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ALLAHABAD SERIES

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JUDGES PRESENT

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<i> Puisno Judges:</i>	
<i>1. Hon'ble Mrs. Justice Sunita Agarwal</i>	<i>33. Hon'ble Mr. Justice Veeraj Tivari</i>
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2). The instant appeal has been preferred under Section 374 of Cr.P.C.

against the judgement and order dated 29.10.1998 passed by Additional Sessions and District Judge, VIIIth, District Lucknow in Session Trial No. 110 of 1994, arising out of Case Crime No. 352 of 1994, Police Station Hazratganj District Lucknow, wherein, the appellant, Liyaqat Ali, has been convicted and sentenced for the offence under Section 8/21 of Narcotics Drugs and Psychotropic Substance Act, 1985, (hereinafter referred as 'NDPS Act') for 10 years rigorous imprisonment with fine of Rs. 1,00,000/- and in default of payment of fine he shall further undergo two years of simple imprisonment and in Case Crime No. 353 of 1994, Police Station Hazratganj, District Lucknow, in addition to the aforesaid sentence, the appellant has also been convicted and sentenced for the offence under Section 25/4 of the Arms Act, 1959 for one year of simple imprisonment. Both the sentences were ordered to be run concurrently.

3). The prosecution case in brief is that on 23.03.1994 at 11:45, the appellant/accused was arrested by the Police at the boundary of Gora Kabristan and a knife as well as 500 gms Smack was recovered from his possession. On being confronted to produce the license of keeping the knife as well as the contraband/smack, the accused-appellant failed to produce any valid document. Inspector Sunil Kumar Mishra prepared the recovery memo on the place of occurrence on the basis of which Head Constable Harful Verma scribed the First Information Report and made an entry in the GD regarding the possession of illegal arm and contraband with the accused-appellant on basis of which the First Information Report was registered and the investigation was carried by Sub-Inspector S.S. Hussain and on account of incompleteness of the

investigation, the investigation was entrusted to Sub-Inspector, R.K. Tiwari but also due to some reasons, he could not complete the investigation and then the investigation was entrusted to V.K. Trivedi who after completing the investigation and on the basis of FSL Report ascertaining that the contraband recovered from the possession of the appellant is Smack, filed a charge-sheet against the appellant under Section 8/21 of the NDPS Act and under Section 25/4 of the Arms Act.

4). Charges for the offence under Section 8/21 of the NDPS Act and Section 25/4 of the Arms Act were framed by the learned trial Court and it was read to the appellant which he denied and claimed for trial.

5). The prosecution, in order to prove its case produced Sub-Inspector Sadanand Rai (P.W.1) and Constable Satendra Pachori (P.W.2). Apart from the aforesaid two witnesses, there were no other witnesses produced by the prosecution for the reason that the learned counsel appearing on behalf of the appellant before the learned trial Court confessed the certification of the documentary evidence.

6). After conclusion of the prosecution witness, the statement was recorded under Section 313 of Cr.P.C. where he denied the prosecution and stated that no recovery was made from his possession and all the documents were prepared fraudulently with a motive to falsely implicate him.

7). To controvert the prosecution story, Nisar (D.W.1) and Ikrar Ahmed (D.W.2) were examined by the appellant and a copy of the telegram of intervening night 22/23 dated 23.03.1994 to the Station

House Officer, Hazratganj was also produced as an evidence in which it was stated that at about 1 of 2 in the night, some police personals called Ikrar and Liyaqat Ali and both were taken by the police personals on a pretext that the Inspector of Police Station has called them. Apart from the aforesaid, there is no other evidence produced on behalf of the appellant.

8). After the conclusion of the trial, the learned trial Court hold the appellant guilty under Section 8/21 of NDPS Act and 25/4 of Arms Act and sentenced him as above vide impugned judgement and order.

9). Aggrieved with the impugned judgement this appeal has been preferred.

10). The learned counsel appearing for the appellant submits that he is innocent and has falsely been implicated in this case by the Police. The learned counsel for the appellant has further submitted that the Police has also not complied the mandatory provision of Section 50 of the NDPS Act. It is further submitted by the learned counsel for the appellant that no public witness was produced despite the said recovery was alleged to be made in a busy public place. The learned counsel for the appellant submits that there are sufficient infirmities in the procedural steps which ought to have been undertaken by the Police and statutory provisions regarding search and seizure have been disregarded by the Investigating Officer. He further submits that as a matter of fact the appellant was illegally arrested in the intervening night of 22/23.03.1994 at around 02:00 A.M. by the Police of Police Station, Hazratganj and subsequently, he was falsely implicated in the present criminal case on 23.03.1994. It is further submitted by the learned counsel for the appellant that from the perusal of the First

Information Report it is evident that there is over writing in the column relating to the date of occurrence and the date of lodging of First Information Report. It is further submitted that the Police was not carrying any instrument of weighing and there is no explanation as to how the weight of the recovered articles were assessed. It is further submitted by the learned counsel for the appellant that the percentage of narcotic substance were not assessed by the chemical analysis in the report dated 06.06.1999. He added that the alleged recovery is of 23.03.1994 and the sample reached the Forensic Laboratory on 16.05.1994 and there is no plausible explanation for the delay caused and there is complete violation of provision of the NDPS Act by the Police as Section 50 of NDPS Act has been violated as well as Section 42 of NDPS Act has also not been complied with by the Police.

11). In support of his contention, the learned counsel for the appellant has also placed reliance on the following judgements and referred the following paragraphs:-

1) Vijaysinh Chandubha Jadeja Vs. State of Gujrat, (2021) 1 SCC 609 and has referred paragraphs 29, 30 and 32 which are quoted herein under:-

"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(1) 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.

30. As observed in Re Presidential Poll, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole."

32. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

2) Munnan Vs. State of U.P. arising out of Criminal Appeal No. 437 of 1997 decided on 05.01.2021 and has referred paragraphs 16, 17, 18 and 19 which are quoted herein:-

"16. The Hon'ble Supreme Court in a catena of decisions, has discussed the importance of Section 50 of NDPS Act. In State of Punjab vs. Baldev Singh AIR 1999 SC 2378, the Constitutional Bench of Supreme Court has elaborately discussed the importance and scope of mandatory provisions of Section 50 of NDPS Act as follows :

"55. On the basis of the reasoning and discussion above, the following conclusions arise :

(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 concerned person 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 concerned person 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:

(4) That there is indeed need to protect society from criminals. The societal

intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards 50 have by Section 50 at the trial, would render the trial unfair.

(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 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 concerned person 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;"

(Emphasis supplied)

17. In Vijaysing Chandubha Jadeja vs. State of Gujarat, AIR 2011 SC 77 while discussing the scope of Section 50 of NDPS Act, the Constitutional Bench of Supreme Court while observing that mere informing the accused his willingness to be searched before Gazetted Officer or Magistrate is not sufficient but it is the duty of the concerned officer to apprise the accused about his/her right of Section 50 of the Act has held as under :-

"22. 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. As observed in Re Presidential Poll14, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest

gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

(Emphasis Supplied)"

18. In Arif Khan @ Agha Khan vs. State of Uttarakhand AIR 2018 SC 2123, Hon'ble Supreme Court while discussing the importance of compliance of mandatory provision of Section 50 of N.D.P.S. Act, has held as below:-

"21. 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, remains no more res integra and are now settled by the two decisions of the Constitution Bench of this Court in State of Punjab vs. Baldev Singh (1999) 6 SCC 172: (AIR 1999 SC 2378) and Vijaysinh Chandubha Jadeja (AIR 2011 SC 77) (supra).

22. Indeed, the latter Constitution Bench decision rendered in the case of Vijaysinh Chandubha Jadeja (AIR 2011 SC 77) (supra) has settled the aforementioned questions after taking into considerations all previous case law on the subject.

23. Their Lordships have held in Vijaysinh Chandubha Jadeja (AIR 2011 SC 77) (supra) 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 authorized 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. (See also Ashok Kumar Sharma vs. State of Rajasthan, 2013 (2) SCC 67 and Narcotics Control Bureau vs. Sukh Dev Raj Sodhi, 2011 (6) SCC 392) : (AIR 2011 SC 1939)."

(Emphasis Supplied)

19. Thus, it is clear that if the contraband narcotics was recovered in contravention of specific mandate of Section 50 of the Act, the whole prosecution story becomes doubtful and the appellant is entitled for acquittal. "

3) Ram Pratap Vs. State of U.P. arising out of Criminal Appeal No. 357 of 1999 decided on 22.05.2020 and has referred paragraphs 16, 17 and 18 which are quoted herein:-

"16. Severe punishment has been provided in the N.D.P.S. Act to check the misuse of this Act by the police personnel or officers and certain safeguards particularly Section 50 of N.D.P.S. Act has been incorporated in this Act that search of the suspected person must be done before the Magistrate or Gazetted Officer. Similarly Section 55 and 57 of N.D.P.S. Act provides that seized contraband article be kept by Station House Officer in safe custody and report of arrest and seizure be

sent immediately to immediate Superior Officer within 48 hours.

17. Hon'ble Supreme Court in Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2010 (2) EFR 755, while discussing the importance and relevancy of section 50 of N.D.P.S. Act, in para-22, has held as under:-

"22. 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. As observed in Re Presidential Poll (1974) 2 SCC 33, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the

concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in *Joseph Fernandez (supra)* and *Prabha Shankar Dubey (supra)* is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *Baldev Singh's case (supra)*. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

(Emphasis supplied)

18. Hon'ble Supreme Court in *State of Rajasthan Vs. Parmanand and another*, (2014) 2 SCC (Cri) 563, again in paragraph-17, has held as under:-

"In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are

minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in *Paramjit Singh* and the Bombay High Court in *Dharamveer Lekhrum Sharma* meets with our approval."

4) **Vijay Jain Vs. State of Madhya Pradesh**, (2013) 14 SCC 527 and has referred paragraphs 10, 11, 12 and 13 which are quoted herein:-

"10. On the other hand, on a reading of this Court's judgment in *Jitendra case [Jitendra v. State of M.P., (2004) 10 SCC 562 : 2004 SCC (Cri) 2028]*, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused

would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in *Ashok* [*Ashok v. State of M.P.*, (2011) 5 SCC 123 : (2011) 2 SCC (Cri) 547] this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant.

11. In the present case, finding of the trial court that the seized contraband goods were produced in a suitcase is contrary to the evidence of PW 11, which is to the following effect:

“81. Note.—A big suitcase from the store materials on which No. 466/05 is written has been received in a white cloth along with seal of the sealing material. In this the lock is of numbers and the lock is not getting open because of this AGP is directed to call some technical person for opening the lock, on this AGP had called Shri Shakoor who expressed that the lock is of numbers and cannot be opened, it can be broken. In the case, the evidence material is important and therefore it was directed to break the lock, the lock was opened. In the suitcase on the opening a big packet wrapped in cloth was found but the cloth is torn and blue colour polythene is being seen in which clothes are there. The cloth which is rolled on blue colour polythene there is no seal visible on it, nor any description is being seen, because the cloth is damp and has been in contaminated condition and is torn and no note is marked on it. In the polythene there are 5 pants and 5 shirts which are in wet condition.

111. Today I cannot say that in what colour bag the rest of the substance was packed in the bag. The material which was seized from Vijay Jain, out of it two samples 25-25 gm were made and marked B-1 and B-2 which were shown to the witness when he said that they were taken out from the material found with Vijay Jain on site. No other packet except the two samples and rest of material were made on the site. The said both packets which have been submitted in the court are sealed and on them the seizure chit is not affixed showed the B-1 and B-2 packet and asked that the seal of police station is affixed then the witness said the seal of police station is affixed then the witness said that it is the seal of the Tahsildar, Indore. Leaving aside rest of the substance and mobile the other seized material from Vijay is submitted in the court. This is true that I had not given the mobile for sealing to the Incharge of stores. Today I cannot say where that mobile is.”

Thus the only evidence before the court was that in the suitcase in which the contraband goods were allegedly kept when opened, there was only a big packet wrapped in cloth and the cloth was torn and there was a blue-coloured polythene in which there were clothes. There is no mention in the evidence of PW 11 of any brown sugar having been found in the suitcase. There is, however, evidence that samples were prepared of 25-25 gm which were shown to the witnesses and were marked B-1 and B-2 but we find that PW 3 has stated before the court in his examination that these samples were not prepared in his presence and PW 2 has stated before the court that the witnesses were not taken to the site where the materials were seized.

12. We are thus of the view that as the prosecution has not produced the brown

sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW 2 and PW 3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable.

13. In the result, we allow these appeals and set aside the impugned judgment of the trial court as well as the High Court. The appellants are stated to be in jail. They shall be released forthwith if not required in connection with any other case."

5) Jitendra Vs. State of M.P., (2004) 10 SCC 562 and has referred paragraph 6, 9 and 10 which are quoted herein:-

"6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It

was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched.

9. Taking the cumulative effect of all the circumstances, it appears to us that the material placed on record by the prosecution does not bring home the charge beyond reasonable doubt. We are of the view that upon the material placed on record it would be unsafe to convict the appellants. They are certainly entitled to the benefit of doubt.

10. In the result, we allow the appeals, set aside the judgment of the High Court and the trial court and quash the conviction of the appellants. The appellant Jitendra is directed to be released from custody forthwith, if not required in any other case."

6) Ashok @ Dangra Jaiswal, (2011) 5 SCC 123 and has referred paragraphs 10, 11, 12 and 13 which are quoted herein:-

"10. The seizure of the alleged narcotic substance is shown to have been made on 8-3-2005, at 11.45 in the evening. The samples taken from the seized substance were sent to the FSL on 10-3-2005, along with the draft, Ext. P-31. The samples sent for forensic examination were, however, not deposited at the FSL on that date but those came back to the police station on 12-3-2005 due to some mistake in the draft or with some query in respect of the draft. The samples were sent back to the

FSL on 14-3-2005, after necessary corrections in the draft and/or giving reply to the query and on that date the samples were accepted at the FSL. From the time of the seizure in the late evening of 8-3-2005, till their deposit in the FSL on 14-3-2005, it is not clear where the samples were laid or were handled by how many people and in what ways.

11. The FSL report came on 21-3-2005, and on that basis the police submitted charge-sheet against the accused on 31-3-2005, but the alleged narcotic substance that was seized from the accused, including the appellant was deposited in the malkhana about two months later on 28-5-2005. There is no explanation where the seized substance was kept in the meanwhile.

12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

13. It may be noted here that in Jitendra v. State of M.P. [(2004) 10 SCC 562 : 2004 SCC (Cri) 2028] , on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In Jitendra [(2004) 10 SCC 562 : 2004 SCC (Cri) 2028] , the Court observed and held as under: (SCC pp. 564-65, paras 5-6)

“5. The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the

panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the forensic science laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the forensic science laboratory were taken from the drugs seized from the possession of the accused. Although the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the chemical examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, ‘non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced’. The High Court relied on Section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were

seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched."

12). On the other hand, the learned AGA appearing for the State submits that the statement of prosecution witnesses can not be rejected only on the ground that they are police personnels and there is no illegality in the impugned judgement and order and it is a settled provision of law that only on a solitary testimony of witness, conviction can be maintained. He further submits that the impugned judgement and order passed by the trial Court is well reasoned, well discussed and is liable to be affirmed.

13). Considering the rival submissions advanced by the learned counsel for the parties, the following facts and law emerges for discussion.

14). Prior to discussing the evidences and material available on record, it is relevant to be aware about the stringent provisions of Narcotics Drugs and Psychotropic Substance Act, 1985 for the offences relating to the quantity, which is not less than 10 years of regirous imprisonment with a minimum fine of Rs. 1,00,000/-. Because of the nature of sever punishment and the strict laws of the Act, certain safeguards have also been provided to prevent the misuse of the Act and time and again, the Hon. Apex Court has also discussed the aforesaid laws and have given its finding.

15). In view of the gravity and severity of the punishment certain important safeguards have been provided under Section 50 of the NDPS Act with a view to prevent the misuse of the Act, which is as under:-

"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. 1[(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.]”

16). Coming to the fact of this case, admittedly, the contraband narcotic and knife was recovered from the personal search of the appellant from his trousers worn by him. In addition to the above, a recovery memo was prepared on the place of the arrest and the First Information Report was registered against the appellant.

17). S.I. Sadanand Rai was examined as P.W. 1 before the learned trial Court and in his deposition as deposed before the trial Court that on input of the Police informer, the Police already reached at Gora Kabristan and found a person, when stopped by the Police, he tried to fled away but was apprehended by the Police and

disclosed his identity as Liyaqat Ali resident of Singhahi, Police Station Fakharpur, Bahraich and a knife and contraband was recovered from the pocket of his trousers worn by him. It was deposed that many persons passing from the place of occurrence were requested to be a witness of the recovery but all of them denied and therefore the search was conducted before the Police that was deposed that the appellant was informed that he may be searched before any Magistrate or Gazetted Officer but the appellant refused the same on the pretext that the contraband has been recovered from his possession, therefore there is no necessity for producing him before any Magistrate or Gazetted Officer. It was further deposed that the alleged recovered contraband was 500 gms smack which has been sealed.

18). Constable Satendra Pachori has been examined as P.W. 2 before the trial Court and in his deposition he has stated that on an input provided by the Police informer that a person is possessing contraband narcotics and illegal weapon, Police reached at Gora Kabristan, where a person was found and being stopped, he tried to fled but was apprehended by the Police. It was deposed that several persons were requested to be a witness of the recovery but all denied and in the aforesaid circumstances, the search was conducted before the Police only. It was stated by the witness that the appellant was informed that his search may be conducted before the Magistrate or Gazetted Officer but the appellant denied for the same that since he is now being arrested, therefore there is no purpose of producing him before any Magistrate or Gazetted Officer.

19). In the present case, admittedly, S.I. Sunil Kumar Mishra, who is most vital

witness of the prosecution, who prepared the recovery memo has not been examined by the prosecution and no explanation has also been given by the prosecution, as to why this star witness has not been examined. Thus in view of the above, the concern of search given by the appellant becomes doubtful.

20). It is also noticeable that in the present case, the prosecution has failed to prove the compliance of mandatory provision of Section 50 of the NDPS Act.

21). It is worth of mentioning that severe punishment has been provided in the N.D.P.S. Act to check the misuse of this Act by the police personnel or officers and certain safeguards particularly Section 50 of N.D.P.S. Act has been incorporated in this Act that search of the suspected person must be done before the Magistrate or Gazetted Officer. Similarly Section 55 and 57 of N.D.P.S. Act provides that seized contraband article be kept by Station House Officer in safe custody and report of arrest and seizure be sent immediately to immediate Superior Officer within 48 hours.

22). As above regard, the view of the Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja Vs. State of Gujarat* (supra) has emphasized the importance and relevancy of section 50 of N.D.P.S. Act, in para-22, which says that "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. As observed in *Re Presidential Poll* (1974) 2 SCC 33, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in *Joseph Fernandez* (supra) and *Prabha Shankar Dubey* (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *Baldev Singh's case* (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest

gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

23). Further the Hon'ble Apex Court in case of State of Rajasthan Vs. Parmanand and another, (2014) 2 SCC (Cri) 563 has again held in paragraph-17 that "In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court

in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval."

24). In the present case, from the perusal of the testimonies of P.W. 1 and P.W. 2 recorded before the learned trial Court, it is evident that the appellant was never informed regarding his statutory right to be searched before the Magistrate or Gazetted Officer and being so, this Court finds that there is gross violation of the Section 50 of the NDPS Act. Thus, it is clear that if the recovery of the contraband narcotics has been made in contravention to the mandate of the Section 50 of the NDPS Act, the whole prosecution story becomes doubtful and the appellant gets entitled for acquittal.

25). Since the Court finds that the recovery of the contraband from the possession of the appellant is doubtful, therefore the same will lead to the inference that the recovery of knife from the possession of the appellant is also doubtful.

26). Thus I am of the view that prosecution has miserably failed to prove its case beyond reasonable doubt against the appellant. The trial Court has not properly discussed the evidence produced by the prosecution and has passed the impugned judgment and order against the settled principle of law including provisions of N.D.P.S. Act. Being so there is no reason to uphold the conviction and sentence of the appellant. The appellant is entitled to be acquitted. The impugned judgment and order is liable to be set aside and accordingly, appeal is liable to be allowed.

27). In view of the above, impugned judgment and order dated 29.10.1998

passed by Additional Sessions and District Judge, VIIIth, District Lucknow in Session Trial No. 110 of 1994 arising out of Case Crime No. 352 of 1994 and Case Crime No. 353 of 1994 under Sections 8/21 of Narcotics Drugs and Psychotropic Substance Act, 1985 and 25/4 of the Arms Act, 1959, Police Station Hazratganj District Lucknow, is set aside and accused appellant is acquitted. Consequently, the appeal is allowed.

28). Keeping in view the provision of Section 437-A of the Code, appellant-Liyaqat Ali is hereby directed forthwith to furnish a personal bond of a sum of Rs. 20,000/- and two reliable sureties each of the like amount before Trial Court, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against this judgment or for grant of leave, appellant-Liyaqat Ali, on receipt of notice thereof, shall appear before Hon'ble Supreme Court.

29). Appellant is on bail, his personal bond is cancelled and sureties stand discharged.

30). Let a copy of this judgment along with the lower court record be sent immediately to the Trial Court concerned for necessary compliance.

(2023) 7 ILRA 21
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.07.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal U/S 372 CR.P.C. No. 31 of 2023

Javed Alam

...Appellant

Versus

Ram Pratap Yadav & Ors. ...Respondents

Counsel for the Appellant:

Sajjad Hussain

Counsel for the Respondents:

G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 308/34, 323/34, 504 & 506 - Code of Criminal Procedure, 1973 - Section 313 - Appeal against acquittal - According to prosecution, on 18.03.2016 when son of complainant/appellant was coming to his house dragging a cart which was laden by mustard crops, fennel crops standing in field of opposite party No. 1 got stuck, on this accused persons abused him, thereafter, appellant was going to his field again for taking crops, accused persons assaulted him - On shrieks, complainant and his family members reached at spot, accused persons fled, threatened complainant and his other family members - Written report registered by police against accused persons. (Para 3)

Contention by appellant, court below not appreciate evidence on record, prosecution proved offence against accused on basis of evidence and impugned judgment was passed without considering St.ment of witnesses. (Para 5)

Held, criminal trial proceeds with presumption of innocence of accused persons - With acquittal of accused persons, this presumption stands fortified - Strong and cogent reasons must exist in interfering judgment of acquittal - View by court below was probable and logical, based on valid reasons. (Para 11, 12)

Appeal dismissed. (E-13)

List of Cases cited:

Sadhu Saran Singh Vs St. of U.P. & ors. reported in (2016) 4 SCC 357, (Para 20, 21)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Sajjad Husain, the learned counsel for the appellant, Shri Hari Shanker Vajpayee, the learned A.G.A.-I for the State, as well perused the material available on record.

2. By means of the present appeal under Section 372 Cr.P.C., the appellant, Javed Alam, has challenged the judgment and order dated 21.02.2023 passed by learned Additional Sessions Judge-I, Ambedkar Nagar in Session Trial No. 281 of 2016, State Vs. Ram Pratap Yadav and others, arising out of Case Crime No. 83 of 2016, under Sections 308/34, 323/34, 504, 506 I.P.C., Police Station Jalalpur, District Ambedkar Nagar, acquitting the opposite party Nos. 1 & 2 from the charges under Section 308/34 I.P.C. framed against them and convicting them for the offence under Sections 323/34, 504, 506 I.P.C. and releasing them on furnishing personal bond of Rs. 30,000/- each for probation period.

3. According to the prosecution version, on 18.03.2016 at about 11:00 a.m. when the son of complainant, namely, Javed Alam (present appellant) was coming to his house dragging a cart which was laden by mustard crops, then the fennel crops standing in the field of opposite party No. 1-Ram Pratap, got stuck, on account of which the accused persons started abusing him, thereafter, when the son of complainant was going to his field again for taking crops, the accused persons including Sudhanshu and Kaushalya surrounded him and assaulted him by lathi, danda and iron rod. On shrieks when the complainant and his family members reached at the spot the accused persons fled away from there while threatening the complainant and his other family members. On this written report the case was registered by the

police against the accused persons. After the case was committed, the accused persons in their statements under Section 313 Cr.P.C. denied their guilt and claimed to be tried.

4. The court below after taking into consideration the facts and circumstances of the case and evidence available on record, passed the impugned judgment and order dated 21.02.2023.

5. Learned counsel for the appellant submits court below did not appreciate the evidence on record, prosecution has successfully proved the offence against the accused on the basis of evidence and the impugned judgment was passed without considering the statement of witnesses and the case set up by the prosecution and was passed on surmises and conjectures.

6. Learned A.G.A.-I submits that there appears no illegality or infirmity in the impugned judgment and order passed by the trial court, therefore, the present appeal may be dismissed.

7. I have heard the learned counsel for the appellant as well as learned A.G.A. and gone through the impugned judgment and order passed by the trial court.

8. In the present case from the statements given by the witnesses produced by the prosecution including the injury report of the injured, I found that prosecution has failed to establish that the crime in question has been committed by the accused. There appears no illegality or infirmity in the impugned judgment and order, which is before this Court.

9. Further, this Court observed that an appeal against acquittal stands on a

different footing from the appeal against conviction. Hon'ble the Apex Court in a very recent judgment in the case of **Sadhu Saran Singh Vs. State of Uttar Pradesh and Others reported in (2016) 4 SCC 357** has considered this difference and has observed in paragraph nos.20 and 21 as under:

*"20. Generally, an appeal against acquittal has always been altogether on a different pedestal from that of an appeal against conviction. In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. This Court, while enunciating the principles with regard to the scope of powers of the appellate court in an appeal against acquittal, in **Sambasiva V. State of Kerala 1998 SCC (Cri) 1320** has held:*

7. The principles with regard to the scope of the powers of the appellate court in an appeal against acquittal, are well settled. The powers of the appellate court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellate court cannot substitute its view in the place of that of the trial court. It is only when the approach of the trial in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions

therefrom that the appellate court can interfere with the order of acquittal."

21. The Court, in several cases, has taken the consistent view that the appellate court, while dealing with an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded. If the appellate court, on scrutiny, finds that the decision of the court below is based on erroneous views and against settled position of law, then the interference of the appellate court with such an order is imperative."

10. In the light of the aforesaid guidelines, the impugned judgment has to be considered from the point of view whether the view taken by the court below was a probable view based on the material on record or it is an absolutely erroneous judgment devoid of merits.

11. A criminal trial proceeds with the presumption of innocence of the accused persons. With the acquittal of the accused persons this presumption of innocence stands fortified. So very strong and cogent reasons must exist in interfering the judgment of acquittal.

12. Keeping in view the aforesaid weakness of the prosecution case, as noted by the court below, I am of the view that the view taken by the court below was a probable and logical view, which is based on valid reasons. The judgment of the court below cannot be said to be illegal, illogical and improbable and not based on material on record or is based on erroneous views and is against the settled position of law. So, this Court is satisfied that there is absolutely no hope of success in this appeal and accordingly, no interference is called for.

13. Accordingly, the present appeal is dismissed.

14. No order as to costs.

15. Copy of this judgment be sent to the court below for its compliance.

16. Lower court record, if any, be returned back to the court concerned.

(2023) 7 ILRA 24

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 14.07.2023

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Criminal Appeal No. 1041 of 2001

Ganga Prasad & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:

M.C. Yadav, Anil Kumar Tiwari

Counsel for the Respondent:

G.A.

**Criminal Law - Indian Penal Code, 1860-
Section 363 - Appeal against conviction -
Rigorous imprisonment - Complainant St.d
in F.I.R. that his son was married to
daughter of accused but due to some
dispute, his daughter-in-law was residing
at residence of accused and not coming to
reside with his son - One month before
date of incident, appellants extended
threat that they will kidnap complainant's
daughter - On 28.05.1994 when
complainant's daughter, was going to
bring articles of breakfast, appellants
enticed his daughter and took her away
with them - Victim's age was 11 years,
complainant searched but could not trace
out - After investigation, charge-sheet**

**submitted - On basis of evidence, trial
court convicted them. (Para 2, 4, 6)**

**Held, F.I.R. lodged after 19 days of
incident - P.W. 1, victim's mother in her
testimony deposed she was recovered
after 15-20 days from date of incident
whereas P.W. 2, victim St.d she remained
in house of accused only for 9-10 days,
thereafter appellants took her to Lucknow
and came back to her house - P.W. 4,
victim's sister deposed when she was not
traceable then her father lodged F.I.R. and
after 25 days she came back parent's
house - Contradictions in testimonies
when seen along with entire facts and
circumstances of case, becomes vital -
Probability of false implication of
appellants as there was dispute between
family of complainant and accused -
Impugned order set aside. (Para 17, 18,
21)**

Appeal allowed. (E-13)

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard learned counsel appearing for Appellant No. 2, learned Additional Government Advocate appearing for the State and perused the record.

2. I find from the record that Appellant No.1 has already died and the present appeal in respect of Appellant No.1 has already been dismissed as abated vide order dated 26.02.2020 passed by this Court.

3. Appellant No.2 through present appeal has challenged judgment and order dated 06.11.2001 passed by 9th Additional Sessions Judge, Lucknow in Session Trial No. 744 of 1996 (State Vs. Ganga Prasad & Anr.) whereby Appellant No. 2 has been convicted for offence punishable under Section 363 IPC and has been sentenced for rigorous imprisonment of five years with

fine of Rs. 5,000/- with rider that in default of payment of fine, he will have to undergo simple imprisonment of one year.

4. Prosecution story of the case in brief is that the complainant, Ram Bharose lodged an F.I.R. on 16.06.1994 at about 15:20 hours in Police Station, Krishna Nagar, Lucknow which was registered as **Case Crime No. 384 of 1994 under Sections 363 and 366 IPC**. Complainant in the F.I.R. stated that he is the resident of 55 Gha/Chha/138(kha), Naya Sardari Kheda, Police Station, Krishna Nagar, Lucknow and father-in-law of his son, Ganga Prasad and brother of Ganga Prasad, Sohan Lal are residents of village, Paigambar Nagar, Police Station, Mawai, District, Barabanki. Complainant has further stated in F.I.R. that his son, Ranjit Kumar was married to the daughter of Ganga Prasad but due to some dispute, his daughter-in-law is residing at the residence of Ganga Prasad and is not coming to reside with his son and therefore, Ganga Prasad is annoyed with the complainant. Complainant has also stated that almost one month before the date of incident, Ganga Prasad and Sohan Lal came to his residence and extended threat that they will kidnap his daughter, Brahm Kumari, therefore, entire family got scared. It has been further stated in the F.I.R. that on 28.05.1994 at about 7:00 a.m. when daughter of the complainant, Brahm Kumari was going to bring some articles of breakfast in vicinity, aforesaid Ganga Prasad and Sohan Lal came and enticed his daughter and took her away with them. Age of the victim is 11 years and further complainant stated that he searched out his daughter and even enquired from the accused but he could not trace out his daughter, therefore, he is giving information to the police.

5. It is to be noted here that the aforesaid girl, Brahm Kumari after

sometime came back to residence of her father.

6. Police after investigation submitted charge-sheet against Ganga Prasad and Sohan Lal under Sections 363 & 366 I.P.C. Since offences were triable by Sessions Court, as such, case was sent to Sessions Court and the trial started.

7. During trial, testimonies of PW-1, Smt. Prema Devi, PW-2, Brahm Kumari, PW-3, Sri Ram Bharose, PW-4, Santosh Kumari, PW-5, Constable Khushi Ram, PW-6, Sri Ram Ji Mishra (Investigating Officer) and PW-7, Sri R.S. Tomar (Investigating Officer) were recorded.

8. Thereafter two Defense Witnesses were produced from the side of appellant i.e. DW-1, Smt. Neelam, DW-2, Sri Sundar Singh.

9. PW-1, Smt. Prema Devi who is mother of the victim girl, in her testimony has deposed that when her daughter Brahm Kumari went to bring some articles of breakfast in the vicinity, Ganga Prasad & Sohan Lal enticed her daughter and took her to their house in District, Barabanki. She further stated that at the time of incident, age of Brahm Kumari was 10-11 years. Smt. Prema Devi in her testimony stated that the girl, Brahm Kumari was recovered after 15-20 days from the date of the incident.

10. P.W. 2, victim, Brahm Kumari in her testimony has deposed that Ganga Prasad and Sohan Lal are fathers-in-law of his brother. She further deposed that on the date of incident, Ganga Prasad and Sohan Lal enticed her by saying that they will give something to her and took her away to their home. Brahm Kumari further stated

that when she refused to go with the aforesaid Ganga Prasad and Sohan Lal then they said that we will give you something and then you may go to your house. Brahm Kumari further categorically stated that she remained in the house of Ganga Prasad and Sohan Lal at Barabanki for about 9-10 days and, thereafter they brought her back and left at Alambagh Chauraha at Lucknow and said that now you go to your home and, thereafter she came to her home. P.W. 2 in her testimony has also said that both, Ganga Prasad and Sohan Lal have not done any indecency with her.

11. P.W. 4, Santosh Kumari who is sister of Brahm Kumari in her statement has said that Brahm Kumari came back to her house after 25 days.

12. Learned trial court on the basis of the aforesaid testimonies of prosecution witnesses and other evidence available on record, came to the conclusion that Ganga Prasad and Sohan Lal have committed offence punishable under Section 363 I.P.C. and thereby vide judgement and order dated 6.11.2001 has sentenced them for rigorous imprisonment of five years with a fine of Rs. 5,000/- each.

13. Learned counsel appearing for the Appellant No. 2 has vehemently argued that the F.I.R. was lodged by the complainant in the Police Station on 16.06.1994 at 15:20 hours and all the prosecution witnesses have said that the incident took place on 28.05.1994 meaning thereby that the F.I.R. was lodged 19 days after the date of incident whereas P.W. 2, Brahm Kumari (victim) in her statement has categorically said that she remained in the house of Ganga Prasad and Sohan Lal only for 9-10 days and, thereafter she came back to house of her father, therefore, it is

patently manifest that the entire prosecution story is false, fabricated and is an after-thought. Learned counsel for the appellant has further argued that since complainant and accused are relatives and girl on her own free will went along with Ganga Prasad and Sohan Lal to their house in District Barabanki and when she came back after 9-10 days then the complainant has lodged the F.I.R. on 16.06.1994.

14. Learned counsel appearing for the appellant has also vehemently argued that there is serious contradiction in the testimony of the prosecution witnesses in respect of the fact that after how many days, girl came back to the residence of her parents. P.W. 1, mother in her statement has stated that the girl was recovered after 15-20 days whereas the girl, Brahm Kumari in her statement has stated that she herself came back to her house after 9-10 days. Since there is delay of 19 days in lodging of F.I.R., therefore, the aforesaid contradiction between the testimonies of prosecution witnesses is of prime importance and makes the entire prosecution story suspicious. Learned counsel for the appellant has also invited attention of this Court that there is one more contradiction in the version of mother and the victim i.e. mother has said that the victim has been recovered whereas the girl has said that she herself came back to the house of her parents.

15. Learned counsel for the appellant has also put emphasis on the fact that there is motive for the complainant to falsely implicate Ram Prasad and Sohan Lal in the present case as the prosecution witnesses in their testimonies have categorically admitted that there was some dispute in the matrimonial relationship of the son of the complainant and daughter of Ram Prasad.

Learned counsel for the appellant has concluded his arguments by saying that in totality of the circumstances, it is patently manifest that the Appellant No. 2 has been falsely implicated in the present case and further prosecution has not been able to prove its case beyond reasonable doubt and, therefore, judgement and order dated 6.11.2001 passed by learned trial court in Sessions Trial No. 744 of 1996 is liable to be set-aside.

16. On the other hand, learned Additional Government Advocate has argued that there are no contradictions in the testimonies of the prosecution witnesses and prosecution has proved its case beyond reasonable doubt and therefore, judgement and order dated 6.11.2001 passed by the learned trial court is liable to be upheld by this Court.

17. I have considered the rival submissions advanced by learned counsels appearing for the parties. I find that the complainant i.e. father of the victim lodged F.I.R. in Police Station Krishna Nagar on 16.06.1994 at about 15:20 hours and the date and time of incident is 28.05.1994 at 7:00 a.m., therefore, F.I.R. has been lodged after clear 19 days of the incident. I find that P.W. 1, Smt. Prema Devi, who is mother of the victim in her testimony has deposed that the girl was recovered after about 15-20 days from the date of incident whereas P.W. 2, Brahm Kumari (victim) in her testimony has stated that she remained in the house of Ganga Prasad and Sohan Lal only for 9-10 days and, thereafter they took her to Lucknow and she came back to her house.

18. P.W. 2, Brahm Kumari in her testimony has also deposed that when her father lodged F.I.R. with the police only

then aforesaid Ganga Prasad and Sohan Lal have brought her to Lucknow and she could reach the house of her parents. I also find that the P.W. 4, sister of the victim in her testimony has deposed that when Brahm Kumari was not traceable then her father lodged F.I.R. with the police and then after about 25 days from the date of incident, Brahm Kumari came back to the house of her parents.

19. It appears from the testimonies of the prosecution witnesses that the victim, Brahm Kumari stayed in the house of Ganga Prasad and Sohan Lal for 9-10 days and, thereafter she came back to house of her parents and only thereafter complainant lodged the F.I.R. as there is gap of 19 days in the date of incident and the date of lodging of F.I.R. It also appears that there are serious contradictions in the testimonies of prosecution witnesses regarding the prosecution story as mother has said that the girl was recovered after 15-20 days, sister (P.W. 4) Santosh Kumari has said that victim came back to her house after 25 days whereas the victim herself has said that she came back to her house after 9-10 days.

20. The aforesaid contradictions in the testimonies become very vital when there is delay of 19 days in lodging the F.I.R. and further all the prosecution witnesses have said that the girl has come to parents' house only after lodging of F.I.R.

21. I find that the mother of the victim i.e. P.W. 1 has deposed that the girl was recovered whereas all other prosecution witnesses have said that the girl herself came back to her house. This contradiction when seen along with entire facts and circumstances of the case, becomes vital. I also find that there is probability of false

implication of Ganga Prasad and Sohan Lal in the present case as admittedly there was some dispute in between complainant family and the family of Ganga Prasad and Sohan Lal. Learned trial court has simply ignored the aforesaid serious contradictions in the testimonies of the prosecution witnesses and probability of the false implication of Ganga Prasad and Sohan Lal in the present case and has convicted and sentenced Ganga Prasad and Sohan Lal.

22. I am of the view that the prosecution story is under the cloud of suspicion and prosecution has not been able to prove its case against Ganga Prasad and Sohan Lal beyond reasonable doubt, therefore, Appellant No. 2 is liable to get benefit of doubt.

23. In view of the aforesaid reasons, this Criminal Appeal is allowed.

24. Judgement and order dated 6.11.2001 passed by 9th Additional Sessions Judge, Lucknow in Session Trial No. 744 of 1996 thereby convicting and sentencing Sohan Lal under Section 363 I.P.C., is set-aside.

25. Appellant No. 2 is already on bail. Sureties of Appellant No. 2 are, hereby, discharged.

26. Let the copy of this judgement and lower court record be sent back to the court concerned for necessary information and compliance.

(2023) 7 ILRA 28

**APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.07.2023**

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Criminal Appeal No. 1119 of 2001

Devanand Pandey ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Avinash Srivastava

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Indian Penal Code, 1860 - Section 376 - Appeal against conviction - Rigorous imprisonment with fine - Code of Criminal Procedure, 1973 - Sections 164, 200 & 313 - Complainant (brother of victim) St.d in FIR that appellant and co-accused enticed his sister and took her away - Victim's age was 14 years and minor - She had taken away cash and jewellery with her - During investigation, in presence of witnesses, police found victim was going on road, jewellery was in her bag - After completing investigation police submitted charge sheet - Trial court framed charges and convicted him. (Para 3, 4, 6)

Held, initial version of victim that she was put to threat and enticed by appellant to run away has been found to be unbelievable by trial court as circumstances narrated make it absolutely improbable that if a girl was being taken away by extending threat by only one man and she was passing through roads having heavy traffic and persons, then she will not make any hue and cry and will not make complaint to any person and accordingly, trial court acquitted appellant and co-accused for offence punishable u/s 366 IPC. (Para 26)

Testimony of PW-1 and PW-2 regarding age of victim on date of incident was false, in medical examination she was found to be 18 years and as per version of her brother given in cross-examination she

was 21 years and victim in her St.ment said her age was 19 years and she has married to appellant with her free will, trial court acquitted appellant of offence punishable u/s 363, IPC. (Para 27)

Trial court found testimony of prosecutrix as unbelievable, therefore, in absence of any corroborative evidence, there was manifest error of law and facts while convicting and sentencing appellant u/s 376, IPC (Para 34)

Appeal allowed. (E-13)

List of Cases cited:

1. Baldeo Sao Vs St. of Jharkhand, reported in 2007 (CrLJ) 3992, (Para 4 to 7)

2. Santosh Prasad @ Santosh Kumar Vs St. of Bihar, reported in (2020) 3 SCC 443

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard Mr. Avinash Srivastava, learned counsel appearing for the appellant and Mr. Balram Singh, learned Additional Government Advocate appearing for the State.

2. Appellant through this criminal appeal has challenged the judgment and order dated 28.11.2001 passed by 11th Additional Sessions Judge, Faizabad in **Sessions Trial No.90/93** whereby the appellant has been convicted for offence punishable under Section 376 IPC and has been sentenced for rigorous imprisonment of 10 years with fine of Rs.5,000/- with rider that in the event of failure to deposit the amount of fine, he will undergo six months' rigorous imprisonment.

3. Complainant (brother of the victim) lodged an FIR in Police Station Tarun, District Faizabad which was registered as **Case Crime No.218 of 1992 under**

Section 363/366 IPC. The complainant in the aforesaid FIR has stated that accused appellant son of Suryabhan Pandey and Rohit Kumar Pandey son of Ram Bahor Pandey, residents of Village Vidyapur Gayaspur, P.S. Tarun, District Faizabad had enticed his sister and thereby took her away. The complainant in the FIR has further stated that his sister is aged about 14 years and is a minor. In the FIR, it has further been stated that his sister had also taken away cash and jewellery with her. The complainant in the FIR has said that he tried to search out his sister but she is untraceable, therefore the First Information Report be lodged and the police may search out his sister.

4. After lodging of the aforesaid FIR, the police of the concerned police station started investigation. On 5.1.1993 at about 7 p.m. in presence of witnesses Madan Mohan Mishra and Mohd. Junaid Khan, the police found that the victim was going on the road near the south Kabristan of village Saidpur towards village Pandey Ka Purwa and thereafter she was questioned and her bag was searched out, then it was found that jewellery was in the bag. The recovery memo was prepared and the victim after medical examination was handed over to her father.

5. The police after completing the investigation submitted charge sheet against accused appellant under Sections 363, 366, 376 IPC and against accused Rohit Kumar Pandey under Section 363/34 and 366/34 IPC.

6. The trial court framed charges against accused appellant under Sections 363, 366, 376 IPC and against accused Rohit Kumar Pandey under Sections 363/34 and 366/34 IPC. During trial,

testimony of PW-1 (brother of the victim), PW-2 (victim), PW-3 Dr. Meera Srivastava, PW-4 Dr. D.R. Bhuwan and PW-5 Sub Inspector M.L. Khan was recorded.

7. Thereafter, statements of both the accused were recorded under Section 313 CrPC.

8. PW-1 (brother of the victim) in his testimony recorded during trial has deposed that in the night of 2/3.11.1992 he was sleeping outside his house and his sister was sleeping inside the house. When he woke up in the night and went inside the house, he found that his sister was not there and at that time it was about 2.30 a.m. in the night. PW-1 in his testimony has further deposed that the age of his sister was 14 years and he tried to search out his sister but she could not be traced. He has further stated that accused Rohit Kumar Pandey and accused appellant are the residents of his village and both used to come to his house and also used to talk to his sister. He also deposed that he had instructed them not to talk to his sister. He said that when his sister could not be traced out, then he became confident that Rohit and accused appellant had enticed his sister and further his sister along with her had also taken away Rs.200/- cash and jewellery. When his sister could not be traced out, then on the next day he went to the police station and lodged the FIR. He has also said that at the time of incident his mother and father were not present in the house as his mother had gone to Ayodhya and his father was in Surat on his service.

9. PW-1 complainant in his cross examination has deposed that at the time of incident his age was about 25 years. He has further said that he has two younger sisters namely Saroj Kumari and victim. Saroj

Kumari was two years younger to him and victim was two years younger to Saroj Kumari.

10. PW-2 (victim) in her testimony recorded before the trial court has deposed that she knows accused appellant and Rohit, who are residents of village Vidyapur and marriage of accused appellant had already taken place. She has further deposed that her father is in service at Surat. PW-2 in her testimony has also stated that accused appellant and Rohit by extending threat to her had taken her away with them. The accused appellant and Rohit used to come to her house frequently before the incident and accused appellant is the distant brother of her father. The marriage of accused appellant had already taken place one year back but accused appellant used to say that he loves her a lot and his marriage has been done at a wrong place and he further used to say that he will marry with victim. The mother of PW-2 came to know about the talks between accused appellant and victim and then she instructed the accused appellant not to come to her house. On the date of incident her mother was in Ayodhya. PW-2 in her testimony has further deposed that on the date of incident at about 2.00 a.m. in the night, there was knock at the door and she opened the door, then the accused appellant extended threat to her and forcibly took her on his bicycle to Faizabad and Rohit also went with him. She has also said that due to threat given by the accused appellant she took Rs.200/- cash and jewellery with her. Rohit stopped at Faizabad and thereafter the accused appellant took her on bicycle to Ayodhya and then took her to Hanuman temple and forcibly put *Sindoor* in her hair. PW-2 has further stated that in the night she and the accused appellant stayed at Ayodhya station and next day he took her to Barabanki and

there she stayed at station and on 5.11.1992 he took her to the court compound at Barabanki and said that they should marry in writing and further said that she should tell her age as 20 years and he will not tell anything about his first marriage. In the court the accused appellant by extending threat to the victim took her signatures on some plain papers. Thereafter, the accused appellant took PW-2 to Delhi and there he went in a room in some colony and in the night of the same day when the accused appellant found PW-2 alone, he extended threat to her and against her will did sexual intercourse. PW-2 in her statement has further stated that whenever he used to protest, the accused appellant extended threat and said that he will go leaving her alone. PW-2 in her statement has also said that after the date of incident she remained with the accused appellant for about two months and during the period when she stayed in the colony every night the accused appellant forcibly used to do sexual intercourse with her. After two months he brought her to Barabanki from Delhi and said her to take tempo and to go to village Saidpur and there to contact his Mausam Ram Kumar who will arrange her stay at the house of some one known to him and further the accused appellant for arranging money went to his house at village Vidyapur and asked that he will come tomorrow. PW-2 has also said that after leaving tempo while she was moving towards village Pandey Ka Purwa, then the Inspector of the police station along with her father came and with the help of Jeep light they caught her and thereafter memo of recovery was prepared and she after her medical examination was handed over to her father.

11. It is to be noted here that though PW-2 (Victim) in her testimony recorded

during trial has not said anything about her age at the time of incident but her statement under Section 164 CrPC was recorded on 16.1.1993 and in the said statement she has said that her age was 15-16 years.

12. PW-3 Dr. Meera Srivastava, Emergency Medical Officer, Woman Hospital, Faizabad in her testimony recorded during trial has said that she had conducted medical examination of the victim on 7.1.1993 and in the medical examination it has been found that her hymen was old torn and two fingers can easily be inserted in her private part. PW-3 has further stated that as per the x-ray report the age of the victim was 18 years and further no opinion can be given in respect of rape as the girl was used to sexual intercourse.

13. PW-4 Dr. D.R. Bhuwan, Senior Medical Officer (X-Ray) in his testimony recorded during trial has deposed that the x-ray of right elbow and right wrist of the victim was carried out on 8.1.1993 and on the basis of the x-ray report the age of the victim was found to be 18 years.

14. Lastly, testimony of PW-5 Sub Inspector M.L. Khan, Incharge Chowki Shahjadpur, Kotwali Akbarpur has been recorded and he has proved different papers submitted by the police.

15. Thereafter, the statements of accused under Section 313 CrPC were recorded. Accused appellant in his statement has categorically stated that he had neither extended any threat to the victim nor had enticed for taking her away and further she had gone with him with her free will. Accused appellant has also stated that he did not extend any threat to the victim for having sexual intercourse with

him and whenever sexual intercourse took place it was with her consent. Accused appellant has also stated that the victim on the date of incident was major and after the incident she had also filed one Complaint Case No.3219/92 in the court of Chief Judicial Magistrate, Barabanki against the brother of the victim and others wherein her statement under Section 200 CrPC was recorded on 27.11.1992. In the aforesaid statement recorded under Section 200 CrPC the victim has stated that her age is 19 years and she has also stated that she had married with the accused appellant with her free will. The accused appellant has also filed certified copy of the statement of the victim recorded under Section 200 CrPC in Case No.3219/92, Victim vs. brother of the victim and others filed in the court of Chief Judicial Magistrate, Barabanki. For convenience, the aforesaid statement recorded under Section 200 CrPC is reproduced as under:-

"नकल बयान अन्तर्गत 200
CrPC.....(पीड़िता)

.....(पीड़िता) उम्र 19साल निवासिनी मो० काशीपुर कस्बा व थाना रुदौली जिला बाराबंकी ने सशपथ बयान किया कि मेरे पिता रामचन्द्र वाहर सूरत में रहते हैं जिनकी बिना इजाजत के मेरे भाई सुधीर कुमार पाण्डेय व मेरे चाचा सत्यनारायण व मेरी माँ परमेश्वरी एक अज्ञात आदमी के हाथ बेच देना चाहते थे इसके लिए मैं तैयार नहीं थी, मेरा मूल रूप से निवास विद्यापुर थाना तारुन जिला फैजाबाद है लेकिन मुल्जिमान बराबर दबाव डाल रहे थे कि मेरी मर्जी के हिसाब से चलो नहीं तो मार डालेंगे। इसी डर के कारण मैं दिनांक 2.11.92 को अपनी मर्जी से बिना किसी जोर दबाव के अपने एक रिस्तेदार मो० काशीपुर कस्बा व थाना रुदौली जिला बाराबंकी के घर आ गई और उनसे मैंने घटना बाक्यदा बतायी और अपने रिस्तेदार से अनुरोध किया कि अब हम मुल्जिमानों के घर नहीं जायेंगे क्योंकि मेरे पिता जी घर पर नहीं हैं। तब मेरे रिस्तेदारों ने देवानन्द पुत्र सूर्यभान जो मेरे गांव विद्यापुर के रहने वाले हैं को रुदौली बुलाया और सबके सामने देवानन्द से शादी करना तय कर लिया और मैंने गवाहों के सामने अपनी मर्जी से शादी कर लिया।

आज से 15 दिन हुए जब शाम पांच बजे उपरोक्त मुल्जिमान मेरे रहने के स्थान मो० काशीपुर आये इनके साथ तीन अज्ञात आदमी भी थे और फिर दबाव डाला और मर्जी के खिलाफ मुल्जिमानों ने थप्पड़ों से मारा और मार कर लापता करने की धमकी दिया। मुझे मुल्जिमानों से जान का खतरा है। देवानन्द ने मुझे भगाया नहीं बल्कि मैंने अपनी मर्जी से उनसे शादी किया है। इस घटना की रिपोर्ट मैंने पुलिस कप्तान को दिया है।

सुनकर तस्दीक किया।

ह०-.....(पीड़िता)

ह०-

कोर्ट सर्टी०

मुख्य न्यायिक

सी.जे.एम

दण्डाधिकारी बाराबंकी

बाराबंकी

27.11.92

27.11.92

16. Learned trial court has considered the testimonies of the prosecution witnesses and the statements of the accused recorded under Section 313 CrPC. Learned trial court has found that though the victim in her testimony has said that the accused appellant and Rohit had extended threat to her and enticed her and thereby took her away but the facts of the case clearly reveal that the victim while going with the accused appellant took away Rs.200/- cash and jewellery from her house. Thereafter, she went on the bicycle of the accused appellant to Faizabad and further she went on bicycle from Faizabad to Ayodhya. At Ayodhya, the accused appellant and the victim went to Hanuman temple and there the accused appellant had put *Sindoor* in her hair. The victim in the night stayed at Ayodhya station and the next day came with the accused appellant to Barabanki and stayed at station. Thereafter, on 5.11.1992 she along with the accused appellant went to the court and there she signed on some plain papers. Thereafter, the victim went to Delhi with the accused appellant and stayed in a room in some colony at Delhi and there sexual intercourse took place and after staying for some time in Delhi, accused appellant took

her back to Barabanki and while she was going from Barabanki to some place she was caught by the police and was handed over to her father. During the aforesaid travel from village to Faizabad, Faizabad to Ayodhya, Ayodhya to Barabanki, Barabanki to Delhi and Delhi to Barabanki, the victim was with the accused appellant and must have passed through many places having presence of several persons but she never made any attempt either to make a cry or to contact any person to tell that the accused appellant had extended any kind of threat and she had gone with the accused appellant under the threat extended by him. Therefore, in the facts and circumstances of the case, learned trial court found that there was no threat extended by the accused appellant and the victim was moving with accused appellant with her free will.

17. Learned trial court has considered the entire evidence available on record in respect of the age of the victim on the date of incident and though the brother of the victim and the victim herself in her statement recorded under Section 164 CrPC have stated that the victim was minor on the date of incident but the medical examination conducted by the doctors clearly reveals that on the date of medical examination the victim was aged about 18 years and further the brother of the victim in his statement and the cross examination has categorically stated that on the date of incident his age was about 25 years. He has two younger sisters, next sister is two years is younger to him and the victim is two years younger to the next sister, as such, the age of the victim on the date of incident as per version of his brother was 21 years. In view of the aforesaid evidence, learned trial court has concluded that the victim on the date of incident was major.

18. Learned trial court in view of the aforesaid conclusions ultimately has acquitted the accused appellant and Rohit for the offences punishable under Sections 363 and 366 IPC.

19. Learned trial court thereafter has considered that the victim in her testimony recorded during trial has said that accused appellant did sexual intercourse with her without her consent and even she was extended threat by accused appellant and the learned trial court has concluded that once the victim has said that accused appellant had done sexual intercourse with her without her consent and by putting her to threat, then there is no reason to disbelieve her version and accordingly, accused appellant is liable to be convicted for offence punishable under Section 376 IPC and thus, the learned trial court has convicted the accused appellant under Section 376 IPC and sentenced him for rigorous imprisonment of 10 years and fine of Rs.5,000/-.

20. Learned counsel appearing for the appellant has vehemently argued that the testimony of the prosecution witnesses recorded during trial categorically demonstrates that PW-1 and PW-2 all along have narrated an absolutely false story. Even the trial court has concluded that the testimony given by the victim in respect of threat extended to her by the accused appellant for running away with him and to marry him is absolutely false as she travelled at many places with the accused appellant and she never raised any alarm or she never asked any help from other persons present on the roads. Learned trial court has also found the version of the prosecution and the statement of the victim in respect of her age to be absolutely false as in the medical report the doctors have

found the age of the victim to be 18 years and further as per the testimony of her brother, she was of 21 years of age on the date of incident.

21. Learned counsel for the appellant has further argued that once the testimony of the victim in respect of threats extended to her for running away and in respect of her age has been found to be unbelievable, then the part of her testimony that she was put to sexual intercourse by the accused appellant under threat and without her consent cannot be believed unless there is some corroborative evidence and in the present case there is only piece of testimony of the victim and there is no other corroborative evidence and therefore, learned trial court while convicting the appellant for offence punishable under Section 376 IPC has committed manifest illegality.

22. On the other hand, learned Additional Government Advocate appearing for the State has argued that since the victim has said that sexual intercourse was done by the accused appellant under threat and without her consent, as such the learned trial court has rightly convicted the accused appellant for offence punishable under Section 376 IPC.

23. I have considered the submissions advanced by the learned counsels for the parties and I have also perused the record of the case.

24. I find that the victim in her testimony recorded during trial has deposed that she was extended threat and enticed by the accused appellant and Rohit and thereby she went with the accused appellant. She has further stated that she went from her house to Faizabad with the

accused appellant on bicycle. Thereafter, from Faizabad to Ayodhya on bicycle and then in Ayodhya she along with the accused appellant went to Hanuman temple where the accused appellant extended threat and put '*Sindoor*' in her hair. She has further said that from Ayodhya she came to Barabanki and in Barabanki she along with the accused appellant went to the court compound and there under threat she signed on some plain papers. She has further stated that thereafter she along with the accused appellant went to Delhi and stayed there in a room in some colony for some days and there the accused appellant under threat and without her consent did sexual intercourse with her.

25. No doubt, in cases lodged under Sections 363, 366 and 376 IPC, testimony of the victim girl is of paramount importance and once the testimony of the victim is without contradiction, then the said testimony itself is sufficient to convict the accused but where it is found that the story narrated by the victim is absolutely improbable and from the very beginning the victim is giving false statement, then her testimony definitely has to be looked by the court with extra care and in the said circumstance, other corroborative evidence is also necessary to convict the accused for offences punishable under Sections 363, 366 and 376 IPC.

26. I find that initial version of the victim that she was put to threat and was enticed by the accused appellant to run away with him has been found to be unbelievable by the learned trial court as the circumstances narrated in the prosecution story make it absolutely improbable that if a girl is being taken away by extending threat by only one man and she is passing through roads having

heavy traffic and persons, then she will not make any hue and cry and will not make complaint to any person and accordingly, learned trial court has acquitted the accused appellant and Rohit for offence punishable under Section 366 IPC.

27. I also find that learned trial court has also concluded that the testimony of PW-1 and PW-2 regarding the age of the victim on the date of incident is absolutely false as in the medical examination the victim has been found to be 18 years of age and as per version of her brother given in his cross-examination she on the date of incident was aged about 21 years and further the victim herself has filed a Complaint Case No.3219/92 in the court of Chief Judicial Magistrate, Barabanki wherein in her statement recorded under Section 200 CrPC she has categorically said that her age is 19 years and thereby learned trial court has acquitted the accused of the offence punishable under Section 363 IPC.

28. From the aforesaid, it can be very easily deduced that the victim's testimony recorded during trial all along has been found to be unbelievable/improbable by the trial court itself and therefore, there is hardly any occasion to rely upon a small piece of her testimony and to convict accused appellant for offence punishable under Section 376 IPC. It is also a very important piece of evidence which was on record in the trial court and even the accused in their statement recorded under Section 313 CrPC have also stated about the said evidence that the victim herself after the incident in question had filed a Complaint Case No.3219/92, Victim vs. brother of the victim and others i.e. against her brother in which her statement under Section 200 CrPC was recorded on

27.11.1992 and in the said statement she has categorically said that her age is 19 years and she has married to the accused appellant with her free will. The aforesaid statement of the victim recorded under Section 200 CrPC in different complaint case categorically demonstrates that her marriage took place with the accused appellant with her free will.

29. The facts when seen in totality clearly demonstrate that the testimony of the victim recorded during trial does not inspire confidence and has been found to be absolutely unbelievable/improbable, therefore in these circumstances one piece of her testimony that the accused appellant extended threat to her and did sexual intercourse with her without her consent, that too without there being any corroborative evidence regarding threat and sexual intercourse without consent of the victim, can also not be relied upon and therefore, the trial court while relying upon a piece of her testimony without any corroborative evidence has committed manifest illegality.

30. Once it is found that from the very beginning the victim is giving false evidence, then a very small piece of her evidence cannot be relied upon unless there is some other corroborative evidence. In the present case, from the very beginning the entire prosecution story has been found to be false by the trial court itself, therefore unless there is some other clinching corroborative evidence, the accused cannot be convicted only by relying upon a very small piece of testimony of the witness recorded during trial.

31. The Hon'ble Supreme Court in its judgment rendered in the case of **Baldeo Sao vs. State of Jharkhand**, reported in

2007 (CrLJ) 3992 has categorically held that once the prosecution version has been found to be unbelievable/improbable, then the accused cannot be convicted solely relying on a small piece of evidence of the victim. Relevant portion of the aforesaid judgment is extracted as under:-

“4. The present appeal has been preferred mainly on the grounds that the learned trial Court has not considered the improbability of the prosecution case. It was also asserted that the doctor (PW 3) did not find any sign of rape and in absence of probable witness of the occurrence, the reliance placed by the learned trial Court on sole statement of the prosecutrix is misplaced. Mr. P.P.N. Roy, learned senior counsel appearing on behalf of the appellant, submitted that the reason behind this false prosecution has been admitted by PW 1 and PW 2 during their statements before the trial Court. According to learned Counsel, further in absence of the investigating officer, the defence has been prejudiced. Therefore, the appellant may be acquitted to the charges.

5. I have gone through the evidence on record. The prosecution story depends upon the sole statement of PW 1, the victim. According to her, the appellant alongwith Dilip Sao entered in the house on pretext of water and forcibly committed rape while nobody was in her house. She has given the details of the occurrence and thereafter stated that she became unconscious. According to her version, when her bhabhi returned after few hours, she was made conscious when she narrated the entire incident to her bhabhi and brother. She further admitted that the same night they went to Ichak Police Station where her statement was recorded by Ranvijay Singh vide Ext. 1. However, she admitted during cross-examination that her

brother PW 2 Hemjraj Turi was an accused in a case under Section 395 the Indian Penal Code in which the father of the appellant. Tulsi Turi, has given evidence against his brother. She admitted vide paragraph-20 that her parents as well as two other brothers were alive. According to her version, she has got this experience of sexual intercourse for the first time and she got injured during rape. However, this fact has been disputed by PW 3 Dr. Kalpana Sharan, who found hymen with old rupture admitting two fingers and no sign of rape on 13.4.1996. She did not find any injury on other parts of her body PW 2, brother of the prosecutrix is hearsay witness of the occurrence. According to him vide paragraph-11, the father of the appellant has got a case registered against him for theft. He supported prosecutrix regarding her injuries on her body. He named four persons to have accompanied the victim to Police Station. However, no other witness has been examined before the trial Court though named in the chargesheet.

6. The learned trial Court has considered all these facts and discussed vide paragraphs-9 to 11. However, he has relied upon the sole evidence of prosecutrix and convicted the appellant in spite of the fact that PW 1 and PW 2 have admitted enmity between the families for a criminal case against PW 2 in which the father of the appellant has deposed against him. The trial Court has disbelieved the version regarding the offence under Section 3/4 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, but accepted the prosecution version from prosecutrix claiming that she has been subjected to sexual intercourse for the first time, the doctor (PW 3) contradict her. The doctor did not find any mark of violence on her private parts, which is against the prosecution version.

7. In the facts and circumstances discussed above where previous enmity between the families is admitted and in absence of any evidence to support the prosecution version that PW 1 has been subjected to rape by two persons, I find and hold that the prosecution in the facts of present case has not been able to prove beyond all reasonable doubts the charges against the appellant. Accordingly the present appeal has got merit and deserves to be allowed.

32. The Hon'ble Supreme Court in its judgment dated 14th February, 2020 rendered in the case of **Santosh Prasad @ Santosh Kumar vs. State of Bihar, reported in (2020) 3 SCC 443** has considered the issue of conviction of the accused based on the sole testimony of the prosecutrix and has held that where the story narrated by the prosecutrix has been found to be under the cloud of suspicion, then one piece of her testimony cannot be made the basis for conviction of the accused under Section 376 IPC. The Hon'ble Supreme Court has categorically held that the testimony of the prosecutrix has to pass test of 'sterling witness' and only then the said testimony can be made the basis for conviction of the accused. Relevant portion of the aforesaid judgement of the Hon'ble Supreme Court is extracted as under:-

"5. We have heard the learned counsel for the respective parties at length.

