth Joglekar v. Commissioner of Police, Greater Bombay [Supreme Court Petition No. 102 of 1956, decided on September 17, 1956] the word "forthwith" occurring in Section 3(3) of the Indian Preventive Detention Act (4 of 1950) came up for consideration. After observing that the word "forthwith" occurring in Section 3(3) of that Act did not mean the same thing as "as soon as may be" used in Section 7 of the same Act and that the former was more peremptory than the latter, this Court observed that the time that was allowed to the authority to communicate the grounds to the detenue and was predicated by the expression "as soon as may be" was what was "reasonably convenient" or "reasonably requisite". Whenever the question of reasonableness arises in computing the period of time the Court has perforce to have regard to the particular circumstances of the case in which the question arises for decision. It may not be possible in many cases to affirmatively say or to precisely quantify the period of time by reference to hours, days, or months nevertheless, it is possible having regard to the circumstances of the case, to say whether the thing done was or was not done "as soon as may be" i.e. within the time which was reasonably convenient or requisite. It cannot be disputed and indeed it has not been disputed by the learned Attorney-General that sub-section (1) does prescribe a period of time within which the

communication is to be made and this time begins to run from the date the detention under the order takes effect."

Though the above mentioned observations were made in the context of the interpretation of the Article 22, the definition of the phrase "as soon as may be" i.e. within the time which is reasonably requisite would apply with full vigour to the interpretation of Section 11(1) of the 1982 Act.

67. The Board further erred in calling for the names of two senior most teachers in the year 2022 despite that they did not senior most as per the cut off date prescribed in the advertisement, thus, the Board changed the rules midway which is not permissible and on that count also, the Board was at error in calling for the said names which fact also gets fortify in the case of Vivek Kumar Upadhyay (supra).

68. The Board, I have no hesitation in holding, has failed on all the said fronts and thus on all the grounds as noted above, I have no hesitation in holding that the action of the Board in making the recruitment after nine years is violative of Article 14 of the Constitution of India.

69. The selections so made have clearly deprived the eligible candidates (two senior most teachers) of their rights under Rule 12(6) of the 1998 Rules and also the candidates who acquired qualifications after 2014 as they are deprived of being considered only on account of delay by the Board. The rights of the petitioners have also been violated, as the appointment through the direct recruitment is indirectly an avenue of promotion available to the senior most teachers which is otherwise not available in terms of Rule 10 of 1998 Rules. The entire process of selection is also bad as the pool from which the selection are to be made by the Board has got shrunk only on account of inordinate delay in completing the process of appointment and has thus resulted in violation of Article 16 of the Constitution of India.

70. Thus for all the reasons recorded above, all the appointments made by the Board in pursuance to the Advertisement No.03 of 2013 are set aside as being violative of Articles 14 and 16 of the Constitution of India. The Board shall now take steps for recruitment by issuing fresh advertisements with all expeditions strictly in accordance with law.

71. Till such steps as directed are taken by the Board, the arrangement as provided in the 1982 Act particularly Section 18 shall continue to govern the recruitment to the posts of Principals and the Headmasters.

72. In view of above, all the writ petitions stand ***allowed.***

(2023) 2 ILRA 947
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

Writ-A No. 19308 of 2022

Constable Mahesh Chandra (Mahesh Singh) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sudhir Singh Chauhan, Sri Ashutosh Vishwakarma

Counsel for the Respondents:

C.S.C.

A. Service Law – Gratuity – Pendency of a criminal case - In order for the Authorities to withhold the gratuity of the petitioner, it would be imperative to record that the pensioner would be guilty or is under trial for a serious crime. It will be necessary for the Authorities to apply its mind to see whether the nature of the crime in which the pensioner is involved comes within the ambit of the serious crime or not. (Para 15)

B. The Competent Authority must also bear in the mind whether the complaint or charge sheet against the petitioner was filed during the service period and if the allegations in the charge sheet against the petitioner falls within the ambit of a serious offence which is unbecoming of a government servant, then how and in what contingency, the pensioner was allowed to continue in employment even though the Department knew of the pendency of the criminal case against the pensioner and whether in such circumstances, it would be appropriate to withhold the gratuity of the pensioner on the ground of the pendency of the criminal case. (Para 15)

The petitioner had joined the services in the year 1982 and he superannuated on 31.01.2022 after putting in a service of more than 39 years, 11 months and 23 days. (Para 16)

The Department was aware of the said criminal case bearing No. 207 of 2005 pending against the petitioner. The charge sheet was filed in the year 2006 and the matter is still engaging the attention of the Court concerned. Whether any reasonable case is made out is for the Court concerned to decide but at the same time, after more than 16 years of the institution of the said case and where the petitioner has superannuated on 31.01.2022, it had to be considered objectively by the Authorities as to whether there is reasonable material to arrive at a finding that the petitioner is somewhat involved in a serious crime. In case if it was so then under what circumstances, the petitioner was allowed to continue in service without any departmental proceedings, are all relevant issues, which ought to have been considered but unfortunately this aspect of the matter has not been considered by the Authority. (Para 17)

The gratuity which has been withheld is only on account of the pendency of the criminal case and it does not indicate that there is any serious deliberation regarding the fact as to whether the petitioner was involved in a serious crime. The impugned order is apparently non-speaking and does not reflect any application of judicial mind. (Para 20)

Writ petition allowed. Matter is remitted to the Authority concerned. (E-4)

Precedent followed:

1. Shiv Gopal & ors. Vs St. of U.P., 2019 (5) ADJ (41) (FB) (Para 8)

2. Uday Narayan Ojha Vs St.of U.P. & ors., 2020 (6) AWC 5502 (Para 8)

3. Devendra Kumar Sharma Vs St. of U.P. & ors., 2021 (0) Supreme 1154 Allahabad (Para 8)

4. U.O.I. & ors. Vs S.L. Abbas, 1993 (4) SCC 351 (Para 14)

Present petition challenges the order dated 31.01.2022, issued by Superintendent of Police, Orai, District Jalaun, whereby the gratuity of the petitioner has been withheld on the ground of pendency of a criminal case against the petitioner.

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

1. Heard Sri Sudhir Singh Chauhan, learned counsel for the petitioner as well as Sri Shrawan Kumar Dubey, learned Additional Chief Standing Counsel for the State-respondents.

2. The learned counsel for the petitioner has also filed a supplementary

affidavit today after serving a copy on the learned counsel for the State-respondents and the same is taken on record.

3. By means of the instant petition, the petitioner prays for the following reliefs which reads as under:-

"(I) Issue a writ, order or direction in the nature of Certiorari to quash/set-aside the impugned order/letter No. Sa-96/2021 dated 31.01.2022 issued by the respondent no. 3 i.e. Superintendent of Police Orai at District Jalaun.

(II) Issue a writ, order or direction in the nature of mandamus commanding and directing to the respondents to pay/allow the gratuity with interest to the petitioner."

4. The petitioner has approached this Court assailing the order dated 31.01.2022 whereby the gratuity of the petitioner has been withheld on the ground of pendency of a criminal case against the petitioner. The submission of learned counsel for the petitioner is that the petitioner was appointed on the post of Constable on 01.02.1982 by the Superintendent of Police, Fatehgarh, District Farrukhabad. The petitioner after completing a service of 39 years 11 months and 23 days has retired on 31.01.2022. It is also the case of the petitioner that during his service tenure, he was awarded with cash rewards and was also appreciated for his services and no case for any embezzlement or causing harm or loss to the Government was initiated or is pending against the petitioner, during his entire service tenure.

6. It is the contention of the learned counsel for the petitioner that a case bearing No. 207 of 2005 came to be lodged against the petitioner on 29.06.2005 under Sections 307/332/333/504/506/120-B I.P.C. in respect of an alleged incident which occurred on 29.06.2005. It is urged that the said case is still pending and on account of the said pendency, the gratuity of the petitioner has been withheld. It is also urged that the petitioner has been falsely implicated, inasmuch as, on the alleged date of the incident, i.e. on 29.06.2005, the petitioner was on duty and was not at the alleged site of the incident and to buttress the aforesaid submissions, he has also brought on record the documents in the shape of Annexure Nos. 1 and 2 with the writ petition.

7. By drawing the attention of the Court to the supplementary affidavit indicating the anomalies in the trial of Case No. 207 of 2005, it is urged that the petitioner has been falsely implicated and there is no fault of the petitioner despite the same the matter is pending since more than 16 years and the aforesaid information was always available with the police department, yet, no departmental inquiry was initiated against the petitioner on this count till retirement.

8. It is also urged that there is no justification for withholding the gratuity of the petitioner especially when the Authorities themselves did not find that the petitioner was guilty of any serious offence or crime nor the alleged case no. 207 of 2005 prompted the respondent-authorities to institute any departmental proceedings against the petitioner and now when that he has retired, it is not lawful for the respondents to have withheld the gratuity which is against the settled legal principles as enunciated by a Full Bench decision of this Court in the Case of ***Shiv Gopal and Others Vs. State of U.P. 2019 (5) ADJ (441) (FB)***. The learned counsel for the petitioner also relies upon a decision in the

case of ***Uday Narayan Ojha Vs. State of U.P. and others; 2020 (6) AWC 5502. and Devendra Kumar Sharma Vs. State of U.P. and 4 others; 2021 (0) Supreme 1154 Allahabad.***

9. On the strength of the aforesaid decisions, it is urged that the impugned order dated 31.01.2022 whereby the gratuity has been withheld is bad and as such a direction be issued to release the withheld gratuity to the petitioner expeditiously along with interest after setting aside the impugned order.

10. The learned Additional Chief Standing Counsel on the basis of written instructions submits that on account of pendency of the criminal case, the gratuity has been withheld. It is urged that there is no error or jurisdictional error committed by the Authorities in withholding the gratuity and as such the writ petition is not maintainable and deserves to be dismissed.

11 . The Court has considered the submissions and also perused the material available on record.

12. It is not disputed that the petitioner had joined the services in the year 1982 and had attained the age of superannuation on 31.01.2022. It is also not disputed that no departmental inquiry was pending against the petitioner in his entire service tenure. It is also not disputed that the petitioner is also not guilty of any act of omission or commission whereby there has been any loss to the Government. The solitary ground upon which the gratuity of the petitioner has been withheld is the pendency of the criminal case no. 207 of 2005.

14. In order to ascertain the veracity as well as the justification for withholding the gratuity of the petitioner only on the ground of pendency of the criminal case, it will be necessary to examine the issue in light of the full bench decision of tIn ***Union of India and others Vs. S.L. Abbas; 1993 (4) SCC 351*** wherein the Apex Court held as under:-his Court in the case of Shiv Gopal (supra) and the relevant portion thereof reads as under:-.

"31. On plain reading, Article 351 confers power upon the State Government of withholding or withdrawing pension or any part of it, if the pensioner be convicted of "serious crime' or be guilty of grave misconduct. In other words the State Government can withhold or withdraw pension on two grounds: (i) convicted of serious crime; (ii) guilty of grave misconduct; but not otherwise. In other words mere pendency of criminal case or disciplinary proceedings is not sufficient to withhold/or withdraw pension under Article 351.

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39. The expression "serious crime' has to be understood in the context of service jurisprudence involving the government servant. It may be any act of ommission which in the opinion of the competent authority is serious enough and calls for punitive action in terms of Article 351. It has no bearing with the quantum of sentence but with the nature of the offence and the degree of involvement of the government servant in the commission/omission of the crime.

40. Article 351-A empowers the Governor to withhold or withdraw pension or a part of it permanently or for specified period and order recovery from pension for pecuniary loss caused to the Government if the pensioner in departmental proceedings or in judicial proceedings, has been found:

(i) guilty of grave misconduct or (ii) to have caused pecuniary loss to Government by misconduct or negligence during his service. The proviso to the Article spells out the circumstances/conditions in which the departmental proceedings/judicial proceedings is required to be instituted for the purposes of withholding/withdrawing pension. Article 351-A reads thus:

"351-A21. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement:

Provided that-

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during reemployment-

(i) shall not be instituted save with the sanction of the Governor.

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceeding; and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) Judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c) the Public Service Commission, U.P. shall be consulted before final orders are passed.

[Provided further that of the order passed by the Governor relates to a cash dealt with under the Uttar Pradesh Disciplinary Proceedings, (Administrative Tribunal) Rules, 1947, it shall not be necessary to consult Public Service Commission].

Explanation-For the purposes of this article-

(a) Departmental proceeding shall be deemed to have been instituted when the charges framed against the pensioner are issued to him or, if the officer has been placed under suspension from an earlier date, on such date ; and

(b) judicial proceedings shall be deemed to have been instituted:

(i) in the case of criminal proceedings, on the date on which complaint is made, or a charge-sheet is submitted, to a criminal court ; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made to Civil court

Note- As soon as proceedings of the nature referred to in this article are instituted the authority which institutes such proceedings shall without delay intimate the fact to the Audit Officer concerned."

41. Explanation to Article 351-A clarifies that departmental proceedings shall be deemed to have been instituted: (i) when charges are framed against the pensioner; or (ii) the officer has been placed under suspension from such date. Further, judicial proceedings is deemed to have been instituted against the pensioner: (i) in the case of criminal proceedings, on

date on which complaint is made or charge-sheet is submitted to a criminal court; (ii) in case of civil proceedings on the date on which plaint is presented or as the case may be, an application is made to Civil Court.

42. Now we will refer to the proviso to Article 351-A. The proviso speaks about initiation of disciplinary proceedings or judicial proceedings against the government servant after retirement. For initiating proceedings the conditions specified therein must be satisfied, that is, departmental proceedings as indicated in proviso (a) if not instituted while the officer was on duty then it shall not be instituted except:

(i). with the sanction of the Governor;

(ii). it shall be initiated on an event which took place not more than 4 years before the institution of the proceedings;

(iii). such proceedings would be conducted by such authority and in such place as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

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48. On joint reading of Article 351 and 351-A of the Civil Service Regulations clearly indicates that the State Government/Governor reserves to itself the power and right to withhold or withdraw pension or part thereof, whether permanently or for specified period or to order recovery from pension of the whole or part of any pecuniary loss caused to the government in the following eventualities:-

i. pensioner be convicted of serious crime;

ii. pensioner be guilty of grave misconduct;

iii. pensioner having caused pecuniary loss to the government by misconduct or negligence, during service including service rendered on reemployment after retirement;

iv. The power under Article 351 and 351-A can be invoked by the Governor/State Government upon conclusion of disciplinary/judicial proceedings and not at the inception of the proceedings. In other words, the condition precedent for exercise of power under these Articles is on conclusion of the proceedings and order being passed thereon by the competent authority.

Article 351-AA/Article 919-A:

49. Article 351-AA came to be incorporated entitling provisional pension as against full pension (commutation of pension) to government servant against whom departmental or judicial proceedings or any enquiry by Administrative Tribunal is pending on the date of retirement or is to be instituted after retirement, such government servant may be sanctioned provisional pension as provided in Article 919-A.

50. Article 351-AA reads thus:

"[351-AA25. In the case of a Government Servant who retires on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings or any enquiry by Administrative Tribunal is pending on the date of retirement or is to be instituted after retirement a provisional pension as provided in Article 919-A may be sanctioned."

51. On plain reading of Article 351-AA, it transpires that in the eventuality of proceedings/enquiry, referred therein, is pending against a government servant on the date of superannuation, the government servant shall be entitled to provisional pension. In other words, pendency of departmental/judicial proceedings or any enquiry or enquiry to be instituted after

retirement would not empower the State Government to withhold pension, but the government servant may be sanctioned provisional pension, computed as per Rules. It follows that the full pension has to be computed on conclusion of the proceedings/enquiry as the case may be."

15. From the perusal of the aforesaid paragraphs, it would be relevant to note that in order for the Authorities to withhold the gratuity of the petitioner, it would be imperative to record that the pensioner would be guilty or is under trial for a serious crime. It will be necessary for the Authorities to apply its mind to see whether the nature of the crime in which the pensioner is involved comes within the ambit of the serious crime or not. While entering into the aforesaid aspect of the matter, the Competent Authority must also bear in the mind whether the complaint or charge sheet against the petitioner was filed during the service period and if the allegations in the charge sheet against the petitioner falls within the ambit of a serious offence which is unbecoming of a government servant, then how and in what contingency, the pensioner was allowed to continue in employment even though the Department knew of the pendency of the criminal case against the pensioner and whether in such circumstances, it would be appropriate to withhold the gratuity of the pensioner on the ground of the pendency of the criminal case.

16. It is in view of the aforesaid, if the facts of the instant case are seen, it would be noticed that the petitioner had joined the services in the year 1982 and he superannuated on 31.01.2022 after putting in a service of more than 39 years, 11 months and 23 days.

17. It is not the case of the respondents that the Department was not aware of the said criminal case bearing No. 207 of 2005 pending against the petitioner. It is also not disputed by the respondents that the charge sheet in the said case was filed in the year 2006 and the matter is still engaging the attention of the Court concerned. Whether any reasonable case is made out is for the Court concerned to look into the matter but at the same time, after more than 16 years of the institution of the said case and where the petitioner has superannuated on 31.01.2022, it had to be considered objectively by the Authorities as to whether there is reasonable material to arrive at a finding that the petitioner is somewhat involved in a serious crime. In case if it was so then under what circumstances, the petitioner was allowed to continue in service without any departmental proceedings, are all relevant issues, which ought to have been considered but unfortunately this aspect of the matter has not been considered by the Authority.

18. A coordinate Bench of this Court in the case of ***Devendra Kumar Sharma (supra)*** has noticed the aforesaid aspect in the following paragraphs which reads as under:-

"21. Thus, from the aforesaid deliberation, it is evident that to withhold the full pension or any part of pension, the crime of which the pensioner is charged must be a 'serious crime'. If the crime alleged against the pensioner, does not fall within the ambit of 'serious crime', the Governor or the State Government cannot withhold the pension or any part of it or gratuity of the pensioner.

22. Though, the Full Bench has held in para nos.-66 to 69 of the judgment that the

cause of action to the pensioner would arise after the order is passed by the competent authority upon conclusion of the proceedings and findings returned thereon, but the Full Bench in para no.31 of the judgment has observed that mere pendency of criminal case or disciplinary proceedings is not sufficient to withhold or withdraw pension under Article 351 of Civil Service Regulations.

23. Further, in para no. 39 of the judgment it has been observed that the expression 'serious crime' in the context of service jurisprudence involving the government servant refers to any act or omission which in the opinion of the competent authority is serious enough and calls for punitive action in terms of Article 351. It further holds that the quantum of sentence is not relevant but the nature of the offence and the degree of involvement of the government servant in the commission or omission of the crime is relevant.

24. Since, the Full Bench in para no.31 of the judgment has held that mere pendency of criminal case or disciplinary proceedings is not sufficient to withhold or withdraw pension under Article 351 of the Civil Service Regulations and further elaborated expression 'serious crime' in para no.39 of the judgment, therefore, from the conjoint reading of the aforesaid two paragraphs of the judgment, it can be safely culled out that the competent authority while withholding the gratuity and pension of the pensioner should apply its mind to see whether the nature of crime in which the pensioner is involved comes within the ambit of 'serious crime' or not. In doing so, the competent authority must also bear in mind that whether the complaint and charge sheet against the pensioner was filed during the service period, and if the allegations in the complaint and charges against the petitioner fall within the ambit of 'serious offence' which is unbecoming of a Government Servant, then how and in what contingency, the pensioner was allowed to continue in employment even though the department knew of the pendency of criminal case against the pensioner, and whether in such circumstances, it would be appropriate to withhold gratuity and pension of the pensioner on the ground of pendency of criminal case against him.

25. Once, the competent authority on the subjective satisfaction of the case holds in the light of paragraph nos. 31 & 39 of the full Bench Judgment and observation made above that the crime which is alleged against the pensioner falls within the ambit of 'serious crime', the opinion of the competent authority would be final and the pensioner has to wait till the conclusion of disciplinary or judicial proceeding, and the Court should constraint to interfere with the finding of the competent authority unless the finding is without application of mind or is based on irrelevant considerations or is perverse or is otherwise not sustainable in law.

26. Now, coming to the facts of this case, the competent authority had knowledge about the filing of charge sheet against the petitioner in the criminal case on 02.02.2011, and the petitioner was allowed to continue in service thereafter for about 09 years till retirement i.e. 31.12.2020; yet it passed only one-line order that "10% gratuity and final pension of the petitioner is withheld due to pendency of criminal case". The impugned order does not reflect any application of mind by the competent authority nor there is any finding that the offence alleged against the petitioner falls within the category of 'serious crime' to entitle it to

invoke the power under Article 351 of Civil Service Regulations.

27. This Court in normal circumstances would have remanded the matter to the competent authority, but considering the fact that the charge sheet in the criminal case had been filed on 02.02.2011 and the petitioner was allowed to continue in service thereafter about 09 years till retirement, i.e, 31.12.2020, therefore, this Court believes that the competent authority was of the opinion that the nature of crime in which the petitioner has been charge-sheeted is not 'Serious Offence' so as to warrant any disciplinary proceeding against the petitioner, and accordingly, he was allowed to continue in service uninterruptedly till retirement. Therefore, in view of paragraph-31 of the Full Bench judgment of this Court in the case of Shivagopal & others (supra), this Court believes that the order impugned is not sustainable and is, accordingly, set aside with the direction to the respondents to release 10% unpaid gratuity and fix and pay final pension including arrears to the petitioner within three months from the date of production of a certified copy of this order. "

19. Even in ***Uday Narayan Ojha (supra),*** this aspect has been considered in the following paragraphs which reads as under:

"8. The power of State to withhold pension and gratuity, therefore, must be exercised strictly as per the applicable law and if the State action is not found to be in consonance with it, the withholding of gratuity would violate Article 300-A of the Constitution of India. The denial of such constitutional right, therefore, would be liable to be interfered with by this Court under Article 226 of the Constitution of India.

9. Even otherwise, the period of 4 years is a reasonable period from the date of the event, leading to submission of charge-sheet and the employee cannot be made to suffer for any un-explained or undue delay on the part of the State or the investigating agency. It is, otherwise, not shown by the respondents that such delay was attributed to any act or omission on part of the petitioner. The right of State to proceed in accordance with law, is otherwise available by virtue of Article 351 of Civil Services Regulations if the charges are found proved in judicial proceedings and the public interest also would not be adversely affected, if the gratuity due is paid to the government servant. In view of the above discussions, this Court has no hesitation in holding that action of respondents in withholding payment of gratuity to petitioner is wholly illegal, arbitrary and cannot be sustained.

10. Writ petition succeeds and is allowed. The order dated 28.1.2012 passed by the respondent no. 3, so far as it relates withholding of gratuity payable to petitioner is concerned, is set aside. A writ of mandamus is issued to the respondents to forthwith release the withheld amount of gratuity together with 6% interest. In case the amount is not paid within four months from today, the petitioner shall be entitled to enhanced rate of interest at the rate of 8% per annum, and it shall be open for the authorities of the State to realise the additional interest from the salary of the officer found responsible for not ensuring release of gratuity to petitioner in terms of this order. .."

20. In light of the aforesaid and in view of the fact that from the perusal of the impugned order, the gratuity which has been withheld is only on account of the pendency of the criminal case and it does not indicate that there is any serious deliberation regarding the fact as to whether the petitioner was involved in a serious crime and the aspects which have been noted above especially in light of the Full Bench Decision of ***Shiv Gopal (supra), Devendra Kumar Sharma (supra)*** and ***Uday Narayan Ojha (supra)*** which have been reproduced hereinabove. The impugned order is apparently non-speaking and does not reflect any application of judicial mind. It was incumbent upon the Authorities to pass appropriate orders only taking into consideration the law laid down by this Court in the case of Shiv Gopal (supra).

21. Apparently, the Authorities have not applied their judicial mind nor have considered the case of the petitioner in light of the dictum of the full bench decision, accordingly, in the aforesaid circumstances, the impugned order in so far as it relates to withholding the gratuity of the petitioner is not sustainable.

22. In the aforesaid circumstances, the matter is remitted to the Authority concerned and the petitioner is permitted to file a detailed representation alongwith a copy of this judgment within two weeks raising the issue before the Authority concerned who shall consider the said representation and pass a reasoned and speaking order taking note of the decision of this Court in the case of Shiv Gopal (supra) as well as the observations made in this judgment. The decision shall be taken by the Authorities concerned within a period of four weeks and it shall be communicated to the petitioner.

23. The writ petition is allowed in the aforesaid terms. In the facts and circumstances, there shall be no order as to costs.

(2023) 2 ILRA 956
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.02.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-A No. 26819 of 2019
along with other connected cases

Eklavya Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anwar Ashfaq, Rina Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law – Departmental Inquiry - U.P. Government Servant (Discipline & Appeal) Rules, 1999: Rule 7 - In this St. not even a single departmental inquiry for major punishment is being conducted in accordance with law. All the delinquent employees are discharged repeatedly as proper procedure is not followed. The orders of the Supreme Court, of this Court as well as the Government Orders issued by the Chief Secretary, Government of U.P. appear to be falling on deaf ears. (Para 166)

In the leading Writ Petition No. 26819 of 2019, the petitioner has approached this Court challenging the impugned punishment order dated 02.08.2019 passed by the St. Government. Earlier also, the petitioner was punished by order dated 04.04.2013. The said order dated 04.04.2013 was set aside by this Court in Writ Petition No. 30422 (S/B) of 2016.

The writ petition was allowed on the ground that the inquiry was conducted in violation of Rule 7 of U.P. Government Servant (Discipline & Appeal) Rules, 1999. This Court gave a categorical finding that the earlier inquiry was concluded merely after taking reply of the petitioner, without holding any oral inquiry as per Rule 7 of Rules, 1999. The respondents again proceeded to hold an inquiry and passed the impugned order dated 02.08.2019. (Para 8)

A perusal of the inquiry report shows that on the charge-sheet, only reply of the delinquent officer/petitioner is considered and thereafter the findings on the same are given. **There is no reference to any oral evidence or documentary evidence and the manner in which the documentary evidence was proved, reflected in the inquiry report. On the basis of the said report final order of punishment** dated 02.08.2019 **is passed. The inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.** (Para 9, 10, 11)

Learned Chief Standing Counsel-III makes a St.ment before this Court, on instructions, that the St. shall ensure that appropriate departmental proceedings are initiated against the erring Inquiry Officers as well as the disciplinary authorities. He assures the Court that these proceedings shall also be brought to its logical conclusion, within a period of two months in accordance with law. (Para 168)

All the writ petitions are allowed and finally disposed of except Writ-A No. 8408 of 2022, which is not being disposed of finally to ensure compliance. Respondents may proceed to hold a fresh enquiry by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law. (E-4)

Precedent followed:

1. Prakash Chandra Agrawal Vs St. of U.P. & anr., Writ-A No. 2555 of 2022, decided on 07.05.2022 (Para 3)

2. St. of U.P. & ors. Vs Vijaya Nand Tiwari, Special Leave to Appeal No. 10331 of 2022 (Para 3)

3. St. of U.P. & anr. Vs Prakash Chandra Agrawal, Special Appeal Defective No. 97 of 2022, Order passed on 22.07.2022 (Para 4)

4. St. of U.P. & anr. Vs Prakash Chandra Agrawal, Special Appeal No. 351 of 2022, decided on 05.09.2022 (Para 5)

Present petitions challenge orders imposing major punishment.

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard Shri Jaideep Narain Mathur and Shri Upendra Nath Mishra, learned senior advocates, Shri Gaurav Mehrotra, Shri Ramesh Kumar Srivastava, Shri Raj Kumar Upadhyaya, Shri Pt. S. Chandra, Shri Apoorva Tewari and other counsels for the petitioners. Sri Kuldeep Pati Tripathi, learned Additional Advocate General, Sri Ravi Singh Sisodiya, learned Chief Standing Counsel-III, Shri Ratnesh Chandra and learned counsel for the respective department appeared for the respondents.

2. The departmental inquiries with regard to the major punishment in the State of U.P. are in utter chaos since long. Day in and out, punishment orders are challenged before this Court wherein Rule 7 of U.P. Government Servant (Discipline & Appeal) Rules, 1999 (hereinafter referred to as 'Rules of 1999'), is violated. In fact, entire roster of a Judge can pass without a single case of major punishment being placed before him in which Rule 7 of Rules of 1999 is complied with. Rule 7 (iii) and (vii) of Rules of 1999 reads as under:-

*"**7. Procedure for imposing major penalties** - Before imposing any major penalty on a Government Servant, an inquiry shall be held in the following manner :*

..

(iii) The charge framed shall be so precise and clear as to give sufficient indication to the charged Government

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Servant of the facts and circumstances against him. The proposed documentary evidence and the name of the witnesses proposed to prove the same alongwith oral evidence, if any, shall be mentioned in the charge-sheet.

...

(vii) Where the charged Government Servant denies the charge, the Inquiry 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 evidence, 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."

3. The seriousness of the situation resulted in repeated orders passed by the Supreme Court, by this Court as well as Government Orders issued. Relevant amongst these read as follows:-

This Court in the case of Prakash Chandra Agrawal vs. State of U.P. and another (Writ-A No.2555 of 2022, decided on 7.5.2022, passed the following order:

"1. Present writ petition is filed by the petitioner challenging his punishment order dated 11.04.2022 passed by Additional Chief Secretary/Principal Secretary, Secretariat Administration Department, Lucknow (respondent no.2).

2. By the impugned order, petitioner is given a punishment of censure entry and reversion to the post of Section Officer from the post of Under-Secretary.

3. At the very outset, learned counsel for petitioner submits that the inquiry was conducted by the Special Secretary, Medical Education Services, U.P., who submitted her report on 25.08.2021. He submits that in the present case, the inquiry officer was never provided the documents to which she had relied upon in the inquiry. The said documents were summoned by the inquiry officer during the conduct of the inquiry and were also perused by her. However, neither copy of the said documents were provided to the petitioner nor the same were permitted to be perused by the petitioner. Learned counsel for petitioner further submits that a bare perusal of the report shows that the inquiry was conducted in violation of Rule-7 of the U.P. Government Servants (Discipline and Appeal) Rules, 1999 (hereinafter referred to as 'Rules of 1999'), as no date, time and place was fixed in the inquiry.

4. I have perused the inquiry report as well as the impugned punishment order. A bare perusal of the same shows that the inquiry officer has, in fact, not merely failed to follow the procedure provided by Rule-7 of Rules of 1999 but has also placed burden upon the delinquent employee to prove that he is not guilty. In the first line of discussion, the inquiry officer states, that, delinquent employee through his reply to the charge-sheet/statements could not submit any evidence which would prove that the delinquent employee is wrongly charged.

5. In the present case, the Additional Chief Secretary was summoned along with the record. Today he is present in Court along with the record and with his assistance as well as assistance of the

counsels for parties, record is perused. Learned Standing Counsel also could not show from the record of the case that the procedure as prescribed under Rule-7 of Rules of 1999 is followed in conducting the inquiry and any date, time and place was fixed for evidence or evidence relied upon/summoned was provided to the petitioner.

6. Though the matter is simple as it is to be remanded back, but, in large number of cases filed before this Court, it is found that the inquiry with regard to major penalty is conducted in violation of Rule-7 of Rules of 1999. The present case is a glaring example of the same. Inquiry officer is a Special Secretary and the punishing authority is a Principal Secretary. Still a glaring error is committed in conduct of the inquiry by the inquiry officer and in failure to check the same by the punishing authority before punishment order was issued. It is not merely the duty of the inquiry officer to comply with the Rule-7 but also the duty of the punishing authority, while passing order of punishment, to ensure that the inquiry is conducted as per the procedure prescribed.

7. Such mistakes in large numbers are occurring for quite some time now in the State. The State Government as far back as on 22.04.2015 issued a detailed government order explaining at length the manner in which inquiry with regard to minor punishment or major punishment should be conducted. The government order explains at length what is already prescribed in Rule-7. When the inquiries were still not being conducted in proper manner, again under order of this Court dated 13.01.2021 passed in Writ-A No.12110 of 2020; 'State of U.P. & Others Vs. Vijay Anand Tiwari', a Government Order dated 10.02.2021 was issued by the State Government for compliance of Rule-7. Despite two aforesaid government orders, the inquiries are still not conducted in a proper manner. It is sad to note that the both the aforesaid government orders are also not being complied with by the officials. It is also noted that in large number of cases, after remand when the inquiry is re-conducted, the same procedural error is again made and again the inquiry report is submitted without following the due procedure as per Rule-7. This is also putting burden of unnecessary litigation upon this Court. It is the duty of the inquiry officer as well as the punishing authority to ensure compliance of Rule-7.

8. Since these incidences are abundant in number, therefore, this Court finds it necessary now to ensure that every inquiry officer, who at present is conducting an inquiry or appointed to conduct any inquiry in future, is provided proper training with regard to the manner and procedure for conducting the inquiry. Similarly the disciplinary authorities are also required to go through a training with regard to the manner in which the inquiries are to be conducted and, thereafter, punishment orders are to be passed. It goes without saying that the power exercised by the inquiry officers are quasi judicial in nature and for the same a judicially trained mind is required. The State Government is already having a Judicial Training and Research Institute (J.T.R.I.) which trains/educates the officers of the State Government on the legal compliances/procedures.

9. Therefore, Director, J.T.R.I., Lucknow is directed to forthwith prepare an appropriate program for training of the inquiry officers as well as for training of the disciplinary authorities so that such mistakes are not repeated. The J.T.R.I shall also issue an appropriate identifiable certificate to every officer after he/she

completes the training session. The relevant details of the said training session/certificates shall be referred by the officer concerned in every inquiry report submitted by him/her or punishment order passed. All the officers who are conducting any inquiry at present in the State shall attend the training without any delay and such inquiry officers shall conclude their inquiries only after their training is completed. Similarly the punishing authority shall also go through the required training before passing any punishment order and also refer to their session/certificate. It is further directed that no inquiry officer in future shall be appointed for departmental inquiry who has not received the training from the J.T.R.I. The State government shall bear the cost of the aforesaid training at J.T.R.I. at its own cost.

10. Senior Registrar of this Court shall forthwith send a copy of this order to the Chief Secretary of the State of U.P. as well as Director, J.T.R.I., Lucknow for its compliance.

11. Since, in the present case, admittedly, there is violation of Rule-7 as the documents relied upon by the inquiry officer were never provided to the petitioner nor the inquiry is conducted following the procedure prescribed under Rule-7, i.e., by summoning the witnesses of the department, giving chance of cross examination, providing opportunity to the delinquent employee/petitioner to call his witnesses, therefore, impugned order dated 11.04.2022 cannot stand and is set aside.

12. The matter is remanded back to respondent no.2 for conducting fresh inquiry after following proper procedure as prescribed under Rule-7.

13. With the aforesaid, the writ petition is allowed."

Supreme Court in the case of State of U.P. and others vs. Vijaya Nand Tiwari: Special Leave to Appeal No.10331 of 2022, has passed following comments on 13.7.2022 with regard to working of the State Government:

"As the inquiry was found to be in breach of Rule 7 (vii) of the U.P. Government Servant (Discipline and Appeal), Rules, 1999 (for short of 1999"), as such the learned Tribunal rightly set aside the order of punishment. In fact, the learned Tribunal allowed the back wages to the extent of 50% only. The same is rightly confirmed by the High Court. Therefore, there is no merit in the Special Leave Petition and the same deserves to be dismissed and is accordingly dismissed.

At this stage, it is required to be noted that while passing the impugned order, the High Court has shown its displeasure and observed and issued directions to the Chief Secretary, State of U.P. to look into the matter and appropriately direct the Secretaries of concerned departments to ensure that inquiry is conducted after observing Rule 7 of the Rules of 1999 in strict terms and more specially to lead oral evidence to prove the charges. The High Court has passed the following order -

"Before parting with the judgment, it is necessary to indicate that time and again Tribunal is causing interference in the order of punishment finding violation of Rule 7(vii) of the Rules of 1999.

Rule 7(vii) of the Rules of 1999 provides for oral evidence and invariably not followed in the enquiry despite catena of judgments of this Court causing interference the order of punishment. The violation of the Rule 7(vii) of the Rules of 1999 results not only interference of order of punishment but financial burden on the Government in shape of back wages.

The Chief Secretary, State of U.P. is directed to look into the matter and appropriately direct the Secretaries of concerned departments to ensure that enquiry is conducted after observing Rule 7 of the Rules of 1999 in strict terms and more specially to lead oral evidence to prove the charges.

Necessary direction in compliance of this order would be issued by office of Chief Secretary, State of U.P. with an information to this Court in reference to the present order.

The registry is directed to send the copy of this order to Chief Secretary, State of U.P. for compliance within a period of one month from the date of its receipt."

Nothing is on the record to show any further steps taken by the Chief Secretary, State of U.P. in furtherance of the aforesaid directions issued by the High Court. Only for that purpose, the Registry is directed to notify the matter before this Bench on 18.07.2022 so as to enable the learned counsel for the petitioners. to place on record what steps are taken by the Chief Secretary, State of U.P. in compliance with the directions issued by this Court, as above.

Pending applications shall stand disposed of."

4. Further, the Supreme Court in the aforesaid case of **Vijaya Nand Tiwari (supra) passed the following order on 18.7.2022.**

"Pursuant to our earlier Order dated 13.07.2022, an Affidavit is filed on behalf of the State of U.P. The affidavit is filed by one Chintan, posted as Prabhagiya Nirdeshak, Van Vibagh, Mau, U.P. which ought to have been filed either by the Chief Secretary or from the office of the Chief Secretary. In the affidavit, it is pointed out that, pursuant to the impugned judgment and order passed by the High Court, the Chief Secretary has issued the Circular dated 10.02.2021, directing that in all the departmental enquiry proceedings in the State, Rule 7(vii) of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 shall have to be followed.

When a pointed question was asked to the learned Senior Counsel appearing on behalf of the State that whether the Circular dated 10.02.2021 has been scrupulously thereafter followed or not. in the subsequent departmental enquires, he has stated that he has no further instructions in the matter and he cannot make any statement on that. Mere issuance of a Circular by the Chief Secretary to follow the rules is not sufficient. When the Chief Secretary has issued the Circular, it is his duty to see that his own Circular is followed.

Therefore, we direct the Chief Secretary to see that his own Circular dated 10.02.2021 to follow Rule 7 (vii) of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 shall be followed by all concerned Officers in the departmental enquiries so that the order of punishment on conclusion of the departmental enquiry is not set aside on the technical ground of not following the procedure as required under Rule 7 (vii) of the Rules, 1999. The Chief Secretary, State of Uttar Pradesh is directed to act accordingly. He must also ensure that if his own Circular is not followed, in that case, a further departmental enquiry be initiated against the erring officers, which may be including the insubordination and not following the Circular issued by the Chief Secretary.

With this, we close the present proceedings."

The **Government Order dated 10.8.2022 issued by the State Government** reads as under:

सर्वोच्च प्राथमिकता

संख्या–10/2022/738रिट/का–1–2022/13(9) 1998

प्रेषक,

दुर्गा शंकर मिश्र,

मुख्य सचिव

उत्तर प्रदेश शासन।

सेवा में,

समस्त अपर मुख्य सचिव/प्रमुख सचिव/सचिव,

उत्तर प्रदेश शासन।

कार्मिक अनुभाग–1 लखनऊः दिनांक 10 अगस्त, 2022

विषय– विभागीय कार्यवाहियों ;क्मचंतजउमदजंस मदुनपतपमेद्ध में सम्बन्धित अधिकारियों द्वारा उत्तर प्रदेश सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999 के नियम–7 ;अपपद्ध का अनुपालन न किये जाने के संबंध में।

महोदय,

मा0 उच्चतम न्यायालय के समक्ष दायर एस0एल0पी0 (सिविल) संख्या–10331/2022 उत्तर प्रदेश राज्य व अन्य बनाम विजयानन्द तिवारी में मा0 उच्चतम न्यायालय द्वारा पारित आदेश दिनांक 13.07.2022 सपठित आदेश दिनांक 18.07.2022 के मुख्य क्रियात्मक अंश निम्नवत् है–

"..... Mere issuance of a circular by the Chief Secretary to follow the rules is not sufficient. When the Chief Secretary has issued the circular, it is his duty to see that his own Circular is followed.

Therefore, we direct the Chief Secretary to see that his own circular dated 10.02.2021 to follow rule 7(vii) of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 shall be followed by all concerned officers in the departmental enquiries so that the order of punishment on conclusion of the departmental enquiry is not set aside on the technical ground of not following the procedure as required under Rule 7 (vii) of the Rules, 1999. The Chief Secretary, State of Uttar Pradesh is directed to act accordingly. He must also ensure that if his own Circular is not followed, in that case, a further departmental enquiry be initiated against the erring officers, which may be including the insubordination and not following the circular issued by the Chief Secretary.

With this, we close the present proceedings."

2- मा0 उच्चतम न्यायालय के उपर्युक्त आदेशों के समादर में आपका ध्यान शासनादेश संख्या–01/2021/13(9)1998–20रिट/का–1–2021 दिनांक–10.02.2021 की ओर आकृष्ट करते हुए मुझे आपसे यह कहने का निदेश हुआ है कि प्रत्येक विभागीय जांच के प्रकरण में उ0प्र0 सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999 के नियम–7 ;अपपद्ध का अनिवार्य रूप से अनुपालन सुनिश्चित कराया जाय, यदि उक्त का अनुपालन सुनिश्चित नहीं किया जाता हैं तो दोषी ;मततपदहद्ध अधिकारियो के विरूद्ध विभागीय जांच संस्थित करने की कार्यवाही भी की जाये।

जैम ैजंजम ळवअमतदउमदज पेनमक ळवअमतदउमदज व्तकमत कंजमक 16ण्8ण्2022ए ूपबी तमंकेे नदकमतरू

"संख्या–11/2022/सैतालिस–का–1/2022/13 ;3द्ध/2022

प्रेषक,

दुर्गा शंकर मिश्र,

मुख्य सचिव,

उत्तर प्रदेश शासन।

सेवा में,

समस्त अपर मुख्य सचिव/प्रमुख सचिव/सचिव,

उत्तर प्रदेश शासन।

कार्मिक अनुभाग–1 लखनऊ : दिनांक 16 अगस्त, 2022

विषयः उत्तर प्रदेश सरकारी सेवक के अन्तर्गत विभागीय कार्यवाहियों का नियमानुसार निस्तारण के संबंध में जाँच अधिकारियों को प्रशिक्षण दिए जाने के संबंध में।

कृपया रिट याचिका संख्या–2555/2022 रिट–ए प्रकाश चन्द्र अग्रवाल बनाम उत्तर प्रदेश राज्य व अन्य में मा0 उच्च न्यायालय द्वारा पारित आदेश दिनांक 07 मई 2022 के विरूद्ध राज्य सरकार द्वारा योजित विशेष अपील संख्या–97/2022 में मा0 उच्च न्यायालय द्वारा दिनांक–22.07.2022 को पारित किये गए आदेश का सन्दर्भ ग्रहण करने का कष्ट करें, जिसका कार्यकारी अंश निम्नवत् हैः

".....At this stage, we are only examining the issue regarding training part of Enquiry Officers in the State. Learned Single Judge vide order dated May 7, 2022 issued direction that no Enquiry Officer in future shall be appointed for departmental inquiry, who has not received training from the Judicial Training & Research Institute (hereinafter referred to as "JTRI"). We find

2 Special Appeal Defective No.97 of 2022 that this sweeping direction will withhold number of inquires, which are pending in the different departments in the State keeping in view the infrastructure available in the JTRI. For conducting such inquiries, the importance of training to the officers, who have to hold the departmental inquiry, may not be lost sight of keeping in view the repeated violation of principles of natural justice and the rules governing such inquiries.

5. In the affidavit filed today, certain communications have been annexed and figures have been provided regarding training programs conducted after passing of the aforesaid order and from April 1, 2022 onwards. It is claimed that departmental inquiry is one of the subject in the training programme of the Officers but what we find prima facie is that the training being imparted is not yielding the results as required, as still the rules and principles of natural justice are found to be violated. The training programme for such Officers has to be more robust and specialised, for which the State is directed to place before the Court a comprehensive plan.

6. As the sweeping directions issued by the learned Signle Judge will withhold all the departmental inquiries, we stay those directions to the extent - "that no Officer in future shall be appointed for departmental inquiry unless he has received training from JTRI'. However, we expect that in the pending inquiries, the Officers holding such inquiries shall be sensitised without any delay and further the training programs of the Officers shall be regular exercise."

2- *मा0 उच्च न्यायालय के आदेश दिनांक–22.07.2022 के क्रम में अवगत कराना है कि उत्तर प्रदेश राज्य के सरकारी सेवकों के विरूद्ध अनुशासनिक कार्यवाहियाँ किए जाने के संबंध में उत्तर प्रदेश सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999 प्रथम संशोधन नियमावली, 2014, शासनादेश क्रमशः दिनांक 22.04.2015, दिनांक– 11.08.2015, दिनांक 10.02.2021 और दिनांक 19.07.2022 मुख्य रूप से निर्गत किए गए हैं।*

3. उत्तर प्रदेश सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999 के नियम–7 के अधीन संस्थित अनुशासनिक जाँच के प्रकरण में नियुक्त जाँच अधिकारियों के मार्गदर्शन हेतु मुख्य रूप से निम्नांकित दिशा निर्देश शासनादेश दिनांक 19.07.2022 के माध्यम से निर्गत किए गए है:

(अ)–जिसका अनुपालन आवश्यक है ;क्वश्ेद्ध.

(I) अपचारी कार्मिक द्वारा यदि अभिलेखों के निरीक्षण की अपेक्षा की जाती हो तो उसे निरीक्षण का अवसर अवश्य प्रदान किया जाये।

(II) अपचारी कार्मिक से अपना लिखित स्पष्टीकरण 15 दिन से 01 माह के अन्दर प्रस्तुत करने को कहा जाये।

(III) यदि जांच, पूर्व नियुक्ति के स्थान से संबंधित है तो अपचारी सरकारी सेवक को उस स्थान पर जाने की अनुमति दे दी जाये, जहाँ उसे अभिलेख आदि देखने है।

(IV) जाँच अधिकारी द्वारा अपचारी कार्मिक को साक्ष्य के अन्तर्गत दिये गये अभिलेखों की स्वीकार्यता के संबंध में आपत्ति प्रकट करने का अवसर भी दिया जाये।

(V) आरोपित सरकारी सेवक को अपना पक्ष प्रस्तुत करने का युक्तियुक्त अवसर दिया जाना चाहिए। यदि आरोपित सरकारी सेवक आरोपों से इन्कार करता हैं, वहां जांच अधिकारी आरोप पत्र में प्रस्तावित साक्षियों ;ॅपजदमेमेद्धको प्रतिपरीक्षण ;ब्तवे.म्गंउपदंजपवदद्ध हेतु बुला सकता है। जांच अधिकारी द्वारा उनके मौखिक साक्ष्यों को आरोपित अधिकारी की उपस्थिति में अभिलिखित किया जाये। उपर्युक्त साक्ष्यों को अभिलिखित करने के पश्चात जाँच अधिकारी उस मौखिक साक्ष्य को माँगेगा और उसे अभिलिखित करेगा जिसे आरोपित सरकारी सेवक ने अपनी प्रतिरक्षा में अपने लिखित कथन में प्रस्तुत करना चाहा था।

प्रतिबन्ध यह है कि जाँच अधिकारी ऐसे कारणों से जो लिखित रूप से अभिलिखित किए जाएगें, किसी साक्षी को बुलाने से इन्कार कर सकेगा।

(VI) जाँच अधिकारी द्वारा जाँच के दौरान गवाहों के बयान आरोपित सरकारी सेवक के समक्ष तथा विधिवत शपथ दिलवाने के उपरान्त लिया जाये।

(VII) जाँच अधिकारी द्वारा संपूर्ण जांच की कार्यवाही में कृत कार्यवाहियों का आदेश पत्रक ;वतकमत ैममजद्ध तैयार किये जाये जिस पर यथासमय आरोपित अधिकारी एवं अन्य साक्षियों के हस्ताक्षर कराया जाये। जाँच आख्या प्रस्तुत करते समय जाँच आख्या के साथ उक्त ओदश पत्रक को संलग्नक के रूप में अनुशासनिक प्राधिकारी को प्रेषित किया जाये।

(ब)–निषेधात्मक निर्देश ;क्वदश्जेद्ध.

(I) सामान्यतया अपचारी कार्मिक को अपना स्पष्टीकरण दिये जाने हेतु 02 माह से अधिक का समय न दिया जाये। किन्तु अपरिहार्य परिस्थितियों में उक्त समय सीमा में युक्ति–युक्त ;त्मेंवदंइसमद्ध वृद्धि की जा सकती है।

(II) जाँच अधिकारी को जाँच आख्या में प्रस्तावित दण्ड के विषय में कोई मंतव्य अथवा संस्तुति अंकित नही की जाये।

(III) बिना उचित कारण के जांच कार्यवाही लम्बित नही रखी जाये।

(IV) सुनवाई, साक्ष्य अथवा अन्य कार्यवाही हेतु नियत तिथियों को आगे न टाला जाये। यदि ऐसा करना अपरिहार्य हो तो उसे सकारण आदेश पत्रक में उल्लिखित किया जाये।

4. वर्तमान में प्रचलित अनुशासनिक कार्यवाहियों से सम्बन्धित जांच अधिकारियों को प्रस्तर–3 में उल्लिखित निर्देशों को उपलब्ध, कराते हुए उनसे इस आशय का प्रमाण पत्र प्राप्त कर लिया जाये कि उनके द्वारा उक्त निर्देशों को पढ़कर भली–भांति समझ लिया गया है। भविष्य में भी जितनी अनुशासनिक कार्यवाहियां संस्थित की जाएं उनके जांच अधिकारियों को भी उनकी नियुक्ति पत्र के साथ ही इसकी प्रति संलग्न करते हुए इस आशय का प्रमाण–पत्र प्राप्त कर लिया जाये कि उनके द्वारा इन निर्देशों को पढ़कर भली–भांति समझ लिया गया है।

5. उपर्युक्त के आलोक में अनुरोध है कि अपने विभाग के नियंत्रणाधीन समस्त प्रशिक्षण संस्थाओं को उपर्युक्त प्रस्तर–2 में उल्लिखित नियमावलियों/शासनादेशों की व्यवस्थाओं का संज्ञान लेते हुए आधार भूत प्रशिक्षण (Induction Training) कार्यक्रमों में पांच/छः सत्र ;Period) एवं सेवा कालीन प्रशिक्षण (In Service Training) के कार्यक्रमों में एक/दो सत्र (Period) अनुशासनिक जाँच कार्यवाही/प्रक्रिया के संबंध में रखा जाये। इसके साथ ही शीर्ष प्राथमिकता के आधार पर, अधिक से अधिक संख्या में प्रभावी प्रशिक्षण कराये जाने हेतु व्यापक योजना (Comprehensive plan) तथा प्रस्तर–4 मे उल्लिखित बिन्दु के सम्बन्ध में की गई कार्यवाही की सूचना कार्मिक विभाग को दिनांक 15.09.2022 तक उपलब्ध कराने का कष्ट करें।

6. उपर्युक्त प्रशिक्षण कार्यक्रमों में उन अधिकारियों को वरीयता प्रदान की जाये जिन्हें संप्रति प्रचलित किसी अनुशासनिक कार्यवाही में जाँच अधिकारी नामित किया गया हो।

A Division Bench of this Court in the case of State of U.P. and another vs. Prakash Chandra Agrawal (Special Appeal Defective No.97 of 2022) passed an order on 22.7.2022, relevant portion of the same reads:

".....4. At this stage, we are only examining the issue regarding training part of Enquiry Officers in the State. Learned Single Judge vide order dated May 7, 2022 issued direction that no Enquiry Officer in future shall be appointed for departmental inquiry, who has not received training from the Judicial Training & Research Institute (hereinafter referred to as "JTRI"). We find that this sweeping direction will withhold number of inquires, which are pending in the different departments in the State keeping in view the infrastructure available in the JTRI. For conducting such inquiries, the importance of training to the officers, who have to hold the departmental inquiry, may not be lost sight of keeping in view the repeated violation of principles of natural justice and the rules governing such inquiries.

5. In the affidavit filed today, certain communications have been annexed and figures have been provided regarding training programs conducted after passing of the aforesaid order and from April 1, 2022 onwards. It is claimed that departmental inquiry is one of the subject in the training programme of the Officers but what we find prima facie is that the training being imparted is not yielding the results as required, as still the rules and principles of natural justice are found to be violated. The training programme for such Officers has to be more robust and specialised, for which the State is directed to place before the Court a comprehensive plan.

6. As the sweeping directions issued by the learned Signle Judge will withhold all the departmental inquiries, we stay those directions to the extent - "that no Officer in future shall be appointed for departmental

inquiry unless he has received training from JTRI'. However, we expect that in the pending inquiries, the Officers holding such inquiries shall be sensitised without any delay and further the training programs of the Officers shall be regular exercise.

7. Adjourned to August 24, 2022."

5. Thereafter, another **Division Bench of this Court has also passed a detailed order on 5.9.2022 in the case of State of U.P. and another vs. Prakash Chandra Agarwal: Special Appeal No.351 of 2022.** The order dated 5.9.2022 reads as under:

"This Court by means of an order dated 22.07.2022 had directed the State to place before the Court a comprehensive plan for training of officers of the State Government who are entrusted with conducting inquiries in the departmental proceedings and also those who are to take final decision in the matter in their capacity as appointing authorities/disciplinary authorities. On 02.09.2022 the Court again required the State to file the said affidavit.

In compliance of the said orders dated 22.07.2022 and 02.09.2022, an affidavit has been filed by the learned State Counsel sworn in by the Special Secretary, Secretariat Administration Department. The said affidavit is taken on record.

In the affidavit filed today, it has been stated that the Chief Secretary of the State of Uttar Pradesh has issued directions by means of his letter/order dated 16.08.2022 for continuing various training programmes in all the departments. The letter/order has been circulated by the Additional Chief Secretary in the Department of Karmik. According to the said letter/order, the departments have required to prepare a comprehensive plan for effective training of the officers in good numbers on priority basis and necessary information has also been directed to be furnished to the Karmik Department till 15.09.2022.

Learned State Counsel has submitted that the said information is to be received by the Karmik Department by 15.09.2022, as such once the necessary information is received, the affidavit as ordered vide order of the Court, dated 22.07.2022 shall be filed.

For the said purpose, we direct that after collecting the information as mentioned in the order dated 16.08.2022 of the chief Secretary of the State of U.P., an affidavit shall be filed before this Court by the next date of listing giving therein the details of the comprehensive plan for training.

Learned State Counsel has also submitted that as a result of the order passed by the learned Single Judge, which is under appeal herein, the departmental proceedings in the entire State of U.P. have been put to halt though the Court by means of the order dated 22.07.2022 had stayed certain direction issued by the learned Single Judge to the extent, "that no Officer in future shall be appointed for departmental inquiry unless he has received training from JTRI". However, it has further been stated that after the said stay order dated 22.07.2022 though now enquiry officers are being appointed for conducting the departmental enquiries without receiving the training from JTRI but so far as the appointing/disciplinary authorities are concerned, they are unable to take final decision in the matters where the enquiries have been taken to final stages.

Accordingly, we provide that the directions issued by the learned Single Judge to the extent "punishing authority shall go through the required training

before passing any punishment order and also refer to their session/certificate" shall remain stayed. However, this order whereby a part of the order passed by learned Single Judge has been stayed, does not mean that the appointing/punishing authorities in the State of U.P. shall not undergo the requisite training as directed by learned Single Judge at JTRI.

We make it clear that directions issued by learned Single Judge are an expression of concerns of the Court relating to various irregularities which are noticed by the Court almost on everyday basis in the matters relating to departmental proceedings where on account of un-acquaintance with the exact procedure for conducting departmental proceedings and thereafter for passing the appropriate punishment orders, the erring officers many times go scot-free."

6. Since 2.1.2023 till date, more or less all the petitions which have come before this Court as fresh or for hearing, where order imposing major punishment is under challenge, are part of this bunch. The argument in each of these is with regard to violation of both Rule 7 (iii) and (vii) of the Rules of 1999. Thus, these all writ petitions can be decided on the same ground. However, learned Chief Standing Counsel-III requested the Court to decide each and every case separately.

7. On request of Sri Ravi Singh Sisodia, learned Chief Standing Counsel-III, this Court has taken up each and every case separately.

Writ-A No.26819 of 2019

8. In the leading Writ Petition No.26819 of 2019, the petitioner has approached this Court challenging the impugned punishment order dated 02.08.2019 passed by the State Government. Earlier also, the petitioner was punished by order dated 04.04.2013. The said order dated 04.04.2013 was set aside by this Court in Writ Petition No.30422 (S/B) of2016 (Eklavya Kumar Vs. State of U.P. and others). The writ petition was allowed on the ground that the inquiry was conducted in violation of Rule 7 of U.P. Government Servant (Discipline & Appeal) Rules, 1999 (hereinafter referred to as 'Rules of 1999'). This Court gave a categorical finding that the earlier inquiry was concluded merely after taking reply of the petitioner, without holding any oral inquiry as per Rule 7 of Rules,1999. The respondents again proceeded to hold an inquiry and passed the impugned order dated 02.08.2019. Now, learned counsel for the petitioner submits that the impugned order dated 02.08.2019, shows that on the charge sheet, reply of the petitioner was obtained and no oral inquiry took place, and thus again procedure prescribed in Rule 7, is not followed.

9. Learned counsel for the petitioner has placed before the Court the inquiry report dated 21.09.2018 (Annexure -9 to the writ petition). A perusal of the inquiry report shows that on the charge-sheet, only reply of the delinquent officer/petitioner is considered and thereafter the findings on the same are given. There is no reference to any oral evidence or documentary evidence and the manner in which the documentary evidence was proved, reflected in the inquiry report. On the basis of the said report final order of punishment dated 02.08.2019 is passed.

10. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999;

inasmuch as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

11. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

12. Hence, the impugned order dated 02.08.2019, cannot stand and is set aside. Consequences to follow.

13. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law. The writ petition is allowed.

Writ-A No.3171 of 2021

14. In this petition petitioner has challenged the impugned punishment order dated 13.1.2021 passed by respondent no.2.

15. A perusal of the impugned order dated 13.1.2021, shows that on the charge sheet, only the reply of the petitioner was obtained.

16. Learned counsel for the petitioner has placed the inquiry report dated 24.7.2020. A perusal of the inquiry report shows that on the charges, only reply of the delinquent officer/petitioner is considered and thereafter the findings on the same are given. There is non-consideration of any oral evidence or documentary evidence and the manner in which the documentary evidence was proved, reflected in the inquiry report. On the basis of the said report final order of punishment dated 13.1.2021 is passed.

17. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999 as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

18. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in breach of Rule 7 of Rules of 1999.

19. In view thereof, the impugned order dated 13.1.2021, cannot stand and is set aside. Consequences to follow.

20. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law. The writ petition is allowed.

Writ-A No.3909 of 2021

21. In this petition, the petitioner has challenged the impugned punishment order dated 16.2.2016.

22. The petitioner was initially punished by order dated 16.02.2016. The said order was challenged by the petitioner by way of Claim Petition no.2251 of 2016

(Mithlesh Kumar Vs. State of U.P. and another) before the State Public Services Tribunal, Lucknow. The Tribunal by its judgment and order dated 27.03.2021, on finding that "Since gross irregularity in conducting the inquiry has been committed, it would be appropriate to remand back the matter for inquiry afresh from the stage of reply submitted by the petitioner", set aside the punishment order.

23. Thereafter, fresh inquiry was conducted against the petitioner and the inquiry report was submitted on 13.09.2019. A perusal of the inquiry report shows that no oral inquiry was conducted and no witnesses on behalf of the department were produced in inquiry to prove the evidence of the department and only on the basis of reply of the delinquent officer, the inquiry was concluded. On the basis of the said inquiry, impugned order dated 31.12.2020 is passed.

24. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999 as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

25. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

26. Hence, the impugned order dated 31.12.2020, cannot stand and is set aside. Consequences to follow.

27. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

28. The writ petition is allowed.

Writ-A No.19998 of 2021

29. In this petition petitioner has challenged the impugned orders dated 16.6.2021 and 18.6.2021.

30. A perusal of the impugned orders dated 16.6.2021 and 18.6.2021, show that on the charge sheet, reply of the petitioner was obtained.

31. Learned counsel for the petitioner has placed the inquiry report dated 2.11.2020. A perusal of the inquiry report shows that on the charges, only reply of the delinquent officer/petitioner is considered and thereafter the findings on the same are given. Oral evidence was not produced by the department to prove the charge. On the basis of the said report, impugned orders dated 16.6.2021 and 18.6.2021 are passed.

32. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999 as no opportunity to petitioner was given to cross-examine the witnesses. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

33. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

34. Hence, the impugned orders dated 16.6.2021 and 18.6.2021, cannot stand and are set aside. Consequences to follow.

35. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

36. The writ petition is allowed.

Writ-A No.23387 of 2021

37. In this petition, petitioner has challenged the impugned orders dated 13.11.2018 and 24.7.2019.

38. Learned counsel for the petitioner has placed the inquiry report dated 8.9.2016. A perusal of the inquiry report shows that no date, time and place was fixed for holding enquiry and that on the charges, only reply of the delinquent officer/petitioner is considered and thereafter the findings on the same are given. There is non-consideration of any oral evidence or manner in which the documentary evidence was proved. On the basis of the said report order of punishment dated 13.11.2018 is passed. Against the said order, the petitioner preferred an appeal, which is also rejected on 24.7.2019.

39. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999 as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

40. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

41. Hence, the impugned orders dated 13.11.2018 and 24.7.2019, cannot stand and are set aside. Consequences to follow.

42. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

43. The writ petition is allowed.

Writ-A No.5364 of 2022

44. In this petition, petitioner has challenged the impugned punishment order dated 20.7.2022.

45. A perusal of the impugned order dated 20.7.2022, shows that on the charge sheet, reply of the petitioner was obtained.

46. Learned counsel for the petitioner has placed the inquiry report dated 13.02.2022. A perusal of the inquiry report shows that on the charge, only reply of the delinquent officer/petitioner is considered and thereafter the findings on the same are given. There is non-consideration of any oral evidence or documentary evidence and the manner in which the documentary evidence was proved, reflected in the inquiry report. On the basis of the said report final order of punishment dated 20.7.2022 is passed.

47. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999 as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

48. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

49. Hence, the impugned order dated 20.7.2022, cannot stand and is set aside. Consequences to follow.

50. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

51. The writ petition is allowed.

Writ-A No.7508 of 2022

52. In this petition petitioner has challenged the impugned punishment order dated 22.9.2022.

53. A perusal of the impugned order dated 22.9.2022 shows that on the charge sheet reply of the petitioner was obtained.

54. Learned counsel for the petitioner has placed the inquiry report dated 22.4.2022. A perusal of the inquiry report shows that on the charge, only reply of the delinquent officer/petitioner is considered and thereafter the findings on the same are given. There is non-consideration of any oral evidence or documentary evidence and the manner in which the documentary evidence was proved, reflected in the inquiry report. On the basis of the said report final order of punishment dated 22.9.2022 is passed.

55. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999 as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

56. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

57. Hence, the impugned order dated 22.9.2022, cannot stand and is set aside. Consequences to follow.

58. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

59. The writ petition is allowed.

Writ-A No.8737 of 2022

60. In this petition petitioner has challenged the impugned punishment order dated 18.10.2022. A perusal of the impugned order dated 18.10.2022, shows

that on the charge sheet, reply of the petitioner was obtained. Learned counsel for the petitioner has placed the inquiry report dated 18.1.2020. A perusal of the inquiry report yet again shows that on the charge, only reply of the delinquent officer/petitioner is considered and thereafter the findings on the same are given. There is non-consideration of any oral evidence or documentary evidence and the manner in which the documentary evidence was proved. On the basis of the said report final order of punishment dated 18.10.2022 is passed.

61. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999 as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

62. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

63. Hence, the impugned order dated 18.10.2022, cannot stand and is set aside. Consequences to follow.

64. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

65. The writ petition is allowed.

Writ-A No.8750 of 2022

66. In this petition petitioner has challenged the impugned punishment order dated 22.9.2022. An undated enquiry report along with the show cause notice dated 29.7.2022 was served upon the petitioner. When procedural irregularities were raised in reply to the show cause notice, the punishing authority has refused to consider the same as is noted in the impugned order dated 22.9.2022.

67. There is non-consideration of any oral evidence or documentary evidence and the manner in which the documentary evidence was proved reflected in the inquiry report. On the basis of the said report final order of punishment dated 22.9.2022 is passed.

68. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999 as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner. Even his objection is not considered by the disciplinary authority.

69. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

70. Hence, the impugned order dated 22.9.2022, cannot stand and is set aside. Consequences to follow.

71. The respondents may, if they so desire, proceed to hold a fresh inquiry

against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

72. The writ petition is allowed.

Writ-A No.8860 of 2022

73. In this petition petitioner has challenged the impugned orders dated 17.8.2022 and 5.12.2022.

74. Learned counsel for the petitioner has placed the inquiry report dated 12.4.2018. A perusal of the inquiry report shows that no date, time and place was fixed for holding enquiry and that on the charge, only reply of the delinquent officer/petitioner is considered and thereafter the findings on the same are given. There is non-consideration of any oral evidence or documentary evidence and the manner in which the documentary evidence was proved, reflected in the inquiry report. On the basis of the said report order of punishment dated 17.8.2022 is passed. Against the said order the petitioner preferred an appeal, which is also rejected on 5.12.2022.

75. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999 as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

76. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

77. Hence, the impugned orders dated 17.8.2022 and 5.12.2022, cannot stand and are set aside. Consequences to follow.

78. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

79. The writ petition is allowed.

Writ-A No.8982 of 2022

80. In this petition petitioner has challenged the impugned punishment order dated 13.4.2022.

81. A perusal of the impugned order dated 13.4.2022, shows that on the charge sheet, reply of the petitioner was obtained.

82. Learned counsel for the petitioner has placed the inquiry report dated 22.1.2021. A perusal of the inquiry report shows that on the charge only reply of the delinquent officer/petitioner is considered and thereafter the findings on the same are given. There is non-consideration of any oral evidence or documentary evidence and the manner in which the documentary evidence was proved, reflected in the inquiry report. On the basis of the said report final order of punishment dated 13.4.2022 is passed.

83. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999 as there is no oral evidence submitted by the

department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

84. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

85. Hence, the impugned order dated 13.4.2022, cannot stand and is set aside. Consequences to follow.

86. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

87. The writ petition is allowed.

Writ-A No.108 of 2023

88. In this petition petitioner has challenged the impugned punishment order dated 13.9.2022.

89. The petitioner filed Writ Petition No.1685 (SB) of 2013 challenging the punishment order dated 11.10.2013 which was allowed on 05.08.2016 finding that no oral inquiry was conducted and directing that fresh inquiry be conducted from the stage of submitting reply to the charge sheet filed by the petitioner within five months from the date of the order. The Court had granted only five months time. Despite the same, five years have taken in holding inquiry against a person who is now retired.

90. An undated inquiry report was served upon the petitioner along with covering letter dated 25.08.2018.

91. A perusal of the inquiry report shows that the department did not produce any witnesses to prove their documents. Thus, the inquiry is conducted without any oral evidence

92. After submission of inquiry report on 04.12.2018, punishment order was passed on 13.09.2022, only on the basis of reply dated 6.3.2019 submitted by the petitioner.

93. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

94. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999 as no oral inquiry is conducted.

95. Hence, the impugned order dated 13.9.2022 cannot stand and is set aside. Consequences to follow.

96. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law and complete inquiry positively within six months from today. In case of failure to complete the same within six months, the same shall stand lapsed.

97. The writ petition is allowed.

Writ-A No.388 of 2023

98. In this petition petitioner has challenged the impugned punishment order dated 31.10.2022 passed by the State Government.

99. A perusal of the impugned order dated 31.10.2022 shows that on the charge sheet reply of the petitioner was obtained. Learned counsel for the petitioner has placed the inquiry report dated 23.01.2020. A perusal of the inquiry report shows that on the charge, only reply of the delinquent officer/petitioner is considered and thereafter the findings on the same are given. There is non-consideration of any oral evidence or the manner in which the documentary evidence was proved. On the basis of the said report final order of punishment dated 31.10.2022 is passed.

100. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999 as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross- examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

101. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999. Hence, the impugned order dated 31.10.2022, cannot stand and is set aside. Consequences to follow. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

102. The writ petition is allowed.

Writ-A No.940 of 2023

103. In this petition petitioner has challenged the impugned punishment order dated 04.11.2022 passed by the State Government.

104. A perusal of the impugned order dated 04.11.2022 shows that on the charge sheet 23.10.2020 and additional charge-sheet dated 18.01.2021 reply of the petitioner was obtained. Learned counsel for the petitioner has placed the inquiry report dated 17.10.2022. A perusal of the inquiry report shows that on the charges only reply of the delinquent officer/petitioner is considered and thereafter the findings on the same are given. There is non-consideration of any oral evidence or documentary evidence or the manner in which the documentary evidence was proved. On the basis of the said report, final order of punishment dated 04.11.2022, is passed.

105. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999; inasmuch as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross- examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

106. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

107. Hence, the impugned order dated 04.11.2022, cannot stand and is set aside. Consequences to follow.

108. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

109. The writ petition is allowed.

Writ-A No.6838 of 2022

110. In this petition petitioner has challenged the impugned punishment order dated 29.09.2022 passed by the State Government.

111. Earlier also petitioner was punished by order dated 28.07.2021. The said order dated 28.07.2021 was set aside by this Court in Writ-A No.445 of 2022 (Dinesh Kumar Gupta Vs. State of U.P. and others). The Court categorically found that the inquiry proceedings have been conducted in gross violation of principles of natural justice as well as provisions contained in Rule 7 of U.P. Government Servant (Discipline & Appeal) Rules, 1999 and no date, time and place was fixed by the inquiry officer. The writ petition was allowed permitting the department to conduct fresh inquiry in accordance with law.

112. A perusal of the impugned order dated 29.09.2022, shows that on the charge sheet 07.08.2020 reply of the petitioner was obtained. Learned counsel for the petitioner has placed the inquiry report dated 05.09.2022. A perusal of the inquiry report shows that on the charges, only reply of the delinquent officer/petitioner is considered and thereafter the findings of the same are given. There is non-submission of any oral evidence and the manner in which the documentary evidence was proved, reflected in the inquiry report. On the basis of the said report final order of punishment dated 29.09.2022 is passed.

113. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999 as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross- examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

114. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

115. Hence, the impugned order dated 29.09.2022, cannot stand and is set aside. Consequences to follow.

116. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

117. The writ petition is allowed.

Writ-A No.2922 of 2019

118. In this petition petitioner has challenged the impugned punishment order passed by the respondent no. 4.

119. Learned counsel for the petitioner has drawn attention of this Court towards the inquiry report dated 27.07.2018. A perusal of the inquiry report shows that the Inquiry Officer has not fixed any date, time and place of and no oral evidence/inquiry has been conducted, as such there is gross violation of Rule (vii) of Rules of 1999. The Punishing Authority has not even considered the reply to the show cause notice. The impugned order is

absolutely, non-speaking and no reason for recording the conclusion given, which was mandatory on the part of the punishing authority.

120. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

121. In view thereof, the impugned punishment order dated 07.01.2019 is set aside. Consequences to follow.

122. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law. The writ petition is allowed.

Writ-A No.25694 of 2019

123. In this petition petitioner has approached this Court challenging the punishment order dated 7.10.2016 and the order dated 15.4.2019 and the inquiry report submitted along with the covering letter dated 20.7.2012.

124. Learned counsel for the petitioner submits that the impugned orders have been passed in a most arbitrary manner which are in violations of the Rules of 1999. After filing reply to the charge sheet by the petitioner, no oral inquiry was conducted and no date, time and place was fixed. The Inquiry Officer has submitted the enquiry report straightaway, after submission of the reply by the petitioner to the charge sheet. No witnesses have been examined by the Inquiry Officer to prove the documentary evidence.

125. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

126. In view thereof, the impugned punishment order dated 07.10.2016 and the order dated 15.04.2019, are set aside. Consequences to follow.

127. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

128. The writ petition is allowed.

Writ-A No.31943 of 2019

129. In this petition also the common ground of challenge is that while passing the impugned order of punishment dated 10.6.2019 on the inquiry report dated 16.4.2019 that the respondents have not afforded the petitioner with an opportunity to cross-examine the witnesses and record their oral evidence against the charges levelled, in utter violation of Rule 7(vii) of Rules of 1999. While passing the impugned order the reply given by the petitioner has not been taken into account and a major punishment was imposed upon the petitioner. The appellate authority while passing the appellate order also did not apply its mind and considered the circumstances, the punishment and the appellate order are unlawful and the same cannot stand in the eyes of law.

130. Learned Chief Standing Counsel could not dispute the fact that the inquiry

report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

131. Hence, the impugned punishment order as well as the appellate order are set aside. Consequences to follow.

132. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

133. The writ petition is allowed.

Writ-A No.32749 of 2019

134. In this petition, the petitioner has approached the Court challenging the punishment order dated 11.1.2010 passed against the petitioner in the departmental proceedings as well as appellate order dated 16.1.2013 and the order passed on the review petition. Learned counsel for the petitioner has placed the inquiry report dated 8.7.2009. A perusal of the inquiry report shows that on the charge, only reply of the delinquent officer/petitioner is considered and thereafter the findings of the same are given. There is non-consideration of any oral evidence or documentary evidence and the manner in which the documentary evidence was proved, reflected in the inquiry report. On the basis of the said report, final order of punishment dated 8.7.2009, is passed.

135. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999; inasmuch as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

136. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

137. Hence, the impugned punishment order dated 11.1.2010 as well as the appellate order dated 16.1.2013 and the order dated 16.09.2019, passed in the review petition cannot stand and is set aside. Consequences to follow.

138. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

139. The writ petition is allowed.

Writ-A No.3286 of 2020

140. In this petition order under challenge is the punishment order dated 30.11.2018 passed by the respondent no.2.

141. Learned counsel for the petitioner has placed the inquiry report dated 12.9.2018. A perusal of the inquiry report shows that on the charge, only reply of the delinquent officer/petitioner is considered and thereafter the findings of the same are given. There is non-consideration of any oral evidence or documentary evidence and the manner in which the documentary evidence was

proved, reflected in the inquiry report. On the basis of the said report, final order of punishment dated 30.11.2018, is passed.

142. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999; inasmuch as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

143. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999.

144. Hence, the impugned punishment order dated 30.11.2018 and the appellate order dated 1.11.2019, cannot stand and is set aside. Consequences to follow.

145. The respondents may, if they so desire, proceed to hold a fresh inquiry against the petitioner by serving a fresh charge sheet along with documentary and oral evidence and following the proper procedure of law.

146. The writ petition is allowed.

Writ-A No.4614 of 2020

147. In this petition the order under challenge is the punishment order dated 19.10.2010 and the appellate order dated 29.11.2010 passed by the respondent nos. 1 and 2.

148. Learned counsel for the petitioner has placed the inquiry report along with the covering letter dated 4.2.2010. A perusal of the inquiry report shows that on the charge, only reply of the delinquent officer/petitioner is considered and thereafter the findings of the same are given. There is non-consideration of any oral evidence or documentary evidence and the manner in which the documentary evidence was proved, reflected in the inquiry report. On the basis of the said report, final order of punishment dated 19.10.2010, is passed.

149. Learned counsel for the petitioner submits that the entire inquiry is in violation of Rule 7 of Rules of 1999; inasmuch as there is no oral evidence submitted by the department to prove the documents against the petitioner and no opportunity to petitioner was given to cross-examine the same. The inquiry is concluded only on the basis of the reply submitted by the petitioner.

150. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order have been passed in violation of Rule 7 of Rules of 1999.

151. Hence, the punishment order dated 19.10.2010 as well as the appellate order dated 29.11.2019, impugned herein cannot stand and are set aside. Consequences to follow.

152. The writ petition is allowed.

Writ-A No.24001 of 2020

153. In this petition the order under challenge is the dismissal order dated 7.8.2020 passed by the respondent no. 1.

154. As per the charge sheet dated 24.1.2020, two charges were framed against the petitioner and in the same certain documents were referred to as the evidence. The charge sheet does not even refer to any witness on the partment of the department to prove the said documents. The charge sheet seeks a reply from the petitioner within 15 days and also requires that in case he desires to any personal opportunity of hearing and if he wants to produce any witness and gives details of the same.

155. It is surprising that the department instead of bringing its witness to prove its documents, is asking the delinquent officer to submit his early evidence. No oral evidence, in fact, in the case of date and place of early evidence in the case has taken place, as is reflected from the impugned order, which is passed in furtherance of the show cause notice only without there being any inquiry.

156. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order have been passed in breach of Rule 7 of Rules of 1999.

157. Hence, the impugned punishment order dated 7.8.2020, cannot stand and is set aside. Consequences to follow.

158. In case any inquiry is to be conducted the same shall be initiated by serving a fresh charge-sheet containing therein documentary as well as oral evidence and the same shall be concluded within a period of four months. In case the State fails to conclude the inquiry within four months, it is restrained from holding it further.

159. The writ petition is allowed.

Writ-A No.8408 of 2022

160. In this petition, the petitioner has challenged the impugned punishment order dated 24.1.2022 and review order dated 19.7.2022.

161. The facts of the present inquiry shows the manner in which the inquiries are being conducted in the State of U.P. The charge sheet dated 15.12.2018 was given to the petitioner in which only documentary evidence was referred to, and no oral evidence or names of the witnesses on behalf of the department were given. During course of inquiry also, no witnesses were produced by the department. The delinquent officer moved an application dated 27.02.2019 praying that Shri Deepak Mathur, Section Officer, may be summoned along with the note sheet and the complaint file. The said application was allowed by the inquiry officer i.e. Commissioner, Lucknow Region, Lucknow, by the order dated 18.03.2021 requiring Shri Deepak Mathur to be present on 25.03.2021. Thereafter, on the date fixed, i.e., 25.03.2021, the case was adjourned on the request of the State and thereafter, a final inquiry report dated 15.9.2021was submitted, without fixing any date for statement of witness summoned.

162. Attention of the Court is also drawn to the note sheet dated 03.09.2021, signed by Lallu Prasad, Head Assistant and Shri Ram Kumar, Administrative Officer in the office of the Commissioner, Lucknow

Region, Lucknow. The concluding paragraphs of the same states that the Head Assistant and the Administrative Officer have prepared the final inquiry report and in case the inquiry officer agrees with the same, he may sign the same. The same reflects that the inquiry report was not prepared by the inquiry officer. There cannot be a more gross illegality committed by the department. The Inquiry Officer cannot delegate his responsibility of conducting inquiry and preparation of inquiry report to his subordinate clerical staff. The inquiry report dated 15.09.2021 also shows that the inquiry is conducted without any oral evidence.

163. Learned Chief Standing Counsel could not dispute the fact that the inquiry report as well as the punishment order are in violation of Rule 7 of Rules of 1999 and also the fact that the inquiry report is not prepared by the Inquiry Officer himself.

164. Hence, the impugned punishment order dated 24.01.2022 and review order dated 19.07.2022 cannot stand and are set aside. Consequences to follow.

165. List this case on 11.4.2023.

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166. From the aforesaid, it is also clear that in this State not even a single departmental inquiry for major punishment is being conducted in accordance with law. All the delinquent employees are discharged repeatedly as proper procedure is not followed. The orders of the Supreme Court, of this Court as well as the Government Orders issued by the Chief Secretary, Government of U.P. appear to be falling on deaf ears.

167. Sri Kuldeep Pati Tripathi, learned Additional Advocate General and Sri Ravi Singh Sisodia , learned Chief Standing Counsel-III agree that this cannot be permitted.

168. Learned Chief Standing Counsel-III makes a statement before this Court, on instructions, that the State shall ensure that appropriate departmental proceedings are initiated against the erring Inquiry Officers as well as the disciplinary authorities. He assures the Court that these proceedings shall also be brought to its logical conclusion, within a period of two months in accordance with law.

169. The statement of learned Chief Standing Counsel-III, is taken on record.

170. In view of the aforesaid statement, this Court is not issuing any further directions. It puts its faith in the Chief Secretary, that Government of U.P. shall stand true to its words.

171. In view thereof, in all the aforesaid writ petitions the impugned orders/charge-sheets are set aside as indicated in each petition and the authorities are permitted to proceed in accordance with law. All the writ petitions are allowed and finally disposed of except Writ-A No.8408 of 2022, which is not being disposed of finally to ensure compliance.

172. Put up Writ-A No.8408 of 2022 on 11.4.2023.

173. By the next date of listing, Chief Secretary shall ensure that a report with regard to the action taken is filed positively.

(2023) 2 ILRA 981
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE GAJENDRA KUMAR, J.

Crl. Misc. Writ Petition No. 14344 of 2022

Nafisa & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ajatshatru Pandey

Counsel for the Respondents:
G.A., Sri Kamlesh Kumar Tiwari, Sri Manoj Kumar Srivastava

Criminal Law - Constitution of India, 1950 - Article - 226, - Criminal Procedure Code,1973 - Sections 156(3), 173(3), 200, 202, 376-D, 438 & 482 - Indian Penal Code, 1860 - Sections 120(B), 195, 211, 384, 420 & 506 - Writ Petition - Quashing of F.I.R. and protection from arrest - maintainability - allegations are that petitioners are working as a Gang under the protection of an advocate and they are also involved in several FIRs regarding gang rape etc. against several innocent persons and extracted money - court finds that, Prima facie a case of cognizable offence is made out against the petitioners which requires a detailed investigation to be carried out by the authorities - No blanket orders staying arrest of the petitioners can be passed in such matter - present case did not fall under the category of rarest of the rare cases - thus, writ petition not entertained - however, Liberty given to file appropriate application u/S. 438 of Cr.P.C. seeking anticipatory bail and, to file an Application u/S. 482 of Cr.P.C. for quashing of FIR - writ petition stands dismissed.(Para - 8, 12, 14, 16)

Writ Petition Dismissed. (E-11)

List of Cases cited: -

1. Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah. & ors. (2021 SCC Online SC 315),

2. St. of Telangana Vs Habib Abdullah Jeelani (2017 Vol. 2 SCC 779),

3. Nivedita Sharma Vs Cellular Operators Association of India (2011 Vol. 14 SCC 337).

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

1. At the very outset, learned counsel for the petitioners states that he does not propose to file any rejoinder affidavit in response to the counter affidavit filed by the respondents.

2. Heard Sri Ajatshatru Pandey, learned counsel for the petitioners and learned counsel for the State-respondents.

3. The instant petition has been filed on behalf of the petitioners with a prayer to quash the FIR dated 07.08.2022 giving rise to Case Crime No.0582 of 2022, under Sections 384, 420, 195, 506, 120-B, 211 IPC, Police Station-Cantt., District-Gorakhpur as well as not to arrest the petitioners in pursuance of the impugned FIR.

4. Prosecution story in brief is as follows:

Petitioner no.1 (Nafisa) is leading a Gang as "Nafisa Gang" and in her team, there are five other members (co-accused) namely, Bindrawati (petitioner no.2), Soni (named accused in the impugned FIR), Aarti (petitioner no.3), Indrawati (petitioner no.4) and Tara Chauhan (petitioner no.5) are the Members of the said Gang and the aforesaid gang is being guided/protected by co-accused, namely, Madhav Tiwari, Advocate (named accused in the impugned FIR). It has further been alleged that

aforesaid Gang is involved in filing the several vague Applications under Section 156(3) Cr.P.C./complaint cases as well as FIRs regarding gang rape and various Sections of IPC & SC/ST Act against several innocent persons and by lodging the same, they used to abstract money.

5. Learned counsel for the petitioners submitted that they are innocent and have been falsely implicated in the present case due to ulterior motive. Instant case is nothing but a counter-blast of earlier cases, lodged by the petitioners at various point of time against respondent no.4 and other accused persons and only with a view to mount pressure upon the petitioners and compromise in the earlier matters, present FIR has been lodged. Even in an Application under Section 156(3) Cr.P.C. moved by the petitioner no.1 against respondent no.4/informant (Khalid @ Jiaurrahman) and others regarding an incident, which is said to have taken place on 04.09.2016 at 10:00 a.m., as the aforesaid accused persons were pressurising upon the petitioner no.1 to compromise the aforesaid case, and when she denied the same, then all the accused persons (respondent no.4 and other co-accused persons) entered inside her house forcibly and brutally beaten her with 'lathi-danda' and tore her clothes, due to which, she received grievous injuries. The said application was treated as complaint case on 05.01.2017, and, thereafter, statements of the witnesses under Section 200 and under Section 202 Cr.P.C. were recorded and the accused persons including the informant were summoned by the court below on 28.08.2019. Respondent no.4/informant and his associates are persons of criminal in nature and on several occasions, they had committed serious crime, for which, FIRs had been lodged by the petitioners against them. Petitioners allege false implication. Petitioners never tried to blackmail any person and there is no gang as has been alleged by the respondent no.4 in the impugned FIR. There is no cogent evidence available on record against the petitioners so as to implicate them in the present case.

6. Per contra, learned counsel for the respondents vehemently opposed the contentions aforesaid and submitted that petition itself is not maintainable under Article 226 of the Constitution of India. It is pointed out that the conduct of the petitioners is required to be seen in the present matter. It has further submitted that informant/respondent no.4 has been falsely implicated by the petitioners in several cases as has been narrated in the memo of the writ petition and even in one case registered as Case Crime No.182 of 2016, Final Report has also been submitted by the Investigating Officer concerned, thereafter, a protest petition was filed by the petitioner no.1 and the said protest petition was allowed and Final Report bearing No.146 of 2017 was rejected by the court below and the same was treated as a complaint case on 03.03.2020. Thereafter, the court below had summoned the informant/respondent no.4 and other accused persons under Sections 376-D and 506 IPC. Against the summoning order, they (respondents in the present case) had filed Criminal Misc. Application U/S 482 No.28592 of 2022 (Shahnaj Ansari and 3 Others Vs. State of U.P. and another), in which, interim protection was granted to them by the learned Single Judge vide order dated 10.10.2022.

7. Learned counsel for the respondents has further submitted that investigation is yet to be carried out in the matter. At this stage, it cannot be

ascertained whether the authorities are filing a charge sheet against the petitioners or closure report is being submitted. Issuance of direction for taking no coercive action is also not permissible in view of the law laid down by the Hon'ble Supreme Court in the case of **Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and others; 2021 SCC Online SC 315** as well as in the case of **State of Telangana Vs. Habib Abdullah Jeelani; (2017) 2 SCC 779,** wherein the Hon'ble Supreme Court has highly condemned the issuance of directions by the High Courts in a casual manner. It is submitted that the statutory provisions are available and the petitioners should adhere to the statutory provisions available to him under law and should have at least filed an application for grant of anticipatory bail under Section 438 of Cr.P.C. Without even approaching the competent Courts for availing the remedy of anticipatory bail, he has directly filed this petition under Article 226 of the Constitution of India. There are statutory provisions under Section 482 of Cr.P.C. for seeking for quashment of an FIR. Bypassing the abovenoted statutory provisions, this petition under Article 226 of the Constitution of India has been filed seeking quashment of the proceedings along with an FIR which is not permissible under the law. It has further submitted that petitioners are involved in filing of such types of FIRs as well as complaint cases against the innocent persons for raising the illegal demands and are running a Gang in the name of "Nafisa Gang" with the help of one Madhav Tiwari, Advocate. As such, the grounds taken therein by the counsel for the petitioners are not sustainable in the eyes of law and petition is liable to be dismissed.

7. Considering the facts and circumstances of the case and having heard learned counsel for the parties and after perusal of the aforesaid dictum by the Hon'ble Supreme Court, it is apparently clear that no such orders for not arresting or not taking any coercive action can be passed in the pending investigation into the matter. The petitioners are having a remedy to approach the concerning Courts by filing an anticipatory bail application under Section 438 of Cr.P.C. and, thereafter, can take a recourse under Section 482 of Cr.P.C. wherein the High Court is having an inherent power for quashment of FIR but in the present case without following the dictum of the Hon'ble Supreme Court, instant petition under Article 226 of the Constitution of India has been filed seeking quashment of FIR as well as staying the arrest of the petitioners, alleging that the petitioners are unnecessarily being harassed. However, the fact remains that bare perusal of the FIR which has been registered against the petitioners prima facie makes out a cognizable case for which investigation is required in the matter.

16. The issuance of such orders by High Court was taken into consideration by the Supreme Court in the case of Habib Abdullah Jeelani **(supra**) and was again taken note of by the Hon'ble Supreme Court in the case of Neeharika **(supra)** which reads as under :-

*"67. This Court in the case of Habib Abdullah Jeelani **(supra)**, as such, deprecated such practice/orders passed by the High Courts, directing police not to arrest, even while declining to interfere with the quashing petition in exercise of powers under Section 482 Cr.P.C. In the aforesaid case before this Court, the High Court dismissed the petition filed under Section 482 Cr.P.C. for quashing the FIR. However, while*

dismissing the quashing petition, the High Court directed the police not to arrest the petitioners during the pendency of the investigation. While setting aside such order, it is observed by this Court that such direction amounts to an order under Section 438 Cr.P.C., albeit without satisfaction of the conditions of the said provision and the same is legally unacceptable. In the aforesaid decision, it is specifically observed and held by this Court that "it is absolutely inconceivable and unthinkable to pass an order directing the police not to arrest till the investigation is completed while declining to interfere or expressing opinion that it is not appropriate to stay the investigation". It is further observed that this kind of order is really inappropriate and unseemly and it has no sanction in law. It is further observed that the courts should oust and obstruct unscrupulous litigants from invoking the inherent jurisdiction of the Court on the drop of a hat to file an application for quashing of launching an FIR or investigation and then seek relief by an interim order. It is further observed that it is the obligation of the court to keep such unprincipled and unethical litigants at bay.

68. In the aforesaid decision, this Court has further deprecated the orders passed by the High Courts, while dismissing the applications under Section 482 Cr.P.C. to the effect that if the petitioner-accused surrenders before the trial Magistrate, he shall be admitted to bail on such terms and conditions as deemed fit and appropriate to be imposed by the Magistrate concerned. It is observed that such orders are de hors the powers conferred under Section 438 Cr.P.C. That thereafter, this Court in paragraph 25 has observed as under:

"25. Having reminded the same, presently we can only say that the types of orders like the present one, are totally unsustainable, for it is contrary to the aforesaid settled principles and judicial precedents. It is intellectual truancy to avoid the precedents and issue directions which are not in consonance with law. It is the duty of a Judge to sustain the judicial balance and not to think of an order which can cause trauma to the process of adjudication. It should be borne in mind that the culture of adjudication is stabilised when intellectual discipline is maintained and further when such discipline constantly keeps guard on the mind."

69. We are at pains to note that despite the law laid down by this Court in the case of Habib Abdullah Jeelani (supra), deprecating such orders passed by the High Courts of not to arrest during the pendency of the investigation, even when the quashing petitions under Section 482 Cr.P.C. or Article 226 of the Constitution of India are dismissed, even thereafter also, many High Courts are passing such 15 orders. The law declared/laid down by this Court is binding on all the High Courts and not following the law laid down by this Court would have a very serious implications in the administration of justice.

70. In the recent decision of this Court in the case of Ravuri Krishna Murthy (supra), this bench set aside the similar order passed by the Andhra Pradesh High Court of granting a blanket order of protection from arrest, even after coming to the conclusion that no case for quashing was established. The High Court while disposing of the quashing petition and while refusing to quash the criminal proceedings in exercise of powers under Section 482 Cr.P.C. directed to complete the investigation into the crime without

arresting the second petitioner - A2 and file a final report, if any, in accordance with law. The High Court also further passed an order that the second petitioner - A2 to appear before the investigating agency as and when required and cooperate with the investigating agency. After considering the decision of this Court in the case of Habib Abdullah Jeelani (supra), this Court set aside the order passed by the High Court restraining the investigating officer from arresting the second accused.

71. Thus, it has been found that despite absolute proposition of law laid down by this Court in the case of Habib Abdullah Jeelani (supra) that such a blanket order of not to arrest till the investigation is completed and the final report is filed, passed while declining to quash the criminal proceedings in exercise of powers under Section 482 Cr.P.C, as observed hereinabove, the High Courts have continued to pass such orders. Therefore, we again reiterate the law laid down by this Court in the case of Habib Abdullah Jeelani (supra) and we direct all the High Courts to scrupulously follow the law laid down by this Court in the case of Habib Abdullah Jeelani (supra) and the law laid down by this Court in the present case, which otherwise the High Courts are bound to follow. We caution the High Courts again against passing such orders of not to arrest or "no coercive steps to be taken" till the investigation is completed and the final report is filed, while not entertaining quashing petitions under Section 482 Cr.P.C. and/or Article 226 of the Constitution of India.

72. Now so far as the legality of the impugned interim order passed by the High Court directing the investigating agency/police "not to adopt any coercive steps" against the accused is concerned, for the reasons stated hereinbelow, the same is unsustainable:

(i) that such a blanket interim order passed by the High Court affects the powers of the investigating agency to investigate into the cognizable offences, which otherwise is a statutory right/duty of the police under the relevant provisions of the Cr.P.C.;

(ii) that the interim order is a cryptic order;

(iii) that no reasons whatsoever have been assigned by the High Court, while passing such a blanket order of "no coercive steps to be adopted" by the police;

(iv) that it is not clear what the High Court meant by passing the order of "not to adopt any coercive steps", as it is clear from the impugned interim order that it was brought to the notice of the High Court that so far as the accused are concerned, they are already protected by the interim protection granted by the learned Sessions Court, and therefore there was no further reason and/or justification for the High Court to pass such an interim order of "no coercive steps to be adopted". If the High Court meant by passing such an interim order of "no coercive steps" directing the investigating agency/police not to further investigate, in that case, such a blanket order without assigning any reasons whatsoever and without even permitting the investigating agency to further investigate into the allegations of the cognizable offence is otherwise unsustainable. It has affected the right of the investigating agency to investigate into the cognizable offences. While passing such a blanket order, the High Court has not indicated any reasons."

10. The aforesaid aspect was considered by the Hon'ble Supreme Court in the case of Neeharika Infrastructure **(supra)** wherein after a detailed analysis of various provisions of criminal law and various judgments passed by the Hon'ble Supreme Court has drawn conclusion in para 80 of the judgment which reads as under :-

"80. In view of the above and for the reasons stated above, our final conclusions on the principal/core issue, whether the High Court would be justified in passing an interim order of stay of investigation and/or "no coercive steps to be adopted", during the pendency of the quashing petition under Section 482 Cr.P.C and/or under Article 226 of the Constitution of India and in what circumstances and whether the High Court would be justified in passing the order of not to arrest the accused or "no coercive steps to be adopted" during the investigation or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of/not entertaining/not quashing the criminal proceedings/complaint/FIR in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India, our final conclusions are as under:

(i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence;

(ii) Courts would not thwart any investigation into the cognizable offences;

(iii) It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;

(iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the 'rarest of rare cases (not to be confused with the formation in the context of death penalty).

(v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

(vi) Criminal proceedings ought not to be scuttled at the initial stage;

(vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

(viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere;

(ix) The functions of the judiciary and the police are complementary, not overlapping;

(x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

(xi) Extraordinary and inherent powers of the Court do not confer an

arbitrary jurisdiction on the Court to act according to its whims or caprice;

(xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance

(xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court;

(xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;

(xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;

(xvi) The aforesaid parameters would be applicable and/or the aforesaid aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely, casually and/or mechanically. Normally, when the investigation is in progress and the facts are hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or "no coercive steps to be adopted" and the accused should be relegated to apply for anticipatory bail under Section 438 Cr.P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or "no coercive steps" either during the investigation or till the investigation is completed and/or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of the quashing petition under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India.

(xvii) Even in a case where the High Court is prima facie of the opinion that an exceptional case is made out for grant of interim stay of further

investigation, after considering the broad parameters while exercising the powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that it can demonstrate the application of mind by the Court and the higher forum can consider what was weighed with the High Court while passing such an interim order.

(xviii) Whenever an interim order is passed by the High Court of "no coercive steps to be adopted" within the aforesaid parameters, the High Court must clarify what does it mean by "no coercive steps to be adopted" as the term "no coercive steps to be adopted" can be said to be too vague and/or broad which can be misunderstood and/or misapplied."

11. It is seen that the Hon'ble Supreme Court in the aforesaid case has gone to an extent that no such orders not to arrest or no coercive steps either during the investigation or till the investigation is completed or till the final report or charge sheet is being filed under Section 173(3) of Cr.P.C. while dismissing or disposing of the quashing of petition shall be passed under Section 482 of Cr.P.C. or under Article 226 of the Constitution of India.

12. The Hon'ble Supreme Court has further observed that even in a case where the High Court is prima facie of the opinion that an exceptional case is made out for grant of interim stay of further investigation after considering the broad parameters then also the reasons are required to be recorded while passing an interim order so that it can demonstrate the application of mind by the learned Court. In the present case, it is evident from the impugned FIR as well as complaint so filed by the respondent no.4 on 25.04.2022, wherein after direction of respondent no.2/Senior Superintendent of Police, Gorakhpur, the concerned Circle Officer, after investigating the matter, had submitted his report on 29.05.2022/30.05.2022 stating therein that "petitioners are involved in running a Gang in the name of "Nafisa Gang" under the guidance of Madhav Tiwari, Advocate and is a active Gang", as such, prima facie, the involvement of the members of the gang as has been alleged in the complaint dated 25.04.2022 under the protection of Madhav Tiwari, Advocate is made out. In such circumstances, when clearly a case of cognizable offence is made out no such blanket orders can be passed. The authorities are required to complete an investigation into the matter and persons showing themselves to be an innocent person can take a recourse under the relevant provisions of criminal law that is under Section 438 of Cr.P.C. for seeking an anticipatory bail in the matter.

20. The Hon'ble Supreme Court in the case of **Nivedita Sharma Vs. Cellular Operators Association of India; (2011) 14 SCC 337,** has held that "where hierarchy of appeals was provided by the statute, a party must exhaust the statutory remedies before resorting to writ jurisdiction for relief, but inspite of having alternative remedy the writ petition has been preferred seeking multiple reliefs, therefore, the petition was not entertained being devoid of merits is not maintainable and is dismissed." In the present case, without exhausting the remedy of seeking anticipatory bail under Section 438 of Cr.P.C. or approaching this Court by way of filing a petition under

Section 482 of Cr.P.C. petition seeking quashment of an FIR or a criminal proceedings, he has taken a recourse to file a writ petition under Article 226 of the Constitution of India.

15. Looking to the contents of the FIR, a prima facie case is made out against the petitioners, which requires a detailed investigation to be carried out by the Authorities. In such circumstances, the case does not fall under the category of rarest of the rare cases, therefore, the relief praying for quashment of FIR and for interim relief not to arrest the petitioners, without adhering to the statutory provisions of criminal jurisprudence, this Court refrains from entertaining the writ petition under Article 226 of the Constitution of India.

15. With the aforesaid observations, the writ petition stands **dismissed.**

16. However, the petitioners are at liberty to file appropriate application under Section 438 of Cr.P.C. seeking anticipatory bail and, thereafter, may file an Application under Section 482 of Cr.P.C. seeking quashment of FIR.

(2023) 2 ILRA 989
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2023

BEFORE

THE HON'BLE MAYANK KUMAR JAIN, J.

Criminal Appeal No. 404 of 1988

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

Counsel for the Appellants:
Sri V.S.Singh

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

Criminal Law - Evidence Act,1872 - Section 3 - Testimony of Witness - Minor Contradiction - When Immaterial - One is required to consider the entire evidence as a whole with the other evidence on record - Mere one sentence here or there and that too to the question asked by the defence in the cross-examination cannot be considered stand alone - if there are minor discrepancies or minor contradictions in the testimony of the witness which does not adversely affect the case of the prosecution then it should not be taken into consideration - minor discrepancies not touching upon the core of the prosecution case, would not affect the credibility of the witnesses or the prosecution case (Para 31, 34)

Criminal Law - Indian Penal Code,1860 - Section 308 - Attempt to commit culpable homicide - In the F.I.R., PW-1, the informant, mentioned that at the time of the incident, he along with Sidhdha and Mahipal was present on the spot - In his evidence, he corroborated being present at the place of occurrence - A minor contradiction occurred in the cross-examination, when PW-1 stated that when injured raised an alarm, they rushed towards him - But at the same moment PW1, the informant stated that he had seen the incident himself - During his cross examination specific question was asked from this witness "when you had seen the incident then why did you ask?" to which he replied "I did not ask about who hit my brother, I only asked where he was hit with the spear" - Held - evidence of PW-1 and PW-2 as a whole, inspires the confidence and has ring of truth - considering the evidence of injured witness PW-2 Ram Sanehi, PW-1 Ram Asrey in the capacity of the informant as well as the eyewitness, and the medical evidence, the evidence produced in defence by accused Kishori does not create any doubt about the prosecution version - trial Court rightly convicted the

appellant under Section 308 IPC. (Para 39, 40)

Allowed. (E-5)

List of Cases cited:

1. Rakesh Vs St.of U.P., 2021 (3) SCC (Cri) 149

2. Sachin Kumar Singhraha Vs St. of M.P. (2019) 3 SCC Cri 575

3. Jai Prakash Vs St. of U.P. , (2021) 3 SCC Cri. 306

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

1. Feeling aggrieved with the judgment dated 12.02.1988 passed by Sri Udai Pratap Singh Kushwaha, the then Special Sessions Judge (Essential Commodities Act) Hamirpur, in Sessions Trial No. 3 of 1987 (State Vs Kishori) arising out of Crime No. 110 of 1985, registered at police station Khanna, District Hamirpur, under section 308 IPC whereby the learned Special Session Judge convicted the appellant under Sections 308 of I.P.C. and sentenced him to undergo rigorous imprisonment for three years, the present criminal appeal has been preferred.

2. Brief facts of the case are that the informant Ram Asrey submitted a written report **(Ex.Ka-1)** to police Station Khanna, Sub Division Mohraha, District Hamirpur on 28.06.1985, stating therein that his brother Ram Sanehi was going with animals across the pond at around 8:45 AM. When he reached opposite the house of Tirra, accused Kishori was present there having a spear in his hand. Upon seeing the brother of the informant he said you are against me a lot. He hit his brother on the right side of the stomach with the spear. Sidhdha S/o Baiju, the informant himself and his relative Mahipal S/o Bhagirath rushed and saved Ram Sanehi.

3. On the basis of the aforesaid written report, case crime no. 110 of 1985 was registered against the appellant-accused under section 324 IPC.

4. The investigation was set to motion and it was entrusted to S.I. Pradeep Kumar Singh and thereafter to A.S.I. Ram Milan Dubey, who after completing preliminary formalities, sent injured Ram Sanehi for a medical examination. He recorded the statements of the informant, Ram Sanehi, the injured, witnesses Sidhdha, Mahipal and others. He inspected the place of occurrence and prepared the site plan. After the conclusion of the investigation, he submitted the charge sheet against the applicant-accused under section 327/307 IPC.

5. The case was committed to the Court of Sessions. It was registered as Session Trial No. 3/87 (State Vs Kishori).

6. Charge under section 307 I.P.C. was framed against the accused-appellant which he denied and claimed to be tried.

7. In order to prove its case, the prosecution produced two witnesses of the fact as P.W. 1 Ram Asrey, the complainant and P.W.-2 Ram Sanehi, the injured, formal witnesses P.W.-3 Dr. P.K. Bhadaura, P.W-4 H.C. Narvada Prasad., P.W.-5, S.I. Ram Milan Dubey, Investigating Officer and P.W.-6 Dr. K.C. Gupta.

8. After the close of the prosecution witness, the statement of the appellant-accused Kishori was recorded under section 313 Cr. P.C. He denied the prosecution

story and also denied that he caused any injury to Ram Saheni with the spear. He further stated that the charge sheet has been filed against him on the basis of false and unfair investigation. The case was registred against him due to enmity The witnesses Ram Asray and Ram Sanehi are inimical to him. He submitted that Ram Rati is the cousin of the informant Ram Asrey. Ram Kripal the father-in-law of Ram Rati was murdered before this incident. Bankey Lal and others were arrayed as accused who were convicted by the High Court. Under the orders of the State Government, Banekey Lal was released on parole. The brother of the appellant Ram Charan stood as surety for Bankey Lal before the present incident. He did not permit Ram Sanehi and Ram Asrey to keep their crops in his field. For this reason, he has falsely been implicated in this case.

9. DW-1 Rameshwar Prasad Pandey was produced by the accused-appellant in his defence.

10. I have heard Sri V.S. Singh, learned counsel for the appellant and Sri. M.P. Singh Gaur, leaned A.G.A. for the State. I have perused the record and reappreciated the evidence available on record.

11. It is submitted by the Learned counsel for the appellant that the learned trial Court has not appreciated the evidence available on record in a rightful manner and has wrongly convicted the appellant. The complainant in the FIR stated that he was present on the spot when the accused-appellant hit his brother Ram Sanehi with the spear. He claimed to be the eyewitness of the incident but he is not the eyewitness of the incident. He came to know about the incident only when Ram Sanehi told him about the incident. Thus, it is clear that he has not seen the incident. The motive of the incident is not proved. Important witnesses Tirra and Sidhdha, before whom the incident is said to have happened, have not been produced by the prosecution. It has come in the evidence of the injured that the complainant asked him to depose against the appellant in the Court and pursuant to this, the injured deposed against the appellant while no such incident had taken place. The Investigating Officer did not investigate the matter fairly and he submitted the chargesheet against the appellant in a casual manner. There are material contradictions in the testimony of the complainant PW-1 Ram Asrey and the injured PW-2 Ram Sanehi. The medical report is not in consonance with the ocular evidence. The seat of injury as described by the complainant is not corroborated by the injured in his evidence. It is further submitted that the learned trial Court has wrongly convicted the accused. The appellant in his defence produced DW-1 Rameshwar Prasad Pandey, to corroborate the enmity of the complainant with the appellant. As a result, the appellant had been falsely implicated in this case. The appeal deserves to be allowed.

12. Per-contra, the learned AGA submitted that the complainant and the injured have corroborated the incident by their evidence There are no contradictions in the ocular and medical evidence. The prosecution has proved the motive behind the commission of the offence by the appellant. It is further submitted that the appellant has rightly been convicted by the trial Court and the trial Court has appreciated the evidence available on record in a rightful manner. The appeal is liable to be dismissed and the judgment of the trial Court is liable to be affirmed.

13. In the present case, it is to be determined as to whether on 28.06.1985, the appellant-accused Kishori hit injured Ram Sanehi with the spear and caused injury to his stomach.

14. PW-1 Ram Asray is the informant of the case. He stated in his examination-in-chief that on the day of the incident at around 8:45 AM, he was present opposite the house of Tirra. Sidhdha and Mahipal were already sitting there. When his brother reached along with his animals opposite the house of Tirra, the appellant, Kishori, who was having a spear in his hand said that he was against him a lot. The appellant-accused threatened him to kill. Kishori hit Ram Sanehi with the spear and injured him on the left side of his abdomen. The spear was hit towards the stomach which went through the body and came out a little towards the back. Ram Sanehi was saved by them. The accused Kishori ran away from there. This witness has proved the written report as Ext. Ka-1.

15. P.W. -2 Ram Sanehi is the injured witness. He stated in his examination-in-chief that he knows the accused/appellant. At the time of the incident, he was taking his animals across the pond. When he reached opposite the house of Tirra near the pond, accused Kishori met him having a heavy spear with him. He said that this witness was against him a lot, and he would kill him. Saying this, the accused Kishori hit him with the spear on the right side of the back which went through his body and came out a little. Ram Asrey, Mahipal and Giddha came there and saved him. The accused-appellant dislodged the spear from his body and ran away along with the spear. His brother took him to the police station Khanna. His injury was seen by police personnel. He was medically examined at Maudaha hospital. From there he went to Hamirpur where his x-ray was done.

16. P.W.-3 Dr. P.K. Bhadaura stated in his examination-in-chief that on 28.06.1985 at 10.00 A.M. in the capacity of the medical officer, PHC Maudaha, he examined Ram Sanehi. The following injuries were found on his body;-

1. Semi circular shaped wound 1.5 Cm. X 1 Cm. on posterial lateral surface of Rt. Side of back of abdomen just below the posterial floating rib margins are inverted. Muscles are protruding out continuous bleeding from the wound.

2. ½ cm semi circular wound over abdomen 4 cm. Above & the right lateral to the umbilical. Margin are inverted fresh blood oozed .

X-ray was advised.

17. In his opinion the condition of the patient was poor. The patient was kept under observation. The above injuries were possibly caused by some pointed object as the spear. Injury no. 1 was the penetration wound of the weapon and injury no. 2 was the exit wound. The duration was fresh. Both injuries were likely caused on 23.06.1985 at 8.45 am. The witness has proved the medical report as **Ext-Ka-3.**

18. PW-4 H.C. Narvada Awasthi stated in his examination-in-chief that on 28.06.1985 he prepared the chik FIR on the basis of the written report submitted by the informant Ram Asray. Its endorsement was entered in G.D. vide report no. 14 at 9:30 A.M. on 28.06.1985. This witness proved the FIR as **Ex. Ka-3** and G.D. as **Ex. Ka-4**.

He had seen the injuries of Ram Sanehi. He was sent for a medical examination to the government hospital in Maudaha.

19. P.W.-5 S.I. Ram Milan Dubey is the investigating officer of this case. He stated in his examination-in-chief that the case was registered in his presence since the first investigating officer was on leave therefore, he was entrusted with the investigation. He completed preliminary formalities and reached the place of occurrence and recorded the statements of the informant, Siddha, Mahipal and others. He inspected the place of occurrence and prepared the site plan which is proved by him as **Ex- Ka-5**. He converted the case from section 324 I.PC. to 307 I.P.C. He recorded the statement of the injured. He submitted the charge sheet against the appellant-accused Kishori, which he proved as **Ex-Ka-6.**

20. PW-6 Dr. K.C. Gupta stated in his examination-in-chief that on 06.07.1985 he was posted as Radiologist in the District Hospital. X-Ray of the stomach and chest of injured Ram Sanehi was done under his supervision and he prepared the X-Ray report. On the basis of the X-ray plate, he found a fracture on the last corner of the right ribs. The witness has proved the X-Ray report as **Ext-Ka-7** and the X-ray plate as **MEx. 1**.

21. DW1 Rameshwar Prasad Pandey was deposed in Court on the basis of record pertaining to Bankey Lal. The entry made at serial no. 72 relates to the bonds of Bankey Lal. Ram Charan S/O Ganesha stood surety for Bankey Lal which was accepted by the Probation officer on 25.08.1984. He identified the signatures of the officer concerned. He proved the copy of the surety bond as **Ex. Kha-1**

22. Section 308 IPC provides;-

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."

23. During their deposition before the court PW-1 Ram Asrey, the informant and PW2 Ram Sanehi, the injured witness corroborated the prosecution version that on the day of the incident at about 8:45 am when Ram Asray was heading towards the pond, he met the accused-appellant Kishori. Kishori, who was having a spear in his hand said that he was against him a lot and threatened him to kill. Kishori hit Ram Sanehi with the spear and injured him on the left side of his abdomen. The spear was hit towards the stomach which went through his body and came out a little towards the back. The injured witness stated that the accused dislodged the spear from his body and ran away with the spear.

26. Learned counsel for the appellant drew the attention of the court to a contradiction that occurred in the testimony of the informant and injured witness about the seat of injury. He submitted that the informant in his FIR stated that his brother Ram Sanehi was hit by the accused on the right side of the stomach but in his

deposition in the court, he stated that the accused hit his brother by a spear on the left side of the stomach. The injured witness stated that he was hit on the right side of the stomach. There are contradictions between the ocular evidence and medical evidence which falsify the entire prosecution version.

27. Considering this argument, it is pertinent to mention here that the seat of injury described in the FIR and by the injured witness is the same. Moreover, PW3 Dr. P.K. Bhadura found injuries No. 1 and 2 on the right side over and back of the abdomen. Injury no. 1 was the penetration wound of the weapon and injury no. 2 was the exit wound. Both the injuries were fresh and likely to have been caused on 23.06.1985 at 8.45 am. Further PW6 Dr. K.C. Gupta, the Radiologist, recorded a fracture in the last corner of the right ribs. Therefore, the seat of injury situated on the right side of the stomach of the injured is corroborated by the oral evidence of the injured witness as well the medical evidence. In view of the above appreciation, it is observed that oral evidence is consistent with medical evidence.

28 . Learned counsel for the appellant vehemently argued that the complainant in his FIR stated that he was present at the spot when the accused hit his brother Ram Sanehi with a spear. He claimed himself to be the eyewitness of the incident but he is not the eyewitness of the incident. He came to know about the incident only when Ram Sanehi told him. He has not seen the incident. The alleged eye witness Sidhdha was not produced by the prosecution. Thus there is no independent witness of the incident.

29. Suffice to mention here that PW2 Ram Sanehi, the injured witness has stated that the witness of this case Sidhdha colluded with the accused and was not ready to depose before the Court against him. Under these circumstances, a proper explanation is offered by the prosecution for not producing a witness who was won over by the accused and was not ready to support the case of the prosecution in Court. So far as the argument that the informant is not the eye witness is concerned, it is pertinent to mention here that in the First Information Report, the informant mentioned that at the time of the incident, he along with Sidhdha and Mahipal was present on the spot. In his evidence, he corroborated the version of the First Information Report about his presence at the place of occurrence and corroborated that the incident happened before him. A minor contradiction occurred in the cross-examination of the informant when injured Ram Sanehi raised an alarm they rushed towards him. His brother told him that he was hit with a spear by the accused Kishori. But at the same moment PW1, the informant stated that he had seen the incident himself. During his cross examination specific question was asked from this witness "when you had seen the incident then why did you ask?" to which he replied "I did not ask about who hit my brother, I only asked where he was hit with the spear"

30. Conclusion can very well be drawn in favor of the prosecution since the aforesaid evidence indicates that the query was made to his brother by the informant confined to the extent only as to know about the seat of injury, not about the accused Kishori. Therefore, it is proved that the informant was present at the place of occurrence at the time of the incident.

31. In ***Rakesh Vs. State of U.P., 2021 (3) SCC (Cri) 149,*** The Hon'ble Apex Court observed that the evidence of a witness is to be considered as a whole:-

"One is required to consider the entire evidence as a whole with the other evidence on record. Mere one sentence here or there and that too to the question asked by the defence in the cross-examination cannot be considered stand alone. Even otherwise it is to be noted that what is stated by the Doctor/Medical officer can at the most be said to be his opinion. He is not the eye-witness to the incident. PW1 & PW2 have categorically stated that the other accused inflicted the blows by knives."

32. In the present case also PW-1 informant Ram Asrey and PW-2 injured Ram Sanehi have consistently stated that the accused Kishori inflicted the injury to injured Ram Sanehi. On reading the evidence of PW-1 and PW-2 as a whole, it inspires confidence and has a ring of truth.

33. The Hon'ble Apex Court in **Sachin Kumar Singhraha Vs. State of M.P. (2019) 3 SCC Cri 575,** observed that if there are minor discrepancies or minor contradictions in the testimony of the witness which does not adversely affect the case of the prosecution then it should not be taken into consideration. The Hon'ble Apex held that:-

"The Court will have to evaluate the evidence before it keeping in mind the rustic nature of the depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole."

34. The Hon'ble Apex Court in **Jai Prakash Vs. State of U.P. , (2021) 3 SCC Cri. 306** distinguished material discrepancies in evidence of witnesses from minor discrepancies. The Hon'ble Court held that:-

"The witnesses who have deposed in the court after considerable lapse of time of course, cannot be expected to have photographic memory of the case. We are conscious of the well settled position that the minor discrepancies not touching upon the core of the prosecution case, would not affect the credibility of the witnesses or the prosecution case."

35. In view of the above observation made by Hon'ble Apex Court, in the present case on reading the evidence of PW-1 and PW-2 as a whole, it inspires the confidence and has ring of truth. The evidence of PW-1 Ram Asrey does not contain any material contradiction, which can adversely affect the case of prosecution. In his statement, the informant has proved that the accused-appellant attacked his brother with a spear and caused injuries. The evidence of P.W.-2 Ram Sanehi corroborates the prosecution version and does not suffer from any material contradiction which may create doubt over the prosecution story.

36. Learned counsel for the appellant argued that DW-1 Rameshwar Prasad Pandey has proved on the basis of the record that Ramcharan stood as surety for

Bankeylal. Ram Rati was the cousin of the informant Ram Asrey. Ramkripal, the father-in-law of Ram Rati was murdered before this incident in which Bankeylal and others were convicted by the High Court. Bankeylal was released on parole by the State Government. Ramcharan, the brother of the accused stood surety for Bankelal so informant Ram Asrey was inimical to the accused Kishori. For this reason, accused Kishori has been falsely implicated in this case.

37. Considering the aforesaid argument, PW-1 Ram Asrey, although admitted the fact that Bankelal and others were convicted for the murder of Ram Kripal, Ram Charan stood surety for Bankelal is not within his knowledge. This witness has categorically denied that for this reason, he was inimical to the accused Kishori. Further, considering the evidence of injured witness PW-2 Ram Sanehi, PW-1 Ram Asrey in the capacity of the informant as well as the eyewitness, and the medical evidence available on record the evidence produced in defence by accused Kishori does not create any doubt about the prosecution version.

38. Learned counsel for the appellant lastly submitted that PW-2 Ram Sanehi, was compelled to give evidence against the accused-appellant by his brother P.W.-1 Ram Asrey. PW-1 Ram Asrey stated in his evidence that he told his brother Ram Sanehi that he had lodged a report with the police station against Ram Sanehi with regard to the incident of causing injury to him by a spear. He also asked his brother Ram Sanehi to depose against accused Kishori in the Court. Ram Sanehi accepted it.

39. Considering the aforesaid argument advanced by the learned counsel for the appellant, it is to be noted that PW-2 Ram Sanehi, the injured, in his evidence has stated that his brother Ram Asray accompanied him to the police station concerned after he sustained injuries in the incident and his brother informed him that he had submitted a report with regard to the incident against the accused Kishori, This information was given to him at the time of lodging of the FIR. On the basis of aforesaid evidence and keeping in view the facts and circumstances of the case I am of the opinion that it cannot be concluded that PW-2, the injured witness, deposed against the accused Kishori only on the direction given by his brother because PW-2 Ram Sanehi has corroborated the prosecution version by his cogent evidence and also the manner of assault and about the injury sustained by him, therefore, it cannot be opined that PW-2 deposed before the court only on the instigation of the informant PW-1 Ram Asrey.

40. The learned trial Court while appreciating the evidence available on record under the facts and circumstances of the case has rightly convicted the appellant under Section 308 IPC. The learned trial Court after thoughtful consideration of each aspect of the case and keeping in view the evidence adduced by the prosecution as well as by the defence has passed the impugned judgment and order of sentence.

Order

41. The criminal appeal is accordingly dismissed. The judgment and order dated 07.11.2017 passed by learned trial Court is hereby affirmed.

42. The appellant was on bail during Appeal. He be taken into custody and be sent to jail to serve out the sentence.

43. Let the copy of the judgment be transmitted to learned trial court to ensure the compliance.

44. let the lower court record be transmitted to the court concerned forthwith.

(2023) 2 ILRA 997
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.01.2023

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1982 of 2009

Sanjoo @ Sanjay ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Yogesh Srivastava, Sri Manu Sharma Amicus

Counsel for the Opposite Party:
Sri J.K. Upadhyay, A.G.A., Sri K.K. Dwivedi, Sri Mohit Singh, Sri Satish Trivedi, Sri Shashidhar Pandey

A. Criminal Law - Indian Penal Code,1860 - Section 302 - Murder - Deceased died after sustaining one gun shot injury on his temporal region - there was no eye witnesses - main evidence were statements of P.W.3 and P.W.4 who saw the appellants coming out from the house of the deceased - Held - Merely on the basis of that evidence, it was not safe to conclude that the accused committed the murder - No evidence as to in what manner the murder of the deceased was committed by the accused persons - Knives were seized from the accused, but no knife injuries were found on the deceased's body - Recovery was not proved by any independent witness - A country-made pistol was seized from the accused, but there was no ballistic expert report connecting the seizure to the offense - Appellants entitled to the benefit of the doubt - entire prosecution case based on circumstantial evidence - Prosecution failed to prove the charges against the appellants beyond reasonable doubt (Para 19, 25)

Allowed. (E-5)

List of Cases cited:

1. Sattatiya @ Satish Rajanna Kartalla Vs St. of Mah. (2008) 3 SCC 210

2. Devi Lal Vs St. of Raj. (2019) 19 SCC 447

3. Ramanand @ Nandlal Bharti Vs St. of U.P. Criminal Appeal Nos. 64-65 of 2022 13.10.2022

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

1. Heard Shri Yogesh Srivastava for appellant Nos. 2, 3 & 4, Shri Manu Sharma, Amicus, for appellant No.1 and Shri J.K. Upadhyay, learned AGA for the State.

2. This appeal arises out of the impugned judgement and order dated 26.03.2009 passed by Special Judge (D.A.A.), Agra in S.T. No. 85 of 2002 (State Vs. Sanjoo @ Sanjay & others) arising out of Crime No. 78 of 2002, under Sections 394, 302, 411, 120-B, I.P.C, and Sessions Trial No. 97 of 2002, arising out of Crime Nos. 84 and 85 of 2002 under Sections 25 and 25/4 Arms Act, Police Station-New Agra, District Agra, convicting appellants Sanjay @ Sanjoo, Praveen Dubey, Banwari and Lala @

Kishan and sentencing them to undergo seven years rigorous imprisonment for the offence u/s 394 with a fine of Rs.5,000/- (each), in default thereof, to undergo additional simple imprisonment for one year; to undergo imprisonment of life for the offence under Section 302/34 of IPC with a fine of Rs.20,000/- (each), in default thereof, to undergo two years additional simple imprisonment; to undergo imprisonment of life for the offence under Section 120-B of IPC with a fine of Rs.10,000/- (each), in default thereof, to undergo one year simple imprisonment; convicting appellants Sanjay @ Sanjoo, Praveen Dubey and Banwari and sentencing them to undergo two years rigorous imprisonment for the offence under Section 411 of IPC; convicting appellant Sanjay @ Sanjoo and sentencing him to undergo two years rigorous imprisonment for the offence under Section 25 Arms Act with a fine of Rs.5,000/- in default thereof to undergo one year additional simple imprisonment; and convicting appellants Pradeep Dubey and Banwari and sentencing them to undergo one year rigorous imprisonment for the offence under Section 25/4 with a fine of Rs.2,000/- (each), in default thereof to undergo six months additional simple imprisonment; and it was directed that all the sentences shall run concurrently.

3. In the present case, name of the deceased is Sanjay, who died after sustaining one gun shot injury on his temporal region. On 21.01.2002 at 8.55 pm, on the basis of written report Ex.Ka-1, FIR Ex.Ka-26 was registered against unknown persons under Section 302 of I.P.C.

4. Inquest on the dead body was conducted on 21.01.2002, vide Ex.Ka-2, and the body was sent for postmortem, which was conducted on the second day, i.e. on 22.01.2002, vide Ex.Ka-3, by P.W.2. As per post mortem report, one gun shot injury was found on the temporal region of the deceased and the cause of death was shock and hemorrhage as a result of ante mortem injury.

5. While framing charge, trial Judge has framed charge against the accused-persons under Sections 394, 302, 411, 120-B, I.P.C; whereas separate charge under Section 25 and 25/4 of Arms Act has also been framed against accused appellants, Sanjay @ Sanju, Praveen Dubey and Banwari.

6. So as to hold accused appellants guilty, prosecution has examined eleven witnesses. Statement of the accused-appellants were recorded under Section 313 of Cr.P.C. in which, they pleaded their innocence and false implication.

7. By the impugned judgment and order, the trial Judge has convicted and awarded the sentence, as mentioned in paragraph-2 of this judgment.

8. Counsel for the appellants submits:

(i) that there is no eye-witness account to the incident and the appellants have been convicted solely on the basis of weak circumstantial evidence.

(ii) that the main piece of evidence against the appellants are statements of P.W.3 Punit Kumar Gautam and P.W.4 Hariom Gautam, who allegedly saw the appellants coming out from the house of the deceased. Even assuming that the accused persons had visited the house of the deceased, it could be because of some business transaction or for some other reasons.

(iii) that motive has not been proved by the prosecution.

(iv) that the circumstantial evidence collected by the prosecution is not conclusive and considering the law laid down by the Apex Court and this Court, it will not be safe for this Court to uphold the conviction.

(v) that from accused Banwari and Praveen Dubey, knives have been seized, however, no knife injuries have been found on the body of the deceased. Likewise, from accused Sanjoo @ Sanjay, one country made pistol has been seized, but there is no evidence connecting the said seizure from the murder of the deceased or from the injuries sustained by him.

(vi) that the alleged recovery of money has been planted against the accused persons to make the offence serious, otherwise, recovery has not been proved by the prosecution as required under the law.

(vii) that the appellants have already spent about 14 years of jail sentence.

9. On the other hand, supporting the impugned judgment and order of the trial Court, it has been argued by the State Counsel:-

(i) that the conviction of the appellants, though based on circumstantial evidence, is in accordance with law and there is no infirmity in the same.

(ii) that a sum of Rs.10,000/- each from accused Sanjoo @ Sanjay and Banwari and a sum of Rs.5,348/- from accused Praveen Dubey, belonging to the deceased, have been seized.

10. We have heard learned counsel for the parties and perused the record.

11. PW-1 Mukesh Gupta is a neighbor of the deceased, who immediately after hearing the cries of the deceased reached to his house, but he has not seen the accused persons near the place of occurrence. He also lodged the FIR.

12. PW-2 Dr. Yogesh Bhargava conducted the post mortem on the body of the deceased, one gun shot injury was found on the temporal region of the deceased and the cause of death was shock and hemorrhage as a result of ante mortem injury.

13. PW-3 Punit Kumar Gautam has stated that he knew the accused persons and on the date of incident, he saw one of the accused pressing the call bell and then the accused persons had entered the house of the deceased. He also saw the accused persons returning from the house of the deceased. He states that his uncle has asked as to whether he has heard the noise of gun shot, however, he denied the same. He admits that within 10 minutes, police has reached to the place of occurrence, but he did not inform the police about the accused persons gaining entry in the house of the deceased. He further states that even he did not inform the crowd gathered there about the accused persons. He admits that his uncle is an Assistant Public Prosecutor but how many reports have been lodged by him, he does not know. He further admits that he himself had not heard any sound of gun shot. He states that in his presence, PW-1 Mukesh Gupta had gone to lodge the

report, but he did not inform anything to him.

14. PW-4 Hariom Gautam, who was attending the nature's call at the relevant time, has stated that he heard the noise of gun shot. He also stated that he was informed by PW-3 Punit Kumar Gautam of hearing some gun shot noise. He states that after entering the house of deceased Anil Kumar and other police officers present there had asked him to visit the house and when an attempt was made to open the door, it did not open; it was pressed and then they entered in the said room, had gone to the drawing room where dead body of the deceased was lying. About the presence of light at the place of occurrence, he does not appear to be very sure. However, when I.O. was confronted, he had stated that this witness had informed him about the presence of light.

15. PW-5 Yogendra Kumar Goyal saw the accused persons about 100 meters away from the house of the deceased. He is also witness of recovery of one empty cartridge and blood stained knife, but there is no FSL or ballistic expert report.

16. PW-6 Rampal Yadav is the Investigating Officer, who has duly supported the prosecution case.

17. PW-7 Anil Kumar Singh, PW-8 Jitendra Kr. Goyal, PW-10 Ghanshyam Das and PW-11 Nathuram Maurya have assisted during investigation.

18. P.W.9 Kundan Lal is an Investigating Officer of the Arms Act.

19. Close scrutiny of the evidence makes it clear that there is no eye witnesss account to the incident and the entire prosecution case is based on circumstantial evidence. Main piece of evidence is the statement of P.W.3 Puneet Kumar Gautam, who saw the accused persons entering the house of the deceased and thereafter coming out from the same, however, merely on the basis of this evidence, it will not be safe for this Court to reach to the positive conclusion that it is the accused persons, who have committed the murder of the deceased. There is absolutely no evidence as to in what manner the murder of the deceased was committed by the accused persons. From accused Sanjoo @ Sanjay, one country made pistol has been seized, but there is no ballistic expert report connecting the said seizer in the commission of offence. Furthermore, from accused Banwari and Praveen Dubey, knives have been seized, but undisputedly, no knife injury has been found on the body of the deceased.

So far as the recovery of the amount is concerned, the said recovery has not been proved by any independent witness and the basic ingredients of Section 411 I.P.C. have also not been proved by the prosecution as required under the law. Here also, the appellants are entitled to get the benefit of doubt.

20. Taking cumulative effect of the evidence, we are of the considered view that the evidence adduced by the prosecution does not appear to be sufficient on which basis the conviction of the appellants can be upheld.

21. The law in respect of conviction, based on circumstantial evidence, is very clear. In **Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra1,** the Supreme Court, while dealing with circumstantial evidence, observed as under:

"11. In *Hanumant Govind Nargundkar v. State of M.P. [AIR 1952 SC 343],* which is one of the earliest decisions on the subject, this court observed as under:

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

12. In *Padala Veera Reddy v. State of AP [(1989) Supp (2) SCC 706],* this court held that when a case rests upon circumstantial evidence, the following tests must be satisfied:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

13. In *Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116],* it was held that the onus was on the prosecution to prove that the chain is complete and falsity or untenability of the defence set up by the accused cannot be made basis for ignoring serious infirmity or lacuna in the prosecution case. The Court then proceeded to indicate the conditions which must be fully established before conviction can be based on circumstantial evidence. These are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

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

(3) the circumstances should be of a conclusive nature and 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."

22. In **Devi Lal vs. State of Rajasthan2** the Supreme Court, while

dealing with circumstantial evidence, observed as under:

16. The classic enunciation of law pertaining to circumstantial evidence, its relevance and decisiveness, as a proof of charge of a criminal offence, is amongst others traceable decision of the Court in Sharad Birdhichand Sarda Vs. State of Maharashtra 1984 (4) SCC 116. The relevant excerpts from para 153 of the decision is assuredly apposite:

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 & Anr. Vs. State of Maharashtra [(1973) 2 SCC 793* where the observations were made: (SC p.807, para 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."

17. It has further been considered by this Court in *Sujit Biswas Vs. State of Assam 2013(12) SCC 406* and *Raja alias Rajinder Vs. State of Haryana 2015(11) SCC 43*. It has been propounded that while scrutinising the circumstantial evidence, a Court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straight jacket formula which can be laid down for the purpose. But the circumstances adduced when considered collectively, it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused.

18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial

evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

19. hat apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

23. Recently, the Supreme Court in **Ramanand alias Nandlal Bharti Vs. State of Uttar Pradesh3** while referring to the previous judgements on the question of circumstantial evidence, observed in paras 105, 106 and 117 as under:-

"105. Addressing this aspect, however, is the following extract also from the same treatise "The Law of Evidence" fifth edition by Ian Dennis at page 483:

"Where the case against the accused depends wholly or partly on inferences from circumstantial evidence, fact-finders cannot logically convict unless they are sure that inferences of guilt are the only ones that can reasonably be drawn. If they think that there are possible innocent explanations for circumstantial evidence that are not "merely fanciful", it must follow that there is a reasonable doubt about guilt. There is no rule, however, that judges must direct juries in terms not to convict unless they are sure that the evidence bears no other explanation than guilt. It is sufficient to direct simply that the burden on the prosecution is to satisfy the jury beyond reasonable doubt, or so that they are sure.

The very high standard of proof required in criminal cases minimises the risk of a wrongful conviction. It means that someone whom, on the evidence, the fact-finder believes is "probably" guilty, or "likely" to be guilty will be acquitted, since these judgments of probability necessarily admit that the fact-finder is not "sure". It is generally accepted that some at least of these acquittals will be of persons who are in fact guilty of the offences charged, and who would be convicted if the standard of proof were the lower civil standard of the balance of probabilities. Such acquittals are the price paid for the safeguard provided by the "beyond reasonable doubt" standard against wrongful conviction."

[Emphasis supplied]

106. We must remind ourselves of what this Court observed in the case of Shankarlal Gyarasilal Dixit v. State of Maharashtra reported in (1981) 2 SCC 35. We quote as under:

"32. .....But, while formulating its own view the High Court, with respect, fell into an error in stating the true legal position by saying that what the court has

to consider is whether the cumulative effect of the circumstances establishes the guilt of the accused beyond the "shadow of doubt". In the first place, "shadow of doubt", even in cases which depend on direct evidence is shadow of "reasonable" doubt. Secondly, in its practical application, the test which requires the exclusion of other alternative hypotheses is far more rigorous than the test of proof beyond reasonable doubt."

[Emphasis supplied]

xxx xxx xxx

117. Thus, none of the pieces of evidence relied on as incriminating by the courts below, can be treated as incriminating pieces of circumstantial evidence against the accused. Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by heinous nature of the crime or the gruesome manner in which it was found to have been committed. Though the offence is gruesome and revolts the human conscience but an accused can be convicted only on legal evidence and if only a chain of circumstantial evidence has been so forged as to rule out the possibility of any other reasonable hypothesis excepting the guilt of the accused. In Shankarlal Gyarasilal (supra), this Court cautioned -"human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions". This Court has held time and again that between "may be true" and "must be true" there is a long distance to travel which must be covered by clear, cogent and unimpeachable evidence by the prosecution before an accused is condemned a convict. [See Ashish Batham v. State of M.P., (2002) 7 SCC 317]."

24. Keeping in mind the above proposition of law, facts and circumstances of the present case, we are of the view that the appellants are entitled for the benefit of doubt and, therefore, they are acquitted of all the charges.

25. For the foregoing reasons, we have no hesitation to hold that the prosecution has failed to prove the charges against the appellants beyond reasonable doubt and, therefore, the judgment and order of the court below is liable to be set aside.

26. The judgment and order of the trial court is set aside. The appeal of the appellants is allowed. The appellants shall be set free forthwith from the jail, unless wanted in any other case.

27. We appreciate the assistance offered by the learned counsel for the parties including the Amicus Curiae, who would be entitled to receive fee as per Rules.

28. Let a copy of this order along with the record be sent to the court below for information and compliance.

(2023) 2 ILRA 1004
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.01.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Crl. Revision No. 65 of 2023

Atique Ahmad ...Revisionist
Versus
State of U.P. ...Opp. Party

Counsel for the Revisionist:
Sri Chandrakesh Mishra, Sri Abhishek Kumar Mishra, Sri Shadab Ali (Sr. Advocate). Sri Daya Shanker Misra (Sr. Adv.)

Counsel for the Opp. Party
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 82, 83, 195, 309, 340, 362, 397(1) & 401 - Indian Penal Code, 1860 - Sections 147, 148, 174-A, 323, 341, 364, 504 & 506 - Criminal Law Amendment Act - Section - 7 - Criminal Revision - Order of remand & order of cognizance was *void ab initio* and remand would no longer be accorded and application for remand was rejected - being aggrieved, St. filed a Criminal Revision - there is a specific bar for reviewing its order by the criminal court, it would be a nullity and without jurisdiction - Order taking cognizance or issuing process is not an interlocutory order as held by Supreme Court in case of *Adalat Prasad Vs Roopal Jindal & ors.* - In the said case, Hon'ble Supreme Court held that, view taken by this Court in case of *K.M. Mathew Vs St. of Kerala*, that it would be open to court issuing summons to recall same on being satisfied that issuance of summons was not in accordance with law and order of issuing process is an interim order and not a judgement and, therefore, it can be varied or recalled, is not a correct view - It is evident that order of taking cognizance is a final order and whether it is erroneous order or not, can be looked into by superior court in appropriate proceedings and not by same court, which has taken cognizance - thus, order under challenged does not suffer from any illegality or error of jurisdiction or law - hence, Revision dismissed.(Para - 17, 21, 22)

Revision Dismissed. (E-11)

List of Cases cited: -

1. Sunil Tyagi Vs Government of NCT of Dehi, (2021) 0 Supreme (Del) 831,

2. Pepsi Foods Ltd. & anr. Vs Special Judicial Magistrate & ors., (1998) 5 SCC 749,

3. Dhariwal Tobacco Products Ltd. & ors. Vs St. of Mah. & anr., (2009) 2 SCC 370,

4. Vishnu Agarwal Vs St. of U.P. & anr., (2011) 14 SCC 813,

5. Madhu Limaye & ors. Vs Unknown, (1969) 1 SCC 292,

6. Inder Mohan Goswami & anr. Vs St. of Uttaranchal, (2007) 12 SCC 1,

7. Adalat Prasad Vs Roopal Jindal & ors., (2004) 7 SCC 338,

8. K.M. Mathew Vs St. of Ker., (1992) 1 SCC 217,

9. Mohd. Zakir Vs Shabana & ors., (2018 Vol. 15 SCC 316),

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

1. The present criminal revision under Section 397 (1) read with Section 401 Cr.P.C. has been instituted by Atique Ahmad, revisionist against the order dated 17.11.2022 passed by the Additional Sessions Judge/Special Judge(MP/MLA), Allahabad in Criminal Revision No.249 of 2008, whereby the learned revisional court allowed the criminal revision filed by the State against the order dated 7.3.2008 passed by the Additional Civil Judge/Judicial Magistrate, Court No.6, Allahabad.

2. The facts of the case, in brief, are that on 5.7.2007 Sri Ompal, a member of the Zila Panchayat, Allahabad lodged FIR No.270 of 2007, under Sections 147, 148, 323, 341, 342, 364, 504 and 506 IPC and Section 7 Criminal Law Amendment Act against the revisionist, a sitting Member of Parliament and others. The investigation of the said offence was conducted by Sri K.K. Mishra, Station House Officer.

3. During the course of investigation, efforts were made by the Investigating Officer to arrest the accused-revisionist, however, the accused could not be arrested nor they surrendered before the trial court. Warrants were issued against the accused and, thereafter, proceedings under Section 82/83 Cr.P.C. were undertaken. However, the accused could not be arrested nor they surrendered before the trial court within the prescribed time. In view thereof, an FIR under Section 174A IPC was registered on 26.8.2007.

4. The Investigating Officer after investigating the offence, filed an application for submitting the charge sheet and prosecuting the accused, including the revisionist. Learned Magistrate granted permission for submitting the charge sheet and, thereafter, charge sheet was submitted on 13.9.2007 by the Investigating Officer in the court. One application was also filed along with the charge sheet stating that as per the provisions of Section 195 Cr.P.C. read with Section 340 Cr.P.C., the court may send the charge sheet in its signature to the competent court for taking cognizance. The trial court without deciding the application dated 13.11.2007 filed by the Investigating Officer, took cognizance of the charge sheet on 16.1.2008 and ordered for preparing the copies of the documents.

5. co-accused Aizaz Akhtar surrendered before the trial court and filed an application for bail. The said accused was taken into custody and his application for bail was rejected. Thereafter, his bail application was allowed by the Sessions Court. The present revisionist was arrested by the police and he was sent to judicial custody. Co-accused Ashraf @ Kale was still absconding.

6. It appears that an application came to be filed after change of the presiding officer in the court of Additional Civil Judge/Judicial Magistrate, Allahabad against the order dated 6.1.2008 and the presiding officer as siting in appal against its own order, held that the objection could be entertained on behalf of the accused against the cognizance taken by the court when the objection would go at the bottom of the jurisdiction of the court. Learned Magistrate has held that provisions of Section 195 Cr.P.C. could not have been evaded and the order of taking cognizance dated 16.1.2008 was without jurisdiction and void ab initio.

7. It was further held that since the order of cognizance was *void ab initio* and remand under Section 309 Cr.P.C. would no longer be accorded and the application for remand was rejected vide order dated 7.3.2008.

8. Aggrieved by the said order, the State has filed Criminal Revision No.249 of 2008 and the learned revisional court has held that vide impugned order, the learned Magistrate had reviewed its own order of taking cognizance. It is well settled that the criminal court does not have power to review its own order. Learned revisional court had set aside the order dated 7.3.2008 impugned in the present revision.

9. Heard Sri Daya Shanker Mishra, learned Senior Advocate assisted by S/Sri Abhishek Kumar Mishra and Shadab Ali, learned counsel for the revisionist and Sri Manish Goyal, learned Additional Advocate General assisted by Sri Sanjay Kumar Singh, learned AGA for the State.

10. Sri Daya Shankar Mishra, learned Senior advocate for the revisionist has

submitted that cognizance for an offence under Section 174A IPC could not be taken without complying the provisions of Section 195 Cr.P.C. He has further submitted that the charge sheet was filed in the court on a police report and the Investigating Officer filed an application for forwarding the said report to the concerned court. However, learned Magistrate did not take decision on the application of the Investigating Officer and took cognizance himself and ordered for issuing copies of the documents. He has further submitted that the remand under Section 309 Cr.P.C. in such a case where the order of cognizance on the face of record is void and could not have been passed. He has, therefore, submitted that the learned Magistrate has not committed any error of jurisdiction or law which required the revisional court to interfere with the well reasoned order dated 7.3.2008 refusing the remand of the accused-revisionist.

11. Learned Senior Advocate for the revisionist has further submitted that the order of cognizance is not a final order and on an application, the court concerned can cancel/recall the said order. Learned trial court on the application of the accused-revisionist has recalled the order finding that the order of taking cognizance was void ab initio as it was passed in violation of Section 195 Cr.P.C. He has also submitted that the revisionist was not given opportunity of hearing by the revisional court and, therefore, the order impugned is bad in law inasmuch as the accused-respondent was required to be heard as provided in Section 401 Cr.P.C. and it is in violation of principles of natural justice.

12. Sri Daya Shanker Mishra in support of his contention has placed reliance on the following judgements:-

"1.Sunil Tyagi Vs. Government of NCT of Dehi, (2021) 0 Supreme (Del) 831 ;

2. Pepsi Foods Ltd. & Another Vs. Special Judicial Magistrate & other, (1998) 5

3. Dhariwal Tobacco Products Ltd. and Ors. v. State of Maharashtra and another; (2009) 2 SCC 370 : and

4. Vishnu Agarwal Vs. State of U.P. and another, (2011) 14 SCC 813.

5. Madhu Limaye and others Vs. Unknown, (1969) 1 SCC 292.

6. Inder Mohan Goswami and another vs. State of Uttaranchal, (2007) 12 SCC 1"

13. On the other hand, Sri Manish Goyal, learned Additional Advocate General has submitted that the order of taking cognizance is a final order. Under Section 362 Cr.P.C. there is a specific bar for reviewing its own order by the criminal court. He has further submitted that the learned trial court has not only refused remand of the accused-revisionist under Section 309 Cr.P.C., but also reviewed the order passed by the same court (however by another presiding officer) and held that the order of taking cognizance was *void ab initio*. It has been further submitted that such a course was not opened to the learned Magistrate inasmuch as he is not empowered to review its earlier order. It has also been submitted that the order taking cognizance and issuing process is a final order and it is not an interlocutory order, which can not be recalled or reviewed by the same court.

14. Learned Additional Advocate General has further submitted that the

impugned order itself would show that the accused-revisionist was given several opportunities for making submissions. However, the accused avoided to address the arguments. He has, therefore, submitted that the revisional court has not committed any error of jurisdiction or law in setting aside the order passed by the learned Magistrate inasmuch as the order passed by the learned Magistrate would amount to an order in appeal or reviewing its own order, which is not permissible under the law. He has submitted that in view thereof, the present revision has no merit, which is liable to be dismissed.

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

16. For the sake of argument, Section 362 Cr.P.C. reads a under:-

"362. Court not to after judgement. Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

17. Thus, there is a specific bar for reviewing its own order by the criminal court. The power of review is a statutory power and if the court reviews its own order, then it would be a nullity and without jurisdiction.

18. From perusal of the order dated 7.3.2008 passed by the learned Additional Civil Judge/Judicial Magistrate, Allahabad, it is evident that the learned Magistrate while considering the application filed by the accused-revisionist against the order of taking cognizance, has decided the application as if he was exercising the appellate jurisdiction or review jurisdiction. Learned Magistrate has held the earlier order taking cognizance dated 16.1.2008 was void ab initio. Such a course is completely barred under the provisions of Section 362 Cr.P.C.

19. The order taking cognizance or issuing process is not an interlocutory order as held by the Supreme Court in the case of ***Adalat Prasad Vs. Roopal Jindal and others, (2004) 7 SCC 338.*** In the said judgement, the Supreme Court held that the view taken by this Court in the case of ***K.M. Mathew Vs. State of Kerala, (1992) 1 SCC 217*** that it would be open to the court issuing summons to recall the same on being satisfied that the issuance of summons was not in accordance with law and order of issuing process is an interim order and not a judgement and, therefore, it can be varied or recalled, is not a correct view. Paragraphs 14, 15 and 16 of the said judgement, which would be relevant, are extracted hereunder:-

"14. But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore, what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons

because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in Mathew case [(1992) 1 SCC 217:1992 SCC (Cri) 88] that before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and the only stage of dismissal of the complaint arises under Section 203 of the Code at which stage the accused has no role to play, therefore, the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under Section 203 of the Code on a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.

15. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code.

16. Therefore, in our opinion the observation of this Court in the case of Mathew [(1992) 1 SCC 217 : 1992 SCC (Cri) 88] that for recalling an erroneous order of issuance of process, no specific provision of law is required, would run counter to the scheme of the Code which has not provided for review and prohibits interference at interlocutory stages. Therefore, we are of the opinion, that the view of this Court in Mathew case [(1992) 1 SCC 217 : 1992 SCC (Cri) 88] that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law."

20. The Supreme Court in the case of ***Mohammed Zakir Vs. Shabana and others,*** (2018) 15 SCC 316 has held that a criminal court can not make correction of a final order on merits howsoever patently erroneous the earlier order be. Such an order can only be corrected in the process known to law and not under Section 362 Cr.P.C. Paragraphs 2 and 3 of the said judgement are extracted hereunder:-

"2. The appellant is aggrieved since the High Court passed an order under Section 362 CrPC dated 28-4-2017 [Mohd. Zakir v. Shabana, 2017 SCC OnLine Kar 4719] recalling its own order dated 18-4-2017 [Mohd. Zakir v. Shabana, 2017 SCC OnLine Kar 1000 : (2017) 2 CCC 515 (1)] . The order dated 28-4-2017 [Mohd. Zakir v. Shabana, 2017 SCC OnLine Kar 4719] reads as under:

"Notwithstanding Section 362 CrPC the order rendered by this Court earlier on 18-4-2017 [Mohd. Zakir v. Shabana, 2017 SCC OnLine Kar 1000 : (2017) 2 CCC 515 (1)] is found to be patently erroneous and therefore the order is withdrawn. The petition is restored to file and the registry is directed not to

webhost the order passed earlier and to take note of the fact that the order is withdrawn."

3. The High Court should not have exercised the power under Section 362 CrPC for a correction on merits. However patently erroneous the earlier order be, it can only be corrected in the process known to law and not under Section 362 CrPC. The whole purpose of Section 362 CrPC is only to correct a clerical or arithmetical error. What the High Court sought to do in the impugned order is not to correct a clerical or arithmetical error; it sought to rehear the matter on merits, since, according to the learned Judge, the earlier order was patently erroneous. That is impermissible under law. Accordingly, we set aside the impugned order dated 28-4-2017."

21. From the aforesaid discussion, it is evident that the order of taking cognizance is a final order and whether it is erroneous order or not, can be looked into by the superior court in appropriate proceedings and not by the same court, which has taken cognizance.