5.1 We have considered in detail the impugned judgments and orders passed by the High Court as well as that of the learned trial Court convicting the accused. We have also considered in detail the evidence on record, both oral as well as documentary.

5.2 From the impugned judgments and orders passed by both the courts below, it appears that the appellant has been convicted solely relying upon the deposition of the prosecutrix (PW5). Neither any independent witness nor even the medical evidence supports the case of the prosecution. From the deposition of PW1, it has come on record that there was a land dispute going on between both the parties. Even in the cross-examination even the PW5 – prosecutrix had admitted that she had an enmity with Santosh (accused). The prosecutrix was called for medical examination by Dr. Renu Singh – Medical Officer and PW7 – Dr. Renu Singh submitted injury report. In the injury report, no sperm as well as RBC and WBC were found. Dr. Renu Singh, PW7 – Medical Officer in her deposition has specifically opined and stated that she did not find any violence marks on the body of the victim. She has also categorically stated that there is no physical or pathological evidence of rape. It is true that thereafter she has stated that possibility of rape cannot be ruled out (so stated in the examination- in-chief). However, in the cross-examination, she has stated that there was no physical or pathological evidence of rape.

5.3 As per the FSL report, the blood group on the petticoat and the semen on the petticoat are stated to be inconclusive. Therefore, the only evidence available on record would be the deposition of the prosecutrix. It cannot be disputed that there can be a conviction solely based on the evidence of the prosecutrix. However, the evidence must be reliable and trustworthy. Therefore, now let us examine the evidence of the prosecutrix and consider whether in the facts and circumstances of the case is it safe to convict the accused solely based on the

deposition of the prosecutrix, more particularly when neither the medical report/evidence supports nor other witnesses support and it has come on record that there was an enmity between both the parties. 5.4 Before considering the evidence of the prosecutrix, the decisions of this Court in the cases of Raju (*supra*) and Rai Sandeep @ Deepu, relied upon by he learned Advocate appearing on behalf of the appellant-accused, are required to be referred to and considered.

5.4.1 In the case of Raju (*supra*), it is observed and held by this Court in paragraphs 11 and 12 as under:

“11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

12. Reference has been made in Gurmit Singh case [(1996) 2 SCC 384 : 1996 SCC (Cri) 316] to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment

by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.” 5.4.2 In the case of Rai Sandeep alias Deepu (*supra*), this Court had an occasion to consider who can be said to be a “sterling witness”. In paragraph 22, it is observed and held as under:

“22 In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused.

*There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged." 5.4.3 In the case of *Krishna Kumar Malik v. State of Haryana* (2011) 7 SCC 130, it is observed and held by this Court that no doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of*

the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. 5.5 With the aforesaid decisions in mind, it is required to be considered, whether is it safe to convict the accused solely on the solitary evidence of the prosecutrix? Whether the evidence of the prosecutrix inspires confidence and appears to be absolutely trustworthy, unblemished and is of sterling quality?

6. Having gone through and considered the deposition of the prosecutrix, we find that there are material contradictions. Not only there are material contradictions, but even the manner in which the alleged incident has taken place as per the version of the prosecutrix is not believable. In the examination-in-chief, the prosecutrix has stated that after jumping the fallen compound wall accused came inside and thereafter the accused committed rape. She has stated that she identified the accused from the light of the mobile. However, no mobile is recovered. Even nothing is on record that there was a broken compound wall. She has further stated that in the morning at 10 O'clock she went to the police station and gave oral complaint. However, according to the investigating officer a written complaint was given. It is also required to be noted that even the FIR is registered at 4:00 p.m. In her deposition, the prosecutrix has referred to the name of Shanti Devi, PW1 and others. However, Shanti Devi has not supported the case of the prosecution. Therefore, when we tested the version of PW5 -prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests of "sterling witness". There is a variation in her version about giving the complaint. There is a delay in the FIR. The medical report does not support the case of

the prosecution. FSL report also does not support the case of the prosecution. As admitted, there was an enmity/dispute between both the parties with respect to land. The manner in which the occurrence is stated to have occurred is not believable. Therefore, in the facts and circumstances of the case, we find that the solitary version of the prosecutrix – PW5 cannot be taken as a gospel truth at face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the appellant and accused is to be given the benefit of doubt.”

33. The law laid down through the aforesaid judgments of the Hon'ble Supreme Court, in clear terms, provides that if the testimony of the prosecutrix has been found to be full of contradictions, then the conviction cannot be based on certain piece of testimony of the prosecutrix unless there is corroborative evidence to support the version of the prosecutrix.

34. In the present case, learned trial court has found that the testimony of the prosecutrix is unbelievable/improbable, therefore, in absence of any corroborative evidence, learned trial court has committed manifest error of law and facts both while convicting and sentencing the appellant for offence punishable under Section 376 IPC.

35. I find and hold that the prosecution in the facts of the present case has not been able to prove charges against the appellant beyond reasonable doubt. Accordingly, the present appeal has got merit and deserves to be allowed.

36. In view of the aforesaid reasons, this criminal appeal is **allowed**. The judgment and order dated 28.11.2001 passed by 11th Additional Sessions Judge,

Faizabad in **Sessions Trial No.90/93** convicting appellant for offence punishable under Section 376 IPC and sentencing him for rigorous imprisonment of 10 years with fine of Rs.5,000/-, is hereby set aside. The appellant is acquitted of the charge levelled against him for offence punishable under Section 376 IPC.

37. The appellant is already on bail, therefore, his bail bonds are cancelled and sureties are discharged.

38. Let lower court record be sent back to the trial court concerned along with a copy of this order for necessary compliance.

(2023) 7 ILRA 40
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.07.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 1699 of 2022

Dhirendra **...Appellant**
Versus
State of U.P. & Anr. **...Respondents**

Counsel for the Appellant:

Shraddha Verma, Ajeet Kumar, Shaunak Singh, Sudhir Kumar, Suhail Kashif

Counsel for the Respondents:

G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 376-D & 506 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(2)(V) - I.T. (Amendment) Act, 2008 - Sections 66-E, 67-A - Constitution of India, 1950 - Article 21 - Appeal against rejection of bail - Initially F.I.R lodged against present

accused/appellant and two other named accused persons after an inordinate and unexplained delay of three days - No allegation of rape against appellant and only allegation against him was of making video when other two accused were committing rape upon prosecutrix, who have already been enlarged on bail - After conclusion of investigation, charge sheet filed against all the three named accused - Victim was major, aged about 20 years - Medical report of victim does not corroborate manner of commission of offence - No mobile phone recovered by Investigating Agency nor any alleged video clip has been recovered from such mobile phone - Appellant was languishing in jail since 26.03.2022 - After considering all facts and circumstances of case, nature of evidence, period of detention already undergone, unlikelihood of early conclusion of trial, thus impugned order set aside. (Para 5, 14, 15)

Appeal allowed. (E-13)

List of Cases cited:

Dataram Singh Vs St. of UP & anr., reported in (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Suhail Kashif along with Shri Sudhir Kumar, the learned counsels for the appellant as well as Shri Ashok Kumar Singh, the learned A.G.A. for the State-opposite party No. 1 and perused the entire record.

2. This Court vide order dated 19.07.2022 while issuing notice to the opposite party No. 1 has already granted time to the learned A.G.A. to file counter affidavit.

3. As per the office report dated 03.08.2022 notice has already been served upon the opposite party No. 2 but till date

neither any counsel has appeared on behalf of opposite party No. 2 nor counter affidavit has been filed on her behalf. Even no counter affidavit has been filed on behalf of State till date. It appears that learned A.G.A. as well as opposite party No. 2 are not interested to file any counter affidavit.

4. In the above circumstances, as the matter pertains to bail this Court has no option but to proceed for final arguments to decide the present appeal.

5. The present criminal appeal under Section 14-A (2) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act has been preferred against the impugned orders dated 05.05.2022 and 05.07.2022 passed by the court of learned Special Judge (S.C./S.T. Act), Barabanki in Bail Application No. 1008 of 2022 (Dhirendra vs. State of U.P.), arising out of Case Crime No. 86 of 2022, under Sections 376-D, 506 I.P.C. read with Section 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and Section 67-A of I.T. (Amendment) Act and Bail Application No. 1639 of 2022 (Dhirendra Vs. State of U.P.), arising out of Case Crime No. 86 of 2022, under Section 66-E of I.T. (Amendment) Act, relating to Police Station- Jaidpur, District- Barabanki, respectively, whereby the both the bail applications of the appellant have been rejected.

6. Learned counsel for the appellant submits that the F.I.R. was lodged under Sections 376-D, 506 I.P.C. read with Section 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and Section 67-A of I.T. (Amendment) Act against three persons including the present appellant, which too, after an

inordinate delay without explaining the delay. The charge sheet was filed against all the accused persons.

7. Learned counsel for the appellant further submits that against the present appellant there is only allegation against him is for making video of prosecutrix while two other accused were committing rape of the prosecutrix, whereas no any camera or mobile phone has been recovered. Thus, the entire allegation levelled against the appellant is false and fabricated which has been made by the prosecutrix due to enmity as there is enmity between the family members of the appellant and the family members of the proxecutrix.

8. Learned counsel for the appellant submits that two accused against whom prosecutrix have levelled allegation of rape committed upon her by them have already been enlarged on bail by two different coordinate Benches of this Court vide orders dated 05.05.2023 and 19.06.2023 passed in Criminal Appeal No. 1082 of 2022 (Mohit Vs. State of U.P. and another) and Criminal Revision No. 820 of 2022 (Vijay Kumar Vs. State of U.P.), and as there is only allegation against the appellant is for making video of prosecutrix while two other accused were committing rape of the prosecutrix, thus, the case of appellant is on the better footing than that of the aforesaid two accused. Both the orders are taken on record.

9. Learned counsel for the appellant further submits that younger cousin sister of the victim was also present on the date of occurrence who went to inform her family members about this incident. He submitted that the story as narrated by victim itself is improbable as the

accused/appellants, who were three in number, would not allow anybody to escape from the scene of occurrence so easily so as to go and inform his/ her family members about the incident. He further submitted that the victim is major, aged about 20 years. The medical report of the victim does not corroborate the manner of commission of offence. He has also submitted that no mobile phone has been recovered by the Investigating Agency, nor any alleged video clip has been recovered or retrieved from any such mobile phone which belies the prosecution story.

10. Learned counsel for the appellant further submits that accused/appellant is languishing in jail since 26.03.2022, who has no previous criminal history, and in case the appellant is enlarged on bail, he shall not misuse the liberty of bail and he shall also fully cooperate with the trial. He has further submitted that there is no possibility of the appellant to intimidate or pressurize the witnesses or any other persons acquainted with the facts of the present case.

11. For the aforesaid reasons, learned counsel for the appellant submits that the instant criminal appeal deserves to be allowed and the orders dated 05.05.2022 and 05.07.2022 passed by the court of learned Special Judge (S.C./S.T. Act), Barabanki in Bail Application No. 1008 of 2022 (Dhirendra vs. State of U.P.), arising out of Case Crime No. 86 of 2022, under Sections 376-D, 506 I.P.C. read with Section 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and Section 67-A of I.T. (Amendment) Act and Bail Application No. 1639 of 2022 (Dhirendra Vs. State of U.P.), arising out of Case Crime No. 86 of 2022, under Section 66-E of I.T. (Amendment) Act, relating to

Police Station- Jaidpur, District- Barabanki, deserve to be set aside and consequently, the accused/appellant deserves to be enlarged on bail during pendency of the trial.

12. Several other submissions in order to demonstrate the falsity of the allegations made against the appellant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the appellant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 26.03.2022 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

13. Per contra, learned A.G.A. has vehemently opposed the prayer by submitting that there is active participation of accused/appellant in the crime. Therefore, the accused/ appellant is not entitled to be enlarged on bail and the instant criminal appeal deserves to be dismissed. However, he has been unable to dispute the other factual submissions advanced by the learned counsel for the accused/appellant.

14. Having heard the learned counsel for the appellant, learned A.G.A. for the State and upon perusal of record, it transpires that initially a first information report came to be lodged against the present accused/appellant and two other named accused persons, namely, Mohit and

Vijay after an inordinate and unexplained delay of three days, under Sections 376-D, 506 I.P.C., 67-A I.T. (Amendment) Act & Section 3(2)(V) of SC/ST Act. Upon conclusion of investigation, a charge sheet came to be laid against the all the three named accused including the appellant for the offence under Sections 376 D, 506 I.P.C. & Section 3(2)(v) S.C./S.T. Act, and Section 66-E I.T. (Amendment) Act. The victim is major, aged about 20 years. The medical report of the victim does not corroborate the manner of commission of offence. No mobile phone has been recovered by the Investigating Agency, nor any alleged video clip has been recovered or retrieved from any such mobile phone. The accused/ appellant is languishing in jail since 26.03.2022 and he has no previous criminal history.

15. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, unlikelihood of early conclusion of trial and also in absence of any convincing material to indicate the possibility of tampering with the evidence and considering the fact that there is no allegation of rape against the present appellant and only allegation made against him is of making video of the occurrence when other two accused were committing rape upon the prosecutrix, further two other named accused against whom prosecutrix have levelled allegation of rape committed upon her by them have already been enlarged on bail by two different coordinate Benches of this Court and the case of appellant is on the better footing than that of the aforesaid two accused, further medical report of the victim does not corroborate the manner of commission of

offence, neither mobile phone has been recovered by the Investigating Agency, nor any alleged video clip has been recovered or retrieved from any such mobile phone, further considering the fact that appellant is in jail since 26.03.2022 and has now by done a substantial period of detention and further considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh Vs. State of UP and another, reported in (2018) 3 SCC 22**, this Court is of the view that the learned court below has failed to appreciate the material available on record, both the impugned orders passed by the trial court are liable to be set aside.

16. Accordingly, the appeal is **allowed**. Consequently, the orders 05.05.2022 and 05.07.2022 passed by the court of learned Special Judge (S.C./S.T. Act), Barabanki in Bail Application No. 1008 of 2022 (Dhirendra vs. State of U.P.), arising out of Case Crime No. 86 of 2022, under Sections 376-D, 506 I.P.C. read with Section 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and Section 67-A of I.T. (Amendment) Act and Bail Application No. 1639 of 2022 (Dhirendra Vs. State of U.P.), arising out of Case Crime No. 86 of 2022, under Section 66-E of I.T. (Amendment) Act, relating to Police Station- Jaidpur, District- Barabanki, are hereby **reversed** and **set aside**.

17. Let the appellant, **Dhirendra**, be enlarged on bail in Case Crime No. 86 of 2022, under Sections 376-D, 506 I.P.C. read with Section 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and Section 67-A of I.T. (Amendment) Act and Case Crime No. 86 of 2022, under Section 66-E of I.T. (Amendment) Act, relating to Police

Station- Jaidpur, District- Barabanki with the following conditions:-

(i) The appellant shall furnish a personal bond with two sureties each of like amount to the satisfaction of the court concerned.

(ii) The appellant shall appear and strictly comply following terms of bond executed under section 437 sub section 3 of Chapter- 33 of Cr.P.C.:-

(a) The appellant shall attend in accordance with the conditions of the bond executed under this Chapter.

(b) The appellant shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

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

(iii) The appellant shall cooperate with investigation /trial.

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

(v) The appellant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(vi) In case, the appellant misuses the liberty of bail during trial, in order to secure his presence, proclamation under section 82 Cr.P.C. is issued and the

appellant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

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

18. The trial court is also directed to expedite the trial of the aforesaid case, within a period of one year from today, by following the provisions of Section 309 Cr.P.C., strictly without granting any unnecessary adjournments to the parties, in case there is no other legal impediment.

(2023) 7 ILRA 45

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 04.07.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 2205 of 2022

Shailendra Saini ...Appellant

Versus

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

Counsel for the Appellant:

Vashu Deo Mishra

Counsel for the Respondents:

G.A., Bhupendra Nath Tripathi

Criminal Law - Indian Penal Code, 1860 - Sections 354, 323, 504, 506, 376, 313, 328 & 392 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(2)(V) - Appeal against rejection of bail - Allegation against appellant that by playing fraud and on false promise of marriage, committed rape - Appellant contended that prosecutrix was major and with her consent, physical relation was made by appellant. (Para 2, 3)

Held, appellant committed rape several times with prosecutrix either giving some in toxic material or on some false promise of marriage, even as per version of F.I.R, prosecutrix was pregnant and forcefully aborted on instance of appellant - Prosecutrix marriage was solemnized with some other person - Appellant did not leave her free and always threatened her to give naked photographs and video to her husband and to her in-laws and after marriage of prosecutrix, he made physical relation forcefully several times - She requested appellant to return all photographs, video graphs and pen drive but refused by accused - Appellant committed heinous crime and he is not entitled to get any relief. (Para 9, 10)

Appeal dismissed. (E-13)

List of Cases cited:

1. Dr. Dhruvaram Murlidhar Sonar Vs The St. of Mah., (2019) 18 SCC 191
2. Anurag Soni Vs St. of Chhattisgarh, (2019) 13 SCC 1: AIR 2019 SC 1857

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Vashu Deo Mishra, learned counsel for the appellant, Sri Bhupendra Nath Tripathi, learned counsel for the complainant, Ms. Shikha Sinha, learned Additional Government Advocate

for the State and perused the material available on record.

2. The present Criminal Appeal under Section 14-A (2) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been preferred against the impugned order dated 05.09.2022 passed by the learned Special Judge, SC/ST Act, Lucknow in Bail Application No. 6984 of 2022 (CNR No. UPLKO10119882022), Case Crime No. 0537 of 2022, under Sections 354, 323, 504, 506, 376, 313, 328, 392 IPC and Sections 3(2)(v) of SC/ST Act, Police Station Chinhat, District Lucknow, whereby the bail application of the appellant has been rejected.

3. Learned counsel for the appellant submits that the appellant is innocent and has falsely been implicated in the present case. No such incident took place, as alleged by the prosecutrix in the First Information Report. It is a case of false promise of marriage and the parties are consenting. Thus, the allegation of rape is false, even though, no ingredient of Section 3(2)(v) of SC/ST Act is attracted against the applicant. The prosecutrix is major and with her consent, the physical relation was made by the appellant. Thus, the entire allegation is false and fabricated. Therefore, the present appeal be allowed and the appellant be released on bail.

4. Per contra, Sri Bhupendra Nath Tripathi, learned counsel for opposite party no. 2 as well as Ms. Shikha Sinha, learned AGA for the State-opposite party no. 1 opposed the prayer for bail and submitted that prima facie, from the plain reading of the First Information Report, the cognizable offence is made out. In this case, chargesheet has already been submitted against the appellant. The

prosecutrix has made balled allegation of committing rape several times by the appellant after giving some intoxic material and also demanding money from the prosecutrix. Even though, she was pregnant and on the pressure created by the appellant, abortion was made. As per the version of the FIR, the marriage of the prosecutrix was also solemnized with some other person. There also the appellant put pressure and threatened her to send the naked photographs and video to her husband which he has obtained at the time of first physical relation with the prosecutrix forcefully. The prosecutrix made a request to return all the alleged videographs and photographs, even though the pen drive, but the appellant refused and threatened her for dire consequences. Thus, the present appeal be rejected and the appellant is not entitled to get any relief by this Court.

5. In support of his argument, Sri Bhupendra Nath Tripathi, learned counsel for opposite party no. 2 has placed reliance on the judgment rendered in the case of Dr. Dhruvaram Murlidhar Sonar: (2019) 18 SCC 191, wherein Hon'ble the Apex Court has observed that there is a clear distinction between rape and consensual sex and, in such cases, it must be very carefully examined whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. The Supreme Court after referring to various decisions has observed as follows:

"Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had

actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under section 376 of the IPC."

6. It has been settled view that the question whether consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under "misconception of fact" depends on the facts of each case. While considering the question of consent, the Court must consider the evidence before it and the surrounding circumstances before reaching a conclusion. Evidence adduced by the prosecution has to be weighed keeping in mind that the burden is on the prosecution to prove each and every ingredient of the offence. Prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that accused had no intention to marry prosecutrix at all from

inception and that promise made was false to his knowledge.

12. Learned counsel for the complainant further submits that in **Anurag Soni v. State of Chhattisgarh, (2019) 13 SCC 1: AIR 2019 SC 1857**, the accused never intended to marry the prosecutrix; he gave false promises/promise to the prosecutrix to marry her and on such false promise he had physical relationship with the prosecutrix; the prosecutrix initially resisted, however, gave the consent relying upon the false promise of the accused that he will marry her and, therefore, her consent can be said to be a consent on misconception of fact. The prosecutrix, in the present case, was an educated girl studying in B. Pharmacy. Therefore, it is not believable that despite having knowledge that that appellant's marriage is fixed with another lady, she and her family members would continue to pressurize the accused to marry and the prosecutrix will give the consent for physical relation. Even considering Section 114A of the Evidence Act which has been inserted subsequently, there is a presumption and the court shall presume that she gave the consent for the physical relationship with the accused relying upon the promise by the accused that he will marry her. From the very inception, the promise given by the accused to marry the prosecutrix was a false promise and from the very beginning there was no intention of the accused to marry the prosecutrix as his marriage with Priyanka Soni was already fixed long back and, despite the same, he continued to give promise/false promise and alluded the prosecutrix to give her consent for the physical relationship. The Supreme Court after having discussed the law on the point held as follows:

"The sum and substance of the aforesaid decisions would be that if it is

established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her; such a consent can be said to be a consent obtained on misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 of the IPC and can be convicted for the offence under Section 376 of the the IPC."

7. Thus, learned counsel for the opposite party no. 2 submits that in view of the judgment rendered by the Hon'ble Supreme Court, it is not a case of consent. Thus, it amount to rape and in view of the judgment of Hon'ble Supreme Court, the present appeal be rejected.

8. After considering the arguments, as advanced by learned counsel for the parties and after perusal of record, this Court finds that the appellant committed rape several times with the prosecutrix either giving some intoxic material or on some false promise of marriage, even though as per the version of the First Information Report, the prosecutrix was pregnant and was forcefully aborted on the instance of the present appellant. Anyhow, the prosecutrix marriage was solemnized with some other person. There also the appellant did not leave her free and always threatened her to give the naked photographs and video to her husband and to her in-laws and tried to make physical relation forcefully several times, after the marriage of the prosecutrix also, that made the entire life of the prosecutrix as hell.

Thus, she has no option but she requested the appellant to return all the photographs, videographs and pen drive but the appellant refused for the same.

9. Thus, in the opinion of the Court, the appellant has committed a heinous crime and he is not entitled to get any relief by this Court, as was also observed by the Hon'ble Apex Court in case of **Anurag Soni (supra)** and also in case of **Dr. Dhruvaram Murlidhar Sonar (supra)** that if the rape is committed by playing the fraud and on false promise of marriage, then the appellant is not entitled to get any relief. Thus, in view of the opinion of this Court, the impugned order of the court below dated 05.09.2022 is justified. No interference is required by this Court. The appeal is liable to be dismissed.

10. Accordingly, the appeal filed by the appellant is *dismissed*.

11. File is consigned to record.

(2023) 7 ILRA 48
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.07.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 2378 of 2022

Mohan Yadav @ Vivek Yadav ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Mata Prasad Yadav, Abhishek Singh Yadav,
Shiva Shashank

Counsel for the Respondents:

G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 342, 376, 504 & 506 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(2)(V) - Constitution of India, 1950 - Article 21 - Code of Criminal Procedure, 1973 - Sections 161, 164 - Appeal against rejection of bail - Malicious intention - Allegation against appellant that on false promise of marriage, made physical relation with prosecutrix - Appellant submitted that prosecutrix was major, consenting party and knew consequences that promise of marriage can be broken at any stage by appellant but she continued to remain in relation - Appellant further submitted that as per F.I.R. and St.ment of prosecutrix, no ingredients under SC/ST Act was attracted, as incident, happened in room and not at public place. (Para 2, 4, 5, 10)

Held, prosecutrix in F.I.R. admitted that she was in relation with appellant for last six months and her age was 20 years and thus she was major - Allegation of rape in F.I.R. and St.ments of victim got demolished after perusal of medical report, wherein doctor opined there was no external or internal injury found on private parts of victim, nor doctor has given any definite opinion regarding sexual assault and urine pregnancy test came negative - Both the parties are consenting party and physical relation was not made forcefully and considering substantial period of detention, impugned order set aside. (Para 15)

Appeal allowed. (E-13)

List of Cases cited:

1. Pramod Suryabhan Pawar Vs St. of Mah., (2019) 9 SCC 608, (Para 17, 21)
2. Hitesh Verma Vs The St. of Utrakhnad reported in (2020) 10 SCC, (Para 15)
3. Swaran Singh & ors. Vs St. (2008) 8SCC 435

4. Dataram Singh Vs St. of UP & anr., reported in (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Mata Prasad Yadav, the learned counsels for the appellant and Sri Satendra Kumar Srivastava, the learned A.G.A. for the State-opposite party and perused the entire record.

2. The present criminal appeal under Section 14-A (2) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act has been preferred against the impugned order dated 02.09.2022 passed by the court of learned Special Judge (S.C./S.T. Act), Sultanpur in Bail Application No. 2800/2022 : Mohan Yadav Vs. State of U.P., arising out of Case Crime No. 262/2022, under Sections 342, 376, 504, 506 I.P.C. and under Section 3 (2) (v) SC/ST Act, Police Station Akhand Nagar, District Sultanpur, whereby the bail application of the appellant has been rejected.

3. Learned counsel for the appellant submits that the appellant is innocent and has been falsely implicated in the present case. No such incident took place, as alleged by the prosecutrix in the F.I.R.

4. Learned counsel for the appellant further submits that as per prosecution version the prosecutrix and appellant were in relation with for the last six months and they loved each other and were ready to solemnize marriage. He further submits that the F.I.R. was lodged against the appellant and one named person and one unknown person, but after investigation names of Rajpati Yadav and another person were dropped and the charge sheet was filed against the appellant only. The

prosecutrix in the F.I.R. admitted this fact that she was in relation with the appellant for the last six months and the appellant has promised for marriage and it was a false promise of marriage and forcefully physical relation was made. The prosecutrix in F.I.R. has admitted her age to be 20 years and thus she is major.

5. Learned counsel for the appellant further submits that the prosecuterix was major and she was a consenting party and knew the consequences very well that the promise of marriage can be broken at any stage by the appellant but in spite of knowing this fact she continued to remain in relation with the appellant and as per averment of prosecutrix, the appellant made physical relation with the prosecutrix, thus the story appears to be false and concocted and the present F.I.R. has been lodged under pressure created by the family members of the prosecutrix.

6. Learned counsel for the appellant further submits that the prosecutrix in her statement recorded under Section 161 and 164 Cr.P.C. repeated the same version of the F.I.R. but did not dispute this fact that she was in relation with the appellant for the last six months and the appellant made promise of marriage.

7. Learned counsel for the applicant further submits that the allegation of rape as levelled in the F.I.R. as well as in the statements of the victim recorded under Sections 161 and 164 Cr.P.C. also got demolished after perusal of medical report of the victim, wherein concerned doctor has opined that there is no external or internal injury found on the private parts of the victim, nor the doctor has given any definite opinion regarding sexual assault and urine pregnancy test came negative. As

per medical report the age of the prosecutrix is around 20 years.

8. Learned counsel for the appellant further submits that no such promise was ever made and even though if any promise is made with the prosecutrix, she was major and was knowing the consequences very well. In support of his arguments, learned counsel for the appellant has relied upon the judgment rendered by the Hon'ble Supreme Court in the case of **Pramod Suryabhan Pawar vs. State of Maharashtra, (2019) 9 SCC 608** and placed reliance upon paras 17 and 21, which are reproduced hereunder:-

"17. In Uday v State of Karnataka the complainant was a college going student when the accused promised to marry her. In the complainants statement, she admitted that she was aware that there would be significant opposition from both the complainants and accuseds families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The court observed that in these circumstances the accuseds promise to marry the complainant was not of immediate relevance to the complainants decision to engage in sexual intercourse with the accused, which was motivated by other factors: [(2003) 4 SCC 46].

25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that

the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married (Emphasis supplied).

21. The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the

complainant, it was done in bad faith or with the intention to deceive her. The appellants failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellants promise of marriage. Therefore, even if the facts set out in the complainants statements are accepted in totality, no offence under Section 375 of the IPC has occurred."

Thus, learned counsel for the appellant submits that in view of the judgment rendered by the Hon'ble Supreme Court, the promise of marriage made by the appellant to the prosecutrix is in good faith as per the case set up by the prosecutrix and it does not amount to rape as there is a consent of the prosecutrix. From the perusal of the F.I.R. and the statements of prosecutrix recorded under Sections 161 and 164 Cr.P.C. it appears that both the parties are consenting party and it cannot be said that the physical relation was made forcefully, thus the appellant has been implicated with malicious intention.

9. Learned counsel for the appellant has drawn attention of this Court towards the judgment of the Hon'ble Apex Court in the case of **Hitesh Verma Vs. The State of Uttarakhand reported in (2020) 10 SCC**, wherein in para 15 relying on the

judgment passed in **Swaran Singh and others Vs. State (2008) 8SCC 435** has held as under:

"as per the F.I.R., the allegations of abusing the informant were within the four walls of her building. It is not the case of the informant that there was any member of the public (nor merely relatives or friends) at the time of the incident in the house. Therefore, the basic ingredient that the words were uttered in any place within public view is not made out. In the list of witnesses appended to the charge-sheet, certain witnesses are named but it could not be said that those were the persons present within the four walls of the building. The offence is alleged to have taken place within the four walls of the building. Therefore, in view of the judgment of this Court in Swaran Singh, it cannot be said to be a place within public view as none was said of be present within the four walls of the building as per the FIR and/or charge-sheet."

10. Learned counsel for the appellant further submits that from the averments made in the F.I.R. and also from perusal of the statement no ingredients under Section 3 (2) (v) SC/ST Act is attracted against the appellant, as the incident, as per prosecutrix happens in a room and not at a public place or public view.

11. Learned counsel for the appellant further submits that accused/appellant is languishing in jail since 03.08.2022, who has no previous criminal history, and in case the appellant is enlarged on bail, he shall not misuse the liberty of bail and he shall also fully cooperate with the trial. He has further submitted that there is no possibility of the appellant to intimidate or pressurize the witnesses or any other

persons acquainted with the facts of the present case.

12. For the aforesaid reasons, learned counsel for the appellant submits that the instant criminal appeal deserves to be allowed and the order dated 02.09.2022 passed by the court of learned Special Judge (S.C./S.T. Act), Sultanpur in Bail Application No. 2800/2022 : Mohan Yadav Vs. State of U.P., arising out of Case Crime No. 262/2022, under Sections 342, 376, 504, 506 I.P.C. and under Section 3 (2) (v) SC/ST Act, Police Station Akhand Nagar, District Sultanpur deserves to be set aside and consequently, the accused/appellant deserves to be enlarged on bail during pendency of the trial.

13. Several other submissions in order to demonstrate the falsity of the allegations made against the appellant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the appellant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 03.08.2022 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

14. Per contra, learned A.G.A. has vehemently opposed the prayer by submitting that there is active participation of accused/appellant in the crime. Therefore, the accused/appellant is not entitled to be enlarged on bail and the

instant criminal appeal deserves to be dismissed. However, he has been unable to dispute the other factual submissions advanced by the learned counsel for the accused/appellant.

15. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, unlikelihood of early conclusion of trial and also in absence of any convincing material to indicate the possibility of tampering with the evidence and considering that the prosecutrix in the F.I.R. admitted this fact that she was in relation with the appellant for the last six months and has admitted her age to be 20 years and thus she is major, the allegation of rape as levelled in the F.I.R. as well as in the statements of the victim recorded under Sections 161 and 164 Cr.P.C. also got demolished after perusal of medical report of the victim, wherein concerned doctor has opined that there is no external or internal injury found on the private parts of the victim, nor the doctor has given any definite opinion regarding sexual assault and urine pregnancy test came negative, From the perusal of the F.I.R. and the statements of prosecutrix recorded under Sections 161 and 164 Cr.P.C. it appears that both the parties are consenting party and it cannot be said that the physical relation was made forcefully and further considering the fact that appellant is in jail since 03.08.2022 and has now by done a substantial period of detention and further considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh Vs. State of UP and another**, reported in (2018) 3 SCC 22, **Pramod Suryabhan**

Pawar vs. State of Maharashtra, (2019) 9 SCC 608, Hitesh Verma Vs. The State of Uttarakhand reported in (2020) 10 SCC, this Court is of the view that the learned court below has failed to appreciate the material available on record, both the impugned orders passed by the trial court are liable to be set aside.

16. Accordingly, the appeal is **allowed**. Consequently, the order dated 02.09.2022 passed by the court of learned Special Judge (S.C./S.T. Act), Sultanpur in Bail Application No. 2800/2022 : Mohan Yadav Vs. State of U.P., arising out of Case Crime No. 262/2022, under Sections 342, 376, 504, 506 I.P.C. and under Section 3 (2) (v) SC/ST Act, Police Station Akhand Nagar, District Sultanpur is hereby **reversed and set aside**.

17. Let the appellant, **Mohan Yadav**, be enlarged on bail in Case Crime No. 262/2022, under Sections 342, 376, 504, 506 I.P.C. and under Section 3 (2) (v) SC/ST Act, Police Station Akhand Nagar, District Sultanpur with the following conditions:-

(i) The appellant shall furnish a personal bond with two sureties each of like amount to the satisfaction of the court concerned.

(ii) The appellant shall appear and strictly comply following terms of bond executed under section 437 sub section 3 of Chapter- 33 of Cr.P.C.:-

(a) The appellant shall attend in accordance with the conditions of the bond executed under this Chapter.

(b) The appellant shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

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

(iii) The appellant shall cooperate with investigation /trial.

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

(v) The appellant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

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

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

18. The trial court is also directed to expedite the trial of the aforesaid case, within a period of one year from today, by following the provisions of Section 309 Cr.P.C., strictly without granting any unnecessary adjournments to the parties, in case there is no other legal impediment.

(2023) 7 ILRA 54

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 21.07.2023

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Revision No. 2 of 2023

Ram Prakash Achari ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:

Ashish Chaturvedi, Anilesh Tewari, Desh Deepak Singh

Counsel for the Opposite Parties:

G.A., Raj Kumar

(A) Criminal Law - Family Court Act, 1984 - Section 19(4) - Revision, The Hindu Marriage Act, 1955 - Section 13 - Divorce , The Code of criminal procedure, 1973 - section 125 - Order for maintenance of wives, children and parents, Domestic Violence Act, 2005 - Section 12 - Dowry prohibition Act, 1961 - Section 3/4 , Indian Penal Code, 1860 - Sections 498-A, 323, 504 - as per Hindu Marriage Act, 1955, the second marriage is void and such marriages are illegal as per the provisions of the Act, but still they are not immoral and financially dependent women cannot be denied maintenance on this ground - interpretation of expression wife - broad and expansive interpretation should be give to the term wife - include even those cases where a man and woman

are living for long period of time as husband wife. (Para - 10)

Maintenance application 15-b moved by applicant/revisionist - rejected by Family Court - opposite party no.2 legally wedded wife - Husband alive - their marriage not yet dissolved by any court - moved application No.22-B - claim - revisionist solemnized marriage with her - hiding facts of his first marriage and two sons - evidence presented indicates - opposite party no.2 continues to live with revisionist as his wife - legality of her divorce from her first husband and her marriage to the current revisionist to be proven during the trial. **(Para - 2,6,9)**

HELD:- Maintenance application by opposite party no.2 should not be thrown out at the threshold without considering the merit of the case, as it is a matter of evidence. Order of Family Court passed on the application No.15-B moved by revisionist, suffers with no illegality, infirmity or irregularity. **(Para - 11)**

Revision dismissed. (E-7)

List of Cases cited:

1. Rameshchandra Rampratapji Daga Vs Rameshwari Rameshchandra Daga

2. Chanmuniya Vs Virendra Kumar Singh Kushwaha

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

1. Heard Shri Ashish Chaturvedi & Shri Desh Deepak Singh, learned counsel for the revisionist, Shri Raj Kumar Pandey, learned counsel for opposite party no.2 and learned A.G.A for the State and perused the record.

2. This criminal revision under section 19(4) of Family Court Act, 1984 has been filed against the order dated 22.09.2022 passed by Additional Principal Judge, Family Court, Faizabad, in Criminal Misc. Case No.388 of 2016 (Priyanka Achari Vs. Ram Prakash Achari), by which the application No.15-B moved by the revisionist in the trial

court concerned, challenging the maintainability of the petition filed by the respondent no.2, claiming maintenance has been, rejected.

3. It is submitted by learned counsel for the revisionist that as per settled proposition of law of section 125 Cr.P.C. only the legally wedded wife can claim the maintenance from her husband. Additional Principal Judge, Family Court, Faizabad, considered the aadhar card of the opposite party no.2 as only basis to conclude that the opposite party no.2 is prima-facie wife of the revisionist. The opposite party no.2 is the legally wedded wife of one Lavkush Shukla and the decree of divorce has not been taken as per procedure under section 13 of Hindu Marriage Act. The opposite party no.2 herself alleged to be the second wife of revisionist and no proof of dissolution of her first marriage is ever produced in the concerned court below. Hence the order passed by the court below is perverse and against evidence on record, therefore, it is liable to be set-aside.

4. Per contra learned counsel for opposite party no.2 submitted that opposite party no.2 is the legally wedded wife of revisionist, as the marriage of the revisionist and opposite party no.2 was solemnized on 08.06.2010 with their consent as per Hindu Rites and Rituals in the presence of both the families and their relatives etc. and at the time of marriage the father of opposite party no.2 has given gifts according to his capacity. It is further submitted that revisionist has not disclosed the facts that Leelawati Pandey, daughter of Sitaram Pandey was the first wife of the revisionist and after the death of his first wife on 21.06.2009 the revisionist solemnized the marriage with opposite party no.2 on 08.06.2010. The opposite

party no.2 was firstly married with Lavkush Shukla on 10.05.2005 and due to some dispute both of them decided to take divorce on the ground of mutual consent and a petition for dissolution of marriage was moved by both the parties in the court of Judge Family Court, Court No.3, Ahmedabad Gujarat. Thereafter, on 15.01.2007 the application for execution of petition for dissolution of marriage was moved by both the parties and their marriage was got dissolved vide order dated 15.01.2007. Thereafter, the revisionist solemnized the marriage with opposite party no.2. In aadhar card, electoral card, pass book of bank etc., the name of revisionist is entered as husband of opposite party no.2 and copies thereof are filed with counter affidavit. The revisionist and his family members physically harassed and beaten the opposite party no.2 on 02.08.2011 at about 5.00 P.M. and detained her in a room. In the night she reached to the house of her parents and narrated the entire story to her family members. Thereafter, a complaint case bearing No.1232 of 2011, under section 12 of Domestic Violence Act was filed at Police Station Kotwali, District Faizabad. Objections were filed by the brother of revisionist Ved Prakash Achari and Deepak Achari and the A.C.J.M.-3 Ayodhya passed the order dated 12.04.2017 in favour of opposite party no.2. Brothers of revisionist namely Ved Prakash Achari and Deepak Achari filed a Criminal Revision, bearing No.41 of 2017 in the court of Additional Sessions Judge, Court No.9, Faizabad, which was rejected on merits vide order dated 29.09.2017. Thereafter, the opposite party no.2 has filed FIR bearing Case Crime No.1224 of 2011, under sections 498-A, 323, 504, IPC, and section 3/4 D.P. Act. Police Station Kotwali, District Faizabad, in which charge sheet has been

filed against the revisionist and others. Being second legally wedded wife of the revisionist the present application under section 125 Cr.P.C. was moved for maintenance disclosing all the facts regarding dissolution of first marriage, which was considered by the Additional Principal Judge, Family Court, Faizabad and appropriate order was passed on 22.09.2022. It is further submitted by learned counsel for opposite party no.2 that there is no illegality in the order passed by the learned Magistrate, hence the revisionist is liable to be dismissed.

5. I have heard the rival submissions of learned counsel for the parties and perused the record.

6. Application 15-B is moved by the applicant/revisionist in the court concerned contention that Priyanka Achari (opposite party no.2) is the legally wedded wife of Lavkush Shukla. Lavkush Shukla is alive and their marriage is not yet dissolved by any court. The wife of revisionist Leelawati Achari was died in the year 2009, leaving two children Abhinav Achari and Ayushi Achari. Learned Additional Principal Judge, Family Court, Faizabad, considered the rival submissions made by learned counsel for the revisionist as well as the counsel for opposite party no.2. On the contrary the opposite party no.2 moved application No.22-B in the trial court stating that revisionist solemnized marriage with her hiding the facts of his first marriage and two son and she is living with the revisionist as his legally wedded wife.

7. Learned trial court relying upon the aadhar card, voter card and the pass book of SBI Bank, wherein the name of revisionist is mentioned as husband of opposite party no.2, hold that the opposite

party no.2 is apparently wife of the revisionist. It is also mentioned in the impugned judgment that aadhar card of opposite party no.2, which was got prepared has been rejected by Regional Office, Lucknow. Voter card (Annexure No.2) reveals that Ram Prakash Achari is mentioned as the name of the husband of opposite party no.2 and voter card itself was issued on 14.10.2010. In aadhar card also the name of present revisionist is mentioned as husband of opposite party no.2. However, it is submitted by learned counsel for the revisionist that aadhar card of opposite party no.2 has been cancelled on the application moved on behalf of the revisionist. Annexure no.1 is the order passed by the Family Court No.3, Ahmedabad Gujarat dated 15.01.2007, by which the concerned court has dismissed the case on the basis of agreement of divorce. Learned counsel for the revisionist submitted that this paper is not decree of divorce. This paper does not disclosed which of the case is dismissed. The agreement of divorce is not annexed with the counter affidavit. However, it transpires from annexure no.3, which is the order passed by A.C.J.M.-3, Faizabad dated 12.04.2017 that Case No.1224 of 2011 was rejected on the basis of agreement on non judicial stamp of Rs.100/-. It is true that decree of divorce is not on record, but revisionist has not denied that opposite party no.2 was not living with him. The only objection is that opposite party no.2 did not obtained valid decree of divorce from her first husband, therefore, there was no possibility of legal marriage with present revisionist.

8. Opposite party no.2 filed annexure no.2 with supplementary counter affidavit, which is statement of Deepak Achari son of Ram Krishna Achari (real brother of

revisionist), in which he is stated on oath that "रामप्रकाश आचारी मेरा सगा भाई है। परन्तु मैं तथा मेरी पत्नी कृष्णा माँ विमला व भाई वेद प्रकाश अलग रहते हैं। यदि रामप्रकाश ने दिनांक 08-06-10 को हिन्दू रीति के मुताबिक प्रियंका आचारी से शादी किया था दोनों के बीच किसी मामले को लेकर मतभेद हो गया जिस कारण प्रियंका आचारी को भाई रामप्रकाश ने छोड़ दिया है। रामप्रकाश हम लोगों से अलग रहता है। जिस कारण प्रियंका द्वारा लिखाया गया एफ.आई.आर. में हम लोगों को झूठा नामित कर दिया गया है। इस प्रकार जुर्म से इनकार करना बताया"। Annexure no.4 to the supplementary counter affidavit of opposite party no.2 is the pass book of state bank, in which Priyanka Achari is shown as the wife of Ram Prakash Achari. Few photographs are also annexed as annexure no.4 of supplementary counter affidavit.

9. The complete evidence produced, goes to show that opposite party no.2 continue to live with the revisionist as his wife. The legality divorce of opposite party no.2 with her first husband and marriage with present revisionist is the matter of evidence to be produced at the time of trial. At this stage it cannot be held that there is no relationship between the parties. Aadhar card of opposite party no.2 which is cancelled on the application of revisionist was issued in the year 2010 and revisionist never tried to delete his name as husband of opposite party no.2 in the aadhar card, voter card, bank passbook of SBI, till present dispute arise between the parties.

10. In the case of **“Rameshchandra Rampratapi Daga Vs. Rameshwari Rameshchandra Daga”** the apex court held that as per Hindu Marriage Act, 1955, the second marriage is void and such marriages are illegal as per the provisions of the Act, but still they are not immoral and financially dependent women cannot be denied maintenance on this ground. In **Chanmuniya Vs. Virendra Kumar Singh**

Kushwaha, the Apex Court interpreted the meaning of expression wife and states that broad and expansive interpretation should be give to the term wife which would include even those cases where a man and woman are living for long period of time as husband wife.

11. In the present scenario when the revisionist was married to one Leelawati who expired in the year 2009 and opposite party no.2 who filed an agreement before the court of law regarding dissolution of marriage and after filing the contract of dissolution of marriage in the court of law she solemnized marriage with the present revisionist. Now it is the matter of evidence, whether opposite party no.2 is entitled for maintenance or not. Therefore, at the very outset it cannot be said that the maintenance application moved by opposite party no.2 should be thrown out at the very threshold, without going into merit of the case. Learned trial court discussed the above mentioned facts in the impugned order. Hence the order of Additional Principal Judge, Family Court, Faizabad, passed on the application No.15-B moved by revisionist, suffers with no illegality, infirmity or irregularity, hence the revision has no merit and is liable to be dismissed.

12. Accordingly, the present revision is dismissed.

(2023) 7 ILRA 58

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 14.07.2023

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Criminal Revision No. 435 of 2007

Salik Singh & Anr.

...Revisionists

Versus

State of U.P.

...Opposite Party

Counsel for the Revisionists:

Sulabh Kr. Srivastava

Counsel for the Opposite Party:

G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 34,323, 325 & 504 - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - For roping the accused for the crime with the help of Section 34 I.P.C. - prosecution must lead evidence to prove that there was common intention of all the accused to commit the crime. (Para - 31)

(B) Criminal Law - Indian Penal Code, 1860 - Sections 34 - Acts done by several persons in furtherance of common intention - Section 34 I.P.C. requires a common intention between the accused and the person sought to be held liable for an offense - Unless both common intention and participation are present, Section 34 I.P.C. cannot be applied - Mere proof that some accused persons were with the main accused who inflicted fatal injury on the deceased will not attract the applicability of Section 34. (Para - 23,24,25,27)

Convictions of revisionists - conversion of convictions into Sections 323/34 and 325/34 - Prosecution lacks evidence for common intention or pre-meeting of minds for committing crime - Appellate Court added Section 34 I.P.C. in revisionist convictions - violates Sections 323 and 325 I.P.C. - revisionists not committed any offenses or been convicted for any offenses since 1992 - crime occurred in 1992 - more than 30 years elapsed - both revisionists have died - both over 60 years old. **(Para -2,29,31,37)**

HELD:- Revisionists' conviction set-aside. Trial court's judgment upheld under Sections 323 and 325 I.P.C.. Appellate Court upholds exonerating revisionists under Section 504 I.P.C..

Revisionists are entitled for benefit of Section 4 of The Probation of Offenders Act, 1958. **(Para -32,33,38)**

Revision partly allowed. (E-7)

List of Cases cited:

1. Sheodan & ors. Vs The St. of Raj. , 1974 CRI. L. J. 234 (V 80 C 91

2. Parichhat & ors. Vs The St. of M.P., AIR 1972 SC 535

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard Mr. Sulabh Kr. Srivastava, learned counsel for the revisionists and Ms. Mamta Pandey, learned Additional Government Advocate for the State.

2. Revisionists have filed the present revision challenging therein the judgement and order dated 9.03.2007 passed by First Additional Civil Judge, Junior Division/Judicial Magistrate, Gonda in Case No. 622/06/94 [State Vs. Atma Singh (deceased) and Others] whereby revisionists have been convicted for offences punishable under Sections 323, 325 and 504 I.P.C. Revisionists have also challenged the judgement and order dated 19.07.2007 passed by Additional Sessions Judge/Fast Track Court No.-4, Gonda in Criminal Appeal No. 14 of 2007 whereby the aforementioned conviction of the revisionists under Sections 323, 325 and 504 I.P.C. has been converted into conviction under Sections 323/34 and 325/34 I.P.C.

3. Brief facts of the case are that a criminal case was registered as N.C.R. No. 147 of 1992 under Sections 323 and 504 I.P.C. in Police Station Tarabganj, District Gonda. Later on Section 325 I.P.C. was added and after investigation, police

submitted charge-sheet against the accused before the competent court.

4. Charges were framed against accused i.e. Atma, Saliq, Amar Bahadur and Raj Bahadur under Sections 323/34, 325/34 and 504 I.P.C. All the accused stated before Court that they are not guilty of the charges levelled against them and demanded for trial.

5. During trial, testimony of P.W.-1, Smt. Pushpa, P.W.-2, Heera Devi, P.W.-3, Dr. S.C. Vishwas, P.W.-4, Dr. G.N. Prasad and P.W.-5, Ram Lakhan Tiwari (police personnel) was recorded. Statements of accused were recorded under Section 313 Cr.P.C. and accused also produced D.W.-1, Braj Bahadur Singh and his testimony was also recorded.

6. P.W.-1, Smt. Pushpa deposed that on 3.7.1992 at about 5:00 p.m., she was inside her house in village, Brahdsthan Bouriha, Police Station Tarabganj, District Gonda. She heard a noise of her mother and, thereafter she reached on the spot outside her house and found that all the accused were beating her mother and when she tried to save her, all the accused started beating P.W.-1. P.W.-1 also deposed that 'sahan' of her house is on eastern side and house of the accused is on northern side of her house. Accused had put 'jhakhra' on the 'sahan' land and when her mother went to remove the said 'jhakhra', all the accused beaten her which resulted in injuries to her mother and when she tried to save her mother, they also beaten her and she also suffered injuries.

7. P.W.-2, Heera Devi deposed that about three and half years ago, accused put 'jhakhra' on the abadi land in front of her house with an intention to grab the said

land and when she went to remove that '*jhakhra*', accused started beating her with 'lathi-danda' and when her daughter, Pushpa came to save her then accused also beaten her and used abusive language. P.W.-2, Heera Devi in her cross-examination admitted that there was a land dispute between the accused and husband of the petitioner. P.W.-2 Heera Devi in her cross-examination also stated that she received six blows of lathi, fists and kicks. She further stated that her hand got fractured due to blow of lathi given by accused, Raj Bahadur.

8. Besides the testimony of P.W.-1 and P.W.-2, testimonies of other prosecution witnesses were also recorded. Accused in their defense produced D.W.-1, Braj Bahadur Singh and his testimony was also recorded.

9. Learned First Additional Civil Judge (Junior Division)/Judicial Magistrate, Gonda considered the evidence recorded during trial and ultimately found that accused are guilty of offences punishable under Sections 323, 325, 504 I.P.C. and thereby vide judgement and order dated 9.03.2007 convicted them under Sections 323, 325, 504 I.P.C.

10. During the trial, since accused Atma Singh and Raj Bahadur died, therefore, trial stood abated in respect of the said two accused.

11. Trial court sentenced Saliq Ram Singh and Amar Bahadur Singh with three years' rigorous imprisonment and fine of Rs. 1,000/- each under Section 325 I.P.C., one year rigorous imprisonment and fine of Rs. 1,000/- each under Section 323 I.P.C. and rigorous imprisonment of two years and fine of Rs. 1,000/- each under Section

504 I.P.C. Learned trial court further provided that in case of default in deposit of fine, accused will have to undergo six months' imprisonment each and all the sentences will run simultaneously.

12. Learned trial court refused to give benefit of Section 4 of The Probation of Offenders Act, 1958 to both the accused on the ground that they have beaten Smt. Heera Devi and her daughter, Pushpa and have also fractured the bone of Smt. Heera Devi.

13. From perusal of the testimony of P.W.-1 and P.W.-2 and the judgement and order dated 9.03.2007, it appears that neither the prosecution led any evidence in respect of common intention of the accused regarding criminal act nor the trial court could draw inference from the circumstances of the case regarding common intention of all the accused for committing the crime in question, as such, trial court instead of convicting accused under Sections 323/34, 325/34 and 504 I.P.C., convicted the accused for offences punishable under Sections 323, 325 and 504 I.P.C.

14. The aforesaid judgement and order dated 9.03.2007 passed by First Additional Civil Judge (Junior Division)/Judicial Magistrate, Gonda in Case No. 622/06/94 was challenged by Saliq Singh and Amar Bahadur Singh by filing an Appeal in the Court of Additional Sessions Judge/ Fast Track Court No. 4, Gonda and the said appeal was registered as Criminal Appeal No. 14 of 2007.

15. Learned Appellate Court considered that the trial court framed charges against the appellants under Section 323/34, 325/34 and 504 I.P.C. and

further considered the testimony of P.W.-1 and P.W.-2 recorded during the trial. Learned appellate court passed final order in aforementioned Criminal Appeal No. 14 of 2007 on 19.07.2007.

16. Learned Appellate Court after considering the testimony of P.W.-1 and P.W.-2 recorded during trial, came to conclusion that since all the accused have beaten Smt. Heera Devi and her daughter, Pushpa, therefore, there was common intention of all the accused to commit the crime in question, as such, appellants are liable to be convicted for offences punishable under Sections 323/34 and 325/34 I.P.C. Learned appellate court in its judgement and order dated 19.07.2007 has further recorded a finding that there was a clerical error in judgement and order dated 9.03.2007 passed by the trial court for the reason that the trial court framed charges under Section 323/34 and 325/34 and 504 I.P.C. and keeping in view the circumstances of the case, conviction could not have been done under Sections 323/34, 325/34 and 504 I.P.C. and, therefore, learned Appellate Court vide judgement and order dated 19.07.2007 rectified the said clerical error and convicted the appellants under Sections 323/34 and 325/34 I.P.C. and also maintained the sentence given by the trial court under the aforesaid sections.

17. So far as conviction under Section 504 I.P.C. was concerned, learned Appellate Court on appraisal of the evidence found that the offence punishable under Section 504 I.P.C. is not made out against the appellants, as such, conviction under the said section by the trial court has been set-aside.

18. In the aforesaid circumstances, revisionists have filed the present revision.

19. Learned counsel for the revisionists has submitted that the learned Appellate Court without there being any material on record, could not have recorded a finding that non mentioning of Section 34 I.P.C. along with Sections 323 and 325 I.P.C. in the conviction order dated 09.03.2007 passed by learned trial court, is a clerical error. Learned counsel appearing for the revisionists has vehemently argued that though charges were framed against the accused under Sections 323/34, 325/34 and 504 I.P.C. but since prosecution did not lead evidence to prove common intention of all the accused for commission of crime in question, as such, learned trial court has convicted the accused only under Sections 323, 325 and 504 I.P.C.

20. Learned counsel appearing for the revisionists has vehemently argued that neither P.W.-1 nor P.W.-2 in their testimony have said that there was any common intention of all the accused to commit the crime in question and further no evidence has been led by the prosecution that there was any kind of pre-meeting of minds of all the accused for commission of the crime, therefore, in absence of any evidence led by the prosecution, there was no occasion for the trial court to convict the accused under Sections 323/34 and 325/34 I.P.C., as such, Appellate Court, on presumption that since all the four accused beaten Heera Devi and her daughter, Pushpa, therefore, necessarily there was common intention of all the accused to commit the crime in question, could not have convicted the revisionists under Sections 323/34 and 325/34 I.P.C.

21. Learned counsel appearing for the revisionists has also vehemently argued that P.W.-2 in her testimony has categorically stated that her hand was fractured due to lathi blow given by accused, Raj Bahadur and, therefore, unless there was any evidence led by the prosecution in respect of the common intention and pre-meeting of minds of all accused for committing the crime in question, there could not have been any occasion for the Appellate Court to convict the revisionists under Sections 323/34 and 325/34 I.P.C.

22. I have considered submissions advanced by learned counsel for the revisionists, learned A.G.A. for the State and have also perused the record of the Trial Court as well as record of the Appellate Court.

23. For arriving at a conclusion, it is necessary for this Court to have a look over Section 34 I.P.C. which is extracted as under:

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

24. A bare perusal of the aforesaid Section 34 I.P.C., it is patently manifest that the said section will come into play only when there existed common intention of all the accused for a criminal act.

25. Before a person can be held liable for offence done by another under provisions of Section 34 I.P.C., it must be established that there was common

intention in the sense of a pre-arranged plan between accused and the person sought to be held liable had participated in some manner in the act constituting the offence. Unless both common intention and participation are present, Section 34 I.P.C. cannot be applied.

26. The Hon’ble Supreme Court in its judgement and order rendered in the case of *Sheodan and others Vs. The State of Rajasthan* reported in *1974 CRI. L. J. 234 (V 80 C 91)* has held that inference of common intention should never be reached unless it is necessary inference deducible from the circumstances of the case. The presence of accused at the scene of the offence and their running away after occurrence without further materials or without direct evidence of prior concert cannot be said to be incompatible with innocence of accused. Relevant portion of the aforesaid judgement is extracted as under:-

5. Then remains the case of the remaining two accused Amilal and Kishanlal. In the first information report it was only stated that these persons had challenged Roopram while he was on camel's back. In the course of trial the prosecution has improved its case by introducing a material fact that they exhorted Sheodan to fire at Roopram. This was never the allegation in the first information report. Moreover as to the exhortation the evidence of the eye-witnesses is not uniform. Roopram injured has of course deposed to the exhortation by the witnesses to Sheodan to fire at him but Kaniram P.W. 2 and Chuniram P.W. 3 had only stated that only Kishanlal exhorted Sheodan to fire at Roopram and Amilal was only standing having a lathi in his hand. All the witnesses have said that the accused

were standing in the lane. They have not deposed as to whether they had come together and at what time they had come in the lane. The learned Addl. Sessions Judge had rightly discarded the version of exhortation prior to the firing by these two accused persons. He, however, has held them guilty on the basis of circumstances which were relevant in his opinion to make out a case under Section 34, I.P.C. against these accused persons. The first circumstance pointed by the learned Addl. Sessions Judge is that Kishanlal and Amilal were with accused Sheodan at the time of the occurrence in the lane and that their presence was not usual and in his opinion they were awaiting Roopram so that he could be availed of. It may be true that all the accused persons were in the lane at the time of the occurrence. But it cannot be said that their presence was unusual. They were the residents of the same village which was a small village and it cannot be said to be unusual to be present in a village lane which was meant for the use of the villagers. The learned Addl. Sessions Judge has entered into the realm of conjecture when he has observed that they were awaiting Roopram so that he could be availed of. This is merely a guess based on no material on the record. The presence of these persons in the lane cannot be said to be incompatible with their innocence. The second circumstance pointed out by the learned Addl. Sessions Judge is that both these accused went away from the scene of occurrence with accused Sheodan. It is not in the evidence that they had come together or in a body. It is true that the witnesses have deposed that when some neighbours had arrived at the spot all the three ran away towards the south. The learned counsel for the State emphasized on this circumstance and stated that it was a relevant and sufficient circumstance to

show that they had a preconcert and shared the common intention to cause injury to Roopram. In that connection, the learned counsel for the State relied on *Mamand v. Emperor*, AIR 1946 PC 45=(47 Cri LJ 344) and *State v. Iftikharkhan*, AIR 1973 SC 863 = (1973 Cri LJ 636). On the other hand, Mr. Kashinath Joshi has sought to distinguish these two cases relied on in *Pandurang v. State of Hyderabad*, AIR 1955 SC 216=(1955 Cri LJ 572) and *Banwari v. State of U. P.*, AIR 1962 SC 1198 = (1962 (2) Cri LJ 278). In AIR 1946 PC 45=(47 Cri LJ 344) their Lordships of the Privy Council took the fact of running away together as one of the considerations to establish a common intention. But that was not the sole circumstance but there was much more than that. In that case there was evidence that all the three accused came together. There was also evidence that they all ran away together in a body. In AIR 1973 SC 863=(1973 Cri LJ 636) also there was evidence that the accused had come together at the time of occurrence and they were close associates and they had run away together in a body after the shooting was over. The facts of the particular case cannot be applied indiscriminately to hold the persons guilty. The case must rest on its facts and the mere similarity of facts in one case cannot be used to determine a conclusion of fact in another. In the present case ex- cepting that the accused were present in the lane at the time of the occurrence and that they had ran away after the shooting there is no conclusive circumstance to establish that the accused had a prior concert and shared the common intention to cause the injury to Roopram. It has not been proved that the accused were close associates of Sheodan nor it has been proved that they had come together. It is of course true that they had after the shooting run away towards the south but it is not the

suggestion of the prosecution that they had run in a body i.e. together. Their running away after the shooting cannot be a conclusive circumstance incapable of being explained on other hypothesis. The running away simultaneously after the shooting could have been motivated by the instinct of saving themselves from the villagers who could have thought that these two accused persons were also party to the incident. It will be profitable to extract the observations made in Pandurang's case AIR 1955 SC 216= (1955 Cri LJ 572) which throw considerable light on the controversy before me-

"In the present case there is no evidence of any prior meeting we know nothing of what they said or did before the attack-not even immediately before..... But to quote the Privy Council again. The inference of common intention should never be reached unless it is necessary inference deducible from the circumstances of the case'. But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of cases. At bottom, it is a question of fact in every case and, however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis."

Bearing the principle laid down by their Lordships of the Privy Council and as approved by the Supreme Court, in mind, there is no room for doubt to say that there is no direct evidence of prior concert

and the circumstantial evidence is not such which necessarily establish the conclusion of the guilt of these two accused persons. The presence of these persons on the spot and their running away after the shooting without further materials cannot be said to be incompatible with the innocence of these accused persons as already stated above. The learned Additional Sessions Judge was also not right when he used the omission of these accused to intervene as a relevant circumstance against them. There was one fire by Sheodan and question of intervention could not have arisen. On the other hand their omission to commit violence or show of criminal force is a circumstance in the facts of this case in their favour. Consequently, it cannot be said that the case against these two accused is proved beyond any manner of doubt."

27. Hon'ble Supreme Court in its judgement rendered in the case of **Parichhat and Others v. The State of M.P.**, AIR 1972 Supreme Court 535 has held that in absence of any evidence of prior meeting of minds and any pre-arranged plan or of participation of accused persons in the fight in question they cannot be convicted with the aid of Section 34. The prosecution must prove that the criminal act has been done in concert pursuant to the pre-arranged plan. Mere proof that some accused persons were with the main accused who inflicted fatal injury on the deceased will not attract the applicability of Section 34.

28. Relevant portion of the aforesaid judgement passed by the Hon'ble Supreme Court is reproduced as under:-

"20. The Sessions Court disbelieved that the appellants Sunnu and Sitaram had instigated the appellant Gangu

to give a ballam blow to Kashiram. The appellants Parichhat, Sunnu and Sitaram did not beat or strike anyone. Common intention within the meaning of Section 34 of the Indian Penal Code implies pre arranged plan. There being no evidence of a prior meeting of minds and any prearranged plan or of participation of Sunnu and Sitaram in the fight they could not be convicted with the aid of Section 34 of the Indian Penal Code. Parichhat could not be said to have common intention with Gangu to cause the death of Kashiram and Parichhat could not be convicted with the aid of Section 34 of the Indian Penal Code. If they wanted to dispossess Damru and if they went there to dispossess Damru and if Gangu killed Kashiram and appellants Parichhat, Sunnu and Sitaram could not be brought within the common intention of killing Kashiram. No such pre-arranged plan has been proved. It has also not been proved that any criminal act has been done in concert pursuant to the pre-arranged plan. Several persons can simultaneously attack a man and each can have the same intention, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by Section 34 of the Indian Penal Code because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of murder.