22. In view thereof, I am of the view that the order under challenge in the present revision does not suffer from any illegality or error of jurisdiction or law. Learned Magistrate has no power to review the earlier order dated 16.1.2008 taking cognizance and, therefore, I find no merit in the present revision, which is hereby ***dismissed.***

(2023) 2 ILRA 1010
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.02.2023

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 472 of 2022

Saud Akhtar & Anr. ...Petitioners
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Malay Prasad. Sri Ramesh Chandra Agrahari,Sr. Adv., Sri Madhu Shukla, Sri Piyush Shukla, Ms. Saloni Mathur, Ms. Tanya Makker

Counsel for the Respondents:
A.S.G.I., Sri Arvind Singh G.A.

Criminal Law - Constitution of India,1950 - Article 21, 22(3)(B), 226, - Criminal Procedure Code, 1973 - Sections 167 & 167(2)(C), - National Security Act, 1980 - Sections 3(2) & 3(4) - Representation of the People Act, 1950 - Sections 123(2) , 123(3) & 123(3)(A) - Indian Penal Code,1860 - Sections 34, 120(B), 147, 148, 149, 302 & 307 - Criminal Law Amendment Act - Section - 7, - The UP Gangsters & Anti Social Activities (Prevention) Act, - Section - 3(1), - Preventive Detention Act, 1950 - Sections 3(2), 123 (2), 123 (3) & 123 (3A), - Indian Evidence Act, 1972: - Writ of Habeas Corpus - against detention order - representation - rejected - maintainability - lack of subjective satisfaction of competent authority - Law and order & Public order define - court finds that, the detaining authority has merely mentioned in grounds of detention that petitioner has filed his bail application before Court and there was possibility of petitioner indulging in similar activities prejudicial to maintenance of public order on his coming out of jail - she has not recorded her satisfaction in the impugned order - there was real possibility of his being released on bail which omission in our opinion has totally vitiated impugned order - hence, the detention of detenu under provisions of Section 3 (2) of NSA, 1980 is unsustainable - consequential impugned orders are hereby quashed - Petition

allowed - directions issued accordingly. (Para - 36, 38, 39, 40)

Writ Petition Allowed. (E-11)

List of Cases cited: -

1. Saud Akhtar Vs St. of U.P., (Crl. Misc. Bail Application No. 31658/2021, decided on dated 15.2.2022),

2. Saud Akhtar Vs St. of U.P., Criminal Misc. Bail Application No.10417 of 2022, order dated 30.3.2022,

3. Saud Akhtar & anr. Vs U.O.I. & ors., (SLP (Crl.) No. 10091/2022, decided on dated 12.9.2022),

4. Quamarul Islam Vs S.K. Kanta & ors. (1994 (1) SCR 210),

5. Naval Kishore Sharma Vs St. of U.P. & anr. (Matter U/A 227 No.6178 of 2022, decided on 30.9.2022),

6. Yumman Ongbi Lembi Leima Vs St. of Manipur & ors. (Criminal Appeal No. 26/2012, decided on 04.1.2012),

7. Abhayraj Gupta Vs Superintendent, Jail, Bareilly (Habeas Corpus W. P. No. 362/2021, decided on 23.12.2021),

8. Huidrom Konungjao Singh Vs St. of Manipur & ors. (2012 Vol. 7 SCC 181),

9. Kanu Biswas Vs St. of W.B., AIR 1972 SC 1656,

10. Dr. Ram Manohar Lohia Vs St. of Bihar & ors., (1966 (1) SCR 709,

11. Kishori Mohan Bera Vs The St. of W.B., 1972 (3) SCC 845,

12. Haradhan Saha & anr. Vs The St. of W.B. & ors., (1975) 3 SCC 198,

13. Kamarunnissa Vs U.O.I. & anr., 1990 (27) ACC 621 SC,

14. Dharmendra Suganchand Chelawat Vs U.O.I., AIR 1990 SC 1196,

15. Arun Ghosh Vs St. of W.B., 1970 (3) SCR 288,

16. Rivadeneyta Ricardo Agustin Vs Government of the National Capital Territory of Delhi & ors., 1994 Supp. 1 SCC 597,

17. Vijay Narain Singh Vs St. of Bihar, (1984) 3 SCC 14,

18. Binod Singh Vs D.M., Dhanbad, (1986) 4 SCC 416,

19. S.K. Mabud Vs St. of Odisha & anr., Writ Petition (Crl) No.82 of 2020, decided on 03.08.202,

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Mr. Malay Prasad alongwith Ms. Saloni Mathur and Ms. Tanya Makker, learned counsel for the petitioners; Sri Arvind Singh, learned counsel for the Union of India and Sri A.N. Mullah & Sri S.A. Murtaza, learned A.G.A. for the State respondents.

2. Present Habeas Corpus Writ Petition under Article 226 of the Constitution of India is preferred seeking following reliefs:-

"I. Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 31.03.2022 passed by respondent no.3 purportedly under Section 3 (2) of National Security Act, 1980 (Annexure No.1).

II. Issue a writ, order or direction in the nature of certiorari quashing the impugned Notification No.111/2/04/2022-C.X-6 Lucknow dated 07.04.2022 issued by respondent no.2 in exercise of the power under Section 3 (3) (4) of National Security Act, 1980 (Annexure No.2).

III. Issue a writ, order or direction in the nature of certiorari

quashing the impugned order dated 11.04.2022 passed by respondent no.3, by which the representation of the petitioners has been rejected (Annexure No.3).

IV. Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 20.05.2022 passed by respondent No.5 (copy not provided to the petitioner).

V. Issue writ, order or direction in the nature of Habeas Corpus commanding and directing the respondents concerned to produce the petitioner no.1/detenue before this Hon'ble Court and set petitioner no.1 detenue at liberty forthwith, who is under illegal detention vide impugned detention order dated 31.03.2022 under Section 3 (2) of National Security Act, 1980 passed by respondent no.3.

VI. Issue a writ, order or direction to pay him compensation to be decided by this Hon'ble Court for his illegal detention.

VII. Issue a writ, order or direction which this Hon'ble Court may deem fit and proper under the fact and circumstances of the case.

VIII. Award the cost of the petition to the petitioners."

3. It appears from the record that on 31.3.2022 the District Magistrate, Kanpur Nagar has passed an order of detention under Section 3 (2) of the National Security Act, 19801. In passing the said detention order, the District Magistrate felt satisfied that since it was necessary to prevent the petitioner no.1 from acting in any manner prejudicial to the maintenance of public order, the passing of the order under NSA, 1980 was imperative. She based her satisfaction for invocation of proceedings under NSA, 1980 on the following grounds, which are reflected from the record:-

(1) A first information report was lodged on 20.06.2020 registered as Case Crime No.425 of 2020 under Sections 147, 148, 149, 302/34 IPC & Section 7 of Criminal Law Amendment Act at Police Station Chakeri, District Kanpur Nagar by the complainant Dharmendra Singh Sengar with allegation that three years' ago the petitioner no.1 Saud Akhtar and co-accused Mohd. Asim @ Pappu made firing upon his brother Pintu Sengar with an intention to kill him, wherein his brother Pintu Sengar escaped and in this regard, a case was pending in the Court. Due to said previous enmity, the accused-petitioner Saud Akhtar alongwith other co-accused hatched conspiracy and called his brother for compromise whereon on 20.06.2020 at about 1:00 p.m. the complainant alongwith his brother Pintu Sengar and driver Rupesh were going to meet them by Innova Car but in the way, the accused-petitioner and other co-accused with common intention to kill him, made indiscriminate firing upon his brother due to which he received grievous injuries and fell down. The complainant and the driver by hiding saved themselves. The complainant took his brother to the hospital where he was declared dead. In aforesaid Case Crime No.425 of 2020 after investigation the investigating officer submitted charge sheet dated 20.11.2020 against the petitioner under Sections 147, 148, 149, 302, 307, 34, 120B IPC & Section 7 of Criminal Law Amendment Act. It is further averred that the print media and electronic media highlighted the said incident in their news reports in the newspapers for so many days. The

postmortem report; the statement of the informant; statement of driver of the deceased and the statement of the family members of the deceased are referred and a supplementary charge sheet No.605-A dated 20.11.2020 has also been filed against the petitioner no.1/detenue with the added Section 120B IPC. In the said criminal case the petitioner no.1 has been granted bail by learned Single Judge of this Court vide order dated 15.2.2022 passed in Criminal Misc. Bail Application No.31658 of 2021 (Saud Akhtar vs. State of UP).

(2) The grounds of detention also refers a subsequent FIR dated 06.3.2021 lodged by the police under Section 3 (1) of U.P. Gangsters & Anti Social Activities (Prevention) Act, 1986 registered as Case Crime No.212 of 2021 at Police Station Chakeri, District Kanpur Nagar and after investigation the charge sheet has been filed in the said case. The details of 34 criminal cases are also mentioned in the grounds of detention in caption of criminal history. There was immense possibility of release of the petitioner no.1 as his bail application in Case Crime No.212 of 2021 was pending before this Court. Ultimately, in the said Case the petitioner has been accorded bail by this Court vide order dated 30.3.2022 passed in Criminal Misc. Bail Application No.10417 of 2022 (Saud Akhtar vs. State of U.P.).

(3) Meanwhile, the concerned Station House Officer submitted a report dated 30.3.2022 to the Assistant Commissioner of Police for initiating proceedings against the petitioner under NSA, 1980. The Assistant Commissioner of Police forwarded the same to the Deputy Commissioner of Police on 31.3.2022. It was further forwarded to the Commissioner of Police, Kanpur Nagar and on the same day, the Commissioner of Police has sent his report to the District Magistrate, Kanpur Nagar. After going through the entire material available on record the District Magistrate was satisfied that the petitioner no.1 should be detained so that he may be prevented from acting in any manner prejudicial to the maintenance of public order, breach of which is rather imminent and consequently, he has passed the impugned detention order on 31.3.2022. In the grounds of detention, the District Magistrate has also referred a beat information of the Mobile Constables regarding release of the petitioner on bail and to repeat the offences disturbing the public order. It has been finally concluded by the District Magistrate in the grounds of detention after considering the column of criminal history also that it is necessary to pass the detention order against the petitioner.

4. The petitioner no.1 was confined in the District Jail, Kanpur Nagar since 20.10.2020 after his arrest in pursuance of the FIR dated 20.5.2020. The detention order dated 31.3.2022 alongwith grounds of the detention and other relevant materials were served to the petitioner on the same day through the jail authorities to afford him opportunity for making an effective representation. The detention order alognwith grounds of detention was sent to the State Government on 01.4.2022 through special messenger. Finally, the State Government vide order dated 07.4.2022 granted approval to the detention order. The petitioner no.1 made representations dated 04/08.04.2022 for being forwarded to the Advisory Board, State Government as also to the Central Government. However, there was an intervening period of two days on 09.4.2022 and 10.4.2022 being second Saturday and Sunday and therefore, the

District Magistrate has rejected the representation on 11.4.2022. It was communicated to the petitioner on the same day through jail authorities. The rejection of the representation was also communicated to the State Government & Central Government on 11.4.2022 through special messenger. Having received the comments, the State Government forwarded the report on his representation to the Central Government. The State Government has rejected the representation of the petitioner on 26.4.2022 and the Central Government rejected his representation on 27.4.2022. Both the rejection orders were also communicated to the petitioner through jail authorities on the same day. The Advisory Board also heard the petitioner on 09.5.2022. After receiving report of the Advisory Board, the said detention order was confirmed by the State Government vide order dated 20.5.2022 initially for a period of three months from the date of detention i.e. 31.3.2022, which has been challenged in the petition.

5. Feeling aggrieved by the aforesaid, the detenue/petitioner has filed the instant habeas corpus petition through his next friend/son Nawaz Akhtar (petitioner no.2) with the prayer, as mentioned in paragraph-2 herein-above. During pendency of the instant habeas corpus petition, the State Government vide order dated 14.6.2022, extended the period of detention for a further period of three months and then on 22.9.2022 the State Government extended the period of detention for nine months from the date of detention i.e. 31.3.2022, but it transpires from the record that the extension orders dated 14.6.2022 and 22.9.2022 have not been challenged by the detenue/petitioner in the instant habeas corpus petition.

6. This petition was initially presented in this Court on 01.7.2022 when the opposite parties were granted time to file counter affidavit. The State Government, the District Magistrate and the Superintendent of District Jail have done so. Rejoinder affidavit has also been filed by the petitioner on 09.9.2022. Thereafter, the matter was taken up on 12.9.2022 and on the said date, it was directed to be listed on 21.9.2022. Meanwhile, the petitioner had filed Special Leave to Appeal (Crl.) No(s).10091/2022 (Saud Akhtar & another vs. Union of India & ors) arising out of the order passed by this Court dated 12.9.2022 and Hon'ble Supreme Court vide order dated 14.11.2022 has proceeded to dispose of the said SLP with following observations:-

"1. While considering Habeas Corpus Writ Petition No.472 of 2022, a Division Bench of the High Court of Judicature at Allahabad, by its order dated 12 September 2022, directed that the proceedings should be listed on 21 September 2022. The Special Leave Petition before this Court was instituted on 14 October, 2022. Ordinarily, we would not have entertained the Special Leave Petition having regard to the fact that the Habeas Corpus Petition was only directed to stand over by a period of ten days. However, Mr. Sidharth Luthra, senior counsel appearing on behalf of the petitioners, with Mr. Rohit Amit Sthalekar, submits that thereafter the petition has been adjourned on 21 September 2022, 28 September 2022, 12 October 2022, 19 October 2022, 2 November 2022 and 14 November 2022 and has not been taken up for hearing.

2. Having due regard to the fact that the petition seeks to challenge an order of detention passed under Section 3 (2) of the National Security Act, 1980, we request the High Court to take up the petition with

all reasonable dispatch and make an endeavour to dispose it of expeditiously, preferably within a period of two months from the date of receipt of a certified copy of this order.

3. Subject to the aforesaid, the Special Leave Petition is disposed of.

4. Pending application, if any, stands disposed of."

7. In this backdrop, learned counsel for the petitioner vehemently submitted that in this writ petition, the validity of the detention of the petitioner no.1 has been challenged. The petitioner no.1 has been detained by the District Magistrate, Kanpur Nagar by an order dated 31.3.2022 (Annexure No.1 to the writ petition) made under Section 3 (2) of the NSA, 1980. The State Government vide order dated 07.4.2022 after receipt of the opinion of the Advisory Board has approved the detention order as required under Section 3 (4) of the NSA, 1980. The grounds of detention contain a recital that aforesaid incident had resulted in spread of fear and terror amongst general public of District Kanpur Nagar. The public order and the tempo of life was totally disturbed. The aforesaid incidents were given wide coverage by the media in various national and local level newspapers. A person already arrested can still be detained under the NSA Act, but for exercising that power, the authorities have to fulfill certain requirements. The necessary ingredients for recording a valid "subjective satisfaction" of Competent Authority is absent in the impugned order dated 31.3.2022.

8. Learned counsel for the petitioner contended that as per Section 3 (2) of NSA, 1980 an order of detention can be passed with the view to prevent a person from acting in any manner prejudicial to the security of the State or to the maintenance of the Public Order. The present case mainly falls under the category of disturbance to "law and order" and not "public order". Public Order was said to embrace more of the community than law and order. Public Order is the even tempo of the life of the community taking the country as a whole or even a specified locality. The disturbance of Public Order is to be distinguished from acts directed against individuals, which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines, whether the disturbance amounts only to a breach of law and order. Therefore, the question, whether a man has committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order, is a question of degree and the extent of the reach of the act upon the society.

9. It is submitted that in the instant case the alleged acts of assault by firearms are directed against the individual and are not subversive of Public Order. Therefore, the detention order on the ostensible ground of preventing him in any manner prejudicial to the public order was not justified. It is an act infringing law and order and the reach and effect of the act is not so extensive as to affect a considerable member of the Society. In other words, the alleged act of the petitioner does not disturb the public tranquility nor does it create any terror or panic in the minds of the people of the locality nor does it affect the even tempo of the life of the community. This criminal act emanates from alleged personal animosity between the detenus

and the complainant and therefore, such an act cannot be the basis for subjective satisfaction of the detaining authority to pass an order of detention on the ground that the act purports to public order i.e., the even tempo of the life of the community which is the sole basis of the clamping the order of detention.

10. It is contended that in the present case, the allegation against the petitioner is that he hired professional shooters to execute the murder of the deceased namely Pintu Sengar in broad day-light at J.K. Colony, Kanpur. The incident is said to have disrupted the public tranquility which has been conveyed as the major ground for the detention of the petitioner. He has placed reliance on the Naksha Nazri from the case diary of the said case, which is appended as Annexure SA-1 to the supplementary affidavit, wherein the incident took place not in a very densely populated area so as to disturb or affect public at large. The spot of incident is merely surrounded by empty plots at both ends and there is only one general store at a distance of 50 meters from the spot of the incident. Many people were not present at the spot of the incident. The CCTV footage of the incident, which was recovered during the course of the investigation, does not identify the petitioner as an assailant. Infact, the presence of the petitioner has also not been captured in the CCTV footage.

11. It is further submitted that the detention order is passed without there being any cogent material. A stale incident of 2020 became the reason for passing the order of detention. In the said case, the petitioner has already been accorded bail by this Court vide order dated 15.2.2022. The past record must have a live and proximate link with the reason of detention. Otherwise, such stale material/case cannot be a basis for passing the detention order. In the present detention order, the media clippings have been made as the sole proof of disruption of public order and there are no eye-witnesses to the incident on record. As per Indian Evidence Act, 1972, newspaper reports by themselves are not evidence of the contents thereof. As such, the District Magistrate, Kanpur Nagar has not applied her mind to the facts of the case and the material on record and she has passed the impugned order in a routine manner on the report submitted to her by the police authorities. The detaining authority has failed to record any satisfaction in the impugned order that there was real possibility of the petitioner, who was already in judicial custody, being released on bail. Further the material before the detaining authority was not sufficient to satisfy her that after being released on bail the petitioner shall again indulge in activities prejudicial to the public order and hence, the impugned order, which is per-se illegal, may be set aside and the petitioner be set at liberty forthwith. In support of his submission, he has placed reliance on the judgments of Apex Court in **Quamarul Islam vs. S.K. Kanta and ors 2** as well as the judgment of this Court in **Naval Kishore Sharma vs. State of UP and another3.**

12. It is submitted that the detaining authority did not apply its mind before passing the order of detention and failed to strike a balance between the constitutional and the legal obligation charged on the petitioner before passing the order and the manner in which the power of detention has been exercised. It does not appear to have been exercised rationally. The District Magistrate has placed reliance on the

criminal list of 34 cases out of which the petitioner has been acquitted in 10 criminal cases; final report has been submitted in 9 cases; 4 cases are not related to the petitioner and proceeding of two criminal cases have been quashed. Further the District Magistrate has failed to create a nexus between alleged offences and the order of detention. The details of criminal cases have been given in paragraph-36 of the writ petition. It is submitted that preventive detention is not to punish a person for something he has done but to prevent him from doing it. Therefore, since the detention order has been passed on the allegation of involvement of the detenu in a number of criminal cases without disclosing any material in the report of the Superintendent of Police or materials available before the detaining authority that there is likely to be a breach of public order, the detention order cannot be sustained. In this regard, he has placed reliance on the judgement of Apex Court in **Yumman Ongbi Lembi Leima vs. State of Manipur & ors4** as well as the judgment of **Orissa High Court in S.K. Mabud vs. State of Odisha and another5**. He further submitted that the incident took place on 20.6.2020 and it is a stale incident, which is not proximate to the time when the detention order was passed on 31.3.2022. After a long delay of about two years, the invocation of the provisions of NSA, 1980 was neither warranted nor justified and the delay was not satisfactorily explained by the detaining authority. He has placed reliance on the judgment of this Court in **Abhayraj Gupta vs. Superintendent, Jail, Bareilly6.**

13. Lastly, it is submitted that in Case Crime No.425 of 2020 the petitioner has been accorded bail by this Court vide order dated 15.2.2022 passed in Criminal Misc. Bail Application No.31658 of 2021, prior to passing the detention order. The bail application contained the grounds for bail including the ground that he was falsely implicated in the said case. The informant was said to be an unreliable witness as he changed his statements on several occasions. There was material inconsistency in the prosecution version set out in the FIR and the subsequent statements given by the informant from time to time before the investigating officer. Some of the offenders named in the FIR as principal offenders were not even chargesheeted. The CCTV footage of the incident on record does not show the presence of the petitioner. The criminal history of the petitioner was duly explained. There were sufficient materials which could have reasonably influenced the decision of the detaining authority but the detaining authority has not considered them. However, if the authorities were not satisfied with the release of the petitioner on bail, the same could have been challenged before the higher Court. When there was an option available to the respondents then imposing of the detention of the petitioner under NSA, 1980 was unjust and violative of Article 21 of the Constitution of India. It is submitted that if the ordinary law of the land can deal with the situation, then recourse to a preventive detention law will be illegal.

14. Per contra, learned A.G.A. and learned counsel for the Union of India made their submissions in support of impugned order and submitted that due to the aforesaid incident, the public order and tranquility of the locality was disturbed. There was immense possibility of release of the petitioner as his bail application in Case Crime No.212 of 2021 was pending before this Court, therefore, the Station

House Officer submitted his report dated 30.3.2022 to the Assistant Commissioner of Police for initiating the proceedings against the petitioner under NSA, 1980. The report of Assistant Commissioner of Police shows that the likelihood of involvement of petitioner in similar acts was not ruled out. This report became basis for passing of detention order. After going through the entire material available on record and the report of the sponsoring authority, the detaining authority has passed the impugned order after being fully satisfied on the basis of the material produced before her that on being released on bail the petitioner may again indulge in activities prejudicial to the public order and the same does not suffer from any illegality or infirmity, hence the present habeas corpus writ petition is liable to be dismissed.

15. It was submitted that the detention order was communicated to the petitioner and it was approved by State Government on 07.4.2022 i.e. within statutory limit. As per judgment of Apex Court in **Konungjao Singh vs. State of Manipur & Ors.7**, the petitioner was entitled to receive an information regarding grounds of detention and was further entitled to get an opportunity to represent against it. Both the requirements were taken care of and hence, no interference is required by this Court. It is submitted that the representations of the petitioner dated 04.4.2022 and 08.4.2022 were duly considered and rejected by the State Government and Central Government on 26.4.2022 and 27.4.2022 and accordingly, the detenu alongwith authorities concerned were informed.

16. After having very carefully examined the submissions made by learned counsel for the parties and perused the impugned order as well as the other material brought on record, we find that the issue involved in this writ petition is that whether the failure of the District Magistrate to record in the impugned order, that there was strong possibility of the petitioner, who was already in judicial custody on account of his being accused in Case Crime No.212 of 2021 of being released on bail, has vitiated the impugned order and whether the subsequent recording of her satisfaction that on being released on bail there was possibility of the petitioner indulging in similar activities which were prejudicial to the public order would validate the impugned order.

17. In the instant case, it transpires that the allegation against the Corpus was that he hired professional shooters to execute the murder of the deceased namely Pintu Sengar in broad day-light at J.K. Colony, Kanpur. The stand of Corpus is that he has been falsely trapped and implicated in Case Crime No.425 of 2020 in which he has been granted bail by this Court vide order dated 15.2.2022 passed Criminal Misc. Bail Application No.31658 of 2021. In subsequent Case Crime No.212 of 2021 under Section 3 (1) of U.P. Gangsters & Anti Social Activities (Prevention) Act, 1986 the corpus has also been accorded bail by this Court vide order dated 30.3.2022 passed in Criminal Misc. Bail Application No.10417 of 2022. Meanwhile, the concerned Station House Officer submitted his report dated 30.3.2022 to the Assistant Commissioner of Police for initiating the proceedings under NSA, 1980 against the petitioner. Finally, the District Magistrate has formed her opinion on the basis of a media trial and imposed the NSA, 1980 against the petitioner on 31.3.2022. The detention order refers an old case of the year 2020 in which he has been accorded bail by this

Court on 15.2.2022. There is no live nexus between the incident of 2020 and action for which detention order is passed. The order of detention indicated cases relating to law and order situation and had nothing to do with maintenance of public order and was stale to be considered relevant for the purpose of detention.

18. Section 3 (2) of NSA, 1980 contemplates that a citizen can be detailed under the NSA - (i) for preventing him from acting in any manner prejudicial to the security of the State; (ii) for preventing him from acting in any manner prejudicial to the maintenance of public order; (iii) for preventing him from acting in any manner prejudicial to the maintenance of supplies and services to the community. The 'explanation' to Section 3 (2) deals with contingency (iii) only. The preventive law can be invoked to prevent somebody from acting in a manner prejudicial to the security of State, public order or to maintain supplies and services essential to the communities. There was no material to show that the alleged acts of the detenu disturbed the even tempo of life. Since the Corpus is facing a criminal case, we are not inclined to give any finding on this aspect, which may have a bearing on the trial. In view of aforesaid three requirements, we are only inclined to observe that there was no material before the learned District Magistrate to believe that the Corpus will again indulge in similar activity of hiring professional shooters.

19. We further find that there is no indication in the detention order to the effect that the detaining authority was aware that the detenu was already in custody and that she has reason to believe on the basis of reliable material that there is a possibility of his being released on bail and that on being so released the detenu would in all probabilities indulge in prejudicial activities and for compelling reasons a preventive detention order need to be made. It is the settled position of law that the authorities are not precluded from passing an order of detention when the person concerned is in jail, but while passing the order of detention, they are required to apply their mind to the fact that the person concerned is already in jail and there are compelling reasons justifying such detention despite the fact that the detenu was already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that the detenu is likely to be released from custody in the near future or taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would probably indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

20. The crucial issue is whether the activities of the detenu were prejudicial to public order. While the expression 'law and order' is wider in scope inasmuch as contravention of law always affects order. 'Public order' has a narrow ambit, and public order could be affected by only such contravention, which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of 'law and order' and 'public order' is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to

disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting 'public order' from that concerning 'law and order'. The test to be adopted in determining whether an act affects law and order or public order, is : Does it lead to disturbance of the current life of the community so as to amount to disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? (Ref. Kanu Biswas Vs. State of West Bengal8).

21. "Public order" is synonymous with public safety and tranquility. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum, which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. (Ref. **Dr. Ram Manohar Lohia Vs. State of Bihar and Ors.9**).

22. 'Public Order', 'law and order' and the 'security of the State' fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the State (Ref. **Kishori Mohan Bera Vs. The State of West Bengal10**.

23. Hon'ble Supreme Court in paragraph 35 of its judgment rendered in the case of **Haradhan Saha & Another vs The State Of West Bengal & Ors.11** observed that where the concerned person is actually in jail custody at the time when the order of detention is passed against him, and is not likely to be released for a fairly long time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in the activities which would jeopardise the security of the State or the public order.

24. Hon'ble Supreme Court has laid down the principles as to when a detention order can be passed with regard to a person already in judicial custody in the case of **Kamarunnissa vs. Union of India and another12** and in paragraph 13 of the aforesaid case, Hon'ble Supreme Court has held as hereunder :-

"13. From the catena of decisions referred to above, it seems clear to us that even in the case of a person in custody a detention order can validly be passed(1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him(a) that there is real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity; and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in his behalf, such an order can not be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question of before a higher Court."

25. Another leading authority on the same issue is the judgment of Apex Court rendered in the case of **Huidrom Konungjao Singh Vs. State of Manipur** (supra) wherein the Supreme Court has held that while detaining a person, who was already arrested, due care should be taken as under:

"If the detention order, passed against a person who is already in custody in respect of criminal case is challenged the detaining authority has to satisfy the Court the following facts :

1. The authority was fully aware of the fact that the detenue was actually in custody.

2. There was reliable material before the said authority on the basis of which it could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order.

3. In view of the above the authority felt it necessary to prevent him from indulging in such activities and therefore, detention order was necessary.

In case either of these facts does not exist, the detention order would stand vitiated and liable to be quashed.

Merely because somebody else in similar cases had been granted bail, there could be no presumption that in the instant case had the detenue applied for bail, he could have been released on bail. If the said bail orders do not relate to the co-accused of the same case crime number, the accused released on bail in these cases of similar nature, having no concern with the present case, their bail orders can not be a ground to presume that the detenue may also be released on bail.

The appeal succeeds and is allowed. The impugned detention order is set aside."

26. In **Dharmendra Suganchand Chelawat Vs. Union of India13** the Supreme Court has observed as under :-

"21. .....an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that -

1.The detaining authority was aware of the fact that the detenue is already in detention.

2.There were compelling reasons justifying such detention despite the fact that the detenue is already in detention.

The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that the detenu is likely to be released from custody in the near future and taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

27. In the decision of Apex Court in the case of **Arun Ghosh v. State of West Bengal14,** the question was whether the grounds mentioned in the detention order could be construed to be breach of public order and as such, the detention order could be validly made. The appellant in the said case had molested two respectable young ladies threatened their father's life and assaulted two other individuals. He was detained under Section 3(2) of the Preventive Detention Act, 1950 in order to prevent him from acting prejudicially to the maintenance of public order. It was held by the Apex Court that the question whether a man has only committed a breach of law and order, or has acted in a manner likely to cause a disturbance of the public order, is a question of degree and the extent of the reach of the act upon society. The test is: does it lead to a disturbance of the even tempo of the life of the community so as to amount to a disturbance of the public order, or, does it affect merely an individual without affecting the tranquility of society. Therefore, it could not be said to amount to an apprehension or breach of public order, and hence, he was entitled to be released.

28. In **Yumman Ongbi Lembi Leima v. State of Manipur and Ors. (supra)**, the Hon'ble Supreme Court held that preventive detention is not to punish a person for something he has done but to prevent him from doing it. Only on the apprehension of the detaining authority that after being released on bail, the petitioner-detenu will indulge in similar activities, which will be prejudicial to public order, order under the Act should not ordinarily be passed. The personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order.

29. In the case of **Quamarul Islam v. S.K. Kanta** (supra), the Supreme Court has considered a case where the cassette containing a speech of a returned candidate was recorded by a police officer, which was tendered by the election petitioner in order to prove a corrupt practice against the returned candidate under Section 123 (2), 123 (3) and 123 (3A) of the Representation of the People Act, 1950. Relevant paragraph 48 of the judgment is reproduced herein below:-

"48. Newspaper reports by themselves are not evidence of the contents thereof. Those reports are only hearsay evidence. These have to be proved and the manner of proving a newspaper report is well settled. Since, in this case, neither the reporter who heard the speech and sent the report was examined nor even his reports

produced, the production of the newspaper by the Editor and Publisher, PW 4 by itself cannot amount to proving the contents of the newspaper reports. Newspaper, is at the best secondary evidence of its contents and is not admissible in evidence without proper proof of the contents under the Indian Evidence Act. The learned trial Judge could not treat the newspaper reports as duly "proved' only by the production of the copies of the newspaper. The election petitioner also examined Abrar Razi, PW 5, who was the polling agent of the election petitioner and a resident of the locality in support of the correctness of the reports including advertisements and messages as published in the said newspaper. We have carefully perused his testimony and find that his evidence also falls short of proving the contents of the reports of the alleged speeches or the messages and the advertisements, which appeared in different issues of the newspaper. Since, the maker of the report which formed(18) basis of the publications, did not appear in the court to depose about the facts as perceived by him, the facts contained in the published reports were clearly inadmissible. No evidence was led by the election petitioner to prove the contents of the messages and the advertisements as the original manuscript of the advertisements or the messages was not produced at the trial. No witness came forward to prove the receipt of the manuscript of any of the advertisements or the messages or the publication of the same in accordance with the manuscript. There is no satisfactory and reliable evidence on the record to even establish that the same were actually issued by IUML or MYL, ignoring for the time being, whether or not the appellant had any connection with IUML or MYL or that the same were published by him or with his consent by any other person or published by his election agent or by any other person with the consent of his election agent. The evidence of the election petitioner himself or of PW 4 and PW 5 to prove the contents of the messages and advertisements in the newspaper in our opinion was wrongly admitted and relied upon as evidence of the contents of the statement contained therein."

30. In the case of **Naval Kishor Sharma vs. State of U.P. and another** (supra) it has been held by this Court in paragraphs 20, 21 and 26 as under:-

"20. From the above judgements it is clear that newspaper report by itself does not constitute an evidence of the contents of it. The reports are only hearsay evidence. They have to be proved either by production of the reporter who heard the said statements and sent them for reporting or by production of report sent by such reporter and production of the Editor of the newspaper or it's publisher to prove the said report. It has been held by the Apex Court that newspaper reports are at best secondary evidence and not admissible in evidence without proper proof of its content under the Indian Evidence Act, 1872. It is thus clear that newspaper report is not a "legal evidence" which can be examined in support of the complainant.

21. It is trite law that there has to be legal evidence in support of the allegations levelled against a person. In the present case the only evidence relied upon is the newspaper reporting and nothing else. For what has been stated above and as per the settled legal position, a newspaper report is not a "legal evidence".

26. While dealing with the word "consequence" appearing in Section 179 of Cr.P.C., in the case of Ganeshi Lal Vs.

Nand Kishore : 1912 SCC Online All 76 : 1912 (Vol. X) A.L.J.R. 45, it has been held as under:-

"The word "consequence" in this section, in my opinion, means a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence. In Babu Lal Vs. Ghansham Dass : (1908) 5 A.L.J.R. 333, it is remarked: "it is contended that section 179 by reason of the words "contained in it' and "of any consequence which has ensued' gives the Magistrate at Aligarh in this case jurisdiction. But the only reasonable interpretation which can be put upon these words is that they are intended to embrace only such consequences as modify or complete the acts alleged to be an offence." The above remarks support the view I take."

31. In **Rivadeneyta Ricardo Agustin Vs. Government of the National Capital Territory of Delhi and others15,** the Hon'ble Supreme Court has observed :

"if there is no material before the detaining authority indicating that the detenue is likely to be released or such release is imminent, the detention order, passed without such satisfaction is liable to be quashed."

32. In **Vijay Narain Singh Vs. State of Bihar16,** the Apex Court has observed that :

"the law of preventive detention being a drastic and hard law, must be strictly construed and should not ordinarily be used for clipping the wings of an accused if, criminal prosecution would suffice."

33. In **Binod Singh Vs. District Magistrate, Dhanbad17**, the Apex Court has emphasised that :

"before passing a detention order in respect of a person who is in jail the concerned authority must satisfy himself and that satisfaction must be reached on the basis of cogent material that there is a real possibility of the detenu being released on bail and further if released on bail he will indulge in prejudicial activity if not detained."

34. Considering the aforesaid facts and circumstances, we had also proceeded to examine a few precedents in detail so as to ascertain whether the facts of the present case make out a case of disturbance to "public order" or it would merely fall under the category of a disturbance to "law and order". The Division Bench of this Court in **Abhayraj Gupta vs. Superintendent, Central Jail, Bareilly** (supra), had considered said aspect of the matter in detail in paragraphs 54 to 61 and the same same are reproduced herein below:-

"54. From a perusal of aforesaid pronouncements, it is clear that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is real possibility of his being released on bail and, and (b) that on being so released he would in all probability indulge in prejudicial activity; and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in his behalf, such an order cannot be struck down on the ground that the proper course for the

authority was to oppose the bail and if bail is granted notwithstanding such opposition to question the same before a higher Court.

55. In Kamarunnissa (Supra), one of the accused persons had secreted diamonds and precious stones in his rectum while the other two detenus had swallowed 100 capsules each containing foreign currency notes. The detaining authority was ware of the fact that two of the accused persons had applied bail and in such cases courts ordinarily enlarge the accused on bail. He was also aware of the fact that one of the detenus had not applied for bail. Conscious of the fact that all the three detenus were in custody, he passed the impugned orders of detention as he had reason to believe that the detenus would in all probability secure bail and if they are at large, they would indulge in the same prejudicial activity since the manner in which the three detenus were in the process of smuggling diamonds and currency notes was itself indicative of they having received training in this behalf. The fact that one of them secreted diamonds and precious stones in two balloon rolls in his rectum and that the other two detenus had created cavities for secreting as many as 100 capsules each in their bodies was indicative of the fact that this was not to be a solitary instance. All the three detenus had prepared themselves for indulging in smuggling by creating cavities in their bodies after receiving training. In Baby Devassy Chully (Supra) also the Directorate of Revenue Intelligence had intercepted one sea-faring vessel by carrying diesel oil of foreign origin which was smuggled into India. The officers of the DRI seized the said diesel oil weighing about 770 MTs, worth Rs 2 crores, under the Customs Act, 1962, which was being delivered to the accused person. The accused had been granted bail but he had not availed the same. The Hon'ble Supreme Court had upheld the detention orders keeping in view the peculiar facts of the aforesaid cases that the accused persons were professional smugglers, on the ground that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty.

56. While examining the applicability of the aforesaid decisions, it would be appropriate to have a look at the law regarding application of precedents, as explained by the Hon'ble Supreme Court in Roger Shashoua v. Mukesh Sharma19, in the following words: -

"55. ....It is well settled in law that the ratio decidendi of each case has to be correctly understood. In Regional Manager v. Pawan Kumar Dubey, a three-Judge Bench ruled: (SCC p. 338, para 7)

"7. ... It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."

56. In Director of Settlements v. M.R. Apparao, another three-Judge Bench, dealing with the concept whether a decision is "declared law", observed: (SCC p. 650, para 7)

"7. ... But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. ..."

57. In this context, a passage from CIT v. Sun Engg. Works (P) Ltd. would be absolutely apt: (SCC pp. 385-86, para 39)

"39. ... It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. ..."

58. In this context, we recapitulate what the Court had said in Ambica Quarry Works v. State of Gujarat: (SCC p. 221, para 18)

" 18. ... The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. (See Lord Halsbury in Quinn v. Leathem43.) ..."

59. From the aforesaid authorities, it is quite vivid that a ratio of a judgment has the precedential value and it is obligatory on the part of the court to cogitate on the judgment regard being had to the facts exposited therein and the context in which the questions had arisen and the law has been declared. It is also necessary to read the judgment in entirety and if any principle has been laid down, it has to be considered keeping in view the questions that arose for consideration in the case. One is not expected to pick up a word or a sentence from a judgment dehors from the context and understand the ratio decidendi which has the precedential value. That apart, the court before whom an authority is cited is required to consider what has been decided therein but not what can be deduced by following a syllogistic process."

57. Keeping in view the aforesaid dictum of the Hon'ble Supreme Court, the aforesaid principles laid down in Kamarunnissa, Baby Devassy Chully, Ahmad Nassar and Pankaj (Supra) in view of the peculiar facts of those cases are not applicable to the facts of the present case.

58. Moreover, even in Baby Devassy Chully (Supra), the Hon'ble Supreme Court has held that if a person is in custody and there is no imminent possibility of his being released, the rule is that the power of preventive detention should not be exercised. The allegation

against the petitioner is that he committed murder of a person, regarding whom the petitioner claims to have an old family animosity. He is not alleged to be a professional killer who would again start indulging in similar activities as soon as he comes out on bail. Moreover, a F.I.R. was lodged against the petitioner on the ground of the same incident, under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 as Case Crime No. 221/20 in Police Station Sadar Bazar, Shahjahanpur, in which the petitioner was in custody since 01-05-2020 and as on the date of passing of the detention order, he had not even filed an application for bail. The bail application in the aforesaid case was filed on 25-01-2021, although as per the submissions of Mr. Murtaza, a copy of the bail application had been served on 21-01-2021.

59. In a case under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 a bail order cannot be passed in a manner in which it is passed in case of any offence under the I.P.C. Section 19 of the aforesaid Act provides as follows: -

"19. Modified application of certain provisions of the Code. - (1) Notwithstanding anything contained in the Code every offence punishable under this Act or any rule made thereunder shall be deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of the Code and cognizable case as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that-

(a) the reference in sub-section (1) thereof to "Judicial Magistrate" shall be construed as a reference to "Judicial Magistrate or Executive Magistrate";

(b) the references in sub-section (2) thereof to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "sixty days", "one year" and "one year", respectively;

(c) sub-section (2A) thereof shall be deemed to have been omitted.

(3) Sections 366, 367, 368 and 371 of the Code shall apply in relation to a case involving an offence triable by a Special Court, subject to the modification that the reference to "Court of Session" wherever occurring herein, shall be construed as reference to "Special Court".

(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless :

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(5) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code."

60. Keeping in view the fact that the petitioner was already in Jail in a case under Sections 2/3 of the Uttar Pradesh

Gangsters and Anti-Social Activities (Prevention) Act, 1986, that he had not filed an application for bail in the aforesaid case and that even when he would file an application for bail, he would not be released on bail unless (a) the Public Prosecutor is given an opportunity to oppose the application for such release, and (b) the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail, it cannot be accepted that there was any material for recording the satisfaction of the detaining authority that with a view to preventing the petitioner from acting in any manner prejudicial to the maintenance of public order it was necessary to detain the petitioner under the NSA, 1980. The satisfaction that it is necessary to detain the petitioner for the purpose of preventing him from acting in a manner prejudicial to the maintenance of public order is thus, the basis of the order under section 3 (2) of the NSA, 1980 and this basis is clearly absent in the present case. Therefore, the detention order dated 23-01-2021 is unsustainable in law on this ground also.

61. In view of the aforesaid discussion, the present Writ Petition is allowed. The impugned order dated 23-01-2021 passed by the District Magistrate, Shahjahanpur ordering detention of the petitioner Abhay Raj Gupta under Section 3 (3) of the NSA, 1980 is hereby quashed. The Respondents are commanded to release the petitioner from detention under the aforesaid order dated 23-01-2021 forthwith."

35. In **S.K.Mabud @ Mamud vs. State of Odisha & another** (supra), a Division Bench of Orisa High Court held that while quashing order of preventive detention under the NSA, 1980 that the legal obligations in cases related to Detention under National Security Act needs to be discharged with great sense of responsibility. Relevant paragraphs 14 and 15 of the judgment are reproduced herein below:-

"14. Preventive detention is an exception to the normal procedure and is sanctioned and authorized for very limited purpose under Article 22(3)(b) with good deal of safeguards. The exercise of that power of preventive detention must be with proper circumspection and due care. In a regime of constitutional governance, it requires the understanding between those who exercise power and the people over whom or in respect of whom such power is exercised. The legal obligation in this type of case, need to be discharged with great sense of responsibility even if the satisfaction to be derived is a subjective satisfaction such subjective satisfaction has to be based on objective facts. If the objective facts are missing for the purpose of coming to subjective satisfaction, in absence of objective facts the satisfaction leading to an order without due and proper application of mind will render the order unsustainable. In view of the above legal position, this Court has expected from the detaining authority that subjective satisfaction of the detaining authority should be based on objective facts.

15. Similarly, in the instant case, the details of the alleged bail application have not been provided in the order of detention, ground of detention or in the application of the Superintendent of Police, Balasore. Further, no details have been given about the alleged similar cases in which bail was allegedly granted by the concerned Court. The only mention

regarding bail is in the letter dated 26.12.2019 by the Superintendent of Police, Balasore wherein he had reported that it has come to his knowledge that the petitioner has arranged for his bail. However, this statement is entirely ambiguous and this Court cannot rely on the same. Considering the above submissions, we are of the view that this Court should not allow the petitioner-detenu to be kept in custody on the basis of order of detention which is illegal, bad in law hence amounts to illegal custody of the petitioner detenu."

36. The true distinction between the areas of law and order and public order lies not merely in the nature or quality of the act, but in the degree and extent of its reach upon society. Acts similar in nature, but committed in different contexts and circumstances, might cause different reactions. In one case it might affect specific individuals only, and therefore touches the problem of law and order only, while in another it might affect public order. The act by itself, therefore, is not determinant of its own gravity. In its quality it may not differ from other similar acts, but in its potentiality, that is, in its impact on society, it may be very different.

37. While passing the detention order impugned much emphasis is being placed on the stale incident of 2020 in which the petitioner no.1 was already accorded bail by this Court. The media clippings have been made as the proof of disruption of public order. The newspaper report by itself does not constitute an evidence of the contents. The reports are moreover hearsay evidence. The newspaper reports are at best secondary evidence and not admissible in evidence without proper proof of its content under the Indian Evidence Act, 1872. It is thus clear that newspaper report is not a "legal evidence" which can be examined in support of the complainant. It is trite law that there has to be legal evidence in support of the allegations levelled against a person. In the present case, the only evidence relied upon is the newspaper reporting and nothing else. For what has been stated above and as per the settled legal position, a newspaper report is not a "legal evidence".

38. In the present case, the detaining authority has merely mentioned in the grounds of detention that the petitioner has filed his bail application before this Court on 15.2.2022 and there was possibility of the petitioner indulging in similar activities prejudicial to the maintenance of public order on his coming out of jail. She has not recorded her satisfaction in the impugned order that there was real possibility of his being released on bail which omission in our opinion has totally vitiated the impugned order.

39. Therefore, in view of foregoing analysis, we are of the considered opinion that the detention of the detenu under the provisions of Section 3 (2) of the NSA, 1980 is unsustainable. In the result the impugned of order of detention dated 31.3.2022 and the consequential orders are hereby quashed.

40. The present Habeas Corpus Petition is allowed and the detenue/petitioner is ordered to be set at liberty by the respondents forthwith unless required in connection with any other case.

(2023) 2 ILRA 1030
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2023

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Special Appeal No. 17 of 2023
Connected with
Special Appeal. No. 18 of 2023
Connected with
Special Appeal. No. 19 of 2023

B.H.U., Varanasi & Ors. ...Appellants
Versus
Dr. Alok Kumar ...Respondent

Counsel for the Appellants:
Sri Gyanendra Pratap Singh, Sri Hem Pratap Singh (Sr. Adv.), Sri Ajeet Singh Singh

Counsel for the Respondent:
Sri Ajit Kumar Singh, Sri Pawan Kumar Singh, Sri V.K. Ojha, Sri N.K. Ojha, Sri Ashok Khare (Sr. Adv.)

A. Education Law – Selection/Appointment - UGC Regulations on Minimum Qualifications for Appointment of Teachers and other Academic Staff in the Universities and Colleges and Measures for the Maintenance of Standards in Higher Education, 2010 - It is well settled that any clause in a document or a statute is not to be read in isolation as to find its true meaning. In the advertisement it has been specifically provided that "Mere eligibility will not entitle any candidate for being called for interview. More stringent criteria may be applied for short-listing the candidates to be called for interview. Applicants having higher qualification and merit will be given preference. For teaching positions short-listing shall be done as per guidelines approved by Executive Council of the University."(Para 21)

A plain reading of the aforesaid provision in the advertisement would reflect that there could be more stringent criteria for short-listing candidates and for teaching positions short-listing would be done as per the guidelines approved by Executive Council of the University. The word approved in the statement "as per guidelines approved by the Executive Council of the University" is not qualified by use of the word "already". It simply states that short-listing is to be done as per the guidelines approved by Executive Council of the University. This enables the University to apply those guidelines for short-listing as are approved by Executive Council of the University. In the instant case, the short-listing exercise was carried out on 11.01.2011 on basis of revised guidelines approved by resolution of Executive Council dated 2.11.2010. (Para 22)

The University had already taken a decision to make changes in the short-listing guidelines before the last date of receipt of application forms, pursuant to the advertisement. This decision was taken by the University on account of the UGC Regulations, 2010. Pursuant to the resolution of Executive Council, the guidelines for short-listing applicants to be called for interview for teaching positions in the University became effective. (Para 23, 26)

B. The general principle prohibiting changing the rules of the game midway would have no application when the change is w.r.t. selection process and not to the qualification or eligibility. (Para 31)

General Instruction No. 2 of the advertisement: "Eligibility of a candidate and satisfaction of any other short-listing criteria shall be considered as on the last date of the receipt for application", would mean:-

(a) that **the eligibility of a candidate is to be considered with reference to the last date for receipt of the application**, i.e. any eligibility qualification obtained subsequent to the last date for receipt of application will not be taken into consideration; and
(b) that **whether a candidate had satisfied the short-listing criteria would be determined on the basis of his credentials**

(i.e. qualifications, etc) as on the last date for receipt of the application. This implies that if weightage is to be accorded to the credentials of a candidate for determining whether he has satisfied the shortlisting criteria, no weightage shall be accorded to such credentials which he did not possess on the last date for receipt of the application. (Para 3, 30)

C. Short-listing criteria may be made stringent depending on the number of applicants as to make it convenient for the Selection Body to effectively interview the short-listed candidates. (Para 31)

Where selection is to be made only on the basis of interview, the Commission or the Selection Board can adopt any rational procedure to fix the number of candidates who should be called for interview. As the short-listing exercise is to be conducted only after receipt of applications, the short-listing criteria may be fixed after the last date for receipt of application forms, keeping in mind the number of applications received. Even if there is no rule providing for short-listing nor any mention of it in the advertisement calling for applications for the post, the Selection Body can resort to a short-listing procedure if there are a large number of eligible candidates who apply and it is not possible for the authority to interview all of them. (Para 27)

Therefore, by revising the guidelines for short-listing the candidates for interview, the University had not changed the rules of the game midway after the selection process had started.

In the instant case, there were about 200 odd applicants against a solitary post of Assistant Professor for Sociology. According to the short-listing guidelines, 10 candidates were to be called for interview as against one post. As 3 candidates had obtained equal marks on the basis of short-listing criteria adopted, as many as 12 candidates were short-listed by the University for interview. Notably, the writ petitioner (Dr. Alok Kumar) was not one of the 12 candidates short-listed. (Para 28)

In the writ petition it is stated that the revised guidelines should not have been applied for short-listing but there is no statement that under the old guidelines he would have obtained marks higher than the other 10 short-listed candidates. That apart, what is interesting is that the learned Single Judge has declined the first prayer of the writ petitioner (Dr. Alok Kumar) which challenged the short-listing done by the University by applying the short-listing guidelines. Once that is the position, the writ petitioner (Dr. Alok Kumar) having been screened out was not entitled to any relief as was accorded to him. (Para 29)

Special Appeal Nos. 17 of 2023 and 18 of 2023 are allowed. (E-4)

Special Appeal No. 19 of 2023 is partly allowed and Writ-A No. 45120 of 2013 is disposed off by giving liberty to the University to complete the selection/appointment process on the basis of interview marks awarded to the candidates who were short-listed for interview on the basis of revised short-listing guidelines.

Precedent followed:

1. Madhya Pradesh Public Service Commission Vs Navnit Kumar Potdar & anr., (1994) 6 SCC 293 (Para 16(a))
2. B. Ramakichenin @ Balagandhi Vs U.O.I. & ors., (2008) 1 SCC 362 (Para 16(b))

3. The State of Uttar Pradesh Vs Karunesh Kumar & ors., Civil Appeal Nos. 8822-8823 of 2022 (arising out of SLP (C) Nos. 10386-10387 of 2020 (2022 SCC OnLine SC 1706)), dated December 12, 2022 (Para 16(c))

4. Shankarshan Dash Vs U.O.I., (1991) 3 SCC 47 (Para 18)

Present special appeal assails the judgment and order dated 02.09.2022, passed by Hon'ble Single Judge.

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

1. Special Appeal No. 17 of 2023 and Special Appeal No. 18 of 2023 are against the judgment and order dated 02.09.2022 of the learned Single Judge allowing Writ Petition No. 4963 of 2011 filed by Dr. Alok

Kumar whereas Special Appeal No. 19 of 2023 is against the judgment and order of the same date in Writ A No. 45120 of 2013 dismissing the writ petition filed by Dr. Rashmi Ranjan as infructuous in light of the judgment and order in Writ A No. 4963 of 2011. As common questions of law and facts arise for consideration in these three appeals, with the consent of learned counsel for the parties they were heard together and are being decided by a common judgment and order.

FACTS

2. Writ A No. 4963 of 2011 was filed by Dr. Alok Kumar (the respondent) seeking following reliefs:-

"(i) Issue an appropriate writ, order or direction in the nature of certiorari after calling t*he relevant records from the Banaras Hindu University, Varanasi quashing the entire short listing qua petitioner's post which has been done by applying the shortlisting guidelines which became effective from 02.11.2010.*

(ii) Issue an appropriate writ, order or direction in the nature of mandamus directing the respondent-University and its authorities to conduct the entire selection as per the University Grants Commission guidelines, regulations and the eligibility qualifications mentioned in the advertisement for the purpose of short-listing.

(iii) Pass such other and further order, which this Hon'ble Court may deem fit in the facts and circumstances of the case.

(iv) Award cost"

3. The case of the writ petitioner (Dr. Alok Kumar) in a nutshell was that the Banaras Hindu University, Varanasi (for short 'University') issued an advertisement inviting applications for various posts including that of Assistant Professor in Sociology (Post Code 3712). The last date for receipt of application form to participate in the selection process was 21.09.2010. The advertisement specified that:

"Mere eligibility will not entitle any candidate for being called for interview. More stringent criteria may be applied for short-listing the candidates to be called for interview. Applicants having higher qualification and merit will be given preference. For teaching positions short-listing shall be done as per guidelines approved by Executive Council of the University."

General Instruction No. 2 of the advertisement stated as follows:-

"Eligibility of a candidate and satisfaction of any other short-listing criteria shall be considered as on the last date of the receipt for application"

4. According to the writ petitioner (Dr. Alok Kumar) a short-listing guidelines, dated 10.04.2010, approved by Executive Council of the University existed but, instead of applying those guidelines, revised guidelines framed pursuant to the resolution dated 02.11.2010 of the Executive Council, made effective from 02.11.2010, were used to shortlist 12 out of more than 200 applicants to be called for interview for the post of Assistant Professor in Sociology. As the writ petitioner was not among those shortlisted, Writ A No. 4963 of 2011 was filed. The

grievance of the writ petitioner (Dr. Alok Kumar) was that the short-listing guidelines made applicable from 02.11.2010 should not have been pressed into service as the last date for receipt of the application, as per the advertisement, was 21.09.2010, whereas the revised shortlisting guidelines became effective from 02.11.2010, therefore, in view of General Instruction No.2, any shortlisting criteria adopted later, could not have been applied.

5. In Writ A No.4963 of 2011 on 28.01.2011 an interim order was passed, which is reproduced below:-

"Shri Ravi Kiran Jain, Senior Advocate assisted by Shri R.K. Awasthi appearing for the petitioner submit that though the petitioner is eligible with Ph.D as essential qualification, the additional qualifications of NET/SLET have been given 20 marks in the guidelines for shortlisting made effective from 2.11.2010, whereas the last date of receipt of applications in the advertisement was 21.9.2010. He states that under the General Instructions to the Candidates: (item no.2) eligibility of a candidate and satisfaction of any other shortlisting criteria was required to be considered as on the last date of the receipt of the application. The requirement of NET/SLET has been thus impliedly introduced subsequently causing discrimination between the eligible candidates. The candidates having Ph.D/D.Phil along with NET/SLET will be given 20 additional marks in shortlisting, whereas a candidate fully eligible such as petitioner having Ph.D degree will be deprived of additional marks.

An objection has been taken by Shri K.S. Chauhan appearing for the University that the same advertisement provides that mere eligibility will not entitle any candidate for being called for interview and that more stringent criteria may be applied for shortlisting. The applicants having higher qualification and merit were to be given preference. Shri Chauhan is not in a position to state whether the guidelines dated 2.11.2010, have been approved by the Executive Council of the University.

The matter requires consideration.

As an interim measure, we provide that if the interview for the post of Assistant Professor (Sociology) in the category of the petitioner have not been held so far, the petitioner will be provisionally allowed to appear in the interview. The result of the selection for the post, however, shall not be declared until further orders of the Court.

Put up this matter on 14th February, 2011. In addition to the order to be filed by the petitioner in the University, learned counsel appearing for the University will also inform the University today about this order. Copy of the order be given to learned counsel for the parties today."

6. Pursuant to the interim order, interviews were held of the shortlisted candidates as well as the writ petitioner (Dr. Alok Kumar) and the result of the interview was produced before the writ court in a sealed cover. On 28.02.2013, the writ court opened the sealed cover and found that in the interview Dr. Alok Kumar had secured highest 85 marks. The next top three were Dr. Rashmi Ranjan (83 marks) (writ petitioner in Writ A No.45120 of 2013); Dr. Manish Tiwari (81 marks); and

Dr. Siya Saran Pandey (80 marks). After noticing the result so produced, on 28.02.2013 following order was passed:-

"In compliance of this Court's order dated 6.2.2013 the result of the interview, in which the petitioner was provisionally permitted to appear vide this Court's order dated 28.1.2011, has been produced before us in sealed cover. The result in sealed cover has been opened by the Court and perused. According to the same the Committee has recommended for the appointment of the petitioner who has been placed at Serial No. 1 having obtained 85 marks. A waiting list of three candidates has been prepared which is as follows :

1. Dr. Rashmi Ranjan (83 marks)

2. Dr. Manish Tiwari (81 marks)

3. Dr. Siya Saran Pandey (80 marks)

The said result as has been produced before this Court is being returned to Shri V.K. Singh, learned senior advocate appearing

for respondent-University.

List on 13.3.2013. "

7. While Writ A No. 4963 of 2011 was pending, Dr. Rashmi Ranjan, who had secured 83 marks in the interview and was among the twelve candidates shortlisted, filed Writ A No. 45120 of 2013, impleading Dr. Alok Kumar as respondent no.4, seeking following reliefs:-

(a) Issue a writ, order or direction in the nature of certiorari for quashing the interview letter issued in favour of the respondent no.4 and also the recommendation of the Selection Committee in so far it relates to respondent no.4 for appointment on the post of Assistant Professor (Sociology) in Banaras Hindu University, Varanasi;

(b) Issue a writ, order or direction in the nature of mandamus directing the respondents 1 to 3 to appoint the petitioner on the post of Assistant Professor (Sociology) in Banaras Hindu University, Varanasi by issuing appointment letter in her favour.

(c) Issue any other writ, order or direction which this Hon'ble Court may deem fit in the facts and circumstances of the present case.

(d) Award the cost of the writ petition in favour of the petitioner.

8. In Writ A No. 45120 of 2013, the case taken by Dr. Rashmi Ranjan was that there could be no vested right in respect of the procedure for short-listing therefore, when the University framed guidelines for short-listing and by applying those guidelines shortlisted 12 candidates including her for the interview, Dr. Alok Kumar, who was screened out, had no right to appear in the interview hence his interview letter was liable to be quashed and as she was placed at the top of the list of shortlisted candidates who were interviewed, she was entitled to be appointed.

9. In the counter-affidavit filed by the University, the stand taken was that the University Grants Commission (UGC) had promulgated UGC Regulations on Minimum Qualifications for Appointment

of Teachers and other Academic Staff in the Universities and Colleges and Measures for the Maintenance of Standards in Higher Education, 2010 (for short UGC Regulations 2010), effective from 30.06.2010, which were adopted by the Executive Council of the University vide ECR No. 200, dated August 31, 2010, therefore, by Corrigendum No. 1, the revised qualifications as prescribed by UGC Regulations, 2010 were notified and the last date of receipt of applications was extended from 20.06.2010 to 21.09.2010. The University stated in the counter affidavit that while adopting the UGC Regulations, 2010, the Executive Council, vide ECR No. 200, dated August 31, 2010, inter-alia, resolved as under:-

"RESOLVED STILL FURTHER that the Vice Chancellor be authorized to make the required changes in the short-listing guidelines for faculty position in the University as approved by Executive Council, in the light of the provisions of the new UGC Regulations, 2010."

10. It was further the case of the University that the earlier short-listing guidelines were revised in consonance with the qualifications and other eligibility conditions for teaching positions as prescribed by the UGC Regulations, 2010 and approved by the Vice-Chancellor, BHU vide his order dated 29.10.2010, which was ratified by the Executive Council vide ECR No. 208, dated November 2, 2010. It was the case of the University that recruitment exercise is a continuous process and has to be done in light of the qualifications prescribed by UGC/MHRD from time to time; and the short-listing of candidates for interview was done as per the revised norms of short-listing approved by the Vice-Chancellor, BHU, ratified and approved by the Executive Council. The University contended that there was a specific clause in the advertisement that mere eligibility will not entitle any candidate to be called for interview and more stringent criteria may be applied for short-listing the candidates to be called for interview and in furtherance thereof, the University adopted/applied the short-listing guidelines hence, the petitioner (Dr. Alok Kumar) could have no grievance against his exclusion from the list of candidates shortlisted for interview.

11. The learned Single Judge took the view that since by General Instruction No.2 the eligibility of a candidate had to be tested as on the last date of receipt of application which, in the present case, was 21.09.2010, the short-listing guidelines that came into effect from 02.11.2010 could not be applied and as there existed no dispute as regards the eligibility of Dr. Alok Kumar and that pursuant to the interim order he participated in the interview and secured highest marks in the interview, he was entitled to be appointed. Consequently, the learned Single Judge allowed the writ petition of Dr. Alok Kumar. The operative portion of the order passed in Writ A No. 4963 of 2011 filed by Dr. Alok Kumar is extracted below:-

"In view of the above, there is no room to allow the University to apply the new guidelines with respect to the advertisement in question. As to the eligibility of the petitioner under the old guidelines and his suitability for appointment, there is no dispute. The petitioner has obtained the highest marks in the interview conducted by the University under orders of this Court.

The first prayer made by the petitioner is declined.

In view of the discussion made above, a mandamus is issued to the University to issue necessary letter of appointment to the petitioner within a period of one month. All consequential effects shall arise accordingly.

Accordingly, the writ petition is allowed. "

12. As the writ petition of Dr. Alok Kumar was allowed, Writ A No. 45120 of 2013 of Dr. Rashmi Ranjan was dismissed as infructuous. The order dated 02.09.2022 passed in Writ A No. 45120 of 2013 is extracted below:-

"In view of the order passed in Writ No. 4963 of 2011, the petitioner is worth hearing on the issue of short-listing. However, since he has been awarded marks lesser than the Dr. Alok Kumar, the petitioner, in Writ- 4963 of 2011, no relief can be granted to the petitioner. Also, the result of the interview has not been assailed in this writ petition. The writ petition appears to have been rendered infructuous.

As such, the writ petition is dismissed as infructuous."

SUBMISSIONS

13. We have heard Sri Gajendra Pratap, learned senior counsel, assisted by Sri Santosh Kumar Singh, for Dr. Rashmi Ranjan; Sri Ajeet Kumar Singh, learned senior counsel, assisted by Sri Hem Pratap Singh, for the University; and Sri Ashok Khare, learned senior counsel, assisted by Sri V.K. Ojha, for Dr. Alok Kumar and have perused the record.

14. Leading the arguments on behalf of the appellants in these three connected appeals, Sri Gajendra Pratap submitted that the learned Single Judge wrongly interpreted General Instruction No. 2 of the advertisement to hold that it places an embargo on adoption of any new guidelines for short-listing of candidates for interview. According to him, the true interpretation of Instruction No. 2 would be that if any criteria is adopted for the purposes of short-listing, whether that criteria has been met by a candidate would be determined on basis of his qualifications as on the last date of receipt of application form. According to him, Instruction No. 2 would not mean that there could be no new short-listing guidelines applied. He submitted that the purpose of short listing is to reduce the number of candidates as to effectively undertake required steps for selection. More stringent guidelines can therefore be applied for short-listing depending on the number of applicants. In such circumstances, there could be no vested right in any candidate with regard to application of any particular short-listing guidelines. The learned Single Judge fell in error while holding that the short-listing guidelines made effective from 02.11.2010 could not have been applied in a recruitment exercise wherein the last date of receipt of application form was 21.09.2010. He further submitted that the short-listing exercise was carried out after the revised guidelines were adopted and the list of short-listed candidates was published on 11.01.2011. He also submitted that from the counter-affidavit filed by the University it was established that the new short-listing guidelines were necessitated consequent to the UGC Regulations, 2010 which became effective on 30.06.2010 whereas the old guidelines for short-listing were dated 10.04.2010 therefore, the University

deemed it appropriate to revise the short-listing guidelines as to give appropriate weightage to the new norms. It was argued that the eligibility criteria was not changed by the University, only the weightage marks for certain qualifications, for the purpose of shortlisting, was changed.

15. The aforesaid submissions were adopted by Sri Ajeet Kumar Singh, learned senior counsel, appearing for the University.

16. In support of their submissions, learned counsel for the appellants cited a number of authorities, namely:

(a) **Madhya Pradesh Public Service Commission vs. Navnit Kumar Potdar and another, (1994) 6 SCC 293**. In this case it was held that whenever applications are invited for recruitment to different posts, certain basic qualifications and criteria are fixed and the applicants must possess those basic qualifications and criteria before their applications can be entertained for consideration. The Selection Board or the Commission has to decide as to what procedure is to be followed for selecting the best candidates from amongst the applicants. In most of the services, screening tests or written tests have been introduced to limit the number of candidates who have to be called for interview. Such screening tests or written tests have been provided in the concerned statutes or prospectus which govern the selection of the candidates. But where the selection is to be made only on basis of interview, the Commission or the Selection Board can adopt any rational procedure to fix the number of candidates who should be called for interview.

(b) **B. Ramakichenin @ Balagandhi vs. Union of India and others, (2008) 1 SCC 362.** In this case, following the earlier decision in Navnit Kumar Potdar's case (supra), it was held that even if there is no rule providing for short-listing nor any mention of it in the advertisement calling the applications for the post, the Selection Body can resort to a short-listing procedure if there are large number of eligible candidates, who have applied, and it is not possible to interview all of them.

(c) **The State of Uttar Pradesh vs. Karunesh Kumar & Ors., dated December 12, 2022 in Civil Appeal Nos. 8822-8823 of 2022 (arising out of SLP (C) Nos. 10386-10387 of 2020) (2022 SCC OnLine SC 1706),** wherein, in paragraph 32, in respect of the principle that rules of the game in respect of a recruitment exercise must not be changed midway, it was observed that that principle would have no application when the change is with respect to selection process and not to the qualification or eligibility.

17. By placing reliance on the aforesaid decisions, the learned counsel for the appellants submitted that there existed a specific stipulation in the advertisement that mere eligibility will not entitle any candidate to be called for interview and a more stringent criteria may be applied for short-listing the candidates to be called for interview therefore, the University had an unqualified right to adopt any rational short-listing procedure for short-listing candidates for the interview; and as there was no challenge laid to the validity of the short-listing guidelines adopted and applied by the University, the writ petition of Dr. Alok Kumar was liable to be dismissed.

18. In addition to above, an alternative submission was also advanced

on behalf of the University, which is, that the learned Single Judge could not have issued a direction for appointment of Dr. Alok Kumar inasmuch as a selected candidate does not acquire an indefeasible right to be appointed. In support of this submission, a decision of the Apex Court in **Shankarshan Dash vs. Union of India, (1991) 3 SCC 47** was cited. It was also argued that the order impugned passed by the learned Single Judge is technically defective inasmuch as the first prayer of the writ petitioner (Dr. Alok Kumar) for quashing the order of short-listing has been declined. Having declined the first prayer, the second prayer could not have been accepted inasmuch as the petitioner having been screened out could not have legally participated in interview and his participation in the interview pursuant to an interim-order would not confer any right of appointment because such right would obviously be subject to the final decision of the writ petition. It was thus argued that as the first prayer made in the writ petition was declined, the relief accorded to the writ petitioner was misconceived and for all the reasons above, the appeals deserve to be allowed.

19. **Per Contra**, Sri Ashok Khare, learned senior counsel, appearing for the writ petitioner (Dr. Alok Kumar) submitted that there is no dispute with regard to the petitioner being eligible and there is also no dispute that the revised guidelines for short-listing were effective from 02.11.2010 whereas the last date for receipt of application was 21.09.2010. Since Instruction No. 2 clearly specified that eligibility of a candidate and satisfaction of any other short-listing criteria shall be considered as on the last date of the receipt of application, the revised guidelines which became effective from 02.11.2010 could not have been applied. In such circumstances, once it is found that Dr. Alok Kumar had secured highest marks in the interview, the direction issued by the learned Single Judge calls for no interference. He, therefore, prayed that all three appeals be dismissed.

DISCUSSION

20. Having noticed the rival submissions, the relevant pleadings of the parties including the terms and conditions of the advertisement, the issue that arises for our consideration is as to what interpretation is to be accorded to General Instruction No.2 of the advertisement, which reads as follows:-

"Eligibility of a candidate and satisfaction of any other short-listing criteria shall be considered as on the last date of the receipt of application."

21. It is well settled that any clause in a document or a statute is not to be read in isolation as to find its true meaning. We would have therefore to accord consideration to other relevant provisions in the advertisement which enables the University to adopt short-listing procedure. In the advertisement it has been specifically provided that "Mere eligibility will not entitle any candidate for being called for interview. More stringent criteria may be applied for short-listing the candidates to be called for interview. Applicants having higher qualification and merit will be given preference. For teaching positions short-listing shall be done as per guidelines approved by Executive Council of the University."

22. A plain reading of the aforesaid provision in the advertisement would

reflect that there could be more stringent criteria for short-listing candidates and for teaching positions short-listing would be done as per the guidelines approved by Executive Council of the University. The word approved in the statement *"as per guidelines approved by the Executive Council of the University"* is not qualified by use of the word "already". It simply states that short-listing is to be done as per the guidelines approved by Executive Council of the University. This enables the University to apply those guidelines for short-listing as are approved by Executive Council of the University. In the instant case, the short-listing exercise was carried out on 11.01.2011 on basis of revised guidelines approved by resolution of Executive Council dated 2.11.2010.

23. From the counter-affidavit of the University, it is clear that the earlier guidelines framed on 10.04.2010 warranted a revision consequent to UGC Regulations, 2010 which came into effect on 30.06.2010. The counter-affidavit of the University also indicates that while adopting the UGC Regulations, 2010, the Executive Council, vide ECR No. 200, dated August 31, 2010, had resolved to authorize the Vice-Chancellor to make required changes in the short-listing guidelines for faculty positions in the University as approved by Executive Council. It is therefore clear that the University had already taken a decision to make changes in the short-listing guidelines before the last date of receipt of application forms, pursuant to the advertisement. This decision was taken by the University on account of the UGC Regulations, 2010.

24. ECR No. 200, dated August 31, 2010, annexed along with the counter-affidavit, is extracted below:-

"COPY OF ECR No.200 DATED AUGUST 31, 2010

ITEM 17 *CONSIDERED the orders of the Vice-Chancellor for adoption of UGC Regulations on minimum qualifications for appointment of teachers and other academic staff in Universities and Colleges and measures for the maintenance of standards in Higher Education, 2010.*

The Executive Council was informed that UGC has promulgated the UGC Regulation on minimum qualifications for appointment of teachers and other academic staff in Universities and Colleges and measures for the maintenance of standards in Higher Education, 2010 that have come into effect from June 30, 2010. These Regulations were placed in the meeting of all the Directors of Institutes, Deans of Faculties and other Senior Officers of the University for discussion on their various provisions. The matter was deliberated at length and it was found that the UGC Regulations inter alia provide that for teachers in the Faculties of Agriculture and Veterinary Science, the norms/Regulations of Indian Council of Agriculture Research; for faculty of Medicine, Dentistry, Nursing and AYUSH, the norms/Regulations of Ministry of Health and Family Welfare, Government of India; shall apply.

Prior to this for the faculty of medicine in norms of MCI, for Dentistry the norms of DCI and for Agriculture and Ayurveda the norms of UGC in the matter of recruitment were applicable.

Accordingly, the Director, Institute of Medical Science has written to the Medical Council of India to clarify

whether the norms of MCI or any other norms of Ministry of Health and Family Welfare shall be applicable in recruitment and promotion of teachers in Medicine. The MCI has informed that norms of MCI for recruitment of Faculty in Medicine shall apply as the MCI gives recognition of various subjects in Medicine in different Medical Colleges.

The Executive Council was also apprised that in the Regulation, 2010 for appointment as Assistant Professor exemption from NET has been given to only those who have done their Ph.D in accordance with the UGC Regulation 2009 for award of Ph.D Degree.

The Executive Council was also informed that a number of representations against this clause have been received from the candidates who have already done their Ph.D degree before the UGC Regulation, 2009 came into effect and that they are also requesting for grant of exemption from NET. The Vice-Chancellor has written letters to the UGC and MHRD in this regard, requesting for consideration of their cases.

It was also informed that since these Regulations are mandatory, the University has adopted these for implementation. In view of this and in view of the urgent necessity of availability of teachers to take up the increased teaching load due to increase in the student strength on implementation of OBC reservation in admissions, as a follow up, the posts that have been advertised earlier have been re-advertised according to the provision of the New UGC Regulations, 2010 by issuing corrigendum to the earlier advertisements with the last date of submission of up-dated application as 21.09.2010. Some members pointed out some discrepancies in the UGC Regulations such as the exemption from NET Clause for appointment as Assistant Professor and also that NET is not required for appointment as Assistant Professor in Management whereas it is conducted by UGC in Management subjects, etc.

RESOLVED that the orders of the Vice-Chancellor for adoption of UGC Regulations on minimum qualifications for appointment of teachers and other academic staff in Universities and Colleges and measures for the maintenance of standards in Higher Education, 2010 and the follow up actions taken in this regard be approved.

RESOLVED FURTHER that further follow-up actions as required in these Regulations be also initiated. RESOLVED STILL FURTHER that UGC/MHRD may be informed about discrepancies in qualification for Assistant Professor in Management where NET has not been prescribed as essential qualifications notwithstanding the fact that NET is conducted in Management.