22. Section 34 of the Indian Penal Code will not be attracted unless first it is established that a criminal act was done by several persons, second, that there was a common intention and a pre-arranged plan to commit an offence and third that there

was participation in the commission of the offence in furtherance of that common intention. The High Court was wrong in convicting the appellants Parichhat, Sunnu and Sitaram under Section 326 read with Section 34 of the Indian Penal Code. Their convictions are set aside. The High Court in setting aside the acquittal of Parichhat, Sunnu and Sitaram should have considered the enmity between Dharam Ballabh and Parichhat, the case instituted by Durji against Dharam Ballabh, the allegations made by Parichhat against Dharam Ballabh, the hostile and unsympathetic attitude of Ram Lakhani Sharma in investigating the complaint of Durji against Dharam Ballabh. If the appellants could not be convicted under Sections 147, 447 and 302 read with Section 149 of the Indian Penal Code and they were acquitted the acquittal could not be set aside by the High Court unless the Sessions Court in acquitting the accused was palpably wrong or took an erroneous view or committed grave injustice. The setting aside of the acquittal by the High Court was itself erroneous and wrong. The High Court was also wrong in convicting the appellants under Section 326 read with Section 34 of the Indian Penal Code. Merely remaining with Gangu at the time of cutting the crop will not justify any application of Section 34 of the Indian Penal Code with regard to the murder of Kashiram."

29. Neither Smt. Heera Devi (P.W.-2) nor her daughter, Pushpa (P.W.-1) in her testimonies have deposed that there was any pre-arranged plan of accused regarding commission of crime in question nor there was any common intention of all the accused to commit the crime. I find that prosecution even did not lead any evidence to prove that there was common intention of all the accused or there was pre-meeting

of minds of all the accused for committing the crime in question.

30. In absence of any evidence led by the prosecution or even any attempt by the prosecution to prove that there was common intention of all the accused or pre-meeting of minds for committing the crime in question, the Appellate Court on its own could not have drawn the inference that there was common intention of all the accused for committing the crime in question.

31. In the aforesaid judgements rendered by the Hon'ble Supreme Court, it has been categorically held that for roping the accused for the crime with the help of Section 34 I.P.C., prosecution must lead evidence to prove that there was common intention of all the accused to commit the crime whereas in the present case prosecution did not lead any evidence and there is nothing in the testimony of P.W.-1 and P.W.-2 regarding common intention of all the accused and pre-meeting of minds or any pre-arranged plan in respect of commission of crime, as such, Appellate Court while adding Section 34 I.P.C. in conviction of revisionists under Sections 323 and 325 I.P.C. has committed an illegality.

32. In view of the aforesaid discussion and reasoning, conviction of the revisionists under Section 323 I.P.C. read with Section 34 I.P.C. and Section 325 I.P.C. read with Section 34 I.P.C. is set-aside and conviction of the revisionists done by the trial court vide judgement and order dated 9.03.2007 under Sections 323 and 325 I.P.C. is upheld.

33. So far as the order of the Appellate Court exonerating

revisionists/appellants under Section 504 I.P.C. is concerned, the same is hereby upheld.

34. Learned counsel appearing for the revisionists has also argued that if the conviction of revisionists under Sections 323 and 325 I.P.C. is upheld then they are entitled for protection of Section 4 of The Probation of Offenders Act, 1958 as prior to said conviction, they have not been convicted for any offence by any competent court of law.

35. Learned counsel appearing for the revisionists has also submitted that the learned Appellate Court has refused to grant benefit of Section 4 of The Probation of Offenders Act, 1958 without considering all the facts and circumstances and only for the reason that Smt. Heera Devi and her daughter, Pushpa have suffered injuries, the benefit of Section 4 of The Probation of Offenders Act, 1958 has been denied.

36. Learned counsel appearing for the revisionists has also submitted that the crime in question took place on 3.07.1992 and two accused including Raj Bahadur by whose lathi blow, hand of Smt. Heera Devi was fractured, have already died and since then about more than 30 years have elapsed and there is no offence committed by the revisionists, therefore, in the facts and circumstances of the case, at this stage, revisionists are entitled for benefit of Section 4 of The Probation of Offenders Act, 1958.

37. I have considered submissions advanced by learned counsel for the revisionists in respect of the protection under Section 4 of the Probation of Offenders Act, 1958 and from the facts and circumstances of the case, I find that the crime in question took place in the year

1992 and since then, 30 years have elapsed and neither there is any offence committed by the revisionists nor they have been convicted for any offence. Even prior to the crime in question, revisionists have not been convicted for any offence. I also find that Raj Bahadur, by whose lathi-blow, hand of Smt. Heera Devi was fractured, has already died and another convict, Atma Singh has also died. Both the revisionists, as on date, are of age more than 60 years.

38. In the entire facts and circumstances, I am of the view that revisionists are entitled for benefit of Section 4 of The Probation of Offenders Act, 1958 and, therefore, instead of sentencing the revisionists under Section 325 I.P.C. with rigorous imprisonment of three years and fine of Rs. 1,000/- each and under Section 323 with rigorous imprisonment of one year and fine of Rs. 1,000/- each, they shall file two bonds to the tune of Rs. 20,000/- coupled with personal bonds to the effect that they shall not commit any offence and shall be of good behaviour and shall maintain peace during the period of one year. If there is breach of any of the aforesaid conditions, revisionists will subject themselves to undergo sentence before the Magistrate as per Rules. The aforesaid bonds shall be filed by the convicts within two months from the date of this judgement.

39. Revision is partly allowed regarding sentence of the revisionist.

40. Let record of trial court & appellate court along with certified copy of this order be sent to the court concerned for necessary information and compliance.

(2023) 7 ILRA 67

REVISIONAL JURISDICTION

CRIMINAL SIDE
DATED: LUCKNOW 14.07.2023

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Criminal Revision No. 484 of 2007

Amar Bahadur Singh ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sushil Kumar Singh

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Section 244 - Evidence for prosecution - The Prevention of Food Adulteration Act, 1954 - Section 7/16 - Prohibitions of manufacture, sale, etc., of certain articles of food/ Penalties , Section 2 (ia) (m) , 16 (1) (a) (i) - for punishing an accused for an offence under Section 16(1)(a)(i) - prosecution has to lead evidence and to prove that the quality or purity of the article being primary food has fallen below the prescribed standards or its constituents are not present in quantities within the prescribed limits of variability, in either case due to adulteration made by the accused and such fall in quality or purity is not due to natural causes. (Para - 15)

(B) The Prevention of Food Adulteration Act, 1954 - Proviso to Section 2(ia)(m) - For milk to be declared adulterated - prosecution must prove that the percentage of fat falling below the prescribed standards was not within the prescribed limits of variability and not due to natural or human agency. (Para - 16)

Complaint against revisionist - cognizance over complaint - Food Inspector got herself examined under Section 244 Cr.P.C. and cross-examined -

Trial Court framed charges against revisionist - prosecution not provided evidence - regarding admissible variation limits for standard of fat percentage in cow milk - as the level of fat varies from cow to cow - not provided evidence that shortage of fat in the milk sample is due to adulteration by revisionist - which cannot be attributed to natural causes or human agency. **(Para -16)**

HELD:- Trial court and appellate court have not considered the prosecution's lack of evidence regarding the variability in the standard of fat percentage in cow milk. Not provided evidence that shortfall in fat in the sample is due to adulteration by the revisionist, and that the shortage was not due to natural or human-controlled causes. As a result, the sample of milk cannot be considered adulterated solely because the percentage of fat in the milk was 14% less than the fixed standard. Judgement and order convicting revisionist and sentencing him for rigorous imprisonment of six months along with fine are set-aside. **(Para - 17)**

Revision allowed. (E-7)

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard learned counsel for the revisionist, learned Additional Government Advocate for the State and perused the record.

2. Revisionist has filed this revision challenging therein judgment and order dated 27.05.2005 passed by Additional Chief Judicial Magistrate, Sultanpur in Criminal Case No. 4423 of 2003 (State Vs. Amar Bahadur Singh) whereby revisionist has been convicted for an offence punishable under Section 7/16 of The Prevention of Food Adulteration Act, 1954 and has been sentenced for rigorous imprisonment of six months with a fine of Rs. 1,000/- and judgment and order dated 22.08.2007 passed by Additional Sessions Judge, Court No. 2, Sultanpur whereby Criminal Appeal No. 49 of 2005

(Amar Bahadur Singh Vs. State of U.P.) has been dismissed.

3. A complaint case was filed against revisionist in the Court of Additional Chief Judicial Magistrate, Sultanpur which was registered as Criminal Case No. 4423 of 2003 under Section 7/16 of The Prevention of Food Adulteration Act, 1954.

4. Complainant, Smt. Kiran Yadav in the complaint has stated that she is Food Inspector and found revisionist, Amar Bahadur Singh carrying 30 litres milk for sale on 09.08.2003 at 11:00 a.m. near Police Station Lambhua, District Sultanpur. She, on being suspicious of adulteration in milk, gave her introduction to revisionist, Amar Bahadur Singh and by paying Rs. 9/-, purchased 750 ml. milk. In the complaint, it has been further stated that the aforesaid milk was distributed in three equal parts and was put in three clean bottles and in each bottle, 20-20 drops of 40% formalin was added and thereafter caps were put on each bottle and all the three samples were properly sealed. One sample was deposited in the office of Chief Medical Officer, Sultanpur for sending it to Public Analyst at Lucknow. It was further stated in the complaint that later on Public Analyst, Government of U.P. after examining the aforesaid sample, has forwarded his report vide letter dated 26.08.2003 and in the said report it is mentioned that fat in the milk has been found 14% less than the standard of fat prescribed for cow milk.

5. Learned Additional Chief Judicial Magistrate took cognizance over the aforesaid complaint thereafter complainant, Food Inspector, Smt. Kiran Yadav got

herself examined under Section 244 Cr.P.C. and she was also cross-examined.

6. On the aforesaid basis, learned Trial Court framed charges against the revisionist under Section 7/16 of The Prevention of Food Adulteration Act, 1954 on 03.12.2004. Revisionist pleaded not guilty and therefore, learned Trial Court started trial.

7. Statement of revisionist was also recorded under Section 313 Cr.P.C.

8. Learned Trial Court has considered the testimony of Food Inspector, Smt. Kiran Yadav and found her version absolutely correct. Further Trial Court recorded a finding that Public Analyst, Govt. of U.P., after examination of the sample of the milk collected by Smt. Kiran Yadav, has given its report that fat in the sample of milk was found 14% less than standard of fat fixed for the cow milk, therefore, revisionist is liable to be convicted for offence punishable under Section 7/16 of The Prevention of Food Adulteration Act, 1954 and thereby has sentenced him for rigorous imprisonment of six months with fine of Rs. 1,000/-.

9. Revisionist challenged the aforesaid judgment and order dated 27.05.2005 passed by learned Trial Court in Criminal Case No. 4423 of 2003 by filing Criminal Appeal No. 49 of 2005 (Amar Bahadur Singh Vs. State) before Court of Additional Sessions Judge, Court No.2, Sultanpur.

10. Learned Appellate Court has considered the evidence appreciated by the trial court and, thereafter has passed order on 22.08.2007 wherein it has been concluded that the prosecution has proved

its case against the accused under Section 16(1)(a)(i) of The Prevention of Food Adulteration Act, 1954 and therefore, conviction and sentence given vide judgment and order dated 27.05.2005 passed by the learned Trial Court does not suffer from any illegality.

11. I find that the prosecution during trial has based its case on the report of the Public Analyst, Govt. of U.P. wherein it has been said that in the sample milk, fat was found 14% less than the standard of fat fixed for cow milk but prosecution did not lead any evidence before the trial court that the revisionist has done some adulteration in the milk and thereby the percentage of fat in the sample milk has become less than the standard of fat fixed for cow milk.

12. For arriving at a correct conclusion, certain provisions of The Prevention of Food Adulteration Act, 1954 are necessary to be seen, therefore, they are extracted as under:-

“7. Prohibitions of manufacture, sale, etc., of certain articles of food.— No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute—

(i) any adulterated food;

(ii) any misbranded food;

(iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence;

(iv) any article of food the sale of which is for the time being prohibited by the Food (Health) Authority in the interest of public health;

(v) any article of food in contravention of any other provision of this Act or of any rule made thereunder; or

(vi) any adulterant.”

“16. Penalties .— (1) *Subject to the provisions of sub-section (1A) if any person—*

(a) whether by himself or by any other person on his behalf, imports into India or manufactures for sales or stores, sells or distributes any article of food—

(i) which is adulterated within the meaning of sub-clause (m) of clause (ia) of section 2 or misbranded within the meaning of clause (ix) of that section or the sale of which is prohibited under any provision of this Act or any rule made thereunder or by an order of the Food (Health) Authority;

(ii) other than an article of food referred to in sub-clause (i), in contravention of any of the provisions of this Act or of any rule made thereunder; or

(b) whether by himself or by any other person on his behalf, imports into India or manufactures for sales or stores, sells or distributes any adulterant which is not injurious to health; or

(c) prevents a food inspector from taking a sample as authorised by this Act; or

(d) prevents a food inspector from exercising any other power conferred on him by or under this Act; or

(e) being a manufacturer of an article of food, has in his possession, or in any of the premises occupied by him, any adulterant which is not injurious to health; or

(f) uses any report or certificate of a test or analysis made by the Director of the Central Food Laboratory or by a public analyst or any extract thereof for the purpose of advertising any article of food; or

(g) whether by himself or by any other person on his behalf, gives to the vendor a false warranty in writing in respect of any article of food sold by him,

he shall, in addition to the penalty to which he may be liable under the provisions of section 6, be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years, and with fine which shall not be less than one thousand rupees:

13. Aforesaid Section 16 (1) (a) (i) provides that subject to provisions of Sub-Section (1A), if any person whether by himself or by any other person on his behalf imports into India or manufactures for sale or stores, sale or distributes any article of food which is adulterated within the meaning of Sub-Clause (m) of Clause (ia) of Section 2 shall be punished with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than Rs. 100/-.

14. Now it is necessary to look into Section 2 (ia) (m) which is extracted as under:-

“(m) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injurious to health:

Provided that, where the quality or purity of the article, being primary food, has fallen below the prescribed standards or its constituents are present in quantities not within the prescribed limits of variability in either case, solely due to natural causes and beyond the control of human agency, then, such article shall not be deemed to be adulterated within the meaning of this sub-clause.”

15. From bare perusal of proviso appended to Section 2(ia)(m), it becomes

patently manifest that for punishing an accused for an offence under Section 16(1)(a)(i), prosecution has to lead evidence and to prove that the quality or purity of the article being primary food has fallen below the prescribed standards or its constituents are not present in quantities within the prescribed limits of variability, in either case due to adulteration made by the accused and such fall in quality or purity is not due to natural causes.

16. Prosecution has not led any evidence in respect of the admissible variation limits (if any) regarding the standard of percentage of fat in cow milk as definitely the level of fat is bound to vary from cow to cow. Further prosecution has also not led any evidence that the shortage of fat which has been found in the sample of milk taken from the revisionist, is only due to adulteration made by him and the said shortage of fat could not have occurred due to natural causes and for any reason beyond the control of human agency. Proviso appended to Section 2(ia)(m) makes it crystal clear that for a primary food i.e. milk to be declared adulterated, it is obligatory upon the prosecution to prove that the percentage of fat which has fallen below the prescribed standards was not within the prescribed limits of variability and further the said shortfall was not due to natural causes and causes beyond the control of human agency.

17. In the present case, trial court as well as appellate court have not considered that prosecution has not led any evidence in respect of prescribed limits (if any) of variability in the standard of percentage of fat in cow milk

and has also not led any evidence that for shortfall of fat in the sample in question is the result of adulteration made by the revisionist and further the said shortage of percentage of fat was not due to any natural cause or due to any cause beyond the control of human agency. In absence of any evidence, as required under proviso appended with Section 2 (ia)(m), the sample of milk taken from the revisionist cannot be said to be adulterated only for the reason that the percentage of fat in the milk was 14% less than the standard fixed.

18. In view of the aforesaid reasons, this Court is of the considered view that judgement and order dated 27.05.2005 passed by Additional Chief Judicial Magistrate, Sultanpur convicting the revisionist under Section 7/16 of The Prevention of Food Adulteration Act, 1954 and sentencing him for rigorous imprisonment of six months along with fine of Rs. 1,000/- and judgement and order dated 22.08.2007 passed by Additional Sessions Judge, Court No. 2, Sultanpur in Criminal Appeal No. 49 of 2005 are liable to be set-aside and, accordingly, they are set-aside.

19. Revision is allowed. Revisionist is, hereby, acquitted from the aforesaid charge.

20. Revisionist is already on bail. Sureties given in favour of the revisionist, stand discharged.

21. Let copy of this judgement be sent to the court concerned for necessary information and compliance.

(2023) 7 ILRA 72
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2023

BEFORE

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

First Appeal From Order No. 243 of 1995

Smt. Madresh & Ors. ...Appellants
Versus
U.P.S.R.T.C. & Ors. ...Respondents

Counsel for the Appellants:

Sri Devendra Singh, Sri Pravindra Singh

Counsel for the Respondents:

Sri Samir Sharma, Sri Sunil Kumar Mishra,
Sri Vikas Sahai

A. Civil Law - Motor Vehicles Act, 1988-Sections 166, 168 & 173- Death in accident-Grant of Compensation-Future Prospects-Deceased was aged about 36 years-Rule 220-A(3) of the Rules of 1998, deceased falls in the category of 40 years and below, entitling his dependents to add future prospect to his income to extent 50% of his salary-Claimant's award is modified and the compensation awarded enhanced to Rs. 5,82,980/-. The 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. The entire sum of enhanced compensation shall be payable to the claimants in the manner that 60% of the compensation shall go to the widow, and out of the balance 40%, the other four claimants shall equally share. (Para 1 to 25)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Sarla Verma (Smt.) & ors. Vs DTC (2009) 6 SCC 121
2. Vimal Kanwar & ors. Vs Kishore Dan & ors. (2013) 7 SCC 476

3. Helen C. Rebello Vs M SRTC [(1999) 1 SCC 90 : 1999 SCC (Cri) 197]

4. National Ins. Co. Vs Pranay Sethi & ors. (2017) 16 SCC 680

5. New India Assur. Co. Ltd Vs Urmila Shukla & ors.. (2021) SCC OnLine SC 822

6. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd & ors. (2017) 35 LCD 1311

7. Ram Sarup Vs Munshi (1963) AIR SC 553

8. Dayawati Vs Inderjit (1966) AIR SC 1423

9. Mula Vs Godhu (1971) AIR SC 89

10. Amarjit Kaur Vs Pritam Singh (1974) AIR SC 2068

11. Puttamma Vs K.L. Narayana Reddy (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574

12. UP SRTC Vs Trilok Chandra (1996) 4 SCC 362

13. Magma General Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors. (2018) 18 SCC 130

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

1. This is an appeal by the claimants of Motor Accident Claim Petition No.48 of 1992, seeking enhancement of compensation awarded by the Motor Accident Claims Tribunal.

2. According to the claimant-appellants, who are dependents of the late Rajvir Singh, the deceased, on the 2nd of December, 1991 was proceeding from Roorkee to Meerut on board Maruti Car, bearing registration No. DNC-2281. He was travelling on the car along with Raj Kumar and some others. The car was moving according to the rule of the road and at a controlled speed. At forty minutes

past seven in the evening, as the car reached the Village Siwaya, a bus, owned by the Uttar Pradesh State Road Transport Corporation (for short, 'UPSRTC'), bearing registration No. UHN-2268, approached from the opposite direction. It was driven at the high speed of about 70 kilometers per hour and negligently. It hit the Maruti Car, leading to injury being sustained by several persons. One Raj Kumar died on the spot. Rajvir Singh, who sustained grievous injuries, was admitted to the Medical College Hospital. He breathed his last on 03/04.12.1991. A First Information Report about the accident was lodged with the Police, leading to the registration of a case. Rajvir Singh's body was sent to autopsy, that was carried out at the P.L. Sharma Hospital, Meerut.

3. According to the claimant-appellants (for short, 'the claimants'), the deceased was a Constable in the Uttar Pradesh Police and aged thirty-six and a half years at the time of his demise. He was a healthy man and in the usual course of life would have gone on to celebrate his 85th birthday. The deceased was in receipt of a total salary of Rs.1961/- *per mensem*. Due to Rajvir Singh's untimely demise, the claimants have been destituted and left without a source of income. The claimants have also been denied their love and affection. A compensation in the sum of Rs.8,10,000/- was, accordingly, claimed.

4. A written statement was filed on behalf of the UPSRTC, who are opposite party No.1 to the claim petition and respondent No.1 to this appeal. The UPSRTC have generally denied the allegations in the claim petition. The particulars of the accident have been denied, leading to Rajvir Singh's death. It has been averred that burden lay upon the claimants to establish the factum of

the accident. It is the further case of the UPSRTC that the accident did not happen on account of negligence of the bus driver, but it is a case of contributory negligence, where the bus driver and the driver of the Maruti Car ought to share the liability in equal proportion. It was also pleaded that the compensation sought is excessive and without basis. The case further pleaded is that compensation cannot come to the claimants as a lottery or windfall.

5. A written statement was filed on behalf of the National Insurance Company Limited, Branch Office Haridwar through the Divisional Manager, Begum Bridge, Meerut, opposite party No.4 to the claim petition and respondent No.4 here, who are Insurers of the Maruti Car. The Insurance Company aforesaid took a stand that it is the claimants' burden to establish the factum of the accident and all other things necessary to entitle them to compensation. It was the Insurance Company's case that the car was not being driven negligently and not responsible for the accident. It was the offending bus alone, that has to be held liable. The Insurance Company too said that the compensation demanded was excessive.

6. Upon pleadings of parties, the following issues were framed (translated into English from Hindi):

“1. Whether the accident in question happened on 02.12.1991 at 7.40 p.m. in the jungle of Shivaya, Police Station Daurala, Meerut on account of negligent driving at a high speed by the drivers of bus No. UHN-2268 and Maruti car No. DNC-2282? If yes, its effect.

2. Whether the claimants are entitled to receive any compensation? If yes, how much and from which party?

7. On behalf of the claimants, Smt. Madresh, the widow, was examined as PW-1, whereas Constable Ajay Pal Singh, an eye-witness of the accident, was examined as PW-2. In the claimants' documentary evidence, a copy of the FIR, the charge sheet, the site plan, the postmortem report and the deceased's salary certificate, besides his High School Certificate were filed. On behalf of the UPSRTC, the bus driver, Raj Kumar was produced in the witness-box and examined as DW-1.

8. It must be noticed that the claim petition has, of course, been pursued by the claimants before the Tribunal and defended by the UPSRTC. The other three opposite parties do not appear to have much contested the claim before the Tribunal. Before this Court, the appeal has been supported by the claimants and resisted on behalf of the UPSRTC. None of the other parties have appeared at the hearing before this Court.

9. Heard Mr. Pravindra Singh, learned Counsel for the claimants and Mr. Vikas Sahai, learned Counsel appearing for the UPSRTC. No one appears on behalf of respondent Nos.2 to 4.

10. The lower court records have been carefully perused.

11. Since this appeal is limited to a claim for enhancement of compensation, this Court proposes to scrutinize the findings of the Tribunal on Issue No.2 alone. There is no cavil about the findings on the first issue.

12. It is argued by the learned Counsel for the claimants that the Tribunal has erred in law in applying a multiplier of '12', instead of '15', on account of the fact

that the widow was in receipt of a family pension of Rs.500-600/- per month. He submits that the pension payable to the widow is not legally deductible, or in any manner relevant to a quantification of the dependency. It is also argued that the Tribunal has not awarded anything towards future prospects of the deceased. Also, nothing has been awarded towards loss of consortium to each of the claimants, besides award towards loss of estate and adequate funeral expenses.

13. Mr. Vikas Sahai, learned Counsel appearing on behalf of the UPSRTC, on the other hand, has supported the impugned judgment and says that it makes for a just award, which ought not to be disturbed.

14. In order to work out the compensation and pass a just and fair award, the most fundamental figure to be determined is the deceased's monthly income. Happily in this case, the deceased was a government servant, whose income, whether high or low, is accepted in law and by the society with a kind of trust, faith and reverence, which the income of the richest of men may not command. The deceased's income in this case has the infallible certification of the Deputy Superintendent of Police, Haridwar, who has issued a certificate dated 20.12.1991, paper No. 38-Ga. We have perused the said certificate. It shows the deceased's income to be Rs.1961. The monthly income of the deceased is, therefore, to be regarded as Rs.1961/-, the annual income working out to a figure of Rs.23,532/-.

15. The deceased left behind five dependents, to wit, his widow Smt. Madresh, two minor daughters, Km. Kalpna and Km. Alpna, aged 13 and 11 years, respectively, and two sons, Master

Atul and Master Pintu, aged 8 years and 4 years, respectively. Going by the principle for determining the number of surviving family members, in turn to quantify the deduction towards personal and living expenses for the deceased, Rule 220-A (2)(iii) of the U.P. Motor Vehicles Rules, 1998 (for short, 'the Rules of 1998') serves as the guide. The Rule postulates that for the purpose of calculation of the number of family members in Clause (ii), a minor dependent will be counted as half a unit. Therefore, the four children of the deceased would make for two dependents, whereas the widow would constitute one. Thus, it has to be held that the deceased was survived by three dependent family members. According to Rule 220-A(2)(ii) of the Rules of 1998, deduction towards personal and living expenses for a married person in order to work out the survivors' dependency, where he is survived by dependents in the bracket of 2 to 3 shall be one-third. The same deduction for living expenses of the deceased is envisaged in Paragraph No.30 of the decision in **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another, (2009) 6 SCC 121**, where the dependent family members are 2-3. Thus, in this case, out of the annual income of the deceased, a **one-third** has to be deducted towards personal and living expenses.

16. The next issue to be considered, in order to work out the dependency, is the appropriate multiplier to apply. According to the guidance of the Supreme Court in **Sarla Verma (supra)** in Paragraph No.42 of the report, for the dependents of a deceased in the age bracket of 36-40 years, the applicable multiplier is '15'. Here, the deceased was aged thirty-six and a half years. There is no cavil about his age as the High School

Certificate is on record as paper No.40-Kha. The High School Certificate shows the deceased's date of birth as 1st July, 1955. At the time of his demise, on 03/04.12.1991, the deceased would, therefore, be aged as 36 years or as the Tribunal says, thirty-six and a half years. Therefore, the applicable multiplier would clearly be '15' and not '12', as adopted by the Tribunal. The Tribunal has adopted a lower multiplier, apparently referring to the fact that the widow is in receipt of a family pension of Rs.500-600/-. The fact that the widow is in receipt of family pension is absolutely irrelevant for the purpose of working out the dependency for the claimants. In this regard, the law on the issue has been authoritatively laid down by the Supreme Court in **Vimal Kanwar and others v. Kishore Dan and others, (2013) 7 SCC 476**, where it has been held:

18. The first issue is “whether provident fund, pension and insurance receivable by the claimants come within the periphery of the Motor Vehicles Act to be termed as ‘pecuniary advantage’ liable for deduction”.

19. The aforesaid issue fell for consideration before this Court in *Helen C. Rebello v. Maharashtra SRTC [(1999) 1 SCC 90 : 1999 SCC (Cri) 197]*. In the said case, this Court held that provident fund, pension, insurance and similarly any cash, bank balance, shares, fixed deposits, etc. are all a “pecuniary advantage” receivable by the heirs on account of one's death but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death. Such an amount will not come within the periphery of the Motor Vehicles Act to be termed as “pecuniary advantage”

liable for deduction. The following was the observation and finding of this Court: (SCC pp. 111-12, para 35)

“35. Broadly, we may examine the receipt of the provident fund which is a deferred payment out of the contribution made by an employee during the tenure of his service. Such employee or his heirs are entitled to receive this amount irrespective of the accidental death. This amount is secured, is certain to be received, while the amount under the Motor Vehicles Act is uncertain and is receivable only on the happening of the event viz. accident, which may not take place at all. Similarly, family pension is also earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. No co-relation between the two. Similarly, life insurance policy is received either by the insured or the heirs of the insured on account of the contract with the insurer, for which the insured contributes in the form of premium. It is receivable even by the insured if he lives till maturity after paying all the premiums. In the case of death, the insurer indemnifies to pay the sum to the heirs, again in terms of the contract for the premium paid. Again, this amount is receivable by the claimant not on account of any accidental death but otherwise on the insured's death. Death is only a step or contingency in terms of the contract, to receive the amount. Similarly any cash, bank balance, shares, fixed deposits, etc. though are all a pecuniary advantage receivable by the heirs on account of one's death but all these have no co-relation with the amount receivable under a statute occasioned only on account of accidental death. How could such an

amount come within the periphery of the Motor Vehicles Act to be termed as 'pecuniary advantage' liable for deduction. When we seek the principle of loss and gain, it has to be on a similar and same plane having nexus, inter se, between them and not to which there is no semblance of any co-relation. The insured (the deceased) contributes his own money for which he receives the amount which has no co-relation to the compensation computed as against the tortfeasor for his negligence on account of the accident. As aforesaid, the amount receivable as compensation under the Act is on account of the injury or death without making any contribution towards it, then how can the fruits of an amount received through contributions of the insured be deducted out of the amount receivable under the Motor Vehicles Act. The amount under this Act he receives without any contribution. As we have said, the compensation payable under the Motor Vehicles Act is statutory while the amount receivable under the life insurance policy is contractual.”

17. Therefore, in our opinion, the Tribunal went wrong in scaling down the multiplier to '12', instead of adopting the appropriate multiplier of '15'.

18. So far as the future prospects of the deceased are concerned, he was aged 36 years or thereabouts. According to Rule 220-A(3) of the Rules of 1998, the deceased falls in the category of 40 years and below, entitling his dependents to add future prospect to his income to the extent 50% of his salary.

19. The issue if the award of future prospects would be governed by the decision in **National Insurance Company v. Pranay Sethi and others, (2017) 16 SCC 680** or Rule 220-A(3) of the Rules of

1998, fell for consideration of the Supreme Court 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 in Pranay Sethi cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in Pranay Sethi cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs.”

20. In the opinion of this Court, therefore, the right to determination of future prospects would be governed by Rule 220-A(3) and not the principles laid down in **Pranay Sethi (supra)**.

21. It was urged on behalf of the UPSRTC that Rule 220-A(3) of the Rules of 1998 would not be applicable to the present case, because they were introduced w.e.f. 26th September, 2011, whereas the accident in this case had happened in the year 1991. This question fell for consideration of 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:

“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 take 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.”

22. No decision by a Larger Bench or the Supreme Court has been brought to the notice of this Court overruling the law as aforesaid laid down in **Sushil Kumar**. There is, thus, no difficulty in applying the provisions of the Rules of 1998, here and elsewhere, for the determination of compensation payable to the deceased in this case.

23. The claimants are entitled to receive compensation under the conventional heads. This issue was again the subject matter of consideration by their Lordships of the Supreme Court in **Pranay Sethi**, 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)

24. The question of award of compensation for loss of consortium 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 was 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)

25. In the circumstances, this appeal deserves to succeed and in order to make a just award, the impugned award shall stand modified and revised as follows:

(I) Monthly Income (of the deceased) = **1961**

(ii) Annual Income (of the deceased) = **1961x12 = 23532**

(iii) Annual Income+Future Prospects (monthly income x 50%) = 23532+11766 = **35298**

(iv) Annual Dependency = Annual Income – one-third deduction towards personal expenses of the deceased = 35298-11766 = **23532**

(v) Total Dependency = Annual Dependency x Applied Multiplier = 23532 x 15 = **352980**

(vi) Claimant's entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium = 15000+15000+40000x5 = **230000**

The total compensation would therefore, work out to a figure of Rs. 352980+ Rs. 230000 = 582980

26. 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. 5,82,980/-**. 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. The entire sum of enhanced compensation shall be payable to the claimants in the manner that 60% of the compensation shall go to the widow, and out of the balance 40%, the other four claimants shall equally share. Any sum of money already deposited with the Tribunal by the UPSRTC, pursuant to the impugned award or the interim orders passed by this Court, shall be adjusted against the award. Costs easy.

(2023) 7 ILRA 81
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

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

First Appeal From Order No. 316 of 1997

Sanjay Kumar Sharma & Anr. ...Appellants
Versus
Sri Murari Lal & Ors. ...Respondents

Counsel for the Appellants:
 Sri Madhav Jain

Counsel for the Respondents:
 Sri A.K. Shukl

A. Civil Law - Motor Vehicles Act, 1988 - Section 173- Death in accident-Grant of

Compensation-deceased was aged 30 years was a compounder working with a doctor who has left behind him his mother, father, widow, one son and two daughters-The tribunal has considered his income to be Rs. 1200/-p.m, deducted 1/3rd, granted multiplier of 16, added Rs. 10,000/- towards non pecuniary damages and granted interest at the rate of 12%.- income of Rs. 1200/- p.m cannot be said to be on the lower side, the same is maintained, 40% future prospects to be added-Multiplier of 17 as per the judgment of Sarla Verma would be admissible. Rs. 50,000/- for non pecuniary damages- Total compensation : 2,78,480/-The interest on the enhanced amount would be 7% from the date of filing of the claim petition as that would have been rate in the year 1997.(Para 1 to 18)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Lakkamma Vs United India Ins. Co. Ltd. (2021) AIR SC 3301
2. Sarla Verma Vs DTC (2009) 6 SCC 121
3. A.V. Padma Vs Venugopal (2012) 1 GLH SC 442
4. Smt. Hansaguri P. Ladhani Vs The Oriental Ins. Co. Ltd. (2007) 2 GLH 291
5. Smt. Sudesna & ors. Vs Hari Singh & anr., FAFO No. 23 of 2001
6. Bajaj Allianz General Ins. Co. Pvt. Ltd. Vs U.O.I. & ors.

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

1. Heard Sri Madhav Jain, learned counsel for the appellants and Sri A.K.Shukl learned counsel for respondents.

2. This appeal, at the behest of the claimants, challenges the judgement and

award dated 8.11.1996 passed by M.A.C.T/7th-Additional District Judge, Agra (hereinafter referred to as "Tribunal") in M.A.C. Case No. 206 of 1993. The accident is not in dispute. The liability fastened on the insurance company is not in dispute. The age of the deceased is not in dispute. The insurance company and the owner have not challenged the judgment. The oral objection is to the granting of interest at 12% granted by the tribunal. The only question which remains to be considered in this appeal is whether the compensation awarded is just compensation in view of the settled legal position of law.

3. Brief facts as culled out from the record are on 21.03.1993 deceased Raj Kumar Sharma was going to his village Pathauli by bicycle on his side from Agra. When he reached near village Baant Sucheta and near village Pathauli a metador coming from opposite side bearing no. U.P. 80A 9317 driven by its driver rashly and negligently hit the bicycle of deceased as a result of which the deceased received grievous injuries. He had been rushed to the S.N. Hospital for treatment but the doctors declared him dead.

4. The deceased Raj Kumar Sharma on the date of accident i.e on 21.03.1993 was aged 30 years was a compounder working with a doctor who has left behind him his mother, father, widow, one son and two daughters. The tribunal has considered his income to be Rs. 1200/-p.m, deducted 1/3rd, granted multiplier of 16, added Rs. 10,000/- towards non pecuniary damages and granted interest at the rate of 12%.

5. It is submitted by Sri Madhav Jain, learned counsel for the appellants that the deceased was earning Rs. 2500/-p.m and

40% of this be added to future loss of income and multiplier of 17 should be granted. It is submitted that 1/4th of the amount should be deducted towards personal expenses of the deceased as the deceased was survived by four legal representatives. The rate of interest granted is just and proper.

6. Per contra, as against this, it is submitted by Sri A.K.Shukl, learned counsel for the respondents that in absence of any proof of income Rs. 2500/- p.m cannot be considered to be income of a compounder in the year of accident. It is further submitted that there is no question of granting future loss of income as law did not subscribe to the same and the multiplier granted is just and proper. According to learned counsel interest granted at 12% is exorbitantly granted. Further, it is submitted that the matter remained pending since 1997 till 2022 and only on 27.02.2023, a copy of the memo of appeal was given to the respondent and therefore in view of the judgement of **Lakkamma Vs. United India Insurance Co. Ltd. AIR 2021 SC 3301**, it is submitted that interest under Section 171 of the M.V.Act should not be ordered for the said period where the insurance company was not at fault and the appellant's counsel was totally negligent in not even getting the matter listed on the board and getting notice issued till year 2023.

7. After hearing Sri Madhav Jain, learned counsel for the appellants and Sri A.K.Shukl learned counsel for the insurance company. The two claimants who are two in number they are proforma respondents though who were originally arrayed as claimants, who will also benefitted by this judgment.

8. The income of Rs. 1200/- p.m cannot be said to be on the lower side, the

same is maintained, 40% of this monthly income would have to be added. The deceased was aged 30 years at the time of accident hence multiplier of 17 as per the judgment of **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121**, would be admissible. Rs. 50,000/- for non pecuniary damages.

8. Hence, the total compensation payable to the appellants is computed herein below:

- i. Income : Rs.1200/-
- ii. Percentage towards future prospects : 40% namely Rs.480/-
- iii. Total income : Rs. 1200 + 480 = Rs. 1680/-
- iv. Income after deduction of 1/3rd : Rs. 1120/-
- v. Annual loss : Rs. 1120 x 12 = Rs. 13,440/-
- vi. Multiplier applicable : 17
- vii. Total loss : Rs. 13,440 x 17 = Rs. 2,28,480/-
- xii. Amount under non-pecuniary head : Rs.50,000/-
- xiii. Total compensation : 2,78,480/-

9. This takes this Court to the most interesting question of rate of interest as many matters are lying pending in this Court since 1992 without notices been issued, without matter being listed on board even once, is this failure on the part of the Registry to list the matters and/or on the part of the learned counsels, I do not want to delve into the same but the fact that this appeal has remain pending since 1997 without even notices been issued to the insurance company. Should insurance company be saddled with huge liability of the interest. Section 171 of the M.V. Act, 16988 stipulates as follows:-

“171. Award of interest where any claim is allowed.—Where any Claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf.”

10. The interest on the enhanced amount would be 7% from the date of filing of the claim petition as that would have been *rapo* rate in the year 1997. Thereafter, for the period for which it has remained pending even without notices being served a marginal rate of interest of 2% would be worked out on the total amount, thereafter, again it would be 7% from the date the insurance company was represented before this Court.

11. As the matter has remain pending for about 2 decades no amount shall be kept in fixed deposit. The minor children would have become major by now, the daughters might have been married they shall be summoned and the amount proportionate to their share would be paid by account payee cheque by the tribunal in view of the judgment of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**.

12. No other grounds are urged orally when the matter was heard.

13. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the additional amount within a period of 12 weeks from today with interest as directed above.

14. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma (supra)**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

15. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (**Smt. Sudesna and others Vs. Hari Singh and another**) while disbursing the amount.

16. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma**

(**supra**). The same is to be applied looking to the facts of each case.

17. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As 10 years have elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

18. Record be sent back to the tribunal.

19. This Court is thankful to Sri Madhav Jain, learned counsel for the appellants and Sri A.K.Shukl learned counsel for respondents for getting this old appeal disposed of.

(2023) 7 ILRA 84

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 14.07.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

First Appeal From Order No. 613 of 2019

**New India Assurance Co. Ltd. ...Appellant
Versus**

Anil Kumar & Ors. ...Respondents

Counsel for the Appellant:

Anchal Mishra

Counsel for the Respondents:

Ravindra Pratap Singh

**A. Civil Law - Motor Vehicles Act,1988-
Sections 173- enhancement of**

compensation-deceased died in accident she was a homemaker and her income is Rs. 5,000/- per month from the Tea Stall - 25% towards the future prospects which would be Rs. 1,250/- per month would make the income @ Rs. 6,250/- per month-From this, if 1/3rd is deducted towards the personal expenses and rounding it off to Rs. 2, 100/- per month, then the net income would be [Rs. 6,250-2,100] Rs. 4,150/- per month. Adopting a multiplier of 15 as per decision of the Apex Court in *Sarla Verma (supra)*, the compensation amount would be Rs. 7,47,000/- to which the amount towards consortium and loss of estate and funeral expenses, if added at Rs. 70,000/-, would finally rest the award at 8,17,000/- Tribunal erred in not making deductions for the personal expenses despite the same the Tribunal awarded a sum of Rs. 70,000/- towards the head for consortium, loss of estate and funeral expenses and finally granted a total sum of Rs. 7,45,000/- to the claimants. (Para 1 to 47)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Sarla Verma (Smt.) & ors. Vs DTC (2009) 6 SCC 121
2. `Magma General Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors. (2018) 18 SCC 130
3. Rajendra Singh & ors. Vs National Ins. Co. Ltd. & ors. (2020) 7 SCC 256
4. Kirti & anr. Vs Oriental Ins. Co. Ltd. (2021) 2 SCC 166
5. Ranjana Prakash & ors. Vs Div. Manager & Anr. (2011) 14 SCC 639
6. Saurabh Jain Vs A.B.P. Design (2021) SCC Online 552
7. New India Assr. Co. Ltd. Vs Smt. Neelam Jaiswal & ors. (2020) SCC Online All 85

8. New India Assr. Co. Ltd. Vs Risha Devi & ors. (2017) 3 ADJ 685

(Delivered by Hon'ble Jaspreet Singh, J.)

1. The Insurance Company has come up in Appeal under Section 173 of the Motor Vehicles Act, 1988 assailing the award dated 07.08.2019 passed in Claim Petition No. 81 of 2018 by Motor Accident Claims Tribunal/Additional District Judge, Court No. VI, District Barabanki solely assailing the quantum.

2. Sri Anchal Mishra, learned counsel for the appellant has submitted that upon the death of Smt. Sunita on 01.11.2016, a Claim Petition bearing No. 81 of 2016 came to be filed. The averments of the claim petition indicated that Smt. Sunita being the pillion rider was traveling along with her husband Anil Kumar on his motorcycle bearing No. UP 32HF 8507. While the said couple had reached near Makarpur Petrol Pump, P.S. Loni Katra, District Barabanki, the offending truck bearing No. UP 83 H 9611 being driven rashly and negligently hit the motorcycle, as a result, Smt. Sunita received grievous injuries and she died on the spot.

3. It was further pleaded that Smt. Sunita was a proficient housewife and was also running a Tea Stall and was able to earn Rs. 6,000/- per month from the said Tea Stall and she contributed towards the household work and that was valued at Rs. 3,000/- per month and consequently the loss was indicated as Rs. 9,000/- per month. The deceased was survived by her husband Anil Kumar, son Pramod Kumar and a daughter Ms. Priya.

4. The claim petition came to be contested and upon exchange of the

pleadings, the Tribunal framed six issues. After considering the evidence both oral and documentary, the Tribunal returned a finding that the accident which caused the death of Smt. Sunita was on account of rash and negligent driving of a truck bearing No. UP 83 H 9611. It also held that the truck was duly insured with the New India Assurance Company Ltd. and its driver had a valid and subsisting driving license, however, while computing the compensation, the Tribunal adopted a notional income of Rs. 3,000/-per month upon which 25% was added for future prospects and considering that the age of the deceased as 40 years, a multiplier of 15 was adopted and thereafter a sum of Rs. 70,000/- towards loss of consortium, loss of estate, funeral expenses was added and thus a total sum of Rs. 7,45,000/- has been awarded in favour of the claimants-respondents along with 7% interest by means of the award dated 07.08.2019 which is under challenge.

5. The learned counsel for the Insurance Company has submitted that the Tribunal has erred on two counts:-

(i) No deductions towards personal expenses has been made which is apparent from the manner in which the issue no. (vi) has been decided.

(ii) The Tribunal has also erred in adopting an incorrect multiplier of 15 rather a multiplier of 14 ought to have been adopted.

6. It is further elaborated that since no proof was furnished for proving any income of the deceased, hence, even the notional income which has been taken is on the higher side and consequently the award is inflated and necessarily needs to be modified.

7. Sri Ravindra Pratap Singh, learned counsel appearing for the claimants-respondent nos. 1, 2 and 3 has opposed the aforesaid submissions and has urged that the primary requirement in a claim petition under Section 166 of the Motor Vehicles Act casts a duty on the Tribunal to ascertain a just and fair compensation.

8. It is urged that specific evidence was led on behalf of the claimants to indicate that the deceased was running a Tea Stall from where she earned Rs. 6,000/-per month. It is further pointed out that she was also a proficient housewife who contributed to the household and this was specifically pleaded in the claim petition including in the evidence and despite the same, the Tribunal has merely taken a notional income of Rs. 3,000/-per month without any basis and has completely ignored the fact that the deceased was running a Tea Stall and the income generated therefrom.

9. It is further submitted that the age of the deceased has been taken to be 40 years which was specifically stated in the claim petition as well as corroborated from the postmortem report and there was no contradictory material against the same and thus at the age of 40 years as per the dictum of the Apex Court in **Sarla Verma and Others v. Delhi Transport Corporation and Others, (2009) 6 SCC 121**, the appropriate multiplier to be adopted is 15 which has been noted by the Claims Tribunal and therefore it cannot be said that the Tribunal has erred in adopting an incorrect multiplier.

10. It is further submitted that this fact apart since Smt. Sunita had died in the accident and she was survived by her husband and two children, accordingly,

consortium should have been awarded in terms of the decision of the Apex Court in **Magma General Insurance Company Ltd. Vs. Nanu Ram, 2018 SCC Online SC 1546** i.e. to say that the husband would be entitled to spouse consortium and the two children were entitled to parental consortium and this aspect has been ignored by the Tribunal.

11. It is also pointed out that in the aforesaid circumstance if the appropriate income of the deceased was taken, coupled with the fact that appropriate consortium is awarded then amount as granted by the Tribunal will be just and appropriate and then even if an adjustment for personal expenses is made then there would not be much of a difference in the quantum to persuade the Appellate Court to intervene where substantial justice has been done and a fair and adequate compensation has been awarded. Hence, the award may not be disturbed only on account of mathematical calculations or for technical reasons.

12. In reply, the learned counsel for the Insurance Company has pointed out that it is the appeal of the Insurance Company which is assailing the quantum of award on the aforesaid counts. The claimants-respondents have not filed any appeal nor any cross objections and thus they are precluded from making any submission for enhancement of the award on the ground that the Tribunal has not taken the appropriate income of the deceased and the consortium has also not been granted appropriately. Moreover, the respondent do not dispute that the Tribunal ought to have made adjustments towards personal expenses, which has not been done, consequently, the appeal deserves to be allowed.

13. The Court has considered the rival submissions and also perused the material on record.

14. In light of the rival submissions, the issues which arise for the consideration of this Court in the present appeal is:-

(i) Whether in absence of any cross appeal under Order 41 Rule 22 C.P.C. filed by the claimants, this Court can consider the submissions regarding enhancement of the award at the behest of the claimants, whereas it is the Insurance Company who has challenged the award on the ground of quantum being high?.

(ii) Whether the quantum as determined by the Tribunal is just and fair compensation?

15. In order to answer the aforesaid two issues, it will be necessary to notice certain statutory provisions as contained in the Motor Vehicles Act, 1988.

16. Section 165 of the Motor Vehicles Act, 1988 provides for constitution of a Claims Tribunal and Section 166 of the Motor Vehicles Act, 1988 relates to how an application for compensation is to be made.

17. Section 169 of the Motor Vehicles Act, 1988 of the aforesaid Act provides for the procedure and powers of the Claims Tribunal and it specifically provides that in holding an inquiry under Section 168, the Claims Tribunal may subject to any rules that may be made in this behalf follow such summary procedure as it thinks fit and it shall have all the powers of Civil Court for the purpose of taking evidence on oath and for enforcing the attendance of witness and for compelling the discovery of production of documents.

18. Section 168 of the Motor Vehicles Act, 1988 specifically provides that on receipt of an application for compensation made under Section 166 of the Act, the Claims Tribunal after giving notice to the insurer and the parties concerned and after affording any opportunity of being heard, hold an inquiry into the claim and may make an award determining the amount of compensation which appears to be just and specify the person or persons to whom the compensation shall be payable and shall also specify the amount which shall be paid by the owner or the insurer or the driver of the vehicle involved in the accident or by all, as the case may be.

19. An appeal against the award is provided under Section 173 of the Motor Vehicles Act, 1988 to the High Court. In the State of U.P., the Government has formulated the Uttar Pradesh Motor Vehicles Rules, 1998 and matters relating to the claims have been covered in Chapter 9 from Rules 204 to 222.

20. It will also be seen that the primary duty of the Claims Tribunal is to hold an inquiry in order to ascertain and arrive at a just and fair compensation. In order to arrive at such a finding, the inquiry is held and it is open for the parties to lead their evidence to help the Tribunal to arrive at a just compensation. Once, a compensation has been determined by the Tribunal, it is open for either of the parties either to accept or to challenge the award by filing an appeal.

21. The award passed by the Tribunal can be assailed by an aggrieved party on various counts including the quantum. If an appeal has been filed by any party, (other than the claimant) on any ground then if the claimants are dissatisfied with the amount

as awarded, they always have a right of seeking enhancement of the award by either filing a separate appeal or by filing cross objections under Order 41 Rule 22 C.P.C.

22. The complexion would change where a party (other than the claimant) assails the award solely on the ground of quantum of compensation before the Appellate Court and the claimant who has a right of filing a cross objection but he does not file any cross-objection or cross appeal. In such a situation whether the Appellate Court is only required to assess and examine the appeal within the limited parameters as urged by the appellants assailing the award on quantum or is it open for the Appellate Court, if during hearing of the appeal, It finds that the compensation has not been appropriately granted by the Tribunal then whether it can grant such higher compensation than the one which has been granted by the Tribunal and which is already assailed and under challenge before it in appeal.

23. In order to find an answer to the said question, it will be appropriate to take a glance at few decisions on the subject. A Division Bench of this Court in ***New India Assurance Company Ltd. Vs. Risha Devi and others; 2017 (3) ADJ 685*** considered the issue in context with provisions of Order 41 Rule 33 C.P.C. and the relevant portion of the said decision reads as under:-

“18. The other argument advanced by learned counsel for the appellant that amount of compensation cannot be increased in an appeal filed by the Insurance Company in the absence of cross-appeal by the claimant, is also without any force.

19. Order XLI Rule 33 of the Code of Civil Procedure prescribing the power of court of appeal clearly provides that the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made as the case may require, and this power may be exercised in favour of all or any of the respondents or parties though they may not file any appeal or objection. Order XLI Rule 33 of the Code reads as under:

“33. Power of Court of Appeal - The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [any may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]

[Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

20. The provisions of Order XLI Rule 33 C.P.C. was explained by the Hon'ble Apex Court in the case of Mahant Dhangir v. Madan Mohan, 1987 Supp SCC 528: AIR 1988 SC 54 in following words:

“The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The

appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words “as the case may require” used in Rule 33 Order 41 have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these : That the parties before the lower Court should be there before the appellate Court. The question raised must properly arise out of the judgment of the lower Court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower Court. It may be urged by any party to the appeal. It is true that the power of the appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities.”

21. The same view has again been reiterated in a later decision by the Hon'ble Apex Court in the case of Delhi Electric Supply Undertaking v. Basanti Devi, (1999) 8 SCC 229: AIR 2000 SC 43.

22. We are of the considered view that the conditions as laid down in provisions of Order XLI Rule 33 are satisfied in the present case. In Delhi Electric Supply Undertaking (Supra) the Hon'ble Apex Court has observed that when circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the court cannot be found wanting when it comes to exercise its powers.

23. Thus the argument in this regard made by the learned counsel for the appellant has no legs to stand and is not liable to be sustained.”

24. A similar issue was raised before this Court in *New India Assurance Company Ltd. Vs. Smt. Neelam Jaiswal and others; 2020 SCC Online (All.) 85* wherein the issue was whether in an appeal preferred by the Insurance Company on a ground other than the quantum and in absence of any cross appeal by the claimants whether the court would be justified in enhancing the amount in terms of powers conferred under Order 41 Rule 22 C.P.C. and Order 41 Rule 33 C.P.C. This was considered in detail by the Court with the aid of the decisions of the Apex Court and finally it was held as under:-

“28. There is another angle to look at the aforesaid situation. In the decision relied upon by the learned counsel for the respondents in the case of Resha Devi (supra) it would be seen that the appeal had been preferred by the Insurance Company. The submission of the learned counsel for the Insurance Company is noted in paragraph-4 of the judgment of the Division Bench and from the perusal whereof, it would indicate that the question before Hon'ble the Division Bench as raised by the Insurance Company was on quantum; inasmuch as it had been contended that the multiplier as adopted by the tribunal was on the higher side and the compensation accordingly was excessive.

29. It is in the aforesaid circumstance, where the question of quantum was before the Division Bench and in such circumstance considering the fact that the Division Bench found that the award was on the lower side had applied the power under Order 41 Rule 33 CPC

and has enhanced the award by adding non-pecuniary damages. Thus, it would be seen that the facts before the Division Bench were completely different; inasmuch as the issue of quantum was before the High Court specifically raised by the Insurance Company and as an appeal is a continuation of the proceedings and the tribunal is required to hold an inquiry to ascertain the compensation which is just and fair; hence in the aforesaid circumstances where the Division Bench came to be conclusion that the Insurance Company was contending that the award was excessive, but it found that it was on the lower side, hence in order to do substantial justice despite the claimants did not file a cross appeal the Division Bench exercised its power under Order 41 Rule 33 CPC and enhance the same.”

25. This Court would be failing in its duty if it did not notice a recent decision of the Apex Court in context with the powers conferred on the Appellate Court under Order 41 Rule 22 C.P.C. and Order 41 Rule 33 C.P.C. in *Saurabh Jain Vs. A.B.P. Design; 2021 SCC Online 552* wherein the issue was whether the superior Court could consider an adverse finding even where a cross objection has not been filed and it was held as under:-

“27. On a perusal of the above authorities, it is evident that the principle stipulated in Order XLI Rule 22 of CPC can be applied to petitions under Article 136 of the Constitution because of this Court's wide powers to do justice under Article 142 of the Constitution. Since the principle in Order XLI Rule 22 of the CPC furthers the cause of justice by providing the party other than the "aggrieved party" to raise any adverse findings against them, this Court can draw colour from Order XLI

Rule 22 CPC and permit objections to findings.

28. From the above it has been established that it not necessary that a challenge to the adverse findings of the lower court needs to be made in the form of a memorandum of cross-objection. In the present case, we note that the appellant had raised an objection to the jurisdiction of the Trial Court for entertaining the suit on the ground that an injunction and declaratory relief could not have been given. Although the Trial Court passed a decree in favour of the appellant, it had decided against the appellant on the question of jurisdiction. This finding was not challenged by the appellant before the High Court in the form of a memorandum of cross-objection. The judgment of the High Court makes no mention that a plea of lack of jurisdiction was taken by either the appellant or the MDA. Before this Court, the appellant has not filed the counter-affidavit it had filed before the High Court. Thus, the conclusion that emanates from the record before us is that the ground of jurisdiction was only raised by the appellant before the Trial Court and not before the High Court. In effect then, this Court would have to adjudicate on a plea, which did not form a part of the decision of the High Court in challenge before us.

29. With regard to new grounds being raised before this Court in a special leave petition under Article 136, we note that under Order 21 Rule 3(c) of the Supreme Court Rules 2013, SLPs are to be confined to the pleadings before the court whose order is challenged. However, with the leave of the Court, additional grounds can be urged at the time of the hearing.

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32. In Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma 17

as well, a three Judge bench of this Court entertained an objection as to maintainability of the suit under Section 9 of the CPC, despite the plea not having been raised before the courts below. The Court observed that the plea of a bar or lack of jurisdiction can be entertained at any stage, since an order or decree passed without jurisdiction is nonest in law.

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.....34. Based on the position of law, we find it just to allow the appellant to raise the ground of jurisdiction before us. Allowing the ground to be raised would not require the submission of additional evidence since it is a pure question of law and strikes at the heart of the matter. We shall now turn to the merits of this argument. “

26. From a gainful reading of the propositions as has been noticed in the decisions considered hereinabove, apparently, what can be culled out is the fact that once the issue of compensation/quantum has been raised by any party before the Appellate Court, then the Appellate Court becomes duty bound to ascertain as to whether the compensation has been adequately and justly awarded or not. The entire ethos behind consideration of a claim petition under the Motor Vehicles Act is grant of just and fair compensation. This is to be seen in the context that in the given facts and circumstance, the compensation should not be meager but at the same time it should not also be a bonanza for the claimants. Within these two outer perimeter, it is the duty of the Tribunal and so also for the Appellate Court to adjudge the issue of quantum with a correct lens and perspective so that the claimants are

awarded just and fair compensation which is pragmatic and close to reality.

27. In the spotlight of the above considered decisions, this Court is of the clear opinion that where an appeal is preferred by any party, other than the claimants, assailing the quantum on whatever ground, in such a case, even though, the claimant may not have filed a cross objection or a separate appeal for enhancement, yet, it is the duty of the Appellate Court to see that the compensation as awarded by the Tribunal is just and fair. While determining the same, even if, the Appellate Court comes to the conclusion that the amount granted by the Tribunal is less, it has all the jurisdiction to grant fair and just compensation by enhancing the award even in absence of any cross objection for the reason that the appellant who is before the Court has already raised the issue of quantum and considering the arguments/contentions of the appellant, the Appellate Court is to arrive at its own independent finding regarding quantum which may then even grant a higher sum than granted by the Tribunal. In such situation, it is not open for the appellant to state that the amount cannot be enhanced as no challenge has been made to the award. What needs to be seen is the fact that it is the quantum of award which is under challenge and that has to be decided and in a befitting case, the Appellate Court can invoke the powers in its repository to pass such orders to grant just and fair compensation.

28. Thus, the Appellate Court would be justified in adopting such a course. However, it would be a different situation altogether where the award is assailed on any other ground, other than quantum, then while the claimants have not filed any cross

objection then during the course of argument the issue regarding enhancement of compensation if made at the behest of the claimants, the Appellate Court may decline to consider it unless a clear case is made out by the claimant, who had failed to file any appeal or cross appeal, by bringing in their case within the parameters of Order 41 Rule 33 C.P.C. as discussed above with the aid of the decision in **Saurabh Jain (Supra)**, **Risha Devi (supra)** and **Neelam Jaiswal (supra)**.

29. This issue can be seen from another lens, inasmuch as, where the Insurance Company files an appeal assailing the grant of compensation, the claimant without filing a cross appeal or cross objection also possesses the right to defend the amount which has already been granted by the Tribunal. In case if in the given facts and circumstances, the claimant is able to justify that the compensation granted by the Tribunal is just and appropriate, it is not necessary for the claimant to file a cross appeal or cross objections. This aspect has also been considered by the Apex Court in **Ranjana Prakash and others Vs. Divisional Manager and Another; (2011) 14 SCC 639** wherein in paragraphs no. 6 to 8, it was held as under:-

“6. We are of the view that the High Court committed an error in ignoring the contention of the claimants. It is true that the claimants had not challenged the award of the Tribunal on the ground that the Tribunal had failed to take note of the future prospects and add 30% to the annual income of the deceased. But the claimants were not aggrieved by Rs 23,134 being taken as the monthly income. There was therefore no need for them to challenge the award of the Tribunal. But where in an

appeal filed by the owner/insurer, if the High Court proposes to reduce the compensation awarded by the Tribunal, the claimants can certainly defend the quantum of compensation awarded by the Tribunal, by pointing out other errors or omissions in the award, which if taken note of, would show that there was no need to reduce the amount awarded as compensation. Therefore, in an appeal by the owner/insurer, the appellant can certainly put forth a contention that if 30% is to be deducted from the income for whatsoever reason, 30% should also be added towards future prospects, so that the compensation awarded is not reduced. The fact that the claimants did not independently challenge the award will not therefore come in the way of their defending the compensation awarded, on other grounds. It would only mean that in an appeal by the owner/insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in the absence of any cross-appeal or cross-objections.

7. This principle also flows from Order 41 Rule 33 of the Code of Civil Procedure which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the

insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the insurer. Be that as it may.

8. Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by the owner/insurer for reduction. The High Court cannot obviously increase the compensation in an appeal by the owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation."

30. Having seen the light through the legal prism, this Court is inclined to examine the quantum of the award as to whether the amount granted by the Tribunal is just and fair and in case if it is found that the amount is lower then the Court would be justified in enhancing the same and in case if the contention of the appellant appears to be correct then the Court also has the power to reduce the compensation

and in case if the compensation is just and appropriate, the Court can also refuse to interfere. Thus, the first issue is answered in the affirmative.

31. In the aforesaid backdrop, if the facts of the instant case are seen in contrast to the submissions made by learned counsel for the parties, it would be found that the sole ground for assailing quantum by the Insurance Company is that there has been no deductions towards personal expenses and that the multiplier is on the higher side and instead of 14 the Tribunal has erred in adopting a multiplier of 15.

32. On the other hand, the submissions of learned counsel for the claimants is that the deceased was engaged in running a Tea Stall and was earning a sum of Rs. 6,000/- per month from the said venture and was also contributing to the household as a proficient homemaker. The Tribunal found that there was no documentary evidence regarding the running of the Tea Stall by the deceased and noticing that the claimant-witness had stated that the Tea Stall was being run by the husband of the deceased namely Anil Kumar, consequently, it adopted merely a notional income of Rs. 3,000/- per month.

33. At the outset, as a principle it is true and correct that a Tribunal while determining the compensation is also required to make a deduction towards personal expenses. Now, having said that, it will be worthwhile to examine as to whether the Court has rightly appreciated the material evidence available on record to arrive at the figure of Rs. 3,000/- per month as notional income.

34. From the perusal of the claim petition, it would indicate that it has clearly

been pleaded that the deceased was running a Tea Stall and was earning around Rs. 6,000/- per month from the said venture. Rs. 3,000/- has been taken as her contribution being a proficient home maker and thus the amount claimed in the petition is on the basis of Rs. 9,000/- per month.

35. On behalf of the claimants, Pramod Kumar son of the deceased was examined and in his examination-in-chief, he clearly stated and reiterated that his mother was a proficient homemaker and used to run a tea stall from where she was earning Rs. 6,000/- per month and was also the bread earner for the family. In his cross-examination, a specific question was put to him wherein he reiterated and positively affirmed his statement that his mother was running the Tea Stall and earned Rs. 6,000/- from the same.

36. This would indicate the factum of the running of the Tea Stall by the deceased and earning of a sum of Rs. 6,000/- per month from the same stood sufficiently proved as no contrary evidence was led. However, the Tribunal fell in error in recording in the award that it has been admitted by the claimant-witness that the father i.e. Anil Kumar is running the aforesaid Tea Stall and therefore it came to the conclusion that the deceased was not running the Tea Stall and adopted a notional income of Rs. 3,000/- per month to compute the compensation.

37. At this stage, it will also be relevant to notice the statement given in the cross-examination by the claimant-witness Pramod Kumar to the effect that his mother was running a Tea Stall and she was earning Rs. 6,000/- per month and that his father is alive and now the Tea Stall is being run by his father. The relevant

portion of the statement for better appreciation is being re-produced for ready reference:-

“मेरी माताजी कुशल गृहणी थी और चाय की दुकान चलाती थी। मैं पढ़ाई करता हूँ। मेरे अलावा मेरी एक बहन प्रियायश सैनी जो अविवाहित है पढ़ाई कर रही है। मेरे पिताजी अभी जीवित हैं। अब चाय की दुकान पिताजी चलाते हैं। सारा खर्चा घर का इसी चाय की दुकान से चलता था। इस समय भी चल रहा है।”

38. This above quoted statement would indicate that the accident had occurred in the year 2016 where Smt. Sunita expired but the statement was given in the year 2019. In this perspective, the evidence of the claimant-witness reflects that the mother of the claimant-witness was a good home maker and was running a Tea Stall. The father of the witness was alive. He stated, now (emphasis supplied) my father runs the Tea Stall. This statement indicates that prior to the accident the deceased was running the Tea Stall and after her death it was the father Anil Kumar who was running the Tea Stall. There is nothing on record to discredit the testimony or contradict the fact that Sunita was running the Tea Stall and she was able to earn Rs. 6,000/- per month from it.