RESOLVED STILL FURTHER that the Vice-Chancellor be authorized to make the required changes in the short-listing guidelines for faculty position in the University as approved by Executive Council, in the light of the provisions of the new UGC Regulations, 2010. **(Emphasis supplied)**

25. In furtherance of ECR No. 200, dated August 31, 2010, the Executive Council, vide ECR No. 208, dated November 2, 2010, resolved as follows:-

"COPY OF ECR No.208 DATED NOVEMBER 2, 2010

ITEM 2 *CONSIDERED the action taken on the decisions of the Executive Council meeting held on August 31, 2010.*

While considering the Action Taken Report on the decisions of the Executive Council meeting held on August 31, 2010, the Executive Council noted that vide ECR No.200 orders of the Vice-Chancellor for adoption of UGC Regulations on minimum qualifications for appointment of teachers and other academic staff in Universities and Colleges and measures for the maintenance of standards in Higher Education, 2010 and the follow up actions taken in this regard were approved and the Vice-Chancellor was authorized to make the required changes in the short-listing guidelines for faculty positions in the University as approved by the Executive Council, in the light of the provisions of the new UGC Regulations, 2010. The Vice-Chancellor constituted a Committee under the chairmanship of Rector with Director, Institute of Agricultural Sciences, the Dean, Faculty of Arts, Management Studies and Science as its member to review the existing Guidelines for Short-listing applicants to be called for Interview for teaching positions in the University as per revised qualifications and other eligibility conditions prescribed under UGC Regulations, 2010.

The Executive Council also noted that the Committee while reviewing the existing guidelines forshort-listing the applications for teaching positions in the University considered the provisions as prescribed in the UGC Regulations, 2010 particularly awarding scores as per API as prescribed under category-III "Research and Academic Contribution' in the UGC Regulations, 2010 and also the observation of the Hon'ble High Court in Civil Misc. Writ Petition No.27647 of 2010 and then recommended a revised Guidelines for short-listing of applicants to be called for interview for teaching posts in the University.

The Executive Council went through the revised Guidelines and found that things have been covered in a very tangible manner.

The Vice-Chancellor then informed the members that in the UGC Regulation-2010 NET is an essential requirement for appointment as Assistant Professor in the disciplines of Arts, Humanities, Science, Social Sciences, Law, Commerce and others and exemption from the requirement of NET shall be given to only those who have done their Ph.D in accordance with the provisions of UGC Regulations 2009 for award of Ph.D degree.

The UGC promulgated the above said UGC Regulations 2009 for award of Ph.D degree, in July 2009. Subsequently UGC vide its letter F.No.1-1/2002(PS) Pt.file-III dated 28 August, 2009 inter alia communicated that while the UGC is in the process of identifying the candidates of various institutions who have been awarded Ph.D degree in compliance of the provisions of the UGC Regulation 2009 so as to exempt them from the eligibility requirement of NET for recruitment of Assistant Professor, it may take some time hence keeping in view the public interest and interest of students at large the commission has decided as an ad-hoc measure, to leave it to concerned Universities/institutions to decide as to whether the Ph.D degree awarded to various candidates is in compliance of the

provision of UGC Regulation 2009 so as to exempt them from the requirement of NET.

In the meantime a number of communications were exchanged between UGC and the University on the issue.

Now it is learnt that the UGC has identified 10 criteria and those who satisfy 6 out of these 10 criteria in admission to Ph.D degree, their degrees shall be considered compliant to UGC Regulations 2009 for award of Ph.D Degree, and hence shall be exempted from the requirement of NET. However formal communication from UGC in this regard has yet not come.

After detailed deliberations the Executive Council resolved as under:

RESOLVED that the revised guidelines for Short-listing Applicants to be called for interview for Teaching Positions in the University as per revised qualifications and other eligibility conditions prescribed under UGC Regulations, 2010 be approved.

RESOLVED FURTHER that the exemption from NET in the appointment of Assistant Professor be given as per the guidelines and directions of the UGC received from time to time.

RESOLVED STILL FURTHER that the actions taken on the decisions of the Executive Council meeting held on August 31, 2010 be approved.

(Emphasis supplied)

26. Pursuant to the above resolution of Executive Council, the guidelines for short-listing applicants to be called for interview for teaching positions in the University became effective.

27. As the short-listing exercise is to be conducted only after receipt of applications, the short-listing criteria may be fixed after the last date for receipt of application forms, keeping in mind the number of applications received. This position is clear from the law laid down by the Apex Court in **Madhya Pradesh Public Service Commission vs. Navnit Kumar Potdar's case (supra)** and in **B. Ramakichenin @ Balagandhi vs. Union of India and others case (supra)** wherein it has been clearly held that where selection is to be made only on the basis of interview, the Commission or the Selection Board can adopt any rational procedure to fix the number of candidates who should be called for interview. It has been specifically held by the Apex Court that even if there is no rule providing for short-listing nor any mention of it in the advertisement calling for applications for the post, the Selection Body can resort to a short-listing procedure if there are a large number of eligible candidates who apply and it is not possible for the authority to interview all of them.

28. In the instant case we find that there were about 200 odd applicants against a solitary post of Assistant Professor for Sociology. According to the short-listing guidelines, 10 candidates were to be called for interview as against one post. As 3 candidates had obtained equal marks on the basis of short-listing criteria adopted, as many as 12 candidates were short-listed by the University for interview. Notably, the writ petitioner (Dr. Alok Kumar) was not one of the 12 candidates short-listed.

29. In the writ petition filed by Dr. Alok Kumar, there is no specific averment that if the guidelines earlier applicable, prior to issuance of revised guidelines, were applied he would have been amongst

the top 10 candidates short-listed for interview. No doubt in the writ petition it is stated that the revised guidelines should not have been applied for short-listing but there is no statement that under the old guidelines he would have obtained marks higher than the other 10 short-listed candidates. That apart, what is interesting is that the learned Single Judge has declined the first prayer of the writ petitioner (Dr. Alok Kumar) which challenged the short-listing done by the University by applying the short-listing guidelines. Once that is the position, the writ petitioner (Dr. Alok Kumar) having been screened out was not entitled to any relief as was accorded to him.

30. According to the learned Single Judge, General Instruction No. 2 of the advertisement made it unequivocally clear that the eligibility of the candidates and satisfaction of short-listing criteria shall be considered as on the last date for receipt of application which, according to the learned Single Judge, would mean that no candidate was permitted to acquire any eligibility as may be considered for the purpose of short-listing, if that was acquired after the cut-off date i.e. 21.09.2010. The interpretation of the aforesaid clause to the extent indicated above does not suffer from any infirmity. But, after concluding as above, the learned Single Judge observed: *"by way of corollary to the same, the University could not prescribe any further condition for the purposes of short-listing, after the last date to submit the application. To allow the University to do that, would be to allow it to violate its own condition set out in the advertisement."* In our view, the afore-quoted portion does not accord correct interpretation to General Instruction No.2 when read with other part of the advertisement relating to short-listing of applicants for the interview. According to us stipulation that eligibility of a candidate and satisfaction of any other short-listing criteria shall be considered as on the last date for the receipt of application, would mean:

(a) that the eligibility of a candidate is to be considered with reference to the last date for receipt of the application, that is any eligibility qualification obtained subsequent to the last date for receipt of application will not be taken into consideration; and

(b) that whether a candidate had satisfied the short-listing criteria would be determined on the basis of his credentials (i.e. qualifications, etc) as on the last date for receipt of the application. This implies that if weightage is to be accorded to the credentials of a candidate for determining whether he has satisfied the shortlisting criteria, no weightage shall be accorded to such credentials which he did not possess on the last date for receipt of the application. This would thus exclude from consideration any qualification, etc obtained after the last date fixed for receipt of the application.

31. By revising the guidelines for short-listing the candidates for interview, in our view, the University had not changed the rules of the game midway after the selection process had started for two reasons:-

(a) The general principle prohibiting changing the rules of the game midway would have no application when the change is with respect to selection process and not to the qualification or eligibility (vide paragraph 32 of the

decision of the Apex Court dated D**ecember 12, 2022, The State of Uttar Pradesh vs. Karunesh Kumar & Ors. (supra);** and

(b) Short-listing criteria may be made stringent depending on the number of applicants as to make it convenient for the Selection Body to effectively interview the short-listed candidates (vide **Madhya Pradesh Public Service Commission vs. Navnit Kumar Potdar and another (supra) and B. Ramakichenin @ Balagandhi vs. Union of India and others (supra).**

32. Apart from above, the short-listing guidelines were revised pursuant to a decision taken on 31.08.2010 by the Executive Council as to make it in consonance with UGC Regulations, 2010 which came into effect from 30.06.2010. The decision to revise the short-listing guidelines was taken before the last date fixed for receipt of the application. Thus, for all the reasons above, in our considered view, the learned Single Judge fell in error in allowing the writ petition of Dr. Alok Kumar. More so, when the learned Single Judge declined the first prayer of the said petitioner. Consequently, the Special Appeal Nos. 17 of 2023 and 18 of 2023 are entitled to be allowed and are hereby **allowed**. The judgment and order of the learned Single Judge dated 02.09.2022 passed in Writ Petition No. 4963 of 2011 is hereby set aside and Writ A No. 4963 of 2011 is dismissed.

33. ` As we have allowed the above two appeals and have dismissed Writ A No. 4963 of 2011 filed by Dr. Alok Kumar, the Special Appeal No. 19 of 2023 filed by Dr. Rashmi Ranjan is partly allowed and Writ A No. 45120 of 2013 filed by Dr. Rashmi Ranjan is disposed off by giving liberty to the University to complete the selection/appointment process on the basis of interview marks awarded to the candidates who were short-listed for interview on the basis of revised short-listing guidelines. There shall be no order as to costs.

(2023) 2 ILRA 1044
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2023

BEFORE

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

Special Appeal Defective No. 381 of 2022

Surendra Yadav ...Appellant
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Vivek Saran

Counsel for the Respondents:
Sri Prateek Sinha, State Law Officer

A. Service Law – Termination – Suppression of material fact - Uttar Pradesh Government Department Driver's Service Rules, 1993 - Rule 17(1) - Once an employee is appointed to government service on a regular and permanent basis, like the present case, a charge about suppression of the fact of involvement in a criminal case has not been favoured in *Avtar Singh's* case to be dealt with summarily with termination of services on just an explanation being called, or a show cause given. In cases of government servants, who are regularly appointed, the course of action that is favoured by the Supreme Court in *Avtar Singh* is the holding of disciplinary proceedings with a proper inquiry to ascertain the charge of suppression and the involvement of the employee concerned in the crime. (Para 15)

In this case, nothing has been pleaded or shown that the writ petitioner was a temporary hand or probationer. If he were, he could have been easily discharged from service. The record shows that the respondents have proceeded against the writ petitioner taking him to be a confirmed employee. Even otherwise, by the time the impugned order came to be passed, the writ petitioner was in service for a period of about four years. In these circumstances, the imperative course for the respondents required would be to hold disciplinary proceedings against the writ petitioner. He could not have been thrown out by issuing a show cause notice to him and asking him to respond in 15 days. The show cause notice was issued to the writ petitioner on 27.02.2004, to which the writ petitioner submitted a reply on 15.04.20024, but the impugned order came to be passed on 21.07.2006. During this long period of time, regular departmental proceedings could be conveniently held, where every fact could be ascertained threadbare. (Para 16)

B. Before a person is held guilty of *suppressio veri or suggestio falsi*, knowledge of the fact must be attributable to him. The decision in *Avtar Singh* also makes it relevant inquiry to the exercise of powers on ground of suppression of the fact of involvement in a criminal case, whether the employee had knowledge of the fact about his involvement. (Para 15, 16)

It has been urged that the learned Single Judge has overlooked the parameters laid down in *Avtar Singh's* case (*infra*) and has proceeded to uphold the termination of the writ petitioner's services on the ground alone that there was a criminal trial pending against him, which he did not disclose at the time of verification. It is submitted that the writ petitioner did not have knowledge about the FIR at the time he filled up the verification form. Therefore, the non-disclosure would not amount to concealment. The petitioner is scantly educated, to wit, up to the 8th standard and was hardly aware about the importance or consequences of non-disclosure in the attestation form relating to the case and once the writ petitioner has been acquitted, the allegations against him stand wiped out. (Para 10)

C. Mere suppression of material/false information in a given case does not mean that the employer can arbitrarily discharge/terminate the employee from service. Mere suppression of material/false information regardless of the fact whether there is a conviction or acquittal has been recorded, the employee/recruit is not to be discharged/terminated axiomatically from service just by a stroke of pen. At the same time, the effect of suppression of material/false information involving in a criminal case, if any, is left for the employer to consider all the relevant facts and circumstances available as to antecedents and keeping in view the objective criteria and the relevant service rules into consideration, while taking appropriate decision regarding continuance/suitability of the employee into service. (Para 17)

D. A formula conclusion from certain objective facts ought not to be the respondents' approach. Else, the action of the respondents would be arbitrary. A perusal of the impugned orders, that have been passed both by the Excise Commissioner and the State Government, show not the slightest consideration of the various factors that ought to be taken into account before a decision is taken to terminate a employee's services on ground of suppression of the fact about his involvement in a criminal case. Both the orders betray mechanical approach and formula decision making that the crime being one involving a charge u/s 308 IPC, which was registered on the date of verification by the writ petitioner, but not disclosed, must inevitably lead to termination of the writ petitioner's services. This is an utterly flawed approach apart from the fact that a regular departmental inquiry ought to have been held in this case. (Para 18, 19)

Special appeal allowed. (E-4)

The impugned judgment and order passed by the learned Single Judge is set aside. The writ petition is allowed. The impugned order dated July 21, 2006 passed by the Excise Commissioner, U.P., Allahabad and the order dated March, 10, 2008 by the Principal Secretary, Government of U.P., Excise Department, Lucknow are hereby quashed.

Precedent followed:

1. Avtar Singh Vs U.O.I. & ors., (2016) 8 SCC 471 (Para 9)

2. U.O.I. & ors. Vs Methu Meda, (2022) 1 SCC 1 (Para 9)

3. Pawan Kumar Vs U.O.I. & anr., 2022 SCC OnLine SC 532 (Para 17)

Present special appeal assails the judgment and order dated 13.07.2022 passed by Hon'ble Single Judge.

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

1. This is a writ petitioner's appeal, arising out of a judgment and order passed by the learned Single Judge, dismissing Writ-A No. 40480 of 2008 preferred by the petitioner, questioning an order dated July 21, 2006, terminating his services, as also the order dated March 10, 2008 passed by the State Government, dismissing the writ petitioner's departmental appeal.

2. The facts giving rise to the present appeal are these:

The writ petitioner was appointed as a driver by the Excise Commissioner, Uttar Pradesh vide order dated May 5, 2003 against a substantive and vacant post. The writ petitioner was selected by a duly constituted Selection Committee in accordance with Rule 17(1) of the Uttar Pradesh Government Department Driver's Service Rules, 1993. His name was placed in the letter of appointment, that carried names of all appointees, at serial No.5 of the list of appointees in the OBC Categories. At the time of appointment, the writ petitioner was required to fill up a verification form carrying all necessary details relating to him. The writ petitioner duly filled up the form, disclosing all necessary information. The form aforesaid was filled up on May 12, 2003. After the aforesaid formality was over, the writ petitioner was permitted to join as a driver in the Excise Department on May 17, 2003 and since then he has been performing his duties regularly, as he says to the satisfaction of his superiors.

3. The writ petitioner was initially posted at the Govardhan Check Post in District Mathura and thereafter transferred to District Maharajganj *vide* order order dated May 30, 2005. It appears that on February 27, 2004, a show cause notice was issued to the writ petitioner, saying that he had made an incorrect declaration with regard to the non-pendency of any criminal case against him, inasmuch as according to a report by the S.S.P., Gorakhpur, Case Crime No. 302 of 2002, under Sections 323, 504, 308, 506 IPC, P.S. Shahjanwa, District Gorakhpur was pending against him. The writ petitioner says that he submitted a reply to the show cause notice on April, 15, 2004, taking a stand that he had not concealed any information with regard to pendency of Crime No. 302 of 2002.

4. It is the writ petitioner's case that the aforesaid crime was registered due to a dispute in the family amongst co-sharers relating to agricultural land. He did not have any information about the pendency of the crime when he filled up his verification form, saying that there was no case against him. It was also his defence in the reply that his name had been mentioned in the crime due to the family dispute without any basis to it. There is also a mention of the fact by the writ petitioner in the petition that the case was lodged against him at the instance of a Constable Driver,

Ravindra Nath Yadav, posted in the office of the Director General of Police, U.P., Lucknow, who had misused his position to get a false case registered against the writ petitioner and his family members. It is also pleaded in the writ petition that the writ petitioner's family have already lodged an FIR against Ravindra Nath Yadav vide Crime No. 302-A of 2002, under Sections 323, 308, 504, 506, 325 IPC, P.S. Shahjanwa, District Gorakhpur. The writ petitioner after trial in Sessions Trial No. 116 of 2004, State Vs. Virai and others, has been acquitted by the Additional Sessions Judge *vide* judgment and order dated August 14, 2006. Even before that judgment came, the Excise Commissioner, looking into the explanation submitted by the writ petitioner, in an arbitrary and mechanical fashion discarded his reply and terminated the writ petitioner's services vide order dated July 21, 2006.

5. The writ petitioner's case is that the order dated July 21, 2006 was passed without adequate opportunity of hearing and prior to that order, neither disciplinary proceedings were initiated, a charge sheet issued or departmental inquiry held. The writ petitioner on August 18, 2006 made a representation to the Commissioner, Excise Department, Allahabad saying that he has never been convicted in any case and so far as Crime No. 302 of 2002, under Sections 323, 504, 308, 506 IPC is concerned, it was lodged behind his back, about which he had no information until time he filled up his verification form. On August 19, 2006, the Additional Commissioner, Excise Department, Maharajganj made an endorsement on the writ petitioner's representation to the Commissioner, Excise Department, Allahabad, requesting the Commissioner to consider the writ petitioner's case sympathetically.

6. The writ petitioner on his part preferred a departmental appeal against the order of termination of his services dated July 21, 2006 to the Principal Secretary, Excise Department, Government of U.P., Lucknow. The Principal Secretary, acting for the State Government, however, by the other order impugned in the writ petition dated March 10, 2008, dismissed the writ petitioner's appeal and affirmed the order terminating his services dated July 21, 2006.

7. It was in these circumstances that the writ petitioner instituted the present writ petition, which came up before the learned Single Judge after exchange of affidavits. The learned Single Judge by the judgment and order impugned has dismissed the writ petition, leading the writ petitioner to prefer the present appeal under Chapter VIII Rule 5 of the Rules of the Court.

8. Heard Mr. Vivek Saran, learned Counsel for the writ petitioner and Mr. Prateek Sinha, learned State Law Officer appearing on behalf of the respondents.

9. A perusal of the impugned judgment passed by the learned Single Judge shows that the learned Judge has taken into account the fact that the writ petitioner suppressed, at the time of his appointment, material information that he was facing trial in a criminal case under Sections 323, 504, 308, 506 IPC. The learned Judge also expressed agreement with the respondents in concluding that the judgment of acquittal, that was passed in the writ petitioner's case, was founded on a compromise, where prosecution witnesses contradicted themselves. The learned Judge has applied the parameters of the law laid down in **Avtar Singh v. Union of India**

and others, (2016) 8 SCC 471 and Union of India and others v. Methu Meda, (2022) 1 SCC 1 to hold that there was suppression of material facts by the writ petitioner, and further, that no benefit could be extended to the writ petitioner on ground that he was acquitted, because the charge under Section 308 IPC was not one of a trivial nature. It was also held that the acquittal was not a clean acquittal.

10. Before this Court, Mr. Vivek Saran, learned Counsel for the writ petitioner has urged that the learned Single Judge has overlooked the parameters laid down in **Avtar Singh's case** *(supra),* in that, that he has not assessed the impact of the case against him for the purpose of judging the writ petitioner's suitability and fitness for the post that he holds, that is to say, a driver. It is argued that the learned Single Judge has proceeded to uphold the termination of the writ petitioner's services on the ground alone that there was a criminal trial pending against him, which he did not disclose at the time of verification. It is also urged that the writ petitioner did not have knowledge about the FIR at the time he filled up the verification form. Therefore, the non-disclosure would not amount to concealment. The petitioner is scantly educated, to wit, up to the 8th standard and was hardly aware about the importance or consequences of non-disclosure in the attestation form relating to the case. It is in the end submitted by the learned Counsel that once the writ petitioner has been acquitted, the allegations against him stand wiped out.

11. Mr. Prateek Sinha, learned State Law Officer has supported the impugned judgment and says that the writ petitioner was involved in a heinous offence. It was his duty to disclose the fact at the time he filled up his verification form. According to Mr. Sinha, the writ petitioner's misconduct emanates from non-disclosure and suppression of the fact when he filled up the form, quite apart from his unsuitability for the post given the fact that was involved in a heinous offence. It is also argued that the writ petitioner's criminal propensities cannot be held wiped out, because the judgment passed by the learned Additional Sessions Judge shows that the acquittal was a consequence of the prosecution witnesses turning hostile in the background of a compromise entered into between parties. The submission, therefore, is that this is not a case where the law in **Avtar Singh's case** would come to the writ petitioner's rescue.

12. The thrust of the writ petitioner's defence before the respondents was that the day he filled up his verification form, to wit, May 12, 2003, he did not know that an FIR had been registered against him on July 31, 2002. The respondents have not believed this stand of the writ petitioner and in the counter affidavit, they say that it is not possible that about an FIR registered against the writ petitioner on July 31, 2002, he would not know until May 12, 2003. It is a possibility in the opinion of this Court both ways. The writ petitioner has consistently taken a stand that he was never arrested in the crime or sent to jail. Had he been arrested and bailed out, those documents would clearly indicate whether he had knowledge or not on the date, he filled up the verification form, that is to say, May 12, 2003. The respondents ought to have ascertained that fact, because the writ petitioner's stance is that he was never arrested. A perusal of the judgment passed by the learned Sessions Judge carries one important fact about the matter. It mentions that the case was committed by the

Magistrate to the Sessions in the month of March, 2004. The date is not clearly mentioned and it is not material either. The reason is that by time the case was committed to the Sessions, the writ petitioner must have appeared and secured bail before committal. That day is in the month of March, 2004. Therefore, the possibility cannot be ruled out that on May 12, 2003, when the writ petitioner filled up the verification form, he did not know about the crime altogether.

13. It is the writ petitioner's case that it was a sudden fight over land between his family members and co-sharers. In the FIR, no doubt, the petitioner has been nominated with a role of assault with a *Kudal*. It could be true or untrue. But, given the fact that the witnesses have turned hostile and contradicted themselves with parties in the backdrop entering into a compromise, it cannot be said with certainty if the petitioner was indeed involved. It is possible that he was. And, it is equally possible that his name was dragged in by a relative or a co-sharer out of malice and ill-will and by that time he had been selected in government service.

14. In judging the truth of these allegations and proceeding to take action, the State employers cannot adopt thumb rules or straitjacket formulae. There are some hard realities in the social milieu of Indian way of life, particularly the rural areas, where the prospect of a young man from another's family joining government service, more often than not, evokes base emotions of jealousy and hatred amongst relatives, co-sharers and friends, who wish the government appointment undone with no ostensible gain to themselves. Many FIRs of this kind would be noticed to be lodged on the eve of selection or appointment of young men to government jobs. One might think that what the learned Counsel for the State says is the view to follow in the case of a heinous crime. Because after all, if a heinous crime has been committed, one cannot think that the corpus delicti is a creation of jealousy or machination. In a situation of this kind, **Avtar Singh's case** lays down comprehensive guidelines, which ought to be followed before taking action.

15. It is perhaps for the said reason that once an employee is appointed to government service on a regular and permanent basis, like the present case, a charge about suppression of the fact of involvement in a criminal case has not been favoured in Avtar Singh's case to be dealt with summarily with termination of services on just an explanation being called, or a show cause given. In cases of government servants, who are regularly appointed, the course of action that is favoured by the Supreme Court in **Avtar Singh** is the holding of disciplinary proceedings with a proper inquiry to ascertain the charge of suppression and the involvement of the employee concerned in the crime. In this connection, reference may be made to the comprehensive guidelines laid down by the Supreme Court in Avtar Singh that the employer has to be guided by before taking a decision to terminate an employee's services, who has held back information about involvement in a criminal case or conviction etc. In **Avtar Singh,** it has been held:

"38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the aforesaid discussion, we summarise our conclusion thus:

38.1. Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after

entering into service must be true and there should be no suppression or false mention of required information.

38.2. While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3. The employer shall take into consideration the government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.4. In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted:

38.4.1. In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2. Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

38.4.3. If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5. In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6. In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion, may appoint the candidate subject to decision of such case.

38.7. In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8. If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9. In case the employee is confirmed in service, holding departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10. For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11. Before a person is held guilty of *suppressio veri or suggestio falsi*, knowledge of the fact must be attributable to him."

16. Now, in this case, nothing has been pleaded or shown that the writ petitioner was a temporary hand or probationer. He was regularly selected and appointed to a substantive post. The order of termination from service dated July 21, 2006 or the show cause notice dated February 27, 2004, does not show, by as much as a hint, that the writ petitioner was a probationer. If he were, he could have been easily discharged from service. The record shows that the respondents have proceeded against the writ petitioner taking him to be a confirmed employee. Even otherwise, by the time the impugned order came to be passed, the writ petitioner was in service for a period of about four years. In these circumstances, given the various facts, that have to be inquired into before the decision to terminate an employee's services on ground of suppression about involvement in a criminal case is taken, the imperative course for the respondents required would be to hold disciplinary proceedings against the writ petitioner. He could not have been thrown out by issuing a show cause notice to him and asking him to respond in 15 days. Surprisingly, in this case, the show cause notice was issued to the writ petitioner on February 27, 2004, to which the writ petitioner submitted a reply on April 15, 2004, but the impugned order came to be passed on July 21, 2006. During this long period of time, regular departmental proceedings could be conveniently held, where every fact could be ascertained threadbare. As already remarked, the decision in Avtar Singh also makes it relevant inquiry to the exercise of powers on ground of suppression of the fact of involvement in a criminal case, whether the employee had knowledge of the fact about his involvement. In this connection, Paragraph No. 38.11 of the report in **Avtar Singh** is relevant. The necessity to hold a departmental inquiry against a confirmed employee is mentioned in Paragraph No. 38.9 of the report in **Avtar Singh**. That is why this Court is inclined to think that a regular departmental inquiry ought to be held in such cases. There are many parameters that the employer must ascertain before deciding to exercise their discretion to terminate an employee from service, who has suppressed the fact about involvement in a criminal case. These various facts have been elaborately laid down in **Avtar Singh's case,** where it is observed:

"28. This Court has also opined that before a person is held guilty of suppression of a fact it has to be considered whether verification form is precise and is not vague, and what it required to disclose. In Daya Shankar [*Daya Shankar Yadav v. Union of India, (2010) 14 SCC 103 : (2011) 2 SCC (L&S) 439*] it was held that in case verification form is vague no fault can be found on the ground of suppression.

However, facts which have come to knowledge it has to be determined by employer whether antecedents of incumbent are good for service, to hold someone guilty of suppression, query in the form has to be specific. Similarly, in *B. Chinnam Naidu [Deptt. of Home, A.P. v. B. Chinnam Naidu*, (2005) 2 SCC 746 : 2005 SCC (L&S) 323] when column in verification form required to disclose detention or conviction, it did not require to disclose a pending criminal case or fact of arrest, removal on the ground of material suppression of pending case and arrest was set aside as that was not required to be disclosed.

29. The verification of antecedents is necessary to find out fitness of incumbent, in the process if a declarant is found to be of good moral character on due verification of antecedents, merely by suppression of involvement in trivial offence which was not pending on date of filling attestation form, whether he may be deprived of employment? There may be case of involving moral turpitude/serious offence in which employee has been acquitted but due to technical reasons or giving benefit of doubt. There may be situation when person has been convicted of an offence before filling verification form or case is pending and information regarding it has been suppressed, whether employer should wait till outcome of pending criminal case to take a decision or in case when action has been initiated there is already conclusion of criminal case resulting in conviction/acquittal as the case may be. The situation may arise for consideration of various aspects in a case where disclosure has been made truthfully of required information, then also authority is required to consider and verify fitness for appointment. Similarly in case of suppression also, if in the process of verification of information, certain information comes to notice then also employer is required to take a decision considering various aspects before holding incumbent as unfit. If on verification of antecedents a person is found fit at the same time authority has to consider effect of suppression of a fact that he was tried for trivial offence which does not render him unfit, what importance to be attached to such non-disclosure. Can there be single yardstick to deal with all kinds of cases?

30. The employer is given "discretion" to terminate or otherwise to condone the omission. Even otherwise, once employer has the power to take a decision when at the time of filling verification form declarant has already been convicted/acquitted, in such a case, it becomes obvious that all the facts and attending circumstances, including impact of suppression or false information are taken into consideration while adjudging suitability of an incumbent for services in question. In case the employer comes to the conclusion that suppression is immaterial and even if facts would have been disclosed it would not have adversely affected fitness of an incumbent, for reasons to be recorded, it has power to condone the lapse. However, while doing so employer has to act prudently on due consideration of nature of post and duties to be rendered. For higher officials/higher posts, standard has to be very high and even slightest false information or suppression may by itself render a person unsuitable for the post. However, same standard cannot be applied to each and every post. In concluded criminal cases, it has to be seen what has been suppressed is material fact and would have rendered an incumbent unfit for appointment. An employer would be

justified in not appointing or if appointed, to terminate services of such incumbent on due consideration of various aspects. Even if disclosure has been made truthfully, the employer has the right to consider fitness and while doing so effect of conviction and background facts of case, nature of offence, etc. have to be considered. Even if acquittal has been made, employer may consider nature of offence, whether acquittal is honourable or giving benefit of doubt on technical reasons and decline to appoint a person who is unfit or of dubious character. In case employer comes to conclusion that conviction or ground of acquittal in criminal case would not affect the fitness for employment, incumbent may be appointed or continued in service."

17. It would also be relevant to inquire in this case that given the nature of the crime alleged against the writ petitioner on one hand and the nature and level of the writ petitioner's job on the other, would the employer find him unsuitable to hold it. All of this would require careful consideration and a regular departmental inquiry, which have not been undertaken in this case. There is further guidance by the Supreme Court on this point in the recent decision of their Lordships in **Pawan Kumar v. Union of India and another, 2022 SCC OnLine SC 532. In Pawan Kumar** *(supra),* it has been observed:

"13. What emerges from the exposition as laid down by this Court is that by mere suppression of material/false information regardless of the fact whether there is a conviction or acquittal has been recorded, the employee/recruit is not to be discharged/terminated axiomatically from service just by a stroke of pen. At the same time, the effect of suppression of material/false information involving in a criminal case, if any, is left for the employer to consider all the relevant facts and circumstances available as to antecedents and keeping in view the objective criteria and the relevant service rules into consideration, while taking appropriate decision regarding continuance/ suitability of the employee into service. What being noticed by this Court is that mere suppression of material/false information in a given case does not mean that the employer can arbitrarily discharge/ terminate the employee from service."

18. Here, a perusal of the impugned orders, that have been passed both by the Excise Commissioner and the State Government, show not the slightest consideration of the various factors that ought to be taken into account before a decision is taken to terminate a employee's services on ground of suppression of the fact about his involvement in a criminal case. Both the orders betray mechanical approach and formula decision making that the crime being one involving a charge under Section 308 IPC, which was registered on the date of verification by the writ petitioner, but not disclosed, must inevitably lead to termination of the writ petitioner's services. This, in our considered opinion, is an utterly flawed approach. This we say quite apart from the fact that a regular departmental inquiry ought to have been held in this case.

19. We may not be misunderstood to say that it is not open to the respondents still to take the same view after holding regular departmental proceedings and carefully considering the matter on all parameters. All that we say is that a formula conclusion from certain objective facts ought not to be the respondents' approach. Else, the action of the

respondents would be arbitrary as is the case with the orders impugned here.

20. In the circumstances, this appeal succeeds and is allowed. The impugned judgment and order passed by the learned Single Judge is set aside. The writ petition is allowed. The impugned order dated July 21, 2006 passed by the Excise Commissioner, U.P., Allahabad and the order dated March, 10, 2008 by the Principal Secretary, Government of U.P., Excise Department, Lucknow are hereby quashed. The writ petitioner shall be entitled to be reinstated in service forthwith with continuity of service and all consequential benefits on a notional basis, including pay, seniority etc. However, the writ petitioner shall not be entitled to arrears of salary for the period, during which he was not in service. It would be open to the respondents to issue the writ petitioner a charge sheet and hold disciplinary proceedings in accordance with law.

(2023) 2 ILRA 1054
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2023

BEFORE

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

Writ-A No. 10560 of 2020
with
Writ-A No. 2190 of 2020
with
Writ-A No. 21463 of 2019

Arvind Singh & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri R.K. Ojha (Sr. Advocate). Sri Chandra Shekhar Singh, Sri Shivendu Ojha

Counsel for the Respondents:
C.S.C.

A. Education Law – Retiral Benefits/Pension - Right of Children to Free and Compulsory Education Act, 2009; Uttar Pradesh Recognized Basic Schools (Recruitment and Conditions of Service of Teachers and other Conditions) Rules, 1975; Uttar Pradesh Basic Education Act, 1972; Societies Registration Act, 1860; Uttar Pradesh St. Aided-Educational Institution Employee's Contributory Provident Fund-Insurance-Pension Rules, 1964; Uttar Pradesh Junior High School (Payment of Salaries of Teachers and other Employees) Act, 1978; Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971; Uttar Pradesh Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978.

Anyone is free to establish an educational institution, but it is well settled that no one has a right to seek affiliation or grant-in-aid from the St. to fund that enterprise. This is so notwithstanding the introduction of Article 21-A in Chapter III and its statutory implementation by enactment of the Act of 2009. (Para 34)

If the St. have taken a policy decision that they would not fund education where private institutions have been established, exclusively teaching Classes I to V, there is no right inhering in anyone to compel the St. to extend grant-in-aid to support pensions to retired teachers of such private institutions, under the Rules 1964, merely because a contingent grant has been provided by the Social Welfare Department to support payment of salaries to teachers, subject to the condition of providing primary education to a certain class of children in particular strength. (Para 38)

B. A plain reading of Rules 3 and 4 of the Rules of 1964, shows that they apply to permanent employees, serving in St. aided educational institutions, whether run by a Local Body or by a private management. The condition for application of the Rules of 1964 is recognition by a competent Authority for

the purposes of payment of grant-in-aid. The grant-in-aid envisaged under the Rules after the enactment of the Act of 1978 would mean the maintenance grant envisaged u/s 2(f) of the Act of 1978. The said Statute regulates payment of salaries to teachers of basic schools and statutorily defines grant-in-aid. It envisages a wholesome maintenance grant and not some kind of an ad hoc or limited grant that can be withdrawn like the one provided to primary schools of the class where the petitioners teach on the happening of contingencies, such as numbers of students of the Scheduled Castes and Scheduled Tribes falling below 50%. (Para 46)

In order to achieve the objective of extending education to marginalized sections of the society represented by the Scheduled Castes and Scheduled Tribes, the Department of Social Welfare of the St. had in the past been extending the facility of a recurring grant-in-aid to primary institutions as well, that is to say, institutions teaching children from Classes I to V, where a minimum of 50% of the scholar strength is from the Scheduled Castes and Scheduled Tribes. This policy too by the St. Government has been discontinued after the year 1994. (Para 41)

C. Maintenance grant defined u/s 2(f) of the Act of 1978 provided by the Department of Basic Education to Junior High Schools is generically different from the recurring grant provided to privately managed primary schools funded by the Department of Social Welfare. The Social Welfare Department has the right to stop such grant and their obligations do not extend to anything beyond payment of salaries to teachers teaching in the special class of primary institution, managed by private managements, who were offered assistance by the St. for the singular reason that at the relevant time and considering the need then emergent, these institutions were providing education to a special class of citizens in the specified age group. (Para 36, 44)

The grant provided by the Social Welfare Department at the relevant time for the purpose of promoting education amongst certain marginalized sections of the society in a particular age group without any permanence or continuity to it, cannot make it into a grant-in-aid envisaged under the Rules of 1964. The grant-in-aid envisaged under the said Rules by no principle can include within its fold an ad hoc or limited grant provided by the Department of Social Welfare to the institutions, where the petitioners teach. (Para 46)

D. The deduction of provident fund has no relevance for the purpose of attracting the Rules of 1964. Since a general provident fund scheme has been introduced for teachers and other employees teaching in private educational institutions w.e.f. 1st March, 1977, a deduction from the salary of teachers is made every month to be credited to the provident fund account, under the provident fund scheme through the Treasury by the school management. Rules 3 and 4 of the Rules of 1964, cannot form basis for the petitioners' entitlement to receive pensions, insurance and contributory provident fund. The order of the Division Bench dated 11.08.2006 in Special Appeal No. 180 of 2000 would entitle the petitioners to benefits other than salary, if there were rules or conditions applicable. (Para 37, 47)

Writ petitions dismissed. (E-4)

Precedent followed:

1. Unni Krishnan, J.P. & ors. Vs St. of Andhra Pradesh & ors., (1993) 1 SCC 645 (Para 23)

2. St. of H.P. Vs H.P. St. Recognized & Aided Schools Managing Committees & ors., (1995) 4 SCC 507 (Para 23)

3. T.M.A. Pai Foundation & ors. Vs St. of Karn. & ors., (2002) 8 SCC 481 (Para 23)

4. Vinod Sharma & ors. Vs Director of Education (Basic), U.P. & ors., (1998) 3 SCC 404 (Para 26)

5. St. of U.P. & ors. Vs Pavan Kumar Divedi & ors., (2006) 7 SCC 745 (Para 27)

6. St. of U. P. & ors. Vs Pawan Kumar Divedi & ors., (2014) 9SCC 692 (Para 28)

7. C/M Adarsh Gramin Vidyalaya Sonakpur, Harthala & ors. Vs St. of U.P. & ors., Writ-A No. 20751 of 2019 (Para 31)

Present petitions assail impugned order dated 27.02.201, which held that teachers of primary schools in receipt of grant-in-aid from the Social Welfare Department, are not entitled to pension, family pension etc. because there is no policy, rule or scheme in force, providing the benefit of pension to teachers of such schools at par with similarly circumstanced teachers of schools funded by the Basic Education Department.

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

This judgment will dispose of Writ-A Nos. 10560 of 2020, 2190 of 2020 and 21463 of 2019, as these involve common questions of fact and law. Writ-A No. 10560 of 2020 shall be treated as the leading case, where pleadings have been exchanged and arguments addressed; of course, with reference to the other two petitions as well. This Court proposes to notice facts from the leading case.

2. The petitioners are assistant teachers and headmasters, either working or retired, who have been appointed to Primary Schools in accordance with the Uttar Pradesh Recognised Basic Schools (Recruitment and Conditions of Service of Teachers and other Conditions) Rules, 1975 (for short, 'the Rules of 1975') as well as other Government Orders issued from time to time. These institutions are established and managed by Societies registered under the Societies Registration Act, 1860 through a Committee of Management. All the schools, where the petitioners were appointed, are duly recognized under the Uttar Pradesh Basic Education Act, 1972 (for short, 'the Act of 1972'). They are in receipt of grant-in-aid from the State Government, but with the difference that unlike some other primary schools that are in receipt of grant-in-aid from the Department of Basic Education, the schools where the petitioners were appointed receive grants from the Department of Social Welfare.

3. The petitioners claim that they are entitled to all retiral benefits under the triple benefit scheme, that is to say, Contributory Provident Fund, Insurance and Pension by virtue of the Uttar Pradesh State Aided-Educational Institution Employee's Contributory Provident Fund-Insurance-Pension Rules, 1964 (for short, 'the Rules of 1964). The question involved in this petition is whether the Rules of 1964 would apply to teachers of primary schools, run by a private management, recognized by the Department of Basic Education and funded by the Social Welfare Department of the Government of Uttar Pradesh. While the petitioners say that they are entitled to receive all benefits under the Rules of 1964, including pension, the stand of the State is that there is a distinction between primary schools run by a private management recognized by the Basic Education Board, where grant is provided by the Department of Social Welfare and those schools run by a private management, where grant is extended by the Department of Basic Education. This distinction is sought to be drawn on the basis of a Government Order dated 31.03.1994.

4. The petitioners say that the Rules of 1964 do not make a distinction between private schools, duly recognized and aided by one Government Department or the other. This distinction between the two sets of schools sought to be drawn by the State on one hand and repudiated by the petitioners on the other, would be alluded to in some detail later in this judgment.

5. It would be apposite to refer to the origins of this issue and the earliest

litigation between parties that has led to the order impugned in the present petition. A writ petition, being Civil Misc. Writ Petition No. 2766 of 1996 was instituted by a certain Sangarsh Samiti Shikshak Samudaya Vibhagiya Pathshala, U.P., Allahabad through its Secretary and five others, all teachers espousing the cause of teachers in primary institutions, that were in receipt of grant-in-aid from the Department of Social Welfare of the State Government. The petition was claimed to be filed on behalf of all such teachers in a representative capacity. The petition was heard and allowed by a learned Single Judge of this Court vide judgment and order dated 01.11.1996, ordering in the following terms:

"This petition is allowed. A mandamus is issued to the Respondent no.1 to pay the same salary, allowances and other benefits to the teachers of Primary schools under the Department of Social Welfare as is being paid and given to the teachers of primary schools run by the Board of Basic Education, U.P. or which are privately managed but are aided and recognized by the Board of Basic Education. The arrears from 1.1.1996 till today shall be paid to the teachers of primary schools run under the Department of Social Welfare within three months from the date of production of a copy of this order before the Authority concerned. The other benefits will also be implemented within the same period."

6. Aggrieved by the said judgment and order, the State preferred Special Appeal No. 180 of 2000, which came to be disposed of largely upholding the judgment of the learned Single Judge, but modifying it in one very material detail. The order of the Division Bench dated 11.08.2006 passed in the Special Appeal aforesaid reads:

"We are in respectful agreement with the reasoning given and the order passed by an Hon'ble Single Judge on the 1st of November, 1996, and the appeal is dismissed, excepting that the last sentence of the said judgment and order shall be struck out. The said last sentence reads as follows:- "The other benefits will also be implemented within the same period."

The phrase, with respect, is a little vague. It would bring in several other matters, like pension for which contribution is ordinarily to be made. As such, in our opinion, the writ petitioners-respondents should not be entitled to any other benefits than salary on the basis of equalisation, but our order will not, needless to mention, prevent the writ petitioners-respondents from receiving all other benefits, which they are entitled to receive on their own on the basis of express rules or conditions applicable to themselves."

7. The State carried the matter further in Appeal by Special Leave to the Supreme Court, where Civil Appeal No. 2028 of 2011 was heard and dismissed on 27th July, 2017 by a short order affirming the Division Bench. The order of the Supreme Court in Civil Appeal No. 2028 of 2011 reads:

"We have heard learned counsel for the parties.

We do not find any ground to interfere with the impugned order.

The appeal is, accordingly, dismissed. Pending applications, if any, shall also stand disposed of."

8. It is the petitioners' case that the Division Bench of this Court modified the learned Single Judge's mandamus only to the extent that apart from salary at par with teachers of aided primary schools, who were funded by the Department of Basic Education of the Government, the teachers of primary schools funded by the Social Welfare Department, like the petitioners, would not be entitled to benefits other than salary at par with the teachers of the former class of schools, but with a further and clear mention that the order of the Division Bench would not deprive the petitioners from receiving all other benefits, which they are entitled to under the Rules.

9. The petitioners' case is that they were paid salary after dismissal of the State's appeal by the Supreme Court at par with teachers of other primary schools funded by the Basic Education Department, but were not paid their pension. The petitioners' case is that in terms of the orders of the Division Bench, they are not at all disentitled to receive pension, because they are eligible to it under the Rules of 1964, which apply to all primary schools aided by the State, irrespective of the Department, which extends the aid.

10. After a long drawn chase of the cause to receive pension under the Rules of 1964, which includes writ proceedings by certain teachers, circumstanced like the petitioners and prosecution for contempt also, the impugned order dated 27.02.2019 has been passed, holding that teachers of primary schools in receipt of grant-in-aid from the Social Welfare Department, are not entitled to pension, family pension etc. because there is no policy, rule or scheme in force, providing the benefit of pension to teachers of such schools at par with similarly circumstanced teachers of schools funded by the Basic Education Department. It is this part of the impugned order that the petitioners challenge through the present writ petition. The order, regarding other matters, acknowledges the petitioners' rights to revision of the pay scale and payment of salary at par with their counterparts in schools funded by the Department of Basic Education.

11. The facts aside that the petitioners' grievance is about the non-grant of pension and family pension, the petitioners before this Court also rely on the Rules of 1964 to urge a case that they are covered by the said Rules and entitled to receive the two other benefits admissible, that is to say, Insurance and Contributory Provident Fund - the triple benefit.

12. It must be recorded here that the impugned order dated 27.02.2019 has recognized the petitioners' right to receive General Provident Fund, towards which deduction from the petitioners' salary and those of teachers similarly circumstanced has been made to be credited to their respective GPF Account. No other benefit, however, has been extended.

13. Heard Mr. R.K. Ojha, learned Senior Advocate, assisted by Mr. Chandra Shekhar Singh, learned Counsel for the petitioners and Mr. Vinod Kant, learned Additional Advocate General assisted by Mr. Sharad Chandra Upadhyay, learned State Law Officer, on behalf of the respondents in the leading case and in Writ-A No. 21463 of 2019.

14. In support of Writ-A No. 2190 of 2020, Mr. Santosh Kumar Shukla, learned Counsel for the petitioners has been heard and Mr. Vinod Kant, learned Additional Advocate General assisted by Mr. Sharad

Chandra Upadhyay, learned State Law Officer, on behalf of the respondents.

15. It is submitted by Mr. R.K. Ojha, learned Senior Advocate that the primary schools funded by the Department of Social Welfare are there for upliftment of the members of the Scheduled Castes and Scheduled Tribes, besides weaker sections of the Society. These institutions are recognized under the Act of 1972 and offer education up to Class-V. Service conditions of the teachers are governed by the Rules of 1975. It is argued that in the matter of control and regulations of these institutions, otherwise managed by private managements, there is some difference with regard to the control exercised by the District Social Welfare Officer, as compared to schools governed by the Department of Basic Education. But, whatever be the Department of the Government providing funds to the institutions, where the petitioners are employed, it is after all grant by the State Government. It matters little, which hand of the State extends that grant.

16. It is, particularly, urged that the issue has been settled in terms of the judgment of the learned Single Judge in Civil Misc. Writ Petition No. 2766 of 1996, decided on 01.11.1996, which has been substantially affirmed in appeal. So far as the modification of the said judgment by the Division Bench is concerned, it is submitted that the Division Bench does not forbid the payment of pension to the petitioners, who are serving in the schools funded by the Department of Social Welfare. All that the Division Bench says is that pension and other benefits, apart from salary, is not to be paid at par by virtue of a writ of this Court. It has been clarified that if pension and other benefits are admissible under the service rules applicable, the judgment of the Division Bench would not be a hurdle in the petitioners' entitlement.

17. It is emphasized by Mr. Ojha that the Rules of 1964 govern the service conditions of teachers of all classes of schools, whether run by a local body or a private management. These apply to primary schools, junior high schools, higher secondary schools, degree colleges and training colleges. The only requirement is that the institution concerned must be recognized by a competent authority for the purpose of receipt of grant-in-aid. It is argued that the institutions, where the petitioners are/ were employed, are without doubt recognized by the competent authorities for the purpose of receipt of grant-in-aid. The submission, therefore, is that the right to pension for the petitioners flows from the Rules of 1964, which the respondents have denied in manifest error.

18. Mr. Vinod Kant, learned Additional Advocate General, on the other hand, submits on the strength of various Government Orders issued from time to time that the Rules of 1964 do not apply to the institutions receiving grant from the Department of Social Welfare in the same manner as they do to the schools, which receive grant-in-aid extended by the Department of Basic Education. It is emphasized by the learned Additional Advocate General that the Social Welfare Department extends a recurring grant to support payment of salary to teachers, imparting education in the primary schools, that teach 50% of students, belonging to the Scheduled Castes and Scheduled Tribes. In the event, the said condition is not fulfilled, the grant is liable to be stopped. It is urged that deductions made from the petitioners'

salary towards provident fund is for the benefit of the teachers and does not in any manner extend the Rules of 1964 to schools, where the petitioners teach. There is absolutely no rule to support the petitioners' claim for the payment of retirement pension or family pension.

19. Upon hearing learned Counsel for parties and looking into the Statutes governing grant-in-aid to private educational institutions, it appears that the Department of Basic Education does not provide grant-in-aid to primary schools or schools imparting education to students up to Class-V. This is particularly true of primary schools that impart education up to Class-V alone as distinguished from those schools imparting basic education up to Class-VIII, with attached primary sections teaching students from Classes I to V also. The reason is that after enactment of the Act of 1972, the State took upon itself quite early the task of establishing and running or transferring to itself already established institutions, imparting education from Classes I to V. This was sought to be done by the State through the Board, established under the Act of 1972, directly managing basic schools up to the primary level or Classes I to V. This obligation the State endeavoured to discharge in keeping with the mandate of Article 45 of the Constitution.

20. Since the objective was to provide the primary part of the basic education to students by the State itself, acting through the Board, a very large number of primary schools were established by the Board. In fact, earlier those schools, that were managed by the Local Bodies, such as the Zila Panchayat or the Municipality, were taken over under Section 9 of the Act of 1972, along with the teachers and other staff by the Board. Later on, the functions of administering and maintaining as also establishing basic schools were restored to the Local Bodies vide U.P. Ordinance No. 4 of 2000. In a nutshell, the State in order to discharge its obligations of providing primary education expended vast resources in establishing and maintaining institutions, teaching Class I-V. It was managed either exclusively by institutions established and run by the Board or an instrumentality of the State, like the Local Bodies. With so much of investment in the establishment and management of schools catering to the primary education, that is, Classes I to V, it is no matter of surprise that the State adopted long back, a firm and inflexible policy of not providing funds to privately managed institutions teaching Classes I to V.

21. It must be remarked, however, that since the State could not cater to all facets of the need of basic education, allowance was made for provision of grant-in-aid to private institutions, teaching Classes VI to VIII or as it is called the Senior Basic or Junior High School Level of Basic Education. The issue whether attached primary sections of Junior High Schools, which included Classes I to V, where the Junior High School Section (Classes VI to VIII) was receiving grant-in-aid could be extended the benefit of a maintenance grant, was the subject matter of much controversy. The State resisted their obligation of providing funds to attached primary sections of Junior High Schools as also those attached to High School and Intermediate Institutions. There was, however, no doubt that the Senior Basic or the Junior High Schools run by private institutions, were always regarded entitled to grant-in-aid and their teachers to salary supported by State grant.

22. To ensure smooth and timely payment of emoluments to teachers of Junior High Schools, that were brought under grant-in-aid, the State enacted the Uttar Pradesh Junior High School (Payment of Salaries of Teachers and other Employees) Act, 1978 (for short, 'the Act of 1978'). Likewise, for the payment of salaries to teachers and employees of High School and Intermediate institutions established and run by private managements, that were supported by a maintenance grant from the State, the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 was enacted. There was no issue about the State sharing its resources for education in private hands when it came to schools teaching Classes VI upwards. All the issues that arose were in connection with attached primary sections of these Junior High Schools, High Schools or Intermediate Colleges to which the State was reluctant to extend grant-in-aid.

23. Much fuel to the efforts to compel the State to restore funding of primary education i.e. Classes I to V in the hands of private management was added after the decision of the Supreme Court in **Unni Krishnan, J.P. and others v. State of Andhra Pradesh and others, (1993) 1 SCC 645**. In Unni Krishnan (supra), the right to primary education was held to be a fundamental right. The idea of provision of free education to children up to 14 was mooted. It was reiterated in **State of H.P. v. H.P. State Recognised & Aided Schools Managing Committees and others, (1995) 4 SCC 507.** The principle was thoroughly scrutinized by a Constitution Bench of 11 Judges in **T.M.A. Pai Foundation and others v. State of Karnataka and others, (2002) 8 SCC 481**, where the principle in Unni Krishnan that primary education is a fundamental right was approved.

24. It would not be of much profit to refer further to the great constitutional advancements on the point that were made through successive decisions of their Lordships of the Supreme Court and various High Courts, but it has to be noted that it all led to the Constitution (Eighty-sixth Amendment) Act, 2002, which introduced Article 21-A to Chapter III w.e.f. 01.04.2010. Article 21-A of the Constitution reads:

"21A. Right to education.- The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

25. Contemporaneously with Article 21-A came into force, the Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009) (for short, 'the Act of 2009') also w.e.f. 01.04.2010. This changed the horizons of the State's obligation to provide free and compulsory education to children in the age group 6-14 years. It took within its fold institutions imparting education from Classes I to V. It involved not only the interest of children in the relevant age group, but also of managements that were establishing and managing institutions imparting instructions to children in the specified age group. It also affected the interest of teachers, who were involved in imparting education to children in this age group.

26. Notwithstanding all these developments on the constitutional horizon, the State of Uttar Pradesh was steadfast in its approach not to repudiate their

obligations to provide free and compulsory education to children in the age group 6-14 years, but to exercise monopoly over the institutions teaching students reading in Classes I to V. The State of Uttar Pradesh did not want to share resources with private institutions teaching students in the primary sections, that is to say, Classes I to V, though it had a different policy, as already said, for Classes VI to VIII, manifest in its Statute. The stance of the State of Uttar Pradesh to decline extending grant-in-aid to attached primary sections of Junior High Schools led to the decision of the Supreme Court in **Vinod Sharma and others v. Director of Education (Basic) U.P. and others, (1998) 3 SCC 404**, where teachers of attached primary section of a recognized and aided Junior High School were held entitled to receive salary supported by State grant under the Act of 1978.

27. The State of Uttar Pradesh again resisted the effort by managements and teachers of private institutions to compel sharing its resources with private managements imparting education from Classes I to V. The State emphasized the distinction in its policies as spelt out in its Statutes between Junior Basic Schools on one hand and Junior High Schools on the other, that is to say, the schools teaching Classes I to V in the former and Classes VI to VIII in the latter. This led a two Judge Bench of the Supreme Court in **State of U.P. and others v. Pawan Kumar Divedi and others, (2006) 7 SCC 745** to doubt the correctness of the decision in **Vinod Sharma** *(supra)* and directed the matter to be laid before a three Judge Bench since Vinod Sharma was decided by a Bench of three Hon'ble Judges. The stance of the State of Uttar Pradesh was succinctly brought out in the order of the Supreme Court referring the matter to a Bench of three Hon'ble Judges in **Pawan Kumar Divedi** *(supra)*, where it was observed:

"20. While noticing the fact that "junior basic schools" and "junior high schools" were treated differently, the High Court and, thereafter, this Court appear to have been swayed by the fact that certain schools provided education from Classes I to X as one single unit, although, the same were divided into different sections, such as, the primary section, the junior high school section, which were combined together to form the junior basic section from Classes I to VIII, and the high school section comprising Classes IX and X. In fact, in one of these appeals where a recognised Sanskrit institution is involved, the said institution is imparting education both for the primary section, the high school section, the intermediate section and the BA section. The Mahavidyalaya is thus imparting education from Class I up to graduate level in a recognised institution affiliated to the Sampurnanand Sanskrit University, Varanasi. It has been contended by Dr. Padia on behalf of the institution that the said institution is one unit having different sections and the teachers of the institution are teachers not of the different sections but of the institution itself and as a result no discrimination could be made amongst them. This was precisely one of the arguments advanced in Vinod Sharma case which was accepted by this Court.

21. However, it appears to us that both the High Court and this Court appear to have lost sight of the fact that education at the primary level has been separated from the junior high school level and separately entrusted under the different enactments to a Board known as the Uttar Pradesh Board of Basic Education constituted under Section 3 of the Uttar

Pradesh Basic Education Act, 1972 and the same Board was entrusted with the authority to exercise control over "junior basic schools" referred to in the 1975 Rules as institutions imparting education up to the Vth class.

22. In our view, the legislature appears to have made a conscientious distinction between "junior basic schools" and "junior high schools" and treated them as two separate components comprising "junior basic education" in the State of Uttar Pradesh. Accordingly, in keeping with the earlier government orders, the Payment of Salary Act, 1978 did not include primary sections and/or separate primary schools within the ambit of the 1978 Act.

23. Of course, it has been conceded on behalf of the State Government that an exemption was made in respect of 393 schools which had been continuing to function from prior to 1973 and the teachers had been paid their salaries continuously by the State Government. In the case of the said schools, the State Government took a decision to continue to pay the salaries of the teachers of the primary section of such schools.

24. Apart from the above, it has also been submitted by Mr Dinesh Dwivedi, learned Senior Counsel appearing for the State of Uttar Pradesh that payment of salaries of teachers of recognised primary institutions must be commensurate with the State's financial condition and capacity to make such payment.

25. Having regard to the contentions of the respective parties, the issue decided in Vinod Sharma case [Vinod Sharma v. Director of Education (Basic) U.P., (1998) 3 SCC 404] that teachers of the primary sections of recognised junior basic schools, junior high schools and high schools were entitled to payment of their salaries under the Payment of Salary Act, 1978, merits reconsideration."

28. The reference of the matter to a Larger Bench in **Pawan Kumar Divedi** ultimately came up for consideration before a Constitution Bench of five Judges of the Supreme Court. The issue there ultimately was whether a Junior High School that was recognized and aided for Classes VI to VIII could, later on, add a primary section or the Junior Basic School Section, that is to say, Classes I to V and claim for it grant-in-aid from the State as an integral part of the aided Junior High School. Their Lordships of the Constitution Bench approved of the view in Vinod Sharma and held in **State of Uttar Pradesh and others v. Pawan Kumar Divedi and others, (2014) 9 SCC 692** that if the institution is a single unit, a Junior High School would necessarily include Classes I to V when established in an existing Junior High School, after obtaining separate recognition. The distinction between Junior Basic or Primary Schools and Junior High Schools was not approved and it was held that they have to be regarded as one unit for the purpose of extension of grant-in-aid, payable in accordance with the provisions of the Act of 1978. In the decision of the Constitution Bench in **Pawan Kumar Divedi** *(supra)*, it was observed:

"39. On behalf of the appellants, heavy reliance is placed on the definition of "Junior High School" in the 1978 Rules. Does the definition of "Junior High School" in the 1978 Rules control the same expression occurring in the 1978 Act? We do not think so. The definition of "Junior

High School" in Rule 2(e) of the 1978 Rules is not incorporated in the 1978 Act either expressly or impliedly. The principle of interpretation that an expression used in a rule or bye-law framed in exercise of power conferred by a statute must have the same meaning as is assigned to it under the statute has no application in a situation such as the present one where the meaning of an expression occurring in a statute is itself to be determined. Obviously that cannot be done with the help of a rule made under a different statute.

40. Section 2(j) of the 1978 Act says that the words and expressions defined in the 1972 Act and not defined in this Act shall have the meanings assigned to them in the 1972 Act. But, the 1972 Act also does not define the expression "Junior High School", it merely refers to it as examination. Mr Sunil Gupta, learned Senior Counsel for the appellants sought to invoke the principle of interpretation of statutes that rules made under a statute must be treated for all purposes of construction and obligation exactly as if they were in the Act, and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction and obligation. The invocation of this principle is misplaced. Firstly, because we are not concerned with the construction of an expression in the 1972 Act under which the 1978 Rules have been made. Secondly, and more importantly, there is no principle that rules made under a different and distinct statute must be treated for the purposes of construction as if they were part of the Act. In our view, the definition of "Junior High School" in the 1978 Rules cannot be judicially noticed for the purposes of construction and obligation of the 1978 Act.

41. We are also not persuaded by the submission of Mr Sunil Gupta that since the expression "Junior High School" is not defined in the 1978 Act, its meaning can be ascertained from the 1978 Rules by applying the principle that when an expression in a later statute is ambiguous, its meaning can be ascertained from its use and/or meaning in a prior statute or statutory instrument dealing with the same subject-matter for the present purpose. On the above principle of interpretation, there is not much challenge. The question is of its applicability to the present case. The 1978 Rules are made by the Governor under the 1972 Act, which do not deal with the aspect of payment of salaries to the teachers and the employees of a recognised school at all. The State Legislature has made a separate enactment viz. the 1978 Act, for payment of salaries. The definition of "Junior High School" in the 1978 Rules does not exhaust the scope of the expression "Junior High School". Moreover, a prior rule cannot be taken in aid to construe a subsequent enactment.

42. It is important to notice here that recognised Junior High Schools can be of three kinds:

(i) having Classes I to VIII i.e. Classes I to V (Junior Basic School) and so also Classes VI to VIII (Senior Basic School);

(ii) a school as above and upgraded to High School or intermediate standard and;

(iii) Classes VI to VIII (Senior Basic School) initially with no Junior Basic

School (Classes I to V) being part of the said school:

42.1. As regards the first two categories of Junior High Schools, the applicability of Section 10 of the 1978 Act does not create any difficulty. The debate which has centred round in this group of appeals is in respect of the third category of the schools where Classes I to V are added after obtaining recognition to the schools which are recognised and aided for imparting education in Classes VI to VIII. Whether teachers of primary section Classes I to V in such schools are entitled to the benefit of Section 10 of the 1978 Act is the moot question.

42.2. As noticed, the constitutional obligation of the State to provide for free and compulsory education of children till they complete the age of 14 years is beyond doubt now. The note appended to clause (xxvi), Para 1 of the Educational Code (Revised Edn. 1958) inter alia provides that Basic Schools include single schools with Classes I to VIII. In our view, if a Junior Basic School (Classes I to V) is added after obtaining necessary recognition to a recognised and aided Senior Basic School (Classes VI to VIII), then surely such Junior Basic School becomes integral part of one school i.e. Basic School having Classes I to VIII. The expression "Junior High School" in the 1978 Act is intended to refer to the schools imparting basic education i.e. education up to Class VIII. We do not think it is appropriate to give narrow meaning to the expression "Junior High School" as contended by the learned Senior Counsel for the State. That legislature used the expression Junior High School and not the Basic School as used and defined in the 1972 Act, in our view, is insignificant. The view, which we have taken, is fortified by the fact that in Section 2(j) of the 1978 Act, the expressions defined in the 1972 Act are incorporated.

43. The submission of Mr P.P. Rao, learned Senior Counsel for the State of U.P. with reference to the subject school, namely, Riyaz Junior High School (Classes VI to VIII), that the said school was initially a private recognised and aided school and the primary section (Classes I to V) was opened by the management later on after obtaining separate recognition, which was unaided, the teachers of such primary section, in terms of definition in Rule 2(b) and Rule 4 of the 1975 Rules are not entitled to the benefits of Section 10 of the 1978 Act does not appeal to us for what we have already said above. The view taken by the High Court in the first round in Vinod Sharma [Vinod Sharma v. Director of Education (Basic) U.P., (1998) 3 SCC 404 : 1998 SCC (L&S) 892] that Classes I to VIII taught in the institution are one unit, the teachers work under one management and one Headmaster and, therefore, teachers of the primary classes cannot be deprived of the benefit of the 1978 Act, cannot be said to be a wrong view. Rather, it is in accord and conformity with the constitutional scheme relating to free education to the children up to 14 years.

44. Though in the reference order, the two-Judge Bench has observed that the High Court in the first round in Vinod Sharma [Vinod Sharma v. Director of Education (Basic) U.P., (1998) 3 SCC 404 : 1998 SCC (L&S) 892] did not appreciate that the education at the primary level has been separated from the Junior High School level and separately entrusted under the different enactments to the Board constituted under Section 3 of the 1972 Act

and the same Board exercises control over Junior Basic Schools and it was a conscious distinction made by the legislature between two sets of schools and treat them as two separate components and, therefore, Vinod Sharma [Vinod Sharma v. Director of Education (Basic) U.P., (1998) 3 SCC 404 : 1998 SCC (L&S) 892] does not take the correct view but we think that the features noted in the reference order do not render the view taken in Vinod Sharma [Vinod Sharma v. Director of Education (Basic) U.P., (1998) 3 SCC 404 : 1998 SCC (L&S) 892] bad. We find merit in the argument of Dr M.P. Raju that the schools having the Junior Basic Schools and the Senior Basic Schools either separately or together are under the same Board i.e. the Board of Basic Education, as per the 1972 Act. Moreover, any other view may render the provisions of the 1978 Act unconstitutional on the ground of discrimination. In our considered view, any interpretation which may lead to unconstitutionality of the provision must be avoided. We hold, as it must be, that Junior High School necessarily includes Classes I to V when they are opened in a Senior Basic School (Classes VI to VIII) after obtaining separate recognition and for which there may not be a separate order of grant-in-aid by the Government."

29. This decision led the State of Uttar Pradesh to amend the Act of 1972 and the Act of 1978 by U.P. Act No. 2 of 2018 and U.P. Act No. 3 of 2018, respectively. The Act of 1972 was amended by U.P. Act No. 2 of 2018 retrospectively w.e.f. August 19, 1972 and by that amendment, the definition of a Junior Basic School and a Junior High School was introduced in the Act vide clauses (d-1) and (d-2) of sub-Section (1) of Section 2 of the Act of 1972. Clauses (d-1) and (d-2) of sub-Section (1) of Section 2 read:

"(d-1) "Junior Basic School" means a basic school in which education is imparted upto class fifth.

(d-2) "Junior High School" means a basic school in which education is imparted to boys or girls or to both from class sixth to class eighth."

30. Likewise, the Act of 1978 was amended by U.P. Act No. 3 of 2018 retrospectively w.e.f. 22.01.1979 to introduce clause (ee) to Section 2, which reads:

"(ee) "Junior High School" means an Institution which is different from High School or Intermediate College in which education is imparted to boys or girls or to both from class sixth to class eight."

31. The aforesaid amendments brought in by U.P. Act No. 2 of 2018 and U.P. Act No. 3 of 2018 were challenged before this Court as being *ultra vires* in **C/M Adarsh Gramin Vidyalaya Sonakpur, Harthala and others vs. State of U.P. and others**, **Writ-A No. 20751 of 2019,** and a batch of petitions, that were heard and decided by a Division Bench of this Court on 14.03.2022. The decision in **C/M Adarsh Gramin Vidyalaya is reported in 2022 SCC OnLine All 271**. The Division Bench classified institutions for the purpose of judging the validity of the Amending Acts and placed these in four categories mentioned in Paragraph No. 5 of the report. The categories of institutions in **C/M Adarsh Gramin Vidyalaya** can be best understood by reproducing Paragraph No. 5 of the report, which reads:

"5. The petitioners herein are recognized institutions imparting education from Classes I to VIII. They have been categorized in four categories in view of the submissions of the learned Advocate General:--

Category A-Unaided Junior High Schools

Category B-Primary Sections recognized first and Junior High School.

Category C-Junior High School recognized first and attached primary sections later.

Category D-Recognized primary and junior High Schools receiving grant-in-aid by wrong orders."

32. The provisions of the Amending Acts were read down by the Division Bench for schools in Categories B and C alone, holding that the amendments partially removed the basis of the decision of the Constitution Bench in **Pawan Kumar Divedi** and not in its entirety. The amendments were read down in the following terms:

"208. In view of the above discussion, our conclusions are:--

1. Since we find that the U.P. Act No. 3 of 2018, bringing amendment to the Payment of Salaries Act' 1978 has been challenged to be discriminatory being in violation of fundamental right of equality enshrined in Article 14 of the Constitution and has been found to be so in the context of the teachers of the petitioners institutions falling in category "B' & "C', the objection as to the maintainability of the writ petitions on the ground that the petitioner's institutions cannot be said to be prejudiced by the amendments is unsustainable, in as much as, it is settled law that no prejudice needs to be proved in cases where breach of fundamental right is asserted/alleged.

In our conclusion, the writ petitioners cannot be non-suited on the grounds that the action before the Court has not been brought by the teachers employed by them; and that the management has no legal right much less a fundamental right to seek grant-in-aid. The plea of the petitioners that the teachers of the attached primary sections of a recognized and aided Junior High School, whether established and recognized prior to or later to the establishment of the Junior High School stood discriminated, itself makes the Amendment Act' 2017 (U.P. Act No. 3 of 2018) vulnerable of being unconstitutional.

Further, it was open for the petitioners institutions to challenge the constitutional validity of the Amendment Acts' 2017 while challenging the orders of rejection of their applications seeking grant-in-aid as the sole basis of rejection of their claim is the amendments under challenge. It is settled that while challenging any action or order of the State or executive, all possible objections have to be raised in one action and separate writ petitions for the same cause of action cannot be entertained. In other words, the petitioners management have no option but to challenge the constitutional validity of the Amendment Acts' 2017 in order to sustain their challenge to the correctness of the decisions rejecting their representations,

as the only basis of rejection of their claims is exclusion by way of Amendment Acts' 2017.

The writ petitions in this batch, thus, cannot be rejected, at the threshold, on the objection of the State as to the locus of the writ petitioners.

(2) The U.P. Act No. 3 of 2018 bringing amendment in the Payment of Salaries Act 1978, which has been termed as the Validation Act does not have the effect to efface the whole basis of the Constitutional Bench judgment in Pawan Kumar Divedi8, which in-turn had upheld the decision in Vinod Sharma6. The issue of integrality or oneness of such institutions which have both primary sections (Junior Basic School) (classes I to V) and Senior Basic School (Junior High School) (classes VI to VIII), as propounded by the Constitution Bench, taking note of Clause (xxvi) Part-1 in Chapter I of the Education Code of U.P. (Revision Edition 1958) cannot be said to have been obliterated by virtue of the U.P. Act No. 3 of 2018 (Amendment Act' 2017).

(3) The introduction of definition of "Junior High School" in Section 2(ee) of the Payment of Salaries Act' 1978 with retrospective effect, i.e. the date of coming into force of the original enactment, i.e. 22.01.1979 has resulted in hostile discrimination to the teachers of institutions imparting education in the primary sections (Classes I to V) of a Junior High School getting grant from the State fund. Such a classification negates equality as it could not satisfy the twin test of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together or those that are left out of the group and that differentia having a rational nexus to the object sought to be achieved by the Statute.

The State could not bring before us the rationale on which classification is founded and which co-relate it to the object sought to be achieved.

4. The intention of the legislature in bringing the Original enactment namely the Payment of Salaries Act' 1978 on 22.01.1979 was to remedy complaints of teachers and non-teaching employees of aided non-government Junior High Schools about non disbursement of their salary in time resulting in hardship to them by taking action against the management under the Act in case of such a complaint is found true. The purpose of bringing Amendment Acts' 2017 for insertion of the definition of "Junior High School" in the 1978' Act, is to clarify that the original enactment regulates the matter of payment of salary to teachers and other employees of a Junior High School, (imparting education from classes VI to VIII) receiving aid out of State fund.

Gathering the intention of the legislature for enactment of the 1978' Act the context in which the regulation provision occurred in the Act and the purpose for which the original enactment was made, the "limitation" to which the expression "Junior High School" has been restricted in the Amendment Act' 2017 (U.P. Act No. 3 of 1978), by excluding primary sections of a recognized and aided Junior High School is not found based on an intelligible differentia which distinguishes the teachers of Classes VI to VIII from the teachers of Classes I to V of "one institution' which are grouped together in a homogeneous class and cannot be differentiated. The differentia sought to be created cannot be said to have a rationale

relation to the object sought to be achieved by the Original Act' 1978 or the Amendment Act' 2017.

5. As the challenge has been entertained by us only for one class of institutions, namely recognized and aided Junior High Schools having primary sections as integral part of the Schools, the whole Amendment Act' 2017 cannot be rendered unconstitutional.

By reading the words "including a Basic School having both Junior and Senior Basic School established or being run as a "single unit' from Classes I to VIII" into Section 2(ee) of 1978' Act inserted by U.P. Act No. 3 of 2018, the object and purpose for which the Original enactment namely the Payment of Salaries Act' 1978 was enacted can very well be achieved. Applying the doctrine of reading down or reading into the statute, the words of limitation in the statute read in such a manner save the statute from being declared unconstitutional. It is, thus, declared that primary sections which are integral part of Junior High Schools, whether established prior or later to the establishment of recognized and aided Junior High Schools shall have to be brought within the purview of the Payment of Salaries Act' 1978 as amended by the U.P. Act No. 3 of 2018. (Amendment Act' 2017).

It is, however, clarified that the issue of integrality or oneness of such an institution would have to be examined in relation to that particular institution in each case depending upon the facts and circumstance of that case. Meaning thereby, whether a particular institution fulfills the test formulated in Vinod Sharma6 approved in Pawan Kumar Divedi8 by the Constitution Bench of the Apex Court, would be an issue of fact to be determined in respect of each individual institution. The test of "oneness of an institution' on the principle of "composite integrality' as evolved by the learned Single Judge in Jai Ram Singh13 as approved by us has to be applied while evaluating as to when an institution may be made up of various sections or compartments to make it "one unit". As held in Jai Ram Singh13, in order to meet the test of "composite integrality', it must be established that the institution exists as an amalgam of various components indelibly fused together to constitute a singular whole (unit). The requirement of a common campus solely as formulated in Vinod Sharma6, cannot be recognised as a determinative factor. The issue of "composite integrality" would have to be answered upon a cumulative consideration of all relevant factors, which are necessary to be brought by the institutions before the competent authority at the time of taking decision.

6. The 2017' Amendment to the Payment of Salaries Act' 1978 only partially removes the basis of the decision of the Apex Court in Vinod Sharma6 and the Constitution Bench in Pawan Kumar Divedi8 as the expression "Junior High School" no longer is open for interpretation by the Court.