39. Now, in so far as the contribution of a homemaker is concerned, this aspect of the matter has been very well elucidated by the Apex Court in **Kirti and Another Vs. Oriental Insurance Company Ltd. 2021 (2) SCC 166**. In the supplementing but concurring opinion authored by His Lordship N.V. Ramana, and the relevant portion thereof reads as under:-

17. There are two distinct categories of situations wherein the court usually determines notional income of a victim. The first category of cases relates to

those wherein the victim was employed, but the claimants are not able to prove her actual income, before the court. In such a situation, the court “guesses” the income of the victim on the basis of the evidence on record, like the quality of life being led by the victim and her family, the general earning of an individual employed in that field, the qualifications of the victim, and other considerations.

18. The second category of cases relates to those situations wherein the Court is called upon to determine the income of a non-earning victim, such as a child, a student or a homemaker. Needless to say, compensation in such cases is extremely difficult to quantify.

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.....20. One category of non-earning victims that courts are often called upon to calculate the compensation for are homemakers. The granting of compensation for homemakers on a pecuniary basis, as in the present case, has been considered by this Court earlier on numerous occasions. A three-Judge Bench of this Court in Lata Wadhwa v. State of Bihar [Lata Wadhwa v. State of Bihar, (2001) 8 SCC 197], while dealing with compensation for the victims of a fire during a function, granted compensation to housewives on the basis of the services rendered by them in the house, and their age. This Court, in that case, held as follows: (SCC pp. 209-10, para 10)

“10. So far as the deceased housewives are concerned, in the absence of any data and as the housewives were not earning any income, attempt has been made to determine the compensation on the basis of services rendered by them to the house. On the basis of the age group of the housewives, appropriate multiplier has been applied, but the estimation of the

value of services rendered to the house by the housewives, which has been arrived at Rs 12,000 p.a. in cases of some and Rs 10,000 for others, appears to us to be grossly low. It is true that the claimants, who ought to have given data for determination of compensation, did not assist in any manner by providing the data for estimating the value of services rendered by such housewives. But even in the absence of such data and taking into consideration the multifarious services rendered by the housewives for managing the entire family, even on a modest estimation, should be Rs 3000 per month and Rs 36,000 p.a. (emphasis supplied)

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.....25. The sheer amount of time and effort that is dedicated to household work by individuals, who are more likely to be women than men, is not surprising when one considers the plethora of activities a housemaker undertakes. A housemaker often prepares food for the entire family, manages the procurement of groceries and other household shopping needs, cleans and manages the house and its surroundings, undertakes decoration, repairs and maintenance work, looks after the needs of the children and any aged member of the household, manages budgets and so much more. In rural households, they often also assist in the sowing, harvesting and transplanting activities in the field, apart from tending cattle [see Arun Kumar Agrawal v. National Insurance Co. Ltd., (2010) 9 SCC 218 : (2010) 3 SCC (Civ) 664 : (2010) 3 SCC (Cri) 1313] ; National Insurance Co. Ltd. v. Deepika [National Insurance Co. Ltd. v. Deepika, 2009 SCC OnLine Mad 828]]. However, despite all the above, the conception that housemakers

do not “work” or that they do not add economic value to the household is a problematic idea that has persisted for many years and must be overcome.

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....30. The issue of fixing notional income for a homemaker, therefore, serves extremely important functions. It is a recognition of the multitude of women who are engaged in this activity, whether by choice or as a result of social/cultural norms. It signals to society at large that the law and the courts of the land believe in the value of the labour, services and sacrifices of homemakers. It is an acceptance of the idea that these activities contribute in a very real way to the economic condition of the family, and the economy of the nation, regardless of the fact that it may have been traditionally excluded from economic analyses. It is a reflection of changing attitudes and mindsets and of our international law obligations. And, most importantly, it is a step towards the constitutional vision of social equality and ensuring dignity of life to all individuals.

31. Returning to the question of how such notional income of a homemaker is to be calculated, there can be no fixed approach. It is to be understood that in such cases the attempt by the court is to fix an approximate economic value for all the work that a homemaker does, impossible though that task may be. Courts must keep in mind the idea of awarding just compensation in such cases, looking to the facts and circumstances. [See R.K. Malik v. Kiran Pal, (2009) 14 SCC 1, para 9 : (2009) 5 SCC (Civ) 265 : (2010) 1 SCC (Cri) 1265] .]

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....38. *The rationale behind the awarding of future prospects is therefore no longer merely about the type of profession, whether permanent or otherwise, although the percentage awarded is still dependent on the same. The awarding of future prospects is now a part of the duty of the court to grant just compensation, taking into account the realities of life, particularly of inflation, the quest of individuals to better their circumstances and those of their loved ones, rising wage rates and the impact of experience on the quality of work.*

39. *Taking the above rationale into account, the situation is quite clear with respect to notional income determined by a court in the first category of cases outlined earlier; those where the victim is proved to be employed but claimants are unable to prove the income before the court. Once the victim has been proved to be employed at some venture, the necessary corollary is that they would be earning an income. It is clear that no rational distinction can be drawn with respect to the granting of future prospects merely on the basis that their income was not proved, particularly when the court has determined their notional income.*

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.....41. *Therefore, on the basis of the above, certain general observations can be made regarding the issue of calculation of notional income for homemakers and the grant of future prospects with respect to them, for the purposes of grant of compensation which can be summarised as follows:*

41.1. *Grant of compensation, on a pecuniary basis, with respect to a homemaker, is a settled proposition of law.*

41.2. *Taking into account the gendered nature of housework, with an*

overwhelming percentage of women being engaged in the same as compared to men, the fixing of notional income of a homemaker attains special significance. It becomes a recognition of the work, labour and sacrifices of homemakers and a reflection of changing attitudes. It is also in furtherance of our nation's international law obligations and our constitutional vision of social equality and ensuring dignity to all.

41.3. *Various methods can be employed by the court to fix the notional income of a homemaker, depending on the facts and circumstances of the case.*

41.4. *The court should ensure while choosing the method, and fixing the notional income, that the same is just in the facts and circumstances of the particular case, neither assessing the compensation too conservatively, nor too liberally.*

41.5. *The granting of future prospects, on the notional income calculated in such cases, is a component of just compensation.*

40. *The issue regarding the computation of compensation in cases where a person is a home maker or such other similar persons where there are no measures for establishing the proved income, was also considered by the Apex Court in **Rajendra Singh and Others Vs. National Insurance Company Ltd. And Others 2020 (7) SCC 256** and the relevant portion reads as under:-*

9. *The first deceased was a housewife aged about 30 years. In **Lata Wadhwa v. State of Bihar** [**Lata Wadhwa v. State of Bihar**, (2001) 8 SCC 197], this Court had observed that considering the multifarious services rendered by housewives, even on a modest estimation, the income of a housewife*

between the age group of 34 to 59 years who were active in life should be assessed at Rs 36,000 p.a. A distinction was also drawn with regard to elderly ladies in the age group of 62 to 72 who would be more adept in discharge of housewife duties by age and experience, and the value of services rendered by them has been taken at Rs 20,000 p.a.

10. In *Arun Kumar Agrawal v. National Insurance Co. Ltd.* [*Arun Kumar Agrawal v. National Insurance Co. Ltd.*, (2010) 9 SCC 218 : (2010) 3 SCC (Civ) 664 : (2010) 3 SCC (Cri) 1313], the Tribunal assessed the notional income of the housewife at Rs 5000 per month, but without any rationale or reasoning concluded that she was a non-earning member and reduced the same to Rs 2500, which was affirmed [*Arun Kumar Agrawal v. National Insurance Co. Ltd.*, FAFO No. 2408 of 2003, order dated 30-4-2004 (All)] by the High Court. Disapproving the same and restoring the assessed income, this Court observed at paras 26 and 27 as follows : (SCC pp. 237-38)

“26. In India the courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by the wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of the husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A

housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean, etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.

27. It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. the husband and children. However, for the purpose of award of compensation to the dependants, some pecuniary estimate has to be made of the services of the housewife/mother. In that context, the term “services” is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier.”

.....12. The second deceased was a school-going child aged about 12 years. She had a whole future to look forward in life with all normal human aspirations. She died prematurely due to the accident at a very tender age for no fault of hers even before she could start to understand the beauty and joys of life with all its ups and downs. The loss of a human life untimely at childhood can never be measured in terms of loss of earning or monetary loss alone. The emotional attachments involved to the loss of the child can have a devastating effect on the family which needs to be visualised and understood. Grant of non-pecuniary damages for the wrong done by

awarding compensation for loss of expectation in life is therefore called for.

13. *Undoubtedly the injury inflicted by deprivation of the life of the child is very difficult to quantify. The future also abounds with uncertainties. Therefore, the courts have used the expression "just compensation" to get over the difficulties in quantifying the figure to ensure consistency and uniformity in awarding compensation. This determination shall not depend upon financial position of the victim or the claimant but rather on the capacity and ability of the deceased to provide happiness in life to the claimants had she remained alive. The compensation is for loss of prospective happiness which the claimant would have enjoyed had the child not died at the tender age. Since the child was studying in a school and opportunities in life would undoubtedly abound for her as the years would have rolled by, compensation must also be granted with regard to future prospects. It can safely be presumed that education would have only led to her better growth and maturity with better prospects and a bright future for which compensation needs to be granted under non-pecuniary damages. (See R.K. Malik v. Kiran Pal [R.K. Malik v. Kiran Pal, (2009) 14 SCC 1 : (2009) 5 SCC (Civ) 265 : (2010) 1 SCC (Cri) 1265].)*

41. Applying the dictum of the aforesaid decisions in context with the facts and the evidence on record of the instant case, this Court is of the clear opinion that the Tribunal erred in taking Rs. 3,000/- per month as notional income as this Court finds that the fact regarding earning through a Tea Stall was clearly established by the evidence of the witnesses who were cross-examined but nothing adverse could be elicited from the testimony to cast a

doubt over their depositions. However, even if the notional income in case of a homemaker was to be assessed and noticing that the accident occurred in the year 2016 even then a sum of Rs. 6,000/- per month was a better figure to adopt as the base as in the case of **Rajendra Singh (supra)** wherein the Apex Court also took the notional income in case of a homemaker at Rs. 6,000/- also related to an accident which occurred in the year 2012.

42. Assessing the overall situation in a holistic fashion with a moderate approach this Court finds that the notional income of the deceased should have been safely taken at Rs. 5,000/- per month. The claimants were also entitled for providing future prospects at the rate of 25%. It is true that even in case where notional income is assessed the Tribunal is required to make adjustments for the personal expenses and in this case where there were three dependents, accordingly, 1/3rd ought to have been deducted.

43. To this extent, the submission of learned counsel for the Insurance Company is justified and this Court too finds that the Tribunal erred in not making deductions for the personal expenses despite the same the Tribunal awarded a sum of Rs. 70,000/- towards the head for consortium, loss of estate and funeral expenses and finally granted a total sum of Rs. 7,45,000/- to the claimants.

44. However, if this Court computes the compensation taking Rs. 5,000/- per month as income (income from the Tea Stall and computation as a homemaker, of the deceased) and adding 25% towards the future prospects which would be Rs. 1,250/- per month would make the income @ Rs. 6,250/- per month. From this, if

1/3rd is deducted towards the personal expenses and rounding it off to Rs. 2, 100/- per month, then the net income would be [Rs. 6,250-2,100] Rs. 4,150/- per month. Adopting a multiplier of 15 as per decision of the Apex Court in *Sarla Verma (supra)*, the compensation amount would be Rs. 7,47,000/- to which the amount towards consortium and loss of estate and funeral expenses, if added at Rs. 70,000/-, would finally rest the award at 8,17,000/-.

45. Once again if it is recapitulated, it would be found that the Tribunal without making deduction for personal expenses yet awarded a sum of Rs. 7,45,000/-. If deduction would have been made then the amount of the Tribunal would get de-escalated to around Rs. 5,20,000/-. On the other hand upon re-computation on the enhanced income, the amount determined is Rs. 8,17,000/-.

46. Now, this Court is poised to determine the delicate task of assessing the just and fair compensation. Whether mathematical calculations should be preferred or considering the facts and overall circumstances including the evidence and adopting the correct and settled methodology with a pragmatic and realistic approach and also keeping in mind that the difference between the amount already awarded and which could be awarded is only about Rs. 72,000/- Whereas the respondents did not seek enhancement of the award and upon accepting the contention of the appellant and at the given base income adopted by the Tribunal and if deduction is made the amount would be hugely disproportionate.

47. Thus, in the aforesaid facts and circumstances and for the detailed discussions and reasons, this Court is not

inclined to interfere in the quantum of the award as awarded by the Tribunal but for different reasons as recorded hereinabove. The award dated 07.08.2019 passed in Claim Petition No. 81 of 2018 is affirmed. Accordingly, the appeal is dismissed. In the facts and circumstances, there shall be no order as to costs. Any amount deposited before this Court or before the Tribunal in pursuance of the order of this Court, if any, shall be remitted to the Claims Tribunal expeditiously to be released in favour of the claimants-respondents.

(2023) 7 ILRA 100

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 02.05.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.**

First Appeal From Order No. 655 of 2005

**The Oriental Insurance Co. Ltd., Sadar
Bazar Shahjahanpur** ...Appellant

Versus

Smt. Haseen Bano @ Booti & Ors.

...Respondents

Counsel for the Appellant:

Sri Viqar Ahmad Ansari, Sri Ashutosh Vaish

Counsel for the Respondents:

Sri B.B. Jauhari

A. Civil Law - Employee's Compensation Act, 1923 Section 4A-Commissioner has awarded compensation @ 7% rate of interest - The claimants have filed cross objection challenging the grant of interest at the rate of 7% which is against the mandate of statute namely, Employee's Compensation Act, 1923-deceased died out of gunshot injury- he was an helper on the truck.- murder while on job is an employment accident-Hence, the said

7 All. The Oriental Insurance Co. Ltd., Sadar Bazar Shahjahanpur Vs. Smt. Haseen Bano @ Booti 101 & Ors.

question is answered against the insurance company - The awarded amount shall carry 12% simple interest which is statutory rate of interest from the date of accident till deposit of difference in interest is made by insurance company- The cross objection of claimant is allowed.(Para 1 to 12)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Rita Devi Vs New India Assr. Co. Ltd. (2000) LAWS SC 499

2. Sunita Mishra & anr. Vs M.T.G. Infra Power Pvt. Ltd & anr. FAFO No. 2126 of 2019

3. Oriental Ins. Co. Vs Siby George & ors. (2012) 4 TAC 4 SC North East Karnataka Road Trans. Corp.Vs Smt. Sujatha Civil Appeal No.7470 of 2009

4. Golla Rajanna Etc. . Vs Div. Manager & anr. (2017) 1 TAC 259 SC

5. Mayan Vs Mustafa & anr. (2022) ACJ 524

6. Sri Chanappa Nagappa Muchalagoda Vs Div. Manager, New India Ins. Co. Ltd (2019)0 SSC1347 Shakuntala Chandrakant Shreshti Vs Prabhakar Maurti Garvali & anr. (2006) 0 SSC 1105

7. Mohd. Yaqub Vs UPSRTC thru Reg. Manager, Moradabad (2003) 97 FLR 224

8. UK HC in Ravindra Singh Negi Vs Workmen's Compensation Commr & ors. (2005) 106 FLR 808

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

1. Heard, learned counsel for the appellant and learned counsel for the respondent.

2. By way of this appeal, the insurance company has challenged the

judgment and award dated 25.1.2005 passed by Workmen Compensation Commissioner/Assistant Labour Commissioner, Shahjahanpur in W.C.A. No.5/WCA/2003.

3. The award passed by the Commissioner has been challenged by the claimant raising the following substantial question of law:

"a) Whether, the learned Workmen Compensation Commissioner was justified in awarding the compensation when the cause of murder has no nexus with the course of employment of arising out of such employment ?

b) Whether there being no proximate connection between the employment and the incidents of murder, can it be deemed to be an accident as provided under Section 3 of Workmen Compensation ?

c) Whether the learned Workmen Compensation Commissioner / Assistant Labour Commissioner, was justified in awarding 7% interest on the awarded amount of compensation ?

d) Whether the Workmen Compensation Commissioner was justified in awarding the interest against the insurer as the insurer who under took the liability to indemnify the employer was not himself, the employer as Section 4A(3) could be invoked only against an employer, as against any person in section 31 of Workmen Compensation Act ?"

4. The claimants have filed cross objection challenging the grant of interest at the rate of 7% which is against the mandate of statute namely, Employee's Compensation Act, 1923. The question of law is whether Commissioner can award interest against the provisions of Section

4A of Act, 1923. Learned counsel for the claimants had relied on the decision of *Uttarkhand High Court in Ravindra Singh Negi Versus Workmen's Compensation Commissioner and others, 2005(106) FLR 808*.

5. So as to appreciate the questions of law the accident did not occur due to employment and during the employment. The factual scenario as it sculled out form the record is that on 20.11.2002 when the truck was plied, some miscreants came with a L.P. Car, they saw dead the driver and the owner of the truck whereby the driver and the owner of goods died on the spot and the son of the claimants Irfan died out of the gun shot injury while being treated in the hospital. The deceased Irfan was serving as a helper. The postmortum report shows that the deceased died out of gun shot injury. The evidence shows that he was an helper on the truck. The finding of fact on issue nos. 1 , 2 & 3 are findings of fact and, therefore, the so called substantial question of law at a and b is covered by the judgment of Apex Court in **Rita Devi Vs. New India Assurance Company Limited, LAWS(SC)2000 499** that murder while on job is an employment accident. Hence, the said question is answered against the insurance company.

6. As far as question (c) is concerned both the insurance company and claimants have raised objection therefore the submission of both the counsel will have to be considered.

7. It is submitted by learned counsel for appellant that the learned Commissioner could not have granted interest lower than the statutory interest as per Section 4A of Employee's Compensation Act, 1923. The Commissioner cannot grant such

conditional order. The same is bad in the eye of law.

8. The only ground pressed by the claimant is that the Commissioner could not have granted interest de hors the provisions of Section 4A of the Employee's Compensation Act, 1923 which reads as under :

"4A. Compensation to be paid when due and penalty for default:-

(1) Compensation under Section 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall--

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent. per annum or at such higher rate not exceedign the maximum of the lendign rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

(b) If, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty:

Provided that an order for the payment of penalty shall not be passed

under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

Explanation - For the purposes of this Sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

[(3A) The interest and the penalty payable under sub-section (3) shall be paid to the workman or his dependant, as the case may be.]]"

9. The above question of law is no longer res integra 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.)** which is later in point of time, wherein it is held that liability to pay interest is on Insurance Company. All other grounds mentioned in the memo of appeal are in the realm of question of facts and the finding of the Commissioner on these issues are not perverse, hence, are not disturbed by this Court as this Court is fortified in its view by the decision of the Apex Court passed in **Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided on 2.11.2018, Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC) & Mayan vs. Mustafa and another, 2022 ACJ 524** wherein the Apex Court has held that under Section 30 of Workmen Compensation Act, the High Court cannot enter into the arena of facts unless they are proved to be perverse and unless there is a question of law involved.

10. The Tribunal granted interest only if there is no payment within one month this finding is against the mandate of this Court. This Court is fortified in its view by the decision of this Court passed in **First**

Appeal From Order No.2126 of 2019 (Sunita Mishra and another Vs. M.T.G. Infra Power Pvt. Ltd and another) decided on 13.9.2019.

11. The appeal is dismissed as a question of law are answered against the appellant. The cross objection of claimant is allowed.

12. The awarded amount shall carry 12% simple interest which is statutory rate of interest from the date of accident till deposit of difference in interest is made by insurance company.

13. The claimants be paid the amount forthwith.

14. Record be transmitted to the Commissioner.

(2023) 7 ILRA 103

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 27.04.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.**

First Appeal From Order No. 757 of 1998

**Pathiram & Ors. ...Appellants
Versus
The United India Insurance Co. Ltd. & Anr.
...Respondents**

Counsel for the Appellants:
Sri R.K. Porwal

Counsel for the Respondents:
Sri Shashi Kant Srivastava

**A. Civil Law - Motor Vehicles Act,1988-
Sections 173- enhancement of**

compensation- The deceased left behind 6 dependents- deceased was 35 years of age at the time of accident-The Tribunal has assessed his income to be Rs.500/- per month which according to this Court, in the year of accident, would be at least Rs.1,000/- per month as she was in the vocation of doing labour work and agriculturist- the deceased was in the age bracket of 31-35, 40% of the income will have to be added in view of the decision of the Apex Court in Pranay Sethi-As far as deduction towards personal expenses of the deceased is concerned, it should be 1/4 looking to the facts of the case-The multiplier applicable would be 16 in view of the decision of the Apex Court in Sarla Verma as the deceased was in the age bracket of 31-35 years-Annual income of the deceased is considered to be Rs. 12,000/- 40% added towards future prospects as per Rules 220-A(3) of 1998 and applied Multiplier 16-Hence, total compensation granted Rs. 2,71,600 @ 7%. (Para 1 to 14)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Bajaj Allianz General Ins. Co. Pvt. Ltd. Vs U.O.I. & ors.
2. Smt. Sudesna & ors. Vs Hari Singh & anr., FAFO No.23 of 2001
3. Smt. Hansaguri P. Ladhani Vs The Oriental Ins. Co. Ltd. (2007) 2 GLH 291
4. A.V. Padma Vs Venugopal, (2012) 1 GLH SC 442
5. Sarla Verma Vs DTC (2009) 6 SCC 121
6. Gobald Motor Service Ltd. & anr..Vs R.M.K Veluswami & ors. (1962) SCR 1 929
7. National Insurance Co. Ltd Vs Pranay Sethi & ors. (2017) 0 SSC 1050
8. Lata Wadhwa Vs St. of Bih. (2001) AIR SC 3218

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

1. Heard R.K. Porwal, learned counsel for the appellant and Sri Shashi Kant Srivastava, learned counsel for respondent and perused the judgment and order impugned.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 16.4.1998 passed by Motor Accident Claims Tribunal/IVth Additional District Judge, Etawah (hereinafter referred to as 'Tribunal') in M.A.C.No.402 of 1995 awarding a sum of Rs.98,000/- with interest at the rate of 12% as compensation.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The vehicle insured with the respondent - insurance company is not in dispute. The respondent has not challenged the liability imposed on them. The only issue to be decided by this Court is, the quantum of compensation awarded.

4. It is submitted by learned counsel for the appellant that the compensation awarded by the Tribunal is on the lower side as the deceased -Ramwati is shown to be wife of appellant who has engaged in the vocation as a labour and agriculturist. The deceased left behind her husband and five children and the tribunal has considered her income to be only Rs.500/- per month and granted multiplier of 16. The tribunal has also granted meager amount of Rs.2,000/- towards funeral expenses as the accident occurred on 18.6.1995. It is further submitted by learned counsel for the appellant that the income of the deceased in the year 1995 as per **Lata Wadhwa v. State of Bihar AIR 2001 SC 3218**, can be considered to be Rs.3,000/- per month

namely Rs.36,000/- per annum, to which as the deceased was below 35 years of age, 40% should be added, as she was survived by six persons, $\frac{1}{4}$ should be deducted and the multiplier of 16 should be granted. It is further submitted by learned counsel for the appellant that non peculiar damages may be awarded as per the judgment of **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** which has been made applicable retrospectively with 10% increase for every three years.

5. Sri Shashi Kant Srivastava, learned counsel for insurance company has submitted that the income granted by the Tribunal is just and proper. However he could not point out that the future loss which has not been granted has been properly granted. As far as multiplier is concerned, he has left that the same may be decided on the basis of judgment of Apex Court in the case of **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC)**. It is submitted by learned counsel for respondent in his oral cross objection that the interest at the rate of 12% granted by the Tribunal is on much higher side and requires to be reduced.

6. Heard the learned counsels for the parties and considered the factual data. This Court finds that the accident occurred on 18.6.1995 causing death of Ramwati who was 35 years of age at the time of accident. The Tribunal has assessed his income to be Rs.500/- per month which according to this Court, in the year of accident, would be at least Rs.1,000/- per month as she was in the vocation of doing labour work and agriculturist. To which as the deceased was in the age bracket of 31-35, 40% of the income will have to be added in view of the

decision of the Apex Court in **Pranay Sethi (Supra)** and the general trend even in earlier 1960 trend in case titled **Gobald Motor Service Ltd. and another Vs. R.M.K Veluswami and other, 1962 SCR(1) 929**, the addition of 40% can be granted. As far as deduction towards personal expenses of the deceased is concerned, it should be $\frac{1}{4}$ looking to the facts of the case. The multiplier applicable would be 16 in view of the decision of the Apex Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** as the deceased was in the age bracket of 31-35 years.

7. The total compensation payable is recalculated and is computed herein below:

- i. Annual Income Rs.12,000/- (Rs.1,000/- per month)
- ii. Percentage towards future prospects : 40% namely Rs.4800/-
- iii. Total income : Rs.12,000 + Rs.4800/- = Rs.16,800/-
- iv. Income after deduction of $\frac{1}{4}$ th towards personal expenses : Rs.12,600/-
- v. Multiplier applicable : 16
- vi. Loss of dependency: Rs.12,600/- x 16 = Rs.2,01,600/-
- vii. Amount under non pecuniary heads : Rs.70,000/-
- viii. Total compensation : Rs.2,71,600/-.

8. As far as issue of interest is concerned, this Court is in agreement with oral cross objection of learned counsel for the respondent- insurance company raised in appeal that interest should not have been awarded at the rate of 12%. Hence, the above, amount awarded by the Tribunal would carry interest at the rate of 7% from the date of filing of claim petition till the

decision and the enhanced amount would carry interest at the rate of 6% from the date of filing of the claim petition till the amount is deposited.

9. No other grounds are urged orally when the matter was heard.

10. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent- insurance company shall deposit the amount within a period of 12 weeks from today with interest as directed above and disbursed to the claimant. The amount already deposited be deducted from the amount to be deposited. Record and proceedings be sent back to the Tribunal forthwith.

11. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

12. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted

at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (**Smt. Sudesna and others Vs. Hari Singh and another**) while disbursing the amount.

13. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of A.V. Padma (supra). The same is to be applied looking to the facts of each case.

14. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long period has elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

15. This Court is thankful to both the counsels for getting this matter decided.

(2023) 7 ILRA 107
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.05.2023

BEFORE

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

First Appeal From Order No. 1011 of 2000

Smt. Hasina Begum & Ors. ...Appellants
Versus
United India Insurance Co. Ltd. Bareilly & Anr. ...Respondents

Counsel for the Appellants:

Sri P.K. Agarwal, Sri Ram Singh

Counsel for the Respondents:

A. Civil Law-Motor Vehicles Act, 1988-Sections 173- enhancement of compensation- The deceased left behind five dependents- claimants sought compensation in the sum of Rs.4,00,000/- together with 18% annual interest- deceased was aged 31 years and would work on the jeep as an assistant and a partner to the owner- The two adults were his widow and the mother, and the three minors, his children- Going by Rule 220-A (2)(iii) of Rules, 1998 reckoning the minor dependents as half a unit, the total number of dependents would be three and a half- It would be rounded off or rationalized to 'four'- According to the holding in Sarla Verma (for a married man, leaving behind dependents in the bracket of 4-6, a deduction of one-fourth has to be directed towards personal and living expenses of the deceased- The Tribunal has directed a quantified deduction of Rs.800/-, that is about two-fifth of the deceased's income, determined by the Tribunal, that is to say, Rs.2000/-. This Court, therefore, holds that the Tribunal has ordered an excessive deduction towards personal expenses, which should be substituted by a deduction of one-fourth- the appropriate multiplier to be adopted is '16'- Tribunal erred in applying

the multiplier of '15'- Annual income of the deceased is considered to be Rs. 36,000/- 50% added towards future prospects as per Rules 220-A(3) of 1998 and applied Multiplier 16- Hence, total compensation granted Rs. 878000/ @ 7%. (Para 1 to 47)

B. (I) 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).]

(II). 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".

(III). 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. (Para 27)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. M.R. Krishna Murthi Vs New India Assur. Co. Ltd & ors. (2020) 15 SCC 493
2. Gopalpuri Jai Prakash & ors. Vs The Managing Dir, APSRTC & ors., MACMA. No. 694 of 2011
3. Meena Pawaia & ors. Vs Ashraf Ali & ors. (2021) SCC OnLine SC 1083
4. Gyan Chand Jain & ors. Vs Permanand & ors. (2003) 1 TAC 490
5. Sarla Verma (Smt.) & ors. Vs DTC (2009) 6 SCC 121

6. `Magma General Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors. (2018) 18 SCC 130

7. National Ins. Co. Vs Pranay Sethi & ors. (2017) 16 SCC 680

8. New India Assur. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC OnLine SC 822

9. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd & ors. (2017) 35 LCD 1311

10. P.O. Meera & anr..Vs Ananda P. Naik & ors. (2022) SCC OnLine Ker 546

11. Branch Manager, Future General India Ins. Co. Ltd. Bengaluru Vs Varsha S.L. (2019) SCC OnLine Kar 3498

12. Shashikala & ors. Vs Ganga-lakshamma & anr. (2015) 9 SCC 150

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

This is a claimants' appeal arising out of a judgment and award dated 26.04.2000 passed by the Motor Accident Claims Tribunal, Bareilly, seeking enhancement of compensation.

2. Motor Accident Claims Petition No.305 of 1999 was instituted before the Motor Accident Claims Tribunal/ the District Judge, Bareilly on 21.04.1999 on behalf of the five dependents of the late Shakeel Ahmad – two adults and three minors – claiming compensation for his death in a motor accident from the owner and the insurers of Truck No. UP-22-6933. According to the claimants, on 2nd of April, 1999, Shakeel Ahmad was on board Jeep No. UP-25-5646. He was deboarding passengers on one side of the road, at about half past five in the evening, parking the jeep there. In the meantime, Truck No. UP-22-6933, driven negligently and at a high speed, came on from the Kicha end and hit Shakeel Ahmad. He was grievously injured.

Shakeel was conveyed to the Primary Health Centre, Baheri for medical aid and thence to the District Hospital, Bareilly for treatment. During treatment, he succumbed to the injuries.

3. According to the five claimant-appellants (for short, 'the claimants'), Shakeel Ahmad was a healthy and hard working young man. His sudden death brought ruin to the family. The claimants sought compensation in the sum of Rs.4,00,000/- together with 18% annual interest. It is the claimants' case that Shakeel Ahmad was aged 30 years and would work on the jeep as an assistant and a partner to the owner. The offending truck was insured with the United India Insurance Co. Ltd. through its Divisional Manager, Rampur Garden, Bareilly (for short, 'the Insurers') *vide* Cover Note No. 706310, valid from 08.01.1999 to 07.01.2000. The Insurers were impleaded as opposite party No.1 to the claim petition and respondent No.1 to this appeal. The offending truck was owned by one Khalil Ahmad, who was arrayed as opposite party No.2 to the claim petition and respondent No.2 to this appeal. He is the registered owner of the truck and shall hereinafter be called 'the owner'.

4. The owner filed a written statement, where he has acknowledged the fact that he is the registered owner of the offending truck. He has admitted the fact that on 02.04.1999, the truck was proceedings from Kicha to Bareilly. It was driven at a regulated speed, with due care by its driver. The jeep driver was operating the vehicle negligently. The offending truck was insured with the Insurers under a cover note valid from 08.01.1999 to 07.01.2000. The driver of the offending truck was Rajesh Kumar, who held a driving licence

valid upto 16.04.2000. He had not been negligent in any way in driving the truck. It was urged that since the offending truck was insured, if any liability be found for the owner, it has to be made good by the Insurers.

5. The Insurers filed a separate written statement and denied the factum of accident. They have denied the deceased's age, avocation and income. It has also been denied that the claimants were dependent upon the deceased. It is also pleaded that all the legal representatives of the deceased have not been made parties and, therefore, the claim petition is bad for non-joinder. A plea has further been raised to the effect that the driver of the offending truck was not made a party, again leading to non-joinder. The accident did not happen on account of negligence of the driver of the offending truck and, therefore, the Insurers are not liable. The owner was operating the offending truck without registration, a fitness certificate and contrary to the terms of the insurance policy. The driver of the truck did not have a valid driving licence. The claimants have come up with an inflated claim. According to the Insurers, the claim petition deserved to be rejected.

6. On the pleadings of parties, the Tribunal struck the following issues (translated into English from Hindi):

“1. Whether on 02.04.1999, at about 5:30 in the evening, at the Baheri Bypass, Truck No. UP-22-6933, driven negligently, recklessly and at a high speed by its driver, proceeding from the Kicha end of the road, hit Shakeel, on account of which he died?

2. Whether at the time of the accident, the driver of the vehicle in

question did not have a valid driving licence?

3. Whether at the time of the accident, the vehicle in question was validly insured with opposite party No.1, United India Insurance Co. Ltd.?

4. Whether the claim petition is bad for non-joinder of necessary party, on account of non-impleadment of the driver of Vehicle No. UP-22-6933?

5. Whether the claimants are entitled to compensation? If yes, how much and from which opposite party?”

7. The claimants examined in support of the claim petition PW-1 Hasima Begum, Mohd. Islam PW-2 and Salim PW-3. The claimants produced in documentary evidence *vide* a list of document, bearing paper No. 17-Ga, six documents, which include a photostat copy of the cover note of the offending truck, a photostat copy of the truck driver's driving licence, a photostat copy of the tax paid for the offending truck and a fitness certificate of the truck. In addition, through another list, bearing paper No. 24-Ga, nine other documents were filed, that include a certified copy of the FIR, a certified copy of the charge sheet and a certified copy of the postmortem report. The Insurers filed a true copy of the insurance policy, but did not lead any oral evidence.

8. Issue No.1 was answered for the claimants, holding that on the date and time of the accident, the deceased died on account of rash and negligent driving by the driver of the offending truck. Issue No.2 was answered against the Insurers, holding that on the date of the accident, Rajesh Kumar, the driver of the offending truck had a valid driving licence. Likewise, Issue No.3 was decided against the Insurers, holding that on the date of the

accident, the offending truck was insured with the Insurers. Issue No.4 was also decided in favour of the claimants and against the Insurers, holding that it was not bad for non-joinder of a necessary party on account of non-impleadment of the offending truck's driver.

9. While answering Issue No.5, the Tribunal held the deceased's income to be a sum of Rs.2000/- per month, and deducting a sum of Rs.800/- towards personal and living expenses, a monthly dependency of Rs.1200/- was determined. The Tribunal applied a multiplier of '15' to find a total substantive dependency of Rs.2,16,000/-. A consolidated sum of Rs.10,000/- was awarded to the widow for the loss of consortium, funeral expenses and loss of estate. Accordingly, a compensation in the sum of Rs.2,26,000/- was awarded to the claimants with an apportionment of Rs.1,10,000/- to the widow, Rs.26,000/- to the deceased's mother and Rs.30,000/- each to the three minor children. The said sum of money was ordered to carry interest @ 10% per annum from the date of institution of the claim petition until realization. The compensation awarded to the minors was directed to be placed in a fixed deposit with a Nationalized Bank, to be held there until the minors attained majority.

10. Heard Mr. Ram Singh, learned Counsel for the claimants. No one has appeared on behalf of the owner or the Insurers, though service was held sufficient *vide* order dated 18.10.2022.

11. The only issue that has been canvassed in this appeal before this Court is the inadequacy of compensation awarded.

12. The Tribunal has reasoned that the deceased was a helper on the jeep. He was

a partner too, in the enterprise of ferrying passengers for hire on the jeep with the registered owner. According to the claimants, he would earn Rs.3500/- per month. The Tribunal has looked into the testimony of PW-1, the deceased's wife, who has said that her husband would garner an income of Rs.3500/- by operating the jeep.

13. The Tribunal has also looked into the evidence of PW-2, Mohd. Islam, the registered owner of the jeep. Mohd. Islam has said in his testimony that the deceased would look after the jeep and was a partner by verbal agreement. After deducting expenses involved in the vehicle's operation, according to the registered owner, the deceased would share profits with him equally. The deceased would save for himself a sum of Rs.4000-4500/- per month. In the cross-examination, the Tribunal has noted that Mohd. Islam, PW-2 has said that in the month of March, 1999, for the last time, Shakeel had paid him a sum of Rs.3500/-. The Tribunal has also noted that this witness has said that he had a register recording the monthly income, but did not produce it in evidence.

14. The Tribunal has concluded that all this evidence proves that the deceased would work on Jeep No. UP-25-5646 and on the date of accident too, he was deboarding passengers. It has also been held that according to the autopsy report, the deceased's age was 32 years. In the absence of any documentary evidence, the Tribunal has opined that the deceased's income ought to be determined at a sum of Rs.2000/- per month, out of which Rs.800/- he would spend on himself. As already noted about the reckoning of compensation, the Tribunal ultimately held the claimants entitled to a sum of Rs.2,26,000/-.

15. Upon hearing learned Counsel for the claimants and perusing the record, this Court finds that there is an unchallenged assertion about the deceased's income being Rs.3500/-. The said income is half of the profits earned by operating the jeep, of which Mohd. Islam was the owner. Mohd. Islam has said that the deceased would earn Rs.4000-4500/- per month. The widow has said that he would earn Rs.3500/-. Therefore, for the Tribunal to say that the deceased would earn Rs.2000/- per month is no more than an *ipse dixit* of the Judge in the Tribunal.

16. The deceased's wife, in the cross-examination done at the instance of the Insurers, has stood by the position that her husband would earn a sum of Rs.3500/- per month, which she has described as salary. The witness being apparently not an educated woman, she would not understand that the deceased was sharing profits with the registered owner earned out of the operating jeep for hire, carrying passengers. What is important is that in the cross-examination, there is nothing said to discredit the assertion about the deceased's income being Rs.3500/- per month. Mohd. Islam, PW-2, in his testimony has pegged the the deceased's monthly income at a figure of Rs.4000-4500/-. In his cross-examination, he has come out with the fact that in the month of March, 1999, the deceased had paid him a sum of Rs.3500/-. There being an equal sharing between the registered owner of the jeep, PW-2 and the deceased, the deceased too would have earned the same sum of money, during the month of March, 1999.

17. This Court is of opinion that in the nature of the work that the deceased and the registered owner of the ill-fated jeep did together, one can hardly expect

maintenance of ledgers, books of account, balance-sheets or tax returns. The Court cannot turn away its face from the hard reality that much economic activity, particularly, in the days gone by, happened outside the formal regime of recorded transactions, but it does not mean that these activities to earn ones livelihood were not there. Howsoever illegal, vehicles registered as private ones, particularly jeeps, have always dotted the highways, at least in this State, to ferry passengers for hire or reward. They have afforded means of transport to some and to others an occupation. We do not know whether the ill-fated jeep was registered as a commercial vehicle or not. We assume it was not. Even then, it cannot be said that the jeep was not exploited for commercial gain by ferrying passengers that yielded a definitive income, both to the registered owner and the deceased. Going by the contemporary standards of the time at the turn of the century, an unskilled labourer would earn about Rs.100/- a day. That was the figure accepted for an unskilled labourer in the earlier years of the last decade of the 20th century.

18. The deceased was not a casual labourer, but a person engaged in providing a service to passengers for hire or reward, using a motor vehicle, sharing profits with the registered owner. In the circumstances, on the most conservative estimate, this Court is of opinion that the deceased can safely be credited with a monthly income of Rs.3000/- per month at the time of his demise in the fatal motor accident. We hold accordingly.

19. It is on the foot of this monthly income that this Court proceeds to determine the claimants' dependency and the compensation. A monthly income of

Rs.3000/- would work to an annual income of Rs.36,000/-.

20. The deceased left behind five dependents, about whom, there is no doubt that they were his dependents. The two adults were his widow and the mother, and the three minors, his children. Going by Rule 220-A (2)(iii) of the U.P. Motor Vehicles Rules, 1998 (for short the 'Rules of 1998'), reckoning the minor dependents as half a unit, the total number of dependents would be three and a half. It would be rounded off or rationalized to 'four'. According to the holding in **Sarla Verma (Smt) v. Delhi Transport Corporation and another, (2009) 6 SCC 121**, for a married man, leaving behind dependents in the bracket of 4-6, a deduction of one-fourth has to be directed towards personal and living expenses of the deceased. The Tribunal has directed a quantified deduction of Rs.800/-, that is about two-fifth of the deceased's income, determined by the Tribunal, that is to say, Rs.2000/-. This Court, therefore, holds that the Tribunal has ordered an excessive deduction towards personal expenses, which should be substituted by a deduction of **one-fourth**.

21. The Tribunal has applied a multiplier of '15'. The deceased was held 32 years old. Going by the table in Paragraph No.40 of the decision in **Sarla Verma (supra)** for a victim in the age group of 31-35 years, the appropriate multiplier to be adopted is '16'. The Tribunal, therefore, erred in applying the multiplier of '15'.

22. The next issue that has been raised by the learned Counsel for the claimants is the non-award of anything towards future prospects. In view of the holding of the Supreme Court in **National Insurance**

Company v. Pranay Sethi and others (2017) 16 SCC 680, future prospects are to be awarded in cases of victims of fatal motor accidents, who are self-employed or worked on a fixed salary too. The question would certainly arise whether future prospects, to which the claimants are entitled, would be governed by the law laid down in **Pranay Sethi (supra)** or Rule 220-A(3) of the Rules of 1998. This issue is no longer *res integra* in view of the holding 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. 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.

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."

23. There is no cavil, therefore, that future prospects in the State of Uttar Pradesh have to be quantified in accordance with Rule 220-A(3) of the Rules of 1998, and not the principles in **Pranay Sethi**.

24. The next issue which arises is whether Rule 220-A(3) of the Rules of 1998, which came into force by virtue of Notification No. 777/XXX4-2011-4(3)-2010 dated 26th September, 2011 i.e. The Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011, would apply retrospectively to an accident which happened much before the amendment. This issue fell for consideration of a Division Bench of this Court in **Sushil Kumar and others v. M/s. Sampark Logistic Private Limited and others, 2017 (35) LCD 1311**. In **Sushil Kumar (supra)**, 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. Nirranjan 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."

25. According to 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 Rule 220-A(3) of Rules, 1998, notwithstanding the fact that accident happened prior to the amendment. Here, the deceased was aged less than 40 years and going by Rule 220-A(3), there has to be an addition of **50%** to his income towards future prospects.

26. The next question that arises for consideration is the claimants' entitlement under the conventional heads. In **Pranay Sethi**, 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)

27. What compensation for the loss of consortium is to be awarded and to which of the claimants, was the issue that was considered by the Supreme Court in **Magma General Insurance Company Ltd. v. Nanu Ram alias Chuhru Ram and others**, (2018) 18 SCC 130, where it was 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)

28. The Tribunal had directed compensation payable to the minor claimants to be placed in a fixed deposit with a nationalized bank until the minors attained majority. The youngest of the minors, who was two years at the time when the claim petition was instituted, would now be aged about 25 years. The others would be older. Therefore, the direction to invest any part of the compensation, now payable in fixed deposit, is not called for.

29. In view of the aforesaid conclusion, the compensation payable to the claimants in this appeal is revised and would have to be determined in the following manner:

(i) Monthly Income (of the deceased) = **3000**

(ii) Annual Income (of the deceased) = **3000x12 = 36000**

(iii) Annual Income+Future Prospects
(annual income x 50%) = **36000+18000 = 54000**

(iv) Annual Dependency = Annual Income – one-fourth deduction towards personal expenses of the deceased = **54000-13500 = 40500**

(v) Total Dependency = Annual Dependency x Applied Multiplier
= 40500 x 16 = **648000**

(vi) Claimant's entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium = 15000+15000+40000x5 = **230000**

The total compensation would therefore, work out to a figure of Rs.648000+ Rs.230000 = 878000

30. 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.8,78,000/-**. 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 realization. Any sum of money already deposited with the Tribunal by the Insurers, pursuant to the impugned award, shall be adjusted against it. The directions of the Tribunal for apportionment amongst the claimants shall remain intact, but it will no longer be necessary to require the compensation to be invested in any kind of a fixed deposit. It

BEFORE

First Appeal From Order No. 1394 of 2006
With
Cross Appeal/Cross Objection No. 65668 of
2013

**National Insurance Co. Ltd., Civil Lines,
Allahabad ...Appellant**

Versus

**Sri Satya Narain Kesarwani & Ors.
...Respondents**

Sri Komal Mehrotra

Sri Ram Singh, Sri Vinay Kumar Chaturvedi

B. 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. (Para 45) The appeal is partly allowed. (E-6)

1. Saroj Devi & ors. Vs Royal Sundaram Alliance Ins. Co. Ltd. & anr. (2016) 2 TAC 281 All..

2. V. Mekala Vs M. Malathi & anr. (2014) 11 SCC 178

3. M.R. Krishna Murthi Vs New India Assur. Co. Ltd & ors. (2020) 15 SCC 493

4. Gopalpuri Jai Prakash & ors. Vs The Managing Dir, APSRTC & ors., MACMA. No. 694 of 2011

5. Meena Pawaia & ors. Vs Ashraf Ali & ors.
(2021) SCC OnLine SC 1083

6. Gyan Chand Jain & ors. Vs Permanand & ors.
(2003) 1 TAC 490

7. Sarla Verma(Smt.) & ors. Vs DTC (2009) 6 SCC 121

8. `Magma General Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors. (2018) 18 SCC 130

9. National Ins. Co. Vs Pranay Sethi & ors.
(2017) 16 SCC 680

10. New India Assur. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC OnLine SC 822

11. Sushil Kumar & ors. Vs M/s. Sampark
Lojastic Pvt. Ltd & ors. (2017) 35 LCD 1311

12. P.O. Meera & anr..Vs Ananda P. Naik & ors.
(2022) SCC OnLine Ker 546

13. Branch Manager, Future General India Ins. Co. Ltd. Bengaluru Vs Varsha S.L. (2019) SCC OnLine Kar 3498

14. Shashikala & ors. Vs Ganga-lakshamma & anr.. (2015) 9 SCC 150

15. United India Ins. Co. Ltd. Vs Smt. Shashi Prabha Sharma & ors. (2015) 4 TAC 650 All

16. National Ins. Co. Ltd. Vs Challa Upendra Rao (2004) 8 SCC 517

17. Shri Kedar Singh Vs Sarla Devi & O rs, FAFO No.2261 of 2019

18. Pappu & ors. Vs Vinod Kumar Lamba & anr. (2018) 3 SCC 208

19. Pepsu Road Trans. Corp. Vs National Ins. Co. Ltd.(2013) 6 AWC 5736

20. Rishi Pal Singh Vs New India Assur. Co. Ltd. & ors. (2022) 3 ACC 556

21. National Ins. Co. Ltd. Vs Swaran Singh (2004) 3 SCC 297 : 2004 SCC (Cri) 733

22. The Branch Manager, New India Ins. Co. Ltd. Vs Kausalyabai & ors., First Appeal 259 of 2003

23. Rukmani & ors. Vs New India Assur. Co. & ors. (1998) 9 SCC 160

24. United India Ins. Co. Ltd. Vs Lehu & ors. (2003) 3 SCC 338

25. New India Assurance Co. Vs Kamla & ors. (2001) 4 SCC 342

26. UPSRTC Vs Trilok Chandra (1996) 4 SCC 362

27. Puttamma Vs K.L. Narayana Reddy (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574

28. Magma General Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors.(2018) 18 SCC 130

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

1. This appeal under Section 173 of the Motor Vehicles Act, 1988 is directed against the judgment and award of the Motor Accident Claims Tribunal/ the

Additional District Judge, Court No.13, Allahabad dated 28.02.2006 passed in MACP No.407 of 2004.

2. The appeal is by the Insurance Company, who say that they are not liable.

3. Cross Objection No.65668 of 2013 has been brought on behalf of the claimants, who are respondents to the appeal, saying that the compensation awarded is insufficient and ought to be enhanced.

4. This judgment will decide both the appeal and the cross-objections.

5. The facts giving rise to the claim petition are that one Dinesh Kumar Kesarwani was engaged in the business of retailing rice. On 08.07.2004, he was proceeding on a bicycle along with one Somnath Kesarwani – both riding their bicycles from Police Station Saini, District Kaushambi towards Shiv Kuti in Allahabad. He was riding his bicycle according to the rule of the road. At about 20 minutes past 12 in the afternoon hours, a gas tanker approached from the Phaphamau end of the road. It bore registration No. HR-29GA-0320. The tanker was driven by its driver at a high speed and negligently. On the Phaphamau bridge, the tanker aforesaid came over to Kesarwani's side and hit his bicycle. Dinesh Kumar Kesarwani was crushed under the wheels of the tanker and died on the spot. The claim petition was instituted by Satya Narain Kesarwani, the deceased's father, claiming compensation for himself and the deceased's mother, Smt. Nirmala Devi, the two dependents, who survived Dinesh Kumar Kesarwani. It was claimed that the deceased was 25 years old and engaged in the business of selling rice. He was a self-

employed man, who would earn Rs.6000/- per month.

6. The owner of the offending tanker, one Tara Chand Goel was impleaded as opposite party No.1 to the claim petition and the National Insurance Company Ltd., M.G. Marg, Civil Lines, Allahabad were the insurers of the offending tanker. The National Insurance Company (the appellant) and Tara Chand Goel (respondent No.3) shall hereinafter be referred to as 'the Insurers' and 'the owner', respectively. The father and the mother of the deceased, including the legal representatives of the father, substituted pending this appeal, shall be referred to as 'the claimants', unless the context otherwise requires. The claimants demanded a total compensation in the sum of Rs.12,55,000/-.

7. The owner filed a written statement, generally denying the claimants' case. It is pleaded that the offending tanker is insured with the Insurers and information of the accident was given to the Insurers. The offending tanker had a national permit, and that, it was fit and roadworthy. The driver of the tanker held a valid driving licence. The accident happened on account of the deceased's negligence while riding his bicycle. It was the deceased, who by his own negligence, came under the wheels of the offending tanker. Along with the written statement, the owner filed eight documents, which include a power of attorney, a notice sent to the Insurers, registration certificate, permit, fitness certificate, a copy of the insurance cover, driving licence and the five yearly permit.

8. The Insurers filed a separate written statement, generally denying the claimants' case. In the additional pleas, it was averred that the registration book, the

driving licence and the permit of the offending tanker, besides other papers have not been filed along with the petition. The compensation claimed for the loss sustained was described as false and bogus, saying that no accident ever took place. It was averred that the claimants have not given the necessary documents and other information in support of the claim petition. The compensation demanded is disproportionate. A plea was also raised to the effect that the offending tanker was being driven against the terms and conditions of the insurance policy at the time of the accident, disentitling the claimants or the owners from recovering from the Insurers. In Paragraph No.29, it is averred that at the time of the accident, the driver of the offending tanker did not hold a valid and effective driving licence to drive the particular kind of vehicle that the offending one was. On these pleas, the Insurers asked to be relieved of their liability.

9. On the pleadings of parties, the following issues were framed (translated into English from Hindi):

“1. Whether on 08.07.2004 at about 12.20 in the afternoon, at the Ganga Bridge, Phaphamau, within the local limits of P.S. Shiv Kuti, District Allahabad, vehicle bearing registration No. HR-29GA-0320, driven at a high speed and negligently by its driver, hit Dinesh Kumar Kesarwani, when he was riding his bicycle, on account of which he sustained injury, leading to his death?

2. Whether the accident happened on account of the exclusive negligence of the deceased?

3. Whether at the time of the accident, the driver of the vehicle in question held a valid driving licence?

4. Whether at the time of the accident, the motor vehicle in question was insured the opposite party, Insurance Company, in accordance with rules?

5. Whether the claimants are entitled to receive any compensation, if yes, from whom?"

10. The claimants filed through a list of documents eight papers, that includes the First Information Report, the charge-sheet, the site plan, the postmortem report, the technical inspection report, the registration certificate, the insurance policy and a copy of the driving licence.

11. In the oral testimony, the claimants examined PW-1, Satya Narain, one of the two claimants. In addition, Somnath Kesarwani was examined as PW-2.

12. On behalf of the owners, a copy of the driving licence was filed. The Insurers filed a report of their Investigator on 24.02.2006, who submitted his report along with a certificate from the concerned Regional Transport Officer about the driving licence, subject matter of consideration here.

13. Issue No.1 was decided in favour of the claimants and against the owner and the Insurers. Issue No.2 was also decided in favour of the claimants and against the Insurers and the owner holding that there was no negligence of the deceased involved, leading to the accident. Issue No.3 was also decided in favour of the claimants and against the Insurers albeit with some vacillating remarks, but in the end holding that the Insurers could not prove by any evidence, apart from their own Investigator's report that the licence was forged or bogus. Issue No.4 was also

decided in favour of the claimants and the owner and against the Insurers holding that on the date of the accident, the offending tanker was duly insured with the Insurers.

14. While deciding Issue No.5, which relates to compensation, to which the claimants are entitled, the Tribunal credited the deceased with a daily income of Rs.100/- per day and making allowance for six days of holiday/ non-working days, the monthly income was determined at a sum of Rs.2400/-. The deduction towards personal and living expenses was ordered to the extent of a one-third, that is say, Rs.800/-, leaving back a dependency for the claimants in the sum of Rs.1600/- per month. The annual income was, therefore, determined at Rs.19,200/-. The deceased's father was aged 49 years and his mother 46. The Tribunal adopted the multiplier of '13', going by the age of the claimants rather than the deceased. Adopting that multiplier, a compensation of Rs.2,49,600/- was awarded, to which was added a sum of Rs.2000/- in funeral expenses. Thus, the total compensation, that was awarded, was a sum of Rs.2,51,600/- carrying 6% simple interest, annually reckoned, from the date of institution of the claim petition, until realization. The entire compensation payable was directed by the Tribunal to be shared equally between the claimants.

15. Heard Mr. Komal Mehrotra, learned Counsel for the Insurers, Mr. Ram Singh, learned Counsel appearing on behalf of the claimants and Mr. Vinay Kumar Chaturvedi, learned Counsel appearing on behalf of the owner.

16. Mr. Ram Singh, learned Counsel has been heard in support of the cross-objections and Mr. Komal Mehrotra and Mr. Vinay Kumar Chaturvedi in answer.

17. It is argued by Mr. Komal Mehrotra that the Insurers are not liable in this case, because the driver was a man, named Hazrat Ali. He was not holding a valid licence. A photostat copy of the driving licence for this driver, that was provided, when verified with the Licensing Authority, Rajkot, Gujarat, who has purportedly issued it, revealed that the driving licence on the relative number was issued in the name of one Harsab Bhai. The driving licence verification report was submitted before the Tribunal. It is pointed out that along with the report that was filed, an application, paper No.26-Ga was moved, that is to say, the application dated 22nd February, 2006, requesting the Tribunal to summon the original record from the Licensing Authority. It is pointed out that by means of an order dated 24th February, 2006, the Tribunal directed the licence verification report to be kept on record, but did not pass any order to summon records from the Licensing Authority, Rajkot. It is argued that while deciding Issue No.3, the Tribunal committed a manifest error of law in holding that since the Insurers produced the Investigator's report on record to show that the driving licence was fake, whereas the claimants produced a copy of it, the Insurers' case about the licence being fake could not be accepted. It is emphasized that along with the Investigator's report dated 2nd September, 2005, the driving licence verification report from the Licensing Authority, Rajkot in original was also filed. The submission is that the Insurers by producing all this evidence evidence discharged their burden to show that the licence claimed for the driver by the owner was fake. With so much of evidence, it was for the claimants or the owner to prove by leading evidence in rebuttal that the licence was genuine. It is urged that in the face of

such facts, the Insurers should have been given the right to recover from the owner as there was a breach of the policy.

18. About the compensation claimed, it is argued that there is no evidence of the deceased being gainfully employed in the business of retailing rice. Therefore, according to the Insurers, he could at best be credited with a notional income of Rs.15,000/- per year. The Tribunal was in error in finding for the deceased an annual income of Rs.19,200/-.

19. Mr. Ram Singh, learned Counsel for the claimants has refuted the submissions advanced on behalf of the Insurers. He submits that it is enough for the owner to produce a photostat copy of the licence, giving full particulars thereof. He emphasizes that to prove that the licence held by the driver was fake, burden lay upon the Insurers to ensure summoning of records from the Licensing Authority or an official of theirs, who issued the certificate about the licence, on the foot of which the licence is dubbed as fake. The official, once summoned, would have to prove the certificate and subject himself to cross-examination. It is then that the Insurers' burden could be discharged or shifted to the owner and the claimants, in the sense of the evidential burden.

20. On the point of the validity of the licence, learned Counsel for the owner, Mr. Vinay Kumar Chaturvedi has supported the claimants' stand. He too submits that given the details of the licence, it was incumbent upon the owner to summon some official from the Licensing Authority's office for the purpose of proving the certificate, on which the Insurers rely.

21. So far as the appeal is concerned, the thrust of the parties' contention is about

the validity of the licence held by the driver and the standards by which it must be proved to be fake or held genuine. Of course, the allied question, who would bear the burden of dispelling the validity of the licence or affirming its genuineness, has been mooted at length during the hearing.

22. In support of his submission, Mr. Mehrotra has relied upon the decision of this Court in *United India Insurance Co. Ltd. v. Smt. Shashi Prabha Sharma and others*, 2015 (4) TAC 650 (All). Apparently, the said Full Bench deals with a very different question, which is concerned more about the mode to recover from the owner assuming a case where the direction is to pay and recover. Therefore, the said authority is not of much assistance to the Insurers.

23. The next decision on which the learned Counsel for the Insurers has relied is *National Insurance Co. Ltd. v. Challa Upendra Rao*, (2004) 8 SCC 517. The holding of their Lordships of the Supreme Court in *Challa Upendra Rao* (supra) is to the effect that where a transport vehicle plies without a permit, it constitutes a violation of Section 149(2) of the Motor Vehicles Act and affords a defence to the Insurers. In that case, it was held that the Insurers would have a right to pay and recover. To the understanding of this Court, that is not at all the point involved here.

24. Mr. Mehrotra has further placed reliance upon an unreported decision of this Court in *Shri Kedar Singh v. Sarla Devi and others*, FAFO No.2261 of 2019, decided on 27.09.2021. In *Shri Kedar Singh* (supra), there are certain remarks of my esteemed brother Siddharth that require consideration. In *Shri Kedar Singh*, it has been observed by His Lordship:

“16. Learned counsel for the respondent no.4/Reliance General Insurance Co. Ltd., has submitted that while deciding issue no.3 the tribunal has rightly proceeded and recorded a finding that the driver of the truck did not had a valid and effective driving licence at the time of the accident as the driving licence on record was found to be fake. A bare perusal of the finding on issue no.3 would go on to show that apart from bringing on record a mere photocopy of the driving licence (driving license no.2222/RJ/2005) no other evidence was filed by the owner/appellant. Neither the original driving license was brought on record by the owner of the truck/ appellant nor did he entered the witness box to substantiate the same. Even the driver was not examined by the owner of the truck/appellant. The insurance company on its part investigated the validity of the driving licence (DL No. 2222/RJ/2005) and consequently filed the report received from the concerned R.T.O. under Form 54 before the tribunal. The bare perusal of the report received on Form 54 would go on to show that the driving licence no. 2222/RJ/2005 was issued in favour of one Krishna Goapal and not in the name of the alleged offending driver i.e., Bhola. As such the photocopy of the driving licence of Bhola filed by owner of the truck/appellant was a fake document. It is a settled proposition of law that Form 54 is a public document which does not requires further evidence of formal proof by examining a witness....

18. During the course of further hearing the owner of the truck/ appellant relied upon the judgement of the Apex court in the case of *Pappu and others Vs. Vinod Kumar Lamba and another*, reported in (2018) 3 SCC,208 and *Pepsu Road Transport Corporation vs. National Insurance Company Ltd.*, reported in

2013(6) AWC 5736. Both these judgements have been relied upon by the owner of the truck/appellant which in fact support the stand of the insurance company/respondent. In the case of Pappu (supra) the Apex court has laid down the parameters of burden of proof of driving licence.

19. It has been categorically held in para-13 in the case of Pappu(Supra) that " the insurance company would be made liable only when the foundational fact are pleaded and proved by the owner of the offending vehicle."

20. In the facts and circumstances of the present case neither did the owner of the truck/applicant bring on record the original driving license of the driver(Bhola) of offending vehicle nor did he enter into the witness box to establish the validity of the driving license. In fact even the driver was not produced before the tribunal. In such circumstances mere filing of photocopy of the driving license would not absolve the owner of the truck/appellant of his liability. To the contrary the insurance company/respondent on its part had duly filed Form 54 which categorically established the fact that the document brought on record by the owner respondent was a fake, forged, fraudulent and fabricated document.

21. So far as the case of Pepsu Road Transport Corporation(supra) is concerned the same is easily distinguishable and do not apply in the peculiar facts and circumstances of the present case. In the case of Pepsu(supra) the insurance Company had brought on record a photocopy of the register maintained for issuing the licence. The report itself was not conclusive since it mentioned that register might be missing. But in the facts and circumstances of the present case the Form 54 categorically mentioned that the driving licence was

issued in the name of a different person than the alleged offending driver,i.e., Bhola.

22. Apart from the above in the case of Pepsu(supra) the insured/employer during the process of employment of the driver had put the driver to a driving test and had infact imparted training to him also. The said aspect of the matter was duly pleaded and proved by the owner/insured by entering the witness box and proving the same. In the peculiar facts and circumstances of the present case, no such assertion or efforts had been made by the owner of the truck/appellant before the tribunal or for that matter before this court. He merely filed a photocopy of the driving license of driver Bhola, which would not discharge him from his burden of proof.

29. Regarding the second submission of the learned counsel for the owner of the truck/appellant of the discarding of the validity of driving licence of the truck driver by the tribunal, this court finds that only photocopy of the driving licence of the driver, Bhola was brought on record by the owner /appellant before the tribunal. The vehicle owner never appeared in witness box before the tribunal to prove that the driving licence was given to him by his driver, Bhola and he was satisfied that it is genuine. He also did not proved that he made efforts to see that the driver is competent to drive. He was required to prove before the tribunal that he had taken reasonable care in employing the driver, who was qualified and competent to drive the vehicle. The liability as between the insurer and the insured depends upon the reasonable care taken by the owner of the vehicle, while employing a qualified and competent driver. These basic facts are required to be proved by the owner of the vehicle before the tribunal so as to protect himself from the liability viz- a- viz

insurance company before the Motor Accidents Claims Tribunal.”

25. In a more recent decision of the Supreme Court in **Rishi Pal Singh v. New India Assurance Co. Ltd. and others, 2022 (3) ACC 556**, the question about the burden of proof regarding the validity of the licence in a motor vehicle accident claim as between the owner, the insurer and the claimant arose for consideration of their Lordships, where it was held:

“10. The owner of the vehicle is expected to verify the driving skills and not run to the licensing authority to verify the genuineness of the driving license before appointing a driver. Therefore, once the owner is satisfied that the driver is competent to drive the vehicle, it is not expected from the owner thereafter to verify the genuineness of the driving license issued to the driver.”

26. Rishi Pal Singh (supra) was a case where the driving licence was not found genuine, but the facts were that the owner deposed on affidavit before the Tribunal that prior to employing the driver, he had subjected the driver to a driving test and found his driving skills satisfactory. In his cross-examination, the owner said that the driver was employed with him for three years before the date of the accident. The owner stood by the fact in his cross-examination that he had taken the driver's driving test before employing him. One feature of the case was that the owner said that the driving licence was obtained from the driver and it was issued by a Licensing Authority in Nagaland, but the owner did not produce it in evidence. The Tribunal and the High Court held that the owner alleged that the driver had a licence from Nagaland, but did not produce it.

Therefore, the Insurance Company was entitled to recover from the owner. Before their Lordships in appeal by special leave, as the report of the decision would show, the records of the Tribunal were requisitioned. The records revealed that the driver's licence was produced before the Tribunal by the claimant. The genuineness of that licence was investigated and in the report that was submitted, the driving licence purporting to be issued by the Licensing Authority, Mandi, State of Himachal Pradesh, was not found genuine. It was in the context of the above facts that in Rishi Pal Singh, it was held:

“5. Thus, it was the claimant alone who relied upon the license issued by Licensing Authority Mandi. The same was not found to be genuine. The statement of the owner, that the license was from Nagaland is without any supporting documents and is thus meaning less. The fact remains, having appointing driver after taking test, the Appellant was not expected to make enquiries from the licensing authority as to whether driving license shown to him is valid or not.

6. If the owner has stated that driver had produced the driving license from Nagaland but no such license was produced on record, it is obviously a mistake on the part of the owner. However, such aspect cannot be used to grant liberty to the Insurance Company to recover the amount from the owner when the driving license actually produced by the claimant themselves was from Una, Himachal Pradesh. It may be stated that falsus in uno, falsus in omnibus is not the principle applicable in India. Therefore, even if a part of the statement that the driver has produced the license from Nagaland is not correct, it is wholly inconsequential.”

27. There is no quarrel about the proposition that if it is the Insurers' case that the driver did not hold a valid driving licence, the burden of proof is upon the Insurers to prove it to be so. But, before that burden can be cast on the Insurers, there is an onus to be discharged by the owner of the offending tanker, which requires him to plead and prove the facts within his knowledge that the driver was the man he had authorized to drive the vehicle, and that, in the owner's belief, he held a valid driving licence at the time of the accident. In Pappu and others v. Vinod Kumar Lamba and another, (2018) 3 SCC 208, this was precisely the question that fell for consideration of the Supreme Court, where it was held:

“12. This Court in National Insurance Co. Ltd. [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] has noticed the defences available to the insurance company under Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988. The insurance company is entitled to take a defence that the offending vehicle was driven by an unauthorised person or the person driving the vehicle did not have a valid driving licence. The onus would shift on the insurance company only after the owner of the offending vehicle pleads and proves the basic facts within his knowledge that the driver of the offending vehicle was authorised by him to drive the vehicle and was having a valid driving licence at the relevant time.”

(emphasis by Court)

28. There are some further remarks in the context of the facts in Pappu (supra), which led their Lordships to hold about the owner's initial burden or the onus probandi to be discharged about the driver's driving

licence and his authorization to drive the vehicle before the insurer's burden to dispel the validity of the driver's licence comes into existence. These facts are mentioned in Paragraph No.13 of the report in Pappu, which read:

“13. In the present case, Respondent 1 owner of the offending vehicle merely raised a vague plea in the written statement that the offending Vehicle No. DIL 5955 was being driven by a person having valid driving licence. He did not disclose the name of the driver and his other details. Besides, Respondent 1 did not enter the witness box or examine any witness in support of this plea. Respondent 2 insurance company in the written statement has plainly refuted that plea and also asserted that the offending vehicle was not driven by an authorised person and having valid driving licence. Respondent 1 owner of the offending vehicle did not produce any evidence except a driving licence of one Joginder Singh, without any specific stand taken in the pleadings or in the evidence that the same Joginder Singh was, in fact, authorised to drive the vehicle in question at the relevant time. Without disclosing the name of the driver in the written statement or producing any evidence to substantiate the fact that the copy of the driving licence produced in support was of a person who, in fact, was authorised to drive the offending vehicle at the relevant time, the owner of the vehicle cannot be said to have extricated himself from his liability. The insurance company would become liable only after such foundational facts are pleaded and proved by the owner of the offending vehicle.”

29. The later part of Paragraph No.13 of the report in Pappu are again enunciative of the law about proof of the foundational

facts that has to be discharged by the owner before the insurer can be called upon to discharge his burden about the validity of the licence. The aforesaid view has been followed by this Court in *Shri Kedar Singh* and also by the Bombay High Court in an unreported judgment in *The Branch Manager, New India Insurance Co. Ltd. v. Kausalyabai and others*, First Appeal No.259 of 2003, decided on 30th September, 2022.

30. In this connection, reference may be made to the decision of the Supreme Court in *Rukmani and others v. New India Assurance Co. and others*, (1998) 9 SCC 160, which was a case arising under the Motor Vehicles Act, 1939. In *Rukmani* (supra), a very brief judgment of their Lordships, it was observed:

“2. The Insurance Company has been absolved from liability in respect of the claim for compensation by the High Court on the ground that the driver had no valid licence. The High Court has noted that under Section 96(2)(b)(ii) of the Motor Vehicles Act, 1939, if the Insurance Company contends that the driver of the vehicle had no valid driving licence, the burden is on the Insurance Company to establish it. The High Court, however, came to the conclusion that this burden had been discharged by the Insurance Company.

3. We have seen the only evidence which the Insurance Company produced in support of the plea. This is the evidence of Inspector of Police who investigated the accident. In his evidence, PW 1 who was the Inspector of Police, stated in his examination-in-chief, “My enquiry revealed that the 1st respondent did not produce the licence to drive the abovesaid scooter. The 1st respondent even

after my demand did not submit the licence since he was not having it.” In his cross-examination he has said that it is the Inspector of Motor Vehicles who is required to check whether the licence is there but he had not informed the Inspector of Motor Vehicles that the 1st respondent was not having a licence since he thought it was not necessary. In our view, this evidence is not sufficient to discharge the burden which was cast on the Insurance Company. It did not summon the driver of the vehicle. No record from the Road Transport Authority has also been produced. In these circumstances, the Insurance Company has not discharged the burden cast upon it under Section 96(2)(b)(ii) of the Motor Vehicles Act, 1939. The impugned order of the High Court is, therefore, set aside and the order of the Tribunal is restored. The appeal is allowed accordingly. No order as to costs.”

31. The principle in *Rukmani* is about the general burden of the Insurance Company to establish that the driver did not hold a valid driving licence if they so allege, but apparently it does not decide the point about the onus probandi resting on the owner's shoulders to establish the basic facts spoken of in *Pappu*. Therefore, the judgment in *Rukmani* would not come to the owner's rescue in this case on a blanket basis, unless it be shown that the owner had established the basic facts about the validity of the driver's driving licence and his authorization to drive the offending tanker.

32. The entire gamut of principles in *United India Insurance Co. Ltd. v. Lehu and others*, (2003) 3 SCC 338, *National Insurance Co. Ltd. v. Swaran Singh and others*, (2004) 3 SCC 297, *New India Assurance Co. v. Kamla and others*, (2001)

4 SCC 342, and above all Rukmani, lay down principles in the context of a motor accident claim, that has the owner before the Tribunal. In all those cases, one part of the principle grants a very liberal cover to the owner, where in the face of a fake driving licence, the owner comes forward with a case that he went by the apparent tenor of the driving licence, that was produced by the driver before him at the time of employment and then tested the driver for his driving skills, which he found to be reasonably proficient. If the owner proves the said fact by his testimony before the Tribunal, a driving licence, howsoever fake, cannot entitle the insurer to recover. Nevertheless, before this part of the protective principle for the owner comes into play, the other part of it mandates, what was laid down in Pappu that the onus would shift to the insurer after the owner 'pleads and proves the basic facts within his knowledge that the driver of the offending vehicle was authorized by him to drive the vehicle and was having a valid driving licence at the relevant time' to borrow the words of their Lordships.

33. It is in the context of the aforesaid principles that the case of parties the way it is pleaded and sought to be proved requires examination. The owner did appear before the Tribunal and filed a written statement. He did not further appear at the hearing, testify on oath in the witness box or tender evidence on affidavit. No doubt, he has filed some documents with his written statement, which includes a photostat copy of the driver's driving licence, the offending tanker's registration certificate, the national permit, the five yearly permit, the fitness certificate and the insurance cover. In addition, a power of attorney in original was also annexed to the written statement. There is not a word in the written statement

filed by the owner that he had seen the driving licence of the driver before recruiting him and gone by its apparent tenor. It is also not pleaded that he had tested the driving skills of the driver and found him to be proficient. Nothing of the kind has been said in the owner's written statement. Since the owner did not tender any evidence on affidavit or in the witness box, it goes without saying that he said nothing about the driver or his driving licence.

34. The Insurers on their part have produced an investigation report written by their own Investigator dated 02.09.2005, bearing paper No. 28-Ga, saying that the driving licence in question was verified with the Licensing Authority, the R.T.O., Bhuj, who has certified that Licence No. MH0260547, the number carried on the xerox copy of the licence relied upon by the owner was issued in the name of one Harsab Bhai. The report of the Investigator is accompanied by a certificate of the Regional Transport Officer, Bhuj, who certifies the name of the licence holder as Harsab Bhai with reference to the relative licence number relied upon by the owner. The documents produced by the Insurers to dispel the validity of the licence, if the Insurers indeed bore the burden, would hardly discharge it. The reason is that no one was produced from the office of the R.T.O., Bhuj to prove the the certificate on which the Insurers rely. But, all these issues are irrelevant because onus probandi was never shifted to the Insurers, requiring them to prove the licence, as the owner never pleaded the basic facts nor proved them by his testimony on affidavit or viva voce. The Insurers' failures are, therefore, irrelevant and discounted.

35. The other evidence that the owner has annexed to the written statement and

about which there is no quarrel, certainly shows that the vehicle was duly insured and plied on the basis of valid papers. It is a case, therefore, where the Insurers cannot be absolved altogether of their liability, but must be granted the right to recover from the owner. It is held accordingly.

36. Now, the other question that arises is about the compensation, to which the claimants are entitled. There is a cross-objection by the claimants seeking enhancement of the compensation awarded. The learned Counsel for the claimants urges that it ought to be enhanced whereas the learned Counsel for the owner and the Insurers say in one voice that the Tribunal has passed a just award. The Tribunal has worked out the dependency on an income of the deceased being a sum of Rs.100/- per day. The evidence on record shows that the deceased was into the retailing of rice. There is no reason why the income of any businessman, of whatsoever scale, should be rated on a daily basis. The system of rating income on a daily basis is applicable to daily-rated labourers, particularly once it comes to discounting a few days of rest from the month. This kind of an approach to the assessment of income is classically associated with casual labourers who would not have engagement throughout the days of the month, and, in any case, would have to suffer or enjoy a day of holiday at the weekend or other non-working days. A businessman of any kind, particularly, a retailer is not tied down to a daily schedule of earnings. His income has to be assessed on a monthly basis or may be for the whole year, based on a monthly division. The deceased here was retailing rice moving about on his bicycle. Therefore, he was a man who was earning not even in a market set up that had market regulations about 'closed' days.

37. The deceased was a bachelor and supporting his parents. The deceased was a young man in the prime of his life, just 25 years old. The testimony of PW-1, Satya Narain, the deceased's father clearly shows that in the examination-in-chief he has asserted that the deceased would earn Rs.6000/- per month from his business in retailing rice. In fact, on the fateful day too, he was returning back from Phaphamanu Bazar along with the witness's nephew. In the cross-examination, at the instance of the Insurers, it is said that the deceased would do retailing of rice at Jhalwa. The said business does not require registration. There are no receipts relating to sale and purchase of rice filed on record, nor did the witness have such receipts. It is but logical that there would be no accounts or balance-sheets for a man earning his livelihood by retailing rice in a semi-urban part of the city. To expect of this kind of retailers to maintain records, like balance-sheets or file income tax returns is nothing, but the betrayal of an unrealistic approach on the Tribunal's part. At the same time, the non-maintenance of such records, like balance-sheets, receipts, accounts, registers or returns cannot derogate from the fact that the man would have been in profitable business, supporting his family at that age. Business outside the organized sector cannot be ignored when it come to assessment of their profits; when it is time to pay them.

38. The deceased died in the year 2004 and the figure of Rs.6000/- for his income has almost gone effectively unchallenged. Bearing in mind the deceased's circumstances, it would be reasonable to assume for him a monthly income of Rs.3000/-, without any deductions, for non-working days as done by the Tribunal. This would lead to an

annual income of Rs.36,000/-. The Tribunal has deducted a one-third towards the deceased's living and personal expenditure. Going by the law laid down in *Sarla Verma (Smt) v. Delhi Transport Corporation* and another, (2009) 6 SCC 121, the deceased being a bachelor, deduction towards living and personal expenses would be a one-half; not a one-third. The Tribunal has adopted a multiplier of '13'. The way the evidence goes, the deceased was a young man of 25 years. Following the table set out in Paragraph No.40 of the report in *Sarla Verma (supra)*, a multiplier of '18' is appropriate to adopt. The Tribunal has erred in adopting the multiplier of '13' going by the age of the deceased's parents. It is, accordingly, held about the deduction to be made and the multiplier to be adopted.

39. Nothing has been awarded by the Tribunal towards future prospects. The issue has received consideration of the Constitution Bench in *National Insurance Company v. Pranay Sethi* and others (2017) 16 SCC 680, where the benefit of future prospects has been extended to the self-employed as well. In *Pranay Sethi (supra)*, 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.

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 in Reshma 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."

40. The next question that falls for answer is whether future prospects, which the claimants would be entitled to, are to be determined in accordance with 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 is answered by the holding of the Supreme Court in *New India Assurance Co. Ltd v. Urmila Shukla and others*, 2021 SCC OnLine SC 822, where it was 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. 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.

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."

41. Therefore, there is little doubt that in the State of Uttar Pradesh, future prospects are to be determined in accordance Rule 220-A(3) of the Rules of 1998.

42. The question whether Rule 220-A(3) of the Rules of 1998, that came into force w.e.f. 26 September, 2011, would apply retrospectively to an accident that took place much before the amendment, is no longer res intergra. A Division Bench of this Court in *Sushil Kumar and others v. M/s. Sampark Lojastic Private Limited and others*, 2017 (35) LCD 1311 has 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."

43. According to 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 the accident happened prior to the amendment. Rule 220-A(3), going by the age of the deceased, which is far less than 40 years, would entitle the claimants to add 50% to his income under the head of future prospects.

44. It still requires determination what the entitlement of the claimants would be

under the conventional heads. The principles in **Pranay Sethi** on the issue are clear, where it is 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 [*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 [*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 [*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 [*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)

45. The question of compensation for the loss of consortium was considered by the Supreme Court in **Magma General Insurance Company Ltd. v. Nanu Ram alias Chuhru Ram and others**, (2018) 18 SCC 130, where 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)

46. Considering the issue of a just compensation to be made, the award would have to be revised in the following manner:

(I) Monthly Income (of the deceased) = **3000**

(ii) Annual Income (of the deceased) = **3000x12= 36000**

(iii) Annual Income+Future Prospects (annual income x 50%)= 36000+18000=**54000**

(iv) Annual Dependency = Annual Income – one-half deduction towards personal expenses of the deceased = 54000-27000 = **27000**

(v) Total Dependency = Annual Dependency x Applied Multiplier= 27000 x 18= **486000**

(vi) Claimant's entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium =15000+15000+40000x2= **110000**

The total compensation would therefore, work out to a figure of Rs.486000+ Rs.110000 = 596000

47. In the result, both the appeal and the cross-objections are **allowed in part**. The impugned award passed by the Tribunal is modified and it is ordered that while the owner would be liable to satisfy the award, the Insurers would be obliged to satisfy the award in the first instance and then recover from the owner through miscellaneous proceedings before the Tribunal. The compensation awarded would stand enhanced to **Rs.5,96,000/-**. 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 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.

48. Costs easy.

Court No. - 64

Case :- Cross Appeal/ Cross Objection
No. - 65668 of 2013

Appellant :- Satya Narain Keserwani
and another

Respondent :- National Insurance
Company Ltd. and others

Counsel for Appellant :- Mr. Ram
Singh, Advocate

Counsel for Respondent :- Mr. Komal
Mehrotra and

Mr. Vinay Kumar Chaturvedi,
Advocates

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

1. Allowed in part.

2. For orders, see my order of date
passed in FAFO No.1394 of 2006.

(2023) 7 ILRA 135

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 29.05.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.**

First Appeal From Order No. 3250 of 2004

**General Manager, M/S. Allahabad Dugdh
Utpadak Sahkari Sangh Ltd., District
Allahabad**

...Appellant

Versus

Suresh Chandra Mishra

...Respondent

Counsel for the Appellant:

Sri Ganesh Datt Mishra, Sri C.D. Misra

Counsel for the Respondents:

Sri Sushil Kumar Srivastava, Sri Shyam
Narain, Sri Sudhanshu Narain, Sri S.D. Ojha

A. Civil matter-Workmen's Compensation Act, 1923-Section 30- Commissioner has awarded compensation of Rs.1,38,340/- with 9% rate of interest-Challenge against- when the claimant was on job at that point of time he fell down from the staircase of the platform-The claimant / respondent sustained multiple injuries on his left lower limb and on his spinal cord was also damaged-disability due to the accidental fall is proved beyond reasonable doubt and under the provisions of Section 4(1)(C) of the Workmen's Compensation Act, 1923 - during the pendency of this litigation the original claimant has passed away-The amount has already been deposited without interest -The claimants would be at least entitled as per Section 4(2)(A) of the Act where the employee has to be granted actual medical expenses and pain shock to the claimant-Hence, the amount of Rs.35000/- with 12% interest from filing of claim application till disbursement as amount is in fixed deposit as per order of this Court, be paid and disbursed to the legal heirs of the deceased- employee within 30 days.(Para 1 to 18)

B. The provisions of Section 4 (1) (C) of the Workmen's Compensation Act, 1923 which reads as follows : -

(i) Where permanent partial (i) in the case of an injury disablement results from specified in Part II of Schedule the injury I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury; Explanation I.-- Where more injuries than one are caused by the same accident, the amount of compensation

payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries; Explanation II.-- In assessing the loss of earning capacity for the purposes of sub- clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I (Para 9)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. North East Karnataka Road Trans. Corp.Vs Smt. Sujatha Civil Appeal No.7470 of 2009
2. Golla Rajanna Etc. . Vs Div. Manager & anr. (2017) 1 TAC 259 SC
3. Mayan Vs Mustafa & anr. (2022) ACJ 524
4. Sri Chanappa Nagappa Muchalagoda Vs Div. Manager, New India Ins. Co. Ltd (2019)0 SSC1347 Shakuntala Chandrakant Shreshti Vs Prabhakar Maurti Garvali & anr. (2006) 0 SSC 1105
5. Mohd. Yaqub Vs UPSRTC thru Reg. Manager, Moradabad (2003) 97 FLR 224

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

1. Heard Sri Ganesh Datt Mishra, learned counsel for the appellant and Sri S.D. Ojha, learned counsel for the claimant.

2. This First Appeal From Order has been filed under section 30 of Workmen's Compensation Act, 1923 (hereinafter referred to 'Act, 1923') by appellant- G.M. Dugdh Sangh Allahabad, being aggrieved by order dated 28.9.2004 passed by the Workmen's Compensation Commissioner/ Assistant Labour Commissioner, Allahabad in WC Case No.46 of 2001 whereby the

learned Commissioner has awarded compensation of Rs.1,38,340/- with 9% rate of interest.

3. The facts of the present case are that it has been culled out from the record that the claimants who was employed by appellant met with an accident. On 19.8.199 when the claimant was on job at that point of time he fell down from the staircase of the platform. The claimant / respondent sustained multiple injures on his left lower limb and on his spinal cord was also damaged. The respondent company rushed the claimant to the hospital where the claimant was admitted and continued to be in hospital from 19.8.1999 to 24.8.1999. For a period one month the claimants was advised bed rest. The claimant was 38 years of age and his wages were about Rs.2000/- per month. The doctors opined that there was 60% disability of body. The claimants spent about Rs.15,000/- for medical expenses and claimed Rs.1,15,000/- as loss of wages. On notices being issued the appellant / owner answered the claim application contending that the employee was injured not in the premises but at a tea stall which is located near the factory and, therefore, the claimant was not entitled for any compensation. The claimant examined himself as against this the appellant examined about five witnesses. The appellant contended before the commissioner that in the year 1997 the claimant had sustained injures due to vehicle accident, and the medical certificate produced related to the injures of that time. The claimant in his rejoinder refuted the charge that he was not injured in the premises of appellant. The commissioner did not accept the contention that the injures were caused beyond the factory premises holding that the injury was caused in the factory premises, and accepted the

claim petition granting compensation by holding against appellant, as the officer of the factory took him to hospital. The claimant was taken to one Preeti Nursing Home, thereafter taken to Jeevan Jyoti Hospital. The officers who came to depose did not know at what time the accident occurred but out of humanity took the claimant to the hospital. This was the testimony of one of the witness Parth Sarthi for employer / appellant as per medical certificate. The calculation was based on the 60% disability with 9% rate of interest. The Commissioner granted compensation as per schedule.

4. While admitting this appeal and issuing notice, the Court on 1.12.2004 passed the following order :-

“Admit.

Issue notice to unserved respondents only by R.P.A.D. Returnable at an early date.

The substantial question of law, apart from other legal grounds, arising in the appeal is :

(i) Whether the Workmen's Compensation Commissioner committed apparent error of law in awarding the compensation without there being any loss of earning and without probing the actual loss of earning capacity by the claimant / opposite party as required within the meaning of Section -4 (1) (c) (ii) of the Workmen's Compensation Act, 1923 ?

Even though Court was of the opinion that this matter be decided finally on the issue raised by the appellant, learned counsel for the claimant – respondent prays for and is allowed four weeks time to file counter affidavit. Rejoinder affidavit, if any, may be filed within four weeks thereafter.

Stay application shall be listed immediately after expiry of aforesaid period.

Until further orders, the operation of the impugned judgment and award dated 28.9.2004 passed by Workmen's Compensation Commissioner, Allahabad/ Assistant Labour Commissioner, Allahabad in W.C. Case No.46 of 2001 (Suresh Chandra Mishra Versus General Manager, M/s Allahabad Dugh Utpadak Sahkari Sangh Limited, Allahabad) shall remain stayed. The amount deposited by the Employer, in pursuance to the aforesaid judgment and award dated 28.9.2004, shall not be disbursed and shall be invested by the concerned authority in a Fixed Deposit Account – carrying maximum interest for minimum period and both the Principal & the interest of it may be reinvested on same terms as above and it shall be subject to any order passed subsequently by this Court.”

5. This Court framed only one question of law based on facts and legislation. The question of law, however, as questions of law are formulated by the appellant which are seven in number they may not be decided, but the arguments are advanced by Shri Ganesh Datt Mishra-Advocate for appellant on all the questions. The said questions are reproduced herein below :-

“(i). Whether the finding recorded by the Workmen's Compensation Commissioner vitiated by not considering the oral evidences of Devendra Swaroop and U.N. Singh and documentary evidence on record and also by not mentioning any reason for disbelieving the oral evidence of K.M. Pandey Production Manager, Jagpal

Singh Factory Manager and Parth Sarathi Computer Accountant ?

(ii) *Whether the Workmen's Compensation Commissioner committed error of law in not considering the case of defendant / appellant and oral and documentary evidences that medical certificate is result of accident of the claimant / opposite party in November, 1997 ?*

(iii) *Whether the injury was caused in November, 1997 and on 19.8.1999 by an accident which was not arising out of in the course of his employment ?*

(iv) *Whether the Workmen's Compensation Commissioner committed apparent error of law in awarding the compensation without there being any loss of earning and without probing the actual loss of earning capacity by the claimant / opposite party as required within the meaning of Section -4 (1) (c) (ii) of the Workmen's Compensation Act, 1923 ?*

(v) *Whether the Workmen's Compensation Commissioner committed apparent error of law and in not considering the points and arguments raised and rulling relied upon in the written argument submitted before the Workmen's Compensation Commissioner and the impugned order / direction is based on non application of mind ?*

(vi) *Whether the Workmen's Compensation Commissioner committed apparent error of law I not drawing adverse inference against the workman / opp. Party regarding accident in November, 1997 ?*

(vii) *Whether an oral evidence adduced by the Workman / opp. Party to the effect that he was injured in November, 1997 by buffalo, is without any pleading there of and the Workmen's Compensation*

Commissioner committed error of law and jurisdiction in relying upon the same ?

6. Learned counsel for the appellant has submitted that finding recorded by the Workmen's Compensation Commissioner that the claimant / opposite party was injured on 29.8.1999 in the factory premises and arising out of employment, is perverse and based on non consideration of the oral and documentary evidence submitted by the owner/appellant. Learned counsel for the appellant has further submitted that the Workmen's Compensation Commissioner committed an error apparent on the face of record in not assigning any reason for disbelieving the testimony of K.M. Pandey Production Manager, Jagpal Singh Factory Manager and Parth Sarathi Computer Accountant and also the Workmen's Compensation Commissioner failed to consider the oral evidence of Devendra Swaroop then General Manager and Mr. U.N. Singh Manager (Admin) and documentary evidence Exh. E-1 to Exhibit E-19 on the records.

7. Learned counsel for the appellant has submitted that there is no loss of earning. The claimant continued to be on the said post and not considering this aspect and this non consideration of the contention of the appellant itself has made the order to be vulnerable as perversity has crept in.

8. As against this, learned counsel for respondent submits that the disability due to the accidental fall is proved beyond reasonable doubt and under the provisions of Section 4(1)(C) of the Workmen's Compensation Act, 1923 it is an employment injure which would entitle the claimant to claim what is known as compensation.

9. The provisions of Section 4 (1) (C) of the Workmen's Compensation Act, 1923 which reads as follows : -

(c) Where permanent partial (i) in the case of an injury disablement results from specified in Part II of Schedule the injury I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury; Explanation I.-- Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries; Explanation II.-- In assessing the loss of earning capacity for the purposes of sub- clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I;

10. 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."

11. 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 limine 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."

12. As far as the finding regarding where the injury occurred, and whether it occurred or not, cannot be gone into as those are finding of fact. Hence, the said ground fails and is answered against the appellant. As far as the question regarding disability is concerned, this is a question of fact and in view of the decisions of the Apex Court, this Court cannot go into the said issue, unless it is proved that the finding of the learned Commissioner is absolutely perverse. In this case, the Court below has considered medical evidence which shows there was disability caused. Thus, grant of compensation of Rs. 1,38,340/- as per the quotient cannot be said to be bad. Rather the rate of interest awarded by the Commissioner is below statutory rate of interest.

13. In **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.

14. All other grounds mentioned in the memo of appeal are in the realm of question of facts and the finding of the Commissioner on these cannot be interfered as this Court has admitted appeal on only the question of law, hence, finding are not disturbed by this Court as this Court is fortified in its view by the decision of the Apex Court passed in **Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided on 2.11.2018, Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC) & Mayan vs. Mustafa and another, 2022 ACJ 524** wherein the Apex Court has held that under Section 30 of Workmen Compensation Act, 1923 the High Court cannot enter into the arena of findings of fact unless they are proved to be perverse and unless there is a question of law involved.

14. All other grounds mentioned in the memo of appeal are in the realm of questions of fact and the finding of the Commissioner on these cannot be interfered as this Court has admitted appeal on only the question of law, hence, findings

are not disturbed by this Court as this Court is fortified in its view by the decision of the Apex Court passed in **Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided on 2.11.2018, Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC) & Mayan vs. Mustafa and another, 2022 ACJ 524** wherein the Apex Court has held that under Section 30 of Workmen Compensation Act, 1923 the High Court cannot enter into the arena of finding of facts unless they are proved to be perverse and unless there is a question of law involved.

15. In this there is a perversity which has crept in the order of the Commissioner as the argument of the appellant that the claimant has not proved loss of income and that he continues to be in job and that he was been working in the diary and his salary has increased on 16.4.2000, therefore there is no loss of income. The Commissioner could not have taken recourse to only one fact that the accident occurred in the premises The next limb of entitlement has not been considered at all except the fact that he was admitted in the hospital.

16. The appeal will have to be allowed. The judgments cited by the counsel for the appellant in ***Sri Chanappa Nagappa Muchalagoda Versus Divisional Manager, New India Insurance Company Limited, 2019(0) Supreme(SC) 1347 and Shakuntala Chandrakant Shreshti Versus Prabhakar Maurti Garvali and another, 2006 (0) Supreme(SC) 1105*** will enure for the benefit of the appellant and the judgment of this High Court in Mohd.

Yaqub Vs. UPSRTC through Regional Manager, Moradabad, 2003 (97) FLR 224

17. While entertaining this appeal and during the pendency of this litigation the original claimant has passed away. The amount has already been deposited without interest .The claimants would be at least entitled as per Section 4(2)(A) of the Act where the employee has to be granted actual medical expenses and pain shock to the claimant. Hence, the amount of Rs.35000/- with 12% interest from filing of claim application till disbursement as amount is in fixed deposit as per order of this Court, be paid and disbursed to the legal heirs of the deceased- employee. The submission that because of this injures the claimant was not granted promotion is not answered by the counsel for the appellant and now that the original claimant has passed away it would not be fruitful to remand the matter to the tribunal for considering this aspect and therefore while returning the amount kept in fixed deposit, Rs.35000/ with 12% interest will have to be granted as per the statute and that the respondent will be entitled to costs of Rs.10,000/-.

18. The appeal is partly allowed. Interim relief, if any, is modified as above. The Registry will forward this order to the Workmen Compensation Commissioner who shall immediately summon the claimants and disburse the amount kept in fixed deposit with interest accrued on the said amount till date within 30 days calculating the same from the date of receipt of this order.

19. This Court is thankful to both the counsels for ably assisting this Court.

(2023) 7 ILRA 142
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.05.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

First Appeal From Order No. 4050 of 2017

Babunandan & Anr. ...Appellants
Versus
Baggal Yadav & Ors. ...Respondents

Counsel for the Appellants:

Sri Sunil Kumar, Sri Daya Shankar

Counsel for the Respondents:

Sri Ashok Kumar Srivastava, Sri Radeep Kumar Sinha

A. Civil Law - Motor Vehicles Act, 1988- Sections 173- enhancement of compensation-Fatal accident-deceased aged about 18 years, only Rs. 26,500/- awarded by the Tribunal-Appellate Court took a minimum wage of Rs. 35,000/- per annum and added 50% for future prospects-after deduction of 50% towards personal expenses and applying multiplier of 18, the total loss of dependency comes to Rs. 4,72,500/- and Rs. 70,000/- added towards various conventional damages-Entitlement to compensation of Rs. 5,42,000/- made out- Interest of 7% and the manner of payment decided by the learned tribunal is just and lawful and does not call for interference. (Para 1 to 33)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Sarla Verma(Smt.) & ors. Vs DTC (2009) 6 SCC 121

2. Magma General Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors. (2018) 18 SCC 130

3. National Ins. Co. Vs Pranay Sethi & ors. (2017) 16 SCC 680

4. New India Assur. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC OnLine SC 822

5. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd & ors. (2017) 35 LCD 1311

(Delivered by Hon'ble Ajay Bhanot, J.)

I. INTRODUCTION:

1. The instant appeal arises out of an award made by the learned Motor Accident Claims Tribunal/Additional District Judge, Azamgarh in Motor Accident Claim Petition No. 04 of 2002, Buabunandan and anr. V Baggal yadav & Ors. dated 01.02.2007 by partly allowing the claim of the claimants.

M.A. Claim Petition No. 04/2002, Babunandan & anr. V Baggal Yadav & Ors.

II. Case of the claimants and respondents before the learned tribunal:

2. Briefly the case of the claimants before the learned tribunal was that the deceased died of injuries sustained in an accident which occurred on 02.01.1998, and was caused by the rash and negligent driving of the driver of truck bearing Registration No. UP 52A/2047. The offending vehicle was insured by respondent no. 3-Insurance Company. On the fateful day, the deceased was returning his house from the school when he met with the accident. The claimants are the parents of the deceased Shyam Narayan. The deceased was 18 years of age at the time of his death.

III. Compensation awarded by the learned tribunal:

3. The learned tribunal in the impugned judgement dated 01.02.2007 awarded compensation which is depicted in the tabulated form hereunder:

Sr.No.	Heads	Amount Awarded by the tribunal
1	Monthly Income	500/-
2	Annual Income	6000/-
3	Deduction towards personal expenses	1/3 of 6000= 2000
4	Multiplier	11
5	Total loss of dependency	2000x11 = 22000/-
6	Conventional Heads (a) Loss of consortium (b) loss of Estate (c) Funeral Expenses	4500/-
7	Total compensation	22000+4500= 26500-
8	Interest	6%

4. The claimants seek enhancement of compensation by means of the instant appeal.

IV. Submissions of learned counsels for the parties:

5. Sri Daya Shankar, learned counsel for the claimants submits that the compensation was not rightly calculated. The learned tribunal erred in law and incorrectly calculated the income, applied an illegal multiplier and neglected to award future prospects which is in teeth of the law laid by Supreme Court in **New India Assurance Co. Ltd. vs. Urmila Shukla**

and others² as well as **National Insurance Company Ltd. vs. Pranay Sethi and others³**. The claimants were entitled to a higher amount.

6. Shri Pradeep Kumar Sinha, learned counsel for the Insurance Company does not satisfactorily dispute the said submissions.

V. Issue for Consideration:

7. After advancing their arguments, learned counsels for the respective parties agree that only the following question falls for consideration in these appeals:

Whether the learned tribunal erred while determining the compensation under these heads: income, future prospects, application of multiplier, conventional heads and interest? If yes, the amount to which the claimants are entitled?

VI. Issue of income of the deceased:

8. The question of income of a child while determining compensation to be paid is a vexed question of facts and law. In many cases the children are entirely dependant on their parents and are not earning. Moreover, even if they are earning, the documentary evidence to support such facts is hard to come by.

9. The Motor Vehicles Act bifurcates children into two categories, namely children below the age of 15 years and those above that age. In a former class, a notional income of Rs. 15,000/- per annum is stipulated in the statute. However, the sum was enhanced to Rs. 30,000/- per annum by various judicial authorities. Children above 15 years of age are treated

as a separate class by the legislature. This is evident from the multiplier system in Schedule II of the Motor Vehicles Act read with **Sarla Verma (Smt) and others Vs. Delhi Transport Company and another**⁴ which govern calculation of income of a deceased child in the latter category.

10. The application of multiplier system to children above 15 years is a legislative recognition of the fact that while the children in that age group may not be actually earning and are dependant on their parents but they have achieved a certain employability potential. Employability potential comprises various skills acquired by children through formal education, informal modes or from the socio-economic environment which endows them with the capacity to earn or contribute to the family income. The employability potential grows with the age and is liable to be determined by factoring education, acquisition of vocational skills (may be hereditary), capacity to assist in households chores, etc. Employment potential becomes the basis of computation of income and grant of compensation in such cases.

11. The jurisprudential foundation of grant of compensation was laid by House of Lords in **Taff Vale Rly. Vs. Jankins**⁵, wherein the basis of grant of compensation was the expectation of pecuniary benefit and not the actual income which accrues to the deceased.

12. Lord Atkinson in **Taff Vale (supra)** set forth the legal position thus:

“...all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact –

there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first, that the deceased earned money in the past and, second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can, I think, be drawn from circumstances other than and different from them.”

13. Judicial authorities has cited earlier have fixed 30,000/- per annum as a notional income for grant of compensation in cases of death of minor children. [Ref: **Meena Devi Vs. Nunu Chand Mahto @ Nemchand Mahto and others**⁶].

14. While the sum fixed by Supreme Court in **Meena Devi (supra)** provides valuable guidance in many cases but cannot constitute a judicial standard to be applied as a rule of thumb without consideration of facts and circumstances of a case.

15. **Meena Devi (supra)** does not absolve the court of the duty to makes relevant enquiries into the facts and evidences to determine the income of the deceased minor child by examining employability potential in light of various factors discussed above.

16. The acquisition of skill is not dependant on a formal training or a certificate attesting such qualification. Skill can be acquired through various means and including informal ways. An environment where such skills are being exercised on a daily basis allows the child to imbibe such skills.

17. Overwhelming majority of our population is engaged in informal sectors of the economy. They do not have well documented evidence of their income. However, courts can apply credible yardsticks to determine the income in such cases. With acquisition of skills and knowledge the children can perform various activities which will fortify the family fortunes. This can take many forms like young students with bright academic records may take tuitions. A student who has developed vocational skills may contribute to the family income by doing related tasks. In addition children may also help out in household chores and agricultural activities.

18. Educational qualification of the deceased was established. His contribution to household chores was proved. These are germane factors to determine the employability potential and fixing the income of deceased.

19. The learned tribunal determined the income at Rs. 6000/- per annum. The finding is perverse. The learned tribunal erred in law by mechanically fixing the income, and failing to make relevant enquiries in this regard.

20. By virtue of his age and education, the deceased had attained a certain employment potentiality which was unlawfully neglected from consideration. The employment potentiality would be the minimum income which a person would draw from market based on his skills and environment.

21. The deceased being a young able bodied and educated adult of 18 years and he had the capacity to take tuitions or impart education to younger children.

Hence he will come in the category of skilled worker.

22. In the facts of this case, a minimum wage of Rs.35,000/- per annum is just and equitable amount which can be considered as the income of the deceased.

VII. Future Prospects:

23. The future prospects are liable to be calculated in accordance with the Uttar Pradesh Motor Vehicles Rules, 19987. Rule 220A-3(iii) 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.”

24. The UP Rules, 1998 came up for consideration before the Supreme Court in **New India Assurance Co. Ltd. vs. Urmila Shukla and others**⁸. In **Urmila Shukla (supra)** upon consideration of various judgements including **National Insurance Company Ltd. Vs. Pranay Sethi and others**⁹ 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)

25. 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*¹⁰. 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.”

26. 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.

27. In this wake, this Court finds that the claimants/respondents are entitled to 50% enhancement in wages under the head of future prospects as contemplated in the UP Rules, 1998. The necessary changes in the award shall be accordingly made.

VIII. Application of Split Multiplier:

28. The age of the deceased was 18 years at the time of the accident. The applicable multiplier as per *Sarla Verma (Smt) and others Vs. Delhi Transport Company and another*¹¹ read with *Pranay Sethi (supra)* is 18.

IX. Calculation of Conventional Heads:

29. 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.”

30. The figure under conventional heads determined in *Pranay Sethi (supra)* shall be applicable to the facts of this case. The award is modified accordingly.

X. Interest:

31. Interest of 7% and the manner of payment decided by the learned tribunal is just and lawful and does not call for interference.

XI. Determination of Compensation to which claimants are entitled:

32. 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 – 02.01.1998
- ii. Name of Deceased – Shyam Narayan
- iii. Age of the deceased – 18 years
- iv. Occupation of the Deceased – Student
- v. Income of the deceased – 35000/- per annum

vi. Name, Age and Relationship of Claimants with the deceased:

Sr. No.	Name	Age	Relation
1.	Babunandan		Father
2.	Pyari Devi		Mother

vii. Computation of Compensation

Sr. No.	Heads	Amount (in Rupees)
1	Annual Income (A)	Rs. 35000/-
2	Future Prospects (B)	50% of 35000/- =17500/-
3	Annual Income + Future Prospects (A+B=C)	35000 + 17500 = 52,500/-
4	Deduction towards personal expenses (D) (50% of C)	50% of 52,500/- = 26,250/-
5	Annual Loss of dependancy (E) (C-D = E)	26,250/-
6	Multiplier (F)	18
7	Total loss of dependancy (E x F)	26,250 x 18 = 4,72,500/-
8	Conventional Heads: (a) Loss of consortium (b) Loss of Estate (c) Funeral Expenses	70,000/-
9	Total compensation	5,42,500/-
10	Interest	7%

XII. Conclusion and Directions:

33. In view of the above, the appeal is partly allowed.

35. The amount deposited by the appellant before this Court shall be transmitted to the learned trial court which shall release the same in favour of the claimants.

Criminal Law - Criminal Procedure Code, 1973 - Sections 200, 202 & 482 - Negotiable Instrument Act, 1881 - Section 138: - Application U/s 482 – for quashing the summoning order as well as entire proceedings – complaint – filed by the opposite party no. 2 u/s 138 NI Act, - – offence of Cheating and dishonesty – dishonour of cheques on the ground that 'Drawer signature Differ' – summoning order – court feels that, the structural defect in the

cheque issued by any drawer may have several reasons, which may either be bonafide, unintentional or be dishonest and malafide – the difference in signature and incomplete signature is none of several categories of structural defects and the reason of such structural defect is a matter of trial and is required to be adjudged after appreciation of the evidence – applicant has taken plea of such structural defect just to get rid of his criminal liability by seeking quashment of impugned order in question without making any plea about non-liability of amount to make payment or the plea of any debt or other liability of complainant to rebut the stand of complainant - held, complaint u/s 138 NI Act, cannot be quashed by high court by taking recourse to section 482 Cr.P.C., if disputed questions of facts are involved which need to be adjudicated after respective evidence is led by the parties before the trial court – accordingly, application is dismissed. (Para – 10, 11, 12)

Application u/s 482 dismissed. (E-11)

List of Cases cited:

1. Messrs. Laxmi Dyechem Vs St. of Guj. & ors.(2012) 13 SCC 375),
2. CC Alavi Haji Vs Palapetty Muhammed & anr.(2007) 6 SCC 555),
3. Ajeet Seeds Ltd. Vs K. Gopala Krishnaiah, (2014) 12 SCC 685),
4. Bharat Barrel & Drum Manufacturing Company Vs Amin Chand Payarelal (1999) 3 SCC 35),
5. Basalingappa Vs Nudibasappa (2019) 5 SCC 418),
6. Kishan Rao Vs Shankargauda (2018) 8 SCC 165),
7. Ranjit Vs St. of U.P. & anr.(Application u/s 482 no. 47282/2019 decided on 31.01.2020),

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

1. Heard Mr. Rakesh Kumar Srivastava, learned counsel for the applicant, Mr. K.P. Pathak, learned AGA for the State and perused the records.

2. The present application under Section 482 Cr.P.C. has been filed to quash the summoning order dated 30.01.2020 as well as the entire proceedings of Complaint Case No.08 of 2020, (Netrapal Awana vs. Omkar Lohiya), under Section 138 of Negotiable Instruments Act, 1881, Police Station-Phase-II NOIDA, District-Gautam Buddh Nagar, pending in the Court of the Additional Court No.3, Gautam Buddha Nagar.

3. Brief facts of the case are that the opposite party no.2 filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act') against the applicant stating therein that the applicant and opposite party no.2 are known to each other and on 10.06.2018, the applicant came to the house of opposite party no.2 and requested for Rs.10 lacs, which was needed by him. The aforesaid amount was given to him on 20.06.2018 by the opposite party no.2 with a condition that the same will be returned by the applicant within six months. Thereafter, in December, 2018, when the opposite party no.2 asked the applicant to return the money, the applicant had issued a cheque of Rs.10,00,000/- from Allahabad Bank, Branch-Bhangel, Phase-II NOIDA, Gautambuddha Nagar, bearing cheque no.035621 dated 16.07.2019 in favour of opposite party no.2. On receipt of the same, opposite party no.2 has presented the same before the concerned Bank for encashment on 16.07.2019, but the same was dishonoured due to "Drawer Signature Differ" on 17.07.2019. The aforesaid information was given to the applicant by

the opposite party no.2, but the applicant refused to return the amount as taken by him from the opposite party no.2. Thereafter, opposite party no.2 sent a legal notice to the applicant on 26.07.2019 through registered post, which has been received by the applicant on 27.07.2019. After the notice neither any amount was paid nor reply was submitted by the applicant, therefore, the present complaint has been filed on 21.08.2019. Subsequently, the learned Magistrate after recording the statement under Sections 200 and 202 Cr.P.C. summoned the applicant vide order dated 30.01.2020, under Section 138 of the Act.

4. Learned counsel for the applicant submits that the applicant is innocent and has been falsely implicated in the present case. He disputed the signature on the cheque and stated that no such cheque was given by the applicant to the opposite party no.2, hence the ingredients of complaint under Section 138 N.I. Act are missing and, therefore, the proceedings are clearly not maintainable under the Negotiable Instruments Act, 1881. He further submits that another cheque for the same amount, which has been placed at page 43 bearing different signature, has been placed before the bank and dishonoured, for which another complaint has also been lodged. Thus, the summoning order as well as the entire proceedings is liable to be quashed.

5. On the other hand, Mr. K.P. Pathak, learned AGA for the State, has submitted that the difference in signature of the applicant in the cheque very well make out the offence u/s 138 N.I. Act as the Apex Court in the case of *Messrs. Laxmi Dyechem vs. State of Gujarat and others* reported in (2012) 13 SCC 375 has held that any such technical reason or

endorsement of Bank for dishonour of cheque does not affect/disqualifies the prosecution under section 138 N.I. Act and would constitute the offence u/s 138 N.I. Act. He further submits that the summoning order passed by the concerned Magistrate is legal and just in the eyes of the law and at this stage, only a *prima facie* case is to be seen and the complaint cannot be thrown at the threshold. He further submits that in case, cheque is disputed, the same can be seen at the time of trial. The cheque placed at page 43 pertains to different cheque number and different transaction, therefore, another complaint under Section 138 N.I. Act has been filed as permitted under the law. Therefore, the present application is liable to be dismissed.

6. I have carefully considered the submissions advanced by learned counsel for the parties and have also gone through the material available on record.

7. Before proceedings further, it is apposite to give reference of some judgments of the Apex Court as well as this Court, wherein the Apex Court has laid down the guideline for quashing of criminal proceedings arising out of Section 138 of N.I. Act, which are as follows:-

i) *C.C. Alavi Haji Vs. Palapetty Muhammed and Another, reported in (2007) 6 SCC 555;*

ii) *Ajeet Seeds Ltd. vs. K. Gopala Krishnaiah, reported in 2014 12 SCC 685;*

iii) *Bharat Barrel & Drum Manufacturing Company Vs. Amin Chand Pyarelal, reported in (1999) 3 SCC 35;*

iv) *Basalingappa Vs. Mudibasappa reported in (2019) 5 SCC 418;*

v) *Kishan Rao Vs. Shankargouda, (2018) 8 SCC 165;*

vi) *Ranjit vs. State of U.P. and another decided on 31.01.2020 passed in Application U/s 482 No. 47282 of 2019.*

9. The law regarding the issue where drawer's signature was incomplete or differing signature has been dealt by the Apex Court in the case of *Laxmi Dyechem Vs. State of Gujrat and others reported in (2012) 13 SCC 375*, wherein it has been held that in case the cheque has been dishonoured on account of "drawer's signature differs", it shall also be a punishable offence and attract to the criminal proceedings under section 138 of the Negotiable Instrument Act.

10. In view of the settled legal position, as noticed above, it is clear that at this stage, only a *prima facie* case is to be seen and the complaint cannot be thrown at the threshold. The Court feels that the structural defect in the cheque issued by any drawer may have several reasons, which may either be bonafide, unintentional or be dishonest and malafide. It would be very unreasonable to say that the receiver of any cheque issued by any drawer should first ensure as to whether there is any structural defect in the cheque or not and further to ensure as to whether such structural defect is an out come of either of the aforesaid reasons. Such structural defects can in most cases come to the knowledge of receiver of the cheque, when the same is returned by the Bank as dishonoured with an endorsement mentioning reasons for its dishonour. The difference in signatures and incomplete signature is one of several categories of structural defects and the reason of such structural defect is a matter of trial and is

required to be adjudged after appreciation of the evidence.

11. In the present matter, the applicant has taken plea of such structural defect just to get rid of his criminal liability by seeking quashment of impugned order in question without making any plea about the non-liability of amount to make payment or the plea of any debt or other liability of complainant to rebut the stand of complainant.

12. It is well settled that for the purpose of quashing of a complaint, the High Court cannot look into the defence of the accused. The Court is only required to see whether on the basis of the averments made in the complaint and the relevant particulars produced by the complainant, there are grounds for proceeding against the accused. Inherent power of quashing criminal proceedings U/s 482 Cr.P.C. should be exercised very sparingly and with great circumspection. It does not confer on the court to act arbitrarily as per its own whims and caprice. At this stage, the Courts could not have gone into the merits and reached a conclusion that there are no existing debt or liability and quash the complaint. Therefore, the basic law is that the complaint under Section 138 of Negotiable Instrument Act cannot be quashed by High Court by taking recourse to Section 482 Cr.P.C, if disputed questions of facts are involved which need to be adjudicated after respective evidence is led by the parties before the trial court

13. On the basis of discussions made herein above, this Court finds that there is no illegality or infirmity in the summoning order dated 30.01.2020 passed by the concerned court below. Therefore, the prayer for quashing the impugned

summoning order as well as the entire proceedings of the aforesaid case are refused, as I do not see any abuse of the court's process at this pre-trial stage.

14. In view of the aforesaid, the application is, accordingly, **dismissed**.

(2023) 7 ILRA 151
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2023

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Application U/S 482 No. 6596 of 2023

Juvenile-X **...Applicant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:

Sri Sushil Shukla, Sri Aditya Prakash Singh

Counsel for the Opposite Parties:

G.A.

Criminal Law - Criminal Procedure Code, 1973 - Section 482 - Indian Penal Code, 1860 - Sections 120-B, 419, 420, 467, 468 & 471 - Juvenile Justice (Care and Protection of Children) Act, 2015 - Section - 18(3): - Application U/s 482 - for quashing the impugned order as well as for a direction to the learned magistrate to transferred the case before Juvenile Justice Board - FIR, against unknown persons - offence of cheating by impersonation - investigation - Recovery - charge-sheet against either persons - cognizance drawn against all the accused persons - Applicant moved regular Bail application claiming juvenile - court held that, - at the time of commission of alleged offence applicant was about 16 years old and he was declared as juvenile by the order passed by the learned Juvenile Justice Board and therefore the magistrate concerned is directed to send the file of the instant case to the Juvenile Justice

Board/Children's Court having jurisdiction to try the case against the applicant in terms of section 18(3) of the Act, 2015 - accordingly, application is allowed. (Para – 11, 13, 14, 15)

Application u/s 482 allowed. (E-11)

List of Cases cited:

Barun Chandra Thakur Vs Master Bholu & anr,
2022 SCC OnLine SC 870

(Delivered by Hon'ble Shekhar Kumar
Yadav, J.)

1. I have heard Mr. Sushil Shukla & Mr. Aditya Prakash Singh, learned counsel for the applicant, Mr. R.P. Mishra, learned A.G.A. for the State and perused the material available on record.

2. This application under Section 482 Cr.P.C. has been filed by applicant to quash the impugned order dated 03.02.2023 passed by learned ACJM, Khurja, District Bulandshahar in connection with Criminal Case No.3431 of 2016 arising out of Case Crime No.483 of 2016, under Sections 419, 420, 467, 468, 471 and 120-B IPC, Police Station Khurja Nagar, District Bulandshahar and for a direction to the learned Magistrate to comply with the order dated 18.05.2022 passed by Juvenile Justice Board, Bulandshshar so that trial of the aforesaid case be transferred under Section 18 (3) of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as the "Act, 2015") before the Children's Court/POCSO Court, Bulandshahar having its jurisdiction.

3. In short, the facts in brief are that on 30.06.2016, the opposite party no.2 lodged the FIR against unknown persons alleging that on false promise of obtaining NOC from Pollution Board, U.P. to run his

cold storage, the informant/opposite party no.2 was duped of Rs.40 lakh by unknown person, who asked him to make deposit the said amount into some bank account, where after the OSD of Hon'ble Chief Minister was promised to help him. It is further alleged that the informant/opposite party no.2 issued three cheques, i.e., cheque no.408173 dated 22.06.2016 amounting to Rs.20 lakh, cheque no.408174 dated 22.06.2016 amounting to Rs.10 lakh and cheque no.408175 dated 24.06.2016 amounting to Rs.10 lakh. Total Rs. 40 lakh has been deposited by the informant/opposite party no.2 through R.T.G.S. in the Account No.20321300148, State Bank of India, C.O.G Bazar, Agra. It is further alleged that when the informant/opposite party no.2 has inquired about the said account, it was found that the said account is opened in the name of Narendra Singh s/o Anil Singh, House No.144, New Abadi, Taj Nagri, Tajganj, Agra Mobile No.8171978713. Since then the informant/opposite party no.2 has contacted several times but the accused person has not responded. Thereafter, the informant/opposite party no.2 has approached the Samajwadi Karyalaya, Lucknow and met one Ashish Yadav, who has stated that he never called and some one has duped his money naming his name.

4. After lodging the FIR, the aforesaid matter was investigated and during investigation it was found that in the alleged commission of offence total eight persons were involved. Co-accused Rahees and other two co-accused persons including the applicant were arrested on 24.07.2016 and from their joint possession Rs.5.5 Lacs were recovered. After conclusion of investigation, the investigating officer has submitted charge sheet on 10.09.2016 against all eight accused persons including

the applicant. Based upon charge sheet, the learned Additional Chief Judicial Magistrate vide order dated 16.09.2016 has taken cognizance and drawn criminal proceeding against all the accused persons. The applicant had moved regular bail claiming juvenility, which was allowed vide order dated 19.10.2016 till the Board made functional and pending decision regarding determination of age of the applicant. Ultimately, the applicant was declared juvenile vide order dated 18.05.2022 passed by Juvenile Justice Board, Bulandshahar.

5. Learned counsel for the applicant has submitted that the applicant was declared juvenile vide order dated 18.05.2022 and at the time of commission of alleged offence, the applicant was 16 years 9 months and 7 days and meaning thereby the applicant was above 16 years but less than 18 years. He has further submitted that after declaring juvenile, the guardian of applicant had moved an application dated 26.08.2022 before learned Additional Chief Judicial Magistrate Khurja, Bulandshahar praying therein to separate the file of trial proceedings of the instant case and send its file before the court having jurisdiction to try the case against the applicant but the same was rejected vide impugned order dated 03.02.2023. He has further submitted that the order impugned is illegal and continuation of trial proceedings of the instant case against the applicant/delinquent juvenile any further will be in violation of clear mandate of law as given under Section 18 (3) of the Act, 2015. Learned counsel for the applicant has drawn the attention of the Court towards the Annexure 11 of the affidavit filed in support of application wherein the Principal Magistrate vide letter dated 27.06.2022

requested the learned Additional Chief Judicial Magistrate to pass appropriate order for sending the matter to the Juvenile Justice Board, but instead of sending the file to the Juvenile Justice Board, learned Magistrate has passed the order impugned, hence, this application.

6. In support of his submission, learned counsel for the applicant has relied upon the judgment of Hon'ble Apex Court in the case of ***Barun Chandra Thakur vs. Master Bholu and another, 2022 SCC OnLine SC 870.***

7. Per contra, learned Additional Government Advocate has vehemently opposed the submissions made by learned counsel for the applicant.

8. I have considered the rival submissions advanced by learned counsel for the parties.

9. Before proceeding to deal with the submissions advanced, it would be appropriate to refer the Sections 18 (3) and 19 of Juvenile Justice (Care and Protection of Children) Act, 2015.

"18 (3). Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences.

19. Powers of Children's Court.

(1) After the receipt of preliminary assessment from the Board under Section 15, the Children's Court may decide that—

(i) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 (2 of

1974) and pass appropriate orders after trial subject to the provisions of this section and section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere;

(ii) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of section 18.

(2) The Childrens Court shall ensure that the final order, with regard to a child in conflict with law, shall include an individual care plan for the rehabilitation of child, including follow up by the probation officer or the District Child Protection Unit or a social worker.

(3) The Childrens Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail:

Provided that the reformatory services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support shall be provided to the child during the period of his stay in the place of safety.

(4) The Childrens Court shall ensure that there is a periodic follow up report every year by the probation officer or the District Child Protection Unit or a social worker, as required, to evaluate the progress of the child in the place of safety and to ensure that there is no ill-treatment to the child in any form.

(5) The reports under sub-section (4) shall be forwarded to the Childrens Court for record and follow up, as may be required."

10. As per terms of Section 18 (3) of the Act, 2015, the Magistrate has no power

to retain the file after declaring the applicant-accused as juvenile and the trial of any accused/delinquent juvenile, who is assessed to be tried as an adult, can only be held before the Children's Court/ POCSO Court in terms of Section 18 (3) of the Act, 2015.

11. But in the present case, the accused-applicant was 16 years 9 months and 7 days at the time of commission of alleged offence, hence, the accused-applicant was declared juvenile vide order dated 18.05.2022 passed by Juvenile Justice Board. After declaring the accused-applicant as juvenile, the Principal Magistrate has rightly requested the learned Additional Chief Judicial Magistrate to pass appropriate order for sending the matter to the Juvenile Justice Board/Children's court, but the learned Additional Chief Judicial Magistrate without giving any heed, rejected the same observing that as the file of the instant case has been transferred to his court, therefore, he will continue to hold the trial proceeding.

12. Recently, the Hon'ble Apex Court in the case of **Barun Chandra Thakur (supra)** has observed as under:

"81. We are conscious of the fact that the power to make the preliminary assessment is vested in the Board and also the Children's Court under Sections 15 and 19 respectively. The Children's Court, on its own, upon a matter being referred to under Section 18(3), would still examine whether the child is to be tried as an adult or not, and if it would come to the conclusion that the child was not to be tried as an adult then it would itself conduct an inquiry as a Board and pass appropriate orders under Section 18. Thus, the power to carry out the

preliminary assessment rests with the Board and the Children's Court. This Court cannot delve upon the exercise of preliminary assessment. This Court will only examine as to whether the preliminary assessment has been carried out as required under law or not. Even the High Court, exercising revisionary power under Section 102, would test the decision of the Board or the Children's Court with respect to its legality or propriety only. In the present case, the High Court has, after considering limited material on record, arrived at a conclusion that the matter required reconsideration and for which, it has remanded the matter to the Board with further directions to take additional evidence and also to afford adequate opportunity to the child before taking a fresh decision."

13. Perusal of letter of Principal Magistrate dated 27.06.2022 clearly states that after declaring the accused-applicant as juvenile, he has requested the learned Additional Chief Judicial Magistrate to pass appropriate order for sending the matter to the Juvenile Justice Board and the learned Magistrate ought to have complied with requisition request dated 27.06.2022 wherein it was asked to transfer the file of the instant case to the Juvenile Justice Board so that Board may transfer the said file to the Children's Court/POCSO Court having jurisdiction to try such case against the accused-applicant in terms of Section 18 (3) of the Act, 2015, but the learned Additional Chief Judicial Magistrate, instead of sending the file to the Juvenile Justice Board, has passed the order impugned.

14. In view of the facts and circumstances of the case and the law laid down as discussed above, the present

application u/s 482 Cr.P.C. is **allowed**. The impugned order dated 03.02.2023 passed by learned ACJM, Khurja, District Bulandshahar is hereby set aside.

15. Consequently, the instant case pending before the learned Magistrate stands transferred to the Children's Court in view of Section 18 (3) of Juvenile Justice (Care & Protection of Children) Act, 2015. The Magistrate concerned is directed to send the file of the instant case to the Juvenile Justice Board/Children's Court having jurisdiction to try the case against the applicant in terms of Section 18 (3) of the Act, 2015.

(2023) 7 ILRA 155

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 17.05.2023

BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Application U/S 482 No. 7631 of 2008

**Bobby Anand @ Yogesh Anand ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties**

Counsel for the Applicant:

Sri Punit Kumar Gupta, Sri A.P. Paul, Sri Anil Tiwari (Sr. Advocate)

Counsel for the Opposite Parties:

G.A., Sri Rahul Chautrvedi, Sri Suresh Chandra Pandey

Criminal Law - Criminal Procedure Code, 1973 - Sections 200, 210, 210(1) & 482 - Indian Penal Code, 1860 - Sections – 381, 420, 511 & 420 – Negotiable Instrument Act, 1881- Sections 118, 138, 139 & 142(2) - Application U/s 482 – for quashing the entire criminal proceedings - FIR – which was lodged by the opposite party as counter

blast – offence of Cheating and dishonesty – dishonour of cheques – investigation – Charge-sheet - summoning order – earlier, applicant moved a complaint to the bank about his two cheques were stolen from his office and letter on lodged an FIR u/s 381, 420 r/w 34 IPC at Mumbai – against the said criminal proceedings opposite party also approached to the Bombay High Court obtaining order of anticipatory bail – and in order to safeguard themselves, a counter blast opposite party no. 2 maliciously filed the present complaint in Mathura u/s 138 NI Act, - court finds that, the sanctity of the judicial process will be seriously eroded if such attempts are not dealt firmly, – no substance in the submission made by the learned counsel for opposite party no. 2 and learned AGA for St. and also find that case laws relied upon by them are clearly distinguishable in the facts of the present case – held, the present proceedings initiated against the applicant are not only malicious but also amount to an abuse of process of court – as such, the proceedings impugned are liable to be quashed by this court – accordingly, application is allowed. (Para – 66, 67, 68)

Application u/s 482 allowed. (E-11)

List of referred Cases: -

1. Taruna Batra Vs Shikha of Delhi High Court, reported in Law Finder Doc Id # 218864,
2. K. Sadanandan Vs Satheesh Kumar & anr. reported in (2016) 1 NIJ 93,
3. Raj Kumar Khurana Vs St. of (NCT of Delhi), reported in Law Finder Doc Id # 192011,
4. M/s. PEPSI Foods Ltd Vs Special Judicial Magistrate reported in Law Finder Doc Id # 7 40157,
5. Omni Plast Pvt. Ltd. Vs Standard Chartered Bank & ors. reported in Law Finder Doc Id # 659121,
6. Bimal Kumar Nopani Vs St. of U. P. & ors., 2006 (55) ACC 399.
7. Joitaram K. Patel Vs St. of Guj. & ors., Manu/ GJ/ 0036/1998
8. Naveen Saxena Vs St. of U.P. & ors., 2021 (7) ADJ 431
9. Rajeshbhari Muljibhai Patel Vs St. of Guj. (2020) 3 SCC 794).
10. M.M.T.C. Ltd. & anr. Vs Medchl Chemicals and pharma (P) Ltd. & anr. (2002) 1 SCC 234),
11. Rathish Babu Unnikrishnan Vs The St. (Govt. of NCT of Delhi) & ors., Manu/ SC/ 0542/2022.
12. Raj Kumar Khurana VS St. of (NCT OF DELHI) & anr. reported in (2009) 6 SCC 72
13. M/s Eicher Tractor Ltd. & ors. Vs Harihar Singh & anr., 2009(1) JIC 245 (SC)
14. M/s. Tilokchand Motichand & ors. Vs H.B. Munshi & anr., reported in AIR 1970 SC 898;
15. St. of Hary. Vs Karnal Distillery reported in AIR 1977 SC 781;
16. Sabia Khan & ors. Vs St. of U.P. & ors. reported in (1999) 1 SCC 271,
17. Agriculture & Process Food Products Vs Oswal Agro Furane & ors., reported in AIR 1996 SC 1947,
18. King Vs General Commissioner, reported in (1917) 1 KB 486,
19. Abdul Rahman Vs Prasony Bai & anr., AIR 2003 SC 718;
20. S.J.S. Business Enterprises (P) Ltd. Vs St. of Bihar & ors., reported in (2004) 7 SCC 166,
21. G. Jayashree Vs Bhagwandas S. Patel reported in (2009) 3 SCC 141.
22. Dhananjay Sharma Vs St. of Har. & ors., reported in AIR 1995 SC 1795,
23. Sunkara Lakshminarasamma & anr. Vs Sagi Subba Raju & ors. reported in (2009) 7 SCC 460
24. Afzal & anr. Vs St. of Har. & ors., reported in JT 1996 (1) SC 328,
25. Dhananjay Sharma Vs St. of Har. & ors. reported AIR 1995 SC 1795,

26. Sabia Khan & ors. Vs St. of U.P. & ors., (1999)
1 SCC 271.

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

1. Heard Anil Tiwari, learned Senior Counsel assisted by Sri A.P. Paul, learned counsel for the applicant, Sri Suresh Chandra Pandey, learned counsel for opposite party no.2 and learned A.G.A. for the State.