7. We may also clarify that in view of the reading of the above noted words into the definition of the "Junior High School" occurring in the U.P. Act No. 3 of 2018 enacted for insertion of Clause (ee) in Section 2 of the U.P. Junior High School (Payment of Salaries of Teachers and Other Employees) Act 1978, the Validity of the U.P. Act No. 2 of 2018 bringing amendment in the U.P. Basic

Education Act' 1972 is not to be looked into, in as much as, the meaning of the expression "Junior High School" in Section 2 (ee) of the 1978' Act as amended upto date, would control the provisions of the 1978 Act. The meaning of the said expression in Section 2 (d-2) of the 1972 Act inserted by the U.P. Act No. 2 of 2018, would not be relevant for the purpose of 1978' Act. The separation of Basic school into two categories in the U.P. Basic Education Act 1972 by the insertion of definition clauses by U.P. Act No. 3 of 2018 would not impact the meaning of the expression "Junior High School" in Section 2 (ee) of 1978' Act as amended by U.P. Act No. 3 of 2018, in as much as, Section 2(j) of 1978 Act takes care of any possible conflict. It clarifies that the words of expression defined in the U.P. Basic Education Act' 1972 and not defined in the 1978 Act shall be given the meaning assigned to them in the 1972' Act. It is clarified that since we have read into Section 2 (ee) of the Payment of Salaries Act' 1978, (as amended upto date) considering the object and purpose of the said enactment, we do not find that the meaning of the expression "Junior High School" in Section 2 (d-2) of 1972' Act would come in the way of the meaning assigned to the said expression in the 1978' Act provided by the Amendment Act No. 3 of 2018, as read down by us herein above."

33. The Division Bench in **C/M Adarsh Gramin Vidyalaya** regarding the policy of the State to fund private institutions offering primary education has remarked as follows:

" 90. It is submitted that the age old policy of the State is not to provide funds to private primary institutions. The rationale behind this classification is that a large number of institutions providing primary education from Classes I to V have been established and are being run by the State or its instrumentalities in discharge of its Constitutional obligation under Article 45 as it stood before the Eighty Sixth Amendment in the Constitution and Article 21-A thereafter. With the passage of time, as a policy matter, the State Government provided aid to institutions where there was need. Junior High Schools established by the State have been found in lesser number and, therefore, it was decided to give grant to private institutions according to the need and availability of fund of the State. No legal right much less fundamental right has been conferred on any individual person or management to seek aid from the State fund to run an educational institution. The policy decision of the State to exclude primary institutions from the purview of the 1978' Act has been challenged in the present matter on the touchstone of Article 21-A, violation of which cannot be agitated by institutions or its management."

34. An overview of these developments would lead to the inescapable conclusion that the State of Uttar Pradesh does not, as a matter of policy, desire to share its resources with private individuals or associations offering primary education to students reading in Class I to V. Of course, anyone is free to establish an educational institution, but it is well settled that no one has a right to seek affiliation or grant-in-aid from the State to fund that enterprise. This is so notwithstanding the introduction of Article 21-A in Chapter III and its statutory implementation by enactment of the Act of 2009.

35. It is for the said reason that the State have come up with a stand in their

supplementary counter affidavit dated 24.03.2021 that private institutions recognized by the Basic Education Department to manage primary institutions are not included in the list of grant-in-aid by the State. It is pleaded in Paragraph No. 5 of the aforesaid counter affidavit that private institutions recognized by the Basic Education Department, who are imparting education to Class VIII (reference to Junior High Schools teaching students from Class VI to Class VIII), are included in the grant-in-aid list by the Basic Education Department, which is clear from the Government Order dated 02.12.2016 issued by the Secretary, Basic Education, Government of U.P. The further stand is that the appointment of teachers to such institutions are governed by the Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 (for short, 'the Rules of 1978') and these teachers are paid salaries under the Act of 1978.

36. I t is the stand of the State in the counter affidavit under reference that maintenance grant defined under Section 2(f) of the Act of 1978 provided by the Department of Basic Education to Junior High Schools is generically different from the recurring grant provided to privately managed primary schools funded by the Department of Social Welfare. It is asserted in Paragraph No. 7 that the Department of Social Welfare provides recurring grant to primary schools that are private institutions teaching students hailing from the Scheduled Castes and Scheduled Tribes in the strength of 50%. It is something which the Department of Basic Education never provides to any primary institution. Therefore, the grant provided by the Department of Social Welfare is limited to making provision for salary of the teachers teaching in such privately managed institutions, where students belonging to the Scheduled Castes and Scheduled Tribes read in the specified strength. The Social Welfare Department have the right to stop such grant and their obligations do not extend to anything beyond payment of salaries.

37. It is also the respondents' case that since a general provident fund scheme has been introduced for teachers and other employees teaching in private educational institutions w.e.f. 1st March, 1977, a deduction from the salary of teachers is made every month to be credited to the provident fund account, under the provident fund scheme through the Treasury by the school management. The deduction of provident fund has no relevance for the purpose of attracting the Rules of 1964.

38. In substance, therefore, what appears to be the case is that there is general embargo by State policy upon funding or the provision of grant-in-aid to primary institutions, exclusively imparting education at the Junior Basic School or Classes I to V. The said education has been retained by the State in its hands with the aspiration that they can provide to each child the necessary primary education up to Class V. The State in their wisdom have thought that they ought not to share resources with private enterprise, where individuals establish primary institutions to teach children from Classes I to V. If the State have taken a policy decision that they would not fund education where private institutions have been established, exclusively teaching Classes I to V, there is no right inhering in anyone to compel the State to extend grant-in-aid to support

pensions to retired teachers of such private institutions, under the Rules 1964, merely because a contingent grant has been provided by the Social Welfare Department to support payment of salaries to teachers, subject to the condition of providing primary education to a certain class of children in particular strength.

39. It is only stated to be noticed that it is well settled that there is no right inhering in any citizen to compel the State to pay grants to a private institution. Of course, children in the age group of 6-14 have a fundamental right to free and compulsory education and it is to be realized in the manner dictated by the law. The Act of 2009 places burden on the shoulder of private institutions, completely unaided, to share it as well. Section 12(1)(c) and 12(2) read with the definition of School in Section 2(n)(iv) of the Act of 2009 make it evident that obligations rest with private unaided institutions as well to admit in Class I at least 25% of the strength of that Class, "children belonging to the weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion", to quote the words of the Statute.

40. Now, in the absence of a policy by the State to fund any privately owned or managed institution imparting primary education from Classes I to V, the petitioners are teachers of a special class of institutions catering to the requirements of a marginalized section of the society, who are members of the Scheduled Castes and Scheduled Tribes. The grant paid to the schools where the petitioners teach is apparently not by the Basic Education Department, who have no policy to extend any grant-in-aid to institutions imparting education from Classes I to V alone.

41. It is another matter that by the State's policy recurring grant is extended, where the primary section is an integral part of the Junior High School. However, in order to achieve the objective of extending education to marginalized sections of the society represented by the Scheduled Castes and Scheduled Tribes, the Department of Social Welfare of the State had in the past been extending the facility of a recurring grant-in-aid to primary institutions as well, that is to say, institutions teaching children from Classes I to V, where a minimum of 50% of the scholar strength is from the Scheduled Castes and Scheduled Tribes. This policy too by the State Government has been discontinued after the year 1994.

42. There is an office memo dated 5th October, 2006 issued by the Department of Social Welfare, which indicates that the policy has been discontinued after 1994 and further says that with the introduction of Article 21-A in Part III of the Constitution, free and compulsory education is the obligation of the State up to the age of 14 years. The said office memo also says that to realize the aforesaid objective under the Sarva Shiksha Abhiyan, the Department of Basic Education has established schools in every village at the distance of 1.5 kilometers. By 2008, these would be established at a distance of a kilometer each. The office memo says that with so much of promotion of free and compulsory education for the children up to the age of 14 years, which has to be achieved through primary schools established by the Department of Basic Education, there is no necessity of offering

grants-in-aid to private institutions, run under managements teaching children, hailing from the Scheduled Castes and Scheduled Tribes. The aforesaid office memo has been annexed as SCA-2 to the supplementary counter affidavit dated 20.01.2021.

43. It is, thus, evident from a reading of the said office memo that the State has long abandoned its policy of funding this special class of institutions, where the petitioners have been teaching. The policy has been changed, because a large number of schools have been established or are to be established by the Basic Education Department through the Board, which would achieve the purpose of free and compulsory education to all children up to the age of 14 years. The policy change is dictated by changes to the law and outlook towards education for children up to the age of 14 years. There is no further need to undertake efforts through assistance of private institutions for the purpose of encouraging marginalized sections of the society, whose needs are now being adequately catered to by the Department of Basic Education through its established schools functioning under the Board.

44. The said changes apart what emerges is that the institutions, where the petitioners are or were employed and have now retired, were funded by a grant very different from the maintenance grant envisaged under Section 2(f) of the Act of 1978. The recurring grant provided by the Department of Social Welfare is very different from the maintenance grant envisaged under the Act of 1978. This grant is limited to the provision of salaries to teachers teaching in the special class of primary institution, managed by private managements, who were offered assistance by the State for the singular reason that at the relevant time and considering the need then emergent, these institutions were provided education to a special class of citizens in the specified age group. The grant provided to these institutions has, therefore, to be limited to the terms of the grant. It cannot be extended beyond anything what it actually is.

45. This brings up, therefore, the question whether by virtue of Rule 3 of the Rules of 1964, the petitioners are entitled to the triple benefit envisaged therein, particularly, payment of pension, in accordance with Chapter V of the said Rules. Rules 3 and 4 of the Rules of 1964 read:

"3. These rules shall apply to permanent employees serving in State aided educational institutions of the following categories run either by a Local Body or by a private Management and recognised by a competent authority as such for purposes of payment of grant-in-aid:

(1) Primary Schools;

(2) Junior High Schools;

(3) Higher Secondary Schools;

(4) Degree Colleges;

(5) Training Colleges.

4. (a) These rules are intended to the employees of the State aided educational institutions, three types of service benefits, viz., Contributory Provident Fund, Insurance and Pension (Triple Benefit Scheme). The quantum of the benefits and the conditions by which

they are governed are described in the succeeding Chapters.

(b) An employee already in permanent service on the date of enforcement of these rules shall be given an option to elect these new rules or to continue to be governed by the existing rules applicable to him.

(c) No employees shall be allowed option to choose only a part of the Scheme except as otherwise specifically provided for in these rules.

(d) Option once exercised shall be final."

46. A plain reading of these rules shows that they apply to permanent employees, serving in State aided educational institutions, whether run by a Local Body or by a private management. The condition for application of the Rules of 1964 is recognition by a competent Authority for the purposes of payment of grant-in-aid. The grant-in-aid envisaged under the Rules after the enactment of the Act of 1978 would mean the maintenance grant envisaged under Section 2(f) of the Act of 1978. The said Statute regulates payment of salaries to teachers of basic schools and statutorily defines grant-in-aid. It envisages a wholesome maintenance grant and not some kind of an ad hoc or limited grant that can be withdrawn like the one provided to primary schools of the class where the petitioners teach on the happening of contingencies, such as numbers of students of the Scheduled Castes and Scheduled Tribes falling below 50%. The grant provided by the Social Welfare Department at the relevant time for the purpose of promoting education amongst certain marginalized sections of the society in a particular age group without any permanence or continuity to it, cannot make it into a grant-in-aid envisaged under the Rules of 1964. The grant-in-aid envisaged under the said Rules by no principle can include within its fold an ad hoc or limited grant provided by the Department of Social Welfare to the institutions, where the petitioners teach.

47. These Rules, therefore, cannot form basis for the petitioners' entitlement to receive pensions, insurance and contributory provident fund. The order of the Division Bench dated 11.08.2006 in Special Appeal No. 180 of 2000 would entitle the petitioners to benefits other than salary, if there were rules or conditions applicable. This Court finds that there are none to support that kind of a claim.

48. In the considered view of this Court, therefore, there is no infirmity in the order impugned and the petitioners are not entitled to any relief.

49. The writ petitions fail and are dismissed. There shall be no order as to costs.

(2023) 2 ILRA 1074
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2023

BEFORE

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

Writ Tax No. 1523 of 2022

M/s ANS Handicrafts ...Petitioner
Versus
Commissioner, Commercial Tax & Anr. ...Respondents

Counsel for the Petitioner:
Sri Pooja Talwar

Counsel for the Respondents:

Sri Ankur Agarwal, Standing Counsel

Civil Law - U.P. Goods and Service Tax Act, 2017-Registration certificate of Petitioner-registered under U.P. Goods and Service Tax-notice for assessment issued u/s 74 of the Act-no opportunity of hearing-no details upon which action is proposed-impugned order is unreasoned, non speaking-quashed.

W.P. allowed. (E-9)

List of Cases cited:

1. Bajrang Trading Ltd. Vs St. of U.P. & ors. (2020) UPTC (Vol. 104) 400

2. Balaji Enterprises Vs Principal Additional Director General (2022) 80 MTNDX 448 (Delhi)

3. Kranti Associates Pvt. Ltd. Vs Masood Ahmed Khan, (2010) 9 SCC 496

4. Harinagar Sugar Mills Ltd. Vs Shyam Sunder Jhunjhunwala, AIR 1961 SC 1669

5. Som Datt Datta Vs U.O.I., AIR 1969 SC 414; Bhagat Raja Vs U.O.I., AIR 1967 SC 1606;

6. Travancore Rayon Ltd. Vs U.O.I. (1969) 3 SCC 868;

7. Mahabir Prasad Santosh Kumar Vs St. of U.P, (1970) 1 SCC 764;

8. Keshav Mills Co. Ltd. Vs U.O.I., (1973) 1 SCC 380;

9. U.O.I. Vs Mohan Lal Capoor, (1973) 2 SCC 836;

10. Woolcombers of India Ltd. Vs Workers Union, (1974) 3 SCC 318;

11. Siemens Engg. and Mfg. Co. of India Ltd. Vs U.O.I., (1976) 2 SCC 981;

12. Maneka Gandhi Vs U.O.I., (1978) 1 SCC 248;

13. Rama Varma Bharathan Thampuram Vs St. of Kerala, (1979) 4 SCC 782;

14. Gurdial Singh Fijji Vs St. of Pun., (1979) 2 SCC 368;

15. H.H Shri Swamiji of Shri Amar MuttVs Commr., Hindu Religious & Charitable Endowments Deptt.,(1979) 4 SCC 642;

16. Bombay Oil Industries (P) Ltd. Vs U.O.I., (1984) 1 SCC 141;

17. Ram Chander Vs U.O.I., (1986) 3 SCC 103;

18. Star Enterprises Vs City and Industrial Development Corpn. of Maharashtra Ltd., (1990) 3 SCC 280;

19. S.N Mukherjee Vs U.O.I., (1990) 4 SCC 594;

20. Maharashtra St. Board of Secondary and Higher Secondary Education Vs K.S Gandhi, (1991) 2 SCC 716;

21. M.L Jaggi Vs MTNL, (1996) 3 SCC 119 and Charan Singh Vs Healing Touch Hospital, (2000) 7 SCC 668

22. ORYX Fisheries Pvt. Ltd. Vs U.O.I. (2010) 13 SCC 427

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

ORDER

1. By means of the instant writ petition, the petitioner is challenging the order dated March 11, 2019 vide which the registration certificate of the petitioner has been cancelled.

2. Learned counsel for the petitioner submitted that petitioner is a registered firm engaged in trading of hardware and aluminium goods. It was duly registered under U.P. Goods and Service Tax. A survey was conducted on February 11, 2019 at the business premises of the petitioner wherein 29 loose papers were found. As according to the Department,

certain discrepancies were found in the stock, the turn-over of the petitioner was enhanced on the presumption that there were suppressed sales. Notice for assessment was issued under Section 74 of U.P. Goods and Service Tax Act, 2017 (hereinafter referred to as "the Act") for the period April' 2018 to February' 2019. Huge demand of more than ₹6 crore was raised. The petitioner preferred appeal, which was finally partially accepted. On the other hand, a notice was issued to the petitioner on February 26, 2019 to show cause as to why the registration certificate of the petitioner be not cancelled. Nothing was mentioned therein as to the reasons for issuing the notice except the generic term *"In case, Registration has been obtained by means of fraud, wilful misstatement or suppression of facts."* Without affording opportunity of hearing to the petitioner, as there were no ground mentioned for cancellation of registration, and without assigning any reason, order dated March 11, 2019 was uploaded on the website cancelling the registration of the petitioner. The argument raised is that the notice issued by the Department to the petitioner has to be action oriented giving complete details on the basis of which action is proposed and after due opportunity of hearing, a reasoned order is required to be passed. In the case in hand, both are lacking, hence the order deserves to be set aside. In support of the aforesaid contentions, reliance is placed on **Bajrang Trading Ltd. Vs. State of U.P. and others (2020) UPTC (Vol. 104) 400 and Balaji Enterprises Vs. Principal Additional Director General (2022) 80 MTNDX 448 (Delhi).**

3. On the other hand, learned counsel for the respondents submitted that the fact by itself that a survey was carried out at the premises of the petitioner and certain loose papers were recovered on the basis of which assessment was framed clearly establishes that the petitioner was indulging in unaccounted sales and was evading tax. Immediately after the survey, the notice was issued to the petitioner to show cause as to why registration certification of the petitioner be not cancelled. The reasons are well mentioned in the notice. Due opportunity of hearing was afforded to petitioner which the petitioner failed to avail of and the order of cancellation of certificate was passed. There is no illegality therein.

4. Heard learned counsel for the parties and perused the paper-book.

5. To appreciate the contentions raised by learned counsel for the parties, it would be apt to first extract the shows cause notice issued to petitioner on February 26, 2019. The reasons assigned in the show-cause notice proposing cancellation of registration are extracted below:

"In case, Registration has been obtained by means of fraud, wilful misstatement or suppression of facts."

6. The petitioner was called upon to appear on March 7, 2019.

7. The order passed in furtherance to the aforesaid show-cause notice on March 11, 2019 is extracted below:

"Order for Cancellation of Registration

This has reference to your reply dated 08/03/2019 in response to the notice to

show cause dated 26/02/2019 whereas no reply to notice to show cause has been submitted.

The effective date of cancellation of your registration is 26/02/2019.

Determination of amount payable pursuant to cancellation:

Accordingly, the amount payable by your and the computation and basis thereof is as follows:

The amounts determined as being payable above are without prejudice to any amount that may be found to be payable you on submission of final return furnished by you.

You are required to pay the following amounts on or before 21/03/2019 failing which the amount will be recovered in accordance with the provisions of the Act and rules made thereunder.

Head	Central Tax	State Tax/ UT Tax	Integrated Tax	Cess Tax
Interest	0	0	0	0
Penalty	0	0	0	0
Others	0	0	0	0
Total	0.0	0.0	0.0	0.0

8. A perusal of the aforesaid order passed by the authority concerned shows that there is total non application of the mind as the order is bereft of any reason, whatsoever. Even the facts of the case have not been referred. In the absence of brief facts and the reasons for coming to a conclusion, it is not possible for the next higher Court or authority to appreciate as to what weighed with the authority concerned to reach the conclusion and as to whether there was application of mind while passing the order or the order is arbitrary.

9. Hon'ble the Supreme Court in **Kranti Associates Private Limited v. Masood Ahmed Khan, (2010) 9 SCC 496, while referring to its earlier judgments in Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala, AIR 1961 SC 1669; Som Datt Datta v. Union of India, AIR 1969 SC 414; Bhagat Raja v. Union of India, AIR 1967 SC 1606; Travancore Rayon Ltd. v. Union Of India (1969) 3 SCC 868; Mahabir Prasad Santosh Kumar v. State of U.P, (1970) 1 SCC 764; Keshav Mills Co. Ltd. v. Union of India, (1973) 1 SCC 380; Union of India v. Mohan Lal Capoor, (1973) 2 SCC 836; Woolcombers of India Ltd. v. Workers Union, (1974) 3 SCC 318; Siemens Engg. and Mfg. Co. of India Ltd. v. Union of India, (1976) 2 SCC 981; Maneka Gandhi v. Union of India, (1978) 1 SCC 248; Rama Varma Bharathan Thampuram v. State of Kerala, (1979) 4 SCC 782; Gurdial Singh Fijji v. State of Punjab, (1979) 2 SCC 368; H.H Shri Swamiji of Shri Amar Mutt v. Commr., Hindu Religious and Charitable Endowments Deptt., (1979) 4 SCC 642; Bombay Oil Industries (P) Ltd. v. Union of India, (1984) 1 SCC 141; Ram Chander v. Union of India, (1986) 3 SCC 103; Star Enterprises v. City and Industrial Development Corpn. of Maharashtra Ltd., (1990) 3 SCC 280; S.N Mukherjee v. Union Of India., (1990) 4 SCC 594; Maharashtra State Board of Secondary and Higher Secondary Education v. K.S Gandhi, (1991) 2 SCC 716; M.L Jaggi v. MTNL, (1996) 3 SCC 119 and Charan Singh v. Healing Touch Hospital, (2000) 7 SCC 668** opined that every order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must be a speaking order. It must not be like the "inscrutable face of a

sphinx". The superior court cannot effectively exercise its power of judicial review unless in the order impugned, facts and reasons have been stated in detail. Merely giving an opportunity of hearing is not enough. Wherever an order can be subject to appeal or judicial review, the necessity to record reasons is even greater. It ensures that the decision is not a result of caprice, whim or fancy but was arrived at after considering the relevant facts and the law. It enables an aggrieved party to demonstrate before the higher court that the reasons on which his claim has been rejected, are erroneous. It operates as a deterrent against possible arbitrary action by any authority invested with judicial power. The aim is to prevent unfairness or arbitrariness in reaching conclusions. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. The faith of the people in administrative authorities can be sustained only if they act fairly and dispose of the matters before them by well-considered orders.

10. Following the aforesaid judgment in Kranti Associates Private Limited's case (supra), Hon'ble the Supreme Court in ORYX Fisheries Private Ltd. v. Union of India (2010) 13 SCC 427 said:

"39. On the requirement of disclosing reasons by a quasi-judicial authority in support of its order, this Court has recently delivered a judgment in the case of Kranti Associates Pvt. Ltd. & Anr. v. Sh. Masood Ahmed Khan & Others on 8th September 2010.

40. In M/s Kranti Associates (supra), this Court after considering various judgments formulated certain principles in para 51 of the judgment which are set out below:

a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

b. A quasi-judicial authority must record reasons in support of its conclusions.

c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

g. Reasons facilitate the process of judicial review by superior Courts.

h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or `rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

11. In view of the above binding authorities and taking into account the fact that the order impugned in the case is hand is totally unreasoned, non speaking and shows no application of mind, in our considered opinion, the same cannot be sustained.

12. As a result, the writ petition is allowed. Impugned order dated March 11, 2019, Annexure-3 to the writ petition, is hereby quashed with liberty to the authority to proceed again against petitioner in accordance with law.

(2023) 2 ILRA 1079
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2023

BEFORE

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

Writ Tax No. 33 of 2023

Sadashiv Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anurag Dubey, Sri Amit Kumar Sharma

Counsel for the Respondents:
Sri Nimai Dass (Addl. Chief Standing Counsel)

U.P. Motor Vehicles Taxation Rules , 1998-Rule 18-Recovery citation issued on account of motor vehicle tax-impugned-Petitioner purchased the vehicle-it was hypothecated with M/s Hinduja Leyland Finance Limited-vehicle was seized on account of non payment in 2013-sold on 2015-Petitioner had deposited the tax up till he had the possession-financier is liable to pay the tax-Petitioner filed an objection against the recovery citation-objections are required to be considered by the competent authority and liability may be re-worked-.

W.P. disposed. (E-9)

List of Cases cited:

Mahindra & Mahindra Financial Services Ltd. Vs St. of U.P. & ors., (2022) 5 SCC 525

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

1. Recovery citation dated October 1, 2022 issued against the petitioner, on account of motor vehicle tax, is under challenge in the present petition.

2. The argument raised by the learned counsel for the petitioner is that he had purchased a Tata Magic (small commercial vehicle), bearing registration No. UP 90T 0839 on March 10, 2011. The same was hypothecated with M/s Hinduja Leyland Finance Limited. On account of default in repayment of loan, the vehicle was seized by the financier in the year 2013. It was thereafter sold and on November 28, 2015, a notice was received by the petitioner for payment of balance loan amount. Upto the date the petitioner was in possession of the vehicle in question, he had deposited the tax. After possession of the vehicle was taken by the financier, the liability of the tax cannot be put on the petitioner as in that case the financier will be liable to pay the tax. The aforesaid facts have been stated by the petitioner in the objections filed to the recovery citation, however, not considered. In support of the argument reliance has been placed upon judgment of Hon'ble the Supreme Court in **Mahindra and Mahindra Financial Services Ltd. vs. State of U.P. and others, (2022) 5 SCC 525.**

3. Learned counsel for the State submitted that in terms of Rule 18 of the U.P. Motor Vehicles Taxation Rules, 1998 (hereinafter referred to as 'the Rules'), the petitioner was required to inform the Taxation Officer about the fact that the possession of the vehicle in question was taken by the financier so as to enable the authority to fasten the liability on the financier. As the petitioner had failed to do so, demand was raised against him. However, in case, he points out the details to the Taxation Officer, the issue will be examined in the light of judgment of Hon'ble the Supreme Court in **Mahindra and Mahindra Financial Services' case (supra).**

4. After hearing the learned counsel for the parties, we find merit in the submission made by learned counsel for the petitioner as he stated that possession of the vehicle in question was taken by the financier in May 2013 and in view of the judgment of Hon'ble the Supreme Court in **Mahindra and Mahindra Financial Services' case (supra)** the liability for payment of tax thereafter cannot be fastened on the petitioner. Relevant paragraph 12 of the aforesaid judgment is reproduced hereinbelow:

"In view of the above discussion and for the reasons stated above, it is held that a financier of a motor vehicle/transport vehicle in respect of which a hire-purchase or lease or hypothecation agreement has been entered, is liable to tax from the date of taking possession of the said vehicle under the said agreement. If, after the payment of tax, the vehicle is not used for a month or more, then such an owner may apply for refund under Section 12 of the Act, 1997 and has to comply with all the requirements for seeking the refund as mentioned in Section 12, and on fulfilling and/or complying with all the conditions mentioned in Section 12(1), he may get the refund to the extent provided in sub-

section(1) of Section 12, as even under Section 12(1), the owner/operator shall not be entitled to the full refund but shall be entitled to the refund of an amount equal to one-third of the rate of quarterly tax or one twelfth of the yearly tax, as the case may be, payable in respect of such vehicle for each thirty days of such period for which such tax has been paid. However, only in a case, which falls under sub-section(2) of Section 12 and subject to surrender of the necessary documents as mentioned in sub-section(2) of Section 12, the liability to pay the tax shall not arise, otherwise the liability to pay the tax by such owner/operator shall continue." (emphasis supplied)

5. In terms of Rule 18 of the Rules, the petitioner had already filed objection against the recovery citation on December 18, 2022 mentioning that possession of the vehicle in question was taken by the financer in May 2013. Subsequently, the vehicle was sold by the financer. The aforesaid objections are required to be considered by the competent authority and from the date of possession of the vehicle was taken by the financer, the liability may be re-worked out in terms of judgment of Hon'ble the Supreme Court in **Mahindra and Mahindra Financial Services' case (supra).** However, for any period prior to that, if the tax has not been paid, the petitioner shall be liable to pay the same.

6. The writ petition is, accordingly, disposed of and recovery citation against the petitioner is quashed.

(2023) 2 ILRA 1081
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2023

BEFORE

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

Writ Tax No. 62 of 2023

M/s. Pioneer Industries 485, Chhota Kaila, Scrap Market, PAC Chowk, Ghaziabad ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Praveen Kumar

Counsel for the Respondents:
Sri Ankur Agarwal (S.C.)

Civil Law - U.P. Goods and Services Tax Act, 2017-Section 129 (1)(b)-Order passed goods in transit seized- impugned-levy of penalty u/s 129 (1)(b) not called for and not justified-as it provides that where owner of the goods comes forward for payment of penalty , the amount has to be two hundred percent of the tax payable-but penalty has been levied to the tune of hundred percent of the value of the goods-impugned order set aside.

W.P. allowed. (E-9)

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

1. The order passed on GST MOV-06 dated January 7, 2023, vide which the goods in transit were seized by the authorities concerned, has been impugned in the present writ petition. Further show cause notice on GST MOV-07 and order passed thereon on GST MOV-09 dated January 11, 2023 are under challenge in the present petition.

2. Learned counsel for the petitioners submitted that the goods were accompanied by proper documents. The owners of the goods either are the consignors or the

consignees. However, still without appreciating the contentions raised by the petitioners, vide impugned order, the driver of the vehicle was deemed to be the owner and penalty of ? 4,01,672/- has been levied in exercise of power under Section 129(1)(b) of U.P. Goods and Services Tax Act, 2017 (hereinafter referred to as 'the Act').

3. The argument is that it is a case in which the goods in transit were accompanied by proper documents. When show cause notice was issued to the driver of the vehicle, the petitioners had filed their replies. In terms of the provisions of Section 129(1)(a) of the Act, in case, the owner of the goods comes forward, the penalty is to be levied upon him. The penalty can be levied under section 129(1)(b) of the Act, only if the owner of the goods does not come forward. In the case in hand, vide impugned order the penalty has been levied under Section 129(1)(b) of the Act, which is not applicable. He has also referred to Circular dated December 31, 2018 issued by the Central Board of Indirect Taxes and Customs (hereinafter referred to as 'Board'), whereby a clarification has been issued as to who is to be treated as owner of the goods for the purpose of Section 129(1) of the Act. It provides that if the goods are accompanied with invoices then consignor should be deemed to be the owner. In the case in hand, the petitioner nos. 1 and 2 are the consignors, whereas petitioner nos. 3 to 5 are consignees, hence, in their presence and accepting the ownership of the goods, the impugned order should not have been passed under Section 129(1)(b) of the Act.

4. On the other hand, learned counsel for the respondents submitted that it is a case in which the goods were not matching with the invoices as certain goods were found either to be more or less than the quantity mentioned in the invoices. Hence, penalty has been appropriately levied.

5. After hearing learned counsel for the parties, in our opinion, the present writ petition deserves to be allowed and the order impugned dated January 11, 2023 deserves to be set aside for the reason that the consignors and consignees are present and accepting ownership of the seized goods. The consignors are registered dealers in the State of U.P.

6. In view of the aforesaid fact and also the clarification given by the Board vide its Circular dated 31, 2018, in our opinion, levy of penalty under Section 129(1)(b) of the Act was not called for and could not be justified as Section 129(1)(a) of the Act provides that where owner of the goods comes forward for payment of penalty, the amount has to be two hundred per cent of the tax payable, whereas, in the case in hand, the penalty has been levied to the tune of hundred per cent of the value of the goods.

7. For the reasons mentioned above, the impugned order dated January 11, 2023 passed by respondent no. 2 is set aside. The writ petition is allowed. The matter is remitted back to the competent authority for passing fresh order within a period of two weeks from the date of receipt of copy of the order.

(2023) 2 ILRA 1083
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2023

BEFORE

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

Writ Tax No. 194 of 2022

Rajendra Pratap Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shambhu Chopra (Sr. Advocate), Ms. Mahima Jaiswal, Sri Rakesh Kumar Tripathi, Ms. Anupama Tripathi

Counsel for the Respondents:
C.S.C., Sri Nimai Dass (Additional Chief Standing Counsel), Sri Apurva Hajela (Standing Counsel)

Uttar Pradesh Cinematograph Rules, 1951-Claim of subsidiary grant after setting up a cinema hall in rural area was rejected and recovery notice issued-impugned-Petitioner claim subsidiary grant as per government scheme dated 21 July, 1986-merely because Petitioner had moved an application for grant of license within the period specified will not entitle him of the benefit when pre-requisites have not been fulfilled—license is granted merely to run the cinema hall-does not ipsofacto entitle to avail the scheme-instead conditions laid down have to be fulfilled.

W.P. dismissed. (E-9)

List of Cases cited:

1. Commissioner of Customs (Import), Mumbai Vs M/s Dilip Kumar & Com. & ors. (2018)9 SCC 1

2. Sun Export Corporation. Vs Collector of Customs (1997) 6 SCC 564

3. Kanai Lal Sur Vs Paramnidhi Sadhukhan, AIR 1957 SC 907

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

1. The present writ petition has been filed praying for quashing of an order dated July 13, 2021 passed by the Joint Secretary, State Tax Department, U.P., Annexure-1 to the writ petition, vide which the claim of the petitioner for providing subsidiary grant after he had set up a cinema hall in rural area was rejected. Further challenge has been made to recovery notice dated August 24, 2021 issued by Assistant Commissioner, Trade Tax, Chandauli, Anneuxre-27 to the writ petition. Further, a direction has been sought to respondent No.1 to provide subsidiary grant to the petitioner with reference to the period mentioned in the scheme dated July 21, 1986.

2. Mr. Shambhu Chopra, learned Senior Advocate appearing for the petitioner submitted that the Government had come out with a scheme dated July 21, 1986 (hereinafter referred to as the "Scheme") pertaining to setting up of new permanent cinema halls. Under the Scheme, such cinema halls, for first year, were to be paid subsidiary grant equal to 100% of the amount of entertainment tax payable with regard to the movie exhibited. Thereafter, for second and third year they were to be paid equal to 74% and 50% of the entertainment tax, respectively. The idea was to promote setting up of more means of entertainment in the rural areas, for which the Scheme was meant. One of the clause of the Scheme provided that benefit will be available to any entrepreneur, who applies for licence to run

a cinema hall between January 1, 1984 to March 31, 1990. In the case in hand, the petitioner had applied for licence on February 26, 1990. Mr. Chopra submitted that the case of the petitioner having been recommended by the different authorities keeping in view the fact that the Scheme was an exercise of the State for grant of certain benefits, liberal construction was required but still despite his repeated attempts the benefit was not granted to him. The petitioner had set up the cinema hall relying upon the Scheme.

3. Mr. Chopra, learned Senior Advocate further contended that licence was granted to the petitioner under the Uttar Pradesh Cinematograph Rules, 1951 (hereinafter referred to as the "Rules") for running the cinema hall from February 21, 1991 and any delay in the process was in the hands of the respondents, which was beyond the control of the petitioner. He further submitted that before passing the impugned order, no opportunity of hearing was afforded to the petitioner despite earlier order passed by this Court, as a result of which he was unable to present his case before the authority concerned for proper consideration.

4. The contention has also been raised that the Scheme does not provide anywhere that construction of the cinema hall has to be completed upto March 31, 1990, as it only provided filing of an application for grant of licence to run the cinema hall, which the petitioner had filed. The licence was granted to him on February 21, 1991, which clearly establishes that the petitioner had fulfilled all the conditions laid down for the purpose. The issue sought to be raised in the present petition is to the decision making process adopted by the State, which should have been fair. Any decision taken after following due process has to be examined thereafter on merit. He further referred to certain examples where, according to the petitioner, benefits of the Scheme have been granted to the entrepreneurs, who had set up the cinema hall in similar circumstances.

5. On the other hand, stand taken by the learned counsel for the respondents is that due opportunity was granted to the petitioner to respond to the notice issued. The reply filed by the petitioner was duly considered. The Scheme clearly provides that application for grant of licence should have been filed between January 1, 1984 to March 31, 1990. In terms of the provisions of the Rules, such an application can be filed only after fulfilment of certain conditions. In the case in hand, the building of cinema hall was still under construction when the petitioner applied for the licence, as evident from the facts mentioned in the impugned order. At the time of inspection, number of discrepancies were found and the certificates/documents required to be annexed by the petitioner with the application were lacking. Merely because the petitioner has been granted licence to run the cinema hall on February 21, 1991, will not mean that he would be entitled to get the benefits under the Scheme, as he does not fulfil the conditions laid down therein. Any such scheme has to be interpreted strictly. It is not a case where there was any delay on the part of the respondents, rather the petitioner just with a view to avail benefits under the Scheme, had filed application for grant of licence under the Rules to run the cinema hall even before construction thereof. It was so found in the inspection made by the respondents.

6. With reference to the argument regarding discriminatory treatment to the

petitioner, he submitted that the aforesaid argument is not available to the petitioner for the reason that he cannot raise a plea of negative discrimination in Court.

7. Heard learned counsel for the parties and perused the record.

8. The issue arises with reference to a communication of the Government dated July 21, 1986 referred to as the Scheme. It was circulated by the Government to encourage setting up of new permanent cinema halls in the rural areas, which has reference to an scheme earlier issued by the Government on September 17, 1983. As certain difficulties were noticed in implementation thereof, fresh Scheme was issued. It providied for subsidiary grant equal to 100% of the amount of entertainment tax payable with regard to the movie exhibited. Thereafter, for second and third year they were to be paid equal to 74% and 50% of the entertainment tax, respectively. The condition was also laid down that aforesaid grant shall be paid to new permanent cinema halls constructed under the Scheme. The Scheme also provided that application for grant of licence under the Rules to run the cinema hall has to be made between January 1, 1984 to March 31, 1990. Certain other conditions were also laid down in the Scheme, which are not required to be referred to in detail for the reason that legal issue required to be considered in the present petition does not hinge on that. It is not a case where there is any procedural error, rather it is a case where very eligibility of the petitioner to receive benefits under the Scheme is the core question.

9. As per Clause 4 of the Scheme to avail of the benefits therein, an application for grant of licence under the Rules has to be filed between January 1, 1984 to March 31, 1990. It is admitted case that such an application was filed on February 26, 1990. However, in terms of Rule 4 of the Rules, an application for grant of licence to run a cinema hall is required to be accompanied with certain documents, which are as follows:

"(a) The order or approval of plan under Rule 3(1);

(b) Plan of the building and premises containing the specification enumerated in sub-rule (2) of Rule 3;

(c) Plan of seating arrangements for each class, separately;

(d) Certificate from the Electrical Inspector to Government that the electrical installations conform to the required standards and the existing rules;

(e) Certificate from the Medical Officer of Health having jurisdiction that the arrangements for sanitation conform to the requirements of the existing rules; and

(f) Certificate from the Regional Fire Officer having jurisdiction that the arrangements for fire-fighting appliances provided and the precautions taken against fire conform to the requirements of the existing rules."

10. As the final cut off date in the Scheme for being eligible to avail of the benefits was March 31, 1990, as is evident from the impugned communication, an inspection was carried out by the Assistant Entertainment Commissioner, Varanasi on April 1, 1990 and following discrepancies were found:

"(i) The construction work of walls and rooms of the cinema building has been completed.

(ii) Inside the auditorium 3/4 part of work has been completed and the rest is in progress. 7 angles (dSapk) for roof have been installed and tin shades for 4 rows of roof have been installed and these are yet to be installed for the two.

(iii) The stage has been completed, but the screen has not been installed nor has the projector been installed in cabin nor has the work of foundation been found in progress. No seat has been laid in any room of balcony and ground floor in auditorium. Six doors have been installed but the flaps are to be fixed. The work of flooring of hall is in progress. The work of dumping soil in auditorium and veranda has been completed, plastering is to be done.

(iv) There is no electric fan and fire-fighting equipment in the auditorium, it was said to be kept in a room.

(v) Plastering work outside the hall is underway. Levelling work of outer open space remains incomplete. Boundary is not constructed."

11. In the inspection report, it has also been mentioned by the Inspecting Officer that at the time of the inspection, the film exhibition was not in a condition to be started. Thereafter on January 9, 1991, the spot inspection of the cinema hall was again conducted by the Assistant Entertainment Tax Commissioner wherein the following shortcomings/defects were found:

"a. The ventilation flow exhausters have not been installed to let out the smoke emitted from the machines in the projection room. The same be installed.

b. There is no door fixed in the female toilet and urinals built near the balcony. The same be fixed.

c. The way leading to the rewinding room passes through the projection room though as per rules, it should be out of the projection room."

12. The aforesaid reports of inspection clearly establish the fact that the date on which the petitioner filed the application for grant of licence or on the last date as provided under the Scheme, even the basic infrastructure was not complete and the petitioner did not have requisite permission on the basis of which licence to run cinema hall could be issued.

13. Merely because the petitioner had moved an application for grant of licence within the period specified under the Scheme will not entitle him to avail of the benefits under the Scheme when the pre-requisites for grant of licence have not been fulfilled.

14. The argument that grant of licence to the petitioner on February 21, 1991 under the Rules clearly establishes that the petitioner is entitled to the benefits under the Scheme is totally misconceived. Two issues are sought to be mixed up. Grant of licence is merely to run the cinema hall. It does not ipso facto entitle the petitioner to avail of benefits as are provided for under the Scheme, as for availing of the benefits under the Scheme, the conditions laid down therein are also to be fulfilled.

15. As far as the other argument of the learned counsel for the petitioner are concerned, they are also only to be noticed and rejected. All the issues sought to be raised by the petitioner even before this Court, have been duly dealt with in the impugned order. We have afforded opportunity of hearing to the petitioner to make out his case. We do not wish to

relegate the petitioner as earlier also he had filed a writ petition. Merely because his case was recommended on wrong presumption of various clauses in the Scheme, will not entitle the petitioner to claim benefits to which he is not entitled, as not fulfilling the conditions laid down therein.

16. As far as liberal construction of Scheme being beneficial is concerned, the argument deserves to be rejected, as all the conditions laid down in the Scheme have to be strictly fulfilled to avail of the benefits therein.

17. The question as to the interpretation tools to be applied while interpreting a tax exemption provision/notification, when there is an ambiguity as regards its applicability or entitlement of the assessee, was referred to be considered by a Constitution Bench of Hon'ble the Supreme Court in **Commissioner of Customs (Import), Mumbai v. M/s Dilip Kumar and Company and others (2018)9 SCC 1.** Paras 1 and 2 of the aforesaid judgment throw light on the issues examined by the Constitution Bench of Hon'ble the Supreme Court. These read as under:

"1. This Constitution Bench is set up to examine the correctness of the ratio in Sun Export Corporation. v. Collector of Customs (1997) 6 SCC 564 (hereinafter referred to as "Sun Export case', for brevity), namely, the question is -- What is the interpretative rule to be applied while interpreting a tax exemption provision/notification when there is an ambiguity as to its applicability with reference to the entitlement of the assessee or the rate of tax to be applied?

2. In Sun Export case (supra), a three-Judge Bench ruled that an ambiguity in a tax exemption provision or notification must be interpreted so as to favour the assessee claiming the benefit of such exemption. Such a rule was doubted when this appeal was placed before a Bench of two Judges. The matter then went before a three Judge Bench consisting one of us (Ranjan Gogoi, J.). The three-Judge Bench having noticed the unsatisfactory state of law as it stands today, opined that the dicta in Sun Export case (supra), requires reconsideration and that is how the matter has been placed before this Constitution Bench."

18. It was further observed in the aforesaid judgment that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of the consequences thereof. Paras 21, 22 and 23 thereof are extracted below:

"21. The well-settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the legislature.

22. In Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more

consistent with the alleged object and policy of the Act.

23. In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to the language employed by the legislation. This is especially so in fiscal statutes and penal statutes. Nevertheless, if the plain language results in absurdity, the court is entitled to determine the meaning of the word in the context in which it is used keeping in view the legislative purpose. Not only that, if the plain construction leads to anomaly and absurdity, the court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation. Having observed general principles applicable to statutory interpretation, it is now time to consider rules of interpretation with respect to taxation."

19. In para 29 of the aforesaid judgment it was opined that strict interpretation of a statute certainly involves literal or plain meaning test. The other tools of interpretation, namely contextual or purposive interpretation cannot be applied nor any resort is made to look to other supporting material, especially in taxation statutes. It is well-settled that in a taxation statute, there is no room for any intendment. Regard has to be given to the clear meaning of the words and the matter has to be governed wholly by the language used therein. Equity has no place. Para 29 thereof is extracted below:

"29. We are not suggesting that literal rule dehors the strict interpretation nor one should ignore to ascertain the interplay between "strict interpretation" and "literal interpretation". We may reiterate at the cost of repetition that strict interpretation of a statute certainly involves literal or plain meaning test. The other tools of interpretation, namely, contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes. Indeed, it is well settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute."

20. The discussion in Para 55 in the judgment regarding the stages at which rule of strict interpretation is to be applied and in case of ambiguity the beneficiary thereof, are quite relevant for consideration of the point in issue in the present writ petition. It was opined that at the stage of taxing a subject, in case of ambiguity the benefit goes to the subject whereas in case of ambiguity in exemption provision the benefit goes to the revenue. Para 55 is extracted below:

"55. There is abundant jurisprudential justification for this. In the governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the courts insist upon strict compliance before a State demands and extracts money from its citizens

towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualising different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the Revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the Revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view." (emphasis supplied)

21. After elaborate discussions on all the issues, the reference to the Constitution Bench was answering in the following terms:

"66. To sum up, we answer the reference holding as under:

66.1. Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

66.2. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.

66.3. The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands over-ruled."

22. It has been authoritatively held in the aforesaid judgment of Hon'ble the Supreme Court that exemption notifications are to be interpreted strictly and the burden to prove that an assessee falls within the four corners of exemption notification lies on him. If the facts of the case in hand are examined in that light, the petitioner has not been able to prove that he is eligible to avail the benefits as provided for under the Scheme, as he had not fulfilled the conditions laid down therein.

23. For the reasons mentioned above, we do not find any merit in the present writ petition. The same is, accordingly, dismissed.

(2023) 2 ILRA 1090
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.02.2023

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE ALOK MATHUR, J.

Writ Tax No. 208 of 2017

Principal Commissioner of Income Tax (Central) ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Mishra, Advocate

Counsel for the Respondents:
Sri D.D. Chopra and Sri S.B. Pandey Senior Advocates with Sri Shishir Chandra and Shailesh Verma, Advocates

Civil Law - Income Tax Act, 1961- Commission proceeded on application of the assesses- settled the matter rejecting the objections raised by the Income tax Department vide impugned order-Further the Settlement Commission proceeded at the behest of only two of the applicant to rectify the order u/s 245 D (6B) of the Income Tax Act, 1961-Manipulation by the respondents and the two assesses who were not before the Commission but were part of search seizure operation is evident-benefits –manner in which commission proceeded is questionable.

The Commission contrary to the settled legal position has illegally and arbitrarily reviewed its order-impugned order quashed.

W.P. allowed. (E-9)

List of Cases cited:

1. Commissioner of Income Tax Vs Anjum M. H. Ghaswala & ors., (2002) 1 SCC 633

2. Jyotendrasinhji Vs S.I. Tripathi & ors., 1993 Supp.(3) SCC 389 at page 399

3. Ajmera Housing Corporation & anr. Vs Commissioner of Income Tax (2010) 8 SCC 739

4. Anjum M.H. Ghaswala & ors.' case (supra) and the other

5. Brij Lal & ors. Vs Commissioner of Income Tax, Jalandhar, (2011) 1 SCC 1

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

1. The Principal Commissioner of Income Tax (Central), Lucknow has approached this Court by means of the present Writ Petition assailing the orders of the Income Tax Settlement Commission (hereinafter referred to as Commission) dated 19/22.08.2016 and 17.02.2017.

2. The brief facts of the case are that a search and seizure was conducted on 31.07.2013 on different premises of 5 persons, namely, (1) Dr A. K. Sachan, (2) Ms. Richa Mishra, (3) Shekhar Chief Justice's Court Serial No. 34 2 WRIT TAX No. 208 of 2017 Hospital (P) Ltd, (4) Shri Balaji Charitable Trust and (5) M/s Hind Charitable Trust. During the search cash of ₹1,76,94,500/- was seized1,76,94,500/- was seized from the residential premises and from the office rooms of the Dr A.K.Sachan and Ms Richa Mishra. At the time of the search one of the assessee Ms. Richa Mishra surrendered ₹1,76,94,500/- was seized 8.00 crores as undisclosed income as under: -

Table-

1.	Ms. Richa Mishra	5.00 crores
2.	Shri Balaji Charitable Trust	1.50 crores
3.	Shekhar Hospital (P) Ltd.	1.50 crores

3. Out of the 5 entities which were subject to search on 31/07/2013, three of them made separate applications on 27.02.2015 before the Settlement Commission under Section 245 of the Income Tax Act, disclosing their unaccounted income as under:-

Table- II

1.	Ms. Richa Mishra	1,93,16,254/-
2.	Shri Balaji Charitable Trust	1,69,04,560/-
3.	Shekhar Hospital (P) Ltd	4,84,46,020/-

4. The Settlement Commission on receipt of the application, decided to proceed further with the application, and sent a copy to the concerned Principal Commissioner of Income Tax seeking his response as per Rule 9 of the Income Tax Settlement (Procedure) Rules, 1997 and finally settled the matter rejecting the objections raised by Income Tax Department vide impugned order dated 19/22.8.2016.

5. Present Writ Petition was filed challenging the order of the Settlement Commission. During pendency of the present petition the Settlement Commission further proceeded at the behest of only two of the applicants to rectify the order in exercise of the powers under Section 3 WRIT TAX No. 208 of 2017 245D(6B) of the Income Tax Act, 1961(hereinafter referred to as "Act of 1961') and gave further benefit to the applicants by order dated 17.02.2017 which has also been assailed in the present petition, after amendment to the writ was carried out.

THE PARTIES BEFORE THE SETTLEMENT COMMISSION :

6. Applications before the Settlement Commission were filed by following entities/persons, the description of which are as follows:-

A:- **Ms. Richa Mishra:-** The applicant has described herself in the application as the Director controlling the administration of M/s Shekhar Hospital (Pvt. Ltd.) which is running a hospital and rendering nursing and health services. Further, she is also controlling and managing the affairs of M/s Shri Balaji Charitable Trust as a trustee, which is running a nursing college and rendering health services. She has further submitted that apart from managing these two institutions she is also running other institutions, wife of Dr. A.K. Sachan, who is working as regular employee and a Professor of Clinical Pharmacology in King George Medical University, Lucknow.

B:- **Shekhar Hospital (Pvt.) Ltd.:**- The applicant Shekhar Hospital (Pvt.) Ltd. was incorporated on 26.12.1995 and is engaged in running a hospital at Indira Nagar, Lucknow, Uttar Pradesh. The Directors of the hospital are: (I) Dr. Rich Mishra; (2) Mr. K.K. Sachan; (3) Dr. Harish Chandra and (4) Dr. A. K. Sachan.

C:- **M/s Balaji Charitable Trust** :- Ms. Richa Mishra is the managing trustee and Dr. A. K. Sachan is also a trustee of the said trust. The trust is running a nursing college and rendering health services. Dr A.K.Sachan is a regular4 WRIT TAX No. 208 of 2017 employee and a Professor of Clinical Pharmacology in King George Medical University, Lucknow.

7. In the application filed before the Settlement Commission on behalf of aforesaid three applicants, the amount of

disclosure was recomputed and re-distributed as stated in Table II.

ARGUMENTS

8. Sri Manish Mishra, learned counsel appearing for the petitioner has assailed the orders of Settlement Commission

A. Firstly on the ground that the disclosure made by the applicants in their applications for settlement was not a full and true disclosure of the unaccounted income as mandated by Section 245(C) of the Act of 1961. It was submitted that it is a precondition for making an application before the Settlement Commission that the declaration of unaccounted income should be full and true, hence on this ground alone the application should have been dismissed by the Settlement Commission.

B. The second ground urged by the Counsel for petitioner was that Dr A. K. Sachan was subjected to search operation and number of undisclosed bank accounts were discovered, but receipts in the said bank accounts were sought to be attributed as income of M/s Hind Charitable Trust. It wassubmitted that Dr A. K. Sachan was not a party before the Commission, nor did he appear before the Commission. He did not give any evidence, hence, the Commission could not have returned finding in this regard in favour of respondents.

C. It was further submitted that Dr A. K. Sachan was subjected to regular assessment, and the Income Tax department had assessed the receipts found in the 5 WRIT TAX No. 208 of 2017 undisclosed account as his income, which could not have been subject matter for Settlement before the Commission as it no longer remained "undisclosed income". Further it was never the stand of Dr. A. K. Sachan that the income belongs to someone else and not him. Therefore the impugned order is illegal and without jurisdiction.

D. The order of Commission dated 17.02.2017 has also been assailed on the ground that while allowing the rectification application the Commission has materially altered and reviewed its initial order dated 19/22.08.2016, on the basis of newly pleaded facts, which was without jurisdiction as the Commission does not have any power of review.

E. The Commission has waived off the interest in favour of the respondents, which according to the learned Counsel for the petitioner could not have been done in light of the judgment of the Supreme Court in the case of **Commissioner of Income Tax vs Anjum M. H. Ghaswala & others1.** He submitted that the Commission has not given any reasons or considered the guidelines of the Board.

F. Lastly it was contended that the manner in which the Commission has proceeded and settled the matter is on the face of it arbitrary in as much as the objections of the Income Tax department have not even been considered or dealt with, which shows that the impugned order is violative of principles of natural justice.

9. Sri D.D. Chopra, Senior Advocate appearing for the respondents supported the impugned order passed by the Settlement Commission. He submitted that during the search operations the details 1 (2002) 1 SCC 633 6 WRIT TAX No. 208 of 2017 of accounts were not available with the private respondents. Subsequently accounts were examined and looked into while filing application before the Commission. He further submitted that the jurisdiction of the Settlement Commission was confined only to settle a matter rather than to adjudicate on all the grounds raised by the department, hence, submitted that there was no

illegality in the order passed by the Commission.

DISCUSSIONS

10. To consider the questions raised in the present petition one has to have regard to the scheme of Chapter XIX-A of the Income Tax Act,1961. The Apex Court in the case of **Jyotendrasinhji v. S.I. Tripathi and others2**, has delineated the scope and jurisdiction of the Commission, which is as follows:

"15. The first question we have to answer is the scope of these appeals preferred under Article 136 of the Constitution against the orders of the Settlement Commission. The question is whether all the questions of fact and law as may have been decided by the Commission are open to review in this appeal. For answering this question one has to have regard to the scheme of Chapter XIX-A. The said chapter was inserted by the Taxation Laws (Amendment) Act, 1975 with effect from April 1, 1976. A somewhat similar provision was contained in sub-sections(1-A) to (1-D) of Section 34 of the Income Tax Act, 1922, introduced in the year 1954. The provisions of Chapter XIX-A are, however, qualitatively different and more elaborate than the said provisions in the 1922 Act. The proceedings under this chapter commence by an application made by the assessee as contemplated by Section 245-C. Section 245-D prescribes 2 1993 Supp.(3) SCC 389 at page 399 7 WRIT TAX No. 208 of 2017 the procedure to be followed by the Commission on receipt of an application under Section 245-C. Sub-section (4) says: "After examination of the records and the report of the Commissioner, received under sub-section(1), and the report, if any, of the Commissioner received under sub-section(3), and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner under sub-section (1) or sub-section

(3)."Section 245-E empowers the Commission to re-open the completed proceedings in appropriate cases, while Section 245-F confers all the powers of an Income Tax authority upon the Commission. Section 245-H empowers the Commission to grant immunity from penalty and prosecution, with or without conditions, in cases where it is satisfied that the assessee has made a full disclosure of his income and its sources. Under Section 245-HA, the Commission can send back the matter to the assessing officer, where it finds that the applicant is not cooperating with it. Section 245-I declares that every order of settlement passed under sub-section (4) of Section 245-D shall be conclusive as to the matters stated therein and no matter 8 WRIT TAX No. 208 of 2017 covered by such order shall, save as otherwise provided in Chapter XIX-A, be re-opened in any proceeding under the Act or under any other law for the time being in force. Section 245-L declares that any proceedings under Chapter XIX-A before the Settlement Commission shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purposes of Section 196 of the Penal Code, 1860.

16. It is true that the finality clause contained in Section 245-I does not and cannot bar the jurisdiction of the High Court under Article 226 or the jurisdiction of this Court under Article 32 or under Article 136, as the case may be. But that does not mean that the jurisdiction of this Court in the appeal preferred directly in this Court is any different than what it would be if the assessee had first approached the High Court under Article 226 and then come up in appeal to this Court under Article 136. A party does not and cannot gain any advantage by approaching this Court directly under Article 136, instead of approaching the High Court under Article 226. This is not a limitation inherent in Article 136; it is a limitation which this Court imposes on itself having regard to the nature of the function performed by the Commission and keeping in view the principles of judicial review. Maybe, there is also some force in what Dr Gauri Shankar says viz., that the order of the Commission is in the nature of a package deal and that it may not be possible, ordinarily speaking, to dissect its order and that the assessee should not be permitted to accept what is favourable to him and reject what is not. According to learned counsel, the Commission is not even required or obligated to pass a reasoned order. Be that as it may, the fact remains that it is 9 WRIT TAX No. 208 of 2017 open to the Commission to accept an amount of tax by way of settlement and to prescribe the manner in which the said amount shall be paid. It may condone the defaults and lapses on the part of the assessee and may waive interest, penalties or prosecution, where it thinks appropriate. Indeed, it would be difficult to predicate the reasons and considerations which induce the Commission to make a particular order, unless of course the Commission itself chooses to give reasons for its order. Even if it gives reasons in a given case, the scope of enquiry in the appeal remains the same as indicated above viz., whether it is contrary to any of the provisions of the Act. In this context, it is relevant to note that the principle of natural justice (*audi alteram partem*) has been incorporated in Section 245-D itself. The sole overall limitation upon the Commission thus appears to be that it should act in accordance with the provisions of the Act. The scope of enquiry, whether by High Court under Article 226 or by this Court under Article 136 is also the same--whether the order of the Commission is contrary to any of the provisions of the Act and if so, has it prejudiced the petitioner/appellant apart from ground of bias, fraud and malice which, of course, constitute a separate and independent category. Reference in this behalf may be had to the decision of this Court in R.B. Shreeram Durga Prasad and Fatechand Nursing Das v. Settlement Commission (IT and WT) [(1989) 1 SCC 628 : 1989 SCC (Tax) 124 : (1989) 176 ITR 169] which too was an appeal against the orders of the Settlement Commission. Sabyasachi Mukharji, J., speaking for the Bench comprising himself and S.R. Pandian, J. observed that in such a case this Court is "concerned with the legality of procedure followed and not 10 WRIT TAX No. 208 of 2017 with the validity of the order". The learned Judge added "judicial review is concerned not with the decision but with the decision-making process". Reliance was placed upon the decision of the House of Lords in Chief Constable of the N.W. Police v. Evans [(1982) 1 WLR 1155 : (1982) 3 All ER 141]. Thus, the appellate power under Article 136 was equated to power of judicial review, where the appeal is directed against the orders of the Settlement Commission. For all the

above reasons, we are of the opinion that the only ground upon which this Court can interfere in these appeals is that the order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant. The main controversy in these appeals relates to the interpretation of the settlement deeds -- though it is true, some contentions of law are also raised. The Commission has interpreted the trust deeds in a particular manner. Even if the interpretation placed by the Commission on the said deeds is not correct, it would not be a ground for interference in these appeals, since a wrong interpretation of a deed of trust cannot be a violation of the provisions of the Income Tax Act. It is equally clear that the interpretation placed upon the said deeds by the Commission does not bind the authorities under the Act in proceedings relating to other assessment years."

TRUE AND FULL DISCLOSURE OF INCOME :

11. The first contentions raised by learned counsel for the petitioner was that the respondents had not made full and true disclosure of income while making application under Section 245(C) of the Act of 1961 and consequently the Commission on noticing the facts should have dismissed the application. In support of his argument, it was submitted 11 WRIT TAX No. 208 of 2017 that during search proceedings the assessee had voluntarily surrendered 8.00 crores as undisclosed income in the ₹1,76,94,500/- was seized following manner. ₹1,76,94,500/- was seized5.00 crore was said to be undisclosed income by Ms. Richa Mishra, ₹1,76,94,500/- was seized1.50 crores by Sri Balaji Charitable Trust and ₹1,76,94,500/- was seized1.50 crores by Shekhar Hospitals Private Limited but in the applications made before the Commission the said figures were changed. The income and disclosure was made of ₹1,76,94,500/- was seized1,93,16,254/- by Dr. Richa Mishra, ₹1,76,94,500/- was seized1,69,04,560/- and ₹1,76,94,500/- was seized4,84,46,020/- by M/s Balaji Charitable Trust and Shekhar Hospital, respectively. It was further stated that the applications were filed by the department on 7.7.2015 to conduct further inquiries but no orders were passed by the Commission. Finally, it was also argued that a sum of ₹1,76,94,500/- was seized1.20 crores the alleged receipts from Sri B. D. Agarwal with Allahabad Bank, was for the first time disclosed and considered in rectification application. This was sufficient to place the matter beyond any doubt that the respondents had not made true and full disclosures of the income and, hence, blatantly violated the statutory requirement of Section 245(C) of the Act. The receipt of ₹1,76,94,500/- was seized1.20 crores was deliberately and willfully not disclosed when the application of Statement of Facts (S.O.F.) was filed before the Settlement Commission. Rather it was an explanation given introducing new facts in the rectification application. The Settlement Commission ought to have rejected the application for settlement as invalid for not truly and fully disclosing the undisclosed income.

12. During search, ₹1,76,94,500/- was seized8.00 crores were declared by Ms. Richa Mishra as undisclosed income pertaining to the three entities as mentioned in Table I. The application was filed before Settlement Commission with substantial variation, adjusting the income between the 3 entities who were applicants before the Settlement Commission in such a manner

so as to not depict the true and full disclosure of their income. After passing of the final order by the Settlement Commission on 27.2.2015, an application for rectification was moved thereby disclosing a further undisclosed amount of ₹1,76,94,500/- was seized1.20 crores which has been accepted 12 WRIT TAX No. 208 of 2017 and adjusted by the Settlement Commission in its order dated 17.02.2017. The aforesaid facts clearly indicate that the respondents did not truly and fully disclose their undisclosed income.

13. All these facts were brought to the knowledge of the Settlement Commission at the time when the petitioners had filed their objections to the settlement application which are as follows:

OBJECTION OF THE INCOME TAX DEPARTMENT TO THE APPLICATION FOR SETTLEMENT :

14. The Principal Commissioner of Income Tax submitted his report under Rule 9 of the Rules of 1997 to the application of Sri Balaji Charitable Trust stating that the additional income disclosed by the applicant was inadequate considering the material seized during the search proceedings. It was further placed on record that considering the fact that during the course of the search Dr. Richa Mishra had admitted cash deposits of 1.50 crores in the Axis Bank ₹1,76,94,500/- was seized account of the trust in the financial year 2009-10, while only an amount of ₹1,76,94,500/- was seized25,40,030/- has been disclosed for the financial year 2009-10 and no evidence has been submitted in support of the disclosed income. It was also submitted that the account maintained with the Axis Bank in the name of Shekhar School of Nursing which is run under the management of M/s Balaji Charitable Trust, unaccounted cash and non-cash deposit were found in various accounts. On the basis of the material collected by the department it was of the considered view that M/s Balaji Charitable trust was not entitled for any deduction under section 10 (23-C) of the Act of 1961 as it does not fulfill the twin conditions prescribed for the application for eligibility for deduction under the said provision, in as much as, the educational institution does not exist solely for the purposes of education but for profit considering the huge amount of cash deposits received by it, and also that it's aggregate annual receipt exceeded the limit prescribed as per Rule 2 (B-C) of the Income Tax Rules. According to the records it 13 WRIT TAX No. 208 of 2017was stated that the group is being managed and controlled by Ms. Richa Mishra and Dr A.K Sachan.

15. After examining the accounts of the M/s Balaji Charitable Trust, it was further submitted that the trust is not only engaged in profitable activities but had also diverted the funds for personal benefits of the trustees, as per the statement made by the trustee herself during the proceedings under section 132(4) of the Income Tax Act. It was urged that the entire deposits in the account should be treated as the income of the assessee and should not be limited to 15% of the receipts since no document or evidence was submitted for allowing the expenses to the tune of 85%. During the search, evidence was also found that ₹1,76,94,500/- was seized65,000/- was received from a particular student towards building fund, and therefore it was assumed that similar amounts in cash were received from all the other students. On the basis of material discovered during the search operation, it was submitted that the

undisclosed income of the M/s Balaji Charitable Trust for assessment years 2007-08 to 2014-15 would be ₹1,76,94,500/- was seized 16,05,97,986/-. In light of the aforesaid calculations and findings it was stated that a true and full disclosure had not been made of all its income by the trust.

16. With regard to the application submitted by Ms. Richa Mishra, the report under Rule 9 of the Procedure Rules 1997 mentioned that the applicant had surrendered only ₹1,76,94,500/- was seized1,93,16,254/-. The applicant is the director and controls M/s Shekhar Hospital (P) Ltd which is running a hospital and rendering nursing and health services and is also controlling and managing the affairs of M/s Balaji charitable trust as a trustee which is also running nursing college and rendering health services. Various bank accounts were used to service the receipt and expenses, most of which were in the name of Dr A. K. Sachan. The disclosure made before the Settlement Commission amounting to ₹1,76,94,500/- was seized 255.30 lakhs was inadequate considering the documents seized and the statements made during the 14 WRIT TAX No. 208 of 2017 search proceedings.

17. During the search Ms. Richa Mishra had given a statement on oath under section 132(4) of the Act of 1961 and had surrendered 5.00 crores for the financial year ₹1,76,94,500/- was seized 2009-10 to 2010-11. Before the Commission, an amount of only ₹1,76,94,500/- was seized1,30,40,256/- was disclosed as additional and total income for assessment year 2010-11 and 2011-12. During and post search operations, the applicant stated that she had surrendered ₹1,76,94,500/- was seized5.00 crores out of which she had given ₹1,76,94,500/- was seized4.00 crores to Dr A.K. Sachan. No satisfactory explanation was given by the applicant forthe receipts and on the other hand, different versions were given by her, and no details were provided to department. Before the Commission she further set up a case that the money found in the undisclosed accounts of Dr A. K. Sachan was in fact given by her. She surrendered the deposits in the account of Axis Bank, Indira Nagar in the name of Dr A. K. Sachan amounting to ₹1,76,94,500/- was seized3,57,92,000/- but has gone back on her version offered only ₹1,76,94,500/- was seized 1,30,40,256/- as additional and total income for the assessment years 2010-11 & 2011-12.

18. During the search proceedings ₹1,76,94,500/- was seized 79.00 lakhs in cash was found at the residence of Ms Richa Mishra and Dr A. K. Sachan and according to the statement made during search it was informed that the said amount was received as admission fee from the guardian of the students, but before the Settlement Commission it was stated that the said amount belongs to Hind charitable trust and the same is as per their books of accounts. It was the stand of the department that the books were prepared post the search and no evidence could be produced in support of this said cash found at the residence.

19. In the report the department had proposed income of Dr Richa Mishra to be ₹1,76,94,500/- was seized13,87,96,615/- while she had offered only ₹1,76,94,500/- was seized1,93,16,254/- and on this basis it was stated that the applicant has not made a full and true disclosure of the income for all the years, hence, the 15 WRIT TAX No. 208 of 2017 application was liable to be rejected.

20. Another application which was considered by the Settlement Commission was preferred by M/s Shekhar Hospital (P) Ltd. In the application for settlement M/s Shekhar Hospital Pvt. Ltd. had offered 4,84,46,020/- as additional income. The ₹1,76,94,500/- was seized Income Tax Department while responding to the notice of the Commission had submitted that the tax was paid only on ₹1,76,94,500/- was seized3,85,80,097/- and not on the whole income which was declared as additional income. It was further stated that the disclosure made by the applicant was inadequate considering the recovery made during search. The applicant had surrendered only ₹1,76,94,500/- was seized 91,33,857/- for assessment year 2013-14 while it should have been ₹1,76,94,500/- was seized 1,63,12,242/- and therefore, submitted that there was no true disclosure of income. Similarly, for the assessment year 2014-15 the applicant surrendered ₹1,76,94,500/- was seized 2,38,14,005/- while it's additional income should have been ₹1,76,94,500/- was seized 2,65,01,543/- and there was a difference in the surrender of ₹1,76,94,500/- was seized 26,87,538/- for the assessment year 2014-15. It was submitted that over and above the amount surrendered before the settlement Commission, the application should have surrendered an amount of ₹1,76,94,500/- was seized 1,26,60,923/- and it demonstrated before the Commission that there was no true and actual disclosure of unaccounted/additional income by the applicant.

21. With regard to the first ground raised by the learned Counsel for the petitioner that the respondents who were the applicants before the Commission were dutybound to make a full and true disclosure of the undisclosed assets before the Commission. The law in this regard, has been settled by the judgment of Supreme Court in the case of **Ajmera Housing Corporation and another Vs. Commissioner of Income Tax3**. The relevant paragraphs 26 and 28 read as under :

"26. The procedure laid down in Section 245D of the Act, contemplates that on receipt of the application under Section 245C(1) of the Act, the Settlement Commission is 3 (2010) 8 SCC 739 16 WRIT TAX No. 208 of 2017 required to forward a copy of the application filed in the prescribed form (No. 34B), containing full details of issues for which application for settlement is made, the nature and circumstances of the case and complexities of the annexures, referred to in item No. 11 of the form and to call for report from the Commissioner. The Commissioner is obliged to furnish such report within a period of 45 days from the date of communication by the Settlement Commission. Thereafter, the Settlement Commission, on the basis of the material contained in the said report and having regard to the facts and circumstances of the case and/or complexity of the investigation involved therein may by an order, allow the application to be proceeded with or reject the application. After an order under Section 245D(1) is made, by the Settlement Commission, Rule 8 of the 1987 Rules mandates that a copy of the annexure to the application, together with a copy of each of the statements and other documents accompanying such annexure shall be forwarded to the Commissioner and further report shall be called from the Commissioner. The Settlement Commission can also direct the Commissioner to make further enquiry and investigations in the matter and furnish his

report. Thereafter, after examining the record, Commissioner's report and such further evidence that may be laid before it or obtained by it, the Settlement Commission is required to pass an order as it thinks fit on the matter covered by the application and in every matter relating to the case not covered by the application and referred to in the report of the Commissioner under sub-section (1) or sub-section (3) of the said Section. It bears repetition that as per the scheme of the 17 WRIT TAX No. 208 of 2017 Chapter, in the first instance, the report of the Commissioner is based on the bare information furnished by the assessee against item No. 10 of the prescribed form, and the material gathered by the revenue by way of its own investigation. It is evident from the language of Section 245C(1) of the Act that the report of the Commissioner is primarily on the nature of the case and the complexities of the investigation, as the annexure filed in support of the disclosure of undisclosed income against item No. 11 of the form and the manner in which such income had been derived are treated as confidential and are not supplied to the Commissioner. It is only after the Settlement Commission has decided to proceed with the application that a copy of the annexure to the said application and other statements and documents accompanying such annexure, containing the aforesaid information are required to be furnished to the Commissioner. In our opinion even when the Settlement Commission decides to proceed with the application, it will not be denuded of its power to examine as to whether in his application under Section 245C(1) of the Act, the assessee has made a full and true disclosure of his undisclosed income. We feel that the report(s) of the Commissioner and other documents coming on record at different stages of the consideration of the case, before or after the Settlement Commission has decided to proceed with the application would be most germane to determination of the said question. It is plain from the language of sub-section (4) of Section 245D of the Act that the jurisdiction of the Settlement Commission to pass such orders as it may think fit is confined to the matters covered by the application and it can extend only to such matters which are referred to in 18 WRIT TAX No. 208 of 2017 the report of the Commissioner under sub-section (1) or subsection (3) of the said Section. A "full and true" disclosure of income, which had not been previously disclosed by the assessee, being a pre-condition for a valid application under Section 245C(1) of the Act, the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application against item No. 11 of the form. Moreover, if an assessee is permitted to revise his disclosure, in essence, he would be making a fresh application in relation to the same case by withdrawing the earlier application. In this regard, Section 245C(3) of the Act which prohibits the withdrawal of an application once made under sub-section (1) of the said Section is instructive in as much as it manifests that an assessee cannot be permitted to resile from his stand at any stage during the proceedings. Therefore, by revising the application, the applicant would be achieving something indirectly what he cannot otherwise achieve directly and, in the process, rendering the provision of subsection (3) of Section 245C of the Act otiose and meaningless. In our opinion, the scheme of said Chapter is clear and admits no ambiguity.

x x x x

28. As afore-stated, in the scheme of Chapter XIXA, there is no stipulation for

revision of an application filed under Section 245C(1) of the Act and thus the natural corollary is that determination of (1921) 1 KB 64 (2000) 6 SCC 550 1961 (2) SCR 189 income by the Settlement Commission has necessarily to be with reference to the income disclosed in the application filed under the said Section in the prescribed form."

22. Applying the principles enunciated by the Supreme Court in the aforementioned case to the facts of the present case, it is noticed that the applicant had substantially deviated in disclosure of the income from the affidavit submitted under Section 132(4) of the Act of 1961 before the Settlement Commission. During search Richa Mishra had surrendered 8.00 crores which included her receipts ₹1,76,94,500/- was seized to the tune of ₹1,76,94,500/- was seized5.00 crores. Before the Commission she has disclosed an amount of ₹1,76,94,500/- was seized 1,93,16,254/-, which is substantially less than the disclosure made during the search. The impugned order reveals that the objection of the petitioner/department have merely been mentioned as a passing reference. They have neither been considered and summarily rejected.

23. Apart from the above, at the stage of filing the rectification application the respondents further revealed undisclosed receipts amounting to ₹1,76,94,500/- was seized1.20 crores for the first time. In the rectification application, the undisclosed income was sought to be re-computed and even the receipt of ₹1,76,94,500/- was seized1.20 crores which was never disclosed in the application (SOF) before the Settlement Commission and disclosed at such a belated stage after passing of the final order by the Commission. The department had estimated the income of M/s Balaji Charitable Trust to be ₹1,76,94,500/- was seized16.05 crores for the assessment years 2007-08 to 2014-15, while that of Ms. Richa Mishra to be ₹1,76,94,500/- was seized13.87 crores, but only ₹1,76,94,500/- was seized1.69 crores was surrendered by M/s Balaji Charitable Trust and ₹1,76,94,500/- was seized1.93 crores by Ms. Richa Mishra which was substantially less. Faced with the said facts, it was incumbent upon the Commission to at least looked into the submissions of the department before proceeding with the matter. Without delving into the issue, the Commission accepted the undisclosed income surrendered by the applicants.