2. This application under Section 482 Cr.P.C. has been preferred for quashing the entire proceedings of Case No. 235/IX of 2003 (Dina Nath Chaturvedi Vs. Maa Sherwali Production and ors), under Section 138 of N.I. Act, Police Station Kotwali, District Mathura, pending in the court of Judicial Magistrate, Mathura.

CASE OF THE APPLICANT:

3. The applicant had given a complaint letter dated **31.10.2002** with Oshiwara Police Station, Mumbai wherein he informed that two cheques bearing No. 210547 and 210546 were stolen from his office. The applicant has also informed his bank i.e. Punjab and Sind Bank, Juhu Branch, Mumbai through the same letter dated **31.10.2002 (Annexure No.1)**, wherein he informed the bank not to clear the above mentioned cheques. On **01.01.2003** a phone call was received from the Bank that one of the cheques mentioned in his letter dated **31.10.2002** was presented before the Bank for clearance. The applicant immediately approached the Senior Inspector of Police, Oshiwara and registered an F.I.R. No. 1/2003 dated **01.01.2003 (Annexure No. 2)** against the respondents under Sections 381, 420 read with Section 34 I.P.C.

4. On **11.03.2003** as a counter blast to the aforesaid FIR lodged by the applicant, respondent no.2 filed a complaint against the applicant (Annexure No.3) alleging therein that the applicant borrowed Rs.30 lacs from the complainant 10 years ago and after settlement, applicant gave Cheque No. 210547 on **13.12.2002** and the same has been bounced.

5. Earlier on **22.02.1998** the opposite party no.2 gave an undertaking on the notary stamp paper stating therein that he had no title or interest in the firm named as "M/s. Maa Sherawali Production" and all assets and liabilities pertaining to the said firm belongs to applicant, namely, Sri Bobby Anand @ Yogesh Anand. (Annexure No.4.).

6. On submission of the said complaint by respondent no.2, the concerned Magistrate recorded the statement of the complainant under Section 200 Cr.P.C. on **28th March, 2003**, which is contradictory and creates doubt in the prosecution case (Annexure No.5). After that on 1st May, 2003, the concerned Magistrate without perusing the material on record and without application of mind, took cognizance thereon and summoned the applicant in a mechanical manner (Annexure No.6).

7. On the other hand, in F.I.R. No. 1/2003 dated **01.01.2003** lodged by the applicant, the Investigating Officer after completing investigation under Chapter XII Cr.P.C. submitted the charge-sheet against the opposite party no.2 and his associates, namely, Santosh, Rakesh Chaturvedi and Manoj Chaturvedi before Xth Metropolitan Magistrate Court at Andheri, Mumbai in Criminal Case No. 371/TW/2004. One accused Santosh arrested by the police on

22.01.2003 and he was granted bail by the X Metropolitan Magistrate. Thereafter opposite party no.2 and other co-accused persons moved anticipatory bail application before the Sessions Court, Greater Mumbai, and the same was rejected vide order dated **19.09.2003** (Annexure No.7). After rejection of anticipatory bail by the court below, the opposite party no.2 and other co-accused approached the Hon'ble High Court, Bombay and the Court passed a descriptive order mentioning therein that opposite party and other co-accused undertake to deposit the second cheque to the Investigating Officer forthwith (Annexure No.8).

8. The opposite party no.2 and other co-accused did not comply with their own undertaking given before the Hon'ble Bombay High Court while obtaining order of anticipatory bail and in order to safeguard themselves, as a counter blast opposite party no.2 maliciously filed the present complaint before the Judicial Magistrate, Mathura under Section 138 N.I. Act.

9. For compliance of the order of Hon'ble Bombay High Court, Senior Police Inspector, Oshiwara, Mumbai moved an application before learned Judicial Magistrate, Mathura with the request to allow him to seize the said cheque being the main ingredient and the relevant muddemal of the said case pending before the learned Xth Metropolitan Magistrate at Andheri, Mumbai (Annexure No.9).

10. The concerned Magistrate, Mathura without application of mind and without going through the materials on record, took cognizance upon the present complaint and ignoring the procedure of Section 210 Cr.P.C., whose sub-Section (1) provides that

when in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation. However, in the present case, concerned Magistrate, Mathura after taking cognizance summoned the applicant, which is wholly illegal, arbitrary and against the settled principle of law prescribed under section 210 (1) Cr.P.C.

11. In connection with above paragraphs, the applicant further clarifies that when the issue related with the present offences is subjudice and pending for disposal, then the parallel proceedings based upon the same instrument cannot be instituted and the same is required to be heard together in accordance with the provision of Section 210 (1) Cr.P.C.

12. As per a catena of judgment of Apex Court, it is a clear cut law that in cases of cross cases between the same parties as a matter of practice in order to avoid duplicacy of proceedings and also to avoid contradictory judgments coming from different court it is desirable that the proceedings be conducted by the same court one after another. Therefore, the passing of the impugned order by the learned Magistrate, Mathura becomes unsustainable in law and ought to be set aside (Reference: Nathi Lal and others Vs. State of U.P. and others, 1990 SCC 145).

13. Even on the point of jurisdiction the learned Magistrate erred in issuing the

order of process by over looking the factual matrix of the case. A bare perusal of the complaint would indicate that it has been the stand of the complainant i.e. the respondent herein that practically entire transaction right from inception had taken place in Bombay, therefore, he never had the jurisdiction to issue process. Except for the deposition of the cheque in Mathura and the issuance of the notice from there nothing else has taken place in Mathura. In fact as per the stand taken by the complainant the intimation of the dishonored cheques have been received by him in his residence in Bombay, therefore, it is clear that the cheque was deposited in Mathura only with the sole purpose of harassing the applicant by making him to appear in a remote and distant place, where he does not have any relations, connections or base to defend himself. Therefore, on this ground the order of process is liable to be set aside as the same has become instrument of harassment to the applicant rather than an instrument of justice to the opposite party. The opposite party no.2 is operating from Bombay. Even in the past opposite party no.2 was always based in Bombay; therefore, he could have very well filed the complaint in Bombay rather than filing in Mathura.

14. On the basis of the aforesaid facts and circumstances, the applicant moved objection before the learned Magistrate, Mathura vide Application dated 09.12.2003, but the same was rejected vide his order dated 28.06.2004 on the ground that the same is not maintainable and learned Magistrate ignored the procedure of Section 210(1) Cr.P.C. (Annexure No.10).

15. Vide order dated 28.06.2004, learned Magistrate rejected the objection under Section 204 Cr.P.C. on the ground

that the summoning order cannot be recalled under Section 204 Cr.P.C. against the impugned order dated 28.06.2004, the applicant preferred revision being No. 2886 of 2004, but vide order dated 04.01.2008, Hon'ble High Court has observed that the aforesaid relief cannot be granted in the revision.

16. In the meanwhile, opposite party no.2 started appearing as accused in the Magistrate Court at Bombay, where charge-sheet has been filed by the Bombay Police. Learned Public Prosecutor vide his order dated 07.02.2005 sought issuance of search warrant for the recovery of cheques which were stolen by the opposite party no.2 and ultimately presented in the Bank by committing an offence of forgery. It is noteworthy that learned Magistrate was pleased to issue an order dated 08.02.2005, whereby he issued a search warrant for the search of the house and for recovery of both the cheques in question.

17. The police did not execute the search warrant, so the applicant had to run from the pillar to post to secure justice to himself. The applicant then realized that nothing would come out so he filed a Misc. Application before the Principal Judge, at Sessions Court Mumbai. The learned Judge was pleased to pass an order dated 21.02.2007, whereby a clear cut direction was given to the police to execute the warrant and at the same time the learned Judge was pleased to direct that upon the submission of report of execution of the warrant the trial shall be concluded within a period of three to four months, there from. The said order has already been communicated to the learned Magistrate and he has given necessary direction to the police for execution thereof. The accused i.e. opposite party no.2 has participated in

the proceedings in the Magistrate Court and they were very well aware of the order passed by the Sessions Court at Bombay, but they have chosen to be quite. The mischief on the part of the accused can be gauged from the omnibus silence on their part. The opposite party no.2 never came to inform the court about the whereabouts of the cheques. He is actually getting benefit due to the lethargic approach of the police in executing the warrant. At the same time, the applicant, who is standing as complainant is handicapped inasmuch as he has been denied the opportunity of assisting the court. The learned Magistrate has taken a view that in a case, which has been instituted on the police report, the informant does not have the right to address the court by engaging his advocate. The learned Magistrate has always insisted upon the representation through the State Prosecutor. The applicant is stuck in vicious circle whereby, he has not been able to proceed with the matter in Bombay due to non-execution of the warrant.

Written argument on behalf of the applicant

18. Learned counsel for the applicant submits that the cheque in question was dishonoured and was otherwise payable through account of and, therefore, as per Section 142 (2) (b) of the Negotiable Instrument Act, Mathura Court does not have the jurisdiction to try the offence.

19. It is submitted that it is admitted case of opposite party no. 2 in his statement recorded under Section 200 Cr.P.C. that the cheque was given to him for discharging collective liability of M/s. ABC Pictures Pvt. Ltd., M/S. ABC Films, Kamud Films and personal liability and Section 138 of N.I. Act cannot be

invoked to discharge collective liability or liability of third party.

20. Assuming but not admitting, then also Section 138 of N.I. Act proceedings cannot be maintained because ingredients of Section 138 of N.I. Act are not fulfilled in the facts of the present case. It is further submitted that Section 138 N.I. Act does not speak about the joint/ collective liability. Even in case of a joint/ collective liability, in case of individual persons, a person other than a person who has drawn the cheque on an account maintained by him, cannot be prosecuted for the offence under Section 138 N.I. Act.

21. In support of this plea learned counsel for the applicant has placed reliance upon the Hon'ble Supreme Court in the case of Alka Khandu Avhad Vs. Amar Syamprasad Mishra, reported in (2021) 2 PUN LR 1. Reliance is also placed upon the judgement of Bombay High Court in the case of Hiten Sagar Vs. IMC Ltd. And another reported in LAW Finder Doc Id # 9631 wherein it has been held that "cheque issued by 'A' in discharge of liability of 'B' - Dishonour of cheque- 'A' is not liable - 'A' could be liable if he had taken upon himself the liability of 'B' by an agreement.

22. It is further submitted that while filing the present complaint under Section 138 N.I. Act before the concerned Magistrate at Mathura, opposite party no.2 has wilfully concealed that a criminal prosecution is pending regarding the same disputed cheque in the court of Mumbai, wherein the opposite party no.2 and others have been charge-sheeted and the charges have been framed against them under Sections 381, 420, 511 r/w 34 I.P.C.

Needless to add, the State of Maharashtra Police tried with respect of the stolen cheque bearing CC No. 2201205/PW/2006 is pending before the Court of X Metropolitan Magistrate at Andheri, Mumbai. In support of his plea, learned counsel for the applicant has placed reliance upon the judgment of the Delhi High Court in the case of *Taruna Batra Vs. Shikha of Delhi High Court*, reported in Law Finder Doc Id # 218864.

23. It is submitted that the disputed cheque was reported as stolen/ missing to the drawee bank on **31.10.2002** and stop payment instruction was given by the applicant. The cheque was returned with remark **“Stop payment”** later on. In such cases liability under Section 138 N. I. Act cannot be attracted. For the said plea, learned counsel for the applicant has placed reliance upon the judgment of the Kerala High Court in the case of K. Sadanandan Vs. Satheesh Kumar & Another reported in (2016) 1 NIJ 93 as also the judgment of the Apex Court in the case of Raj Kumar Khurana Vs. State of (NCT of Delhi), reported in Law Finder Doc Id # 192011, wherein it has held that the payment refused by Bank on the ground that the account holder has reported the cheques as lost/ stolen, no offence under Section 138 N.I. Act is made out.

24. It is further submitted that the summoning order dated 01.05.2003 was a proforma order and was passed without application of mind. Issuing of summon by learned Magistrate at JMFC Court, Mathura under Section 138 N.I. Act was illegal, arbitrary and against the settled principles of law as he has not considered the materials on record and has not scrutinized the evidence on record and has not given any reason for his conclusion as

there is absence of strict consideration of the penal provisions under Section 138 N.I. Act i.e. ingredients to constitute the offence under Section 138 of N.I. Act. Learned counsel for the applicant has drawn the attention of the Court to the judgment of the Apex Court in the case of M/s. PEPSI Foods Ltd Vs. Special Judicial Magistrate reported in Law Finder Doc Id # 40157, wherein the Apex Court has held in paragraph no.26 that “Order of Magistrate summoning the accused should reflect application of his mind – Mere examination of two witnesses by complainant is not sufficient- Magistrate has to carefully scrutinise the evidence and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of allegations or otherwise and then examine if any offence was prima facie committed by the accused.

25. Learned counsel for the applicant submits that it is well settled law that in absence of necessary averments in the complaint in question regarding the nature of transaction between the parties, complaint cannot be maintained on sketchy averments. He further submits that it is well settled law that the complainant should narrate the entire history of transaction and the off shoots of the transactions resulting in litigation between the parties. If the complainant does not place all material facts and details of the cheques, in his complaint before the Court, cognizance of his complaint has to suffer. One who does not come with clean hands has to suffer as the Hon’ble Supreme Court has declared that in absence of requisite pleadings in respect of the transaction concerned (i.e. absence of the details of the cheques, absence of the details of the date and the year of the cheques, absence of the details of the name of the Bank of the cheques,

absence of the details of the cheque number and absence of the time or the year when the said loan was advanced, etc.) quashing of complaint under Section 138 N.I. Act is justified. In support of his plea, learned counsel for the applicant has placed reliance upon the judgment of the Hon'ble Supreme Court in the case of **Omni Plast Pvt. Ltd. Vs. Standard Chartered Bank and others** reported in *Law Finder Doc Id # 659121*.

26. It is lastly submitted by the learned counsel for the applicant that the statutory notice under section 138 of N.I. Act has been sent on 27.01.2003 by the opposite party no.2 i.e. after the period of 15 days from the date of intimation of the dishonour of the stolen cheque number 210547 from Dena Bank, Mathura. Therefore, the demand notice being beyond the period of limitation cannot be considered because, the cause of action came to an end on 25.01.2003 and 26.01.2003. Hence the complaint filed at Mathura is liable to be quashed. Reliance in that regard is placed upon the judgment of Hon'ble Supreme Court in the case of *Tomy Jacob Kattikkaran Vs. Dr. Thomas Man Jaly* and another reported in *Law Finder Doc Id # 39681*.

27. On the cumulative strength of the aforesaid, learned counsel for the applicant submits that the entire criminal proceedings initiated by the respondent no.2/opposite party no.2 against the applicant is not only illegal but is an abuse of process of law, as such, the same are liable to be quashed by this Court in exercise of powers under Section 482 Cr.P.C.

CASE OF THE OPPOSITE PARTIES

28. Opposite party no.2 filed a complaint under Section 138 of N.I. Act against the applicant and his company, namely, Maa Sherawali Production Limited. The allegations made in the complaint are that opposite party no.2 gave money to the applicant and his firms on various dates amounting to Rs.30,00,000/- for which the applicant issued a Cheque No. 210457 from his account No. 2622 of Punjab and Sindh Bank, Juhu, Mumbai and the same has been dishonoured and the opposite party gave notice to the applicant to which he denied to pay the same, hence the present complaint was filed.

29. The present case pertains to a Cheque dated **13.12.2002**, which was submitted in the Bank on 26.12.2002, which was dishonoured on 13.01.2003. A case was filed on 28.03.2003 and the learned court summoned the applicant on 01.05.2003 and since then the matter is pending because of dilatory tactics adopted by the applicant.

30. It would be pertinent to mention that the applicant preferred a Criminal Revision No. 2886 of 2004 before this Hon'ble Court against the summoning order dated 01.05.2003, which was dismissed as not pressed without granting any liberty to file afresh application as such the present application is not maintainable. A copy of the order dated 18.04.2008 passed in Criminal Revision No. 2886 of 2004.

Written Submission on behalf of opposite party no.2 as also the submission of learned A.G.A. for the State

31. The learned counsel for the opposite parties submit that the applicant has taken a defence that the cheque in issue

in the present case has been stolen and an F.I.R. has been registered and he has given stop payment instruction to the bank. They have drawn the attention of the judgment of the Hon'ble Supreme Court in the case of HMT Watches Ltd. Vs. M.A. Abida and others (2015) 11 SCC 776, wherein it has been held that stop payment also attracts the provisions of Section 138 N.I. Act and the factual defence of the accused can not be considered in an application seeking quashing of the proceedings.

32. The learned counsel for the opposite parties further submit that in the cases where the cheque was dishonoured on account of “stop payment” or instructions of the drawer, a presumption regarding the cheque being for consideration would arise under Section 139 of the Act. Reliance in that regard is placed upon the judgment of the Hon'ble Supreme Court in the case of Laxmi Dyechem Vs. State of Gujarat and others (2012) 13 SCC 375. They have further placed reliance upon the judgment of the Apex Court in the case of Goaplast (P) Ltd. v. Chico Ursula D'souza and Anr. (2003) 3 SCC 232, where the Apex Court has held that ‘stop payment instructions’ and consequent dishonour of the cheque of a post-dated cheque attracts provision of Section 138.

33. The learned counsel for the opposite parties further submit that the defence of stolen cheque cannot be taken in the High Court by means of an application under Section 482 Cr.P.C. seeking quashing of the proceedings as the same is a question of fact as the same has been held by this Hon'ble Court in the case of **Bimal Kumar Nopani Vs. State of Uttar Pradesh and others, 2006 (55) ACC 399**. The learned counsel for the opposite parties further

relies upon the judgment of the Gujarat High Court in the case of **Joitaram K. Patel Vs. State of Gujarat and others, Manu/ GJ/ 0036/1998** wherein it has held that defence of stolen cheque cannot be taken in the High Court by an application under Section 482 Cr.P.C. seeking quashing of proceedings as the same is a question of fact.

34. Learned counsel for the opposite parties further submit that at any rate, whenever facts are disputed the truth should be allowed to emerge by weighing the evidence (Reference:-**Rajeshbhari Muljibhai Patel Vs. State of Gujarat (2020) 3 SCC 794**). This Hon'ble Court in the case of **Naveen Saxena Vs. State of U.P. and others, 2021 (7) ADJ 431** held that proceeding cannot be quashed on the basis of factual defiance and that stop payment also attracts the provisions of Section 138 of the N.I. Act.

35. Learned counsel for the opposite parties further submit that the burden of proving that there is no existing debt or liability, is to be discharged in the trial (Reference:- two judges Bench of the Hon'ble Supreme Court in the case of M.M.T.C. Ltd. And another Vs. Medchl Chemicals and pharma (P) Ltd. And another (2002) 1 SCC 234).

36. It is then submitted that at the stage of summoning order, when the factual controversy is yet to be canvassed and considered by the trial court. Based upon a prima facie impression, an element of criminality cannot be entirely ruled out here subject to the determination by the trial court. Therefore, when the proceedings are at a nascent stage, scuttling of the criminal process is not merited. Reliance in that regard is placed upon the judgment of

the Apex Court in the case of **Rathish Babu Unnikrishnan Vs. The State (Govt. of NCT of Delhi) and ors, Manu/ SC/ 0542/2022.**

On the cumulative strength of the aforesaid submissions learned counsel for the opposite parties submits that there is no illegality or infirmity in the order of summoning of the applicant passed by the concerned Magistrate, as also in the order affirming the same passed by the revisional court. It is further submitted that the submissions made by the learned counsel for the applicant that stolen cheques cannot be a basis for not constituting an offence of Section 138 of N.I. Act. As such the present application is liable to be dismissed.

37. I have considered the submissions made by the learned counsel for the applicants and have gone through the records of the present application.

**ISSUE WHETHER SECTION 138
N.I. ACT IS APPLICABLE IN THE
FACTS OF PRESENT CASE AND
THE FINDING AND CONCLUSION
OF THIS COURT**

38. It is admitted position from the records of the present application that the applicant has also informed his bank M/s. Punjab and Sind Bank, Juhu Branch, Mumbai through the same letter dated **31.10.2002 (Annexure No.1)**, wherein he informed the bank not to clear the above mentioned cheques.

39. For ready reference the averments made in the letter dated **31.10.2002** are being quoted herein-below:

“From

*AA SHERAWALI PRODUCTIONS
Date: 31.10.2002*

1/603 Mari Gold C H S LTD

6th Floor New Link Road

Opp Oshiwara Police Station

Andheri (W)

Mumbai-400 053

To

The Manager

Punjab & Sind Bank

Dear Sir/Madam

Re: Our Current Account No: 2664

It has been brought to our notice by my company accountants that our cheques nos: 210546 & 210547 which were left signed by me in the custody of my employees since I was busy travelling, have been STOLEN.

I, instruct your bank to immediately STOP PAYMENT of the above Mention cheques if the same are received by your bank, and to immediately inform me of the same.

In case we discover any other missing cheques we will inform you of the same.

Kindly do the needful

Yours truly

For SHERAWALI PRODUCTIONS”

40. It is also admitted from record that on **01.01.2003** a phone call was received from the Bank that one of the cheques mentioned in his letter dated **31.10.2002** was presented before the Bank for clearance. The applicant immediately approached the Senior Inspector of Police, Oshiwara and registered an F.I.R. No. 1/2003 dated **01.01.2003** (Annexure No. 2) against the respondents under Sections 381, 420 read with Section 34 I.P.C.

41. Before expressing any opinion on the merits of the case set up by both the parties, it would be worthwhile to reproduce Sections 118, 138 and 139 of the

Negotiable Instrument Act, which are quoted herein-below:

“118. Presumptions as to negotiable instruments. —Until the contrary is proved, the following presumptions shall be made:—

(a) of consideration —that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date —that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance —that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer —that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements —that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps —that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course —that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

138. Dishonour of cheque for insufficiency, etc., of funds in the account.

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

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 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.]

139. Presumption in favour of holder.—*It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."*

42. The Legal Fiction created under Section 138 of the N.I. Act, when a cheque is returned by the bank unpaid has been explained as follows:

"A bare perusal of the aforementioned provision would clearly go to show that by reason thereof a legal fiction has been created. A legal fiction, as is well known, although is required to be given full effect, has its own limitations. It cannot be taken recourse to for any purpose other than the one mentioned in the statute itself.

In State of A.P. & Anr. V. A.P. Pensioners Association reported in (2005) 13 SCC 161, the Apex Court has held as follows:

"...In other words, all the consequences ordinarily flowing from a rule would be given effect to if the rule otherwise does not limit the operation thereof. If the rule itself provides a limitation on its operation, the consequences flowing from the legal fiction have to be understood in the light of the limitations prescribed. Thus, it is not possible to construe the legal fiction as simply as suggested by Mr. Lalit."

11. Section 138 of the Act moreover provides for a penal provision. A penal provision created by reason of a legal fiction must receive strict construction. (See R. Kalyani v. Janak C. Mehta & Ors., (2009) 1 SCC 516) and DCM Financial Services Ltd. v. J.N. Sareen & Anr. (2008) (2) KLT 762 (SC) = (2008) 8 SCC 1). Such

a penal provision, enacted in terms of the legal fiction drawn would be attracted when a cheque is returned by the bank unpaid. Such non- payment may either be: (i) because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank.

Before a proceeding thereunder is initiated, all the legal requirements therefor must be complied with. The court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with.

The parameters for invoking the provisions of S.138 of the Act, thus, being limited, we are of the opinion that refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of S.138 of the Act.

12. The court while exercising its jurisdiction for taking cognizance of an offence under S.138 of the Act was required to consider only the allegations made in the complaint petition and the evidence of the complainant and his witnesses, if any."

43. The penal provision, enacted under Section 138 of the Negotiable Instrument Act shows that a legal liability drawn would be attracted when a cheque is returned by the bank unpaid. It explains that, such non-payment by the bank may either be: (i) because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank. Before a proceeding the legal requirements mentioned therein must be complied with and convince the court that all the ingredients of the offence have

been complied with. Therefore it is clear that the parameters for invoking the provisions of S.138 of the Act being limited, the refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of S.138 of the Act.

44. Considering the above limitation, the question here is, whether a cheque is returned by the bank on the ground "cheque reported lost" will come within the purview of Section 138 of the N.I. Act. The limitations are provided in the above dictum. Therefore, the refusal on the part of the bank to honour the cheque would not bring the matter within the penal provisions of Section 138 N.I. Act. The facts and issue involved in the present case are fully applicable to the judgment of the Apex Court in the case of **Raj Kumar Khurana VS. State of (NCT OF DELHI) & Another** reported in (2009) 6 SCC 72.

45. In paragraph nos. 10 to 12 the Apex Court in the case of Raj Kumar Khurana has observed as follows:

"10. A bare perusal of the aforementioned provision would clearly go to show that by reason thereof a legal fiction has been created. A legal fiction, as is well known, although is required to be given full effect, has its own limitations. It cannot be taken recourse to for any purpose other than the one mentioned in the statute itself. In State of A.P. & Anr. Vs. A.P. Pensioners Association & Ors. [(2005) 13 SCC 161], this Court held:

"...In other words, all the consequences ordinarily flowing from a rule would be given effect to if the rule otherwise does not limit the operation thereof. If the rule itself provides a

limitation on its operation, the consequences flowing from the legal fiction have to be understood in the light of the limitations prescribed. Thus, it is not possible to construe the legal fiction as simply as suggested by Mr. Lalit."

11. Section 138 of the Act moreover provides for a penal provision. A penal provision created by reason of a legal fiction must receive strict construction.....

Before a proceeding thereunder is initiated, all the legal requirements therefore must be complied with. The court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with.

12. The parameters for invoking the provisions of Section 138 of the Act, thus, being limited, we are of the opinion that refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of Section 138 of the Act."

46. In view of the legal proposition as discussed above, this Court is of the view that the essential ingredients of Section 138 of the Act are lacking in the facts of the present case as the case of stolen/lost/theft cheque does not fall under the ambit of Section 138 of N.I. Act, thus Section 138 N.I. Act will not be applicable in such cases.

APPLICABILITY OF SECTION 210 (1) CR.P.C. IN THE FACTS OF THE PRESENT CASE, FINDING AND CONCLUSIONS OF THIS COURT

47. From the records it is cropped up that for two stolen cheques being Cheque Nos. 210547 and 210546, the applicant wrote a letter to the concerned Bank on 31st October, 2002 requesting not to clear

or encash the same and when the Bank informed him on telephone that cheque no. 210547 was submitted before the Bank for its clearance/encashment, then the applicant lodged an FIR bearing no. 1 of 2003 at Police Station Oshiwara at Mumbai under Sections 381, 420 read with Section 34 I.P.C. on 01st January, 2003 against the complainant/opposite party no.2 along with other co-accused persons and the present complaint for dishonour of the same cheque i.e. cheque no. 210547 has been filed by the complainant on 11th March, 2003 against the applicant. In Case Crime No. 1 of 2003 at Police Station-Oshiwara at Mumbai, after investigation proceeded and ultimately, charge-sheet came to be submitted against the complainant and other co-accused persons, namely, Santosh, Rakesh Chaturvedi and Manoj Chaturvedi before the Court of X Metropolitan Magistrate, Andheri, Mumbai on which cognizance was taken and Criminal Case No. 371/TW/2004 was registered, after that co-accused Santosh was arrested and he granted bail by the court concerned. Opposite party no.2 and co-accused Rakesh Chaturvedi and Manoj Chaturvedi preferred anticipatory bail application before the Bombay High Court and they were granted anticipatory bail by the Court concerned of the Bombay High Court vide orders dated 3rd November, 2003 In Anticipatory Bail Application No. 3963 of 2003 (Dinanath Chaturvedi & Ors. Vs. The State of Maharashtra). The relevant portion of the order of the Bombay High Court dated 3rd November, 2003 reads as under:

“3. It is noticed that the applicants have already filed criminal case for dishonour of cheque against the complainant and at the behest complainant, C.R.No.1 of 2003 has been at the Oshiwara Police Station at Mumbai for offences

punishable under Sections 381 and 420 read with Section 34 of the Indian Penal Code. The applicants apprehend arrest.

4. The subject matter of the complaint registered against the applicants are two cheques which are alleged to have been stolen from the office of the complainant and one of them or both are subject matter of the proceedings initiated under Section 138 of the Negotiable Instruments Act in a Court at Mathura in Uttar Pradesh. The learned A.P.P. on instructions from the investigating Officer states that the remaining cheque also is not submitted to him by the Applicants and therefore, taking into consideration the allegations for forged signature, their custodial interrogation is necessary.

5.....

6. It is therefore directed that in the even or any of the Applicant's arrest, he/they shall be released on bail in the sum of Rs.50,000/ (Rupees Fifty Thousands) each, with a solvent surety for the like amount, and on the condition that all the Applicants shall report to the Investigating Officer at Oshiwara Police Station for a period of two weeks from tomorrow or day after tomorrow between 2.00 to 6.00 p.m. and none of them shall leave the territories of Greater Bombay District without permission of the said Investigating Officer.

7. The Applicants also undertakes to deposit the second cheque with the Investigating Officer forthwith.

8. This order shall be valid for a period of four weeks or till the interrogation is completed whichever is later, and it operates only of C.R. No. 01/2003.”

48. Despite the order of the Bombay High Court dated 3rd November, 2003 and

the undertaking given before it, the complainant has not submitted the said cheque before the Investigating Officer of Case N. C.R. No. 01 of 2003.

49. Apart from the above, in compliance of the order of the Bombay High Court dated 3rd November, 2003, Senior Police Inspector of Police Station-Oshiwara, Mumbai moved an application before the concerned Judicial Magistrate, Mathura along with the order of the Mumbai High Court dated 18th June, 2004 requesting therein that he may be permitted to seize the cheque, which is alleged to be dishonoured cheque, for which the present complaint has been filed by the complainant/opposite party no.2 against the applicant on 24th November, 2003, as the said cheque being the main ingredient and relevant muddemal of the Criminal Case No. 371/TW/2004 pending before the X Metropolitan Magistrate, Andheri, Mumbai but no order was passed by the concerned Magistrate at Mathura in the present complaint case. After passing of the summoning order passed by the concerned Magistrate at Mathura in the present complaint case, the applicant filed objection by means of application dated 9th December, 2003 that when the issue related with the present offences is subjudice and pending for disposal, then the parallel proceeding based upon the same instrument cannot be instituted and the same is required to be heard together as per the provisions of sub-Section (1) to Section 210 Cr.P.C. But ignoring the said provisions, the concerned Magistrate has rejected the said objection of the applicant vide order dated 28th June, 2004, which was confirmed by the revisional court vide order dated 4th January, 2008.

50. For resolving the said issue, it would be worthwhile to reproduce sub-

Section (1) to Section 210 Cr.P.C., which is quoted as under:

“210.Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.

(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject- matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

....”

51. From perusal of the aforesaid fact and Section 210 (1) Cr.P.C., it is crystal clear that the concerned Magistrate at Mathura has not only disobeyed the orders of the Bombay High Court dated 3rd November, 2003 and 24/28th June, 2004, which is higher court and but also ignored the provisions of Section 210 (1) Cr.P.C. while proceeding further in the present criminal case, despite the fact that the cheque giving rise to the present complaint case is a case property in Criminal Case No. 371/TW/2004 pending before the X Metropolitan Magistrate, Andheri, Mumbai and for its seizure, an application has been made by the Senior Police Inspector of Police Station-Oshiwara, Mumbai on 24th November, 2003 before him. Therefore, this Court is of the firm opinion that the further proceedings in the present complaint as per Section 210 (1) Cr.P.C. are per se illegal.

**THE ISSUE WHETHER THE
PRESENT CRIMINAL
PROCEEDINGS ARE A CASE OF
COUNTER BLAST OR NOT? AND
THE FINDING AND CONCLUSIONS
OF THIS COURT**

52. It is also cropped up from the record that on **1st January, 2003**, the applicant lodged an FIR bearing no. 01 of 2003 for stolen of cheque, against the complainant and three co-accused persons under Section 381, 420 read with Section 34 I.P.C. at Police Station Oshiwara at Mumbai in which after submission of the charge-sheet, all the accused persons granted anticipatory bail/regular bail. It is also emerged that **after more than two months and eleven days i.e. on 11th March, 2003 after lodging of the aforesaid FIR**, the complainant filed the present complaint under Section 138 N.I. Act for dishonour of cheque no. 210547, against the applicant before the concerned Court of Magistrate at Mathura. Meaning thereby the present complaint case is a case of counter blast to the criminal proceedings initiated by the applicant by lodging the aforesaid FIR.

53. The Apex Court considering the case of counter blast or wreak vengeance **M/s Eicher Tractor Ltd. and others Vs. Harihar Singh and another**, 2009(1)JIC 245 (SC) has held as follows:

“7. In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction

under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process, no doubt, should not be an instrument of oppression or needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana Vs. Bhajan Lal [1992 Supp (1) SCC 335]. A note of caution was, however, added that the power should be exercised sparingly and that too in the rarest of the rare cases. The illustrative categories indicated by this Court are as follows: (SCC pp. 378-79, para 102) "(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under

an order of a Magistrate within the purview of Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fides 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."

8. As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised

to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceedings instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is

mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in the court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by itself be the basis for quashing the proceedings.

9. These aspects were also highlighted in *State of Karnataka Vs. M. Devendrappa* [2002(3) SCC 89].

10. The case at hand squarely falls within the parameters indicated in category (7) of Bhajan Lal's case (supra). The factual scenario as noted above clearly shows that the proceedings were initiated as a counterblast to the proceedings initiated by the appellants. Continuance of such proceedings will be nothing but an abuse of the process of law. Proceedings are accordingly quashed."

54. On deeper scrutiny and evaluation of the aforesaid fact and the law laid down by the Apex Court in the case of **Eicher Tractor (Supra)**, this Court is of the considered opinion that the present criminal proceedings by filing a complaint have been engineered to wreak vengeance, which is not permissible.

THE ISSUE WHETHER THE OPPOSITE PARTY NO.2/COMPLAINANT HAS CONCEALED THE MATERIAL FACT IN FILING OF THE PRESENT COMPLAINT CASE OR NOT?

55. For examining the submission of the learned counsel for the applicant that the complainant/opposite party no.2 has concealed the material fact i.e. pendency of criminal case arising out of FIR bearing no. 01 of 2003 against the complainant and three co-accused persons under Section 381, 420 read with Section 34 I.P.C. at Police Station Oshiwara at Mumbai against him along with other co-accused in filing of the present complaint case dated 11th March, 2003 under Section 138 N.I. Act before the Court of concerned Magistrate, Mathura, it would be worthwhile to reproduce the same, which is being quoted herein below:

"महोदय,

संक्षेप में परिवादी का आरोप है कि परिवादी ऐ.बी.सी. पिक्चर्स प्रा०लि० का निदेशक है तथा ऐ.बी.सी. फिल्मस का सह भागीदार है तथा फमोद फिल्मस में परिवादी के परिजन सह भागीदार है इस प्रकार परिवादी अपने परिजनों सहित चलचित्रों से सम्बन्धित व्यवसाय करता है। परिवादी अपनी के.एच.यू.एफ. का कर्ता भी है।

यह कि अभियुक्त बॉबी आनन्द उपरोक्त भी माँ शेरवाली प्रोडक्सन के नाम से फिल्म प्रोडक्सन का कार्य करते हैं। तथा अपनी उपरोक्त फर्म के प्रोपराइटर होने के नाते फर्म के प्रत्येक क्रियाकलाप के लिए पूर्ण रूपेण जिम्मेदार है और दायित्व वहन करते हैं तथा एक ही व्यवसाय में रहने के कारण परिवादी व अभियुक्त एक दूसरे के पूर्व परिचित थे तथा अभियुक्त बॉबी आनन्द ने परिवादी से और भी अधिक नजदीकियाँ बढ़ा रखी थी।

यह कि अभियुक्त ने परिवादी को उपरोक्त नजदीकियों के कारण विश्वास में लेकर अपने व्यवसाय में अचानक धनराशि की आवश्यकता पड़ते रहने की समस्या से अवगत कराया और स्वयं के पास पर्याप्त धनराशि का अभाव बतलाते हुए समय समय पर ऋण के रूप में धनराशि प्राप्त करने और सुविधानुसार व्याज सहित चुका दिए जाने का विश्वास दिलाया और यह भी आश्वासन दिया कि परिवादी की सुविधा के अनुसार अभियुक्त उन्हें ऋण राशि अदा करने की एवज में चैक प्रदान कर देगा। जिससे ऋण राशि चुकायी जा सके।

यह कि उपरोक्त क्रम में परिवादी ने अपनी ए.बी.सी. पिक्चर्स प्रा०लि० से विभिन्न तारीखों 13,85,000/-रु० । तेरह लाख पिच्चासी हजार रूपये, ऐ.बी.सी. फिल्मस से 9,10,000/-रु०। नौ लाख दस हजार रूपये, फमोद फिल्मस से 20,90,000/-

रु०। दो लाख नौ हजार रूपये, तथा स्वयं परिवादी ने 4,96000/-रु०। चार लाख छयान्वे हजार रूपये। विभिन्न तिथियों पर अभियुक्त के मागने पर उसे ऋण के रूप में प्रदान किये जो कुल 30,00000/-रु०। तीस लाख रूपये। की राशि थी। परिवादी द्वारा उपरोक्त ऋण राशि चुका दिये जाने के अनुरोध पर अभियुक्त ने खुद के द्वारा दिये गये विश्वास के अनुरूप 30,00000/-रु०। तीस लाख रूपये की राशि का एक चेक अपनी फर्म माँ शोरावाली प्रोडक्सन के खाता संख्या-2662 पंजाब एण्ड सिंध बैंक जूहू आम्रपाली विल्डिंग शापिंग सेन्टर मुम्बई का एक चेक संख्या 210547 दिनांकित 13.12.02 स्वयं के हस्ताक्षर करके परिवादी के पक्ष में जारी कर उपरोक्त ऋण की आदयगी की एवज में प्रदान कर दिया और पुनः विश्वास दिलाया कि उपरोक्त चेक की उसकी वैधता के दौरान भुगतान हेतु बैंक में प्रस्तुत करने पर अवश्य ही भुगतान हो जावेगा। यह कि इसी विश्वास के अनुसार परिवादी ने भुगतान हेतु उपरोक्त चेक अपनी बैंक देना बैंक मथुरा के अपने खाता संख्या 412 में भुगतान हेतु दिनांक 26.12.02 को जमा किया किन्तु उपरोक्त चेक का भुगतान नहीं हो सका और वह चेक अवमानित हो गया जिसकी सूचना परिवादी को उसकी बैंक द्वारा प्रेषित मीमो द्वारा रजिस्टर्ड डाक दिनांक 13.1.03 की मुम्बई निवास पर हुई।

यह कि परिवादी ने अभियुक्त को अपने एडवोकेट श्री उमाकान्त चतुर्वेदी द्वारा दिनांक 27.1.03 को रजिस्टर्ड वकील नोटिस द्वारा उपरोक्त बैंक का भुगतान नोटिस प्राप्ति के 15 दिन के अन्दर परिवादी को कर दिए जाने को आगाह किया।

यह कि उपरोक्त नोटिस दिनांक 3.2.03 को अभियुक्त को प्राप्त हुआ तथा अभियुक्त ने उपरोक्त नोटिस का जवाब अपने एडवोकेट श्रीमती सोनिया सूद के माध्यम से 12.2.03 को प्रेषित भी कराया तथा किसी भी प्रकार की देनदारी की इन्कार भी कर दिया।

यह कि इस प्रकार अभियुक्त के खाते में न तो चेक का भुगतान किये जाने हेतु पर्याप्त धनराशि थी और न उसने आज तक परिवादी को चेक की राशि का भुगतान ही किया।

यह कि इस प्रकार अभियुक्त का कृत्य नेगोशियेविल इन्स्ट्रूमेन्ट एक्ट की धारा-138 की हद को पहुँचता है।

अतः श्रीमान् जी से निवेदन है कि अभियुक्त को तलब कर दंडित करने की कृपा करें।"

56. From perusal of the above complaint of the complainant/opposite party no.2, it is crystal clear that the complainant has not approached the court of Judicial Magistrate, Mathura with clean

hands in filing such complaint under Section 138 N.I. Act giving rise to the present criminal proceedings against the applicant and has also concealed the material fact qua the above criminal case pending against him at Mumbai for dishonour of the same cheque, which is subject matter in the aforesaid criminal case.

57. In **M/s. Tilokchand Motichand & Ors. Vs. H.B. Munshi & Anr.**, reported in *AIR 1970 SC 898*; **State of Haryana Vs. Karnal Distillery** reported in *AIR 1977 SC 781*; and **Sabia Khan & Ors. Vs. State of U.P. & Ors.** reported in *(1999) 1 SCC 271*, the Hon'ble Supreme Court held that filing totally misconceived petition amounts to abuse of the process of the Court and such a litigant is not required to be dealt with lightly, as petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the Court.

58. In **Agriculture & Process Food Products Vs. Oswal Agro Furane & Ors.**, reported in *AIR 1996 SC 1947*, the Apex Court had taken a serious objection in a case filed by suppressing the material facts and held that if a petitioner is guilty of suppression of very important fact his case cannot be considered on merits. Thus, a litigant is bound to make "full and true disclosure of facts". While deciding the said case, the Hon'ble Supreme Court had placed reliance upon the judgment in **King Vs. General Commissioner**, reported in *(1917) 1 KB 486*, wherein it has been observed as under:-

"Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of

the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent abuse of its process, to refuse to proceed any further with the examination of its merits.....”

59. In **Abdul Rahman Vs. Prasony Bai & Anr.**, AIR 2003 SC 718; and **S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar & Ors.**, reported in (2004) 7 SCC 166, the Hon'ble Supreme Court held that whenever the Court comes to the conclusion that the process of the Court is being abused, the Court would be justified in refusing to proceed further and refuse relief to the party. This rule has been evolved out of need of the Courts to deter a litigant from abusing the process of the Court by deceiving it. However, the suppressed fact must be material one in the sense that had it not been suppressed, it would have led any fact on the merit of the case.

60. In **K.D. Sharma vs. SAIL**, reported in (2008) 12 SCC 481, the Apex Court has held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the writ court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. The same law was reiterated in **G.**

Jayashree vs. Bhagwandas S. Patel reported in (2009) 3 SCC 141.

61. The Hon'ble Supreme Court of India has repeatedly held that filing of false affidavit and concealment of material facts amounts to interference in the administration of justice and as such is criminal contempt of Court. In **Dhananjay Sharma versus State of Haryana & ors.**, reported in AIR 1995 SC 1795, wherein in paragraphs 39 and 40, the Apex Court has held as follows:

“39. The question, therefore, which now requires our consideration is as to what action, is required to be taken against the respondents.

40. Section 2 (c) of the Contempt of Courts Act, 1971 (for short the Act) defines criminal contempt as the publication (whether by words, spoken or written or by signs or visible representation or otherwise) of any matter or the doing of any other act whatsoever to (1) scandalise or tend to scandalise or lower or tend to lower the authority of any Court: (2) prejudice or interfere or tend to interfere.....Thus, any conduct, which has the tendency to interfere with the administration of justice or the due course of judicial proceedings amounts to the commission of criminal contempt.”

62. The Apex Court in the case of **Sunkara Lakshminarasamma & Anr. Versus Sagi Subba Raju & Ors.** reported in (2009) 7 SCC 460 held that filing of false affidavit knowingly is a contempt and exemplary cost be imposed.

63. In **Afzal & Anr. Versus State of Haryana & Ors.**, reported in JT 1996 (1)

SC 328, the Apex Court in paragraph-32 has held as follows:

“32. The question then is: whether he committed contempt in the proceedings of this Court? Section 2 (b) defines “Contempt of Court” to mean any civil or criminal contempt. “Criminal contempt” defined in Section 2(c) means interference with the administration of justice in any other manner. A false or a misleading or a wrong statement deliberately and wilfully made by a party to the proceedings to obtain a favourable order would prejudice or interfere with the due course of judicial proceedings.”

64. In Dhananjay Sharma vs. State of Haryana & others reported AIR 1995 SC 1795, in paragraph-40 the Supreme Court has held as follows:

“40. Thus, any conduct which has the tendency to interfere with the administration of justice or the due course of judicial proceedings amounts to the commission of criminal contempt.”

65. In Sabia Khan & Ors. Vs. State of U.P. & Ors., (1999) 1 SCC 271, the Hon'ble Apex Court held that filing totally misconceived petition amounts to abuse of the process of the Court and such litigant is not required to be dealt with lightly.

66. In view of the aforesaid, this Court finds substance in the submission made by the learned counsel for the applicant that this Court must view with disfavour any attempt by a litigant to abuse the process. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt firmly. A litigant like the applicant who take liberties with the truth or with the procedures of the Court

should be left in no doubt about the consequences to follow. Others should not venture along the same path in the hope or on a misplaced expectation of judicial leniency. Exemplary costs are inevitable, and even necessary, in order to ensure that in litigation, as in the law which is practised in our country, there is no premium on the truth. In the case in hand, the complainant has concealed the material fact by filing complaint under Section 138 N.I. Act before the Court below giving rise to the present criminal proceedings and he has not approached the Court with clean hands, his complaint case is not only liable to be rejected on this ground alone but also the he should be punished with exemplary cost.

67. On the cumulative strength of the aforesaid discussions and deliberations, this Court finds no substance in the submissions made by the learned counsel for opposite party no.2 and the learned A.G.A. for the State and also finds that case laws relied upon by them are clearly distinguishable in the facts of the present case. This Court is of the firm opinion that the present criminal proceedings initiated against the applicant are not only malicious but also amount to an abuse of the process of the Court. As such, the proceedings of the above mentioned complaint case are liable to be quashed by this Court.

68. Accordingly, the proceedings of Complaint Case No. 235/IX of 2003 (Dina Nath Chaturvedi Vs. Maa Sherwali Production and ors), under Section 138 of N.I. Act, Police Station Kotwali, District Mathura, pending in the court of Judicial Magistrate, Mathura are hereby quashed.

69. The application is, accordingly, allowed. There shall be no order as to costs.

3. The allegation against the husband are that on 15.01.2022 at about 04:00 p.m., he pronounced a *Triple Talaq*, putting an end to the marriage. This divorce in the triple mode was pronounced over telephone. The complainant-opposite party has complained of cruelty by applicants nos. 1 to 7, including the said applicants turning her out of her matrimonial home. There is a case of demand of dowry by all the applicants, including cash in the sum of

Rs. 15 lacs. The complainant-opposite party's husband stays and works in the Kingdom of Saudi Arabia. There were certain other allegations regarding molestation and rape, but during investigation, these were not held established. However, during investigation, offences punishable under Sections 498A, 323 IPC and Section 3/4 of the Act of 1961 were found to be disclosed against applicants nos. 1 to 6, and against applicant no. 7, under Sections 498A, 323 IPC, Section 3/4 of the Act of 1961 and Section 3/4 of the Act of 2019. The Police, after investigation, have filed a charge-sheet.

4. This Court entertained this application vide order dated 08.05.2023 and summoned the complainant-opposite party's husband, who was impleaded, pending proceedings, as applicant no. 7 to the application. He is away from the country, serving in the Kingdom of Saudi Arabia. In compliance with this Court's order dated 08.05.2023, instead of complainant-opposite party's husband, her father-in-law appeared before the Court, and so did the complainant-opposite party. The parties were sent to the Court-annexed Mediation Centre the same day, with a direction that the Centre may explore the possibility of resolving the dispute between parties, if need be, through video conferencing put across to the complainant-opposite party's husband. The report from the Mediation Centre dated 18.05.2023 shows that applicant no. 1 and opposite party no. 2 appeared before the Centre, and so did the complainant-opposite party's husband, Mohd. Azeem, through video conferencing, but the mediation was terminated, saying "Parties not willing for the mediation."

5. Heard Mr. Umair Mahmood, learned Counsel for the applicants, Mr.

Vivek Pandey, learned Counsel for opposite party no. 2 and Mr. Shashi Shekhar Tiwari, learned Additional Government Advocate for the State.

6. Upon hearing learned Counsel for parties, this Court finds that there are materials in the case diary, which show prima facie commission of offences under Sections 498A IPC, 3/4 of the Act of 1961 and 3/4 of the Act of 2019. It is not possible for this Court, as the learned Counsel wants, to determine the truth of the allegations, all of which constitute the applicants' disputed defence. The allegations may be true or quite untrue. The Trial Court would have to determine it, upon holding a trial, wherein both sides would lead evidence. Of course, it is for the prosecution to establish the charges.

7. It is noticed in particular that one of the offences charged against applicant no. 7 is pronouncement of *Triple Talaq*. This offence has been created under the Muslim Women (Protection of Rights on Marriage) Act, 2019, a statute of very recent origin, enacted in order to suppress the mischief of pronouncement of *Triple Talaq* amongst a particular section of citizens of India. The practice has been regarded as oppressive, and the legislature has decided to suppress it by making it an offence punishable by law. Therefore, to liberally interfere and scuttle a prosecution for an offence involving pronouncement of *Triple Talaq* would be to bog down a statute recently introduced by the legislature to curtail a prevalent mischief in the society for quite some time. The pronouncement of *Triple Talaq* being regarded as utterly undesirable and something to be abolished by the legislature, the Statute has to be enforced with all its rigours. A prevalent practice in society takes a lot of time to eradicate, and

if the legislative endeavour is not encouraged, the likelihood of the practice surviving and the legislation remaining a dead letter, is imminent. That this Court will not permit to happen.

8. In the circumstances above noticed, there no good ground to interfere with the impugned proceedings. The prayer to quash the impugned proceedings is, consequently, **declined**.

9. In the result, this application under Section 482 of the Code **fails** and stands **rejected**.

(2023) 7 ILRA 178

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 17.07.2023

BEFORE

**THE HON'BLE DEVENDRA KUMAR
UPADHYAYA, J**

THE HON'BLE OM PRAKASH SHUKLA, J.

Special Appeal No. 337 of 2023

Cantonment Board Meerut & Anr.

...Appellants

Versus

Anuj Singh & Ors.

...Respondents

Counsel for the Appellants:

Sanjeev Singh, Ajay Kumar Singh

Counsel for the Respondents:

Gaurav Mehrotra, A.S.G.I., Anant Khanna,
Chinmay Mishra, Lalta Prasad Misra

A. Service Law – Dismissal - Cantonment Fund Servants Rules, 1937 - Rule 11(2)(vi) - Judicial review is not an appeal from a decision but a review of the manner in which the decision is made - Interference by the Court in exercise of its power u/Article 226 of the Constitution of

India in disciplinary proceedings is permissible in case there is some perversity in the findings recorded by the disciplinary authority. (Para 6, 19)

In the matter of disciplinary inquiry against an employee **if the disciplinary/appellate authority arrives at a conclusion which is based on the material available on record and if the view taken by the authority concerned is a plausible view, interference in such findings by this Court in exercise of its power conferred by Article 226 of the Constitution of India should be minimal.** (Para 19)

In present case, there is no finding recorded by the learned Single Judge that the disciplinary proceedings were not conducted in accordance with any rule or law. Learned Single Judge has also not found any flaw or illegality or irregularity in the procedure followed during the course of disciplinary proceedings against respondent No. 1/petitioner. Findings as regards non-observance of principles of natural justice have also not been returned by the learned Single Judge. (Para 20)

B. The adequacy of evidence or even reliability of evidence will not be permissible for this Court to go into in exercise of its jurisdiction u/Article 226 of the Constitution of India if the findings recorded by the disciplinary authority or the appellate authority are based on some legal evidence on which findings can be based. (Para 21)

Under Article 226/227 of the Constitution of India, the High Court will not re-appreciate the evidence neither will it interfere with the conclusions in the inquiry if it has been conducted in accordance with law and the applicable rules. The High Court will not interfere if there be some legal evidence on which findings can be based. **The principle of proportionality of punishment can be taken recourse to only if the punishment inflicted upon the employee shocks the conscience of the Court.** (Para 19)

There is nothing on record which can even remotely point out that there has been any

procedural lapse or any irregularity or illegality or infringement or violation of any rule while the disciplinary proceedings were conducted in this case against respondent No. 1/petitioner. In absence of any such lapse emerging from the record, learned Single Judge ought not to have entered into the findings recorded by the disciplinary and appellate authorities to the extent of substituting its own findings. (Para 21)

The judgment and order dated 27.04.2023 passed in Writ-A No. 14919 of 2021 is set aside.

Special appeal allowed. (E-4)

Precedent followed:

1. U.O.i. Vs P. Gunasekaran, (2015) 2 SCC 610 (Para 6)
2. Bhagat Ram Vs St. of H.. P. & ors., (1983) 2 SCC 422 (Para 6)
3. S.R. Tewari Vs U.O.i. & anr., (2013) 6 SCC 602 (Para 6)
4. U.O.I. & ors. Vs Bodupalli Gopalaswami, (2011) 13 SCC 553 (Para 6)
5. Charanjit Lamba Vs Commanding Officer, Army Southern Command & ors., (2010) 11 SCC 314 (Para 6)
6. B.C. Chaturvedi Vs U.O.I. & ors., (1985) 6 SCC 749 (Para 6)
7. Ranjit Thakur Vs U.O.I. & ors., (1987) 4 SCC 611 (Para 6)
8. Roop Singh Negi Vs Punjab National Bank & ors., (2009) 2 SCC 570 (Para 6)
9. St. of Karn. & ors. Vs N. Gangaraj, MANU/SC/0187/2020 (Para 19)

Present petition assails judgment and order dated 27.04.2023, passed by the learned Single Judge whereby petition filed by the respondent No. 1/petitioner has been allowed and the order of punishment of dismissal from service dated 14.08.2019 and the resolution of the Cantonment Board dated 14.08.2019 as also the order passed

by the appellate authority rejecting the appeal against the punishment order, dated 01.06.2021 have been quashed.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Om Prakash Shukla, J.)

(1) Heard Sri Satish Chandra Mishra, learned Senior Advocate assisted by Sri Sanjeev Singh, Sri Ajai Kumar Singh and Ms. Shataxi Shukla, Advocates for the appellants, Dr. L. P. Misra, Sri Gaurav Mehrotra, Sri Rohit Agarwal, Sri Chinmay Mishra and Sri Anant Khanna for the respondent No.1 and Sri Nishant Shukla, learned Counsel representing respondent No.2 and 3 and perused the records available before us on this Special Appeal.

(2) Invoking the jurisdiction of this Court under Chapter VIII Rule 5 of the Rules of the Court, this intra-Court appeal questions the judgment and order dated 27.04.2023 passed by the learned Single Judge whereby Writ-A No. 14919 of 2021 filed by the respondent No.1/petitioner has been allowed and the order of punishment of dismissal from service dated 14.08.2019 and the resolution of the Cantonment Board dated 14.08.2019 as also the order passed by the appellate authority rejecting the appeal against the punishment order, dated 01.06.2021 have been quashed. Learned Single Judge while allowing the writ petition has also directed the appellants-Cantonment Board, Meerut to re-instate the respondent No.1/petitioner in service alongwith all consequential benefits on the post on which he was working prior to his dismissal.

(3) Learned Senior Advocate representing the appellants-respondents has vehemently argued that the order under appeal passed by the learned Single Judge

dated 27.04.2023 is not sustainable for the reason that the learned Single Judge has apparently exercised his jurisdiction beyond the scope of judicial review under Article 226 of the Constitution of India in respect of an order of dismissal from service passed after conclusion of full-fledged departmental inquiry. It has further been argued on behalf of the appellants-respondents that the learned Single Judge has acted as an appellate authority over the decision taken by the disciplinary authority inasmuch as that the learned Single Judge has substituted his own findings to the findings recorded by the disciplinary authority by appreciating the evidence afresh which is not permissible so far as judicial review of matters relating to disciplinary proceedings is concerned.

(4) It has also been argued that in absence of any finding returned by the learned Single Judge regarding any flaw in the procedure followed during the course of conducting the inquiry, punishment order could not have been set aside. He has thus argued that the disciplinary proceedings against the respondent No.1/petitioner were conducted in terms of the provisions contained in the Rules regulating the disciplinary proceedings and since no irregularity or infringement of any legal provisions have been pointed out by the learned Single Judge, the order under appeal is not sustainable.

(5) Sri Mishra has also contended that once the evidence available on record has been accepted by the disciplinary authority and the findings returned by the disciplinary authority in respect of 'misconduct' are supported by the evidence available on record, the judgment passed by the learned Single Judge setting aside the order of dismissal from service cannot be

justified. It has also been contended by the learned Senior Advocate representing the appellants-petitioners that the findings recorded by the learned Single Judge are not supported by evidence available on record and thus the judgment under appeal cannot be sustained specially for the reason that different acts complained of against the respondent No.1/petitioner clearly amounted to misconduct in terms of the provisions of CCS (Conduct) Rules, 1964. In this view, the submission is that the order under appeal is not sustainable and accordingly the appeal deserves to be allowed.

(6) *Per contra*, Dr. L.P. Misra assisted by other learned counsel representing respondent No.1/petitioner has argued that the learned Single Judge was conscious of the legal position that judicial review cannot be a substitute of an appellate jurisdiction and has thus proceeded to consider the submissions of the parties and has arrived at a conclusion that it was a case where findings recorded by the disciplinary authority as also by the Inquiry Officer suffered from the vice of perversity. He has also argued that it is well settled principle of law as enunciated by Hon'ble Supreme Court in the case ***Union of India (UOI) vs. P. Gunasekaran* [2015 (2) SCC 610]** that interference by this Court in exercise of its power under Article 226 of the Constitution of India in disciplinary proceedings is permissible in case there is some perversity in the findings recorded by the disciplinary authority. In support of his submission, Dr. Misra has relied upon various judgments which are (i) ***Bhagat Ram vs. State of Himachal Pradesh and others* [(1983) 2 SCC 442]**, (ii) ***S.R.Tewari v. Union of India and another* [(2013) 6 SCC 602]**, (iii) ***Union of India and others vs. Bodupalli Gopalaswami* [(2011) 13 SCC**

553], (iv) Charanjit Lamba vs. Commanding Officer, Army Southern Command and others [(2010) 11 SCC 314]. (v) B.C. Chaturvedi vs. Union of India and others [(1995) 6 SCC 749], (vi) Ranjit Thakur vs. Union of India and others [(1987) 4 SCC 611] and (vii) Roop Singh Negi vs. Punjab National Bank and others [(2009) 2 SCC 570].

(7) Certain other judgments have also been relied by the learned counsel representing respondent No.1/petitioner to buttress the submission that it is well within the scope of power of judicial review under Article 226 of the Constitution of India for this Court to interfere even in the findings of fact in the matters of departmental proceedings recorded by the disciplinary authority if the findings are based on no evidence or they are based on misreading of evidence or they are perverse. These judgments have also been cited to emphasize that doctrine of proportionality can be a ground for challenging a punishment order before this Court while scrutinizing such an order passed in departmental proceedings.

(8) The submission on behalf of learned counsel for respondent No.1/petitioner thus is that the learned Single Judge has given a categorical finding in respect of the charges levelled against the respondent No.1/petitioner which is based on the correct appreciation of evidence available on record and thus the order of punishment of dismissal from service has also been quashed by the learned Single Judge. In this view, the submission on behalf of the respondent No.1/petitioner is that no interference in this special appeal ought to be made and that the special appeal is liable to be dismissed.

(9) We have given our thoughtful consideration to the submissions made by

the learned counsel representing the respective parties.

(10) For appropriate adjudication of the issue involved in this appeal, we find it apt to notice certain facts. Respondent No.1/petitioner, at the relevant point of time, was posted on the post of Cantonment Executive Engineer and was Head of the Engineering Section. It is the case of the appellants-respondents that respondent No.1/petitioner having served for 24 long years in the Engineering Section of the Cantonment Board, Meerut was well aware of the facts and circumstances of Meerut Cantonment, however, the omissions attributable to him had resulted in unauthorized construction and encroachment to the extent that the geographical picture of Meerut Cantonment was altered. In respect of certain charges, a charge sheet was issued to the respondent No.1/petitioner on 20.12.2013 which contained seven articles of charges alongwith statement of imputation of misconduct in support of each article of charge. Respondent No.1/petitioner submitted his written statement of defence on 27.01.2014. He, however, remained in jail in pursuance of a criminal case lodged vide F.I.R., dated 09.07.2016 under Sections 147, 302/34 I.P.C. Since he was in jail, an order of deemed suspension was passed against him on 27.07.2016 and the said suspension order continued till 11.01.2018 when it was revoked.

(11) Respondent No.1/petitioner submitted a detailed written statement of defence to the charge sheet on 30.06.2017. He also submitted written brief dated 18.08.2018 before the Inquiry Officer in respect of each article of charge. The Inquiry Officer after conducting inquiry submitted the Inquiry Report on 13.03.2019

finding the respondent No.1/petitioner guilty of misconduct in respect of charge Nos.1 to 5. Charge No.6 was found to be partially proved, whereas charge No.7 was not found proved. The Inquiry Report was served upon the respondent No.1/petitioner who submitted his explanation/comments/written submission to the Inquiry Report on 17.06.2019.

(12) In terms of the provisions of the Cantonments Act, 2006 and the relevant Rules, Cantonment Board being the disciplinary authority considered the Inquiry Report and the reply/representation made by the respondent No.1/petitioner to the Inquiry Report and unanimously resolved that the respondent No.1/petitioner be dismissed from service. Against the said decision of the dismissal from service, an appeal was preferred before the appellate authority under the relevant provisions of the Rules, however, the appellate authority found that the first charge was not proved against the respondent No.1/petitioner, whereas charge Nos.2 to 5 were found proved by the appellate authority as well. The appellate authority also concurred with the disciplinary authority in respect of charge No.6 where he found respondent No.1/petitioner to be partially guilty. The appellate authority thus reduced the major penalty of dismissal from service to the punishment of compulsory retirement as per Rule 11(2)(vi) of the Cantonment Fund Servants Rules, 1937.

(13) The said decision of the Cantonment Board as also the order of appellate authority were challenged by the respondent No.1/petitioner by filing Writ-A No. 14919 of 2021 which has been allowed by the judgment and order which is under appeal before us.

(14) In the aforesaid background facts, if we consider the judgment and

order passed by the learned Single Judge, what we find is that after noticing the facts, the contents of charge sheet and the documents relied upon in support of the charges, learned Single Judge has also noticed the arguments made by the respective parties and has further noticed and observed the principle relating to scope of judicial review in disciplinary proceedings. Learned Single Judge has thus observed that the judicial review in such matters is concerned with the decision-making process and to see whether the same is perverse, illegal or it fails to satisfy the test of non-arbitrariness as enshrined under Article 14 of the Constitution of India.

(15) However, having observed the aforesaid principles governing the scope of judicial review under Article 226 of the Constitution of India in disciplinary matters, learned Single Judge has thereafter analyzed the inquiry report in respect of each charge and has also considered the proceedings before the Inquiry Officer, Disciplinary Authority as also the Appellate Authority.

(16) The inquiry report is on record as also the order of punishment of dismissal from service. The Inquiry Officer has considered in detail the evidence available on record in respect of each charge and the reply submitted by the respondent No.1/petitioner and has arrived at the conclusions mentioned therein. The disciplinary authority has also considered the entire matter and has given its findings based on the documents and evidence available on record. Similarly, the appellate authority has also proceeded to consider the entire evidence available on record in respect of each charge and thus has arrived at the conclusion different than the

conclusion arrived at by the disciplinary authority in respect of some of the charges. The appellate authority has, in its final conclusion, reduced the punishment of dismissal into the punishment of compulsory retirement.

(17) Learned Single Judge has recorded a finding that the disciplinary authority in this case has drawn conclusions only on the basis of the submission of the Inquiry Officer and that there is no application of mind in respect of the defence taken by the respondent No.1/petitioner. This conclusion, however, in our considered opinion goes against the record inasmuch as that the disciplinary authority has clearly discussed the material available on record of the inquiry proceedings including the inquiry report and the reply submitted by the respondent No.1/petitioner. We also noticed that the learned Single Judge has also recorded a finding in respect of the order passed by the appellate authority that while dealing with second to fifth charge, the appellate authority concluded that any kind of minor deviation from the duty of supervision is to be viewed seriously and further that the appellate authority has further held that ineffective execution of duties by the subordinate/technical staff does not exculpate the respondent No.1/petitioner for non-performance of his duties. In the judgment under appeal passed by the learned Single Judge it has been observed that the appellate authority concluded its finding on the basis of dictionary meaning of the word 'supervisor' or 'to supervise' and that he has nowhere held that the respondent No.1/petitioner was in any way actively involved either in illegal constructions or illegal cultivation of crops. Learned Single Judge has opined that the findings recorded by the Inquiry Officer are

erroneous inasmuch as the dictionary meaning of the word 'supervise' or 'to supervise' can be taken aid of only when the supervisory role and the supervisory duties are not specified, whereas in the present case nature of duties was clearly specified and elaborated where such no role for illegal construction is assigned to the respondent No.1/petitioner and the role of reporting was rather specifically assigned to the Junior Engineer Sri K.A. Gupta, Sri Piyush Gautam and Sri Vinod Gupta as also to Sri Roshan Zamir, Draftsman. Learned Single Judge has thus found that the order passed by the appellate authority is erroneous and perverse.

(18) For any finding recorded by the disciplinary authority or the appellate authority in disciplinary proceedings to be termed as perverse or erroneous, in our opinion, this Court in exercise of its power of judicial review under Article 226 of the Constitution of India cannot take upon itself the role of an appellate authority over the decision made by the disciplinary authority or even the appellate authority. Perversity, as is well known, in findings of fact, arises only in case any finding returned by any authority or Court or Tribunal is based on no evidence or misreading of evidence or acceptance of inadmissible evidence or ignorance of any evidence having bearing on the matter in issue. In respect of disciplinary proceedings, as is well established, the strict rule of evidence does not have any application. Accordingly, for this reason alone this Court while exercising the power of judicial review or judicial scrutiny under Article 226 of the Constitution of India has to be extra cautious in the sense that the Court may not enter into the finding of facts.

(19) In the same breath, we also observe that in the matter of disciplinary

inquiry against an employee if the disciplinary/appellate authority arrives at a conclusion which is based on the material available on record and if the view taken by the authority concerned is a plausible view, interference in such findings by this Court in exercise of its power conferred by Article 226 of the Constitution of India should be minimal. Reference in this regard may be made to the judgment of Hon'ble Supreme Court in the case of *State of Karnataka and others vs. N. Gangaraj* [MANU/SC/0187/2020]. In the said judgment, Hon'ble Supreme Court has reviewed the entire law relating to scope of judicial review in the matters of disciplinary proceedings and has clearly held that judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Referring to another judgment of Hon'ble Supreme Court in the case of *Union of India v. P. Gunasekaran (supra)*, it has been observed that under Article 226/227 of the Constitution of India, the High Court will not re-appreciate the evidence neither will it interfere with the conclusions in the inquiry if it has been conducted in accordance with law and the applicable rules. Hon'ble Supreme Court further goes on to observe that the High Court will not go even into the adequacy of evidence or its reliability. Further observations made by Hon'ble Supreme Court are that the High Court will not interfere if there is some legal evidence on which findings can be based. It has also been observed that the principle of proportionality of punishment can be taken recourse to only if the punishment inflicted upon the employee shocks the conscience of the Court. Paragraphs 6 to 13 of the judgment in the case of *N. Gangaraj (supra)* are extracted here-in-below:-

“6. The disciplinary authority has taken into consideration the evidence

led before the IO to return a finding that the charges levelled against the respondent stand proved.

7. We find that the interference in the order of punishment by the Tribunal as affirmed by the High Court suffers from patent error. The power of judicial review is confined to the decision-making process. The power of judicial review conferred on the constitutional court or on the Tribunal is not that of an appellate authority.

8. In *State of Andhra Pradesh and Ors. v. S. Sree Rama Rao* MANU/SC/0222/1963: AIR 1963 SC 1723, a three-Judge Bench of this Court has held that the High Court is not a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant. It is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. The Court held as under :

“7. ... The High Court is not constituted in a proceeding under Article 226 of the Constitution a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in

a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence.”

9. In *B. C. Chaturvedi v. Union of India and Ors.* MANU/SC/0118/1996 : (1995) 6 SCC 749, again, a three-Judge Bench of this Court has held that power of judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eyes of the court. The court/tribunal in its power of judicial review does not act as an appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. It was held as under :

“12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of the Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts

that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

13. The disciplinary authority is the sole judge of facts. Where appeal is presented. The appellate authority has co-extensive power to reappreciate the evidence or the nature of punishment. In a disciplinary inquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In *Union of India v. H.C. Goel* [MANU/SC/0271/1963 : (1964) 4 SCR 718], this Court held at page 728 that if the conclusion, upon consideration of the evidence, reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued.”

10. In *High Court of Judicature at Bombay through its Registrar v. Shashikant S. Patil and Anr.* MANU/SC/0603/1999 : (2000) 1 SCC 416,

this Court held that interference with the decision of departmental authorities is permitted if such authority had held proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such enquiry while exercising jurisdiction under Article 226 of the Constitution. It was held as under :

“16. The Division Bench of the High Court seems to have approached the case as though it was an appeal against the order of the administrative/disciplinary authority of the High Court. Interference with the decision of departmental authorities can be permitted, while exercising jurisdiction under Article 226 of the Constitution if such authority had held proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such enquiry or if the decision of the authority is vitiated by considerations extraneous to the evidence and merits of the case, or if the conclusion made by the authority, on the very face of it, is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion, or grounds very similar to the above. But we cannot overlook that the departmental authority (in this case the Disciplinary Committee of the High Court) is the sole judge of the facts, if the enquiry has been properly conducted. The settled legal position is that if there is some legal evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed under Article 226 of the Constitution.”

11. In *State Bank of Bikaner and Jaipur v. Nemi Chand Nalwaya*

MANU/SC/0411/2011 : (2011) 4 SCC 584, this Court held that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be ground for interfering with the findings in departmental enquiries. The Court held as under :

“7. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. The courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations. (*Vide B.C. Chaturvedi v. Union of India MANU/SC/0118/1996* : (1995) 6 SCC 749, *Union of India v. G. Ganayutham MANU/SC/0834/1997* :

(1997) 7 SCC 463 and *Bank of India v. Degala* *Suryanarayana MANU/SC/0399/1999* : (1999) 5 SCC 762, *High Court of Judicature at Bombay v. Shashikant S. Patil MANU/SC/0603/1999* : (2001) (sic 2000) 1 SCC 416)

xx xx xx

12. The fact that the criminal court subsequently acquitted the respondent by giving him the benefit of doubt, will not in any way render a completed disciplinary proceedings invalid nor affect the validity of the finding of guilt or consequential punishment. The standard of proof required in criminal proceedings being different from the standard of proof required in departmental enquiries, the same charges and evidence may lead to different results in the two proceedings, that is, finding of guilt in departmental proceedings and an acquittal by giving benefit of doubt in the criminal proceedings. This is more so when the departmental proceedings are more proximate to the incident, in point of time, when compared to the criminal proceedings. The findings by the criminal court will have no effect on previously concluded domestic enquiry. An employee who allows the findings in the enquiry and the punishment by the disciplinary authority to attain finality by non-challenge, cannot after several years, challenge the decision on the ground that subsequently, the criminal court has acquitted him.”

13. In another judgment reported as *Union of India v. P. Gunasekaran MANU/SC/1068/2014* : (2015) 2 SCC 610, this Court held that while reappreciating evidence the High Court cannot act as an appellate authority in the disciplinary proceedings. The Court held the parameters as to

when the High Court shall not interfere in the disciplinary proceedings :

13. Under Articles 226/227 of the Constitution of India, the High Court shall not:

- (i) reappreciate the evidence;
- (ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;
- (iii) go into the adequacy of the evidence;
- (iv) go into the reliability of the evidence;
- (v) interfere, if there be some legal evidence on which findings can be based.
- (vi) correct the error of fact however grave it may appear to be;
- (vii) go into the proportionality of punishment unless it shocks its conscience.

13. On the other hand the learned counsel for the respondent relies upon the judgment reported as *Allahabad Bank v. Krishna Narayan Tewari MANU/SC/0006/2017* : (2017) 2 SCC 308, wherein this Court held that if the disciplinary authority records a finding that is not supported by any evidence whatsoever or a finding which is unreasonably arrived at, the writ court could interfere with the finding of the disciplinary proceedings. We do not find that even on touchstone of that test, the Tribunal or the High Court could interfere with the findings recorded by the disciplinary authority. It is not the case of no evidence or that the findings are perverse. The finding that the respondent is guilty of misconduct has been interfered with only on the ground that there are discrepancies in the evidence of the Department. The discrepancies in the evidence will not

make it a case of no evidence. The inquiry officer has appreciated the evidence and returned a finding that the respondent is guilty of misconduct.”

(20) When we thus analyze the judgment rendered by the learned Single Judge in this case in the light of the aforesaid legal principles, what we find is that there is no finding recorded by the learned Single Judge that the disciplinary proceedings were not conducted in accordance with any rule or law. Learned Single Judge has also not found any flaw or illegality or irregularity in the procedure followed during the course of disciplinary proceedings against respondent No.1/petitioner. Findings as regards non-observance of principles of natural justice have also not been returned by the learned Single Judge.

(21) To the contrary, there is nothing on record which can even remotely point out that there has been any procedural lapse or any irregularity or illegality or infringement or violation of any rule while the disciplinary proceedings were conducted in this case against respondent No.1/petitioner. In absence of any such lapse emerging from the record, in our considered opinion, learned Single Judge ought not to have entered into the findings recorded by the disciplinary and appellate authorities to the extent of substituting its own findings. While we say so, we do not mean to state that in no such matters relating to disciplinary proceedings, interference by this Court under Article 226 of the Constitution of India is permissible, however, the scope is very limited so far as the findings recorded by the disciplinary authority or appellate authority are concerned. As already observed above, in the case of *P.*

Gunasekaran (supra) Hon'ble Supreme Court has already held that the adequacy of evidence or even reliability of evidence will not be permissible for this Court to go into in exercise of its jurisdiction under Article 226 of the Constitution of India if the findings recorded by the disciplinary authority or the appellate authority are based on some legal evidence on which findings can be based.

(22) For the reasons aforesaid, we do not find ourselves in agreement with the judgment and order passed by the learned Single Judge which is under appeal before us.

(23) Resultantly, the appeal is **allowed** and the judgment and order dated 27.04.2023 passed in Writ-A No. 14919 of 2021 is hereby set aside.

(24) However, there will be no order as to costs.

(2023) 7 ILRA 188
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.07.2023

BEFORE

THE HON'BLE ABDUL MOIN, J

Writ A No. 2878 of 2014

Usha Devi		...Petitioner
	Versus	
State of U.P. & Anr.		...Respondents

Counsel for the Petitioner:
 Salik Ram Yadava

Counsel for the Respondent:
 C.S.C., Nadeem Murtaza

A. Service Law – Compassionate Appointment – There cannot be any occasion for giving compassionate appointment to the legal heirs of a retired employee.

The petitioner's husband had gone missing on 20.07.2002 while working as Senior Clerk under the respondents. His actual date of retirement was 30.04.2006. The petitioner had filed a suit for declaration before the competent court for declaring that the petitioner's husband was dead. The declaration has been issued on 23.02.2011. By the time the declaration was issued, the petitioner's husband stood retired. **The petitioner's claim for compassionate appointment has been rejected by the department vide order dated 10.07.2013 on the ground that by the time the declaration has been given by the competent court of law on 23.02.2011, the petitioner's husband stood retired and as such there could not be any occasion for giving compassionate appointment to the legal heirs of a retired employee.** (Para 7)

B. The Evidence Act, 1872: Section 108 - Presumption of death - The burden of proving the specific date of death lies upon the person who claims a right to the establishment of that fact. Section 108 of the Evidence Act indicates the presumption of death where a person has not been heard for seven years but the exact time of death is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within 7 years lies upon the person, who claims a right to the establishment of which that fact is essential. (Para 10, 11)

In the instant case, it is the petitioner who is trying to stake her claim for compassionate appointment by asserting that the death of the petitioner's husband took place even prior to his actual date of retirement which was 30.04.2006, he having gone missing on 20.07.2002. However, nowhere in the entire petition the actual date of death of the petitioner's husband is mentioned nor any actual date is coming out from the declaration of any competent court as to on which date the petitioner's husband had died. The question remains disputed as to the

fact of actual date of the petitioner's husband. (Para 12, 13, 14)

Writ petition dismissed. (E-4)

Precedent followed:

1. Zishan Khan Vs District Inspector of Schools & ors., 2012 LawSuit (All) 1265, decided on 02.03.2012 (Para 5)
2. N. Jaayalakshmi Ammal & ors. Vs R. Gopala Pathar & anr., 1995 Supp (1) SCC 27 (Para 5)
3. Darshan Singh & ors. Vs Gujjar Singh & ors., (2002) 2 SCC 62 (Para 5)
4. Lal Chand Marwari Vs Mahant Ramrup Gir, AIR 1926 PC 9 (Para 11)

Present petition assails order dated 10.07.2013 except the payment dues passed, and prays for direction for appointment under Dying in Harness Rule with all consequential benefits.

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and Shri Prashastha Puri, Advocate holding brief of Shri Nadeem Murtaza, learned counsel appearing on behalf of respondent no.2.

2. The case had been heard at length on 05.07.2023. On the request of learned counsel for the petitioner, the matter had been fixed for today.

3. Shri Salik Ram Yadava, learned counsel for the petitioner has been heard at length.

4. The instant petition has been filed by the petitioner for the following reliefs:

"(1). Issue a writ, order or direction in the nature of certiorari

quashing the order dated 10.07.2013 except the payment dues passed by the respondent no.2 annexed as annexure no.1 to the writ petition.

(2). Issue a writ, order of direction in the nature of mandamus commanding the respondents to appoint the petitioner under Dying in Harness Rule at the place of her husband and pay him all consequential benefits."

5. The facts of the case are as under:-

The petitioner a widow claiming compassionate appointment is aggrieved by the order dated 10.07.2013, copy of which is annexure no.1 to the writ petition whereby the claim of the petitioner for compassionate appointment has been rejected. The ground of the rejection is that the husband of the petitioner went missing on 20.07.2002 while working as Senior Clerk under the respondents. His date of retirement was 30.04.2006 while the declaration by the competent court declaring the petitioner's husband as dead has been issued on 23.02.2011 and thus, by the time the declaration has been given by the competent court, the husband of the petitioner already stood retired, consequently she is not entitled for compassionate appointment.

The order of rejection has been challenged by the petitioner by placing reliance on the judgement of this Court in the case of **Zishan Khan vs. District Inspector of Schools and Others 2012 LawSuit(All) 1265** decided on 02.03.2012 whereby this Court has held in a similar matter that the presumption of death would arise prior to the date of retirement, when the department itself has paid the retiral dues of the missing employee and in this case too as the retiral dues have been paid as such the presumption of the death of

petitioner's husband would relate back to the date of his disappearance i.e. 20.07.2002.

On the other hand, Shri Prashatha Puri, Advocate holding brief of Shri Nadeem Murtaza, learned counsel appearing for respondent no.2 has placed reliance on the judgments of the Apex Court in the cases of N. Jayalakshmi Ammal and Others v. R. Gopala Pathar and Another 1995 Supp (1) SCC 27 and Darshan Singh and Others V. Gujjar Singh and Others (2002) 2 SCC 62 and contends that the Apex Court has held that though Section 108 of the Evidence Act indicates the presumption of death where a person has not been heard for seven years but the exact time of death is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within 7 years lies upon the person, who claims a right to the establishment of which that fact is essential.

Placing reliance on the aforesaid observations, the argument of Shri Puri is that in the facts of the instant case where the disappearance of the petitioner's husband took place in July, 2002 and he retired on 30.04.2006 while the declaration of the competent court is 23.02.2011 as such at the time of consideration of claim of compassionate appointment, the petitioner's husband already stood retired and there is no evidence to indicate the exact time of death of the petitioner's husband prior to his retirement date and consequently there would not be any occasion for consideration of the claim of the compassionate appointment inasmuch as compassionate appointment can only be claimed by the legal heirs of the deceased employee who dies in harness, but in this particular case there could not be any consideration of compassionate

appointment after the retirement of the employee.

Placing reliance on the judgment of this Court in the case of *Zishan Khan (supra)*, the contention of learned counsel for the petitioner is that in the said case also this Court is of the view as the retiral dues have been paid even prior to the date of actual retirement of the employee concerned consequently it would be deemed that the said employee had retired prior to his retirement consequently the legal heir would be entitled to be considered for compassionate appointment. In this case too though the retiral dues have been paid much subsequent to the retirement of the employee concerned. Yet considering that the said retiral dues were due to be paid in terms of the relevant rules after two year of the date of the employee having gone missing. Consequently, it should be deemed that the employee died after two years of his having gone missing. This date would be prior to the date of actual retirement. Consequently, the petitioner would be entitled for compassionate appointment.

6. Heard learned counsel for the parties and perused the record of this case.

7. From the argument of learned counsel for the parties and perusal of record it emerges that the petitioner's husband had gone missing on 20.07.2002 while working as Senior Clerk under the respondents. His actual date of retirement was 30.04.2006. The petitioner had filed a suit for declaration before the competent court for declaring that the petitioner's husband was dead. The declaration has been issued on 23.02.2011. By the time the declaration was issued, the petitioner's husband stood retired. The petitioner's claim for compassionate appointment has been

rejected by the department vide order dated 10.07.2013 on the ground that as the petitioner's husband had gone missing on 20.07.2002 while his actual date of retirement was 30.04.2006 as such by the time the declaration has been given by the competent court of law on 23.02.2001, the petitioner's husband stood retired and as such there could not be any occasion for giving compassionate appointment to the legal heirs of a retired employee.

8. The sheet anchor of the case of the learned counsel for the petitioner is the judgment of this Court passed in the case of **Zishan Khan (supra)**. In the said case, this Court after considering that the department has itself paid retiral dues much prior to the actual date of retirement of the employee concerned who had also gone missing had deduced that the department has itself treated the employee to have died much prior to the date of retirement and consequently held that compassionate appointment would be admissible.

9. However in the instant case as per the facts already enumerated above, it is apparent that the petitioner's husband would have retired on 30.04.2006 and the competent court has given a declaration of his death on 23.02.2011 i.e. much subsequent to the date of retirement of the petitioner's husband. The retiral dues have been paid subsequent to the actual date of the retirement of petitioner's husband.

10. The Apex Court in the case of **R. Gopala Pathar (supra)** as well as **Gujjar Singh (supra)** has categorically held that Section 108 of the Evidence Act indicates the presumption of death where a person has not been heard for seven years but the exact time of death is not a matter of presumption but of evidence and the onus

of proving that the death took place at any particular time within 7 years lies upon the person, who claims a right to the establishment of which that fact is essential.

11. Likewise the Privy Council in the case of **Lal Chand Marwari Vs. Mahant Ramrup Gir** reported in AIR 1926 PC 9, a case which has been referred to by this Court in the case of **Zishan Khan (supra)** has also held that if the person has not been heard of for 7 years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.

12. In a number of judgments over which the reliance has been placed by this Court in the case is **Zishan Khan (supra)**, it is apparent that the burden of proving the specific date of death lies upon the person who claims a right to the establishment of that fact. In the instant case, it is the petitioner who is trying to stake her claim for compassionate appointment by asserting that the death of the petitioner's husband took place even prior to his actual date of retirement which was 30.04.2006, he having gone missing on 20.07.2002.

13. Considering the law laid down by the Apex Court in the case of **R. Gopala Pathar (supra)**, **Gujjar Singh (supra)** as well as by the Privy Council in the case of **Lal Chand Marwari (supra)**, it is apparent that the presumption of proving the actual date of death would lie on the petitioner. However, nowhere in the entire

petition the actual date of death of the petitioner's husband is mentioned nor any actual date is coming out from the declaration of any competent court as to on which date the petitioner's husband had died.

14. This Court while exercising the jurisdiction under Article 226 of the Constitution of India finds that the question remains disputed as to the fact of actual date of the petitioner's husband.

15. Keeping in view of the aforesaid, discussion this Court does not find any infirmity with the impugned order dated 10.07.2013 and the writ petition is accordingly **dismissed**.

16. However, the petitioner would be at liberty of approaching the competent court of law for a declaration regarding the actual date of death of her husband.

(2023) 7 ILRA 192
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.07.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR
UPADHYAYA, J
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 18566 of 2021

Neelam Devi **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Ajay Madhavan

Counsel for the Respondents:
 C.S.C., Gaurav Mehrotra, Prashasht Puri,
 Prashast Puri

A. Service Law – UP Cooperative Societies Act, 1965 – Section 122 – UP Cooperative Societies Employees' Service Regulations, 1975 – Reg. 104 – Compassionate Appointment – Entitlement of married daughter – Rule 104 included only 'unmarried daughter' in the term Family – Validity challenged – Held, if compassionate appointment has been made available to the daughters, irrespective of their marital status, of the St. Government employees, there does not appear to be any reason why such benefit should be refused to the daughters of the deceased employees who have served a Cooperative Society in the St. of Uttar Pradesh – *Smt. Vimla Srivastava* case relied upon. (Para 7 and 8)

Writ petition allowed. (E-1)

List of Cases cited:

Writ C No. 60881 of 2015; *Smt. Vimla Srivastava Vs St. of UP* decided on 04.12.2015

(Delivered by Hon'ble Devendra Kumar
Upadhyaya, J.
&
Hon'ble Om Prakash Shukla, J.)

1. Facts of this case presented before us manifest as to how the State can still be apathetic towards the cause of gender justice despite a clear declaration of law by Hon'ble the Supreme Court in the matter of compassionate appointment.

2. Heard Shri Ajay Madhavan, learned counsel for the petitioner, learned State Counsel representing the State-respondents, Ms. Rani Singh holding brief of Shri Gaurav Mehrotra representing the U.P. Cooperative Rural Development Bank Ltd. and Shri Prashast Puri, learned counsel representing U.P. Cooperative Institutional Service Board.

3. The petitioner's father was employed as Assistant Branch Accountant with the respondent-Bank, who unfortunately died in harness and accordingly the petitioner being his daughter made an application seeking compassionate appointment. However, the compassionate appointment, as claimed by the petitioner, has been denied solely on the ground that she is a married daughter of the deceased employee. In terms of the provisions contained in Regulation 104 of the U.P. Cooperative Societies Employees' Service Regulations, 1975 (hereinafter referred to as 'Regulations 1975'), it is only unmarried daughter who is eligible for being offered compassionate appointment and not the married daughter. The claim of the petitioner was, thus, rejected by means of an order dated 29.01.2021, which is under challenge before us in this writ petition. Apart from challenging the said order of rejection of claim of the petitioner for compassionate appointment, the petitioner has also prayed for issuance of an appropriate writ striking down the word 'unmarried' occurring in Regulation 104 of Regulations 1975.

4. It appears that during pendency of the writ petition a proposal was made by Institutional Service Board to amend Regulation 104 of Regulations 1975, however, the said proposal has been turned down by the State Government and information to the said effect has been sent to the office of learned Chief Standing Counsel by the State Government which is contained in the letter dated 27.03.2023. The said letter dated 27.03.2023 is taken on record.

5. For governing the conditions of service of the employees of Cooperative Societies in the State of Uttar Pradesh,

regulations have been framed by U.P. Cooperative Institutional Service Board in terms of the provisions contained in Section 122 of U.P. Cooperative Societies Act, 1965 (hereinafter referred to as '1965 Act') which empowers the Board to frame regulations regulating the conditions of service, however, such regulations are subject to approval of the State Government. It is in exercise of powers vested by Section 122 of the 1965 Act that 1975 Regulations have been made by the Board with the approval of the State Government and it is as per the requirement of Section 122 of 1965 Act that amendment in Regulation 104 of Regulations 1975 was proposed by the Board, however, the State Government has refused to accord its approval to the said proposal.

6. Regulation 104 of 1975 Regulations provides for recruitment of dependents of the deceased employees. A note is appended to said Regulation 104, according to which "family" includes the wife/husband, sons and unmarried or widowed daughters of the deceased employee. The amendment by the Board was proposed to include daughters irrespective of their marital status, however, the said amendment has not been acceded to by the State Government.

7. At this juncture, we may notice that so far as the State Government employees are concerned, compassionate appointments are governed by statutory prescriptions available in the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974. The said Rules have been framed under Article 309 of the Constitution of India and initially within the definition of the word "family", these rules also did not include 'unmarried daughters'. However, a Division

Bench of this Court in a bunch of cases, leading writ petition being Writ -C No.60881 of 2015, *Smt. Vimla Srivastava Vs. State of Uttar Pradesh and Another* delivered a judgment on 04.12.2015 striking down the word "unmarried" in Rule 2 (c)(iii) of the Dying in Harness Rules applicable to the State Government employees. Parity of the judgment in the case of *Vimla Srivastava* was given to another individual, namely, *Neha Srivastava* by a judgment of this Court delivered by a Division Bench on 23.12.2015 in Special Appeal (Defective) No.863 of 2015 (*Neha Srivastava Vs. State of U.P. & Another*). The said judgment by the Division Bench in the case of *Neha Srivastava* was taken up by the State Government before Hon'ble the Supreme Court by instituting Special Leave Petition No.22646 of 2016 which was dismissed by Hon'ble Supreme Court by means of the order dated 23.07.2019. After the aforesaid order passed by Hon'ble the Supreme Court dismissing the special leave petition of the State Government in the case of *Neha Srivastava*, so far as the Rules governing the compassionate appointment in respect of State Government employees are concerned, an amendment has been brought in the said Rules vide notification dated 12.11.2021. According to the said amendment, "family" now includes daughters irrespective of their marital status. The amended rules notified on 12.11.2021 in respect of the State Government employees is quoted hereunder :-

**GOVERNMENT OF UTTAR
PRADESH
PERSONNEL SECTION-2
NOTIFICATION**

Miscellaneous

No.6/XII-1973-Personnel-2-2021T.C.-IV

Dated Lucknow, 12 November, 2021
IN exercies of the powers conferred by the proviso to Article 309 of the Constitution, the Governor is pleased to make the following rules with a view to amending. The Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974:

**THE UTTAR PRADESH
RECRUITMENT OF DEPENDANTS
OF GOVERNMENT SERVANTS
DYING IN HARNESS (TWELFTH
AMENDMENT) RULES, 2021**

Short title and1.commencement
(1) These rules may be called The Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness (Twelfth Amendment) Rules, 2019.
(2) They shall come into force at once.

Amendment of rule-2 2. In the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974, in rule-2, for existing clause (c) set out in column-1 below, the clause as set out in column-2 shall be substituted, namely:-

COLUMN-1	COLUMN-2
Existing clause (c) "family" shall include the following following relations of the relations of the deceased Government Servant:- (i) wife or husband; (ii) sons/adopted sons; (iii) unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law; (iv) unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried; (v) aforementioned relations of such missing Government servant who has been declared as "dead" by by the competent	Clause as hereby substituted (c) "family" shall include the following relations of the deceased Government servant:- (i) wife or husband; (ii) sons/adopted sons; (iii) daughters (including adopted daughters) and widowed daughters-in-law, (iv) unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;

court: Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him.	(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent court: Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him.

By order,
(Dr. Devesh Chaturvedi)
Additional Chief Secretary.

8. When we, thus, notice the facts of this case, we do not find any plausible reason why the proposal made by the Institutional Service Board for making amendment in the note appended to Regulation 104 of the 1975 Service Regulations could be turned down by the State Government. If compassionate appointment has been made available to the daughters irrespective of their marital status, of the State Government employees, there does not appear to be any reason why such benefit should be refused to the daughters of the deceased employees who have served a Cooperative Society in the State of Uttar Pradesh. The conditions of services are governed by statutory prescriptions made in terms of provisions contained in Section 122 of 1965 Act. We are rather at dismay by noticing that the proposal sent by the Institutional Board has

not been approved though in respect of State Government employees the provision has been amended where "family" now includes daughters irrespective of their marital status. It cannot be presumed that the State while rejecting the proposal sent by the Institutional Service Board for amending Regulation 104 was not aware of the Division Bench Judgment of this Court in the case of *Vimla Srivastava* and *Neha Srivastava* (supra). It is also difficult to comprehend as to why the fact that the special leave petition filed by the State in the case of *Neha Srivastava* has been dismissed paving the way to give the benefit of compassionate appointment to all the daughters of the deceased employees irrespective of their marital status has gone unnoticed.

9. For the aforesaid reasons, this writ petition is **allowed** and the word "unmarried" occurring in the note appended to Regulation 104 of U.P. Cooperative Societies Employees' Service Regulations, 1975 is hereby struck down.

10. We, accordingly, also quash the impugned order dated 29.01.2021 passed by the General Manager (Administration) of the respondent-Bank as is contained in Annexure 2 to the writ petition.

11. Resultantly, we also direct that the claim of the petitioner shall be considered for compassionate appointment treating her to be eligible for such claim, within a period of two months from the date of production of a certified copy of this order.

12. We categorically direct the authority concerned of the respondent-Bank shall decide the claim of the petitioner within the period which is being stipulated in this order for the reason that

already about four years time period has elapsed from the date of death of the deceased employee.

(2023) 7 ILRA 196

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 14.07.2023

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Writ B No. 32911 of 2019

Tarawati @ Muna

...Petitioner

Versus

D.D.C. Unnao & Ors.

...Respondents

Counsel for the Petitioner:

Anoop Srivastava

Counsel for the Respondents:

C.S.C., Yogendra Nath Yadav, Dileep Kumar Pandey

A. Consolidation Law – UP Consolidation of Holding Act, 1953 – Section 19(f) – Allotment of chak – Roadside chak – Co-sharer's entitlement – All the co-sharers were allotted the Chaks on the side of Khadanja by CO – In appeal, the petitioner's chak has come on the back side, though other co-sharers were allotted the Chaks on the side of Khadanja – Legality challenged – Held, if the original holding is on the road side and partition has not taken place, then all the co-sharers will have right over whole of the holding, therefore the Chaks should be made in a manner that all the co-sharers may get Chaks on the road side and with their improvements, unless there is any legal impediment or not possible at all for the reasons to be recorded. (Para 3 and 9)

Writ petition partly allowed. (E-1)

List of Cases cited:

1. Hansraj Vs Mewalal; 2019 (142) RD 812

2. Gram Panchayat, Kanonda Vs Director, Consolidation of Holdings, Haryana & ors.; 1989 Supp 5 SCC 465

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

1. Heard Shri Anoop Srivastava, learned counsel for the petitioner. Learned Additional Chief Standing Counsel for respondent nos.1 & 2 and Shri Dileep Kumar Pandey, learned counsel for the respondent no.4 are present. None has put in appearance on behalf of the respondent no.3, despite sufficient service of notice.

2. This petition has been filed challenging the order dated 09.01.2019 passed by Settlement Officer, Consolidation, Unnao, contained in annexure no.2 and the order dated 21.10.2019 passed by Deputy Director of Consolidation, Unnao, contained in annexure no.1 to the writ petition.

3. Learned counsel for the petitioner submits that the petitioner and the respondent no.2 were allotted the Chaks on their original holdings bearing Gata No.751 on the side of Khadanja. On an appeal preferred by the respondent no.3, the respondent no.3 has been allotted the Chak on the southern side of the plot, therefore the Chak of the petitioner has come on the back side, whereas all the co-sharers should have been allotted the Chaks on the side of Khadanja. This order was passed on 09.01.2019 without affording opportunity to the petitioner. The petitioner preferred a revision before the Deputy Director of Consolidation taking specific plea that the petitioner and the respondent no.3 were allotted the Chaks on their holdings on the side of Khadanja, therefore, the Chaks carved out

by Consolidation Officer may be maintained.

4. He further submits that the petitioner had also preferred an application annexing the order passed by the Hon'ble Supreme Court in the case of **Hansraj Vs. Mewalal; 2019 (142) RD 812**, but without considering the grounds raised by the petitioner and the judgment relied by the petitioner, the Deputy Director of Consolidation dismissed the revision by a non-speaking order dated 21.10.2019, only on the ground that the petitioner and the respondent no.3 have been given Chaks on their original holdings. Therefore, the petitioner is constrained to approach this Court.

5. On the basis of above, learned counsel for the petitioner submits that the orders passed by the Deputy Director of Consolidation and the Settlement Officer, Consolidation are liable to be quashed and the Chaks allotted by the Consolidation Officer by means of the order dated 28.11.2018 are liable to be maintained.

6. I have considered the submissions of learned counsel for the petitioner and perused the material available on record of this petition.

7. The Assistant Consolidation Officer had proposed the Chaks to the petitioner, who is Chakdar No.223 and the respondent no.3, who is Chakdar No.443 on their holdings bearing Gata No.751 from east to west. The respondent no.3 filed an objection before the Consolidation Officer, under Section 21(1) of the Consolidation of Holdings Act, 1953 (herein after referred as Act of 1953) claiming his Chak on the southern side of the plot. The objection was

considered and rejected after considering the records and map of the village by means of the order dated 28.11.2018. The respondent no.3 had preferred an appeal under Section 21(2) of the Act of 1953 before the Settlement Officer, Consolidation. The Settlement Officer, Consolidation by means of the order dated 09.01.2019, allowed the appeal on the ground that as per the report of the Consolidator the holding of the petitioner is on the southern side of the Gata No.751 but the Chak of the petitioner has been made from north to east. The petitioner had preferred a revision before the Deputy Director of Consolidation on the grounds that the spot inspection referred by the Settlement Officer, Consolidation is ex-parte and without any intimation to the petitioner, Chaks of both the parties were carved out by the Consolidation Officer on the side of the Khadanja and on account of amendment of Chaks by the Settlement Officer, Consolidation, the petitioner would be deprived of his trees and mill (Chakki) situated on the Chak allotted to the petitioner by the Consolidation Officer.

8. Perusal of the order dated 21.10.2019 passed by the revisional authority i.e. the Deputy Director of Consolidation, Unnao, contained in annexure no.1, indicates that the grounds raised by the petitioner have not been considered by the revisional authority and the revisional authority has dismissed the revision only on the ground that the petitioner and the respondent no.3 have been allotted the Chaks on their original holdings.

9. Section 19(f) of the Act of 1953 provides that every tenure holder is, as far as possible, allotted the plot on which exists his private source of irrigation or any

other improvement, together with an area in the vicinity equal to the valuation of the plots originally held by him, therefore, while allotting the Chaks the authority has to consider the statutory provision and as to whether any improvement made by the petitioner is existing on the Chak given to him or not. In this case the petitioner is claiming that his trees and mill are situated on the Chak allotted by the Consolidation Officer. If the original holding is on the road side and partition has not taken place, then all the co-sharers will have right over whole of the holding, therefore the Chaks should be made in a manner that all the co-sharers may get Chaks on the road side and with their improvements, unless there is any legal impediment or not possible at all for the reasons to be recorded.

10. The Hon'ble Supreme Court in the case of **Hansraj Vs. Mewalal (Supra)** has held that if there are co-sharers and the partition has not taken place under Section 176 of the U.P. Zamindari Abolition & Land Reforms Act, 1950, then till holding is divided in accordance with Section 176 every co-sharer of plot has right on the holding therefore the allotment made by the Consolidation Officer to the co-sharers on the pitch road was justified and the same could not have been changed. The relevant paragraphs 11 and 12 are extracted here-in-below:-

"11. There is one more reason due to which no interference was required in the order of the Settlement Officer Consolidation and the Deputy Director, Consolidation, i.e., the appellant and the respondents were all co-sharers of Plot No.677. Even though parties were in possession of some portions of the plot by mutual arrangement, there was no partition of holding. It is relevant to note that

agricultural holding can be partitioned by instituting the proceedings under Section 176 of U.P. Zamindari Abolition & Land Reforms Act, 1950 which is as follows:

"176. Holding of a bhumidhar or sirdar divisible. (1) A bhumidhar may sue for [division] of his holding.

(2) To every such suit the Gaon Sabha concerned shall be made a party." Till holding is divided in accordance with Section 176 every cosharer of plot has right on the holding.

12. It is not the case of any of the parties that holding was partitioned by an order obtained under Section 176. All the cosharers had right in the plot in question and holdings were not partitioned as per law. The appellant was fully justified in claiming right of allotment on a portion of plot on the pitch road. The Assistant Consolidation Officer has proposed the chaks to the parties in a manner so that every one gets chak on the pitch road. The Consolidation Officer has reversed the allotment of chaks by putting the appellant on the southern side away from the road and allocating the chaks on the pitch road in favour of the respondents which order was rightly reversed by the Settlement Officer of the Consolidation which was an equitable order by which Ram Milan who was given chak including the area where he was constructing the house on the northeastern portion of the plot. The appellant was allotted an area comprising his pumping set and also by allocating chak part of which was on pitch road, other respondents were allotted the chak in such a manner that everyone got their chak on the pitch road. There was no justifiable reason for setting aside the order of the Settlement Officer Consolidation and Deputy Director, Consolidation. It is to be noticed that Settlement Officer Consolidation and Deputy Director while

passing their orders have also inspected the spot and the orders passed by them were on the basis of spot inspection. The High Court in exercise of its jurisdiction under Act 226 committed error in allowing the writ petition by restoring the order of the Consolidation Officer which was an inequitable order. In the facts and circumstances of the present case, equity was adjusted by the order of Settlement Officer of Consolidation in making the chak in the manner that chak of every cosharer was on the pitch road which order needed no interference by the High Court. The appellant filed a review which was too dismissed by the High Court on 20.01.2014."

11. The impugned orders have been passed without assigning reasons and the Deputy Director of Consolidation has passed the order without considering the grounds raised by the petitioner and assigning reasons as to why the grounds taken by the petitioner are not tenable, whereas assigning reasons are necessary to show that the order has been passed after application of mind and why the grounds are not tenable. The Consolidation Authorities have to consider the objections and the grounds and the consideration can be reflected only by assigning reasons, therefore the orders passed by the authorities must contain the reasons on which the grounds taken for assailing the order are not tenable, therefore the reasons are must for deciding a controversy.

12. The Hon'ble Supreme Court, in the case of **Gram Panchayat, Village-Kanonda, Tehsil Bahadurgarh, District-Rohtak Vs. Director, Consolidation of Holdings, Haryana, Chandigarh and Others; 1989 Supp 5 SCC 465**, has held that it is no doubt true that the

Consolidation Officer, who has prepared the scheme or confirmed it or modified or re-partition made and when it is objected to by the affected party, has to consider the objections and, as a part thereof by necessary implication, has to assign reasons and the record must contain reasons and he is not free to take arbitrary decision and assigning reasons are sine quo non for application of the mind.

13. In view of above, and considering the over all facts and circumstances of the case, the impugned orders dated 09.01.2019 passed by the Settlement Officer, Consolidation, Unnao and 21.10.2019 passed by the Deputy Director of Consolidation, Unnao are not sustainable in the eyes of law and liable to be quashed with a direction to reconsider the appeal filed by the respondent no.3 and pass a fresh order after affording opportunity to the parties in accordance with law.

14. The writ petition is, **partly allowed**. The impugned orders dated 09.01.2019 and 21.10.2019 are hereby quashed. The matter is remitted back to the Settlement Officer, Consolidation, Unnao to decide the Appeal No.66 of 2019; Rama Kant Vs. Tarawati and Others, a fresh after affording opportunity to the parties in accordance with law expeditiously. No order as costs.

(2023) 7 ILRA 200

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 06.06.2023

BEFORE

**THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.**

Writ C No. 17356 of 2023

Khursheed Ahmad ...Petitioner
Versus
Addl. District Judge, Court No. 1 Azamgarh & Ors. ...Respondents

Counsel for the Petitioner:

Sri Ashok Khare (Sr. Adv.), Sri Shantanu Khare

Counsel for the Respondents:

Sri Anand Bhaskar Srivastava, Standing Counsel, Sri Prabhakar Awasthi

A. Local Body Law – UP Panchayat Raj Act, 1947 – Section 12-C – Election of Pradhan – Recounting of votes – Proforma Form 36 bearing details of number of ballot paper and votes cast, could not be placed – Except an assertion and affidavits of other candidates, the election-petitioner could not place any material regarding his claim that number of total votes cast were 1170 – Effect – Held, the Revisional Authority, without summoning record or taking an explanation from Election Officer, has rushed through the matter and without any reasonable basis or finding arrived to a conclusion that there was an error in number of valid votes and passed order for recounting – Order of recounting cannot be passed on assumption rather there must be a ground based on material and evidence that a case of recounting is made out, however, such basis is missing in the impugned order – *Smt. Sajida's case* relied upon. (Para 18, 19 and 21)

Writ petition disposed of. (E-1)

List of Cases cited:

1. Ram Adhar Singh Vs District Judge, Ghazipur & ors.; 1985 SCC OnLine All 246
2. Smt. Sajida Vs Sub-Divisional Magistrate, Kairana & ors.; 2023 SCC OnLine All 11

(Delivered by Hon'ble Saurabh Shyam
Shamshery, J.)

**CORAM : HON'BLE SAURABH
SHYAM SHAMSHERY, J.**

1. The present case is arising out of an election dispute with regard to an election for the post of Pradhan of Gram Panchayat Jogyabeer, Kshetra Panchayat Azmatgarh, Tehsil Sagri, District Azamgarh conducted on 19.04.2021.

2. It is not in dispute that petitioner before this Court is the returned candidate whereas Respondent-3 remained runner up in election and margin of victory was only one vote. Remaining private respondents have also participated in the election.

3. Respondent-3 (election-petitioner) has approached the Prescribed Authority under Section 12-C of U.P. Panchayat Raj Act, 1947 (*hereinafter referred to as "Act, 1947"*) by way of filing an Election Petition No. 6727 of 2021 (Computerized Case No. T202115060706727) with prayer for an order for recounting and to declare election petitioner to be returned candidate. Paragraphs No. 3 and 4 of the election petition, being relevant, are reproduced as under:

“3- यह कि दिनांक 19.04.2021 को मतदान सम्पन्न हुआ। मतदान के समय प्रतियाची प्रथम पक्ष के द्वारा मौके पर न रहने वाले व्यक्तियों एवं बाहर रहने वाले व्यक्तियों के भी वोट डाल दिया गया। चुनाव सम्पन्न कराने के लिये कुल तीन बूथ बनाये गये थे, बूथ नं० 1 पर 1 ता 4 वार्ड में 313, बूथ नं० 2 पर 5 से 8 वार्ड में 376 एवं बूथ नं० 3 पर 9 से 13 वार्ड में 481 मत पड़े यानी कुल 1170 मत पड़े।

4- यह कि दिनांक 02.05.2021 को मतगणना करायी गयी। मतगणना में हम याची को 255, प्रतियाची प्रथम को 256, प्रतियाची नं० 3 को 11 मत 9

को 113 मत, 4 को 112 मत, 5 को 02, 6 को 51, 7 को 17, 8 को 001, 09 को 68, 10 को 137, 11 की 72 एवं 12 को 01 मत प्राप्त दिखाया गया है। 71 मत अवैध रहा। कुल 1167 मत मतगणना में दिखाये गये। 3 मतपत्र गायब कर दिया गया, जो मत पत्र गायब किये गये थे हम याची के पक्ष में थे यदि वे गायब नहीं किये जाते तो निश्चित ही हम याची निर्वाचित होते।”

(Emphasis supplied)

4. It is evident from above referred averments that the dispute is, whether total number of votes cast were 1167 or 1170?

5. Returned candidate has filed a reply to election petition wherein averments made in election petition including the averments referred above were denied and in Additional Statement it was specifically stated that no ballot paper was removed and entire counting was undertaken in a peaceful and fair manner.

6. Prescribed Authority on the basis of pleadings, framed following issues:

“1- क्या प्रस्तुत चुनाव याचिका की सुनवाई का क्षेत्राधिकार इस न्यायालय को प्राप्त है?

2- क्या प्रस्तुत चुनाव याचिका में मतगणना के समक्ष याची के पक्ष में 255 मत व विपक्षी को 256 मतपत्र मिले?

3- क्या मतगणना में कुल मतों की सं० 1170 थी। जब कि मतगणना के समय चुनाव अधिकारी द्वारा 1167 मत पत्र की गणना की गयी तथा तीन मत पत्रों की गणना नहीं की गयी। तो याचिका में इसका प्रभाव?

4- क्या याची व उसके मतगणना एजेण्ट द्वारा शिकायत की गयी लेकिन उनकी बातों को अनसुना कर दिया गया?

5- क्या पीठासीन अधिकारी चुनाव अधिकारी द्वारा घोषित परिणाम में ओवर राईटिंग कर 1168 के स्थान पर 1167 मत पत्र दिखाया गया है?

6- क्या पीठासीन अधिकारी द्वारा तीन मत पत्रों को वैध या अवैध घोषित किया गया है?

7- क्या याची पुनः मतगणना कराने का अधिकारी है? ”

7. Prescribed Authority on basis of evidence of parties and documents provided by the office of Election Officer decided relevant issue Nos. 3, 4, 5, 6 and 7 and rejected the Election Petition by order dated 03.10.2022. Relevant part of the order is reproduced as under:

"वाद बिन्दु सं0 3, 4, 5, 6, 7, एक दूसरे से सम्बन्धित है। अतः इनका निस्तारण एक साथ किया जाता है। ग्राम प्रधान पद हेतु डाले गये मतपत्रों की सं0 1167 है। जिसमें विधिमान्य मतों की कुल सं0 1096 है। प्रतिक्षेपित (खारिज / रद्द) मतों की सं0 71 है। इस प्रकार प्रत्याची प्रथम पक्ष खुशीद अहमद 1 मत से विजयी घोषित हुये। प्रधान पद हेतु कुल 13 उम्मीदवार थे जिनके प्राप्त वैध मतों का योग 1096 होता है। याची व उसके एजेंट द्वारा मतगणनों के सम्बन्ध में शिकायत के बावत कोई प्रमाण पत्र प्रस्तुत नहीं किया गया इसके विपरीत उसका यह कथन कि पुनर्मतगणना की बात अनसुनी कर दी गयी, जो कि विश्वसनीय नहीं है। पीठासीन अधिकारी (चुनाव अधिकारी) द्वारा घोषित परिणाम के बावत ओवरराइटिंग करने के बावत कोई साक्ष्य नहीं प्रस्तुत किया गया। तीन मतों को अवैध या वैध घोषित करने के बारे में भी कोई ठोस साक्ष्य नहीं प्रस्तुत किया गया। याची द्वारा अपनी याचिका में प्रधान पद हेतु सम्पन्न निर्वाचन को अवैध या अनियमित घोषित कर पुनः चुनाव कराये जाने व पुनर्मतगणना कराने दोनों की माँग की गयी है, याची की तरफ से कोई भी विश्वसनीय अभिलेखीय साक्ष्य प्रस्तुत न किये जाने की दशा में याची के कथनों में बल प्रतीत नहीं होता है। पुनः मतगणना कराने हेतु कोई औचित्य प्रतीत नहीं होता है। अतः वाद बिन्दु सं0 3, 4, 5, 6, 7 नकारात्मक निर्णित किया जाता है।"

(Emphasis supplied)

8. Election petitioner being aggrieved by aforesaid order preferred Revision bearing No. 161 of 2022 and the same has been allowed by impugned order dated 06.05.2023 whereby above referred order dated 03.10.2022 was set aside and a direction was passed for recounting of votes within 30 days.

9. Sri Ashok Khare, learned Senior Advocate assisted by Sri Shantanu Khare, learned counsel for petitioner, submitted that order of recounting passed by Revisional Authority was illegal being passed without any legally sustainable grounds. Learned Senior Advocate further submitted that in case Revisional Authority was not satisfied or has come to conclusion that certain relevant material/ documents were not considered by Prescribed Authority, the correct approach was to remand the matter to the Prescribed Authority to decide afresh.

10. Learned Senior Advocate also submitted that Revisional Authority has passed impugned order mainly on two grounds. Firstly that State Election Commission has not provided proforma Form '36' and secondly there was an overwriting on number of proforma Form '46' as well as on number of total votes cast, i.e., '1167' and that there were affidavits filed on behalf of other candidates that number of total votes cast were 1170 and not 1167.

11. Learned Senior Advocate lastly submitted that reasons given by Revisional Authority to pass order for recounting are not based on any material except that there were overwriting. No specific finding was given that total number of votes cast were 1170 and not 1167. The alleged overwriting has not made any material effect on election result since there is no dispute that number '1167' is the correct number of total votes cast in favour of candidates including number of votes declared invalid as mentioned in the said form. According to Deputy District Election Officer, Azamgarh, Form 36 was not available, therefore, it was not a case of withholding any document and that said Form has

details of number of ballot papers only, therefore, it has no bearing on merit of election dispute since other relevant proforma forms were available. He has placed reliance on a Full Bench judgment of this Court in **Ram Adhar Singh vs. District Judge, Ghazipur and others 1985 SCC OnLine All 246**, Para 18 of which is reproduced hereinafter:

“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.”

12. Sri Prabhakar Awasthi, learned counsel appearing for Respondent-3 (Election-Petitioner), has vehemently opposed the above submissions. He submitted that Deputy District Election Officer has not provided a copy of proforma Form 36 and as such a material

document has been suppressed. This is the document where details of number of votes cast are mentioned. The Prescribed Authority has not dealt with relevant issues and material on record and has not taken note of specific averment made in the Election Petition, therefore, the Revisional Authority was right in interfering with said order and further on basis of reasons, as referred earlier, the Revisional Authority has rightly passed order for recounting and there is no illegality in the impugned order.

13. Sri Anand Bhaskar Srivastava, learned Standing Counsel appearing for State-Respondents, has not denied that copy of proforma Form 36 was not provided to the Prescribed Authority since it was not available on record and all other relevant documents were provided.

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

15. Before dealing with rival submissions few paragraphs of a judgment passed by this Court in **Smt. Sajida vs. Sub-Divisional Magistrate, Kairana District Shamli and others, 2023 SCC OnLine All 11** being relevant are mentioned hereinafter:

“12. It is well settled that it is important to maintain secrecy of ballot which is sacrosanct and it should not be allowed to be violated on frivolous, vague and indefinite allegations and before inspection is allowed, the allegations made against elected candidate must be clear and specific and must be supported by adequate statements of material facts (See, Bhabhi vs. Sheo Govind and others, AIR 1975 SC 2217 and Ram Sewak Yadav vs. Hussain Kamil Kidwai and others, AIR

1964 SC 1249). The discretion conferred on Courts should be not exercised in such a way so as to enable election petitioner to indulge in a roving enquiry in order to fish out materials for declaring election to be void.

13. Election petitioner has made a assertion in election petition that vote given in her favour were placed in the bundle of votes given in favour of returned candidate and during counting when election petitioner came to know that number of votes given in her favour are 990 and in favour of elected candidate are 993 and number of rejected votes are 157, she raised an objection and prayed for recounting but Election Officer has not paid attention. A further assertion has been made that bundle of 157 rejected votes included some valid votes also.”

“16. It is settled that order of recounting cannot be passed only for the sake of it and on the basis of vague allegation without specifying any particular irregularity in counting as well as how it would affect election result materially. In the present case in the body of election petition vague assertions have been made regarding illegal rejection of valid votes which are not substantiated either in examination of election petitioner or otherwise on the basis of record available. Parties have to take proper pleadings by adducing evidence that by particular irregularity of illegality result of election has been materially affected. There is no dispute to the settled legal proposition that as a rule relief not founded in pleadings should not be granted [See, Arikala Narasa Reddy (supra)].” (Emphasis supplied)

16. In the factual background as referred above, there is no dispute that petitioner has won the election of Gram

Pradhan by only one vote. Election petitioner has taken a ground in election petition that total number of votes cast were 1170 and not 1167. It is also not in dispute that according to proforma Form 46 number of total valid votes were 1096 whereas number of rejected votes were 71 which comes to total votes cast to be 1167.

17. One of the grounds taken by Revisional Authority that there was an overwriting on number of proforma Form ‘46’ as well as an overwriting on number of total votes cast, i.e., 1167, however both overwriting would have no consequence, since it is not in dispute that number of votes mentioned in said proforma Form with addition of number of votes rejected, would come to 1167 and overwriting on number of Form would also have no bearing since it was not the case of election petitioner that document was not genuine.

18. The issue which appears to be disturbing is the letter dated 09.09.2022 from the office of District Election Officer that proforma Form 36, i.e., a document where details of number of ballot paper and votes cast, are mentioned was not available in the office. This is the form where there are details of number of ballot papers received by Election Officer as well as number of ballot papers remained unused or rejected due to any reason and number of votes cast in ballot box, were mentioned. Issue in the present case, whether number of votes cast were 1170 or 1167 could be reverified by said proforma Form 36, however, admittedly Election Officer has not placed it on record on the ground that it was not available. The election petitioner has also not placed any material regarding his claim that number of total votes cast were 1170 except an assertion and affidavits of other candidates, who have participated in election.

19. In the present case both authorities, i.e., Prescribed Authority and Revisional Authority have rushed through the matter. Prescribed Authority has summarily rejected election petition without taking note of relevant materials and aspect of case, i.e., to verify from records that the total number of votes cast were 1170 or 1167, however, said exercise was not undertaken or it appears that it could not be undertaken since proforma Form 36 was not available.

20. The Prescribed Authority was within its jurisdiction to summon Election Officer with record, however, such exercise was not undertaken. Similarly, Revisional Authority though noted errors committed by Prescribed Authority, i.e., it has not taken note of allegation of difference of total number of votes cast, however, it has erroneously taken note of some aspects of the case which may not be relevant such as overwriting on proforma Form 46 or on number of total votes cast. As already referred above, there is no calculation error, therefore, that overwriting may not have any material impact on result of election. However, a document which definitely required to be placed on record is proforma Form 36 of election in question.

21. The Revisional Authority without summoning record or taking an explanation from Election Officer has rushed through the matter and without any reasonable basis or finding arrived to a conclusion that there was an error in number of valid votes and passed order for recounting. As held in **Smt. Sajida (supra)** order of recounting cannot be passed on assumption rather there must be a ground based on material and

evidence that a case of recounting is made out, however, such basis is missing in the impugned order.

22. The outcome of above discussion is that both authorities have rushed through the matter and has taken a decision without relevant document, i.e., proforma Form '36' being on record and in these circumstances, the Revisional Authority ought to have remanded the election petition back to the Prescribed Authority for fresh consideration with a direction that records including proforma Form 36 be summoned from the office of District Election Officer, however, since same has not been followed, therefore, an error has been erupted in the impugned order.

23. In view of above, direction passed in impugned order dated 06.05.2023 for recounting is set aside and operative part of order is modified to the extent that order dated 03.10.2022 passed by Prescribed Authority is set aside and the election petition is remanded back to the Prescribed Authority to decide afresh with direction that Prescribed Authority shall pass appropriate order to summon records including copy of proforma Form 36 of election in question from the office of District Election Officer, Azamgarh and if necessary may summon concerned officer to give evidence in terms of Rule 4 of U.P. Panchayat Raj (Settlement of Election Disputes) Rules, 1994. The Prescribed Authority shall pass afresh order expeditiously, preferably within a period of eight weeks from today in accordance with law.

24. The writ petition is accordingly **disposed of** with above observations and directions.

(2023) 7 ILRA 206
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.05.2023

BEFORE

THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Jail Appeal No. 86 of 2019

Arvind **...Appellant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Appellant:
 From Jail, Sri Rakesh Kumar Gupta (A/C)

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

Criminal Law - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section 3(1) - Appeal against conviction - Rigorous imprisonment - Code of Criminal Procedure, 1973 - Section 313 - As per prosecution story, on basis of information of informant and approved gang chart, on 06.11.2014 F.I.R was lodged against appellant along with co-accused - Allegation that accused appellants have a organized gang, for personal gain of gang, extracts illegal money by committing offences like gang rape, murder, kidnapping and deletion of evidence of offence - Trial court framed charges - Contention by appellant that witnesses of prosecution are police personnel, their testimony was not reliable - No eye-witness in case - Sentence imposed was harsh , deserved to be modified to period already undergone. (Para 4, 12, 17)

Held, as per custody certificate, issued by Jail Superintendent, appellant has actually languishing in jail including remission for period of 9 years, 4 months and 12 days, about a decade on that date however, on date of judgment he was in incarceration about 9 years and 7 months - Appellant

was at verge of completing his term of sentence - He was in jail for long period but no adverse conduct reported - There are fair chances of reformation of accused and to join mainstream of social milieu and to contribute towards developments of society - In these circumstance, reduction of sentence to period of already undergone, will serve ends of justice. (Para 31)

Appeal partly allowed. (E-13)

List of Cases cited:

1. St. of Raj. Vs Banwari Lal & anr, Criminal Appeal No. Nill of 2022 (SLP arising out of Diary No. 21596 of 2020)
2. Satish Kumar Janyanti Lal Dabgar Vs St. of Guj. (2015) 7 SCC 359
3. Alister Anthony Pareira Vs St. of Mah., (2012) SCC 648
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 St. of A.P., AIR 2017 SC 1166t
7. Jameel Vs St. of UP, (2010) 12 SCC 532
8. Guru Basavraj Vs St. of Karn., (2012) 8 SCC 734
9. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323
10. St. of Pun. Vs Bawa Singh, (2015) 3 SCC 441
11. Raj Bala Vs St. of Har., (2016) 1 SCC 463

(Delivered by Hon'ble Mohd. Azhar
 Husain Idrisi, J.)

1. Heard Sri Rakesh Kumar Gupta, learned Amicus Curiae for the appellant

and learned A.G.A. for the State. Perused the record.

2. This appeal has been filed by the accused appellant Arvind against the judgment and order dated 16.05.2019 passed by the Special Judge (Gangsters Act)/Additional Sessions Judge, Court No. 5, Muzaffarnagar in S.T. No. 87 of 2015 (State Vs. Arvind and others) arising out of Case Crime No. 532 of 2014, under Section 3(1) of U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as the “Gangsters Act”), Police Station Budhana, District Muzaffarnagar whereby the appellant was convicted under Section 3(1) Gangsters Act for ten years R.I. with fine of Rs.15,000/-. In default of payment of fine, he was ordered to serve five months additional imprisonment.

3. Aggrieved thus, by the impugned judgment and order dated 16.05.2019, the accused appellant Arvind preferred this appeal. It may be added that there were 05 accused and they were charge sheeted in trial court. The present appeal has been preferred by accused-appellant Arvind. Thus, present appeal is heard in respect of appellant Arvind only.

4. Succinctly, the factual matrix of the prosecution story is that on the basis of information of informant S.H.O. Dhananjay Mishra and approved gang chart, on 06.11.2014 in respect of crimes alleged to have been committed by the appellant alongwith co-accused, the case (F.I.R.) was registered against accused Arvind, Pramod, Monu alias Rakesh, Parveen and Sainki alias Harshvardhan as Crime No. 532 of 2014, under Section 2/3 of the Act, 1986 It was alleged in the F.I.R. that the accused appellants have a organized gang, on the

basis of which who for personal gain of gang extracts illegal money by committing offences like gang rape, murder, kidnapping and deletion of evidence of offence and by this reason general public is engulfed in their terror.

5. On the basis of gang chart, Chick F.I.R. was registered and entries were entered into Kaimi G.D and Carbon copy of which was also prepared in the same process. Investigation was entrusted to S.H.O. Ajay Pal Gautam.

6. The Investigating Officer recorded the statements of the witnesses, prepared site plan after inspecting the place of occurrence and after due investigation, he also procured sanction for prosecution from competent authority and after completing due investigation, submitted against the aforementioned accused/appellant under Section 2/3 Gangsters Act.

7. The trial court framed charges under Section 3(1) Gangsters Act, 1986. The accused/appellant abjured the charges, pleaded “not guilty” and claimed “to be tried”.

8. To bring home the charges, prosecution adduced following ocular evidence examining following witnesses:-

Sl. Nos.	Name of the witnesses	Number of PWs
1.	Inspector Dhananjay Mishra, informant	PW-1
2.	Jaypal	PW-2
3.	H. C.P. 202 Rajkirti Singh	PW-3
4.	Satpal Singh	PW-4
5.	Parab Singh	PW-5
6.	Pratap Singh	PW-6
7.	Constable Arun	PW-7

	Malik	
8.	H.C.P. 197 Mangeram	PW-8
9.	Inspector Ajay Pal Gautam, I.O.	PW-9

9. To support the ocular version of the prosecution, following documentary evidence was also adduced and proved by prosecution ocular witnesses.

Sl. Nos.	Particulars	Ext. Nos.	Proved by
1.	Copy of Charge sheet in Case Crime No. 258 of 2014	Ext. Ka-1	PW-1
2.	Copy of charge sheet in Case Crime No. 259 of 2014	Ext. Ka-2	PW-1
3.	Gang chart	Ext. Ka-3	PW-1
4.	Chick F.I.R.	Ext. Ka-4	PW-1
5.	Copy of Chick F.I.R. of Case Crime No. 258 of 2018	Ext. Ka-5	PW-2
6.	Carbon copy of G.D.	Ext. Ka-6	PW-3
7.	Copy of Chick F.I.R. of Case Crime No. 259 of 2018	Ext. Ka-7	PW-4
8.	Carbon copy of G.D. 37	Ext. Ka-8	PW-8
9.	Photocopy of G.D. 33	Ext. Ka-9	PW-8
10.	Photocopy of G.D. of Case Crime No. 259 of 2014	Ext. Ka-10	PW-8
11.	Letter to S.S.P.,	Ext.	PW-9

	Muzaffarnagar	Ka-11	
12.	Prosecution sanction	Ext. Ka-12	PW-9
13.	Charge sheet	Ext. Ka-13	PW-9

10. After conclusion of prosecution evidence, accused/appellant was examined under Section 313 Cr.P.C., wherein he stated that entire prosecution case is false. He stated that false allegations have been levelled against him by the prosecution witnesses and false case has been lodged due to partibandi.

11. The defence has also adduced documentary evidence in the form of copy of order dated 24.04.2018 passed by Additional Sessions Judge, Court No. 15, District Muzaffarnagar in S.T. No. 173 of 2015 (State Vs. Arvind and others) arising out of Case Crime No. 258 of 2014, under Sections 364, 302, 201, 376(D), 34 I.P.C. and order dated 24.04.2018 passed by Additional Sessions Judge, Court No. 15, Muzffarnagar in S.T. No. 172 of 2015 (State Vs. Arvind and others) arising out of Case Crime No. 259 of 2014, under Sections 302, 201/34 I.P.C.