24. At this stage, we may hasten to add that it has to be kept in mind that the applicant before the Commission is an entity which has not disclosed its total income before the income tax authorities and on 20 WRIT TAX No. 208 of 2017 adoption of coercive methods under Section 132 of the Income Tax Act or otherwise has declared the same before the Settlement Commission. In any view of the matter, such entity cannot be granted undue benefit in contrast to an honest taxpayer, who has voluntarily disclosed all his income and assets. In the present case, it is evident that the applicant has made certain disclosures before the income tax authorities during the search operations and has also submitted an affidavit to this effect. The income tax authorities in their report before the Commission have duly informed the Commission that the assets and receipts of the applicant are much more than what has been disclosed before the Settlement Commission. There is a huge variation in the amounts disclosed by the applicant Ms. Richa Mishra while filling the application before the Settlement

Commission and all these facts were duly bought to the knowledge of the Commission. The Settlement Commission was bound to consider the material recovered during search and placed before the Commission in the reply filed by the department, and could have rejected the stand of the department, but not taking cognizance of the reply of the department and not dealing with the issue the Commission has acted arbitrarily.

25. It is further seen from the language of sub-section (4) of Section 245D of the Act that the jurisdiction of the Settlement Commission to pass such orders as it may think fit is confined to the matters covered by the application and it can extend only to such matters which are referred to in the report of the Commissioner under sub-section (1) or sub-section (3) of the said Section. A "full and true" disclosure of income, which had not been previously disclosed by the assessee, being a precondition for a valid application under Section 245(C-1) of the Act, the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application against item No. 11 of the form. Moreover, if an assessee is permitted to revise his disclosure, in essence, he would be making a fresh application in relation to the same case by 21 WRIT TAX No. 208 of 2017 withdrawing the earlier application. In this regard, Section 245(C-3) of the Act which prohibits the withdrawal of an application once made under sub-section (1) of the said Section is instructive in as much as it manifests that an assessee cannot be permitted to resile from his stand at any stage during the proceedings. Therefore, by revising the application, the applicant would be achieving something indirectly what he cannot otherwise achieve directly and, in the process, rendering the provision of sub-section (3) of Section 245C of the Act otiose and meaningless. Apart from inadequate disclosure made in the application (SOF), in our opinion, the mere fact that the applicant had sought to revise his income by means of rectification application is demonstrative of the fact that he had not made a full and true disclosure of income, hence the application was bound to be rejected on this ground alone.

26. The above facts clearly demonstrate that the respondents had not made a full and true disclosure before the Settlement Commission. The Settlement Commission should have noticed and examined the fact itself, as it is a pre-condition for an application under section 245C of the Act of 1961 that the applicant makes a "true and full disclosure" of their income which has not previously been disclosed, or at subsequent stage when further disclosure was brought to their notice at the time of filing of the application for rectification. Accordingly, we are of considered view that the application before the Commission deserved to be rejected as the respondents had not made true and full disclosure of their undisclosed income. This issue is decided in favour of the petitioner.

VALIDITY OF THE ORDER OF THE SETTLEMENT COMMISSION ADJUSTING THE RECEIPTS IN THE ACCOUNT OF DR. A. K. SACHAN TOWARD THE INCOME OF THE APPLICANTS:

27. The argument of the petitioner was that the jurisdiction of the Settlement Commission limits only to passing the orders with regard to "undisclosed income" of the applicants. Number of undisclosed

22 WRIT TAX No. 208 of 2017 income of Dr. A. K. Sachan was duly taken into consideration by the Assessing Officer in his assessment for the assessment year 2012-13. Once the receipts in the said accounts had been assessed as income of Dr. A. K. Sachan during regular assessment proceedings then the same could not have been considered by the Settlement Commission as undisclosed income of the respondents and such an issue could not have been considered by the Commission. There was no material before the commission for holding that the receipts in the said bank accounts held by Dr A. K. Sachan were income of M/s Shekhar Hospital (Pvt.) Ltd.

28. Submission of Sri D.D. Chopra, Senior Advocate, learned counsel for the respondents is that the Commission was within its competence to return a finding with regard to the receipts in the account of Dr. A.K. Sachan. His argument was that the said income was being claimed by the applicant to be his income, hence the said issue could have been duly considered and decided by the Commission. He had not disputed the fact that Dr. A.K. Sachan was not a party to the proceedings before the Commission and also that he did not participate in the same.

29. Considering the rival contentions it is clear that Dr. A. K. Sachan, who is the account holder of several accounts in Axis Bank, Indiranagar, Lucknow never approached the Commission either by filing an application for settlement, or as a witness before the Commission in the proceedings initiated by the respondents. It was never his stand before the Assessing Officer that the receipts in his bank account are in fact income of M/s Shekhar Hospital(Pvt.) Ltd.

30. It has come on record that M/s Balaji Charitable Trust under the control of Ms. Richa Mishra was using 11 undisclosed bank accounts with the Axis Bank, Indira Nagar Lucknow which were in the name of Dr. Richa Mishra and Dr. A.K. Sachan. In the said bank accounts the receipt from activity were deposited and expenditure was made after making withdrawals from these accounts from time to time. The Income 23 WRIT TAX No. 208 of 2017 Tax Department having objected to the claims made by the applicant stating that the income disclosed in the bank accounts in the name of Dr. A.K Sachan was added to his income in the regular assessment, and he never took the stand that the income pertains to M/s. Balaji Charitable Trust and also that he was not an applicant before the Settlement Commission, still the Settlement Commission proceeded to decide the issue in favour of the respondents which clearly establishes that it had exceeded their jurisdiction.

31. The Income Tax Department had duly intimated to the Settlement Commission in its report submitted on 17.5.2016 the fact that "Assessing Officer" has also reported in this connection that unexplained deposits found in six bank accounts belonging to Dr. A. K. Sachan have been added in the hands of Dr. A. K. Sachan while completing his assessment under Section 153A and 143(3) of the Act of 1961 for the relevant assessment year in March, 2016, still the Commission proceeded to decide this issue in favour of the respondents and did not give any reason nor did it even consider the objections raised by the petitioner, which on the face of it is an arbitrary exercise of power. The Commission is under a duty to at least consider the objection raised by the

department. But by not taking into consideration such objections, the Commission has acted arbitrarily and against the statutory provisions which mandate the Commission to adhere to the principles of natural justice while exercising its jurisdiction. Once the income has already been assessed at the hands of Dr. A.K. Sachan it no longer remained undisclosed income and in that regard to such an issue the Settlement Commission could not have passed any order as it was beyond its jurisdiction as per clear provisions of Section 245 of the Income Tax Act. Deciding the said issue merely at the behest and assertion of the respondents by the Commission and holding that the receipts in his bank account was income of M/s Shekhar Hospital Pvt. Ltd. is arbitrary and abuse of power vested in it. Such a procedure, and findings are clearly perverse and contrary to the settled judicial 24 WRIT TAX No. 208 of 2017 norms and beyond jurisdiction of the Commission. The impugned order is liable to the set aside on this ground alone.

32. When the matter has been duly contested by the department and material was adduced, it was incumbent upon the Commission to have examined the objections raised by the department and return a specific finding either accepting or rejecting their objections but not considering the objections amounts to non application of mind which clearly points towards the arbitrary manner in which the Settlement Commission has proceeded to settle the matter in favour of the applicant. The Settlement Commission being a judicial body, having powers to determine the issues raised before it, it has to discharge its obligation and decided the issues in accordance with law and also to give reasons for the same.

33. Manipulation by the respondents and the two assessees who were not before the Commission but were part of search seizure operation is evident from the fact that appeal was filed by Dr A. K. Sachan before the Commissioner (Appeal) against the assessment order. The Commissioner (Appeals) set aside the assessment order relying on the impugned order passed by the Settlement Commission. This clearly demonstrates that benefit was granted to entities from the impugned order who were not even before the Commission. Further the order passed by the Commission was still under challenge before this Court. Therefore the manner in which the Commission has proceeded is questionable and is accordingly the impugned order is liable to be set aside.

34. Transparency, fairness, giving reasonable opportunity and adherence to the prescribed procedure are some of the hallmarks of a judicial determination. Absence of any one of them will render an order nullity and invite interference of the High Court exercising its jurisdiction under Article 226 of the Constitution of India. The Commission by not considering the reply of the petitioner/department, by considering and 25 WRIT TAX No. 208 of 2017 dealing with regards to income of an individual who is not before it and redistributing the same, not considering the objection of the department that the said income has already been assessed during regular proceedings, has clearly proceeded in violation of statutory provisions and has misdirected itself and we have no hesitation is holding the impugned orders to be illegal and arbitrary.

REGARDING RECTIFICATION ORDER

35. The next ground raised by the petitioners is with regard to the power of the Commission to rectify its orders as per section 245D(6B) of the Act of 1961. After passing of the impugned 19/22.08.2016 order an application for rectification under Section 245(6B) of the Act was preferred by the applicants on the ground that for the assessment year 2012-13 there was deposit of ₹1,76,94,500/- was seized1.20 crores which was received bank accounts of M/s B. D. Agarwal. As discussed, earlier A "full and true" disclosure of income, which had not been previously disclosed by the assessee, being a precondition for a valid application under Section 245(C-1) of the Act, the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application against item No. 11 of the form. Moreover, if an assessee is permitted to revise his disclosure, in essence, he would be making a fresh application in relation to the same case by withdrawing the earlier application. In this regard, Section 245(C-3) of the Act which prohibits the withdrawal of an application once made under sub-section (1) of the said Section is instructive in as much as it manifests that an assessee cannot be permitted to resile from his stand at any stage during the proceedings. Hence, the revision of income sought to be made in the application for rectification was not permissible, and the Commission has exceeded its jurisdiction by entertaining such an application and allowing the same.

36. A perusal of the order dated 17.02.2017 allowing the rectification application would clearly indicate that the Commission has 26 WRIT TAX No. 208 of 2017 revisited, reviewed, and materially altered all the aspects decided by it. In the garb of a rectification application, entire liabilities of the applicants were redetermined by the Commission. The income which was not disclosed in the statement of facts (S.O.F.) was sought to be explained and admitted to the benefits of the same. The liability of Ms. Richa Mishra was reduced from ₹1,76,94,500/- was seized4,43,56,930/- to ₹1,76,94,500/- was seized2,81,26,297/-. The Commission, contrary to the settled legal position has illegally and arbitrarily reviewed its earlier order. It was further submitted that a perusal of the rectification application would clearly demonstrate that there was no full and true disclosure of income receipts of the applicants.

37. Having noticed the manner in which the Commission has proceeded in the present case without following the basic principles of judicial determination like affording proper opportunity of hearing, duly considering the submissions of parties, we deem it proper to observe that the Settlement Commission in exercise of its powers to settle a matter brought before it is endowed with the jurisdiction of the authority under the Income Tax Act. The purpose of conferment of these powers is to settle the matters concerning undisclosed income expeditiously and finally. Such an application should truthfully and fully disclose the undisclosed income. In such a situation where the applicant is granted exemption on account of the business expenses or takes benefit of any provisions of the Income Tax Act to compute total income then the Settlement Commission would be exercising the powers of the assessing authority and is duty bound to examine the claim of the applicant on the basis of evidence and material before it. The Commission while exercising power of the assessing officer will have to make necessary inquiry or it can also direct the Commissioner of Income Tax to make

necessary inquiry and inform the Commission of the outcome of such inquiry. Therefore, it is abundantly clear that the Commission while settling any matter has to do the same in accordance with the provisions of the Act and where required will have to pass necessary orders giving 27 WRIT TAX No. 208 of 2017 reasons for allowing any release or exemption in favour of the applicants.

W A IVE R OF I N TE R EST

38. The Commission has waived off interest in favour of the respondents. This issue has been settled by the Hon'ble Supreme Court in **Anjum M.H. Ghaswala and others' case (supra)** and the other High Court in **Brij Lal and others vs. Commissioner of Income Tax, Jalandhar4**. In **Anjum M.H. Ghaswala and others' case (supra)** it was held : "35. For the reasons stated above, we hold that the Commission in exercise of its power under Sections 245D(4) and (6) does not have the power to reduce or waive interest statutorily payable under Sections 234A, 234B and 234C except to the extent of granting relief under the circulars issued by the Board under Section 119 of the Act."

39. The Settlement Commission, in a mechanical manner, waived off the interest without considering whether the matter of the respondents was covered by the circulars of the Board, and waiving off the interest in such a manner, which may indicate that statutory interest payable under sections 234A, 234B and 234C has also been waived which is clearly beyond the competence and jurisdiction of the Commission. Accordingly, this issue is decided in favour of the petitioner.

40. The judicial review of the orders of the Settlement Commission by the High Court in exercise of its power under Article 226 of the Constitution of India is limited to examine whether proper procedure and the prescription laid down in the statutory provisions has been followed. It is in the limited sphere that we have examined the order of the Settlement Commission and found that they have not 4 (2011) 1 SCC 1 28 WRIT TAX No. 208 of 2017 considered the inputs/objections submitted by the department in their reply to the Commission. By not taking into account or dealing with the reply of the department there is a manifest error in the decisionmaking process by the S ettlement Commission and hence such an order suffers from the vice of arbitrariness and is accordingly liable to be set aside. The golden rules of *audi alteram partem* inheres the principles that a person cannot be condemned unheard. Any judicial or quasi-judicial authority is bound to hear the party before it, the plea raised by the parties are to be duly considered otherwise the "right of hearing" will become meaningless and an empty formality. The Income Tax department submitted various details of assets recovered during the search, including the receipts in undisclosed bank accounts and documents, but the same does not find mention in the order passed by the Commission. Such non consideration by the Commission of the submission of the department is arbitrary and is in violation of principles of natural justice vitiating the impugned order and hence we have no hesitation in setting aside the impugned orders dated 19/22.08.2016 and 17.02.2017 as being violative of Article 14 of the Constitution of India. The writ petition is allowed. The impugned orders dated 19/22.08.2016 and 17.02.2017 are set aside. Dr. A.K. Sachan had got the benefit of orders passed by the Settlement Commission, which have been set aside by this Court, by filing appeal against the

assessment orders passed against him. What transpired at the time of hearing was that at that stage, the department did not prefer any appeal against the order passed by the Commissioner of Income Tax (Appeals) as the tax effect, after giving benefit of the orders passed by the Settlement Commission, was less than the limit prescribed for filing and pursuing the appeals before the Tribunal. As the orders passed by the Settlement Commission have been set aside, to do complete justice, we grant liberty to the department to avail of appropriate remedy against the order passed by the Commissioner of Income Tax (Appeals) dated January 17, 2019 in the 29 WRIT TAX No. 208 of 2017 appeal filed by Dr. A.K. Sachan. If any such remedy is availed of within a period of one month from the date of receipt of copy of the order, the same shall not be rejected only on account of delay and shall be considered on merits.

41. We also feel to observe that the conditions as contained in the circular issued by Central Board of Direct Taxes regarding filing or pursing the appeals at different levels may have to be revisited and certain exceptions may have to be carved out to take care of cases like the one in hand.

42. It has also been brought on record that Dr. A. K. Sachan is a Doctor working as Professor in King Georges Medical University, Lucknow. This fact has come on record as well as in the report submitted by the Commissioner of Income Tax. It is surprising that a person working in a State University is a Director of a private entity and despite huge amounts of money have been found in his personal account including cash during search operations, no action has been taken by his employer which is a State entity. The conduct rules pertaining to government servant and even those employed in public corporation/ utilities are not permitted to indulge in private practice unless there is specific rule or provisions in this regard. This Court has been informed that the Doctors of King Georges Medical University are entitled to non-practicing allowance and further that there is bar from private practice which clearly indicates that they cannot work anywhere except for the University where they are appointed.

43. This Court takes a very serious view of the facts placed before it and it is expected that the university concerned and the State Government shall make due inquiries and proceed appropriately against such individuals who are found indulged in blatant private practice and making profits in private companies and also being on their Boards as Directors. Let a copy of this 30 WRIT TAX No. 208 of 2017 judgment be forwarded to the Principal Secretary, Medical Education, Government of U.P and the Vice Chancellor of King George Medical University, Lucknow by the Senior Registrar of this Court for compliance.

(2023) 2 ILRA 1106
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2023

BEFORE

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

Writ Tax No. 1290 of 2022

Sri Subodh Agarwal ...Petitioner
Versus
Principal Chief Commissioner of Income Tax, Kanpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dhruva Agrawal (Sr. Advocate), Sri Shubham Agrawal, Sanyukta Singh

Counsel for the Respondents:
C.S.C., Sri Gaurav Mahajan (Senior Standing Counsel)

Civil Law - Income Tax Act, 1961-Section 148 A (b)-notice u/s 148 and order rejecting the objection raised against the notice is impugned-prima facie availability of material is sufficient for reopening of the re-assesment proceedings and sufficiency and correctness of the material is not to be considered at that stage.

W.P. dismissed. (E-9)

List of Cases cited:

1. Ram Ballabh Gupta Vs Assistant Commissioner of Income Tax & ors., (2005) 199 CTR

2. Cargo Clearing Agency Vs Joint Commissioner of Income Tax, (2008) 218 CTR

3. Commissioner of Income Tax Vs Kelvinator of India Ltd, (2010) 228 CTR (SC) 488

4. Commissioner of Income Tax Vs Kelvinator of India Ltd, (2017) 392 ITR 336

5. Principal Commissioner of Income Tax Vs Meenakshi Overseas Pvt. Ltd, (2017) 395 ITR 677

6. CWP No. 10219 of 2022- Anshul Jain Vs Principal Commissioner of Income Tax & anr.

7. GKN Driveshafts (India) Ltd. Vs Income Tax Officer, 259 ITR 19 (SC)

8. Krishna Developers & Co. Vs Deputy Commissioner of Income-tax, (2017) 94 Taxmann.com 166 (Guj.)

9. CIT Vs Vishal Gupta, (2012) 22 tax mann.com 82/210 Taxman 65 (Mag) (Delhi)

10. Raymond Woollen Mills Ltd. Vs ITO & ors., (1999) 236 ITR 34 (SC)

11. Assistant Commissioner of Income Tax Vs Rajesh Jhaveri Stock Brokers P. Ltd, (2007) 291 ITR 500 (SC)

12. TO Vs Selected Dalurband Coal Co. Pvt. Ltd. (1996) 217 ITR 597 (SC)

13. Raymond Woollen Mills Ltd. Vs ITO (1999) (236) ITR 34 (SC)

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

1. The petitioner has approached this Court praying for quashing of notice dated March 28, 2022 (Annexure-13) issued under Section 148A(b) of the Income Tax Act, 1961 (for short "the Act'), notice dated April 24, 2022 (Annexure-15) issued under Section 148 of the Act and order dated April 24, 2022 passed by respondent no. 2 rejecting the objections raised by the petitioner against issuance of notice under Section 148A(b) of the Act. Further prayer has been made for dropping the re-assessment proceedings initiated in pursuance of notice under Section 148(1) of the Act.

2. Mr. Dhruva Agrawal, learned Senior Counsel appearing for the petitioner submitted that search was carried out at the premises of the petitioner on August 31, 2015. A show cause notice was issued on June 1, 2016 under Section 153A of the Act for block assessment. The order of assessment was passed on December 31, 2017, which was challenged by the petitioner as well as the Department before the Income Tax Tribunal. The appeal filed by the petitioner was accepted whereas the one filed by the Department was dismissed. The order was further challenged by the Department by filing an appeal before this

Court, which was dismissed vide order dated December 12, 2022.

3. After passing of the order under Section 153A of the Act, during pendency of the appeal against the aforesaid order, a show cause notice was issued to the petitioner on March 28, 2022 under Section 148A(b) of the Act, which was duly replied to by the petitioner. Rejecting the objection raised by the petitioner, order was passed on April 24, 2022 granting sanction for initiation of proceedings against the petitioner under Section 148A(d) of the Act and consequently, a notice was also issued on April 24, 2022. Initiation of proceedings under Section 148 of the Act is subject matter of challenge in the present writ petition.

4. Referring to scheme of the Act, Mr. Agrawal, learned Senior Counsel pointed out that special procedure has been prescribed in the Act for framing of assessment/re-assessment in cases of search and seizure. Chapter XIV-B was added. Subsequently, Section 153A was added with effect from June 1, 2003. Second proviso to Section 153A provides that any proceeding pending for assessment/re-assessment for the relevant period on the date of initiation of the search under Section 132 or requisition under Section 132A shall abate. In the case in hand also, after the assessment was framed under Section 153A, as a consequence of search, all pending proceedings abated. Section 149 of the Act was referred to, which provides for limitation for issuance of notice under Section 148 of the Act. As assessment of the petitioner had already been framed under Section 153A of the Act, which is comprehensive and framed, after taking approval from the higher authorities, the assessment for the same year cannot be reopened by issuing notice under Section 148 of the Act. In support of the arguments, reliance was placed upon judgments of Madhya Pradesh High Court in **Ram Ballabh Gupta Vs. Assistant Commissioner of Income Tax and others1** and Gujarat High Court in **Cargo Clearing Agency vs. Joint Commissioner of Income Tax2.**

5. As far as merits of the controversy and challenge to the order granting permission for issuance of notice under Section 148 of the Act are concerned, it was submitted that the grounds mentioned in the order granting approval for the show cause notice is nothing else but change of opinion. In support of the argument, reliance was placed upon judgment of Hon'ble the Supreme Court in **Commissioner of Income Tax vs. Kelvinator of India Ltd3.** At the time of block assessment after search was carried out all the issues and the material available, were considered. In fact, the entire process started after an audit objection, to which reply was given by the assessee explaining the reasons as to why the objection raised by the audit was not tenable. There was no fresh material available. Initiation of proceedings under Section 148 of the Act are bad on the ground of audit objection only. In support of the arguments, reliance was placed on judgments of Gujarat High Court in **Reckit Benckiser Healthcare India Pvt. Ltd. vs. Deputy Commissioner of Income Tax4** and Delhi High Court in **Principal Commissioner of Income Tax vs. Meenakshi Overseas Pvt. Ltd.5**

6. In response, learned counsel for the Revenue submitted that in terms of the amended provisions of Clause(ii) to second proviso of Explanation 1 of Section 148 of the Act specific mention has been made as

to what shall form information with the Assessing Officer, which would suggest that "income chargeable to tax has escaped assessment'. Audit objection has been mentioned as one of them. The aforesaid amendment was introduced with effect from April 1, 2022. Prior to that, the aforesaid proviso provided for objection raised by the Comptroller and Auditor General of India (hereinafter referred to as "CAG'). In the case in hand as well, there was an objection raised by the Audit specifying that huge income had escaped assessment as the text messages exchanged by the petitioner with various parties have not at all been considered while framing the assessment. This has caused huge loss to the revenue as the income chargeable to the tax had escaped assessment.

7. The objection raised by the Auditor was not treated as information prior to the amendment of Section 148 with effect from April 1, 2022.

8. It is merely a show cause notice to the petitioner at this stage. His preliminary objection against the same has already been considered and rejected. During course of assessment proceeding, the petitioner will have fair opportunity to raise all objections, in the proceedings initiated against him, who has been able to defraud the revenue to the tune of crores of rupees. These proceedings should not be scuttled at the very threshold. In terms of the second proviso to Section 153A of the Act, only pending proceeding abates. The section does not talk about proceedings to be initiated later on. The present case was not a case of re-assessment under Section 153A of the Act; rather it was assessment framed. He further referred to judgment of Punjab and Haryana High Court in **CWP No. 10219 of 2022** titled as **Anshul Jain Vs. Principal Commissioner of Income Tax and another** decided on June 2, 2022, to submit that merits of the controversy cannot be gone into at this stage. Once the competent authority had applied its mind while granting approval for reopening of the assessment, the merits of the controversy cannot be gone into. Special Leave Petition filed against the aforesaid order before Hon'ble the Supreme Court also stands dismissed vide order dated September 2, 2022.

9. Heard learned counsel for the parties and perused the paper book.

SCHEME OF INCOME TAX ACT FOR REASSESSMENT

10. Before we proceed to consider the arguments raised by the parties, we deem it appropriate to examine the scheme of the Act for reassessment as the same has undergone a change with effect from April 1, 2021.

Position prior to April 1, 2021

11. In terms of Section 147 of the Act, existing prior to its amendment with effect from April 1, 2021, an Assessing Officer could initiate proceedings for reassessment for reasons to believe that any income chargeable to tax has escaped assessment. Explanation 2 of Section 147 provides certain instances which for the purpose of section were admitted to be a case where income chargeable to tax has escaped assessment.

12. Section 148 of the Act as existing upto that date required that before making assessment, reassessment or recomputation under Section 147, the Assessing Officer

shall serve on the assessee a notice requiring him to furnish his return. Section 148(2) provides that the Assessing Officer, before issuing any notice under the section, record his reasons for doing so.

13. As the law as stood at that time, upon filing the return the assessee could seek reasons for issuing such notice. After receipt of reasons, the assessee was entitled to question the initiation of reassessment proceedings by filing objections before the Assessing Officer. Before proceeding further, the Assessing Officer was required to dispose of the objections raised by the assessee, challenging his jurisdiction to initiate reassessment proceeding. Any such order passed could be challenged by invoking writ jurisdiction of the Court. Reference can be made to a judgment of Hon'ble the Supreme Court in **GKN Driveshafts (India) Ltd. Vs. Income Tax Officer6**

14. The law interpreting the aforesaid provision as existing at that time also provided that the belief has to be that of a prudent person having connection with the material. Fishing and roving enquiry was not possible nor a change of opinion. Sufficiency of reasons could not be a ground to challenge initiation of reassessment proceedings.

15. Section 151 of the Act provides for prior approval of the competent authority before issuance of notice under Section 148 of the Act.

Position after April 1, 2021

16. Substantial changes have been made in the provisions providing for reassessment with effect from April 1, 2021.

17. Section 147 of the Act, which initially provided for reopening of assessment "for reasons to believe' was amended. It now provides that if any income chargeable to tax has escaped assessment, the Assessing Officer may assess or reassess such income or recompute the loss. The exercise of power is subject to Sections 148 to 153 of the Act.

18. Before passing an order under Section 147 of the Act, the Assessing Officer is required to serve the assessee a notice along with copy of the order passed under clause (d) of Section 148A of the Act, requiring him to file the return. First proviso of Section 148 provides that no notice under this Section shall be issued unless there is information with the Assessing Officer which suggests that income chargeable to tax has escaped assessment. The prerequisite is only availability of information, suggesting that income has escaped assessment. Such an exercise of power has to be with prior approval of the specified authority.

19. In Explanation 1 to the aforesaid Section, meaning of words "information with the Assessing Officer which suggests that income chargeable to tax has escaped assessment', has been defined. It includes objection raised by the CAG to the effect that assessment for the relevant assessment year has not been made in accordance with the provisions of the Act.

20. The aforesaid provision has undergone a change vide Finance Act, 2022 with effect from April 1, 2022. Clause (ii) of Explanation 1, now contain words "any audit objection' instead of the words "any final objection raised by the CAG'. The condition is information in the form of audit objection to the effect that assessment

has not been framed in accordance with the provisions of the Act. The relevant clauses are reproduced hereunder :

"**Explanation 1**-For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,-

(i) any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;

(ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or

(iii) any information received under an agreement referred to in Section 90 or Section 90A of the Act; or

(iv) any information made available to the Assessing Officer under the scheme notified under Section 135A; or

(v) any information which requires action in consequence of the order of a Tribunal or a Court."

(emphasis supplied)

21. Newly added Section 148A of the Act provides that the Assessing Officer before issuing notice under Section 148 of the Act shall conduct enquiry, if required, with prior approval of the specified authority with respect to the information which suggests that income chargeable to tax has escaped assessment. Clause (b) thereof provides that an opportunity of hearing is to be afforded to the assessee to show cause as to why notice under Section 148 of the Act be not issued on the basis of information which suggests that income chargeable to tax has escaped assessment. Reply of the assessee, if any, is to be considered and an order is required to be passed in terms of Section 148(d) of the Act. Second proviso to the aforesaid Section provides eventualities in which the scheme will not apply.

22. Newly added Section 148B of the Act which was added with effect from April 1, 2021 by Finance Act, 2021 provides that no order of assessment or reassessment or recomputation shall be passed by an Officer below the rank of Joint Commissioner, to which Clauses (i) to (iv) of Explanation 2 to Section 148 apply except with prior approval of Additional Commissioner or Additional Director or Joint Commissioner or Joint Director.

DISCUSSIONS

23. In the case in hand, notices under Section 148 of the Act has been issued on the basis of an audit objection to the effect that assessment has not been made in accordance with the provisions of the Act. This constitutes information which is sufficient to initiate proceedings under Sections 147 and 148 of the Act. After the substantial amendments carried out in the Act, it now provides that the proceedings can be initiated in case where income chargeable to tax has escaped assessment. Proviso to Section 148 of the Act provides that before issuing such notice, the Assessing Officer should have information which suggests that the income chargeable to tax has escaped assessment. In terms of Clause (ii) of Explanation 1, meaning has been assigned to the term information suggesting that income chargeable to tax has escaped assessment to include even an audit objection. In the case in hand as well, notice under Section 148 of the Act has been issued on the basis of an audit objection giving complete details as to how the income chargeable to tax has escaped

assessment. Merely because in some of the show cause notices issued to the petitioner during the course of assessment proceedings after search, a brief reference was made to some information, which was not finally dealt with, will not absolve or will not come to the rescue of the assessee to claim that the issue has already been considered. It is for this reason that the audit objection was raised.

24. For the sake of convenience, Sections 147, 148 and 148A of the Act are reproduced below :

"147. If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year, the Assessing Officer may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year).

Explanation -For the purposes of assessment or reassessment or recomputation under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, irrespective of the fact that the provisions of section 148A have not been complied with."

X X X X

"148. Before making the assessment, reassessment or recomputation under section 147, and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of section 148A, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:

Provided that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice:

Provided further that no such approval shall be required where the Assessing Officer, with the prior approval of the specified authority, has passed an order under clause(d) of section 148A to the effect that it is a fit case to issue a notice under this section.

Explanation 1-For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,-

(i) any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;

(ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or

(iii) any information received under an agreement referred to in Section 90 or Section 90A of the Act; or

(iv) any information made available to the Assessing Officer under the scheme notified under Section 135A; or

(v) any information which requires action in consequence of the order of a Tribunal or a Court.

Explanation 2.-For the purposes of this section, where,-

(i) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A, on or after the 1st day of April, 2021, in the case of the assessee; or

(ii) a survey is conducted under section 133A, other than under sub-section(2A) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or

(iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee,

the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee where the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.

Explanation 3.-For the purposes of this section, specified authority means the specified authority referred to in section 151."

X X X X

"148A. The Assessing Officer shall, before issuing any notice under section 148,-

(a) conduct any enquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;

(b) provide an opportunity of being heard to the assessee by serving upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (a);

(c) consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);

(d) decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148, by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (c) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (b) expires:

Provided that the provisions of this section shall not apply in a case where,-

(a) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021; or

(b) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under section 132 or requisitioned under section 132A, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee.

(d) the Assessing Officer has received any information under the scheme notified under section 135A pertaining to income chargeable to tax escaping assessment for any assessment year in the case of the assessee.

Explanation.- For the purposes of this section, specified authority means the specified authority referred to in section 151."

(emphasis supplied)

25. In the present case, a perusal of the notice shows that it was issued on the basis of an audit objection. There were cash transactions to the tune of ₹156,45,19,154/-. During course of assessment, the source and genuineness of the transaction was not asked for. These, having remained unexplained, were required to be treated as income of assessee under Section 68 of the Act. It may have tax effect to the tune of ₹64,34,53,872/-. Details of the cash transactions were also annexed with the reasons. It was on the basis of various messages recovered from the mobile phone of the petitioner, which was seized during raid. In terms of aforesaid text messages, the amount was to be delivered to different persons on being identified by showing currency notes bearing particular numbers. The illegal activities of the petitioner were found to be in the nature of providing accommodation entries through stage managed sham sale and purchase of penny stocks.

26. Aforesaid notice was replied to by the petitioner vide his letter dated April 15, 2022 after seeking adjournments. The plea raised was that all the texts and the information which was available with the Department was examined in detail at the time of framing assessment under Section 153A of the Act, hence, there was no scope for issuing any notice under Section 148 of the Act. There was no fresh material available. Aforesaid reply was supplemented by another reply vide letter dated April 19, 2022. It was stated that after the search the phone of the petitioner was also seized and the messages were extracted therefrom. The chats and messages were thoroughly examined and on the basis of same, additions were made in the case of M/s Kanpur Organics Pvt. Ltd., wherein a sum of ₹1,51,00,000/- was surrendered. Also on the basis of the said material, the assessments of other group assessees were framed. The contents of the information as such was not disputed by the petitioner.

27. The details of the persons to whom the cash has been delivered as per the information extracted from the text messages in the mobile of the petitioner, which forms part of the notice are extracted below:

Date	Message from whom received	Consent Pally/specifying message	Transaction	Amount
23.05.2014	Sonu Kanpur		23 Aaye hai a/c mein	2300000
10.01.2015	Arvind Mittal	UBI RKD Chq. No.033805		250000
12.01.2015	-do-	Kamleshji	10mt (Rs.Ten Crores using Ten Rs.note No.63m356014 for hawala transfer)	100000000
12.01.2015	-do-	PK Singh	5mt (Rs.5 crore Ten Rs, note used for transfer of cash 52L995010)	50000000
14.01.2015	-do-	Kapoorji	90 ka RTGS	9000000
16.01.2015	-do-	Manish	45kg (Rs.45 lacs Delhi Note of Rs. 10 used no.09310088014	4500000
22.01.2015	-do-	Sunil K. Goel	(Scrip code:538921 Scrip Id L RAFL)	1286000
07.02.2015	-do-	Vasundhara Capital & Securities Ltd.		130000
14.02.2015	-do-		Rs.l note no. 41L679749 used for 75 KG (Rs. 75 lacs	7500000
04.03.2015	Sanjay	HDFCR52015030403430793	**(Tatwesh Se Na Kahna**	865128

			ham ne diya hai. That is saying by Sanjay a person of Subodh Agarwa l, Tatwes h is brother of Sri Sahswat Agarwa l director of Rich Capital/ NikkiGl oba1 being largest entry provide r)	
19.0 8.20 15	De epa k Bh arti ya		Directin g to Rajkum arji arrangin g for a note no. for hawala transfer of 10 kg say for Rs.10 lacs	100 000 0
16.0	-		Pl. give	500

6.20 15	do-		note for 5kgs i.e. transfer of hawala for Rs.5 lacs	000
10.0 8.20 15	- do-		Pl. give note for 15 kgs i.e transfer of hawala for Rs. 15 lacs	150 000 0
13.0 8.20 15	- do-		Pl. give note for 10 kg i.e transfer of hawala for Rs. 10 lacs	100 000 0
28 08.2 015	Ar vin d Mi ttal	Arun Kumar		130 000 0
	- do-	Vandana Saini		500 000
	- do-	Arun Kumar		500 000
	- do-	Arun Kumar		130 000 0
	- do-	Vandana Saini		500 000
03.0	-		27 kg	2.70

7.2015	do-		i.e. Rs.2700000 Rs.10 note no.29B 524554	0000
30.6.2015	-do-	Sneha Kurele		145000
28.06.2015	-do-		Jeetu Bhai Ko 25 Subhasji ke a/cmaybol do	2500000
19.06.2015	-do-		10 Rs. Note45T i.e. Rs. 45 crore	450000000
20.05.2015	-do-	Kolkata Rajkumarji	Rs.2 note no.04D 609437 for 40 kg i.e. transfer of hawala fund of Rs. 40 lacs	4000000
20.05.2015	-do-	Prasanta Mondal, Kolkata	Rs. 10 note no.77m 690699 for 40 kg i.e. transfer of hawala	4000000
			fund of Rs. 40 lacs	
25.05.2015	-do-	Yogesh Delhi, Noida	10 Ni Note no.24n032491 for 75 Kg i.e. hawala money involved Rs. 75 lacs	7500000
	-do-	JK Delhi, Noida	Rs.2 note no.62h817157 for 120kg i.e. hawala money Rs.l cr. 20 lacs.	12000000
01.06.2015	-do-	Premier Alloys Ltd.	30Dec. 2014 Rs.17 lacs 2Jan.2015 Rs.10 lacs 7Jan.2015 Rs.15 lacs	4200000
11.05.2015	-do-	Kanhaiya Lal Agarwal		5500000
	-do-	Sapna Kapoor		4000000

	-do-	Sumit Kapoor		5000000
07.05.2015	-do-	Neil refers to Neil Industries owned by Arvind Mittal who corresponds the messages to Sri Subodh Agarwal	Neil Se Abhishek ko 80 Ka Payment diya hai.	8000000
07.05.2015	-do-		Cash	190247
23.04.2015	-do-	Neil i.e. Neil Industries owned by Arvind Mittal	5000 Coding stand to Rs. 50 Crores	500000000
16.04.2015	-do-	Sunita Maheshwari & Anand Maheshwari	Total fund involved	27931994
	-do-	Kundan Dealer Pvt. Ltd,		2500000
	-do-		Prakash Ko Kanpur me 200 dena hai i.e. decoded Rupees	20000000
	-do-		Lala se Delhi Ka 150 Ka number le lena i.e. some note no. to be used for hawala fund	15000000
	-do-		'Give the token for Rs.250 200 OK in Lucknow 250 Paid' total involvement Rs. 2.50 crore	25000000
31.03.2015	-do-		Using of Rs.10 note no.31c584165	
04.04.2015	-do-		Qnt. Of Dev Shankar Pandey Sulabh Shares: 37500 Shares @91	

27.03.2015	-do-		Send 10500 from Abhishek Agarwal	
25.03.2015	-do-	Brahmavarta Infraheights Pvt Ltd.	Transfer hawala fund 45 KG i.e. Rs.45 lacs	4500000
25.03.2015		Brahmavarta Infraheights Pvt Ltd. RTGS for 20 KG i.e. Rs.20 Lacs	Transfer Hawala fund of Rs.20 lacs	2000000
26.03.2015	-do-	Gyandeep Khemka & Co. (Vikash Agarwal, Vikash Agarwal, HUF & Renuka Agarwal)		4793250
27.03.2015	-do-	Abhishek Agarwal	Send 10500 i.e. Rs.10,50,000/- Decoding	1050000
28.03.2015	-do-	Hariom HDFCR52015032861 3((4330 FOR	4330 STAND DECO DED AS	4330000
		2294784.84)	43.30 LACS	
26.03.2015	-do-	Gyandeep Khemka & Co, A/c No.00540340004413		4793250
25.03.2015	-do-	RTGS managed Brahmavarta Infraheights P Ltd. A/c No.32886535860	45 Kg. i.e Hawala Money involved Rs.45 lacs	4500000
	-do-	RTGS managed Brahmavarta Infraheights P Ltd. A/c No.33739193894	45 Kg, i.e Hawala Money involved Rs.45 lacs	4500000
	-do-	RTGS managed Brahmavarta Infraheights P Ltd. Aic No.33739193894	20 Kg. i.e Hawala Money involved Rs.20 lacs	2000000
21/03/2015	-do-	RTGS managed for 55Lacs and 4468702.22		55000004468702
	-do-	Prashant Mondal	Rs. 1 Note no.24E866968 Kg.25 i.e.	2500000

			Hawala Money Rs.25Lacs	
22/03/2015	-do.	Suraj	2 Rs. Note no.67A 333658 for 50K. i.e. Rs. 50Lacs	5000000
21/03/2015	-do-	Escort Wincom Pvt. Ltd.	45Kg. i.e. 45Lacs	4500000
20/03/2015	-do-	Sunil Kapoor	45Kg. from salvation to Sunil Kapoor	4500000
19/03/2015	-do-		200 Lala and 100 Five Roses	
19/03/2015	-do-	Prashant Mondal	Rs.2 note no.63S060829 for 50	5000000
18/03/2015	-do-	Prashant Mondal	'300000' Share Modi ka Alok de raha hai RTGS managed for 50 in Amar Jyoti by Prashant Mondal	5000000
20/03/2015	-do-	Gagandeep Construction Co. Pvt. Ltd.	Rs.155 i.e. 1550000	1550000
18/03/2015	-do-	Suraj	Rs.10 note no.18S066136for 50Kg. i.e. Rs. 50 Lacs	5000000
	-do-	Suraj	Rss 10 note no.53p974097 for 50Kg. i.e. Rs. 50Lacs	5000000
17/03/2015	-do-	Prashant Mondal	Rs.50 note no.8AH 386946 for 50kg. i.e. 50 Lacs	5000000
12/03/2015	-do-	Jai Sharma	RTGs managed 40 ka	4000000
	-do-	Kothari	50000 share ka matter	
	-do-	Gabajee	For 10 kg note of Rs.10 no.	6000000

			60k487337	
11/03/2015	-do-	Deoraji	For 15 Note of Rs.10 no.23a137127	1500000
03/03/2015	-do-	Deendayalji	Rs.15 Note of Rs.5 no. 40c799140	1500000
24/02/2015	-do-	Ocean Advisory P Ltd.	By Pawan Kumar Kurele	1600000
	-do-	Prasanta Mondal	Rs.l note no.78r493629 for 25 kg	2500000
	-do-	Prasanta Mondal	Rs.50 ka note no.5d1556919 for 25 kg	2500000
14/02/2015	-do-	Escort vincom P Ltd, to shubhang export	75 kg(1 Lac mein final kiya i.e. his commission) Note of Rs.l used no.41L679749	7500000
			for this 75 kg to Prasanta mondal	
07/02/2015	-do-	Escort vincom P. Ltd. To Brahmavarta Infraheights	25kg	2500000

Extracts/analysis of messages derived from Mobile I phone of Subodh Agarwal documentised as Document-2

Date	Message from whom received	Consent Party/specifying message	Transaction	Amount
21/07/2015	Rajiv Agnihotri	Rs.5 Note no. 18K941426 For Pintu 5.50+91, and Rs.5 note no.82D363143 Chintu for 7	13.41 Lacs	1341000
23/07/2015	Babua K K	60 O.K.	60 Lacs	6000000
24/07/2015	Niel Industries	RTGS made Rs.	10 Las	1000000

		10Lacs from Sunil K Gupta		
23/07/2015	Intuition Infranstructure p. Ltd.	Rss 5Lacs debited	5Lacs	500000
20/7/2015	N. Kurele 9999@Yahoo.com	7.75+1.25=9 O.K. hogaya 1 Balance	10 Lacs	1000000
11/08/2015	9199561111 11	60 Lacs withdrawn for Niel Ind.	60 Lacs	6000000
12/08/2015	9435029042	Rambabu	3 Lacs	300000
13/08/2015	Kaka 1	3 Lacs cash	3 Lacs	300000
24/08/2015	Sanjay ji Hyd	For 7 Box	7 Lacs	700000
25/08/2015	Lala	Recd. 350Cheq & Old account Che 91.3	4 Cr 41 Lacs 30Th	44130000
24/07/2015	Subhash Ghosh	A/c no.37641089 Credited Rs. 40 Lacs through RTGS	60 Lacs	6000000
		Rodic; and this a/c debited bv 60 Lacs 30/07/2015 to Sanjeevani Fer.		
08/08/2015	VM FROM SC	A/c no.623xxxx8673 credited Rs. 50 Lacs on 20/08/2015 and debited Rs. 20 Lacs on 26/08/2015 and Rs. 10 Lacs debited on 28/08/2015	50 Lacs	5000000
26/08/2015	S Baj	Suresh Kumar Rs. 102240 Manish Goel HUF 110160 Anuj K Singh 195300 Richa Singh 195600	603300	603300
20/08/20	Arvind	Rs 5 Note no,	5 Lacs	500000

15		J5B779015		
28/0/2015	-do-	Arun Kumar, New Delhi Vandana Saini Arun Kumar HUF Sanjay Kumar (Account managed no, 91301005320345 8 Axis Bank, Delhi)	80 Lacs 30 Laos 30 Lacs 25 Lacs	16500000
20/07/2015	R.K. (Raj Kumar Ji)	Chintu Ji Rs. 6Lacs Rs.5 Note no.82D363143	6Lacs	600000
21/07/2015	R. K. (Raj Kumar Ji)	5.5 Lacs Rs. 5 Note no. 18K941426	5.5 Lacs	550000
27/07/2015	-do-	Deepankar Maurya deposit of Rs. 25000 in A/c no. SBI 3297013	25K	25000
		8120		
28/08/2015	-do-	Deposit of rs.10000 in SBI a/c no. 11288630578	10K	10000

Extracts/analysis of messages derived from Mobile I phone of Subodh Agarwal documentised as Document-2:

Date	Message from whom received	Consent Party/specifying message	Transaction	Amount
25/05/2015	N Kurele	Rs.10 Ni note 24N032491 Ph.no. 01123992886 Yogesh for 75 Kg. Delhi Noida	Hawala Money 75 Lacs	7500000/-
07/04/2015	9335126620	Raksha Garg Purchase JP 40000 @86.50 amount 3460000	34Lacs 60Thousand	3460000/-
25/08/2015	Rodic Coffee Pvt.Ltd.	10109.00Kg.@ 202.30 Kg=2045050	20Lacs 45thousand &	2045050/-

		(Arbica Parchment)	fifty	
10/02/2015	AN	Trading of Shares Sneha Kurele 20000, Preity Kurele 20000, Mitee Saigal 10000	-	-
02/03/2015	Mns	Payment made to Ramada Jamshedpur Cash 50Lacs RTGS 2463880 Cash 45353	75.09 Lacs	7509233/-
12/06/2015	Mns	Premier Alloys 42 Kg.(on 30/12/14 Rs.17Lacs, 02/01/2015 Rs. 10Lacs, 07/01/2015 Rs. 15Lacs)	42Lacs	4200000/-
16/06/2015	Mns	Success Vyapar Ltd. 98	1Cr. 19Lacs	11994000/-
		Lacs, Niel Ind. 21.94 Lacs	94Thousand	
19/03/2015	Sanjiv Srivastava	No of share to purchase will be decided by so that the profit on sale next year will be as below: Profit to be allocated @ 9.00 to twelve persons of Surendra Gupta and others 108 Lacs	1Cr. 8 Lacs	10800000/-
22/06/2015	A Kurele	Physical Shares of 320000 of Modi Udyog Ltd. account used Ocian Adviser	-	-

		y Pvt. Ltd. a/c 600350 116274 HDFC Bank and New Wave Commo Deal Pvt Ltd. 600350 116508		
08/04/ 2015	R Kant	Rs. 10 ka Note no. 87A075 453 for 2.5 Peti	2.5L acs	250 000/ -
28/07/ 2015	Karva Vivek	10 for 10 days and 168000	11 Lacs 68Th ousa nd	116 800 0
23/03/ 2015	Harish Gupta, Orai	Usha Devi 3 Lacs, Ram Asrey Gupta 3 Lacs, Rajendr a Kumar Gupta 1.5 Lacs	7Lac s 50T Hous ond	750 000
26&2 7/05/2 015	-do-	Arrange ment for transfer of Rs. 50Lacs	50La cs	500 000 0
12/06/ 2015	-do-	Manjeet Singh Rs.42La cs for Success Vyapar Ltd.	42La cs	420 000 0
8/06/2 015	-do-	Kal 5.00 kaRTG S Success me kar diya gaya tha, kya cash aaj mil sakta hai(Ha 2 baje tak)(RT GS made from Ashish Agarwa l SBI,Ora i Cheq. no.2118 36)	5Lac s	500 000
23/06/ 2015	-do-	Kal 25 entry honi hai;5 Lacs reverse entry	25La cs	250 000 0
08/04/ 2015	Mob.9 621325 335	Flat no.505 Anand Luxmi Apptt.	8Lac s	800 000

		Chain factory Shastri Ngr., Kanpur; 8Kg		
12/05/2015	Mob, 7379312345	RTGS for 40	40Lacs	400000
24/05/2015	-do-	RTGS Req. 85Lacs (send 50 in evening Shri Hanuman Infra Promoters Pvt. Ltd.	85Lacs	8500000
23/04/2015	Mob.9839133556	8+9+5=22 sent from Aruna Nemani	22Lacs	2200000
18/02/2015	Mob,9198932222	Rs.l note no.78R493629 for 25 Kg. Prashant Mondal and Rs.50note no. 5DL556919 for 25Kg	50Lacs	5000000

28. After considering the objections filed by the petitioner in terms of Section 148A(c) of the Act, order was passed under Section 148A(d) and a notice under Section 148 of the Act was issued calling upon the petitioner to file his return on the prescribed form for the assessment year 2015-16. It is the aforesaid show cause notice which is under challenge in the present petition. The order under Section 148(d) of the Act as annexed with the aforesaid notice specifically refers to the audit objection as the information on the basis of which proceedings were initiated. The information is specific. From the information it was evident that the petitioner was indulging in Hawala activities/transactions. It was specifically mentioned that the material as referred to in the audit objection was not considered at the time of initial assessment. The petitioner had not explained the entries as put to him in the show cause notice issued under Section 148(b) of the Act. His reply was based only on technicalities. The unverified and unexplained transactions are to the tune of ₹156,45,19,154/-.

Section 153A of the Act

29. As far as assessment of the petitioner framed under section 153A of the Act is concerned, in the appeal filed against the order, Commissioner of Income Tax (Appeals) has upheld the order of assessment. Appeal filed before Income Tax Appellate Tribunal, Lucknow Bench "B', Lucknow (hereinafter referred to as "the Tribunal') was allowed vide order dated October 7, 2021 on the ground that there was violation of provisions of Section 153D of the Act with reference to prior approval of Additional Commissioner of Income Tax before passing the order of assessment. The opinion of the Tribunal was that the process of granting mechanical approval under Section 153D of the Act

vitiated the entire proceedings. The Department filed Income Tax Appeal No. 86 of 2022 against the aforesaid order before this Court, which was dismissed on December 12, 2022, upholding the order passed by the Tribunal on the ground that approval of draft assessment order by the Competent Authority was without application of mind.

30. Second proviso to Section 153A of the Act will not come to the rescue of the petitioner for the reason that in terms thereof assessment or re-assessment pending for the assessment years in question on the date of initiation of search under Section 132 or making requisition under Section 132A of the Act shall abate. Admittedly, in the case in hand present re-assessment proceedings were not pending on the date when search was carried out at the premises of the petitioner. Notice in the case in hand for initiating re-assessment proceeding was issued on April 24, 2022 whereas search was carried out on August 31, 2015.

31. As to whether an audit objection can constitute information on the basis of which re-assessment proceeding can be initiated, reference can be made to Explanation 1, Clause (ii) to second proviso of Section 148 of the Act. The aforesaid provision clearly provides that any audit objection to the effect that assessment in case of assessee for the relevant assessment year has not been made in accordance with the provisions of the Act is included in the term "information regarding escaped assessment'. In the case in hand, it is not a matter of dispute that there is an audit objection raised that the assessment of assessee has not been framed properly in accordance with the provisions of the Act. It is a case where petitioner was indulging in providing accommodation entries. The text messages recovered from his mobile phone clearly corroborated the modus operandi adopted by the petitioner. The amount involved is to the tune of ₹156,45,19,154/-.

32. Merely because at one stage the Assessing Officer had answered to the queries raised by the Auditor regarding the assessment being in accordance with the provisions of the Act and there being no illegality therein, will not mean that the information in the form of audit objection could not be relied upon to opine that the income chargeable to tax had escaped assessment. Existence or non-existence of information can be subject matter of litigation but not the sufficiency thereof.

33. As far as the argument raised by learned counsel for the petitioner that after assessment had been framed under Section 153A of the Act there was application of mind and examination of record at different levels in the Department as the assessment order is passed with approval of the higher authorities, there was no scope for initiation of fresh proceedings for re-assessment under Section 148 of the Act, in our opinion, even this argument is also to be noticed and rejected. In support of the argument no provision of law as such has been cited except second proviso of Section 153A of the Act, in terms of which only pending proceeding abate. Only reference was made to the judgment of Gujarat High Court passed in **Cargo Clearing Agency's case (supra)**. A plain reading of the aforesaid judgment shows that it is based on the fact that at the time of framing block assessment after search there is detailed examination of the record even at the higher level, hence, no scope is left for raising the issue again by initiating

proceeding under Section 148 of the Act. However, in the case in hand, it is undisputed case on record that the order of assessment passed in case of the petitioner under Section 153A of the Act was set aside only on the ground that there was no application of mind by the higher authorities for granting approval under Section 153D of the Act. And the issue raised by the Audit has not been examined at the time of assessment after search. It may further be added that in the assessment year for the period under consideration in the aforesaid judgment the audit objection was not an information which has been added in Clause(ii) to second proviso of Explanation 1 of Section 148 of the Act with effect from April 1, 2022.

34. Similar issue came up for consideration before Gujarat High Court in **Krishna Developers and Company vs. Deputy Commissioner of Income-tax7,** wherein the Court considered a case where original assessment of the assessee was set aside on technical ground that notice under Section 143(2) of the Act was not served. The argument raised by assessee was that original assessment having failed on the ground of non-issuance of mandatory notice for scrutiny, initiation of proceedings under Section 147/148 was illegal as object was only to cure the defect. The said contention was rejected and the petition was dismissed by the Division Bench of the Gujarat High Court observing that merely on the ground that the reasons recorded by the Assessing Officer were same on the basis of which Assessing Officer has initially decided to make addition but failed as the order was set aside on technical ground would not preclude him from carrying out the exercise of reopening of assessment. Relevant paragraphs are reproduced as under:

"20. Nothing contained in the language of section 147 would permit us to hold that even if all the parameters to enable the Assessing Officer to assess or reassess the income by reopening the assessment are present, same may not be permitted in cases where the original assessment framed by the Assessing Officer has failed on any technical ground, such as in the present case i.e. want of service of notice under section 143(2) of the Act. Once the original assessment is declared as invalid as having been completed without the service of notice on the assessee within the statutory period, there would be thereafter no assessment in the eye of law. The situation therefore, be akin to where return of the assessee has been accepted without a scrutiny. Reopening of the assessment, if the Assessing Officer has the reason to believe that income chargeable to tax has escaped assessment, would be entirely permissible under section 147 of the Act. Merely on the ground that the reasons recorded by the Assessing Officer proceeded on the same basis on which the Assessing Officer initially desired to make additions but which failed on account of setting aside the order of assessment, would not preclude the Assessing Officer from carrying out the exercise of reopening of the assessment. In the present case, facts are peculiar. It is not as if the Assessing Officer after noticing certain discrepancies in the return of the assessee, slept over his right to undertake the scrutiny assessment. The scrutiny assessment was initiated by issuance of notice under section 143(2) of the Act on 23.9.2013. It was also dispatched for service to the assessee on 24.9.2013 by Speed Post on the last known address. The Commissioner (Appeals) however, held that there was no proof of service of notice and since section 143(2) requires service of notice, the assessment

was framed without complying with the mandatory requirements.

21. We may refer to some of the decisions on the point. In case of A G Group Corporation (supra), the Court noticed that at one point the Revenue had reopened the assessment of the assessee. However, such assessment failed on the ground that the reasons were not recorded by the Assessing Officer for issuing such a notice. On the same ground, the Revenue issued fresh notice of reopening which was challenged before the High Court. The High Court held that when the earlier order stood annulled on the ground of lack of fulfillment of the basic requirement under section 147 of the Act, there was no bar against reopening the assessment once again on the same grounds after following due procedure in accordance with law."

(emphasis supplied)

35. The aforesaid order of the Gujarat High Court attained finality after dismissal of the Special Leave Petition of the assessee by Hon'ble Supreme Court vide judgment reported in **(2018) 91 taxmann.com 306 (SC).**

36. Similar issue came up for consideration before Delhi High Court in **CIT Vs. Vishal Gupta8**. In that case also, the order of assessment was set aside by Tribunal on the ground that statutory notice under Section 143(2) of the Act was not served within stipulated period. Thereafter, notice for reopening the assessment was issued. The Tribunal again set aside the said order. However, Delhi High Court, reversing the order of the Tribunal, observed that if the reason to believe that income for any assessment year has escaped assessment are available, the proceedings under Section 147/148 of the Act are independent. There may be valid ground for setting aside the original assessment order, but the same cannot be the basis to quash the reassessment proceedings. Relevant paragraphs are reproduced as under:

"11. The facts elucidated above clearly show that the tribunal has quashed/set aside the original proceedings on the technical ground that statutory notice under Section 143(2) was not served on the respondent-assessee within the stipulated period of 12 months from the month in which return was filed.

12. The Assessing Officer thereafter had recorded fresh reasons and issued notice under Section 147/148 of the Act. The reasons to believe now recorded have to stand on their own legs and are separate from the reasons to believe, which were recorded earlier before initiation of the re-assessment proceedings, which abated. The said reasons to believe and issue of notice under Section 147/148 of the Act cannot be faulted and rejected on the ground that in the earlier/original assessment or re-assessment proceedings, notice under Section 143(2) was not served on the assessee within the statutory time/period. This was a valid ground to quash the first/original assessment/re-assessment order, but it cannot be a ground to quash the re-assessment proceedings, which have been initiated afresh after recording reasons to believe."

37. It is the settled position of law that prima facie availability of material is sufficient for reopening of the reassessment proceedings and the sufficiency and correctness of the material is not to be considered at that stage. In the case of **Raymond Woollen Mills Ltd. Vs. ITO and others9** even though it was a case

where reasons were required to be recorded in writing, Hon'ble the Supreme Court opined that only prima facie material has to be seen on the basis of which the Department could reopen the case. Sufficiency or correctness of the material is not to be considered. The issues can be examined in detail during the assessment proceedings. Relevant paragraph thereof is extracted below:

"3. In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts came to the knowledge of the Income-tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing authority. The appeals are dismissed. There will be, no order as to costs."

(emphasis added)

38. In **Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers P. Ltd.10**, Supreme Court examined the scope of Section 147 of the Act. It was observed that at the stage of initiation of proceedings, final outcome thereof is not relevant. In terms of the provisions of law existing at that time, at the initiation stage what is required is "reason to believe', which, with the legal position as existing today, provides initiations of proceedings only on the information received. It is the subjective satisfaction of the Officer. Relevant paragraph 16 thereof is extracted below:

"16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. ITO (1991) 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at

that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction **(see ITO v. Selected Dalurband Coal Co. Pvt. Ltd. (1996) 217 ITR 597 (SC); Raymond Woollen Mills Ltd. v. ITO (1999) (236) ITR 34 (SC)."**

39. The present case cannot be said to be a case of change of opinion for the reason that there is no finding recorded in the earlier assessment order passed under Section 153A of the Act, which was set aside on technical ground of non approval of the competent authority in terms of Section 153D of the Act.

40. For the reasons mentioned above, we do not find any merit in the present petition. The same is, accordingly, dismissed.

(2023) 2 ILRA 1131
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.01.2023

BEFORE

THE HON'BLE SAMEER JAIN, J.

Application u/s 482 No. 23675 of 2022

Madan Mohan Saxena ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Bhanu Bhushan Jauhari, Sri Rishi Bhushan Jauhari

Counsel for the Opp. Parties:
G.A., Sri Mukesh Kumar Singh

Speedy Trial-Electricity Act,2005 - Sections 39/49 B-Allegation of theft-charge sheet submitted-summons issued-Applicant regularly appeared-dates fixed for framing of charges-without framing of charges-dates started being fixed for evidence till 2018-then again dates fixed for framing of charges-original FIR was summoned-since last 18 years neither charges framed nor FIR placed on records-right of speedy trial is a fundamental right-inordinate delay-proceedings quashed.

Application allowed. (E-9)

List of Cases cited:

1. Bihar St. Electricity Board & anr. Vs Nand Kishore Tamakhuwala, (1986) 2 SCC 414

2. Commissioner of Income Tax Madras Vs Shivakami Company Pvt. Ltd., 1986 (2) SCC 418

3. Vakil Prasad Singh Vs St. of Bihar, (2009) 3 SCC 355

4. Mahendra Singh & ors. Vs St. of U.P. & anr., 2020 (9) ADJ 15

5. Mahipal & anr. Vs St. of U.P., 2020 (9) ADJ 16

6. Dr. Meraj Ali & anr. Vs St. of U.P. & anr., Application U/S 482 Cr.P.C. No. 11924 of 2022

7. Hussainara Khatoon & ors. Vs Home Secretary St. of Bihar AIR 1979 SC 1360

8. Abdul Rehman Antulay Vs R.S. Naik (1992) 1 SCC 225

9. P. Ramachandra Rao Vs St. of Karn. (2002) 4 SCC 578

10. Vakil Prasad Singh Vs St. of Bihar (2009) 3 SCC 355

11. Pankaj Kumar Vs St. of Mah. & anr. (2008) 16 SCC 117

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

1. Heard Sri B.B. Jauhari, learned counsel for the applicant, Sri Mukesh Kumar Singh, learned counsel for the U.P. Power Corporation (opposite party no.3)

and Sri Ravi Kant Kushwaha, learned AGA for the State.

2. By way of present application, applicant made a prayer to quash the charge-sheet no. 404 of 2003 dated 01.12.2003 arising out of Case Crime No. 376 of 2003 and proceedings of Case No. 5276 of 2004, under Section 39/49B Electricity Act, Police Station Sadar Bazar, District Shahjahanpur pending in the court of ACJM-I Shahjahanpur.

3. The FIR of the present case was lodged against the applicant on 15.10.2003 under Section 39/49 Electricity Act at Police Station Sadar Bazar, District Shahjahanpur vide Case Crime No. 376 of 2003.

4. As per allegation applicant committed theft of electricity. After registration of the FIR, investigation was commenced and after investigation charge-sheet was submitted against the applicant on 01.12.2003. After submission of charge-sheet, court concerned on 22.01.2004 took the cognizance and issued summons to the applicant. Applicant appeared before the court concerned through counsel on 20.02.2006 and applicant was regularly appearing through counsel and on 06.08.2009 date was fixed 07.10.2009 for framing of charges and dates were being fixed for framing of charges till 30.08.2013 and on 30.08.2013 without framing of charges dates were started being fixed for evidence and since 30.08.2013 dates were continuously being fixed for prosecution evidence till 13.12.2018 and on 14.01.2019 date was fixed 20.02.2019 for framing of charges and original FIR was summoned and thereafter since 20.02.2019 dates are continuously being fixed for framing of charges and summoning of original FIR. Therefore, it appears that for last about more than 18 years neither charges could be framed in the present matter nor original FIR could be placed on record.

5. Learned counsel for the applicant submits that he is challenging the proceeding of the present case pending against the applicant on the sole ground that proceeding is pending for last about 18 years and although FIR of the present case was lodged in the year 2003 and charge-sheet was submitted in December, 2003 and cognizance was taken in February, 2004 but even till date even charges could not be framed and even original FIR is not on record.

6. He submits that right of speedy trial is a fundamental right of an accused as well as of complainant guaranteed under Article 21 of the Constitution of India and for last about 18 years applicant is facing agony of criminal trial without any fault and proceeding of the present matter is pending for last about two decades. He next submits that according to Article 21 of the Constitution of India no person shall be deprived of his life or personal liberty except according to procedure established by law and such procedure should be reasonable, fair and just and inordinate delay of 18 years in completion of trial cannot be said to be reasonable, fair and just. He further submits, right of speedy trial is, therefore, a fundamental right which has been infringed in the present case. He placed reliance on the following judgements:-

(i) (1986) 2 SCC 414 Bihar State Electricity Board and another Vs. Nand Kishore Tamakhuwala

(ii) 1986 (2) SCC 418 Commissioner of Income Tax Madras Vs. Shivakami Company Private Limited

(iii) (2009) 3 SCC 355 Vakil Prasad Singh Vs. State of Bihar

(iv) 2020 (9) ADJ 15 Mahendra Singh and others Vs. State of U.P. and another

(v) 2020 (9) ADJ 16 Mahipal and another Vs. State of U.P.

(vi) Application U/S 482 Cr.P.C. No. 11924 of 2022 Dr. Meraj Ali and another Vs. State of U.P. and another

7. Per contra, learned AGA for the State and learned counsel for the U.P. Power Corporation (opposite party no.3) although opposed the prayer and submits that it would not be desirable to quash the entire proceeding pending against the applicant on the basis of delay in trial but they could not dispute the fact that applicant is facing agony of criminal trial under Section 39/49B Electricity Act since the year 2004 i.e. for last about 18 years and till date not even charges could be framed and original FIR is also not on record. Both the counsels further could not dispute the fact that there is no fault of applicant and he is regularly appearing before the court concerned either in person or through his counsel.

8. I have heard both the parties and perused the record of the case.

9. The instant application has been pressed on the sole ground that applicant is facing agony of criminal trial for last about 18 years i.e. since the year 2004 and even after 18 years proceeding could not be concluded. Admittedly, the trial of the present case is pending against the applicant since the year 2004 and more than 18 years have been passed but till date not even charges could be framed and from the order-sheet, it appears that applicant is regularly attending the court either in person or through his counsel, therefore, from the record it reflects that delay in trial cannot be attributed to the applicant.

10. The right of speedy trial is a fundamental right enshrined under Article 21 of the Constitution of India. The Apex Court in the case of **Hussainara Khatoon and others Vs. Home Secretary State of Bihar AIR 1979 SC 1360** has observed that speedy trial is an integral part of fundamental right to life and liberty and observed as:-

"5. .....No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21."

11. Therefore, in the case of Hussainara Khatoon (supra) the Apex Court very clearly observed that violation of right of speedy trial is the violation of fundamental right guaranteed under Article 21 of the Constitution of India.

12. The exposition of Article 21 of the Constitution of India in the case of Hussainara Khatoon (supra) was exhaustively considered by the Constitution Bench of the Apex Court in the case of **Abdul Rehman Antulay Vs. R.S. Naik (1992) 1 SCC 225**. Referring to number of decisions of the Apex Court and American Precedent of the VIth amendment of their Constitution making the right to a speedy trial a constitutional guarantee the Apex Court formulated as many as 11 proposals with a note of caution that these were not exhaustive and were meant only to serve as guidelines. These are:-

"1. Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the societal interest also, does not make it any-the-less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

2. Right to Speedy Trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.

3. The concerns underlying the Right to speedy trial from the point of view of the accused are :

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non- availability of witnesses or otherwise.

4. At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the Right to speedy trial is alleged to have been infringed, the first question to be put and answered is-who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not a frivolous. Very often these stays obtained on ex-parte representation.

5. While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the work-load of the court concerned, prevailing local conditions and so on-what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

6. Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in Barker "it cannot be said how long a delay is loo long in a system where justice is

supposed to be swift but deliberate". The same idea has been stated by White, J. in U.S. v. Ewell in the following words :

'..... the sixth amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than more speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an un-constitutional deprivation of rights depends upon all the circumstances.

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become prosecution, again depends upon the facts of a given case.

(Emphasis supplied)

7. We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accussed's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non- asking for a speedy trial cannot be put against the accused. Even in U.S.A., the relevance of demand rule has been substantially watered down in Barker and other succeeding cases.

8. Ultimately, the court has to balance and weigh the several relevant factors- 'balancing test' or 'balancing process'-and determine in each case whether the right to speedy trial has been denied in a given case.

9. Ordinarily speaking, where the court comes to the conclusion that Right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order-including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded-as may be deemed just and equitable in the circumstances of the case.

(Emphasis supplied)

10. It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of Right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of U.S.A. too as repeatedly refused to fix any such outer time limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit in effectuates the guarantee of Right to speedy trial.

11. An objection based on denial of Right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

13. The Constitution Bench in case of Abdul Rehman Antulay (supra) thus

observed that although each and every delay does not necessarily prejudiced the accused but inordinate long delay may be taken as presumptive proof of prejudice and prosecution should not be allowed to become a persecution and if court arrived at the conclusion that right of speedy trial of the accused has been infringed then proceeding pending against him shall be quashed.

14. The issue has again came up before seven judges Constitution Bench of the Apex Court in the case of **P. Ramachandra Rao Vs. State of Karnataka (2002) 4 SCC 578**. The seven judges Bench of the Apex Court in the case of P. Ramachandra Rao (supra) approved the law laid down by the Constitution Bench in case of Abdul Rehman Antulay (supra) and stated that guidelines laid down in Abdul Rehman Antulay (supra) are not exhaustive but only illustrative and their applicability would taken upon facts of each case. The seven judges Constitution Bench in the case of P. Ramachandra Rao (supra) observed that in appropriate cases jurisdiction of the High Court under Section 482 Cr.P.C. and Article 226 and 227 of the Constitution of India can be invoked seeking appropriate relief or suitable direction and observed as:-

"28. It must be left to the judicious discretion of the court seized of an individual case to find out from the totality of circumstances of a given case if the quantum of time consumed upto a given point of time amounted to violation ofArticle 21, and if so, then to terminate the particular proceedings, and if not, then to proceed ahead. The test is whether the proceedings or trial has remained pending for such a length of time that the inordinate delay can legitimately be called oppressive and unwarranted, as suggested in A.R. Antulay. In Kartar Singh's case the Constitution Bench while recognising the principle that the denial of an accused's right of speedy trial may result in a decision to dismiss the indictment or in reversing of a conviction."

15. Therefore, from the dictum of the Apex Court in the case of Hussainara Khatoon (supra), Abdul Rehman Antulay (supra) and P. Ramachandra Rao (supra), it is evident that right of speedy trial is a fundamental right and its violation causes prejudice even to the accused person.

16. The Apex Court in the case of **Vakil Prasad Singh Vs. State of Bihar (2009) 3 SCC 355** (relied by the applicant) after discussing the earlier judgments of the Apex Court including the judgments of Hussainara Khatoon (supra), Abdul Rehman Antulay (supra) and P. Ramachandra Rao (supra) observed that if the Court comes to the conclusion that right to speedy trial of the accused has been infringed, the charges or the conviction as the case may be, may be quashed unless the Court feels that having regard to the nature of offence and other relevant circumstances quashing of the proceedings may not be in the interest of justice.

17. In the case of **Pankaj Kumar Vs. State of Maharashtra and another (2008) 16 SCC 117**, the Apex Court observed that the prosecution has failed to show any exceptional circumstance, which could possibly be taken into consideration for condoning the prolongation of the trial and on the basis of inordinate delay of over eight years quashed the proceedings pending against the accused after observing that his constitutional right to speedy trial has been denied.

18. Therefore, from the discussion made above, it is evident that right to speedy trial of an accused is a fundamental right enshrined under Article 21 of the Constitution of India and if Court finds that it has been violated then proceeding pending against the applicant should be quashed but only after considering following factors:-

(i) whether delay can be attributed to the accused himself

(ii) nature of offence

(iii) whether quashing is in the interest of justice.

(iv) whether inordinate delay can be termed as oppressive and unwarranted.

19. In case at hand, from the perusal of the record it appears that the inordinate delay in completion of the trial cannot be attributed to the accused applicant as order-sheet suggests that he is regularly attending the court either in person or through his counsel and trial of the case relates to Section 39/49B of Electricity Act, which cannot be said to be a heinous crime and trial of the same is pending since the year 2004 i.e. for last about 18 years and prosecution failed to provide any exceptional circumstance to condone such inordinate delay. Therefore, unexplained inordinate delay of 18 years should be termed as oppressive and unwarranted. Therefore, under the facts and circumstances of the case, I am of the view that fundamental right to speedy trial of applicant has been violated.

20. From the discussion made above, this Court is of the view that further continuance of the criminal proceedings pending against the applicant is unwarranted, therefore, to secure the ends of justice proceeding pending against the applicant in the present matter is hereby **quashed.**

21. The instant application stands **allowed.**

(2023) 2 ILRA 1137
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.01.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI (THAKUR), J

Application u/s 482 No. 9911 of 2022

Sonu Kumar Gupta ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Alok Kumar

Counsel for the Opp. Parties:
G.A.

Criminal Law - Narcotic Drugs and Psychotropic Substances Act , 1985– Sections 52-A, 53, 60 & 63- Code of Criminal Procedure, 1973-Sections 451 & 457-Release Application of the vehicle impugned-FIR against 6 named accused-four accused persons caught in the three wheeler vehicle of the Applicant with certain bottles of cough syrup without any bill and voucher-Applicant not apprehended on the spot - he is the owner of the vehicle with all valid documents-falsely implicated-vehicles to be confiscated only after the accused is convicted or acquitted or discharged-after trial has been completed-Provisions of Cr.P.C. shall apply –no provision debarring the release of vehicle seized during trial-temporary release of the vehicle seized provided u/s 451 Cr.P.C.-vehicle is parked unattended –it will deteriorate as parked unattended since last more than 1 year and 10 months-if not given interim custody- the sun and rain would damage it-Applicant not charge sheeted yet-Vehicle to be released in favour of the Applicant.

Application allowed. (E-9)

List of Cases cited:

Sunderbhai Ambalal Desai Vs St. of Gujrat 2003(1) RCR (crl) 380

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. By moving this application under section 482 Cr.P.C. the applicants seek to invoke the inherent jurisdiction of this court to quash the order dated 24.3.2022 in criminal misc. case no. 44 of 2022, State Vs.Pawan Kumar and others, arising out of case crime no. 91 of 2021 under section 8/21 NDPS Act, police station Ghoorpur District Allahabad. A further prayer is made to release three wheeler vehicle no. UP-65-TD-9967 in favour of the applicant relating to the above mentioned case.

2. Heard learned counsel for the applicant, learned A.G.A. and perused the record.

3. Learned counsel for the applicant submits that the FIR was lodged against six named accused persons under section 8/21 NDPS Act on 11.3.2021 with the allegation that in three wheeler vehicle no. U.P.-65-TD-9967 four accused persons Pawan, Kuldeep Kumar, Mohd. Nasir and Sonu @ Mohd. Hasim were apprehended by the police with 49 boxes, total 5807 bottles of onerex cc cough syrup, without any bill and voucher, being transported from New Vridhi Farma Saptnagar Madagin, Varanasi to M/s Shyam medical store Gauhaniya Riva Road Jasra Prayagraj.

4. It is argued that each bottle contained 10 ml. codine phosphate. The total codine phosphate quantity could be said to be 580.7 g. which is much less than the commercial quantity of 1 kg. The applicant was neither apprehended by the police on the spot in possession of any material relating to NDPS Act, nor the material was being supplied by him or it was for him. He is just the owner of the three wheeler no. U.P.-65-TD-9967 with all valid documents. He has been falsely implicated in the present case. He is an innocent, law abiding and peace loving person, having no criminal history. The applicant moved his release application before the trial court, which was dismissed vide order dated 24.3.2022.

5. His vehicle is parked at the premises of police station since 11.3.2021. He has complete documents of the vehicle. GST invoice and account statement of the syrup recovered are also annexed with the paper book. It is alleged by the police that no receipt was shown regarding the medicine recovered, whereas the police concerned did not consider the receipt of the medicines at the time of recovery.

6. Learned A.G.A. opposed the application and submitted that the bill placed before the court does not bear signature of any person. In the recovered syrup the quantity of codine was 580.7 kg. which is much higher than the permitted commercial quantity of 1 kg. The applicant is the vehicle owner, he is responsible for the things supplied in his vehicle, unless he proves otherwise. It is for him to establish prima facie that his vehicle was being used for transportation of the contraband substance without his knowledge.

7. From the perusal of the record, it is found that from three wheeler of the applicant, the police had recovered 5807 bottles, each bottle containing 100 ml. onerex cough syrup on the spot. The person

on the three wheeler could not show the bill and voucher of this cough syrup. Each bottle of cough syrup contained 10 ml codine phosphate and thus, total 58.07 kg codine phosphate was found wherein its permissible commercial quantity is 1 kg. Admittedly, the applicant was not apprehended by the police on the spot. He is said to be the owner of the vehicle, wherein this contraband substance is said to have recovered. The prayer is made to release vehicle no. UP-65-TD-9967. His release application before the trial court is said to have been rejected on 24.3.2022.

8. The trial court found that as the contraband was recovered from the vehicle of the applicant, so it is the presumption that the applicant had the knowledge of transportation of this contraband substance, unless he proves otherwise. Admittedly, the driver of the three wheeler vehicle has been granted bail.

9. The provision regarding the release of the vehicle in NDPS Act 1985 are sections 52-A, 53, 60 and 63. Section 63 of NDPS Act runs as under :-

63. Procedure in making confiscations.

(1) In the trial of offences under this Act, whether the accused is convicted or acquitted or discharged, the court shall decide whether any article or thing seized under this Act is liable to confiscation under section 60 or section 61 or section 62 and, if it decides that the article is so liable, it may order confiscation accordingly

(2) Where any article or thing seized under this Act appears to be liable to confiscation under section 60 or section 61 or section 62, but the person who committed the offence in connection therewith is not known or cannot be found, the court may inquire into and decide such liability, and may order confiscation accordingly:

Provided that no order of confiscation of an article or thing shall be made until the expiry of one month from the date of seizure, or without hearing any person who may claim any right thereto and the evidence, if any, which he produces in respect of his claim:

Provided further that if any such article or thing, other than a narcotic drug, psychotropic substance, 1[controlled substance,] the opium poppy, coca plant or cannabis plant is liable to speedy and natural decay, or if the court is of opinion that its sale would be for the benefit of its owner, it may at any time direct it to be sold; and the provisions of this sub-section shall, as nearly as may be practicable, apply to the net proceeds of the sale

10. Thus, the vehicle is to be confiscated only after the accused is convicted or acquitted or discharged that means that his trial has been completed.

11. Now the question arises that during trial whether the vehicle can be given in temporary custody of the real owner of the vehicle. NDPS Act is silent about the interim custody of the vehicle, while in the code of criminal procedure sections 451 and 457 speak of the custody and disposal of the property pending trial. Now the question arises whether these sections of code of criminal procedure can be applied to the interim custody of vehicle seized under NDPS Act ? In this regard, it is apposite to look into section 51 of NDPS Act which runs as under;

51. Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures:- The

provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act.

12. Thus, the provisions of the code of criminal procedure shall apply with regard to seizure of any article or things regarding NDPS Act, if they are not inconsistent of provisions of the NDPS Act and in NDPS Act, there is no provision debarring the release of vehicle seized under the act during trial as per provisions of Cr.P.C. Thus the provision of section 451 of Cr.P.C. cannot be said to be inconsistent with any specific provision under NDPS Act, so this section of code of criminal procedure will apply to the temporary release of the vehicle seized under NDPS Act as per the mandate under section 51 of the NDPS Act. Section 451 Cr.P.C. runs as under;

451. Order for custody and disposal of property pending trial in certain cases:- When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

13. Section 457 Cr.P.C. described the procedure of police upon seizure of property. This section runs as under;

"457. Procedure by police upon seizure of property.- (1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

14. The land mark judgment relating to the disposal of seized vehicles and articles is **Sunderbhai Ambalal Desai Vs State of Gujrat 2003(1) RCR (crl) 380** wherein the Apex Court held that "if the powers under section 451 Cr.P.C. are judiciouslly exercised, the owner of the property would not suffer because of its remaining unused or by its misappropriation. Further the court or the police would not be required to keep the articles in safe custody. If proper panchanama before handing over the possession of the articles is prepared, that can be used in evidence instead of its production of article before the court during trial."

15. The Apex Court further held that "there was no use to keep such seized

vehicle in police station for long period and directed the judicial magistrates to exercise their powers under section 451 Cr.P.C. expeditiously and judicially and entrusted interim custody of the articles and vehicles seized to the owner of the property or to the person who is entitled to be in possession of the property.

16. In the present case also the vehicle is lying in police station since 11.3.2021 and when the vehicle is parked unattended the valuable parts of the vehicle are taken away or stolen. The vehicle also occupies larger space causing inconvenience to the police department and if during trial the vehicle is kept in open it would be specifically deteriorated and if the court finally finds that the vehicle was unused in the offence or if it was used in the offence not within the knowledge of the owner of the vehicle, the owner will have to collect only scraps of the vehicle. Thus, nobody is getting to be benefited if the vehicle got parked totally unattended at police station. Thus the three wheeler of the applicant which is said to be not confiscated yet and is parked in police station in open since last more than one year and ten months, if it is not given in the interim custody of the applicant, the sun and rain would certainly damage its tyres, colour, machinery and battery and also the interior, which is neither in the interest of nation nor in the interest of the applicant. Admittedly the applicant has not been chargesheeted in the case thus, it is not yet proved that the vehicle was being used in the offence within the knowledge of the applicant. So in the opinion of the court, the vehicle of the applicant needs to be released in favour of the applicant during trial. The order of the trial court in not releasing the vehicle in favour of the applicant even after one year of is seizure is legally unsustainable, hence, the order dated 24.3.2022 is quashed

17. Let the vehicle no. UP-65-TD-9967 be released in favour of the applicant, the owner of the vehicle, subject to the production of all necessary documents, on furnishing a personal bond of Rs. one lakh and two sureties of Rs. one lakh each to the satisfaction of the court concerned on the following conditions;

1. The applicant will not dispose of the vehicle during the pendency of the trial.

2. The applicant will produce the vehicle before the court at his own cost, whenever and wherever, ordered by the court.

3. The applicant shall not alienate or change the nature of the vehicle in any manner.

4. The release of the vehicle shall also remain subject to confiscation proceedings, if any.

18. The application 482 Cr.P.C. is allowed in above mentioned terms.

(2023) 2 ILRA 1141
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 22250 of 2022

Bilal & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicants:
Sri Ravi Prakash Singh

Counsel for the Opp. Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 482-Cross case

by both the parties-already a matrimonial case pending between the parties-cross case depicts enmity between the parties-incidence cannot be denied.

Application rejected. (E-9)

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

1. प्रार्थी की तरफ से श्री रवि प्रकाश सिंह एवं विपक्षी सं० 1 की तरफ से अपर शासकीय अधिवक्ता को सुना गया। सूचना होने के बावजूद विपक्षी सं० 2 की तरफ से कोई उपस्थित नहीं हुआ।

2. प्रार्थीगण ने 482 दं०प्र०सं० के अंतर्गत यह याचिका असंज्ञेय अपराध सं०- 109/2018 अंतर्गत धारा- 323,504 एवं 506 आई०पी०सी० थाना- सिविल लाइन्स, जिला- अलीगढ़ लंबित न्यायालय न्यायिक दण्डाधिकारी अलीगढ़ के दाण्डिक वाद सं०- 750/11/2018 राज्य बनाम बिलाल और अन्य में सत्र न्यायाधीश अलीगढ़ द्वारा दण्ड निगरानी सं०- 490/2021 अयूब उर्फ अनवर सईद एवं अन्य बनाम उत्तर प्रदेश राज्य एवं अन्य में पारित आदेश दिनांकित 09.11.2021 तथा मुख्य न्यायिक दण्डाधिकारी अलीगढ़ द्वारा पारित आदेश दिनांकित 22.10.2018 को निरस्त करने के लिए प्रस्तुत किया है।

3. संक्षेप में वाद के तथ्य यह हैं कि प्रारंभतः एक असंज्ञेय दण्ड परिवाद दिनांक 01.10.2018 को विपक्षी 2 द्वारा प्रार्थीगण के विरुद्ध थाना सिविल लाइन्स जिला अलीगढ़ में धारा- 323,504 एवं 506 भारतीय दण्ड संहिता के अंतर्गत दर्ज कराया गया जो संलग्नक 1 है। सूचना दाता के अनुसार दिनांक 29.09.2018 को एक अभियुक्त सुल्तान मुकदमा अपराध सं०- 562/2018 तथा मुकदमा अपराध सं०- 207/2017 अंतर्गत धारा- 147,148,307,504 एवं 506 भारतीय दण्ड संहिता जिला- अलीगढ़ के अंतर्गत अभिरक्षा में था। सूचना दाता उस मुकदमें के नाजिम एवं सगीर के साथ पैरवी करता था तथा उसने देखा कि घटना के समय प्रार्थीगण भी विद्यमान थे तथा उन्होंने भी विपक्षी सं०- 2 पर आक्रमण किया तथा विपक्षी सं० 2 के साथ मारपीट किया। शोर मचाने पर वह सभी लोग भाग गये।

4. असंज्ञेय सूचना दर्ज कराने के उपरान्त विपक्षी सं०- 2 सरफराज (सरफराज पुत्र मुन्ना) ने जिला चिकित्सालय अलीगढ़ में दिनांक 1.10.2018 को चिकित्सीय परीक्षण कराया। चिकित्सा परीक्षण आख्या प्रदर्श जो संलग्नक 2 है। विपक्षी सं०- 2 ने दिनांक 5.10.2018 को धारा 155(2) दण्ड प्रक्रिया संहिता के अंतर्गत विवेचना के लिए प्रार्थना पत्र संलग्नक 3 प्रस्तुत किया। जिस पर विवेचना के लिए पारित आदेश दिनांकित 22.10.2018 संलग्नक 4 है। विवेचना की अवधि में विवेचक ने सूचना दाता मो० नाजिर एवं मो० समीर का धारा 161 दण्ड प्रक्रिया संहिता के अंतर्गत कथन अंकित किया जिनकी प्रतिलिपियां संलग्नक 5 हैं। विवेचना समाप्त करने के उपरान्त विवेचक ने प्रार्थीगण के विरुद्ध आधारहीन तथ्यों एवं परिस्थितियों के आधार पर उचित साक्ष्य संकलित किये बिना आरोप पत्र संलग्नक 6 प्रस्तुत किया। दिनांक 22.10.2018 को पारित आदेश के विरुद्ध दण्ड निगरानी प्रस्तुत किया गया जो दिनांक 9.11.2021 को पोषणीय न होने के कारण अंगीकरण के स्तर पर सत्र न्यायाधीश अलीगढ़ द्वारा निरस्त कर दिया गया। जिसकी प्रति संलग्नक 7 है।

5. वास्तविकता यह है कि इस घटना के पूर्व दिनांक 24.08.2015 को प्रार्थी सं० 1 ने सगीर, शहनवाज एवं नाजिम पुत्रगण मुन्ना उर्फ जब्बार, मुस्तकीम पुत्र फिरोज जो विपक्षी सं० 2 के भाई हैं, के विरुद्ध मुकदमा अपराध सं० 307/2015 में धारा 406,323,504,506 एवं 307 आई०पी०सी० के अंतर्गत प्रथम सूचना रिपोर्ट दर्ज कराया जिसमें विवेचनोपरान्त विवेचक ने कथित अभियुक्तगण के विरुद्ध दिनांक 27.04.2017 को आरोप पत्र प्रस्तुत किया।

6. प्रार्थी सं० 1 की मौसी रुकसाना द्वारा भी एक प्रथम सूचना रिपोर्ट विपक्षी सं० 2 एवं उसके परिजनों के विरुद्ध दिनांक 26 मई 2017 को अपराध सं० 207/2017 अंतर्गत धारा 323,324 एवं 506 आई०पी०सी० भारतीय दण्ड संहिता के अंतर्गत थाना- कोतवाली नगर, जिला- अलीगढ़ में दर्ज कराया गया था। जिसमें दिनांक 29.06.2018 को विवेचक द्वारा अभियुक्तगण के विरुद्ध धारा 323,324,504,506,147 एवं 326 भारतीय दण्ड

संहिता के अंतर्गत आरोप पत्र प्रस्तुत किया गया था। प्रार्थी सं० 1 द्वारा दर्ज कराये गये प्रथम सूचना रिपोर्ट एवं आरोप पत्र की प्रतिलिपियाँ संलग्नक 8 एवं 9 हैं।

7. पक्षकारों के मध्य वैवाहिक विवाद लंबित है। इसी मध्य विपक्षी सं० 2 द्वारा प्रार्थी सं० 1 एवं 4 तथा रुकसाना, सुल्तान एवं केशर के विरुद्ध अपराध सं० 207/2017 में धारा 147,148,307,452 एवं 504 भारतीय दण्ड संहिता के अंतर्गत प्रथम सूचना रिपोर्ट थाना- कोतवाली नगर, अलीगढ़ में दर्ज कराया गया जिसमें मौसा नाजिम चक्षुदर्शी साक्षी है। उस प्रथम सूचना रिपोर्ट दिनांकित 15.05.2017 की प्रतिलिपियाँ संलग्नक 10 है।

8. अभियोजन कथानक के अनुसार विपक्षी सं० 2 नाजिम एवं रुकसाना के मध्य लंबित मुकदमे की पैरवी के लिए विपक्षी सं० 2 जिला न्यायालय जाता है। उसके द्वारा दुर्भावनावश झूठा एवं फर्जी आघात आख्या 2 दिन बाद विलंब को स्पष्ट किये बगैर तैयार कराया गया। घटना दिनांक 29.10.2018 की है, जब कि असंज्ञेय सूचना दिनांक 1.10.2018 को 2 दिन विलंब से दर्ज करायी गयी है। पक्षकारों के मध्य वैवाहिक विवाद दाण्डिक प्रकीर्ण प्रार्थना पत्र सं० 37751/2018 श्रीमती रुकसाना एवं अन्य बनाम उत्तर प्रदेश राज्य एवं एक अन्य तथा दाण्डिक प्रकीर्ण प्रार्थना पत्र सं० 47106/2018 सुल्तान विरुद्ध उत्तर प्रदेश राज्य एवं एक अन्य भी लंबित है। जिनमें माननीय न्यायालय द्वारा प्रार्थीगण के पक्ष में आदेश पारित किया गया है। जिनकी संलग्न प्रति संलग्नक 11 है।

9. रुकसाना ने विपक्षी सं० 2 तथा अन्य व्यक्तियों के विरुद्ध मुकदमा अपराध सं० 222/2017 अंतर्गत धारा 323,324 एवं 504 भारतीय दण्ड संहिता थाना- कोतवाली नगर, अलीगढ़ में दर्ज कराया, जिसमें विपक्षी सं० 2 एवं उसके भाई नाजिम ने रुकसाना के साथ मारपीट किया था। रुकसाना ने एक अन्य मुकदमा मुकदमा अपराध सं० 400/2017 अंतर्गत धारा 498ए,406 एवं 506 भारतीय दण्ड संहित तथा धारा ¾ दहेज प्रतिषेध अधिनियम के अंतर्गत थाना- अतरौली जनपद- आजमगढ़ में दर्ज कराया गया था जिसके संबंध में विपक्षी सं० 2 ने दाण्डिक प्रकीर्ण प्रार्थना पत्र सं० 39172/2018 नाजिम एवं अन्य बनाम उत्तर प्रदेश राज्य एवं 1 अन्य प्रस्तुत किया था जिसमें माननीय न्यायालय ने अंतरिम आदेश संलग्नक 12 पारित किया था।

10. दुर्भावनावश काउण्टर ब्लास्ट के रूप में प्रार्थीगण को वर्तमान मुकदमें में झूठा फंसाया गया है तथा मुख्य न्यायिक दण्डाधिकारी एवं सत्र न्यायाधीश ने न्यायिक मस्तिष्क का प्रयोग किये बगैर तथा तथ्यों एवं परिस्थितियों पर विचार किये बगैर प्रश्नगत आदेश पारित किया है। प्रार्थीगण का कोई आपराधिक इतिहास नहीं है वह कानून मानने वाले शांतिप्रिय व्यक्ति हैं। यह दण्ड वाद दुर्भावनावश तथा दूरस्थ आशय से प्रार्थीगण को प्रताड़ित करने के लिए प्रस्तुत किया गया है। अतः प्रश्नगत आदेश दिनांक 22.10.2018 तथा दिनांक 9.11.2021 पारित द्वारा मुख्य न्यायिक दण्डाधिकारी एवं सत्र न्यायाधीश निरस्त किया जाये।

11. विपक्षी सं० 2 पर उसके भाई सगीर के माध्यम से सम्मन तामिला पर्याप्त है परन्तु विपक्षी सं० 2 अथवा विपक्षी सं० 1 उत्तर प्रदेश राज्य की तरफ से कोई प्रति शपथ पत्र प्रस्तुत नहीं किया गया है।

12. सुना तथा पत्रावली का अवलोकन किया।

13. स्वीकृत रूप में इस प्रकरण में असंज्ञेय अपराध कारित करने की सूचना दर्ज की गयी थी जिसमें विवेचक धारा 155(2) द०प्र०सं० के अंतर्गत संबंधित मजिस्ट्रेट द्वारा अनुमन्य किये जाने के बिना विवेचना प्रारंभ नहीं कर सकता। इस स्तर पर प्रस्तावित अभियुक्तगण का कोई अधिकार उत्पन्न नहीं होता अतः उन्हें प्रश्नगत आदेशों को चुनौती देने का अधिकार नहीं है न ही मुख्य न्यायिक दण्डाधिकारी को यह अधिकार प्राप्त होना पाया जाता है कि वह धारा 155(2) दं०प्र०सं० का प्रार्थना पत्र को निरस्त कर दें। ऐसी कोई सामग्री भी मुख्य न्यायिक मजिस्ट्रेट के समक्ष उपलब्ध नहीं थी जब उन्होंने दिनांक 22.10.2018 को धारा 155(2) दं०प्र०सं० के प्रार्थना पत्र को स्वीकार किया था। ऐसा प्रतीत होता है कि चूंकि प्रार्थीगण पूर्व से ही इस प्रकरण पर अपना ध्यान केन्द्रित किये हुए थे, अतः उन्होंने उक्त आदेश के विरुद्ध दण्ड निगरानी सं०

490/2021 प्रस्तुत कर दिया जिसके अंगीकरण के प्रश्न पर सुनवाई करते हुए सत्र न्यायाधीश अलीगढ़ ने मुख्य न्यायिक मजिस्ट्रेट के आदेश को अंर्तवर्ती आदेश (Interlocutory Order) मानते हुए तथा यह निष्कर्ष देते हुए कि प्रस्तावित अभियुक्त की निगरानी प्रस्तुत करने का अधिकार नहीं है, निगरानी खारिज कर दिया। सत्र न्यायाधीश ने इस तथ्य का भी संज्ञान लिया गया कि न तो उनके विरुद्ध कोई विधिक प्रक्रिया ही जारी की गयी है न ही मामले का संज्ञान ही लिया गया है।

14. इस स्तर पर यह निष्कर्ष नहीं दिया जा सकता है कि संज्ञेय सूचना के तथ्य गलत हैं तथा काउण्टर ब्लास्ट के रूप में यह असंज्ञेय सूचना दर्ज करायी गयी है। निश्चित रूप में उभय पक्षों में विवाद एवं दुश्मनी है। विवाद या दुश्मनी दोधारी तलवार होती है, जो घटना कारित करने का कारण भी हो सकता है तथा गलत फंसायें जाने का कारण भी बन सकता है। परन्तु इस स्तर पर यह नहीं कहा जा सकता कि यह प्रश्नगत असंज्ञेय सूचना गलत रूप से प्रार्थीगण को फंसाने के लिए ही दर्ज करायी गयी है।

15. निगरानीकर्ता की तरफ से यह तर्क भी प्रस्तुत किया गया कि असंज्ञेय अपराध संख्या गलत लिखी गयी तथा धारा 155(2) दं०प्र०सं० के प्रार्थना पत्र में सरफराज के स्थान पर उसके भाई नाजिम द्वारा हस्ताक्षर किया गया। जहाँ तक गलत अंज्ञेय अपराध की संख्या लिखने का प्रश्न है यह लिपिकीय त्रुटि हो सकती है। इस न्यायालय के मतानुसार जब यह धारा 482 दं०प्र०सं० की याचिका ही संधार्य नहीं है तथा प्रार्थीगण को अभी वाद कारण ही उत्पन्न नहीं हुआ है, अतः इन तथ्यों पर विचार करने का प्रश्न उत्पन्न नहीं होता है।

16. उपरोक्त परिस्थितियों में इस न्यायालय का भी यह अभिमत है कि अधीनस्थ न्यायालयों द्वारा पारित दोनों आदेश तथ्यतः एवं विधितः सही एवं वैध हैं तथा धारा 482 दं०प्र०सं० के अंतर्गत उक्त दोनों आदेश खण्डित किये जाने योग्य नहीं हैं। धारा 482 दं०प्र०सं० निम्नवत है-

17. *इस संहिता में कुछ भी उच्च न्यायालय के अंतर्निहित शक्तियां व्यावृत्ति इस संहिता की कोई बात उच्च न्यायालय को ऐसा आदेश देने की अंतर्निहित शक्तियों को सीमित या प्रभावी करने वाली न समझी जाएगी जैसा इस संहिता के अधीन ऐसे किसी आदेश को प्रभावी करने के लिए या किसी न्यायालय की कार्यवाही का दुरुपयोग निवारित करने के लिए या किसी अन्य प्रकार से न्याय के उद्देश्यों की प्राप्ति सुनिश्चित करने के लिए आवश्यक है।*

18. इस न्यायालय के अनुसार प्रार्थीगण द्वारा अनुचित तौर पर ऐसे आदेशों की धारा 482 दं०प्र०सं० के अंतर्गत चुनौती दिया गया है, जिन्हें चुनौती देने का अभी कोई वाद कारण उन्हें प्राप्त नहीं है। अतः यह याचिका अपरिपक्व होने के कारण खारिज किये जाने योग्य है।

19. निगरानीकर्ता की तरफ से प्रभू चावला बनाम राजस्थान राज्य और एक अन्य दण्ड अपील सं० 842/2016 एवं दण्ड अपील सं० 845-846/2016 में उच्चतम न्यायालय द्वारा पारित आदेश दिनांक 5 सितंबर 2016 को स्वयं पर आधारित किया गया जिसके तथ्य प्रस्तुत मामले के तथ्यों से पूर्णतया भिन्न थे। अतः इसमें निर्धारित विधि का सिद्धान्त प्रार्थीगण के के पक्ष में प्रयुक्त नहीं होता।

आदेश

20. यह याचिका उपरोक्तानुसार निरस्त की जाती है। इस निर्णय की एक प्रति मुख्य न्यायिक दण्डाधिकारी अलीगढ़ को सूचनार्थ एवं अनुपालनार्थ प्रेषित की जाये।

(2023) 2 ILRA 1144
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Application U/S 482. No. 17101 of 2020
And
Other Connected Cases

Zaki Ur Rahman Siddiqui ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Sadaful Islam Jafri, Sri Khalid Mahmood, Sri Nazrul Islam Jafri (Senior Adv.)

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 -Section 482-summoning order under challenged- to quash multiple criminal cases- different FIRs lodged-82 petitions filed against different case crime numbers challenged to be quashed in a single petition-allegations by different farmers- for the applicant taking possession forcefully of 5 hectare land from them by former minister and former C.O. (City) by forging records and threatening them of false implication- and taking them within the boundary wall of the university-Court cannot delve into the defence of accused-only prima facie case has to be looked into-no case of interference is made out.

All applications dismissed. (E-9)

List of Cases cited:

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2. St. of Har. & ors. Vs Ch. Bhajanlal & ors.: (1992) AIR 604

3. T.T. Antony Vs St. of Kerala & ors.: 2001 SCC OnLine SC 805

4. Upkar Singh Vs Ved Prakash : 2005 SCC (Criminal) 211

5. Arnab Ranjan Goswami Vs U.O.I.: (2020) 14 SCC 12

6. Prem Chand Singh Vs St. of U.P.: 2020 SCC OnLine SC 144

7. St. of M. P. Vs Sheetla Sahai & ors.: 2009 SCC OnLine SC

8. Prabhu Chawla Vs St. of Raj. & anr. : 2016 SCC OnLine SC

9. Kishan Singh (Dead) through LRS Vs Gurpal Singh & ors.: 2009 SCC OnLine SC 1451

10. Dhariwal Tobacco Products Ltd. & ors. Vs St. of Maharastra & anr. : (2009) 2 Supreme Court Cases 370

11. Vijay Kumar Ghai & ors. Vs St. of W. B. & ors.: 2022 SCC

12. Issac Isanga Musumba & ors. Vs St. of Mah. & ors.: (2014) 15 SCC 579

13. Tarak Dash Mukharjee & ors. Vs St. of U.P. & ors- Criminal Appeal No. 1400 of 2022

14. Mitesh Kumar J. Sha Vs St. of Karnataka & ors.: 2021 SCC Online SC

15. St. of Karn. Vs Muniswamy & ors. : 1977 Supreme Court Cases (Cri) 404

16. J. Anbazhagan Vs The Speaker, Tamil Nadu Legislative Assembly & ors. :(2018) SCC OnLine Mad 1235

17. Shashimani Mishra Vs St. of M.P. : I.L.R. (2019) M.P. 1397

18. R.P. Kapur Vs St. of Pun.: AIR 1960 SC 866

19. Madhavrao Jiwaji Rao Scindia Vs Sambhajhirao Chandrojirao Angre : (1988) 1 SCC 692

20. St. of Har. & ors. Vs Bhajan Lal & ors.: 1992 Supp (1) SCC 335

21. Chilakamarthi Venkateswarlu & anr. Vs St. of Andhra Pradesh & anr. (2020) 17 SCC 595,

22. T.T. Antony Vs St. of Ker. : (2001) 6 SCC 181

23. Babubhai Vs St. of Guj.: (2010) 12 SCC 254

24. Anju Chaudhary Vs St. of U.P. : (2013) 6 SCC 384

25. Amitbhai Anichandra Shah Vs C.B.I. : (2013) 6 SCC 348

26. S.K. Alagh Vs St. of U.P. : (2008) 5 SCC 661

27. Aneeta Hada Vs Godfather Travels & Tours Pvt. Ltd.: (2012) 5 SCC

28. Sharad Kumar Sanghi Vs Sangita Rane : (2015) 12 SCC 781

29. GHCL Employees Stock Option Trust Vs Kranti Sinha: (2013) 4 SCC 505,

30. Kranti Kumar Vs St. of U.P. : Crl. Misc. Application U/S 482 No. 7050 of 2002

31. Kranti Kumar Vs St. of U.P.: Crl. Misc. Application U/S 482 No. 7060 of 2002

32. Oanali Ismilji Sadikot Vs St. of Guj. : (2016) SCC OnLine Guj 10055

33. Arnab Ranjan Goswami Vs U.O.I. : (2020) 14 SCC 51

34. Arnab Ranjan Goswami Vs U.O.I. : (2020) 14 SCC 12

35. Amish Devgan Vs U.O.I.: (2021) 3 SCC 306

36. Ketaki Chitale Vs St. of Mah.: Crim. Misc. W.P. No. 1919 of 2022

37. Nikhil Shyamrao Bhamare Vs St. of Mah., Criminal Misc. Writ Petition No.1821 of 2022

38. Umesh Kumar Vs St. of Andhra Pradesh : (2013) 10 SCC 591

39. Krishna Lal Chawla & ors. Vs St. of U.P. & anr. : LL2021 SC 145

40. Mitesh Kumar J. Sha Vs St. of Karn. & ors.: LL 2021 SC 592

41. (1) Babubhai Jamuna Bhai Patel Vs St. of Guj.: (2010) 12 SCC 254

42. Barendra Kumar Ghosh Vs Emperor: AIR 1925 PC 1(C)

43. M/S Neharika Infrastructure Pvt. Ltd. Vs St. of Mah.: (2021) SCC OnLine SC 315

44. Jagmohan Singh Vs Vimlesh Kumar & ors.: (2022) LiveLaw (SC) 546,

45. Ramveer Upadhyay & anr. Vs St. of U.P. & anr.: (2022) LiveLaw (SC) 396;

46. Chilakamarthi Venkateswarlu & anr. Vs St. of Andhra Pradesh & anr.: Criminal Appeal No. 1082 of 2019

47. Kaptan Singh Vs St. of U.P. & ors.: AIR 2021 SC 3931

48. St. of Odisha Vs Pratima Mohanty : (2021) SCC OnLine SC 1222,

49. Priti Saraf & ors. Vs St. of NCT of Delhi & ors.: AIR 2021 SC 1531,

50. Anil Vs St. of U.P. & anr.: Criminal Misc. Application U/S 482 Cr.P.C. No. 6504 of 2021, dated 30.6.2021

51. Wasiullah & anr. Vs St. of U.P. & ors.: 2021(1) All. LJ 42;

52. Pankaj Tyagi Vs St. of U.P. & anr. : 2022 SCC OnLine All 163

53. Asha Ranjan Vs St. of Bihar & ors.: (2017) 4 SCC 397

54. Surender Kaushik & ors. Vs St. of U.P. & ors.: (2013) 5 SCC 148;

55. Lalman & ors. Vs St. of U.P. & ors.: (2021) ILR 2 All 167;

56. Beekki Verma Vs St. of U.P. & ors.: 2021 (5) ADJ 351.

57. R.P. Kapur Vs St. of Pun. : AIR 1960 SC 866;

58. St. of Har. & ors. Vs Bhajan Lal & ors. : 1992 Supp (1) SCC 335;

59. St. of Bihar Vs P.P. Sharma : 1992 Supp (1) SCC 222;

60. Trisuns Chemical Industry Vs Rajesh Agarwal & ors. : (1999) 8 SCC 686;

61. M. Krishnan Vs Vijay Singh & anr. : (2001) 8 SCC 645; Zandu Pharmaceuticals Works Ltd. Vs Mohammd Shariful Haque : (2005) 1 SCC 122;

62. M. N. Ojha Vs Alok Kumar Srivastava : (2009) 9 SCC 682;

63. Joseph Salvaraj A. Vs St. of Guj. & ors. : (2011) 7 SCC 59;

64. Arun Bhandari Vs St. of U. P. & ors. : (2013) 2 SCC 801;

65. Md. Allauddin Khan Vs St. of Bihar : (2019) 6 SCC 107;

66. Anand Kumar Mohatta & anr. Vs St. (NCT of Delhi), Department of Home & anr. : (2019) 11 SCC 706

67. Rajeev Kourav Vs Balasaheb & ors. : (2020) 3 SCC 317;

68. Nallapareddy Sridhar Reddy Vs The St. of Andhra Pradesh : (2020) 12 SCC 467

69. Priti Saraf & anr. Vs St. of NCT of Delhi & anr. : Criminal Appeal No(s). 296 of 2021

70. Daxaben Vs St. of Guj. : 2022 SCC Online SC 936

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

1. These 82 petitions filed under Section 482 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") are connected together as they have common issues within themselves which are interlinked. They all have been filed after the investigation in the respective matters has concluded, charge-sheets have been filed and the accused persons have been summoned to face trial. The stage of filing of the petitions is after cognizance on the charge-sheets have been taken by the concerned court and the accused persons have been summoned. The challenge in all the petitions is thus at the stage of summoning.

2. At this stage it would be important to give the details of the First Information Reports in a tabular form case crime number wise. In all there are 27 case crime numbers covering the full bunch of cases. The details are as follows (Table-A) :-

Table-A

Sl.No.	Date of lodging of FIR	Case Crime No., sections, Police Station, District	First informant	Accused named in FIR	Identification of land
1	12.7.2019	Case Crime No. 0224 of 2019, u/ss. 342, 447, 506, 384 I.P.C., P.S. Azeemnagar, District Rampur.	Manoj Kumar, Revenue Inspector	(i) Mohammad Azam Khan, (ii) Aley Hasan Khan	Gata No. 1239, Area 0.114 Hect., Gata No. 1232, Area 0.126 hect., Gata No. 1415 Area 0.089 hect., Gata No. 1253/1, Area 0.089 hect.,

					Gata No. 1319 Kha, Area 1.294 hect.,
2	13.7.2019	Case Crime No. 0226/2019, U/S. 323, 342, 447, 384, 504, 506 I.P.C., P.S.- Azeem Nagar, District Rampur	Yaseen	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City.	Khet No. 1232, Area
3	13.7.2019	Case Crime No. 0227/2019, U/S. 323, 342, 447, 384, 506 I.P.C., P.S.- Azeem Nagar, District Rampur	Bandey Ali	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City.	Gata No. 1232
4	14.7.2019	Case Crime No. 0228/2019, U/S. 323, 342, 447, 384, 506 I.P.C., P.S.- Azeem Nagar, District Rampur	Mohd. Ahmad	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City.	Gata No. 1232
5	15.7.2019	Case Crime No. 0232/2019, U/S. 342, 447, 384, 506 I.P.C., P.S.- Azeem Nagar, District Rampur	Kallan	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City.	Bhumi No. 1230
6	16.7.2019	Case Crime No. 0235/2019, U/S. 342, 447, 384, 504, 506 I.P.C., P.S.- Azeem Nagar, District Rampur	Hanef	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City.	Bhumi No. 1232

7	16.7.2019	Case Crime No. 0236/2019, U/S.323, 342, 447, 384, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Shareef Ahmad	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City.	Bhumi No. 1230
8	16.7.2019	Case Crime No. 0237/2019, U/S.323, 342, 447, 384, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Mohd. Mustakeem	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City.	Bhumi No. 1415
9	16.7.2019	Case Crime No. 0238/2019, U/S.323, 342, 447, 384, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Matloob	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City.	Bhumi No. 1319-Kha
10	16.7.2019	Case Crime No. 0239/2019, U/S. 342, 447, 384, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Nasir	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City.	Bhumi No. 1232
11	16.7.2019	Case Crime No. 0240/2019, U/S. 323, 342, 447, 384, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Nazim	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City.	Bhumi No. 1253/1
12	16.7.2019	Case Crime No. 0241/2019, U/S. 323, 342, 447, 384, 506	Nabbu	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O.,	Bhumi No. 1253/1

		I.P.C., P.S.-Azeem Nagar, District Rampur		City.	
13	16.7.2019	Case Crime No. 0242/2019, U/S. 342, 447, 384, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Zumma	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City.	Bhumi No. 1230
14	18.7.2019	Case Crime No. 0248/2019, U/S. 342, 447, 384, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Mohd. Hasan	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer Singh, Former S.H.O.	Bhumi No. 1319 Kha
15	18.7.2019	Case Crime No. 0249/2019, U/S. 323, 342, 447, 384, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Rafique	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer Singh, Former S.H.O.	Bhumi No. 1253/1
16	19.7.2019	Case Crime No. 0250/2019, U/S. 323, 342, 384,447, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Mohd. Hanef	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer Singh, Former S.H.O.	Bhumi No. 1415
17	19.7.2019	Case Crime No. 0251/2019, U/S. 323, 342, 384, 447, 506 I.P.C., P.S.-Azeem Nagar,	Bhullan	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer	Bhumi No. 1415

		District Rampur		Singh, Former S.H.O.	
18	19.7.2019	Case Crime No. 0252/2019, U/S. 323, 342, 384, 447, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Mohd. Yaseen	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer Singh, Former S.H.O.	Bhumi No. 1415
19	19.7.2019	Case Crime No. 0253/2019, U/S. 323, 342, 384, 447, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Naamey	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer Singh, Former S.H.O.	Bhumi No. 1230
20	19.7.2019	Case Crime No. 0254/2019, U/S. 323, 342, 384, 447, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Abrar	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer Singh, Former S.H.O.	Bhumi No. 1230
21	19.7.2019	Case Crime No. 0255/2019, U/S. 323, 506, 447,384, 342 I.P.C., P.S.-Azeem Nagar, District Rampur	Nazakat	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer Singh, Former S.H.O.	Bhumi No. 1230
22	19.7.2019	Case Crime No. 0256/2019, U/S. 323, 342, 384, 447, 506 I.P.C., P.S.-Azeem Nagar,	Ameer Alam	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer	Bhumi No. 1319 Kha

		District Rampur		Singh, Former S.H.O.	
23	19.7.2019	Case Crime No. 0257/2019, U/S. 342, 384, 447, 504, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Reshma	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer Singh, Former S.H.O.	Bhumi No. 1232
24	20.7.2019	Case Crime No. 0260/2019, U/S. 323, 342, 447, 384, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Mohd. Alim	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer Singh, Former S.H.O.	Bhumi No. 1319 Kha
25	20.7.2019	Case Crime No. 0261/2019, U/S. 323, 342, 447, 384, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Zakir	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer Singh, Former S.H.O.	Bhumi No. 1232
26	20.7.2019	Case Crime No. 0262/2019, U/S. 323, 342, 447, 384, 506 I.P.C., P.S.-Azeem Nagar, District Rampur	Noor Alam	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer Singh, Former S.H.O.	Bhumi No. 1319 Kha
27	3.8.2019	Case Crime No. 0295/2019, U/S. 506, 389, 447, 342, 323 I.P.C., P.S.-Azeem Nagar,	Asrar	(i) Azam Khan (ii) Aley Hasan Khan, Former C.O., City. (iii) Kushalveer	Gata No. 1230

		District Rampur		Singh, Former S.H.O	

3. Five Petitions being Criminal Misc. Application U/S 482 Nos.9832 of 2021 (Aley Hasan Khan vs. State of U.P. and 31 others), 16848 of 2020 (Mohd. Fasih Zaidi vs. State of U.P. and 27 others), 1149 of 2021 (Mustaq Ahmad Siddqui vs. State of U.P. and 27 others), 10254 of 2021 (Adeeb Azam vs. State of U.P. and 27 others) and 9822 of 2021 (Nikhat Aflakh vs. State of U.P. and 27 others) have been filed with the prayers for quashing of multiple charge sheets and proceedings of cases which are as follows (Table-B) :-

Table-B

l. No.	**Criminal Misc. Application U/S 482 Nos.**	**Prayers:-**
1	9832 of 2021, Aley Hasan Khan vs. State of U.P. and 31 others	For quashing and stay the proceedings of :- 1. Sessions Case No. 311of 2020, Case Crime No. 224 of 2019, u/s 120B, 342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 2. Sessions Case No. 315 of 2020, Case Crime No. 226 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 504, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 3. Sessions Case No. 328 of 2020, Case Crime No. 227 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 4. Sessions Case No. 335 of 2020, Case Crime No. 228 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 504, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 5. Sessions Case No. 312 of 2020, Case Crime No. 232 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 6. Sessions Case No. 320 of 2020, Case Crime No. 235 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 504, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 7. Sessions Case No. 336 of 2020, Case Crime No. 236 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 8. Sessions Case No. 324 of 2020, Case Crime No. 237 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 9. Sessions Case No. 337 of 2020, Case Crime No. 238 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 10. Sessions Case No. 310 of 2020, Case Crime No. 239 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 11.Sessions Case No. 332 of 2020, Case Crime No. 240 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 12. Sessions Case No. 322 of 2020, Case Crime No. 241 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur.

		13.Sessions Case No. 316 of 2020, Case Crime No. 242 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 14. Sessions Case No. 334 of 2020, Case Crime No. 248 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 15. Sessions Case No. 331 of 2020, Case Crime No. 249 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 16. Sessions Case No. 338 of 2020, Case Crime No. 250 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 17. Sessions Case No. 321 of 2020, Case Crime No. 251 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 18. Sessions Case No. 325 of 2020, Case Crime No. 252 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 19. Sessions Case No. 326 of 2020, Case Crime No. 253 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 20. Sessions Case No. 333 of 2020, Case Crime No. 254 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 21. Sessions Case No. 329 of 2020, Case Crime No. 255 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 22. Sessions Case No. 318 of 2020, Case Crime No. 256 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 23. Sessions Case No. 330 of 2020, Case Crime No. 257 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 504, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 24. Sessions Case No. 314 of 2020, Case Crime No. 260 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 25. Sessions Case No. 319 of 2020, Case Crime No. 261 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 26. Sessions Case No. 327 of 2020, Case Crime No. 262 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur. 27. Sessions Case No. 317 of 2020, Case Crime No. 295 of 2019, u/s 120B, 323,342, 386, 389, 420, 447, 506 I.P.C., P.S.- Azeem Nagar, District Rampur.			
			2	16848 of 2020, Mohd. Fasih Zaidi vs. State of	To quash supplementary charge sheet as well as summoning orders dated 16.9.2020 and the entire proceedings of :-

	U.P. and 27 others	1. Special Case No. 122 of 2020, Case Crime No. 224 of 2019. 2. Special Case No. 924 of 2020, Case Crime No. 226 of 2019. 3. Special Case No. 936 of 2020, Case Crime No. 227 of 2019. 4. Special Case No. 123 of 2020, Case Crime No. 228 of 2019. 5. Special Case No. 935 of 2020, Case Crime No. 232 of 2019. 6. Special Case No. 118 of 2020, Case Crime No. 235 of 2019. 7. Special Case No. 127 of 2020, Case Crime No. 236 of 2019. 8. Special Case No. 927 of 2020, Case Crime No. 237 of 2019. 9. Special Case No. 126 of 2020, Case Crime No. 238 of 2019. 10. Special Case No. 125 of 2020, Case Crime No. 239 of 2019. 11. Special Case No. 124 of 2020, Case Crime No. 240 of 2019. 12. Special Case No. 115 of 2020, Case Crime No. 241 of 2019. 13.Special Case No. 121 of 2020, Case Crime No. 242 of 2019. 14. Special Case No. 117 of 2020, Case Crime No. 248 of 2019. 15. Special Case No. 933 of 2020, Case Crime No. 249 of 2019. 16. Special Case No. 929 of 2020, Case Crime No. 250 of 2019. 17. Special Case No. 921 of 2020, Case Crime No. 251 of 2019. 18. Special Case No. 120 of 2020, Case Crime No. 252 of 2019. 19. Special Case No. 128 of 2020, Case Crime No. 253 of 2019. 20. Special Case No. 926 of 2020, Case Crime No. 254 of 2019. 21. Special Case No. 930 of 2020, Case Crime No. 255 of 2019. 22. Special Case No. 925 of 2020, Case Crime No. 256 of 2019. 23. Special Case No. 934 of 2020, Case Crime No. 257 of 2019. 24. Special Case No. 928 of 2020, Case Crime No. 260 of 2019. 25. Special Case No. 931 of 2020, Case Crime No. 261 of 2019. 26. Special Case No. 932 of 2020, Case Crime No. 262 of 2019. 27. Special Case No. 937 of 2020, Case Crime No. 295 of 2019.
3	1149 of 2021, Mustaq Ahmad Siddiqui vs. State of U.P. and 27 others	To quash supplementary charge sheet as well as summoning orders dated 16.9.2020 and the entire proceedings of :- 1. Special Case No. 122 of 2020, Case Crime No. 224 of 2019. 2. Special Case No. 924 of 2020, Case Crime No. 226 of 2019. 3. Special Case No. 936 of 2020, Case Crime No. 227 of 2019. 4. Special Case No. 123 of 2020, Case Crime No. 228 of 2019. 5. Special Case No. 935 of 2020, Case Crime No. 232 of 2019. 6. Special Case No. 118 of 2020, Case Crime No. 235 of 2019. 7. Special Case No. 127 of 2020, Case Crime No. 236 of 2019. 8. Special Case No. 927 of

		2020, Case Crime No. 237 of 2019. 9. Special Case No. 126 of 2020, Case Crime No. 238 of 2019. 10. Special Case No. 125 of 2020, Case Crime No. 239 of 2019. 11. Special Case No. 124 of 2020, Case Crime No. 240 of 2019. 12. Special Case No. 115 of 2020, Case Crime No. 241 of 2019. 13.Special Case No. 121 of 2020, Case Crime No. 242 of 2019. 14. Special Case No. 117 of 2020, Case Crime No. 248 of 2019. 15. Special Case No. 933 of 2020, Case Crime No. 249 of 2019. 16. Special Case No. 929 of 2020, Case Crime No. 250 of 2019. 17. Special Case No. 921 of 2020, Case Crime No. 251 of 2019. 18. Special Case No. 120 of 2020, Case Crime No. 252 of 2019. 19. Special Case No. 128 of 2020, Case Crime No. 253 of 2019. 20. Special Case No. 926 of 2020, Case Crime No. 254 of 2019. 21. Special Case No. 930 of 2020, Case Crime No. 255 of 2019. 22. Special Case No. 925 of 2020, Case Crime No. 256 of 2019. 23. Special Case No. 934 of 2020, Case Crime No. 257 of 2019. 24. Special Case No. 928 of 2020, Case Crime No. 260 of 2019. 25. Special Case No. 931 of 2020, Case Crime No. 261 of 2019. 26. Special Case No. 932 of 2020, Case Crime No. 262 of 2019. 27. Special Case No. 937 of 2020, Case Crime No. 295 of 2019.
4	10254 of 2021, Adeeb Azam vs. State of U.P. and 27 others	To quash the supplementary charge sheet dated 3.9.2020 as well as summoning orders dated 16.9.2020 as well as entire proceedings of :- 1. Special Case No. 122 of 2020, Case Crime No. 224 of 2019. 2. Special Case No. 104 of 2020, Case Crime No. 226 of 2019. 3. Special Case No. 114 of 2020, Case Crime No. 227 of 2019. 4. Special Case No. 123 of 2020, Case Crime No. 228 of 2019. 5. Special Case No. 103 of 2020, Case Crime No. 232 of 2019. 6. Special Case No. 118 of 2020, Case Crime No. 235 of 2019. 7. Special Case No. 127 of 2020, Case Crime No. 236 of 2019. 8. Special Case No. 112 of 2020, Case Crime No. 237 of 2019. 9. Special Case No. 126 of 2020, Case Crime No. 238 of 2019. 10. Special Case No. 125 of 2020, Case Crime No. 239 of 2019. 11. Special Case No. 124 of 2020, Case Crime No. 240 of 2019. 12.Special Case No. 115 of 2020, Case Crime No. 241 of 2019. 13. Special Case No. 121 of 2020, Case Crime No. 242 of 2019. 14. Special Case No. 117 of 2020, Case Crime No. 248 of 2019. 15. Special Case No. 106 of 2019, Case Crime No. 249

		of 2019. 16. Special Case No. 108 of 2019, Case Crime No. 250 of 2019. 17. Special Case No. 107 of 2019 Case Crime No. 251 of 2019. 18. Special Case No. 120 of 2020, Case Crime No. 252 of 2019. 19. Special Case No. 128 of 2020, Case Crime No. 253 of 2019. 20. Special Case No. 102 of 2020, Case Crime No. 254 of 2019. 21. Special Case No. 110 of 2019, Case Crime No. 255 of 2019. 22. Special Case No. 105 of 2019, Case Crime No. 256 of 2019. 23. Special Case No. 125 of 2020, Case Crime No. 257 of 2019. 24. Special Case No. 113 of 2020, Case Crime No. 260 of 2019. 25. Special Case No. 109 of 2019, Case Crime No. 261 of 2019. 26. Special Case No. 111 of 2019, Case Crime No. 262 of 2019. 27. Special Case No. 129 of 2020, Case Crime No. 295 of 2019. 28. Special Case No. 134 of 2020, Case Crime No. 46 of 2019. 29. Special Case No. 135 of 2020, Case Crime No. 53 of 2019. All cases are under Sections 447, 420, 120B I.P.C.
5	9822 of 2021, Nikhat Aflakh vs. State of U.P. and 27 others	To quash the supplementary charge sheet dated 3.9.2020, summoning orders dated 16.9.2020 and the entire proceedings of :- 1. Special Case No. 122 of 2020, Case Crime No. 224 of 2019. 2. Special Case No. 104 of 2020, Case Crime No. 226 of 2019. 3. Special Case No. 114 of 2020, Case Crime No. 227 of 2019. 4. Special Case No. 123 of 2020, Case Crime No. 228 of 2019. 5. Special Case No. 103 of 2020, Case Crime No. 232 of 2019. 6. Special Case No. 118 of 2020, Case Crime No. 235 of 2019. 7. Special Case No. 127 of 2020, Case Crime No. 236 of 2019. 8. Special Case No. 112 of 2020, Case Crime No. 237 of 2019. 9. Special Case No. 126 of 2020, Case Crime No. 238 of 2019. 10. Special Case No. 125 of 2020, Case Crime No. 239 of 2019. 11. Special Case No. 124 of 2020, Case Crime No. 240 of 2019. 12.Special Case No. 115 of 2020, Case Crime No. 241 of 2019. 13. Special Case No. 121 of 2020, Case Crime No. 242 of 2019. 14. Special Case No. 117 of 2020, Case Crime No. 248 of 2019. 15. Special Case No. 106 of 2019, Case Crime No. 249 of 2019. 16. Special Case No. 108 of 2019, Case Crime No. 250 of 2019. 17. Special Case No. 107 of 2019 Case Crime No. 251 of 2019. 18. Special Case No. 120 of 2020, Case Crime No. 252 of 2019. 19. Special Case No. 128 of 2020, Case Crime No. 253 of 2019. 20. Special Case No. 102 of 2020, Case Crime No. 254

		of 2019. 21. Special Case No. 110 of 2019, Case Crime No. 255 of 2019. 22. Special Case No. 105 of 2019, Case Crime No. 256 of 2019. 23. Special Case No. 125 of 2020, Case Crime No. 257 of 2019. 24. Special Case No. 113 of 2020, Case Crime No. 260 of 2019. 25. Special Case No. 109 of 2019, Case Crime No. 261 of 2019. 26. Special Case No. 111 of 2019, Case Crime No. 262 of 2019. 27. Special Case No. 129 of 2020, Case Crime No. 295 of 2019. 28. Special Case No. 134 of 2020, Case Crime No. 46 of 2019. 29. Special Case No. 135 of 2020, Case Crime No. 53 of 2019. All cases are under Sections 447, 420, 120B I.P.C.

4. In so far as the applications being Criminal Misc. Application U/S 482 Nos. 9832 of 2021 (Aley Hasan Khan vs. State of U.P. and 31 others), 16848 of 2020 (Mohd. Fasih Zaidi vs. State of U.P. and 27 others), 1149 of 2021 (Mustaq Ahmad Siddqui vs. State of U.P. and 27 others), 10254 of 2021 (Adeeb Azam vs. State of U.P. and 27 others) and 9822 of 2021 (Nikhat Aflakh vs. State of U.P. and 27 others) in **Table-B,** shows that they have been filed with the prayer to quash multiple criminal cases.

During the course of arguments an option was given to the respective counsels to consider the same and file separate petitions for different case crime numbers, but learned counsels pressed to argue the matters.

5. In view of the same and as stated in **Table-B**, it is evident that different case crime numbers have been prayed for quashing in a single petition of which the first informants are different and the land in dispute are different and as such the said applications u/s 482 Cr.P.C. are **dismissed** on the said count only.

6. The applicants of the said cases shall have liberty to take up appropriate remedy as advised.

7. The prosecution case in brief as per the first information report of Case Crime No. 224 of 2019 is as follows:-

The First Information Report was lodged on 12.9.2019 by Manoj Kumar, Revenue Inspector, Area Khaud, Tehsil Sadar, Rampur, under Sections 384, 506, 447, 342 I.P.C., Police Station Azeem Nagar, District Rampur against former minister Mohd. Azam Khan and Aley Hasan Khan is that Mohammad Ali, Vandey Ali and Yaseen sons of Dhoomi, have given a complaint in which after inquiry it transpired that in village Seegankhera, Tehsil Sadar, District Rampur, Gata No. 1239 area 0.114 hectare entered in the name of Abrar Husain, Asrar Husain sons of Abdul, Zumma, Namey Ali, Nazakat sons of Mohammad Raza and Abdul Rahman son of Wali Mohammad, Lallan, Sharif Ahmad, Jeemal Ahmad sons of Jhunda residents of Village Majra Aliaganj, Gata No. 1232 area 0.126 hectare entered in the name of Shayada wife of Ahmad Navi, Ahmad Navi son of Mulla Bahadur, Sharif Mohammad, Ahmad, Ahmad Ali, Bandey Ali, Riyazul Navi, Naseer, Zakir sons of Mohammad Navi and Smt. Reshma wife of Zakir Ali and Maulana Mohammad Ali Jauhar Trust, Gata No. 1415 area 0.089 hectare entered

in the name of Bhullan son of Abdul Hakim, Mohammad Haneef, Mohammad Yaseen, Mohammad Mustkeem, Mohammad Naim sons of Ibrahim, Abdul Waheed, Rahees Ahmad, Zareef Ahmad sons of Abdul Zafar@ Gafoor, Zakir, Naseer, Aarif, Aasif, Imran sons of Ahmad Ashak, Anandi wife of Ahmad Ashak, Rashid, Sajid, Danish, Monish sons of Mohammad Ahmad, Smt. Halam Begum wife of Mohammad Ahmad residents of Majra Aliaganj and Maulana Mohammad Ali Jauhar Trust, Gata No. 1253/1 area 0.089 hectare entered in the name of Nazim, Nabbu, Mohammad Rafik sons of Mohammad Yaseen, Smt. Begum wife of Mohammad Yaseen, Mohammad Bilal, Mohammad Hilal, Mohammad Munav, Mohammad Umar sons of Mohammad Salim, Shakeela Begum wife of Mohammad Salim residents of Majra Aliaganj, Gata No. 1319Kha area 1.294 hectare entered in the name of Mohammad Aleem, Noor Alam, Amir Alam sons of Abdul Husain, Mumtaz Begum wife of Abdul Husain, Mohammad Hasan son of Ahmad, Matloob son of Chhote, Shahjahan wife of Chhote residents of Majra Aliaganj are recorded as *"Sankramniya Bhoomidhars'* in the revenue records. The respective farmers have given applications with regards to the said land along with affidavits on the basis of which their statements were recorded in which the farmers stated that former minister Azam Khan and former C.O. (City) Aley Hasan Khan were forcing them to execute sale deeds in favour of the University and threatened them that they would be implicated in false cases of charas and smack and they were illegally detained for many days in lock up. They did not execute the sale deeds in favour of the University in spite of it, but former minister Azam Khan and former C.O. (City) Aley Hasan Khan forcibly took possession of their lands and included it in the campus of the University. Whenever they used to ask for their property they used to get life threats and used to chase them away. In the inquiry it transpired that Gata Nos. 1230, 1232, 1415 are within the walls of Maulana Mohammad Ali Jauhar University whereas Gata Nos. 1253/1 and 1319Kha are outside the boundary wall. The land of farmers mentioned in their applications have been forcibly taken into possession by former minister Azam Khan and former C.O. (City) Aley Hasan Khan by threatening them and stating of falsely implicating them in false cases. It is further stated that before it, former minister Azam Khan had illegally taken 5.000 hectare land of river which was also included in the campus of the University within its boundary wall of which a First Information Report has already been lodged. From the above facts it is clear that they have forcibly taken into possession private and Government land by forging records. It is prayed that looking to the facts as stated above a First Information Report be lodged against Mohammad Azam Khan, Chancellor, and Aley Hasan Khan, Chief Security Officer, Mohammad Ali Jauhar University and appropriate action be taken.

Further a First Information Report was lodged as Case Crime No. 226 of 2019, under Sections 323, 342, 447, 384, 504, 506 I.P.C., Police Station Azeem Nagar, District Rampur by Yaseen son of Dhoomi, against former minister Azam Khan and former C.O. (City) Aley Hasan Khan on 13.7.2019 alleging therein that he is a resident of village Seegankhera Majra Aliaganj. He is recorded as a co-holder in land no. 1232 in village Seegankhera. On the said land agricultural work is done by him from which he nurtures his family. At the time of construction of Mohammad Ali

Jauhar University former minister Azam Khan and former C.O. (City) Aley Hasan Khan pressurized him to give his land to them, assaulted him and detained him in a lock up and further threatened him that in the event he does not give the land he would be implicated in cases of charas and afeem and would be arrested. Even torture was given to the ladies in his family and children. He did not execute the sale deed in favour of the University but his land was included in the land of the University within its boundary wall. He prays that a report be lodged against former minister Azam Khan and former C.O. (City) Aley Hasan Khan. Justice be done.

The other First Information Reports being 25 in number are by different informants with regards to their different land of which numbers are stated there, the details of which have already been stated in Table-A.

8. The court concerned on receipt of charge sheet took cognizance upon the same and summoned the applicants and other persons named therein in the respective cases to face trial. The details of the order taking cognizance and summoning are as follows (Table-C) :-

Table-C

Sl. No.	**Criminal Misc. Application U/S 482 Nos.**	**Case Crime No., Sections, Police Station, District**	**Charge Sheet No., sections, accused named therein**	**Date of order taking cognizance and summoning**
1	17101/2022	Case Crime No. 241 of 2019, u/ss. 323, 342, 447, 384, 506 I.P.C., P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 65A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzeen Fatma, iii. Modh. Abdulla Azam Khan, iv. Adeeb Azam Khan, v. Sushri Nikhat Aflak, vi. Salim Kasim, vii. Mustak Ahmad Siddiqui, viii. Zakiurrahman Siddiqui ix. Mohd. Fasih Zaidi	16.9.2020
2	17097/2020	Case Crime No.237 of 2019, u/ss. 323, 342, 447, 384, 506 I.P.C., P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 79A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzeen Fatma, iii. Modh. Abdulla Azam Khan, iv. Adeeb Azam Khan, v. Sushri Nikhat Aflak,	16.9.2020

			vi. Salim Kasim, vii. Mustak Ahmad Siddiqui, viii. Zakiurrah man Siddiqui ix. Mohd. Fasih Zaidi	
3	17099/20 20	Case Crime No.224 of 2019, u/ss. 342, 447, 384, 506 I.P.C., P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 84A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzeen Fatma, iii. Modh. Abdulla Azam Khan, iv. Adeeb Azam Khan, v. Sushri Nikhat Aflak, vi. Salim Kasim, vii. Mustak Ahmad Siddiqui, viii. Zakiurrah man Siddiqui ix. Mohd. Fasih Zaidi	16.9.2 020
4	17100/20 20	Case Crime No.253 of 2019, u/ss. 323, 342, 384, 447, 506 I.P.C., P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 286A/201 9, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzeen Fatma, iii.Modh. Abdulla Azam Khan, iv. Adeeb Azam Khan, v. Sushri Nikhat Aflak, vi. Salim Kasim, vii.Mustak Ahmad Siddiqui, viii. Zakiurrah man Siddiqui ix. Mohd. Fasih Zaidi	16.9.2 020
5	17102/20 20	Case Crime No.255 of 2019, u/ss. 323, 342,384 ,447, 506 I.P.C., P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 288A/201 9, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzeen Fatma, iii. Modh. Abdulla Azam Khan, iv. Adeeb Azam Khan, v. Sushri Nikhat Aflak,	16.9.2 020

			vi. Salim Kasim, vii. Mustak Ahmad Siddiqui, viii. Zakiurrah man Siddiqui ix. Mohd. Fasih Zaidi	
6	17103/20 20	Case Crime No.255 of 2019, u/ss. 323, 506, 447,384 ,342 I.P.C., P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 288A/201 9, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzeen Fatma, iii. Modh. Abdulla Azam Khan, iv. Adeeb Azam Khan, v. Sushri Nikhat Aflak, vi. Salim Kasim, vii. Mustak Ahmad Siddiqui, viii. Zakiurrah man Siddiqui ix. Mohd. Fasih Zaidi	16.9.2 020
7	17127/20 20	Case Crime No. 241 of 2019, u/ss. 323, 342, 447, 384, 506 I.P.C., P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 65A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzeen Fatma, iii. Modh. Abdulla Azam Khan, iv. Adeeb Azam Khan, v. Sushri Nikhat Aflak, vi. Salim Kasim, vii. Mustak Ahmad Siddiqui, viii. Zakiurrah man Siddiqui ix. Mohd. Fasih Zaidi	16.9.2 020
8	17128/20 20	Case Crime No. 224 of 2019, u/ss. 342, 447, 506,384 I.P.C., P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 84A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzeen Fatma, iii. Modh. Abdulla Azam Khan, iv. Adeeb Azam Khan, v. Sushri Nikhat	16.9.2 020

			Aflak, vi. Salim Kasim, vii. Mustak Ahmad Siddiqui, viii. Zakiurrahman Siddiqui ix. Mohd. Fasih Zaidi	
9	17131/2020	Case Crime No. 253 of 2019, u/ss. 323, 342, 384,447, 506 I.P.C., P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 286A/2019, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzeen Fatma, iii. Modh. Abdulla Azam Khan, iv. Adeeb Azam Khan, v. Sushri Nikhat Aflak, vi. Salim Kasim, vii. Mustak Ahmad Siddiqui, viii. Zakiurrahman Siddiqui ix. Mohd. Fasih Zaidi	16.9.2020
10	17251/2020	Case Crime No. 237 of 2019, u/ss. 323, 342,447,384, 506 I.P.C., P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 79A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzeen Fatma, iii. Modh. Abdulla Azam Khan, iv. Adeeb Azam Khan, v. Sushri Nikhat Aflak, vi. Salim Kasim, vii. Mustak Ahmad Siddiqui, viii. Zakiurrahman Siddiqui ix. Mohd. Fasih Zaidi	
11	17257/2020	Case Crime No. 46 of 2020, u/ss. 447 I.P.C. and 2/3 Prevention of Damage to Public Property Act, P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 145A/2020, dated 11.9.2020, U/S 447 I.P.C. and 2/3 Prevention of Damage to Public Property Act, i.Naseer Ahmad Khan, ii. Adeeb Azam Khan, iii.Sushri Nikhat	29.9.2020

			Aflak, iv. Salim Kasim, v. Mustak Ahmad siddiqui, vi. Zakiurrahman Siddiqui, vii. Mohd. Fasih Zaidi	
12	17263/2020	Case Crime No.312 of 2019, u/s 3 Prevention of Damage to Public Property Act and Sections 120B, 201, 409, 447, 471, 468, 467, 420 I.P.C., P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 119A/2020, dated 28.9.2020, U/S 420, 447, 120B I.P.C. and 3 Prevention of Damage to Public Property Act, 1984, i. Saiyed Gulam Sayyadan Rizvi, ii. Rahmat Husain Zaidi, iii. Uvaid Ul Haq@Haq Rampuri, iv.Masood Khan@Guddu, v. Nasir Ahmad Khan, vi. Nikhat Aflak, vii. Mohd. Adeeb Azam Khan, viii. Salim Kasim, ix. Mustak Ahmad Siddiqui, x. Mohd. Fasih Zaidi xi. Z. R. Siddiqui.	28.9.2020
13	17360/2020	Case Crime No.256 of 2019, u/ss. 323, 342, 384, 447, 506 I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 68A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
14	17363/2020	Case Crime No.254 of 2019, u/ss. 323, 342, 384, 447, 506 I.P.C. P.S. Azeem	Charge Sheet No. 287A/2019, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin	16.9.2020

		Nagar, District Rampur.	Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	
15	17416/2020	Case Crime No.241 of 2019, u/ss. 323, 342, 447,384, 506 I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 65A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
16	17655/2020	Case Crime No.226 of 2019, u/ss. 323, 342,447,406, 389, 386, 420, 120B, 504 I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 64A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
17	17659/2020	Case Crime No.260 of 2019, u/ss. 323, 342, 447,384, 506 I.P.C. P.S. Azeem Nagar, District Rampur	Charge Sheet No. 70A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd.	16.9.2020

		.	Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	
18	17663/2020	Case Crime No.239 of 2019, u/ss. 342, 447,384, 506 I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 82A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
19	17669/2020	Case Crime No.232 of 2019, u/ss. 342, 384, 447, 506 I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 71A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
20	17673/2020	Case Crime No.250 of 2019, u/ss. 323, 342, 384, 447, 506 I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 76A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam	16.9.2020

			Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	
21	17677/20 20	Case Crime No.239 of 2019, u/ss. 342, 447,384 , 506 I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 82A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2 020
22	17681/20 20	Case Crime No.226 of 2019, u/ss. 323, 342, 447,384 , 504, 506 I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 64A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2 020
23	17683/20 20	Case Crime No.232 of 2019, u/ss. 342, 384, 447, 506 I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 71A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb	16.9.2 020

			Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	
24	17998/2020	Case Crime No. 250 of 2019, u/ss. 323, 342, 384, 447, 506 I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 76A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
25	17999/2020	Case Crime No.260 of 2019, u/ss. 323, 342, 447, 384,506 I.P.C. P.S. Azeem Nagar, District Rampur.	70A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	
26	18942/2020	Case Crime No.254 of 2019, u/ss. 323, 342, 384, 447, 506 I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 287A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan,	16.9.2020

			v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	
27	18948/20 20	Case Crime No.256 of 2019, u/ss. 323, 342, 384, 447, 506 I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 68A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2 020
28	18954/20 20	Case Crime No.250 of 2019, u/ss. 323, 342, 384, 447, 506 I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 76A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2 020
29	19070/20 20	Case Crime No. 242 of 2019, u/ss. 342, 447, 384,506 I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 74A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat	16.9.2 020

			Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	
30	19071/2020	Case Crime No.242 of 2019, u/ss. 342, 447,384, 506 I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 74A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
31	19072/2020	Case Crime No.254 of 2019, u/ss. 323, 342, 384, 447, 506 I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 287A/2019, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
32	19074/2020	Case Crime No.255 of 2019, u/ss. 323, 342, 384, 447, 506 I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 288A/2019, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim	16.9.2020

			Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	
33	19078/20 20	Case Crime No.242 of 2019, u/ss. 342, 447,384 , 506 I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 74A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2 020
34	19710/20 20	Case Crime No. 242 of 2019, u/ss. 342, 447, 506,	Charge Sheet No. 84A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C.	16.9.2 020
		384, I.P.C. P.S. Azeem Nagar, District Rampur .	i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	
35	19751/20 20	Case Crime No. 236 of 2019, u/ss. 323, 342, 447, 384,506 , I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 80A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak	16.9.2 020

			Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	
36	19785/20 20	Case Crime No. 238 of 2019, u/ss. 323, 342, 447, 384,506 , I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 81A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2 020
37	19904/20 20	Case Crime No. 262 of 2019, u/ss. 323, 342, 447, 384,506 , I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 72A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2 020
38	19907/20 20	Case Crime No. 251 of 2019, u/ss. 323, 342, 384, 447, 506, I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 77A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui,	16.9.2 020

			viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	
39	20167/2020	Case Crime No. 260 of 2019, u/ss. 323, 342, 447, 384,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 70A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
40	20172/2020	Case Crime No. 237 of 2019, u/ss. 323, 342, 447, 384,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 79A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
41	20176/2020	Case Crime No. 248 of 2019, u/ss. 342, 447, 384,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 75A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah	16.9.2020

			man Siddiqui, ix. Mohd. Fasih Zaidi	
42	20180/2020	Case Crime No. 235 of 2019, u/ss. 342, 447, 384, 504, 506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 73A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad Siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
43	20188/2020	Case Crime No. 261 of 2019, u/ss. 323, 342, 447, 384,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 86A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
44	20193/2020	Case Crime No. 228 of 2019, u/ss. 323, 342, 447, 384,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 69A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui,	16.9.2020

			ix. Mohd. Fasih Zaidi	
45	20195/2020	Case Crime No. 249 of 2019, u/ss. 323, 342, 447, 384, 506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 67A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
46	20203/2020	Case Crime No. 262 of 2019, u/ss. 323, 342, 447, 384,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 72A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
47	20211/2020	Case Crime No. 256 of 2019, u/ss. 323, 342,, 384, 447, 506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 68A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih	16.9.2020

			Zaidi	
48	20228/2020	Case Crime No. 261 of 2019, u/ss. 323, 342, 447, 384, 506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 86A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
49	20234/2020	Case Crime No. of 2019, u/ss. 323, 342, 384,447,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 78A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
50	20238/2020	Case Crime No. 240 of 2019, u/ss. 323, 342, 447, 384, 506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 63A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
51	155/2021	Case	Charge	16.9.2

		Crime No. 239 of 2019, u/ss. 342, 447, 384, 506, I.P.C. P.S. Azeem Nagar, District Rampur.	Sheet No. 82A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	020
52	168/2021	Case Crime No. 236 of 2019, u/ss. 323, 342, 447, 384, 506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 80A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
53	249/2021	Case Crime No. 232 of 2019, u/ss. 342, 384, 447,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 71A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
54	255/2021	Case Crime No. 226	Charge Sheet No. 64A/2020,	16.9.2020

		of 2019, u/ss. 323, 342, 447, 384, 504, 506 I.P.C. P.S. Azeem Nagar, District Rampur.	dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	
55	262/2021	Case Crime No. 238 of 2019, u/ss.323, 342, 447,384,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 81A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
56	276/2021	Case Crime No. 249 of 2019, u/ss. 323, 342, 447, 384,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 67A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
57	281/2021	Case Crime No. 253 of 2019, u/ss.	Charge Sheet No. 286A/2019, dated 3.9.2020,	16.9.2020

		323, 342, 384, 447,506, I.P.C. P.S. Azeem Nagar, District Rampur.	U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	
58	290/2021	Case Crime No. 240 of 2019, u/ss. 323, 342,, 447, 384 506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 63A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
59	304/2021	Case Crime No. 248 of 2019, u/ss. 342,447,384 ,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 75A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
60	307/2021	Case Crime No. 2 of 2019, u/ss. 342, 447,384	Charge Sheet No. 73A/2020, dated 3.9.2020, U/S 420, 447, 120B	16.9.2020

		,506, I.P.C. P.S. Azeem Nagar, District Rampur.	I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	
61	311/2021	Case Crime No. 251 of 2019, u/ss. 323, 342, 384, 447,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 77A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
62	317/2021	Case Crime No. 252 of 2019, u/ss. 323, 342, 384, 447,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 78A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
63	321/2021	Case Crime No. 228 of 2019, u/ss.323, 342, 447, 384,506, I.P.C.	Charge Sheet No. 69A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer	16.9.2020

		P.S. Azeem Nagar, District Rampur.	Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	
64	355/2021	Case Crime No. 53 of 2020, u/s 447 I.P.C., 2/3 Prevention of Damage to Public Property Act, P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 145A/2020, dated 11.9.2020, U/S 447 I.P.C. and 2/3 Prevention of Damage to Public Property Act, i.Naseer Ahmad Khan, ii.Adeeb Azam Khan, iii. Sushri Nikhat Aflak, iv. Salim Kasim, v. Mustak Ahmad siddiqui,	29.9.2020
65	357/2021	Case Crime No. 46 of 2020, u/s 447 I.P.C., 2/3 Prevention of Damage to Public Property Act, P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 142A/2020, dated 11.9.2020, U/S 447 I.P.C. and 2/3 Prevention of Damage to Public Property Act, i.Naseer Ahmad Khan, ii.Adeeb Azam Khan, iii. Sushri Nikhat Aflak, iv. Salim Kasim, v. Mustak Ahmad siddiqui, vi. Zakiurrahman Siddiqui, vii. Mohd. Fasih Zaidi	29.9.2020
66	358/2021	Case Crime No. 227 of 2019, u/ss.323, 342, 447, 384,506, I.P.C. P.S. Azeem Nagar, District	Charge Sheet No. 66A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin	16.9.2020

		Rampur.	Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	
67	1126/2021	Case Crime No. 295 of 2019, u/ss.323, 342, 447, 389,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 83A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
68	1140/2021	Case Crime No. 227 of 2019, u/ss.323, 342, 447, 384,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 66A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrahman Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2020
69	1141/2021	Case Crime No. 295 of 2019, u/ss.323, 342, 447, 389,506, I.P.C. P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 83A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd.	16.9.2020

			Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	
70	1143/202 1	Case Crime No. 46 of 2020, u/ss. 447 I.P.C. and 2/3 Preventi on of Damage to Public Propert y Act, P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 142A/202 0, dated 3.9.2020, U/S 447 I.P.C. and 2/3 Preventio n of Damage to Public Property Act, i.Naseer Ahmad Khan, ii. Adeeb Azam Khan, iii. Sushri Nikhat Aflak, iv. Salim Kasim, v. Mustak Ahmad siddiqui, vi. Zakiurrah man Siddiqui, vii. Mohd. Fasih	29.9.2 020

			Zaidi	
71	1398/202 1	Case Crime No. 257 of 2019, u/ss. 342, 384, 447, 504, 506 I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 85A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	16.9.2 020
72	1404/202 1	Case Crime No. 257 of 2019, u/ss. 342, 384, 447, 504, 506 I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 85A/2020, dated 3.9.2020, U/S 420, 447, 120B I.P.C. i.Naseer Ahmad Khan, ii. Dr. Tanzin Fatma, iii. Mohd. Abdulla Azam Khan	16.9.2 020

			iv.Adeeb Azam Khan, v.Sushri Nikhat Aflak, vi. Salim Kasim, vii Mustak Ahmad siddiqui, viii. Zakiurrah man Siddiqui, ix. Mohd. Fasih Zaidi	
73	2911/202 1	Case Crime No. 53 of 2020, u/s 447 I.P.C. and 2/3 Preventi on of Damage to Public Propert y Act, P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 145A/202 0, dated 11.9.2020, U/S 447I.P.C. and 2/3 Preventio n of Damage to Public Property Act, i.Naseer Ahmad Khan, ii. Adeeb Azam Khan, iii, Sushri Nikhat Aflak, iv Salim Kasim, v. Mustak Ahmad siddiqui, vi. Zakiurrah man Siddiqui, vii. Mohd. Fasih Zaidi	29.9.2 020
74	2916/202 1	Case Crime No. 312 of 2019, u/s 3 Preventi on of Damage to Public Propert y Act, 1984, Section s 120B, 201, 409, 447, 471, 468, 467, 420 I.P.C. P.S. Azeem Nagar, District Rampur .	Charge Sheet No. 119A/202 0, dated 28.9.2020, U/S 420, 447, 120B I.P.C. and 3 Preventio n of Damage to Public Property Act, 1984, i.Saiyyed Gulam Sayyeden Rizvi, ii. Rahmat Husain Zaidi, iii. Uvaid Ul Haq @ Haq Rampuri, iv. Masood Khan @ Guddu, v. Naseer Ahmad Khan, vi. Nikhat Aflak, vii. Mohd. Adeeb Azam Khan, viii. Salim Kasim, ix. Mustaq Ahmad Siddiqui, x. Mohd. Haseeb Zaidi xi. Z.R. Siddiqui	30.9.2 020
75	3039/202 1	Case Crime No. 46 of 2019, u/ss. 447 I.P.C. and 2/3	Charge Sheet No. 142A/202 0, dated 11.9.2020, U/S 447 I.P.C. and 2/3	29.9.2 020

		Prevention of Damage to Public Property Act, 1984, P.S. Azeem Nagar, District Rampur.	Prevention of Damage to Public Property Act, 1984, i.Naseer Ahmad Khan, ii. Adeeb Azam Khan, iii.Sushri Nikhat Aflak, iv. Salim Kasim, v. Mustak Ahmad siddiqui, vi. Zakiurrahman Siddiqui, vii. Mohd. Fasih Zaidi	
76	14212/2021	Case Crime No. 312 of 2019, u/ss. 420, 467, 468, 471, 447, 409, 201, 120B I.P.C. and 3 Prevention of Damage to Public Property Act, P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 119A/2020, dated 28.9.2020, U/S 420, 447, 120B I.P.C. and 3 Prevention of Damage to Public Property Act. i.Saiyyed Gulam Sayyeden Rizvi, ii. Rahmat Husain Zaidi, iii. Uvaid Ul Haq @ Haq Rampuri, iv. Masood	30.9.2020

			Khan @ Guddu, v. Naseer Ahmad Khan, vi. Nikhat Aflak, vii. Mohd. Adeeb Azam Khan, viii. Salim Kasim, ix. Mustaq Ahmad Siddiqui, x. Mohd. Haseeb Zaidi xi. Z.R. Siddiqui	
77	14851/2021	Case Crime No. 312 of 2019, u/ss. 420, 467, 468, 471, 447, 409, 201, 120B I.P.C. and 3 Prevention of Damage to Public Property Act, P.S. Azeem Nagar, District Rampur.	Charge Sheet No. 119A/2020, dated 28.9.2020, U/S 420, 447, 120B I.P.C. and 3 Prevention of Damage to Public Property Act. i.Saiyyed Gulam Sayyeden Rizvi, ii. Rahmat Husain Zaidi, iii. Uvaid Ul Haq @ Haq Rampuri, iv. Masood Khan @ Guddu, v. Naseer Ahmad Khan, vi. Nikhat	30.9.2020

			Aflak, vii. Mohd. Adeeb Azam Khan, viii. Salim Kasim, ix. Mustaq Ahmad Siddiqui, x. Mohd. Haseeb Zaidi xi. Z.R. Siddiqui	

9. Sri N.I. Jafri, learned Senior Advocate, assisted by Ms. Nasira Adil, learned counsel for the applicants Zaki Ur Rahman Siddiqui, Mohd. Fasih Zaidi, Salim Qasim and Naseer Ahmad Khan argued :-

(1) That Maulana Mohammad Ali Jauhar University was established in the year 2012 and it was granted status of a University by the State Government.

(2) That the applicants are not named in the First Information Reports. Implication of the applicants in the case is on the basis of purcha no. 66 dated 28.3.2020 of the case diary.

(3) That there is no date and time mentioned in the respective First Information Reports regarding occurrence.

(4) That the said First Information Reports have been lodged after an inordinate delay of about 13 years as the incident in question is said to have taken place in the year 2006 but the First Information Reports have been lodged in the year 2019.

(5) That the description of the property in the First Information Reports is already the subject matter in the First Information Report lodged as Case Crime No. 224 of 2019, under Sections 342, 447, 506, 384 I.P.C., P.S. Azeemnagar, District Rampur and as such are successive FIRs for the same offence.

(6) That the allegations in the present case have sameness and is of the same incident with the allegations in respect of which a case has already been registered as Case Crime No. 224 of 2019 thus the lodging of the First Information Reports is not permissible in law.

(7) That there is no allegation at all against the applicants which would constitute a cognizable offence.

(8) Even if all the material collected during investigation are taken to be true at their face value, no offence whatsoever is made out against the applicants.

(9) The lodging of the First Information Reports is because of political vendetta.

Learned counsel has placed reliance upon the following judgments to buttress his submissions:

(i) R.P. Kapur Vs. State of Punjab: AIR 1960 SC 866 (Para-6)

(ii) State of Haryana and others vs. Ch. Bhajanlal and others: (1992) AIR 604 (Para-108);

(iii) T.T. Antony vs. State of Kerala and others: 2001 SCC OnLine SC 805 (Para- 18,19, 20, 27, 28, 35);

(iv) Upkar Singh vs. Ved Prakash : 2005 SCC (Criminal) 211 (Para-9, 10, 16, 17);

(v) Arnab Ranjan Goswami vs. Union of India: (2020) 14 SCC 12 (Para-28, 29, 31, 53);

(vi) Prem Chand Singh vs. State of U.P.: 2020 SCC OnLine SC 144(Para- 2, 3, 5, 10, 11, 13);

(vii) State of Madhya Pradesh vs. Sheetla Sahai and others: 2009 SCC OnLine SC 1451 (Para- 37, 38, 39, 40, 44, 45);

(viii) Prabhu Chawla vs. State of Rajasthan and another : 2016 SCC OnLine SC 905 (Para- 5, 6, 7, 8);

(ix) Kishan Singh (Dead) through LRS vs. Gurpal Singh and others: 2009 SCC OnLine SC 1451 (Para- 9, 21, 22, 25);

(x) Dhariwal Tobacco Products Limited and others vs. State of Maharastra and another : (2009) 2 Supreme Court Cases 370 (Para- 1, 6, 7, 12).

(xi) Vijay Kumar Ghai and others vs. State of West Bengal and others: 2022 SCC OnLine SC 344, (Para- 15, 16, 17, 19, 20);

(xii) Issac Isanga Musumba and others vs. State of Maharastra and others: (2014) 15 SCC 579, (Para- 3, 7);

(xiii) Tarak Dash Mukharjee and others vs. State of U.P. and others: Criminal Appeal No. 1400 of 2022 (arising out of SLP (Crl.) No. 503 of 2020), (Para- 9, 11, 12, 13);

(xiv) Mitesh Kumar J. Sha vs. State of Karnataka and others: 2021 SCC Online SC 976 (Para- 41, 48);

(xv) State of Karnataka vs. Muniswamy and others : 1977 Supreme Court Cases (Cri) 404 (Para-8)

10. Sri Manish Tiwary, learned Senior Advocate assisted by Sri Syed Imran Ibrahim, learned counsel for the applicant Mohd. Fasih Zaidi in Criminal Misc. Application U/S 482 Nos. 16848 of 2020, 17263 of 2020 and 17257 of 2020 argued:-

(1) That multiple F.I.Rs. have been lodged against the applicant. The applicant is a member of the society. There is no concept of vicarious liability in criminal law and as such implication of the applicant is bad. The society was initially not made an accused which was done later on.

(2) That notice under Section 441 Cr.P.C. (as per U.P. Amendment) has not been given and as such proceedings under Section 447 Cr.P.C. cannot be drawn.

(3) That no offence at all is made out against the applicant.

(4) That the applicant has been implicated in the present case due to political vendetta with someone else. He is the victim of process.

He has placed reliance upon the following judgments to buttress his submissions:

(1) J. Anbazhagan vs. The Speaker, Tamil Nadu Legislative Assembly and Ors. : (2018) SCC OnLine Mad 1235 (Para- 29, 30);

(2) Shashimani Mishra vs. State of M.P. : I.L.R. (2019) M.P. 1397 (Para- 14, 15, 16);

(3) R.P. Kapur vs. State of Punjab: AIR 1960 SC 866 (Para- 6);

(4) Madhavrao Jiwaji Rao Scindia vs. Sambhajhirao Chandrojirao Angre : (1988) 1 SCC 692 (Para- 7);

(5) State of Haryana and others vs. Bhajan Lal and others: 1992 Supp (1) SCC 335 (Para- 102);

(6) Chilakamarthi Venkateswarlu and Anr. vs. State of Andhra Pradesh and Anr. : (2020) 17 SCC 595, (Para- 22);

(7) T.T. Antony vs. State of Kerela : (2001) 6 SCC 181(Para- 17, 18, 19, 20, 25, 27);

(8) Babubhai vs. State of Gujarat: (2010) 12 SCC 254 (Para- 20, 21);

(9) Anju Chaudhary vs. State of U.P. : (2013) 6 SCC 384(Para- 14);

(10) Amitbhai Anichandra Shah vs. C.B.I. : (2013) 6 SCC 348(Para- 58) ;

(11) S.K. Alagh vs. State of U.P. : (2008) 5 SCC 661 (Para- 14, 16, 19);

(12) Aneeta Hada vs. Godfather Travels and Tours Private Limited: (2012) 5 SCC 661 (Para- 58, 59);

(13) Sharad Kumar Sanghi vs. Sangita Rane : (2015) 12 SCC 781 (Para- 11, 13);

(14) GHCL Employees Stock Option Trust vs. Kranti Sinha: (2013) 4 SCC 505, (Para- 12, 14, 18, 19);

(15) Kranti Kumar vs. State of U.P. : Crl. Misc. Application U/S 482 No. 7050 of 2002 (Allahabad High Court), (Internal Page- 11);

(16) Kranti Kumar vs. State of U.P.: Crl. Misc. Application U/S 482 No. 7060 of 2002 (Allahabad High Court) (Internal Page- 7-8);

(17) Oanali Ismilji Sadikot vs. State of Gujarat : (2016) SCC OnLine Guj 10055 (Para- 63);

(18) Arnab Ranjan Goswami vs. Union of India : (2020) 14 SCC 51 (Para- 14);

(19) Arnab Ranjan Goswami vs. Union of India : (2020) 14 SCC 12 (Para- 37, 61.5);

(20) Amish Devgan vs. Union of India: (2021) 3 SCC 306 (Para- 4,5, 6);

(21) Amish Devgan vs. Union of India: (2021) 1 SCC 1 (Para- 126);

(22) Ketaki Chitale vs. State of Maharashtra: Criminal Misc. Writ Petition No. 1919 of 2022 (Bombay High Court) (Para- 3);

(23) Nikhil Shyamrao Bhamare vs. State of Maharashtra, Criminal Misc. Writ Petition No.1821 of 2022 (Bombay High Court), (Para- 3);

(24) Umesh Kumar vs. State of Andhra Pradesh : (2013) 10 SCC 591 (Para- 20).

11. Sri Rakesh Dubey, learned counsel for the applicant Mustaq Ahmad Siddiqui in Criminal Misc. Application U/S 482 Nos. 2911 of 2021, 2916 of 2021 and 3039 of 2021 argued :-

(1) That the applicant is a Member/Vice President (Honorary) of Maulana Mohammad Ali Jauhar Society.

(2) That he is an advocate by profession and aged about 78 years.

(3) That the trust was established on 24.4.1995 in the name and style of Maulana Mohammad Ali Jauhar Trust.

(4) That on 17.1.2005 name was changed to Maulana Mohammad Ali Jauhar Kalyankari Trust.

(5) That the applicant was inducted as Vice President (Honorary) in the year 2004-2005.

(6) That there is a delay of lodging of the F.I.Rs. The alleged incident is of the year 2006 of which First Information Reports have been lodged in the year 2019 which is after a lapse of 13 years.

(7) That no date and time of the alleged incident has been mentioned in the F.I.R. The same is vague.

(8) That the implication of the applicants is only because of political vendetta. The applicant is not beneficiary of the alleged transactions and no role has been assigned to him.

(9) That the society has not been made as an accused which was later on made an accused in the matter.

(10) That suits have been filed before Sub Divisional Magistrate, under Section 178 of U.P. Revenue Code, 2000 and as such proper forum would be of getting issues adjudicated before civil court.

He has placed reliance upon the following judgments to buttress his submissions:

(i) Krishna Lal Chawla and others vs. State of U.P. and another : LL2021 SC 145 (Para- 16, 20);

(ii) Mitesh Kumar J. Sha vs. State of Karnataka and others: LL 2021 SC 592 and

(iii) Amish Devgan vs. Union of India: (2021) 1 Supreme Court Cases (Crl.) 32

12. In rebuttal, Sri M.C. Chaturvedi, learned Senior Advocate/ Additional Advocate General, Sri S.K. Pal, learned Government Advocate assisted by Sri Jai Narayan, Sri Abhijit Mukherji, Sri Sanjay Kumar Singh, Sri Ankit Srivastava, learned counsels for the State of U.P., in reply to the submissions of learned counsels for applicants argued :-

(1) That the accused persons are the Members of so-called society. Beneficiary is the society and as such they cannot be said to be not beneficiaries of it.

(2) That the status of alleged society is not clear in itself. It is neither a trust as per the Trusts Act, 2019 nor a Society as per the Societies Registration Act, 1860.

(3) That the group of association of persons is registered under the Societies Registration Act before Sub Registrar (Society). Each member is accountable and will be a beneficiary of the same. The society is also an accused and a supplementary charge sheet has been submitted for it.

(4) That the members of society along with its Chairman are accountable for any act or omission of society.

(5) That an affidavit of Nabbu one of the first informants, was given to the Investigating Officer which forms part of case diary. He discloses the names of the accused persons involved in the matter.

(6) That in so far as the First Information Report lodged by Revenue Inspector is concerned, the same was lodged by him in his official capacity as he is only concern with revenue part of any transaction. Transactions as enumerated by him in his F.I.R. are with regards to non payment of stamp duty in the transactions.

(7) That the other F.I.Rs. have been lodged by the actual victims of the matter who have lost their property due to illegal acts of certain persons. They have their own cause of action and as such the said F.I.Rs. are maintainable.

(8) That every F.I.R. is an independent cause of action as there is an individual loss to every person. Due to illegal acts property of the said persons was forcibly taken away.

(9) That even apart from the allegation of forcibly taking away of the property, there is allegation of extending threat, keeping the said first informants who are the victims in an illegal captivity and threatening them of involving them in false case of various nature.

(10) That the F.I.Rs. are with the same nature of allegations but the offences are different. There is no legal impediment in lodging of the said F.I.Rs.

(11) That non issuance of notices under Section 441 Cr.P.C. may be an irregularity but cannot vitiate proceedings.

(12) That there is no inordinate delay in lodging of the F.I.Rs. The respective informants who are the victims, were under fear and threat for a long period of time and it was only when they found an impartial atmosphere in the State, they stood up and raised their grievances against the accused persons.

(13) That the accused persons have remedy of filing a discharge application by raising all the grounds before the trial court at the appropriate stage which is just and proper remedy available to them.

(14) That the First Information Reports are different in themselves

inasmuch as the informant is different and also the land in question which is one of the subject matters of dispute, is also different, test of sameness cannot be applied as such in the matter.

(15) That all 482 Cr.P.C. applications lack merit and deserve to be dismissed.

He has placed reliance upon the following judgments to buttress his submissions:

(1) Babubhai Jamuna Bhai Patel vs. State of Gujarat: (2010) 12 SCC 254, (Para- 21);

(2) Barendra Kumar Ghosh vs. Emperor: AIR 1925 PC 1(C) (Para-26);

(3) M/S Neharika Infrastructure Pvt. Ltd. vs. State of Maharastra: (2021) SCC OnLine SC 315, para- 23(iv)(xiii);

(4) Jagmohan Singh vs. Vimlesh Kumar and others: (2022) LiveLaw (SC) 546, (Page- 61, 61);

(5) Ramveer Upadhyay and another vs. State of U.P. and another: (2022) LiveLaw (SC) 396, (Para - 30, 39);

(6) Chilakamarthi Venkateswarlu and another vs. State of Andhra Pradesh and another: Criminal Appeal No. 1082 of 2019 (arising out of SLP (Crl.) No. 10762 of 2018, decided on 31.7.2019, (Para- 18, 23);

(7) Kaptan Singh vs. State of U.P. and others: AIR 2021 SC 3931 (Para- 9.1, 9.2);

(8) State of Odisha vs. Pratima Mohanty : (2021) SCC OnLine SC 1222, (Para- 6.2., 9);

(9) Priti Saraf and others vs. State of NCT of Delhi and others: AIR 2021 SC 1531, (Para- 28, 32);

(10) Anil vs. State of U.P. and another: Criminal Misc. Application U/S 482 Cr.P.C. No. 6504 of 2021, dated 30.6.2021 (Para- 28);

(11) Wasiullah and another vs. State of U.P. and others: 2021(1) All. LJ 42;

(12) Pankaj Tyagi vs. State of U.P. and another : 2022 SCC OnLine All 163 (Application U/S 482 No. 1395 of 2022, dated 16.3.2022);

(13) Asha Ranjan vs. State of Bihar and others: (2017) 4 SCC 397, (Para- 54-63);

(14) Surender Kaushik and others vs. State of U.P. and others: (2013) 5 SCC 148;

(15) Lalman and others vs. State of U.P. and others: (2021) ILR 2 All 167;

(16) Beekki Verma vs. State of U.P. and others: 2021 (5) ADJ 351.

13. After having heard learned counsels for the parties and perusing the records it emerges that the applicants in the above mentioned 482 Cr.P.C. petitions except for Aley Hasan Khan who was the then Circle Officer (City), Rampur and a Police Officer and later on was the Chief Security Officer of the University, are the office bearers of the Society/Trust. In so far as Aley Hasan Khan is concerned, he is named in the F.I.R. and there are allegations of his threatening the first informants (except for the first informant of Case Crime No. 224 of 2019), keeping them in confinement illegally, assaulting them, threatening them of being involved in cases of charas and smack if they do not execute sale deeds of their respective lands in favour of the University and then taking forcible possession of their land.

In so far as the other applicants are concerned, they are the office bearers of the Society/Trust. The society has also been charge sheeted. The First Information Report of Case Crime No. 224 of 2019 was lodged by Manoj Kumar, Revenue Inspector, Area Khaud, Tehsil Sadar, Rampur. After registration of the same, several complaints were made by various

persons being the owners of their respective land making complaint of taking of their land forcibly by abducting them, physically assaulting them and threatening them of dire consequences. The other First Information Reports level allegations to the effect that the respective first informants were threatened, illegally confined, pressurized to execute sale deeds in favour of the University, threatened of being involved in cases of charas and smack, were assaulted and then their lands were forcibly taken from them. The matter was investigated by the police and charge sheets in all of them were submitted. The complaints were made by different persons which were registered as separate cases. It was only then that every aggrieved person came forward and opened up with regards to the manner in which his land has been forcibly taken from him illegally.

14. The allegations in the First Information Reports reveal as to how the respective first informants were abducted, assaulted, threatened and their land was forcibly taken from them by coercion and not following the due process of law. The said acts were of different dates, time, place of abduction and manner of activities. In totality, the allegations were common but the dates and identification of land taken forcibly are different. The first informants who are the victims will be having different sets of witnesses to support and substantiate their allegations for the offences alleged. Therefore, it cannot be said that for the same act multiple First Information Reports have been lodged.

15. The crime committed against each individual for his land, his abduction and threatening is an altogether separate offence. The first informants are different in each and every matter and the identification of land is different in each and every case.

16. The situation would have been different if in all the cases, though they look the same would have complained about an incident at the same time and place with the same property in question in all of them. The reports narrate of different incidents of different dates and time involving different victims and different land though the accused in all the matters are common including the applicant. With different dates, time, identification of land and victims, the contention of the learned counsel for the applicant regarding the same being hit by the doctrine of sameness is unacceptable.

17. The judgments relied by the learned counsels for the respective applicants are distinguishable on facts of each case as in the said cases a solitary case had multiple First Information Reports lodged for it. As already observed, in the cases in hand, the incident is not solitary. It has every aspect in it different except for the modus- operandi to be identical in some cases. Therefore, every victim who was subjected to different acts constituting an offence, has raised his grievance and the incidents in each case are of different dates, time covering different piece of land. Therefore, registration of different First Information Reports, in the peculiar facts of the case, cannot be said to be at fault and cannot be set at naught. The accused will have to defend himself in each and every case independently against the individual respective victims. Merely by not giving a notice under Section 441 Cr.P.C. will not be a ground to quash the entire prosecution case as various other offences are disclosed from the reading of the first information report itself and the evidence collected during investigation.

18. It has been held by the Apex Court in the cases of ***R.P. Kapur Vs. State of Punjab : AIR 1960 SC 866; State of Haryana and Ors. Vs. Bhajan Lal and Others : 1992 Supp (1) SCC 335; State of Bihar Vs. P. P. Sharma : 1992 Supp (1) SCC 222; Trisuns Chemical Industry Vs. Rajesh Agarwal and Ors. : (1999) 8 SCC 686; M. Krishnan Vs. Vijay Singh & Anr. : (2001) 8 SCC 645; Zandu Pharmaceuticals Works Ltd. Vs. Mohammd Shariful Haque : (2005) 1 SCC 122; M. N. Ojha Vs. Alok Kumar Srivastava : (2009) 9 SCC 682; Joseph Salvaraj A. Vs. State of Gujarat and Ors. : (2011) 7 SCC 59; Arun Bhandari Vs. State of Uttar Pradesh and Ors. : (2013) 2 SCC 801; Md. Allauddin Khan Vs. State of Bihar : (2019) 6 SCC 107; Anand Kumar Mohatta and Anr. Vs. State (NCT of Delhi), Department of Home and Anr. : (2019) 11 SCC 706; Rajeev Kourav Vs. Balasaheb & others : (2020) 3 SCC 317; Nallapareddy Sridhar Reddy Vs. The State of Andhra Pradesh : (2020) 12 SCC 467,*** that exercise of inherent power of the High Court under Section 482 of the Code of Criminal Procedure is an exceptional one. Great care should be taken by the High Court before embarking to scrutinize the complaint/FIR/charge-sheet in deciding whether the rarest of the rare case is made out to scuttle the prosecution in its inception.

19. Further in the case of ***Priti Saraf & anr. Vs. State of NCT of Delhi & anr. : Criminal Appeal No(s). 296 of 2021 [Arising out of SLP(Crl.) No(s). 6364 of 2019] (judgment dated March 10, 2021) : 2021 SCC Online SC 206*** the Apex Court while considering the powers under Section 482 Cr.P.C. has held as follows:

"23. It being a settled principle of law that to exercise powers under Section 482 CrPC, the complaint in its entirety shall have to be examined on the basis of the allegation made in the complaint/FIR/charge-sheet and the High Court at that stage was not under an obligation to go into the matter or examine its correctness. Whatever appears on the face of the complaint/FIR/charge-sheet shall be taken into consideration without any critical examination of the same. The offence ought to appear ex facie on the complaint/FIR/charge-sheet and other documentary evidence, if any, on record.

24. The question which is raised for consideration is that in what circumstances and categories of cases, a criminal proceeding may be quashed either in exercise of the extraordinary powers of the High Court under Article 226 of the Constitution, or in the exercise of the inherent powers of the High Court under Section 482 CrPC. This has often been hotly debated before this Court and various High Courts. Though in a series of decisions, this question has been answered on several occasions by this Court, yet the same still comes up for consideration and is seriously debated.

25. In this backdrop, the scope and ambit of the inherent jurisdiction of the High Court under Section 482 CrPC has been examined in the judgment of this Court in ***State of Haryana and Others Vs. Bhajan Lal and Others, (1992 Suppl (1) SCC 335).***

The relevant para is mentioned hereunder:-

"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 malafide 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."

26. This Court has clarified the broad contours and parameters in laying down the guidelines which have to be kept in mind by the High Courts while exercising inherent powers under Section 482 CrPC. The aforesaid principles laid down by this Court are illustrative and not exhaustive. Nevertheless, it throws light on the circumstances and the situation which is to be kept in mind when the High Court exercises its inherent powers under Section 482 CrPC.

27. It has been further elucidated recently by this Court in Arnab Manoranjan Goswami Vs. State of Maharashtra and Others, 2020 SCC Online SC 964 where jurisdiction of the High Court under Article 226 of the Constitution of India and Section 482 CrPC has been analyzed at great length.

28. It is thus settled that the exercise of inherent power of the High Court is an extraordinary power which has to be exercised with great care and circumspection before embarking to scrutinize the complaint/FIR/charge-sheet in deciding whether the case is the rarest of rare case, to scuttle the prosecution at its inception."

20. In the case of ***Ramveer Upadhyay Vs. State of U.P. : 2002 SCC Online SC 484*** the Apex Court has held in paragraphs 27, 38 and 39 that quashing of a criminal case by exercising jurisdiction under Section 482 Cr.P.C. should be done in exceptional cases only. It was further held that criminal proceedings cannot be nipped in the bud. Paragraphs 27, 38 and 39 are quoted herein:

"27. Even though, the inherent power of the High Court under Section 482 of the 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.

38. Ends of justice would be better served if valuable time of the Court is spent on hearing appeals rather than entertaining petitions under Section 482 at an interlocutory stage which might ultimately result in miscarriage of justice as held in Hamida v. Rashid @ Rasheed and Others, (2008) 1 SCC 474.

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. The Complaint Case No.19/2018 is not such a case which should be quashed at the inception itself without further Trial. The High Court rightly dismissed the application under Section 482 of the Cr.P.C."

21. Further in the case of ***Daxaben Vs. State of Gujarat : 2022 SCC Online SC 936*** in para 49 the Apex Court has held as under:

"49. In exercise of power under section 482 of the Cr.P.C., 1973 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."

22. Thus, it is trite law that at the stage of quashing only the material of the prosecution has to be seen and the court cannot delve into the defence of the accused and then proceed to examine the matter on its merit by weighing the evidence so produced. The disputed questions of facts of the case cannot be adjudged and adjudicated at this stage while exercising powers under Section 482 Cr.P.C. and only the prima facie prosecution case has to be looked into as it is. Evidence needs to be led to substantiate the defence of the accused. The accused can raise their grievances while claiming discharge at the appropriate stage before the trial court.

23. Looking to the facts of the case, the prima facie allegation against the

applicants and the law well settled as stated above, no case for interference is made out.

24. Accordingly, the present 77 Criminal Misc. Applications U/S 482 Cr.P.C. are **dismissed**.

(2023) 2 ILRA 1195
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.02.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 1177 of 2023

Ved Krishna ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Rishad Murtaza, Aishwarya Mishra, Syed Ali Jafar Rizvi

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure-Sections 190 (1)(b)- Summoning Order-issued without application of judicial mind-in mechanical manner-on a printed proforma-is objectionable-Summoning order must reflect application of mind to the facts and the law-quashed-matter remitted back. (E-9)

List of Cases cited:

1. Dilawar Vs St. of Har., (2018) 16 SCC 521,

2. Menka Gandhi Vs U.O.I., AIR 1978 SC 597,

3. Hussainara Khatoon (I) Vs St. of Bihar, (1980)1 SCC 81,

4. Abdul Rehman Antulay Vs R.S. Nayak, (1992) 1 SCC 225

5. P. Ramchandra Rao Vs St. of Karn., (2002) 4 SCC 578

6. H.N. Rishbud Vs St. of Delhi, AIR 1955 SC 196

7. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr., AIR 2012 SC 1747

8. Basaruddin & ors. Vs St. of U.P. & ors., 2011 (1) JIC 335 (All)(LB)

9. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr., AIR 2012 SC 1747

10. Sunil Bharti Mittal Vs C.B.I., AIR 2015 SC 923

11. Darshan Singh Ram Kishan Vs St. of Mah. , (1971) 2 SCC 654

12. Ankit Vs St. of U.P. & anr. passed in Application U/S 482 No.19647 of 2009

13. Megh Nath Guptas & anr. Vs St. of U.P. & anr. 2008 (62) ACC 826

14. Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC),

15. UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456

16. Kanti Bhadra Vs St. of W. B., 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC)

17. Kavi Ahmad Vs St. of U.P. & anr. passed in Criminal Revision No. 3209 of 2010

18. Abdul Rasheed & ors. Vs St. of U.P. & anr. 2010 (3) JIC 761 (All)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Rishad Murtaza, learned counsel for the applicant as well as Sri Manoj Singh learned A.G.A. for the State and perused the record.

2. The instant application under Section 482 Cr.P.C. has been filed by the applicant with a prayer to quash the proceedings of Case No. 1004/2019 pending before the Court of Additional Chief Judicial Magistrate-I, Faizabad under Sections 427, 188 I.P.C. relating to Crime No. 493/2018, Police Station Pura Kalandar, District Faizabad as well as summoning order dated 02.04.2019 passed by the Additional Chief Judicial Magistrate-I Faizabad in Case No. 1004/2019, relating to Crime No. 493/2018, under Sections 427, 188 I.P.C., Police Station Pura Kalandar, District Faizabad.

3. Learned counsel for the applicant submits that a First Information Report was registered by opposite party No.2, Police Station Pura Kalandar, District Faizabad under Sections 504, 506, 427, 447 and 379 I.P.C.

4. Learned counsel for the applicant further submits that as per the version of the F.I.R. the informant is pairokar of Sri Laxmi Kant Jhunjhunwala and Sri Prakash Chandra Jhunjhunwal who have land situated at Gata No.383 and in Gata No. 399 they have 11 Bigha 15 Biswa 5 Dhoor registered in the revenue record and the competent court has directed for its partition. It is also mentioned that informant has made an application to the District Magistrate on whose direction Consolidation Officer and Police people have got pegs fixed on the spot on 17.05.2018 and they had submitted the report to the District Magistrate concerned and the same has been approved and disposed on 11.06.2018. It is further alleged that instead of pegs, cemented pillars 40-45 in numbers, were erected and the accused person along with his 20-25 companions have demolished the aforesaid cemented pillars and carried some to them and when the informant came to know about this incident then he has again given an application for demarcation and upon the direction of District Magistrate a strong med/boundary was created but again the accused persons got it demolished and they also abused and threatened the informant.

5. Learned counsel for the applicant further submits that the entire prosecution story is false. No such incident took place and the applicants have been falsely implicated in the present case.

6. Learned counsel for the applicant further submits that before arguing the case on merits, he wants to draw attention of this Court on the charge-sheet dated 31.12.2018 submitted by the Investigating Officer in mechanical manner under Sections 427 and 188 I.P.C., copy of the same is filed as Annexure No.7 to the affidavit, whereas he further submits that on the charge-sheet, the learned Magistrate had taken cognizance on 02.04.2019. The cognizance was taken on the printed proforma by filling the sections of IPC, dates and number and in the said proforma the learned Magistrate without assigning any reason has summoned the applicant for facing trial. Copy of the cognizance order is also annexed as Annexure No.1 to the affidavit.

7. Learned counsel for the applicant further submits that by the order dated 02.04.2019 cognizance taken by the learned Magistrate on printed proforma without assigning any reason is abuse of process of law and the same was without application of mind and was in a routine manner.

8. Learned counsel for the applicants further submits that after submission of

charge sheet and cognizance order on printed proforma, the applicant has been summoned mechanically by order dated 02.04.2019 and the court below while summoning the applicant has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the court below without dwelling into material and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial. It is further submitted that the court below has not taken into consideration the material placed before the trial court along with charge sheet and, therefore, the trial court has materially erred in summoning the applicant. The court below has summoned the applicant through a printed order, which is wholly illegal.

9. It is vehemently urged by learned counsel for the applicant that the impugned cognizance/summoning order dated 02.04.2019 is not sustainable in the eye of law, as the same has been passed in mechanical manner without applying the judicial mind, because on the face of record itself it is apparent that impugned cognizance/summoning order dated 02.04.2019 has been passed by the Magistrate concerned on printed proforma by filling up the gaps, therefore the same is liable to be quashed by this Court.

10. Learned counsel for the applicant has given much emphasis that if the cognizance has been taken on the printed proforma, the same is not sustainable.

11. Per contra, learned A.G.A. for the State submitted that considering the material evidences and allegations against the applicant on record, as on date, as per prosecution case, the cognizable offence against the applicant is made out, therefore, application is liable to be dismissed but has not denied that the leaned Magistrate has taken cognizance on the printed proforma. Accordingly, this case is being finally decided at this stage without issuing notice to opposite party no.2 and without calling for a counter affidavit.

12. I have heard the learned counsel for the parties and perused the record.

13. The main issue for consideration before this Court is that whether the learned Magistrate may summon the accused person on a printed proforma without assigning any reason and take cognizance on police report filed under Sections 173 of Cr.P.C. In this regard, it is relevant to mention here that a Court can take cognizance of an offence only when condition requisite for initiation of proceedings before it as set out in Chapter XIV of the Code are fulfilled. Otherwise, the Court does not obtain jurisdiction to try the offences under section 190 (1) of the Cr.P.C. provided that "subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence,

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section

(1) of such offences as are within his competence to inquire into or try."

14. At this juncture, it is fruitful to have a look so far as the law pertaining to summoning of the accused persons, by taking cognizance on a police report filed under section 173 of the Cr.P.C., is concerned and the perusal of the case law mentioned herein below would clearly reveal that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since, it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the material collected by the Investigating Officer results in sufficient grounds to proceed further and would constitute violation of law so as to call a person to appear before the criminal court to face trial. This discretion puts a responsibility on the magistrate concerned to act judiciously keeping in view the facts of the particular case as well as the law on the subject and the orders of Magistrate does not suffers from non-application of judicial mind while taking cognizance of the offence.

15. Fair and proper investigation is the primary duty of the Investigating Officer. No investigating agency can take unduly long time in completing investigation. There is implicit right under Article 21 for speedy trial which in turn encompasses speedy investigation, inquiry, appeal, revision and retrial. There is clear need for time line in completing investigation for having in-house oversight mechanism wherein accountability for adhering to lay down timeline, can be fixed at different levels in the hierarchy, vide **Dilawar vs. State of Haryana, (2018) 16 SCC 521, Menka Gandhi vs. Union of India, AIR 1978 SC 597, Hussainara Khatoon (I) vs. State of Bihar, (1980)1 SCC 81, Abdul Rehman Antulay vs. R.S. Nayak, (1992) 1 SCC 225 and P. Ramchandra Rao vs. State of Karnatka, (2002) 4 SCC 578.**

16. For the purposes of investigation, offences are divided into two categories "cognizable" and "non-cognizable". When information of a cognizable offence is received or such commission is suspected, the proper police officer has the authority to enter in the investigation of the same but where the information relates to a non-cognizable offence, he shall not investigate it without the order of the competent Magistrate. Investigation includes all the proceedings under the Cr.P.C. for the collection of evidence conducted by a police officer or by any person other than a Magistrate (who is authorised by a Magistrate in his behalf). Investigation consists of steps, namely (i) proceeding to spot, (ii) ascertainment of the facts and circumstances of the case, (iii) discovery and arrest of the suspected offender, (iv) collection of evidence relating to the commission of the offence and (v) formation of opinion as to whether on the material collected therein to place the accused before a Magistrate for trial and if so to take necessary steps for the same by filing a charge sheet under Section 173, Cr.P.C., vide **H.N. Rishbud vs. State of Delhi, AIR 1955 SC 196.** Thereafter, the learned Magistrate has to take cognizance after application of judicial mind and by reasoned order and not in mechanical manner.

17. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747,** the Hon'ble Apex Court was pleased to observe that

section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceedIn the case of **Basaruddin & others Vs. State of U.P. and others, 2011 (1) JIC 335 (All)(LB)**, the Hon'ble Court was pleased to observed as under:-

"From a perusal of the impugned order, it appears that the learned Magistrate on the complaint filed by the complainant has summoned the accused in a mechanical way filling the date in the typed proforma. Learned Magistrate while taking cognizance of the offence on complaint was expected to go through the allegations made in the complaint and to satisfy himself as to which offences were prima facies, being made out against the accused on basis of allegations made in the complaint. It appears that the learned Magistrate did not bother to go through the allegations made in the complaint and ascertain as to what offences were, prima facie, being made out against the accused on the basis of allegations made in the complaint. Apparently, the impugned order passed by the learned Magistrate suffers from non-application of mind while taking cognizance of the offence. The impugned order is not well reasoned order, therefore, the same is liable to be quashed and the petition deserves to be allowed and the matter may be remanded back to the learned Chief Judicial Magistrate, Lakhimpur Kheri with direction to him to go through the allegations made in the complaint and ascertain as to what offences against the accused were prima facie being made out against the accused on the basis of allegations made in the complaint and pass fresh order, thereafter, he will proceed according to law."

18. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747,** the Hon'ble Apex Court was pleased to observe that section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

19. In the case of **Sunil Bharti Mittal v. Central Bureau of Investigation, AIR 2015 SC 923,** the Hon,ble Apex Court was pleased to observe in paragraph no.47 of the judgment as under:

"47. However, the words "sufficient grounds for proceeding" appearing in the Section 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.."

20. In the case of **Darshan Singh Ram Kishan v. State of Maharashtra , (1971) 2 SCC 654,** the Hon'ble Court was pleased to observe that the process of taking cognizance does not involve any formal action, but it occurs as soon as the Magistrate applies his mind to the allegations and, thereafter, takes judicial notice of the offence. As provided by

Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report."

21. In the case of **Ankit Vs. State of U.P. And another** passed in Application U/S 482 No.19647 of 2009 decided on 15.10.2009, this Court was pleased to observe in paragraph No.8 of the judgment as under:-

"8. In the beginning, the name of the court, case number, state vs. ..... under section ..... P.S. ..... District ..... case crime No. ..... /2009 also have been printed and blanks have been filled up by mentioning the case number, name of the accused, section, P.S. District etc. by some employee. Below afore cited printed matter, the following sentence has been mentioned in handwriting "अभियुक्त अंकित की गिरफ्तारी मा0 उच्च न्यायायल द्वारा Crl. Writ No. 19559/08 अंकित बनाम राज्य में पारित आदेश दिनांक 5.11.08 द्वारा आरोप पत्र प्राप्त होने तक स्थगित थी।"

Below aforesaid sentence, the seal of the court containing name of Sri Talevar Singh, the then Judicial Magistrate-III, has been affixed and the learned magistrate has put his short signature (initial) over his name. The manner in which the impugned order has been prepared shows that the learned magistrate did not at all apply his judicial mind at the time of passing this order and after the blanks were filled up by some employee of the court, he has put his initial on the seal of the court. This method of passing judicial order is wholly illegal. If for the shake of argument, it is assumed that the blanks on the printed proforma were filled up in the handwriting of learned magistrate, even then the impugned order would be illegal and invalid, because order of taking cognizance of any other judicial order cannot be passed by filling up blanks on the printed proforma. Although as held by this Court in the case of **Megh Nath Guptas & Anr V State of U.P. And Anr, 2008 (62) ACC 826,** in which reference has been made to the cases of **Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC),** the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and

even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."

22. In the case of **Kavi Ahmad Vs. State of U.P. and another** passed in **Criminal Revision No. 3209 of 2010,** wherein order taking cognizance of offence by the Magistrate under Section 190(1)(b) on printed proforma without applying his judicial mind towards the material collected by the Investigating Officer has been held illegal.

23. In the case of **Abdul Rasheed and others Vs. State of U.P. and another 2010 (3) JIC 761 (All)**. The relevant observations and findings recorded in the said case are quoted below:-

"6. Whenever any police report or complaint is filed before the Magistrate, he has to apply his mind to the facts stated in the report or complaint before taking cognizance. If after applying his mind to the facts of the case, the Magistrate comes to the conclusion that there is sufficient material to proceed with the matter, he may take cognizance. In the present case, the summoning order has been passed by affixing a ready made seal of the summoning order on a plain paper and the learned Chief Judicial Magistrate had merely entered the next date fixed in the case in the blank portion of the ready made order. Apparently the learned Magistrate had not applied his mind to the facts of the case before passing the order dated 20.12.2018, therefore, the impugned order cannot be upheld.

7. Judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. Such tendency must be deprecated and cannot be allowed to perpetuate. This reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms. Therefore, this practice must be stopped forthwith."

24. In view of the above, this Court finds and observes that the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto, whereas the impugned summoning order was passed in mechanical manner without application of judicial mind and without satisfying himself as to which offence were prima-facie being made out against the applicants on the basis of the allegations made by the complainant. the impugned cognizance order passed by the learned Magistrate is against the settled judicial norms.

25. In light of the judgments referred to above, it is explicitly clear that the order dated 02.04.2019 passed by the Additional Chief Judicial Magistrate-I, Faizabad is cryptic and does not stand the test of the law laid down by the Hon'ble Apex Court. Consequently, the cognizance/summoning order dated 02.04.2019 cannot be legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him resulting in miscarriage of justice.

26. Accordingly, the present Criminal Misc. Application U/S 482 Cr.P.C succeeds

and is allowed. The impugned cognizance/summoning order dated 02.04.2019 passed by passed by the Additional Chief Judicial Magistrate-I, Faizabad in Case No. 1004/2019, under Sections 427, 188 I.P.C. relating to Crime No. 493/2018, Police Station Pura Kalandar, District Faizabad is hereby quashed.

27. The matter is remitted back to Additional Chief Judicial Magistrate-I, Faizabad directing him to decide afresh the issue for taking cognizance and summoning the applicant and pass appropriate orders in accordance with law keeping in view the observations made by this Court as well as the direction contained in the judgments referred to above within a period of two months from the date of production of a copy of this order.

28. The party shall file certified copy or 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.

30. 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) 2 ILRA 1202
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 29725 of 2022

Dharmendra Yadav & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Amar Nath Singh, Sri Rajesh Kumar Singh, Sri Rajeshwar Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 482-summoning order impugned-not named in the FIR-not named by the victim in her St.ment-no medical examination-no St.ment u/s 164 Cr.P. C. recorded-applicant not present at the place of incidence-affidavit by the victim stating that Applicant is not involved in the alleged crime-but not part of the investigation-no case for interference-as the same is subject matter of the Trial.

Application dismissed. (E-9)

List of Cases cited:

1. Arun Shankar Shukla Vs St. of U.P. AIR 1999 SCC2554

2. St. of U.P. Vs Kasturi Lal, 2004 CRLJ 3866

3. Pawan Kumar Bhaalautiya Vs St. of W.B., 2005 CRLJ1810 SC

4. T.J. Stephen Vs Parle Battling Co. Pvt. Ltd. AIR 1985 SCC 994

5. Mac kuloch Vs Sate of W. B.1947 CRLJ 182 Cal HC

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

1. यह प्रार्थना पत्र धारा 482 द०प्र०सं० के अंतर्गत दण्ड वाद सं0 77/2021 उत्तर प्रदेश राज्य बनाम गनेश प्रसाद एवं अन्य अपराध सं० 606/2020 अंतर्गत धारा 147, 452, 323, 504, 406, 422, 354 एवं 354B भा०द०सं० थाना ताजगंज जनपद आगरा लंबित न्यायालय मुख्य न्यायिक दण्डाधिकारी, आगरा की

कार्यवाही को स्थगित एवं खण्डित करने के लिए शपथ पत्र सहित प्रस्तुत किया गया है।

2. संक्षेप में याचिका के तथ्य यह हैं कि विपक्षी सं० 2 विकास महाजन ने उक्त प्रथम सूचना रिपोर्ट गनेश यादव एवं कप्तान सिंह यादव व 10-12 अज्ञात सह अभियुक्तों के विरुद्ध दिनांक 31 जुलाई 2020 को समय 10:05 बजे पूर्वाह्न दर्ज कराया कि दिनांक 26.07.2020 को दोपहर में खसरा भूमि सं० 91A, 91B स्थित शमशाबाद सड़क निकट भोला बाबा दुग्ध केन्द्र के समीप मुकेश महाजन एवं उसके पत्नी के संयुक्त स्वामित्व में है। दिनांक 20 जुलाई 2020 को गणेश यादव एवं कमान सिंह यादव 10-12 अन्य गुण्डे साथियों के साथ प्रार्थी के प्लाट पर पहुंचे तथा बाउण्ड्री वाल की गेट पर लगे हुए ताले को तोड़ दिया तथा जब वहाँ जमीन की देखरेख कर रही महिला द्वारा मना करने पर उन्होंने उस से मारपीट किया व धक्कामुक्की की जिससे उसके कपड़े फट गये तथा ताला तोड़कर यह सभी लोग महिला से धक्का मुक्की करते हुए बाउण्ड्री के अंदर बने कमरे में घुस गये। यह देखते हुए उस महिला के लड़के ने पुलिस चौकी एकता पर जाकर सूचना दिया जहाँ से कर्मचारी मौके पर आ गये उनके हस्तक्षेप के उपरान्त महिला को कमरे के अन्दर गाली गलौज व जान से मारने की धमकी देते हुए वापस आने को कहकर चले गये। अतः मुकदमा दर्ज कर आवश्यक कार्यवाही किया जाये जिससे यह असामाजिक तत्व व भू-माफिया दोबारा गैर कानूनी कर्तव्य को अंजाम न दे पावें।

3. विवेचनोपरान्त प्रार्थीगण गनेश यादव, कप्तान सिंह यादव, प्रेम कुमार, धर्मेन्द्र यादव एवं अजय कुमार के विरुद्ध धारा 147,452, 323, 504, 506, 427, 354 एवं 354B भा० द०सं० के अंतर्गत अपराध साबित होने पर आरोप पत्र प्रस्तुत किया गया। दिनांक 9.03.2021 को न्यायालय द्वारा संज्ञान लिया गया तथा अभियुक्तगण को समन किया गया। मात्र अभियुक्त गनेश यादव उपस्थित आये जिसे दिनांक 22.08.2022 को जमानत पर अवमुक्त करने का आदेश पारित किया गया तथा शेष अभियुक्तगण के विरुद्ध प्रथमतः समन तदुपरान्त जमानतीय वारण्ट एवं बादहू अजमानतीय वारण्ट जारी किया गया।

4. प्रार्थीगण का यह कथन है कि वह प्रथम सूचना रिपोर्ट में नामित नहीं है, विवेचक ने उचित एवं निष्पक्ष विवेचना किये बिना आरोप पत्र प्रस्तुत कर दिया है। विवेचक ने विपक्षी सं० 2 का बयान अंकित किया है तथा गंभीर सिंह यादव, दुर्गेश कुमार पुनीत यादव का भी बयान अंकित किया है। उन्होंने पीड़िता बृजबाला का बयान भी अंकित किया है जिसमें उसने प्रार्थीगण का नाम नहीं लिया है उसने चिकित्सीय परीक्षण कराने से भी इनकार किया है तथा धारा 164 दण्ड प्रक्रिया संहिता का भी बयान नहीं दिया है। प्रार्थीगण घटना के समय घटना स्थल पर विद्यमान नहीं थे। बृजबाला एवं अन्य साक्षीगण ने वरिष्ठ पुलिस अधीक्षक के समक्ष शपथ पत्र प्रस्तुत किया है तथा उसमें प्रार्थीगण की संलिप्तता से इंकार किया है। सूचना के अधिकार के अंतर्गत प्राप्त सूचना के अनुसार पीड़िता ने स्वयं ही स्वयं के साथ घटना कारित होने से इनकार किया है। पूरी कार्यवाही विपक्षी सं० 2 के प्रभाव में दूरस्थ उद्देश्यों से झूठे तौर पर प्रार्थीगण को संलिप्त करते हुए किया गया है तथा ग्राम पंचायत चुनाव भी इसमें कारण रहा है। प्रार्थीगण का कथित अपराध को कारित करना पूर्णतया संदिग्ध एवं अविश्वसनीय है। विपक्षी सं० 2 तथा सह अभियुक्त गनेश यादव एवं कप्तान सिंह के मध्य जमीन संबंधी विवाद चल रहा है जिससे प्रार्थीगण का कोई संबंध नहीं है। प्रथम सूचना रिपोर्ट विलंब से दर्ज करने का कोई पर्याप्त आधार एवं कोई तार्किक स्पष्टीकरण नहीं है। प्रथम दृष्टया उपरोक्त धाराओं का अपराध प्रार्थीगण के विरुद्ध नहीं बनता है। संज्ञान लेते समय अधीनस्थ न्यायालय ने विवेचना के दौरान संकलित किये गये साक्ष्यों को तकनीकी तरीके से देखते हुए संज्ञान लिया है। प्रार्थीगण को आरोप पत्र की कोई जानकारी नहीं थी तथा जब उन्हें पुलिस कर्मचारियों से दण्ड कार्यवाही की जानकारी हुई तथा उन्होंने आवश्यक अभिलेखों की प्रतिलिपियां प्राप्त किया तब उन्होंने यह याचिका प्रस्तुत किया है। अतः उक्त धारा पर उक्त दण्ड बाद की समस्त कार्यवाही मय आरोप पत्र खण्डित किया जाए।

5. प्रार्थीगण ने सुसंगत अभिलेखों को संलग्नक के रूप में प्रस्तुत किया है।

6. प्रार्थीगण ने पूरक शपथ पत्र 2/2022 संलग्नकों सहित प्रस्तुत किया है जिसमें दिनांक 4.06.2022 को अग्रिम विवेचना के लिए प्रस्तुत प्रार्थना पत्र संलग्नक 1 तथा वरिष्ठ पुलिस अधीक्षक द्वारा पारित अग्रिम विवेचना संबंधी आदेश संलग्नक 2, पीड़िता बृजबाला का बयान अंतर्गत धारा 164 द०प्र०सं० प्रदर्श 3 एवं उसका शपथ पत्र प्रदर्श 4, पुनीत यादव एवं दुर्गेश कुमार का शपथ पत्र संलग्नक 5 प्रस्तुत किया गया है।

7. सूचनादाता विपक्षी सं० 2 मुकेश महाजन ने अपने बयान में यह बयान दिया है कि सूचना पाकर वह तथा उसके साथी हरीकान्त यादव, गंभीर सिंह

यादव, दुर्गेश कुमार एवं पुनीत यादव पहुंचे तो अन्य अभियुक्तगण सहित प्रार्थीगण ने उन लोगों के साथ भी गाली-गलौज व बदतमीजी किया। यदि वह लोग नहीं पहुंचते तो यह लोग महिला के साथ कोई और घटना कारित कर सकते थे। गंभीर सिंह यादव ने अपने बयान में अन्य अभियुक्तगण के साथ प्रार्थीगण को भी विपक्षी सं० 2 के प्लाट पर रहने वाली महिला बृजबाला पत्नी दिनेश तथा उसके पुत्र अनुराग के साथ मारपीट करते हुए देखने का बयान दिया है तथा सूचनादाता विपक्षी सं० 2 की भांति बयान दिया गया। दुर्गेश तथा पुनीत यादव ने भी प्रथम सूचना रिपोर्ट के संबंध में प्रार्थी अभियुक्तगण को नामित करते हुए बयान दिया है। पीड़िता ने प्रथमतः धारा 161 द० प्र०सं० के अंतर्गत गनेश यादव, कप्तान सिंह व प्रेम कुमार उर्फ बग्गा तथा 8-10 अन्य लोगों द्वारा गेट का ताला तोड़ने तथा मना करने पर उसे तथा उसके पुत्र को गन्दी गन्दी गाली देने तथा मना करने पर हाथ पकड़कर उसे खींच लेने तथा कमरे में आ जाने पर पीछे -पीछे कमरे में घुसकर मारपीट करते हुए कपड़ा फाड़ डालने पर शोर मचाने एवं शोर मचाने पर उसके पड़ोसी हरीकान्त यादव व सूचना पाकर सूचनादाता विपक्षी सं० 2 मुकेश महाजन के मौके पर आ जाने का साक्ष्य दिया है। यद्यपि पीड़िता ने धारा 164 द०प्र०सं० का बयान कराने तथा चिकित्सीय परीक्षण कराने से इंकार किया है। विवेचक द्वारा दिनांक 11.10.2020 को आरोप पत्र प्रस्तुत किया गया है।

8. प्रार्थीगण ने पीड़िता एवं साक्षीगण द्वारा बाद में प्रस्तुत शपथ पत्रों के आधार पर धारा 482 द०प्र०सं० के अंतर्गत आरोप पत्र एवं दाण्डिक कार्यवाही को खण्डित करने के लिए निवेदन किया है। यह ध्यान देने योग्य तथ्य है कि पीड़िता श्रीमती बृजबाला ने प्रार्थी अभियुक्तगण को घटना में सम्मिलित न होने का शपथ पत्र दिनांक 2.06.2022 को निष्पादित किया। इस प्रकार पुनीत यादव तथा दुर्गेश कुमार ने दिनांक 30.5.2021 को शपथ पत्र प्रस्तुत कर प्रार्थीगण/ अभियुक्तगण को घटना में सम्मिलित नहीं होने का शपथ पत्र निष्पादित किया गया है। इन शपथ पत्रों के निष्पादन के बहुत पूर्व दिनांक 9.03.2021 को ही संबंधित न्यायालय द्वारा मुकदमे का संज्ञान ले लिया गया था तथा अभियुक्तगण के विरुद्ध समन जारी कर दिया गया था। इस न्यायालय के मतानुसार विचारण के दौरान इस प्रकार के शपथ पत्रों को संज्ञान में नहीं लिया जा सकता तथा यह विचारण में अनुचित हस्तक्षेप के रूप में माना जाएगा तथा यह माना जाएगा कि प्रार्थी अभियुक्तगण ने येन-केन प्रकारेण प्रलोभन अथवा धमकी से उपरोक्त साक्षीगण को प्रभावित कर उन से इस प्रकार का शपथ पत्र निष्पादित करवाकर उसके आधार पर यह धारा 482 द०प्र०सं० का प्रार्थना पत्र प्रस्तुत किया है। यह न्यायिक प्रक्रिया में अनुचित हस्तक्षेप के रूप में लिया जा सकता है। आरोप पत्र प्रस्तुत होने के उपरान्त तथा पूर्व के बयानों के विपरीत शपथ पत्र देने पर उसका संज्ञान लिया जाना किसी भी विधि द्वारा स्थापित न्यायालय के लिए सम्यक एवं उचित नहीं है। इस प्रकार की कार्यवाही किया जाना न्यायिक प्रक्रिया में अनुचित हस्तक्षेप के रूप में है। प्रार्थीगण को चाहिए था कि वह न्यायालय में उपस्थित होकर जमानत कराते तथा आरोप विरचित करते समय उन्मोचन हेतु प्रार्थना पत्र प्रस्तुत करते एवं विचारण में भाग लेते।

9. धारा 482 दण्ड प्रक्रिया संहिता निम्नवत है-

" अदालत आपराधिक कार्यवाही में, सीआरपीसी की धारा 482 के तहत शक्ति का प्रयोग करते हुए, दुर्लभ और असाधारण मामलों में, सीआरपीसी के प्रावधानों को प्रभावी करने के लिए या न्याय के लक्ष्य को सुरक्षित करने के लिए किसी भी न्यायालय की प्रक्रिया का दुरुपयोग या अन्यथा रोकने के लिए हस्तक्षेप करती है।"

10. ***अरुण शंकर शुक्ला बनाम उत्तर प्रदेश राज्य AIR 1999 उच्चतम न्यायालय 2554*** में इस धारा के अंतर्गत उच्च न्यायालय को असीमित शक्तियां प्राप्त नहीं हैं। यह असाधारण शक्तियाँ हैं, जिनका प्रयोग यदा-कदा ही किया जाना चाहिए। ***उत्तर प्रदेश राज्य बनाम कस्तूरी लाल 2004 CRLJ 3866*** में उच्चतम न्यायालय ने अवधारित किया कि धारा 482 द०प्र०सं० के अंतर्गत शक्ति का प्रयोग अपवाद है और उच्च न्यायालय की कोई नयी शक्तियां प्रदान नहीं करता है। यह मात्र उस अंतर्निहित शक्ति को बचाता है जिसे संहिता के अधिनियमन से पहले न्यायालय न्यायालय के पास विद्यमान थी। यह तीन परिस्थितियों की परिकल्पना करता है जिसके अंतर्गत निहित क्षेत्राधिकार का प्रयोग किया जा सकता है।

1- संहिता के आदेश को प्रभावी करने के लिए.

2- न्यायालय की प्रक्रिया के दुरुपयोग को रोकने के लिए तथा

3- अन्यथा उद्देश्यों को सुरक्षित करने के लिए

11. इस संबंध में किसी कठोर नियम को निर्धारित करना न तो संभव है न ही वांछनीय है जो निहित क्षेत्राधिकार के उपयोग को नियंत्रित करेगा। इस शक्ति के प्रयोग में बहुत सावधानी बरतने की आवश्यकता है। इस शक्ति का प्रयोग किसी वैध अभियोजन को रोकने के लिए प्रयुक्त नहीं किया जाना चाहिए।

12. ***पवन कुमार भालोतिया बनाम पश्चिम बंगाल राज्य 2005 CRLJ 1810 उच्चतम न्यायालय*** में अवधारित किया गया है कि जहाँ दर्ज किया गया अपराध केवल याचिकाकर्ता को उत्पीड़ित करने का होगा वहाँ इस शक्ति के अंतर्गत दाण्डिक कार्यवाही खण्डित किया जा सकेगा। आमतौर पर उच्च न्यायालय को अधीनस्थ न्यायालय के आपराधिक मामले की कार्यवाही में हस्तक्षेप नहीं करना चाहिए, लेकिन अवैध अभियोजन के दुष्परिणाम से सुरक्षित रखने के लिए इस धारा की शक्तियों को उच्च न्यायालय द्वारा प्रयोग किया जा सकता है। जहाँ दण्डाधिकारी के समक्ष प्रक्रिया जारी करने के लिए पर्याप्त सामग्री विद्यमान है। अभियुक्त उसे इस धारा के अंतर्गत चुनौती देने का अधिकारी नहीं ***है। टी.जे. स्टीफेन बनाम पार्ले बाटलिंग कं०प्रा०लि० AIR 1985 उच्चतम न्यायालय 994*** में यह अवधारित किया गया है कि विवेचना के अभिलेखों का संदर्भ देखते हुए जब कि कम्प्लेण्ट में आरोपित तथ्य प्रथम दृष्टया अपराध कारित करने का वर्णन करते हैं। ऐसे कम्प्लेण्ट को खण्डित नहीं किया जा सकता।

13. प्रार्थीगण का यह कथन है कि दुर्भावनापूर्ण ढंग से यह प्रथम सूचना रिपोर्ट दर्ज करायी गयी तथा आरोप पत्र प्रस्तुत किया गया। ***मैक कुलोच बनाम पश्चिम बंगाल राज्य 1974 CRLJ 182 कलकत्ता उच्च न्यायालय*** में यह अवधारित किया गया कि यह प्रश्न कि अभियुक्त के पास घटना कारित करने का आपराधिक दुराशय विद्यमान था अथवा नहीं, विचारण में सम्यक सामग्री एवं साक्ष्य प्रस्तुत कर ही देखा जा सकता है तथा ऐसी दशा में उच्च न्यायालय द्वारा अपनी अंर्तनिहित शक्तियों का प्रयोग नहीं किया जाना चाहिए। तथ्य तथा निष्कर्ष के संबंध में अंर्तनिहित शक्ति के अंतर्गत हस्तक्षेप नहीं किया जा सकता। इस स्तर पर उच्च न्यायालय यह जांच नहीं कर सकता कि आरोप साक्ष्य से स्थापित होंगे अथवा नहीं।

<u>आदेश</u>

उपरोक्त आधारों पर इस न्यायालय का यह निष्कर्ष है कि प्रार्थीगण द्वारा दिया गया आधार धारा 482 द०प्र०सं० के प्रार्थना पत्र को स्वीकार कर उपरोक्त वाद की कार्यवाही एवं आरोप पत्र को खण्डित करने के लिए युक्तियुक्त आधार नहीं हैं। अतैव प्रार्थना पत्र अंतर्गत धारा 482 द०प्र०सं० तदनुसार खारिज किया जाता है।

(2023) 2 ILRA 1205
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.02.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application u/s 482 No. 1531 of 2023

Manish Kumar Pandey ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicants:
Prince Lenin

Counsel for the Opp. Parties:
G.A.

Criminal Law - Indian Penal Code, 1860 - summoning order-charge sheet and summoning order impugned- FIR registered against unknown persons-circulation of letter on social media issued in the name of MLA (BJP) on his letter pad-seeking information of criminal cases against various political persons- found forged-Applicant is journalist-posted the letter as he received it from a reputed media person-MLA denied the letter and his signature-prima facie case is made out.

Applicant dismissed. (E-9)

<u>List of Cases cited</u>:

1. R.P. Kapoor Vs St. of Pun., AIR 1960 S.C. 866,

2. St. of Har. Vs Bhajanlal, 1992 SCC (Crl.)426,

3. St. of Bihar Vs P.P. Sharma, 1992 SCC (Crl.)192

4. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., (Para-10) 2005 SCC (Cri.)283

5. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Prince Lenin, the learned counsel for the applicant as well as Shri Vinod Kumar Sahi, learned Additional Advocate General assisted by Sri Diwakar Singh, the learned A.G.A. for the State-opposite party No. 1 and perused the record.

2. The instant application has been filed by the applicant-Manish Kumar Pandey for quashing of the charge-sheet dated 30.09.2021 bearing No.1 of 2021 and the proceedings related to the applicant in Case No. 1730 of 2022, pending in the Court of Special Chief Judicial Magistrate, Custom, Lucknow arising out of Crime No. 228 of 2020, under Sections 419, 420, 465, 469, 471, 153-A, 153-B, 505 (1) (b), 505 (2) I.P.C. and Section 66 of the Information Technology Act, Police Station Hazratganj, District Lucknow as well as summoning order dated 12.01.2022 passed by the Special CJM Custom, Lucknow.

3. Learned counsel for the applicant submits that as per the prosecution case on 21.08.2020 an F.I.R. was registered against unknown persons by the informant/Sub Inspector of Police Station Hazratganj, District Lucknow bearing FIR No. 0228 under Sections 419, 420, 465, 469, 471, 153-A, 153-B, 505(1) (b), 505 (2) I.P.C. and under Section 66 of Information and Technology Act, 2008, while being on duty noticed circulation of a letter on the social media platform, namely, whatsapp/twitter issued in the name of MLA (BJP) Sri Dev Mani Dwivedi on a letter pad bearing Serial No. Ka-6, No. 459473 and letter no.UPMLA/2/87 dated 20.08.20 addressed to the Additional Chief Secretary, Home, regarding providing information of criminal cases registered against various political persons. It is further alleged that on perusal it was noticed that the signature was in different name in the letter pad and on verification sought it was found to be forged. It is further alleged that forged letter pad was prepared for spreading communal hatred in the State of Uttar Pradesh and to defame the image of the present Government.

4. Learned counsel for the applicant submits that the allegations made in the impugned F.I.R. are absolutely false, frivolous and are not made out against the applicant.

5. Learned counsel for the applicant further submits that the applicant is a Journalist by profession and is also having several social media accounts including Twitter account wherein several posts pertaining to political as well as social events are being shared and the information in the form of news is shared by the applicant on issues existing in the social media and elsewhere.

6. Learned counsel for the applicant further submits that on 21.08.2020 the applicant received a copy of the letter dated 20.08.2020 from a reputed media person working as Editor/State Head of a Regional News Channel named India News U.P./U.K.. alleged to be issued by Sri Dev Mani Dwivedi, Member of Legislative Assembly, U.P. from the present ruling party was spreading in the social media addressed in the name of Additional Chief Secretary, Home, Government of U.P. wherein certain names of the political persons of one community with number of criminal cases against their name were

mentioned thereby seeking explanation regarding action taken within last three years. Copy of the Letter Pad is filed as Annexure No. 1 to the applicant filed in support of the application.

7. Learned counsel for the applicant further submits that the applicant shared the aforesaid letter issued by the BJP MLA on his Twitter account. Thereafter, the applicant had made another post. The copy of the post on Twitter account is filed as Annexure No.3 and 4 to the affidavit filed in support of the application.

8. Learned counsel for the applicant further submits that the letter shared by the applicant on his twitter was purely in form of a news report and was not shared with any intention to spread communal terror or to defame the image of the present Government.

9. Learned counsel for the applicant further submits that on 30.09.2021 the impugned Charge Sheet No.1 of 2021 under Sections 419, 420, 465, 469, 471, 153-A, 153-B, 505 (1) (b), 505 (2) I.P.C. and Section 66 of the Information Technology Act was filed by the Investigating Officer before the court concerned after due investigation and on 12.01.2022, learned court below had taken cognizance and issued process against the applicant and seven other accused persons on the basis of the material that the applicant on his Twitter account posted and shared the letter of the BJP MLA only with the intention to spread communal terror and to defame the image of the present Government.

10. Furtther contention of the learned counsel for the applicant is that no offence against the applicant is disclosed and the present prosecution has been instituted with a malafide intention for the purposes of harassment and defaming the image of the applicant in the society.

11. Per contra, the learned Additional Advocate General has contended that the applicant claims himself to be Journalist, but he has not annexed any relevant document or licence issued to him regarding his profession by any authority. The applicant himself admitted this fact in the instant application that he had shared the aforesaid letter pad of the MLA Sri Dev Mani Dwivedi on his Twitter handle. Learned Additional Advocate General has drawn attention of this Court towards the tweet shared by the applicant on his tweeter handle on 21August, which is reproduced as under:

"# बीजेपी के लंभुआ विधायक देवमणि द्विवेदी का सरकार पर एक और हमला। 16 माननीयों की लिस्ट उनके मुकदमें के साथ जारी कर अपर मुख्य सचिव गृह से इनके ऊपर लंबित मुकदमों में पिछले तीन सालों की करवाई का ब्यौरा मांगा।"

12. Learned Additional Advocate General further submits that the applicant had tweeted the aforesaid letter pad of Sri Dev Mani Dwivedi, Member of Legislative Assembly of the ruling party (BJP) with the intention to defame the image of the ruling party in the State and to create communal terror and the said action of the applicant helped him in creating an ploy for him. He tried to defame the image of the U.P. Government led by the Chief Minister. The Government is working in the State for the peace and harmony of the people and for overall development in the State. The said action of the applicant is crime against the State and does not deserve any sympathy by this Court.

13. Having heard learned counsel for the parties and after perusal of the materials

on record and looking into the facts of the case, it could not be stated that no offence has been made out against the applicant. Every person including the present applicant has the freedom of speech and the right to express his thoughts and ideas in general public as guaranteed by the Constitution of India, but such freedom should not be used in such a way that it would result in affecting the peace and tranquillity in the society. No such word or remark should be uttered that would created disharmony in the society. The allegation for spreading incorrect facts, without verifying and sharing the same through twitter handles, has also been levelled against the applicant. On account of sharing of incorrect facts on twitter handles, there was a chance of violation of public peace and tranquillity in the Society. The intention of the applicant was just to defame the image of the present Government in the State and to create communal terror which is direct attack to disturb the peace and harmony of the State. No one can be given the licence to disturb the peace ad tranquillity in the society, even though the applicant was not given authority under the law to do all such type of act for which he has no authority. There is already State machinery to look after the law and order of the State, even though from the action of the applicant it appears that his intention was not fair and wants to disturb the peace of the State and after due investigating the charge-sheet has been filed and the learned Magistrate took cognizance on the charge sheet, which reflects that cognizable offence is made out against the applicant.

14. The applicant in para 9 and 10 of the affidavit in support of the application himself stated this fact that during the course of investigation the statement of the MLA Sri Dev Mani Dwivedi was recorded by the Investigating Officer on 23.08.2022 and the MLA denied the issuance of the letter and his signature, thus this shows that the Blank Letter Pad of the concerned MLA was obtained and to gain undue advantage and with the intention to disturb the peace and harmony of the State, the material was written and forged signature was made and posted on Twitter handle account, which is a very serious matter.

15. From the allegations made in the FIR/Charge-sheet and cognizance order, prima facie offence is made out against the applicant. The innocence of the applicant cannot be adjudged at the pre trial stage. Therefore, the applicant does not deserve any indulgence. There also appears force in the argument of learned Additional Advocate General that the present Government is working in the interest of the State and for the peace and harmony of the people and for the overall development in the State.

16. At the stage of issuing process the court below is not expected to examine and assess in detail the material placed on record, only this has to be seen whether prima facie cognizable offence is disclosed or not and in the present case there is an allegation for spreading incorrect facts, without verifying and sharing the same through twitter handles and there was a chance of violation of peace and tranquility in the Society. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:-**(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC**

(Crl.)192 and (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.)283.

17. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168,** it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

18. The High Court would not embark upon an inquiry as it is the function of the Trial Judge/Court. **The interference at the threshold of quashing of the charge sheet, proceeding of the case and summoning order in the case in hand cannot be said to be exceptional as it discloses prima facie commission of an cognizable offence. In the result, the prayer for quashing is refused.** There is no merit in this application filed under Section 482 Cr.P.C. and is liable to be dismissed.

19. In view of the discussions made above, this application filed under Section 482 Cr.P.C., for the relief as prayed for, is **dismissed**.

(2023) 2 ILRA 1209
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2023

BEFORE

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

Writ Tax No. 1120 of 2022

Madan Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anshul Kumar Singhal

Counsel for the Respondents:
C.S.C., Ankur Agrawal (Standing Counsel)

U.P. Motor Vehicles Taxation Rules , 1998-Rule 18-Recovery citation on account of motor vehicle tax-impugned-the vehicle of the Petitioner hypothecated with finance company-unable to pay the loan-surrendered the vehicle for recovery of loan amount-informed about the surrendering the vehicle-no liability after possession taken by the financer-financier liable to pay tax-objection by the Petitioner to be considered by the competent authority-liability may be re-worked.

W.P. disposed. (E-9)

List of Cases cited:

Mahindra and Mahindra Financial Services Ltd. Vs St. of U.P. & ors., (2022) 5 SCC 525

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

1. Recovery citation dated July 3, 2022 issued against the petitioner, on

account of motor vehicle tax, is under challenge in the present petition.

2. The argument raised by the learned counsel for the petitioner is that he had purchased three Tata Sumo Cars bearing registration Nos. UP 16AT 2265, UP 16AT 2266 and UP 16AT 2267. The same were hypothecated with M/s Magma Fincorp Limited. Being unable to pay EMI of loan, the petitioner surrendered the vehicles bearing registration nos.UP 16AT 2266 and UP 16AT 2267 on July 31, 2015 and bearing registration no. UP 16AT 2265 on August 12, 2015 with request to sale out the vehicles for recovery of the loan amount. Thereafter, the petitioner has moved application dated December 20, 2015 before the Regional Transport Officer, Gautam Buddh Nagar informing him about surrendering of the vehicles to the Finance Company. Petitioner has already paid tax in respect of the vehicles in question up to March 31, 2015. After possession of the vehicle was taken by the financer, the liability of the tax cannot be put on the petitioner as in that case the financer will be liable to pay the tax. In support of the argument reliance has been placed upon judgment of Hon'ble the Supreme Court in **Mahindra and Mahindra Financial Services Ltd. vs. State of U.P. and others, (2022) 5 SCC 525.**

3. Learned counsel for the State submitted that the issue will be examined in the light of judgment of Hon'ble the Supreme Court in **Mahindra and Mahindra Financial Services' case (supra).**

4. After hearing the learned counsel for the parties, we find merit in the submission made by learned counsel for the petitioner as he stated that possession of the vehicles in question was taken by the financer in August 2015 and in view of the judgment of Hon'ble the Supreme Court in **Mahindra and Mahindra Financial Services' case (supra),** the liability for payment of tax thereafter cannot be fastened on the petitioner. Relevant paragraph 12 of the aforesaid judgment is reproduced hereinbelow: "In view of the above discussion and for the reasons stated above, it is held that a financier of a motor vehicle/transport vehicle in respect of which a hire-purchase or lease or hypothecation agreement has been entered, is liable to tax from the date of taking possession of the said vehicle under the said agreement. If, after the payment of tax, the vehicle is not used for a month or more, then such an owner may apply for refund under Section 12 of the Act, 1997 and has to comply with all the requirements for seeking the refund as mentioned in Section 12, and on fulfilling and/or complying with all the conditions mentioned in Section 12(1), he may get the refund to the extent provided in sub-section(1) of Section 12, as even under Section 12(1), the owner/operator shall not be entitled to the full refund but shall be entitled to the refund of an amount equal to one-third of the rate of quarterly tax or one twelfth of the yearly tax, as the case may be, payable in respect of such vehicle for each thirty days of such period for which such tax has been paid. However, only in a case, which falls under sub-section(2) of Section 12 and subject to surrender of the necessary documents as mentioned in sub-section(2) of Section 12, the liability to pay the tax shall not arise, otherwise the liability to pay the tax by such owner/operator shall continue." (emphasis supplied)

5. In view of aforesaid, the petitioner may file objection against the recovery

citation dated July 3, 2022 in terms of Rule 18 of the Rules, mentioning that possession of the vehicles in question was taken by the financer in August 2015. In case, the petitioner files objection, the same be considered by the competent authority and from the date of possession of the vehicles was taken by the financer, the liability may be re-worked out in terms of judgment of Hon'ble the Supreme Court in **Mahindra and Mahindra Financial Services' case (supra)**. However, for any period prior to that, if the tax has not been paid, the petitioner shall be liable to pay the same.

6. The writ petition is, accordingly, disposed of and recovery citation against the petitioner is quashed.