12. Learned counsel for the appellant submits that the witnesses of the prosecution are police personnel, as such their testimony is not reliable. There are material contradictions in the statement of prosecution witnesses. The appellant has falsely been implicated in the present case. The cases shown against the appellant in the gang chart are false. There is no eye-witness of the cases alleged to have been committed by the appellant. The judgment of the trial court could not be sustained in

the eye of law. The appellant deserves to be acquitted and accordingly, his appeal be allowed.

13. Per contra, learned A.G.A. opposed the arguments advanced by the learned counsel for the appellant and contended that out of the cases mentioned in the gang chart the appellant has been convicted in Case Crime Nos. 258 of 2014, under Section 364 IPC & 259 of 2014, under Sections 302, 201 IPC. The appellant is undergoing life imprisonment. The appellant is habitual offender and convicted in various cases. The appellant has organized a gang to commit the crime against the society like gang rape, murder, robbery, kidnapping etc. and concealment of evidence. Thus the appellant created atmosphere of fear and terror in the society. He is a hardened criminal and generally no one dare to adduce evidence against him. The defence could not establish any previous enmity with informant in their cases. Therefore, argument of defence is not tenable in this regard. The prosecution has proved the charges against him beyond reasonable doubt. There is no infirmity or illegality in the impugned judgment and order of the trial court, as such the appeal is liable to be dismissed.

14. In view of the arguments put forth by the learned counsel for the appellant and the learned A.G.A. at this stage a brief discussion of the evidence of prosecution and defence appears, imperative to reach at right conclusion.

15. P.W-1 Inspector Dhananjay Mishra, P.W-2 Jaipal, P.W-3 Head Moharrir Raj Kirti Singh, P.W-4 Satpal Singh, P.W-5 Parab Singh and P.W-6 Pratap Singh have fully supported the prosecution case in their examination. The

defence could not point out any material contradiction in their cross-examination.

16. In all the cases mentioned in the gang chart complainant and relevant witnesses also examined, who proved in their examination the correctness of the gang chart. The gang chart was presented before the competent authority to obtain sanction for prosecution which was rightly granted and the same is proved by P.W-9 as Ext. Ka-12. The evidence adduced by the defence could not fortify its stand in above circumstances. The allegations made against the appellant are established beyond reasonable doubts and the learned trial court has rightly convicted the appellant under Section 3(1) of Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act, 1986.

17. In view of the above, learned counsel for the appellant did not dispute the findings rendered by the learned trial court regarding conviction of the accused appellant. He did not challenge the conviction and confined his argument only regarding sentence. He argued that the sentence imposed is too harsh which deserves to be modified/ reduced to the period already undergone.

18. Learned A.G.A. opposed the argument and contended that the appellant is a hardened criminal and he has criminal history of heinous offences against him, therefore, he deserves no leniency in awarding the sentence. The sentence awarded by the learned trial court is just fair and proper and as per gravity of the offence.

19. In view of the above, the question is whether the quantum of sentence is too harsh and requires to be modified.

20. At this stage, brief legal resume about sentencing is imperative. Sentencing is an important task in the matters of crime. In Criminal Appeal No. Nill of 2022 SLP arising out of Diary No. 21596 of 2020 **State of Rajasthan Vs. Banwari Lal and Another**, the Apex Court referring **Satish Kumar Janyanti Lal Dabgar Vs. State of Gujrat (2015) 7 SCC 359**, has observed that the purpose and justification behind sentencing is retribution, incapacitation, rehabilitation and deterrence as well. One of the prime objective of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done.

21. In India there is no structured sentencing policy. As a matter of course, Indian parliament has not laid down any sentencing policy, though **Malimath Committee (2003)** and **Madhava Menon Committee (2008)** have asserted the need of sentencing policy in changing circumstances of the Indian society. In the absence of any such policy sentencing has been an issue of concerned before the Courts.

22. In **Alister Anthony Pareira V. State of Maharashtra, (2012), SCC 648**, it has been observed by the Apex Court.

"thus, there is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: keeping in view the twin objective of the sentencing deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."

23. A perusal of catena of the decision of the Apex Court and various High Courts indicates that criminal jurisprudence of our country is reformatory and corrective and not retributive, as the court considers that every accused is capable of being reformed and all measures should be taken to give them an opportunity of reformation to bring them into the main social stream.

24. In **Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]**, explaining rehabilitary & reformatory 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."

25. The term 'Proper Sentence' was explained in **Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]** by observing:-

"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".

26. 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],

"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 reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system".

27. Thus, in many cases has tried to provide clarity on the issue. Apex Court has time and again cautioned guidelines in this behalf.

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

29. As discussed above, 'reformatory 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 reformatory approach underlying in criminal justice system.

30. In the above backdrop of legal scenario it is mentioned that in the present appeal, the trial court convicting the appellant, sentenced him for ten years rigorous imprisonment with fine of Rs. 15,000/-, under Section 3(1) of Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

31. As discussed above, learned counsel for the appellant did not challenge the conviction of the appellant but only prayed the court to reduce the sentence to the period already undergone a Xerox copy is submitted by the learned counsel for appellant is on record. He submits that the FIR has been lodged against him on 6.11.2014. As per the custody certificate, issued on 15.3.2023, by Jail Superintendent, Bareilly, the appellant has actually languishing in jail including remission for a period of 9 years, 4 months and 12 days, about a decade on that date however, on the date of judgment he is in incarceration about 9 years and 7 months. Thus the appellant is at the verge of almost completing his term of sentence. Learned counsel for the appellant also submitted that the appellant is a youngster of about 35 years. He was in jail for such a long period but no adverse conduct has been reported by jail Superintendent, concerned. Thus, there are fair chances of reformation of the accused and to join the mainstream of social milieu and to contribute towards developments of the society. In these circumstance, reduction of his sentence to the period of already undergone, will serve the ends of justice.

32. Resultantly, the instant appeal is **partly allowed** with following directions:-

(i) The judgment of the learned trial court dated 16.5.2019 regarding conviction of the appellant is confirmed and shall remain intact.

(ii) In respect of his sentence of ten years rigorous Imprisonment awarded by the learned trial court is modified to the period already undergone by the appellant.

(iii) The amount of fine of Rs. 15,000/- imposed and its default period, shall remain intact.

(iv) The appellant be released immediately, accordingly.

(v) Appellant shall deposit, if not already deposited, the entire amount of fine within four months from the date of this judgment.

(vi) A copy of judgment be sent to trial Court concerned, for necessary information and compliance.

(vii) Trial court's record be remitted back forthwith.

(viii) A sum of Rs. 5,000/- be provided to the learned Amicus Curiae Sri Rakesh Kumar Gupta, Advocate for rendering his valuable help to the Court.

(2023) 7 ILRA 212
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 5252 of 2022

Reena & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:

Sri Satyendra Narayan Singh, Sri Pankaj Kumar Mishra

Counsel for the Opposite Parties:

G.A., Sri Sanjay Mishra

(A) Criminal Law - Indian Penal Code, 1860 - Sections 323,325,504 & 506 -The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Section 319 - Power to proceed against other persons appearing to be guilty of offence - Apex Court's test for invoking powers under section 319 Cr.P.C. - only when strong and cogent evidence occurs against a person the power should be exercised - test to be applied is one which is more than prima facie Case, which is applied at the time of framing of charge - statement of witnesses to the Investigating Officer under section 161Cr.P.C. cannot be relied upon in recording finding that accused sought to be tried could not have been present at the scene of occurrence - it must appear to the court on the evidence that someone not arrayed as accused appears to have committed an offence - court need not be satisfied that he has committed an offence - need only appear to it that he has committed an offence. (Para - 8)

F.I.R. accuses revisionists and others of assaulting - injured - medical reports part of record - injured supported allegations - involvement of revisionists in incident - Investigating Officer exculpated revisionists based on villagers' statements - injured witness reiterated her statements about the revisionists' involvement - prosecution claims all accused persons assaulted causing injuries - Application moved by first informant/ prosecution - under Section 319 Cr.P.C. - Magistrate summoned revisionists - to face trial with co-accused for offence – hence instant revision.(Para - 2,7)

HELD:-There is sufficient and cogent evidence on record which is more than prima-facie case as exercised at the time of framing of charge but short of satisfaction to an extent that the evidence if goes un-rebutted would lead to conviction and it passes the test as laid down by

the Apex Court. Sufficient ground to summon revisionist accused U/s 319 Cr.P.C. No illegality or infirmity in the impugned summoning order.(Para - 9,10)

Revision dismissed. (E-7)

List of Cases cited:

1. Hardeep Singh & ors. Vs St. of Punj. & ors., 2014 0 Supreme (SC) 27
2. Periyasami & ors. Vs S. Nallasamy, 2019 0 Supreme (SC) 284
3. Rajendra Singh Vs St. of U.P. , A.I.R. 2007 SC 2786

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Supplementary affidavit filed by learned counsel for the revisionists is taken on record.

2. Heard Sri Satyendra Narayan Singh, learned counsel for the revisionists, learned AGA for the State and Sri Sanjay Mishra, learned counsel for the opposite party no.2/ first informant.

3. This criminal revision has been filed against the order dated 13.10.2022 passed by A.C.J.M. Court No.1, Etawah in Criminal Case No.623 of 2012 (State Vs. Balram and others) arising out of Case Crime No.633 of 2009, under Sections 323, 325, 504, 506 I.P.C., P.S. Bharthana, District Etawah. By the impugned order, the learned Magistrate in exercise of powers under Section 319 Cr.P.C. on application of first informant/ prosecution has summoned the revisionists to face trial with co-accused for offence under Sections 323, 325, 504, 506 I.P.C.

4. The opposite party no.2 i.e. Anuj Kumar lodged an F.I.R. on 27.12.2009 at 9

a.m. alleging therein that on 27.12.2009 at about 7 a.m. Ram Sakhi Devi, the mother and Pramod Kumar, the brother of the complainant were collecting cow dungs then Balram Singh, Smt. Gopshree, Ruby and Reena started scuffle with the mother and brother of the complainant and they assaulted them causing head injury to his mother, her left hand was also fractured, bleeding started from her head. The left hand of Pramod Kumar was also fractured. Omkar Singh and Rukum Singh saved her. The accused persons fled from the spot abusing and extending life threat. After investigation, charge-sheet was submitted only against Balram Singh and Smt. Gopshree. The revisionists, Rubi and Reena were exonerated. During trial, after examination of Anuj Kumar as P.W.1 and Ram Sakhi as P.W.2, an application under Section 319 Cr.P.C. was moved by the prosecution which has been allowed by the impugned order.

5. Learned counsel for the revisionists contended that there are general allegations in the F.I.R. and no specific role has been assigned to the revisionists-accused. All the members of the family have been implicated whereas no specific role has been assigned to anyone. The Investigating Officer has recorded the statements of independent witnesses who have stated that both the girls (revisionists) were school going and had gone to attend the school. After considering the witnesses and other evidence, the Investigating Officer has come to the conclusion that the involvement of the revisionists was not found, therefore, they were exonerated from the charge-sheet. It is further contended that injured, Ram Sakhi/ P.W.2 has suffered one lacerated wound on forehead, one contusion on right arm and one lacerated wound on wrist joint. In her

X-ray report, fracture of right arm has been detected. The other injured, Pramod Kumar has suffered one lacerated wound, one contusion and one abrasion. His X-ray report is NAD. Therefore, the allegations of the F.I.R. are totally false and concocted. It is further contended that complainant, Anuj Kumar/ P.W.1 is not an eye-witness of the incident, he has not stated anything about the involvement of the revisionists-accused in the F.I.R. The learned Magistrate only on the statement of Ram Sakhi/ P.W.2 has summoned the revisionists in a mechanical manner. At the time of incident, the revisionists were minor and as per High School Certificate-cum-Marksheet, the date of birth of revisionist no.1 is 10.08.1996 and as per High School Marksheet, the date of birth of revisionist no.2 is 11.10.1993. The application under Section 319 Cr.P.C. has been moved with malafide intention only to disturb the matrimonial lives of revisionists who are now married. It is also contended that the impugned order is against the evidence and materials available on record. The learned trial Court has committed manifest illegalities which is apparent on the face of the record. It is also contended that the Apex Court in so many cases has held that power to summon under Section 319 Cr.P.C. is an extraordinary power which should be exercised in exceptional cases where the situation so warrants. The degree of satisfaction is more than that of prima facie case. The learned trial Court has exceeded its jurisdiction in passing the impugned order. No finding has been recorded by the learned Magistrate that on the basis of evidence available on record there is the possibility of conviction of revisionists. Therefore, the order is erroneous and not sustainable. The learned Magistrate placed reliance on the following case laws:- *(i) Hardeep Singh & others Vs. State of Punjab & others 2014 0 Supreme*

(SC) 27 and (ii) Periyasami & others Vs. S. Nallasamy 2019 0 Supreme (SC) 284.

6. Learned counsel for the opposite parties submitted that the revisionists are named in the F.I.R. with clear allegation that they were also present at the place of incident and took part in the commission of the offence. They assaulted Ram Sakhi/ P.W.2 and Pramod Kumar causing them injuries. The complainant- Anuj Kumar and both the injured in their statements during investigation have corroborated the allegations of the F.I.R. but the Investigating Officer in an unfair manner just to benefit the revisionists- accused has ignored it and exonerated them. Both Ram Sakhi/ P.W.2 and Pramod Kumar received injuries in this incident. Injury of Ram Sakhi/ P.W.2 is grievous in nature. The complainant, Anuj Kumar has been examined as P.W.1 while injured Ram Sakhi was examined as P.W.2 and they have again corroborated the allegations of the F.I.R. in their deposition before the Court. So there is sufficient evidence on record against the revisionists and the learned trial Court has rightly passed the impugned order. There is no illegality in the impugned order.

7. The revisionists are named as accused in the F.I.R. There are allegations that the revisionists-accused with other named accused of F.I.R. assaulted Pramod Kumar and Ram Sakhi/ P.W.2, the brother and mother of the complainant. Pramod Kumar and Ram Sakhi were injured and they were medically examined and their medical reports are part of the record. Ram Sakhi/ P.W.2 has suffered grievous injury in right forearm in the form of fracture. The complainant may not be an eye-witness of the incident but the two injured Pramod Kumar and Ram Sakhi, both in their

statements recorded under Section 161 Cr.P.C. have supported the allegations of the F.I.R. and have stated about the involvement of the revisionists-accused in the incident with co-accused. The Investigating Officer on the basis of statements of some villagers has exculpated the revisionists-accused. One of the injured witness, Ram Sakhi has been examined before the trial Court as P.W.2, she has reiterated her previous statements and has stated about the involvement of revisionists-accused in the incident. It is the prosecution case that all the accused persons holding lathi, danda assaulted Ram Sakhi and Pramod Kumar causing them injuries.

8. The test laid down by the Apex Court for invoking powers under section 319 Cr.P.C. inter alia includes the principle that only when strong and cogent evidence occurs against a person the power should be exercised. The test to be applied is one which is more than prima facie Case, which is applied at the time of framing of charge. The Apex Court in **Rajendra Singh versus State of UP A.I.R. 2007 SC 2786** has held that the statement of witnesses to the Investigating Officer under section 161Cr.P.C. cannot be relied upon in recording finding that accused sought to be tried could not have been present at the scene of occurrence. It is further held that it must appear to the court on the evidence that someone not arrayed as accused appears to have committed an offence. The court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence.

9. So applying the test laid down by the Apex Court on the present set of facts, it is clear that there is strong evidence than mere probability of the revisionist accused

in the form of testimony of injured witness. In comparison to it, the evidence on the basis of which the Investigating Officer has exonerated the revisionist accused is of a very weak nature. There is sufficient and cogent evidence on record which is more than prima-facie case as exercised at the time of framing of charge but short of satisfaction to an extent that the evidence if goes un-rebutted would lead to conviction and it passes the test as laid down by the Apex Court.

10. The learned trial court with a detailed and reasoned order has allowed the application. The learned trial court has narrated the entire facts, evidence and other material available on record and after analyzing it, has come to the finding that there is sufficient ground to summon the revisionist accused U/s 319 Cr.P.C. There is no illegality or infirmity in the impugned summoning order.

11. Accordingly, the revision is hereby **dismissed**.

(2023) 7 ILRA 216

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 05.05.2023

BEFORE

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

FAFO No. 795 of 2002

Brahma Nand Maurya ...Appellant

Versus

United India Insurance Co. Ltd. & Ors.

...Respondents

Counsel for the Appellant:

Sri S.N. Tripathi

Counsel for the Respondents:

Sri Amresh Sinha, Sri Anubhav Sinha

A. Civil Law - Motor Vehicles Act, 1988- Sections 173- enhancement of compensation- *has suffered a serious disability in which he has suffered a loss of his leg* - The head of his left femur had been badly fractured on account of the injury-During the ensuing surgical operation, the femur head was removed, which is attached to the hip joint. In consequence, the claimant's leg was shortened by an inch and a half-This caused the claimant considerable difficulty in movement-The middle finger of his right hand was bent. The hip joint was dislocated because its head was fractured-Upon an application of Rule 220-A(3) of the Rules of 1998 to the facts here, the claimant being aged 47 years i.e. in the age bracket of 40-50 years, an addition of 30% towards future prospects and applied multiplier of 13 the total compensation awarded enhanced to Rs.7,72,149-The impugned award passed by the Tribunal is modified and 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.(Para 1 to 33)

B. 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 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.(Para 28)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. New India Assr. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC OnLine SC 822
2. Jagdish Vs Mohan & ors. (2018) 4 SCC 571
3. National Ins. Co. Ltd. Vs Pranay Sethi (2017) 16 SCC 680
4. Mohd. Sabeer @ Shabir Hussain Vs Reg. Manager, UPSRTC (2022) SCC OnLine SC 1701
5. Kajal Vs Jagdish Chand & ors. (2020) 4 SCC 413
6. Sarla Verma (Smt.) & ors. Vs DTC & anr.. (2009) 6 SCC 121
7. Raj Kumar Vs Ajay Kumar & anr. (2011) 1 SCC 343

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

1. This appeal for enhancement of compensation has been preferred by the injured-victim of a motor accident, Brahma Nand Maurya, the claimant of MACP No.418 of 1996. He is aggrieved by the judgment and award of the Motor Accident Claims Tribunal/ Special Judge (Essential Commodities Act), Gorakhpur, which he says, has granted him insufficient recompense for the damage he sustained and the misery he underwent on account of the motor accident, that happened on 29th April, 1996.

2. The facts pleaded in the claim petition are these:

Brahma Nand Maurya is a native of Village Beladar, Post Shivpur, District

Gorakhpur. On the 28th of April, 1996, he had gone to his sister's place at Balsadh. On the day following i.e. 29th April, 1996, he was returning home on board Jeep No. UPK-8702. He was sitting by the driver's side. When the Jeep reached near Village Palahipar at about 11.30 a.m. and was about the Durga Mandir, the driver, who was negligently driving the vehicle at a high speed, swerved out of control and hit a tree. The accident happened on account of negligence of the Jeep driver. Brahma Nand Maurya (hereinafter referred to as 'the claimant') was admitted to the Emergency Section of the District Hospital, Gorakhpur. Since his medical condition deteriorated, the doctors there lost hope. He was then admitted to the care of Dr. S.C. Kaushik, an Orthopedic Doctor at the Jeevan Jyoti Medical Centre, Kasya Road, Betia Hata, Gorakhpur. The head of his left femur had been badly fractured on account of the injury. During the ensuing surgical operation, the femur head was removed, which is attached to the hip joint. In consequence, the claimant's leg was shortened by an inch and a half. This caused the claimant considerable difficulty in movement. The middle finger of his right hand was bent. The hip joint was dislocated because its head was fractured.

3. The claimant suffers from perpetual pain on this account. The claimant remained admitted to the District Hospital from 29.04.1996 to 30.04.1996 and then from 30.04.1996 to 26.06.1996 at Dr. S.C. Kaushik's Nursing Home. Between 26.06.1996 to 26.07.1996, Dr. S.C. Kaushik visited the claimant at his home five times during the duration. These visits were at the claimant's cost. During each of these visits, Dr. Kaushik would do the claimant's dressing etc. According to the claimant, he was entitled to a compensation

of more than Rs.9 lakhs under various heads. It was urged that he was enrolled as an Advocate in the year 1974 and had a legal practice worth Rs.6000/- per month. In addition, he would earn from agriculture that he did, Rs.4000/- a month. After he was handicapped on account of the accident, all his income was effaced. He was bed ridden for four months. His practice had spanned across a period of 22 years, which was all ruined. His clients moved away to different chambers. The claimant is the lone son of his parents. The handicap has left no one at home to carry on farming etc. The claimant asserted that he has suffered immense physical and mental pain. His future had turned bleak.

4. A written statement was filed on behalf of Ram Nakshatra Singh, who pleaded that he is not the owner of the offending Jeep. Long before the accident happened, he had sold the Jeep to Adya Prasad Pandey, which stood transferred to his name. Ram Nakshatra Singh, therefore, said that he had no liability in the matter. Ram Nakshatra Singh was impleaded as opposite party No.1 to the claim petition and respondent No.2 to the appeal.

5. Adya Prasad Pandey was impleaded as opposite party No.2 to the claim petition and respondent No.3 to this appeal. He will hereinafter be called the owner. He filed a written statement separately and admitted the fact that he was the registered owner of the offending Jeep. It is averred that the Jeep aforesaid had not met with any accident on 29.04.1996 at 11.30 a.m. within the local limits of Police Station Khajni nor was the injured travelling on board the said vehicle. The Jeep on the date of the accident was driven by Ram Kripal son of Kishun, who had a driving experience of many years behind

him. He held a valid and effective driving licence on the date of the accident. According to the owner, the claimant had sustained injuries in some other incident. He had set up the claim against the Jeep, without any basis, in order to recover compensation. No FIR was lodged against the offending Jeep on the date of the accident. It was lodged months afterwards, following consultation and premeditation. The claimant did not sustain any injury. The kind of injuries that have been described are utterly wrong and concocted. The ill-fated Jeep, on the date of the accident, was insured with the United India Insurance Company Ltd., opposite party No.3 to the claim petition and respondent No.1 to the appeal. The Insurance Company aforesaid shall hereinafter be referred to as 'the Insurers'. The Jeep was insured with the Insurers under a Cover Note bearing No. 206178, valid from 10.10.1995 to 10.10.1996. The driver was a necessary party and not being impleaded, the claim petition was bad for mis-joinder (incorrectly described as such in the written statement, which should be non-joinder). The owner asserted that the claimant never did travel on board his Jeep, but in case the Tribunal was of opinion that his Jeep was involved in the accident, the burden has to be borne by the Insurers.

6. The Insurers filed their written statement dated 06.01.1998. The factum of the accident was denied, as was the involvement of the offending Jeep. It was pleaded in the alternative that without prejudice to the last mentioned plea, in case it were proved that the accident happened, involving the ill-fated Jeep, it was then the Insurers' case that the Jeep was not being rashly and negligently driven. The owner had not maintained the ill-fated Jeep. It was not roadworthy on the date of accident. It

was being plied against the terms and conditions of the insurance policy. The insurance of the vehicle too was denied. The Insurers said that neither the owner had filed the insurance policy in original in Court nor furnished it to the Insurers. It was also said on behalf of the Insurers that if the owner proved that the premium had been paid and Section 64-VB of the Insurance Act, 1938 was complied with, in that case alone the insurance policy would oblige them; else not. The injuries, if any, sustained by the claimant were simple and cured after routine medical aid. The compensation claimed is excessive and exorbitant. The driver of the ill-fated Jeep did not hold a valid and effective driving licence as envisaged under the Motor Vehicles Act, 1988 (for short, 'the Act'). Accordingly, the Insurers were not liable to indemnify the assured for the said reason. It was pleaded that the claimant bears the burden to prove by cogent evidence that he was travelling on board the ill-fated Jeep. In the submission of the Insurers, the claim petition deserved to be dismissed.

7. On the pleadings of parties, the following issues were framed (translated into English from Hindi):

"1. Whether on 29.04.1996 at about 11:30 a.m. within the limits of Village Palahipar near the Durga Mandir, falling under Police Station Khajni, District Gorakhpur, Jeep No. UPK-8702 collided with a tree, on account of the driver's speed and negligence, resulting in life threatening and grievous injury to Brahma Nand Maurya and that these injuries caused him to be handicapped?"

2. Whether at the time of the accident in question, the driver held a valid driving licence?"

3. Whether at the time of the accident in question, the vehicle in question was insured with opposite party No.3?"

4. Whether at the time of the accident in question, the vehicle was being used contrary to the terms of the insurance policy?"

5. To what compensation is the claimant entitled and from which opposite party?"

6. Any relief, to which the claimant might be entitled?"

8. In support of the claim petition, the claimant examined himself as PW-1, Ram Bachan as PW-2 and Dr. S.C. Kaushik as PW-3. Radha Mohan Dhar Dwivedi, Investigator for the Insurers was examined on their behalf as DW-1 and Sanjay Kumar Sinha, Junior Clerk in the office of the R.T.O., Gorakhpur was examined as DW-2.

9. The claimant in his documentary evidence through a list, bearing paper No.59-Ga placed on record 28 documents. These include a copy of the FIR, the site plan, the charge-sheet and GD. Also included amongst the document are the medical papers of the claimant and cash-memos showing purchase of medicines. Vide another list, 124-Ga, the claimant's birth certificate was filed. Another list, 68-Ga, carried with it paper No.69-Ga, which is a certified copy of the claimant's registration certificate showing his enrollment as an Advocate. Besides, through another list, bearing paper No.70-Ga was filed the claimant's handicap certificate. A list of documents, bearing paper No.95-Ga was filed to bring on record a report from the R.T.O.'s office relating to the driving licences of Ram Kripal and Balram Mishra. By a list of document No.16-Ga, paper No.17-Ga,

another list of document No.90-Ga, paper Nos.91-Ga to 92-Ga, list of document No.100-Ga, paper No.101-Ga and a list of document No.86-Ga, paper No.87-Ga to 88-Ga/2 were filed. All these documents relate to registration and insurance.

10. The Tribunal decided Issue No.1 in the affirmative and in favour of the claimant, holding that the driver of the ill-fated Jeep caused the accident due to his gross negligence, high speed and rash driving, dashing it against the tree near Village Palahipar, in consequence whereof the claimant sustained life threatening and grievous injuries, which led him to be handicapped. Issue Nos.2, 3 and 4 were decided against the Insurers, holding that on the date of the accident, the driver held a valid and effective driving licence, the ill-fated Jeep was insured with the Insurers and the vehicle was being used in accordance with the terms of the insurance policy.

11. It is the findings on Issue Nos.5 and 6 alone that are impugned in this appeal. These relate to the quantum of compensation that the claimant has been held entitled to by the Tribunal. The Tribunal awarded a total sum of Rs.35,149/- towards medical expenses, that includes the hospital bills and purchase of medicines. The Tribunal held the claimant's income to be Rs.5000/- per month from his legal practice, but negatived his income from agriculture saying that there is no document to prove it. The total period of deprivation of his practice was held to be four months, awarding him Rs.20,000/- for the loss of income. Towards expenses on conveyance and special diet, a sum of Rs.10,000/- has been granted. A sum of Rs.10,000/- has been awarded under the head of pain and suffering. About the

80% permanent handicap certificate, it was observed by the Tribunal that the claimant moves with a limp. The contention that the claimant has suffered a loss of income to the extent of 80% was negatived. The Tribunal opined that the claimant while testifying as PW-1 had admitted that his practice had suffered a setback of 50% on account of his handicap. Therefore, the loss of earning capacity due to the functional disability was assessed at Rs.2500/- per month, making for an annual loss of Rs.30,000/-. The loss of earning capacity has been awarded for a period of ten years. Thus, reckoned the total compensation was determined by the Tribunal at a figure of Rs.3,75,149/-. The aforesaid compensation has been ordered to be paid with 9% annual interest with effect from the date of institution of the claim petition, until realization.

12. Heard Mr. S.N. Tripathi, learned Counsel for the claimant and Mr. Anubhav Sinha, Advocate holding brief of Mr. Amresh Sinha, learned Counsel for the Insurers. No one has appeared on behalf of the owner.

13. In order to ascertain damages payable in an injury case, resulting in a disability claimed to be permanent, the principles governing the approach to the issue have been adumbrated by 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."

14. Again, in **Raj Kumar** (*supra*), the heads under which damages are to be awarded in case of personal injury of a permanent character, it has been laid down:

"6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

15. Now, in this case, the claimant is an Advocate, who was practicing in the District Court for the past 22 years, when he met with the accident. Apparently, he was commanding a good practice and

claimed that he would earn Rs.6000/- a month. The Tribunal has assessed it at a sum of Rs.5000/- per month. Looking to the length of his practice, there is no reason to disturb the said finding by the Tribunal, particularly, when the income assessed is a reasonable figure, given the profession and circumstances of the claimant and not very different from what the claimant asserts. The Tribunal has found under the head of loss of earning during the period of treatment, a total loss of income for the period of four months. The claimant has stated in his testimony that he was out of practice on account of the injuries sustained for a period of one year. The Tribunal has not believed the said assertion with the remark that the details of treatment in the claim petition do not go beyond a period of three months and that, therefore, the period of total loss of income, considering the treatment involved and the nature of injuries, would be four months. This Court does not agree with the aforesaid assessment by the Tribunal. In his testimony, the claimant has stated thus:

"दुर्घटना में आयी चोटों के कारण मैं 7-8 माह तक चलने फिरने में असमर्थ था। दो माह वैशाखी पर चले उसके बाद अब भी छड़ी से चलता हूँ साल भर बाद में धीरे-2 कचहरी आने लगा।"

16. There is nothing in the cross-examination of PW-1 that may discredit any of his assertions, as above indicated, made in his examination-in-chief. The injury sustained by the claimant was grievous, where the head of his left femur had been badly fractured, and a part of it had to be surgically removed, leading to shortening of the leg by one and a half inches. The nature of the injury, the impact

whereof has been described by the claimant, need not be doubted. The claimant has said that he was non-ambulatory for 7-8 months in the first stretch. This followed locomotion with the aid of crutches for two months. The claimant then took aid of a walking stick and resumed going to Court after a year.

17. An Advocate is an asset to the society and the training of an Advocate comes after long and toilsome years in the profession. It is a behaviour commonplace amongst members of the Bar that once trained, disciplined and assimilated into the profession, they find it hard to stay away from their professional duties in Court. The period of the claimant's absence described in a graded normalcy back to work inspires confidence and appears to be the correct version about the period of time, during which the claimant had to stay away from work per compulsion. This Court, therefore, has no hesitation to hold that the claimant sustained a total loss of practice and consequent total loss of income for a period of one year. Given the fact that the claimant's income, at the time he suffered the accident, has been adjudged to be Rs.5000/- a month, the total loss of income calculated over a period of one year would be Rs.60,000/-.

18. The next head of determination is about the loss of future earnings caused by the permanent disability. The Tribunal while assessing the loss of future earnings has looked into the handicap certificate, where the permanent disability shown is 80%. This Court also looked into the handicap certificate dated 16.09.1996 issued by a Board of Doctors in the office of the Chief Medical Officer, Gorakhpur, where the disability described is "FUC head of F left with limping due to shorting

80%". A perusal of the certificate shows that the claimant has suffered a permanent disability, apparently to the extent of 80% in one of his lower limbs and developed a permanent limp.

19. The profession of an Advocate requires not only mental alacrity and faculties, but physical fitness to move around, speak to clients, go out on commissions and inspections, all of which would be badly affected by a disability of the kind sustained by the claimant. The Tribunal has, however, readily accepted the claimant's assertion in his testimony that he has lost his practice on account of the disability by 50%. Now, this being an admission by the claimant about a fact that may work to the diminishing of his claim, can safely be accepted. The Tribunal has precisely done that and this Court does not see any reason to disagree. Therefore, the permanent loss of future earnings on account of permanent disability, would be a figure of Rs.2500/- per month.

20. For some inexplicable reason, the Tribunal has chosen to limit this loss to a period of 10 years, virtually applying a multiplier of '10'. The claimant has asserted himself to be 47 years old, a fact that has not been denied or disputed. This Court, therefore, proceeds to find that the claimant was 47 years old at the time of the accident. Unfortunately, the Tribunal has not recorded any finding about the claimant's age. There was a date of birth certificate filed on record and shortlisted in the Tribunal's judgment as a document filed along with a list of documents, bearing paper No.124-Ga. Surprisingly, the list of documents, bearing paper No.124-Ga is on record, but there is no document accompanying it. This Court, therefore, proceeds to accept the undisputed assertion

in the claim petition that the claimant was 47 years old, as already indicated above.

21. According to the principles laid down by the Supreme Court in **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another, (2009) 6 SCC 121** for a person in the age group of 46-50 years, the applicable multiplier is '13'. Therefore, the claimant's loss of future earnings on account of permanent disability have to be multiplied adopting the multiplier of '13'; not '10' as done by the Tribunal. This would conclude the terms on which the loss of future earnings on account of permanent disability are to be calculated.

22. The next issue to be considered is compensation under the head of pecuniary damages or special damages, or expenses relating to treatment, hospitalization, medicines, transportation, nourishing food and miscellaneous expenditure. The Tribunal has awarded towards expenditure in the hospital a sum of Rs.25,660/-. The aforesaid sum has been proved on the basis of voucher-cum-receipts of expenses, incurred in the Jeevan Jyoti Centre dated 26.08.1996, bearing paper No.63-Ga/15. The document is signed by Dr. S.C. Kaushik, Orthopedic Surgeon. He appeared in the witness-box to prove the document and the Tribunal held it proved. The Tribunal has, therefore, accepted the aforesaid expenditure towards hospitalization. Likewise, on a perusal of the cash-memos of the medicines purchased, the Tribunal has awarded a sum of Rs.9489/- under the head of expenditure relating to medicines. A sum of Rs.10,000/- in all has been awarded towards expenses incurred on nourishing food and payments made for the services of an attendant during the time that the claimant was recuperating.

23. So far as award towards expenses relating to treatment, hospitalization and medicines is concerned, this Court does not find any reason to disagree with the Tribunal. However, so far as the money spent on nourishing food and the services of attendant is concerned, all that has figured in the claimant's testimony is that he could not even move about on his own or put on his clothes without assistance. In the claim petition, the claimant has put forward a claim of Rs.20,000/- towards nourishing food and the services of an attendant. This Court is inclined to think that given the nature of the injuries sustained by the claimant, the claim is reasonable. The claim under the head of expenses for nourishing food and the services of an attendant ought to be enhanced from Rs.10,000/- to Rs.20,000/-.

24. So far as the non-pecuniary damages or general damages are concerned, a total sum of Rs.10,000/- has been awarded by the Tribunal towards damage for pain, suffering and trauma. The claimant has demanded a sum of Rs.5,35,000/- under the non-pecuniary heads. In addition, for the loss of expectation of life, a sum of Rs.20,000/- has been claimed. The Tribunal has not awarded anything towards loss of expectation of life or shortening of the life span in consequence of the injury. Learned Counsel for the claimant has placed reliance upon the decision of the Supreme Court in **Kajal v. Jagdish Chand and others, (2020) 4 SCC 413** to submit that compensation for pain and suffering ought to be increased manifold, inasmuch as in **Kajal (supra)**, the compensation awarded was enhanced from Rs.3,00,000/- to Rs.15,00,000/-. A perusal of decision in **Kajal** shows the following observations of their Lordships:

“26. Coming to the non-pecuniary damages under the head of pain, suffering, loss of amenities, the High Court has awarded this girl only Rs 3,00,000. In *Mallikarjun v. National Insurance Co. Ltd.*, (2014) 14 SCC 396 : (2015) 1 SCC (Civ) 335 : (2015) 1 SCC (Cri) 372 : (2013) 10 Scale 668], this Court while dealing with the issue of award under this head held that it should be at least Rs 6,00,000, if the disability is more than 90%. As far as the present case is concerned, in addition to the 100% physical disability, the young girl is suffering from severe incontinence, she is suffering from severe hysteria and above all she is left with a brain of a nine-month-old child. This is a case where departure has to be made from the normal rule and the pain and suffering suffered by this child is such that no amount of compensation can compensate.

27. One factor which must be kept in mind while assessing the compensation in a case like the present one is that the claim can be awarded only once. The claimant cannot come back to court for enhancement of award at a later stage praying that something extra has been spent. Therefore, the courts or the Tribunals assessing the compensation in a case of 100% disability, especially where there is mental disability also, should take a liberal view of the matter when awarding the compensation. While awarding this amount, we are not only taking the physical disability but also the mental disability and various other factors. This child will remain bedridden for life. Her mental age will be that of a nine-month-old child. Effectively, while her body grows, she will remain a small baby. We are dealing with a girl who will physically become a woman but will mentally remain a 9-month-old child. This girl will miss out playing with her friends. She cannot communicate; she

cannot enjoy the pleasures of life; she cannot even be amused by watching cartoons or films; she will miss out the fun of childhood, the excitement of youth; the pleasures of a marital life; she cannot have children who she can love, let alone grandchildren. She will have no pleasure. Her's is a vegetable existence. Therefore, we feel in the peculiar facts and circumstances of the case even after taking a very conservative view of the matter an amount payable for the pain and suffering of this child should be at least Rs 15,00,000.”

25. In the opinion of this Court, the assessment of compensation for pain and suffering in **Kajal** proceed on very extreme facts of a 100% disability, where the young girl was reduced to a bedridden life for all times to come and the growth of her mental faculty perpetually impaired to hold her back at a mental age of nine months. In the opinion of this Court, the principle, that was laid down by their Lordships of the Supreme Court, will not at all be of assistance to the claimant here.

26. In **Mohd. Sabeer alias Shabir Hussain v. Regional Manager, U.P. State Road Transport Corporation**, 2022 SCC OnLine SC 1701, the claimant was a scrap dealer, travelling on board a bus to Delhi from his native place Noor Pur, Gajrola. The bus collided with a stationary tempo. In consequence the claimant sustained injuries. The disability certificate showed the claimant to have suffered 70% permanent disability in his right lower limb, besides other injuries. The claimant's permanent disability in that case arose from the amputation of his right lower limb. It was in that context held by their Lordships of the Supreme Court that the functional disability for the claimant, who was not a

salaried man, but a self-employed businessman, ought to be assessed at 60%. The compensation for pain and suffering in the above background was determined at a sum of Rs.2,00,000/-. The assessment under various heads of compensation was made by the Supreme Court, bearing in mind the socio-economic background of the claimant, who was held to be a man from an economically weaker section of the society. The following observations of the Supreme Court in **Mohd. Sabeer alias Shabir Hussain** (*supra*) are relevant:

“27. We are of the opinion that while awarding compensation in cases of permanent disability caused to claimants, the courts must look at the case in totality, and must consider the socioeconomic background of the claimants. The Appellant herein comes from an economically weaker section of the society.

28. It is almost universally seen that persons from marginalized backgrounds often face an additional layer of discrimination due to bodily disabilities. This is because persons from marginalized sections of the society already face severe discrimination due to a lack of social capital, and a new disability more often than not compounds to such discrimination. In such circumstances, to preserve the essence of justice, it becomes the duty of the Court to at the very least restore the claimant as best as possible to the position he was in before the occurrence of the disability, and to do so must award compensation in a liberal manner.”

27. In this case, the claimant has suffered a 50% permanent disability, where he has developed a permanent limp, impairing not only his capability to work as an Advocate the way he did earlier, but also affected the quality of his life. With every

step that he takes now, being different from what it was before the accident, his quality of life, as a whole, would be perpetually impaired. Therefore, while the claimant's case may be a little less harsher for the worth of pain and suffering than that before their Lordships in **Mohd. Sabeer alias Shabir Hussain**, it is still telltale of enormous pain and suffering for the claimant. The other factor, which has been taken into account in **Mohd. Sabeer alias Shabir Hussain**, is the economically weaker section of the society which the claimant hailed from in that case. The claimant here is an Advocate, who cannot be regarded a man from an economically weaker section of the society. Yet, one cannot lose sight of the fact that Advocates in contemporary society function under tremendous strain with no social support. The social security provided by the State Bar Council is marginal. Lesser is the social security of a different kind offered by the society, who would have no sympathy for a Member of the Bar in distress, a man whom they otherwise look up to for help at every downturn of life. Therefore, given the permanent handicap and the pain and suffering involved, the claimant is entitled to a compensation of Rs.1,50,000/- under this head.

28. Now, it is turn to consider the award of future prospects, the claimant must be held entitled to on account of lost income. The question of award of compensation for the loss of future prospects in the case of a self-employed man suffering a permanent disability on account of an accident, engaged the attention of the Supreme Court in **Jagdish v. Mohan and Others (2018) 4 SCC 571**. In **Jagdish** (*supra*), the claimant was a carpenter, aged 24 years when the accident happened. In the background of the said

facts, the Supreme Court, relying on the decision of the Constitution Bench in **National Insurance Co. Ltd. Vs. Pranay Sethi, (2017) 16 SCC 680**, held in **Jagdish:**

"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 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. In the State of Uttar Pradesh, the issue of addition towards future prospects is not governed by the scale envisaged under the law in **Pranay Sethi (supra)**, but by the Uttar Pradesh Motor Vehicles Rules, 1998 (for short 'the Rules of 1998').

30. 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 Sethi cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in Pranay Sethi cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument

must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. *We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs."*

31. Upon an application of Rule 220-A(3) of the Rules of 1998 to the facts here, the claimant being aged 47 years, that is to say, in the age bracket of 40-50 years, an addition of 30% towards future prospects to his lost income has to be made.

32. The compensation is, accordingly, revised and enhanced in the following manner:

(i)	Expenses relating to treatment, hospitalization and medicines	=	35149
(ii)	Compensation for nourishing food and attendant charges	=	20000
(iii)	Loss of earning during period of treatment (one year) = 5000x12	=	60000
(iv)	Loss of future earnings on account of permanent disability (monthly income x 12 x applied multiplier) = 2500x12x13	=	39000 0
(v)	Lost income + 30% towards future prospects = 390000+117000	=	50700 0
(vi)	Damages for pain, suffering and trauma	=	15000 0
The total compensation would therefore, work out to			= 77214 9

**a figure of
Rs.35149+20000+60000+507
000 + 150000**

33. 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.7,72,149/-**. 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, shall be adjusted. Costs easy.

(2023) 7 ILRA 228

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 28.04.2023

BEFORE

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

FAFO No. 1326 of 2003

Hamidunnisha & Ors. ...Appellants
Versus
U.P.S.R.T.C. & Ors. ...Respondents

Counsel for the Appellants:

Sri Sharve Singh, Sri Sharve Singh

Counsel for the Respondents:

Smt. Seema Mishra, Sri Ashok Kumar Jaiswal, Sri Sunil Kumar Mishra, Sri Siddharth Jaiswal

A. Civil Law - Motor Vehicles Act,1988- Sections 173- enhancement of compensation- The claimants are seven in number- Out of the claimants, the deceased's widow is major whereas the six children are all minors. Applying Rule 220-A (2) (iii) of the U.P. Motor Vehicles Rules, 1998- each child would be

considered half a unit- the six children would reckon for three dependents-Thus, the widow and the six minor children would constitute a total of four dependents- As per rule laid down in Sarla Verma Case the claimants are entitled to be placed in the bracket of dependent family members being 4-6-The rule in Sarla Verma aforesaid sanctions a deduction of one-fourth where the number of dependent family members are 4-6. The finding of the Tribunal, directing deduction of a one-third of the deceased's income towards personal and living expenses, is, therefore, erroneous-The Tribunal has adopted a multiplier of '16'. According to the table in Paragraph No.40 of the report in Sarla Verma for the age group 36-40 years, the multiplier to be adopted is '15'; not '16- Thus, the total compensation would be Rs. 9,17,500/- - The impugned award passed by the Tribunal is modified and the compensation awarded and payable by the owner is enhanced to Rs. 4,587,50/- after deducting 50% of the compensation apportioned to the share of the UPSRTC settled in the Lok Adalat.(Para 1 to 28)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Saroj Devi & ors. Vs Royal Sundaram Alliance Ins. Co. Ltd. & anr. (2016) 2 TAC 281 All..
2. V. Mekala Vs M. Malathi & anr. (2014) 11 SCC 178
3. M.R. Krishna Murthi Vs New India Assur. Co. Ltd & ors. (2020) 15 SCC 493
4. Gopalpuri Jai Prakash & ors. Vs The Managing Dir, APSRTC & ors., MACMA. No. 694 of 2011
5. Meena Pawaia & ors. Vs Ashraf Ali & ors. (2021) SCC OnLine SC 1083
6. Gyan Chand Jain & ors. Vs Permanand & ors. (2003) 1 TAC 490
7. Sarla Verma(Smt.) & ors. Vs DTC (2009) 6 SCC 121
8. `Magma General Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors. (2018) 18 SCC 130
9. National Ins. Co. Vs Pranay Sethi & ors. (2017) 16 SCC 680
10. New India Assur. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC OnLine SC 822
11. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd & ors. (2017) 35 LCD 1311
12. P.O. Meera & anr..Vs Ananda P. Naik & ors. (2022) SCC OnLine Ker 546
13. Branch Manager, Future General India Ins. Co. Ltd. Bengaluru Vs Varsha S.L. (2019) SCC OnLine Kar 3498
14. Shashikala & ors. Vs Ganga-lakshmmamma & anr.. (2015) 9 SCC 150

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

1. This is a claimants' appeal arising out of a judgment and award of Mr. S.C. Bose, District Judge of Allahabad, sitting as the Motor Accident Claims Tribunal, dated 6th January, 2003 passed in Motor Accident Claims Petition No.411 of 1999. The claimants seek enhancement of the compensation awarded.

2. Insanul Haq, the deceased was travelling on board Jeep No. UP-70N-7479 on 13.04.1999. At about 7:30 p.m., near a certain Village Gansiari within the local limits of Police Station Mau Aima, District Allahabad (now Prayagraj), a Bus bearing registration No. UGH-471, owned by the Uttar Pradesh State Road Transport Corporation (for short, 'the UPSRTC'), that was proceeding from Allahabad to Ayodhya, hit the Jeep. In consequence of the accident, Insanul Haq sustained injuries, leading to his death. The Jeep aforesaid, whereon Insanul Haq was travelling, was owned by one Alok Pandey

and insured by the Oriental Insurance Company, Allahabad. The claimants are seven in number, to wit, Hamidunnisa (wife) aged about 40 years, Tito (son) aged about 16 years, Gulzar (son) aged about 15 years, Resham (daughter) aged about 12 years, Sarwar (son) aged about 9 years, Gulsher (son) aged about 5 years and Kulsum (son) aged about 7 years.

3. It is the claimants' case that the deceased was a power loom mechanic and himself the owner of a power loom. His income was Rs.5000/- per month. All the claimants were dependent upon the deceased's income. The claimants have, therefore, demanded a compensation in the sum of Rs.10,00,000/-.

4. A separate written statement each was filed on behalf of the UPSRTC, the owner of the ill-fated Jeep, Alok Pandey and the Oriental Insurance Company, who are the Insurers of the Jeep. The owner of the Jeep and the Insurers shall hereinafter referred to as 'the owner' and 'the Insurers', respectively.

5. The UPSRTC broadly took a stand that the accident happened on account of the Jeep driver's negligence, whereas the owner took a stand that the accident occurred due to the rash and negligent driving by the Bus driver. It was also urged that on the date of accident, the ill-fated Jeep was validly insured with the Insurers. The Insurers did a wholesome and inconsistent denial of everything that was urged to hold them liable. They denied insuring the ill-fated Jeep, the accident between the UPSRTC Bus and the ill-fated Jeep, and also the fact that the driver held a valid driving licence. In substance, the Insurers denied their liability to

indemnify the owner of the Jeep regarding any liability, that may be apportioned to him.

6. On the pleadings of parties, the following issues were framed (translated into English from Hindi):

"1. Whether on 13.04.1999, at about 7:30 in the evening hours, the alleged accident happened on account of rash and negligent driving of Jeep No. UP-70N-7479?"

2. Whether the alleged accident, involving Jeep No. UP-70N-7479 and Bus No. UGH-471, happened due to the contributory negligence of both the vehicles? If yes, which vehicle is at fault and to what extent?"

3. Whether Jeep No. UP-70N-7479 is owned by Alok Pandey and insured with the Oriental Insurance Company?"

4. Whether on the date of the accident, the driver had a valid driving licence?"

5. Whether Jeep No. UP-70N-7479 was being operated in accordance with law, rules and its registration?"

6. Whether the claimants are entitled to compensation? If yes, how much and from which of the parties?"

7. To what relief are the claimants entitled?"

7. The Tribunal dealt with Issues Nos. 1 and 2 together and held that both the Bus and the ill-fated Jeep had equal contributory negligence in the accident. Issue No.3 was answered in favour of the owner and the claimants holding that the ill-fated Jeep was owned by the owner and validly insured with the Insurers. This issue was answered in this manner by the Tribunal on the Insurers' admission. Issue

No.5 was decided in the manner that the ill-fated Jeep was held registered in the owner's name as a vehicle for personal use. There is a further finding that on the date of accident, the ill-fated Jeep was being used to carry passengers. It was, therefore, held on this Issue in conclusion that the ill-fated Jeep was not being operated in accordance with its registered use. In answering Issue No.4, the Tribunal held that according to the evidence on record, the driver of the ill-fated Jeep, Shiv Shankar had a valid driving licence with him, which was valid for driving a private vehicle alone. The licence was not endorsed for driving a commercial vehicle carrying passengers. Issues Nos.6 and 7 were taken up together. The claimants were held entitled to compensation on account of Insanul Haq's death.

8. The Tribunal held that though the claimants said that the deceased was a power loom mechanic, who owned a power loom, yielding an income of Rs.5000/- per month, but there is no proof of the deceased's income or his ownership of the power loom, that were claimed for him. It was noted that no proof was offered regarding the said fact by the claimants. It has been remarked that the fact that the deceased was a power loom mechanic has not been specifically denied as well by the other side. It has been observed by the Tribunal that the deceased, who was found to be aged 40 years, considering his age group and capability to work, must be credited with a minimum monthly income of Rs.3000/-. It is on this basis that the Tribunal proceeded to work out the claimants' dependency.

9. The Tribunal ordered deduction of a one-third out of the deceased's income towards his personal and living expenses.

Accordingly, the monthly income of the deceased available for the purpose of working out dependency was held to be Rs.2000/-. Considering the age of the deceased, a multiplier of '16' was adopted. On the aforesaid basis, a total substantive dependency of Rs.3,84,000/- was determined by the Tribunal, to which the claimants were held entitled. On the said sum of money, interest was directed to be paid @ 10% per annum with effect from the date of institution of the claim. The Tribunal has taken note of the fact that the claimants have entered into a settlement with the UPSRTC in the Lok Adalat held on 04.03.2001, and, accepted in compensation, a total sum of Rs.60,000/- in liquidation of all their claims against the UPSRTC. It was, accordingly, held that there was nothing payable to the claimants by the UPSRTC.

10. The Tribunal has gone on to hold that after receiving Rs.60,000/- from the UPSRTC out of the total compensation of Rs.3,84,000/- payable, 50% would be deducted from the said sum of money, entitling the claimants to a sum of Rs.1,92,000/- in compensation, payable by the owner. The Insurers were discharged on ground that there was a breach of policy. The Tribunal has apportioned compensation, amongst the various claimants, with the largest sum of Rs.42,000/- being directed to be paid to the widow, Smt. Hamidunnisha.

11. Heard Mr. Sharve Singh, learned Counsel for the claimants, Mr. Siddharth Jaiswal, Advocate holding brief of Mr. Ashok Kumar Jaiswal, learned Counsel for the Insurers and Mr. Sunil Kumar Mishra, learned Counsel appearing on behalf of the UPSRTC. No one appeared on behalf of the owner, though the name of Ms. Seema Misra, Advocate is printed in the cause list.

12. It is argued by the learned Counsel for the claimants that the principle of contributory negligence in this case is not applicable, because it is a case of composite negligence. The claimants are free to recover from either of the two vehicles notwithstanding the finding of contributory negligence apportioning a 50% liability. It is next submitted that breach of condition of the insurance policy that the Tribunal has found on account of the driving licence of the driver of the ill-fated Jeep not being endorsed for driving a commercial passenger vehicle, would not entitle the Insurers to an all out exoneration on the policy. Instead, it would give the Insurers a right to recover after paying off the claimants. The claimants have also criticized the Tribunal's finding in holding the deceased's income to be a sum of Rs.3000/- per month, ignoring evidence about his income. It is also said that the Tribunal has not taken into account future prospects of the deceased. The deduction towards personal expenses has been criticized as one much on the higher side. It is also urged that the Tribunal has failed to award anything toward loss of love and affection, besides funeral expenses.

13. The learned Counsel appearing for the UPSRTC says that they are not liable to pay anything to the claimants towards the enhanced compensation, inasmuch as the claimants have accepted a sum of Rs.60,000/- on 04.03.2001 before the Lok Adalat in complete settlement of their claim against the UPSRTC.

14. The learned Counsel for the Insurers, on the other hand, has argued that the Jeep driver's licence being one for a private vehicle alone, without any endorsement for driving a commercial vehicle, there is a fundamental breach of the

policy, entitling the Insurers to complete exoneration, as ordered by the Tribunal.

15. This Court has considered the submissions advanced on behalf of both sides. It is to be noticed that there is no appeal, either by the owner or the Insurers. It is true that so far as the claimants are concerned, it is a case of composite negligence, because the deceased was on board one of the vehicles, that has been found to have contributed to the negligence leading to the accident. The claimants are free to recover from any of the parties found to be in contributory negligence. The issue of apportionment of negligence and a fortiori the liability to pay compensation is a matter inter se the owner and the Insurers on one hand and the UPSRTC on the other. It is not an issue in this appeal at all.

16. What is different in this case is that the rights of the claimants have nevertheless been split into two parts, to wit, one part against the owner and the Insurers and the other against the UPSRTC. There is on record a compromise inter se the claimants and the UPSRTC dated 04.03.2001 filed before the Lok Adalat, which has been accepted on the same day by the Lok Adalat. The terms of the settlement before the Lok Adalat show that the claimants have compromised their claim against the UPSRTC for a sum of Rs.60,000/- in all. The aforesaid compromise between the claimants and the UPSRTC is on record as paper No.14-Ga, on the reverse of which is the order passed by the Lok Adalat. The result is that the present appeal by the claimants for enhancement is confined to their claim against the owner and the Insurers.

17. This Court is of opinion that the Tribunal having returned a finding of contributory negligence to the extent of

50% each between the ill-fated Jeep and the UPSRTC Bus, it is difficult to disturb that finding in the absence of any positive evidence brought to the notice of this Court by the claimants to show that it was a different percentage of negligence on the part of the ill-fated Jeep's driver or it was cent per cent his fault. Even otherwise, it would now not be open to disturb that finding, because on the foot of it the claimants have settled the matter with the UPSRTC before the Lok Adalat. The claim, therefore, that now proceeds is confined to the owner and the Insurers.

18. Whatever enhancement of compensation is granted by this Court, if at all, the same would be limited to 50% of the determination, the other 50% having been settled in terms of the compromise with the UPSRTC.

19. The next question which arises is whether the Insurers have rightly been discharged of their liability by the Tribunal or is it a case where the Insurers ought to be saddled with the liability of making good the compensation awarded with a right to recover from the owner. It is true that the driving licence held by the driver of the ill-fated Jeep was a licence to drive a motorcycle and a light motor vehicle, which authorizes a person to drive a private vehicle. It was not endorsed by the Licensing Authority authorizing the licensee to drive a commercial light motor vehicle, carrying passengers.

20. The Tribunal has recorded a finding that the facts and evidence on record show that the ill-fated Jeep was carrying gratuitous passengers, though there is nothing expressly said in the affidavit of Hamidunnisha, that has been filed in lieu of the claimant's examination-

in-chief, that the deceased boarded the vehicle after paying some kind of a fare. This Court is inclined to agree with the Tribunal on this issue. The reason is that apparently the owner has not raised a specific plea in the written statement that he was carrying passengers, non-gratuitously or introducing circumstances to show some kind of a personal relationship between the deceased or his family and the owner. The Jeep was full of passengers unrelated to the owner from which a presumption about gratuitous carriage of passengers must be raised. There is nothing on record to rebut the presumption that the passengers on board the ill-fated Jeep, none of whom appear to be related to the owner or his acquaintances or friends, were gratuitous. The Jeep was clearly being plied as a passenger vehicle for hire.

21. The Court's inference in this regard must also rest on judicial notice of the reputed fact that vehicles of this type are invariably used as passenger vehicles for hire, though registered as private ones. The Court, therefore, finds that while the driver of the Jeep may not be holding a valid licence, authorizing him to drive passenger vehicles used for commercial purposes, the ill-fated Jeep was nevertheless insured by the Insurers. At the same time, the driving licence not being one which was endorsed to drive a commercial or passenger vehicle, there is a breach of the insurance policy entitling the Insurers to exoneration from their liability to substantively indemnify in terms of the policy. But, they ought to be directed to pay the claimants and recover from the owner.

22. In **Shamanna and another v. Divisional Manager, Oriental Insurance**

Company Limited and others, (2018) 9 SCC 650, the relevant facts were that the deceased was travelling by a Jeep, negligently driven by its driver. The door of the vehicle suddenly opened and the deceased was thrown out of the vehicle leading to his death. The deceased was a young man and his parents claimed compensation. The Tribunal awarded compensation with a direction to pay and recover since the Jeep driver had no valid driving licence, when the accident happened. On an appeal by the Insurance Company and by the claimants as well, the High Court enhanced the compensation, but set aside the direction to pay and recover. It was in those circumstances that on the claimants' appeal by special leave, the Supreme Court after referring to the decision in **National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297** held in **Shamanna (supra)**:

“11. In the present case, to deny the benefit of “pay and recover”, what seems to have substantially weighed with the High Court is the reference to larger Bench made by the two-Judge Bench in National Insurance Co. Ltd. v. Parvathneni [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] which doubted the correctness of the decisions which in exercise of jurisdiction under Article 142 of the Constitution of India directing insurance company to pay the compensation amount even though insurance company has no liability to pay. In Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943], the Supreme Court pointed out that Article 142 of the Constitution of India does not cover such type of cases and that : (SCC p. 786, para 5)

“5. If the insurance company has no liability to pay at all, then, it cannot be compelled by order of the court in exercise of its jurisdiction under Article 142 of the Constitution of India to pay the compensation amount and later on recover it from the owner of the vehicle.”

12. The above reference in Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] has been disposed of on 17-9-2013 [National Insurance Co. Ltd. v. Parvathneni, (2018) 9 SCC 657] by the three-Judge Bench keeping the questions of law open to be decided in an appropriate case.

13. Since the reference to the larger Bench in Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] has been disposed of by keeping the questions of law open to be decided in an appropriate case, presently the decision in Swaran Singh case [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] followed in Laxmi Narain Dhut [National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700 : (2007) 2 SCC (Cri) 142] and other cases hold the field. The award passed by the Tribunal directing the insurance company to pay the compensation amount awarded to the claimants and thereafter, recover the same from the owner of the vehicle in question, is in accordance with the judgment passed by this Court in Swaran Singh [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] and Laxmi Narain Dhut [National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700 : (2007) 2 SCC (Cri) 142] cases. While so, in our view, the High Court ought

not to have interfered with the award passed by the Tribunal directing the first respondent to pay and recover from the owner of the vehicle. The impugned judgment [Shamanna v. Laxman, 2016 SCC OnLine Kar 6928] of the High Court exonerating the insurance company from its liability and directing the claimants to recover the compensation from the owner of the vehicle is set aside and the award passed by the Tribunal is restored.

14. So far as the recovery of the amount from the owner of the vehicle, the insurance company shall recover as held in the decision in *Oriental Insurance Co. Ltd. v. Nanjappan* [*Oriental Insurance Co. Ltd. v. Nanjappan*, (2004) 13 SCC 224 : 2005 SCC (Cri) 148] wherein this Court held that : (SCC p. 226, para 8)

“8. ... For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer.”

23. Therefore, this Court is of opinion that whatever liability is found for the owner, the Insurers would be liable to make good the compensation awarded and recover the same from the owner through an application made to the Tribunal.

24. This spares for the Court the question whether compensation has been validly determined by the Tribunal. The claimants have sought enhancement and say that the compensation as assessed is far on the lower side. They say, it is against the settled principles.

25. The foremost fact in order to outwork the compensation is the monthly income of the deceased. The Tribunal has

considered the deceased to be a productive person with some kind of a capability to earn his livelihood. His age has also been considered to be one which would enable him to earn his livelihood. The Tribunal has taken note of the circumstances about the deceased being said to be a power loom mechanic, a fact that has not been denied by the other side. The case about the deceased being the owner of a power loom has, however, been disbelieved for want of evidence. In the totality of circumstances, the Tribunal has determined for the deceased a monthly income of Rs.3000/-. We are in agreement with the aforesaid assessment made by the Tribunal.

26. The deceased had an income of Rs.3000/- per month and a *fortiori* an income of Rs.36,000/- *per annum*. Given the fact that his dependents are seven in number, all of whom are the claimants, deduction towards personal and living expenses would have to be made accordingly.

27. Out of the claimants, the deceased's widow is major whereas the six children are all minors. Applying Rule 220-A (2) (iii) of the U.P. Motor Vehicles Rules, 1998 (for short, the Rules of 1998), each child would be considered half a unit, and, therefore, the six children would reckon for three dependents. Thus, working it out, the widow and the six minor children would constitute a total of four dependents. In accordance with rule laid down in Paragraph No.30 of **Sarla Verma (Smt) v. Delhi Transport Corporation and another**, (2009) 6 SCC 121, the claimants are entitled to be placed in the bracket of dependent family members being 4-6. The rule in **Sarla Verma** (*supra*) aforesaid sanctions a deduction of **one-fourth** where the number of dependent family members

are 4-6. The finding of the Tribunal, directing deduction of a one-third of the deceased's income towards personal and living expenses, is, therefore, erroneous.

28. The Tribunal has adopted a multiplier of '16'. According to the table in Paragraph No.40 of the report in **Sarla Verma** for the age group 36-40 years, the multiplier to be adopted is '15'; not '16'.

29. The claimants are also entitled to addition of future prospects, which are no longer the preserve of the service class. These are also to be extended to the self-employed or those working on a fixed salary going by the principle laid down by the Supreme Court in **National Insurance Company v. Pranay Sethi and others (2017) 16 SCC 680**. In *Pranay Sethi* (supra), 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.

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 in Reshma 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.”

30. The next point to be considered is whether future prospects, to which the claimants are 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 is no longer *res integra* in view of the decision of the Supreme Court in **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822**, where it was 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. 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.

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. It still remains to be examined whether Rule 220-A(3) of the Rules of 1998, introduced by Notification No. 777/XXX-4-2011-4(3)-2010 dated 26th September, 2011 i.e. The Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011, would apply retrospectively to an accident that took place prior to the amendment. The issue was answered by a Division Bench of this Court in **Sushil Kumar and others v. M/s. Sampark Logistic Private Limited and others, 2017 (35) LCD 1311**. In **Sushil Kumar (supra)**, it was 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. Niranjana 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."*

32. The law laid down by the Division Bench in **Sushil Kumar** (*supra*) binds this Court and computation of future prospects is, therefore, to be made in accordance with the Rule 220-A(3) of Rules, 1998, even though the accident happened long before the amendment. Rule 220-A(3) stipulates that where the age of the deceased is less than 40 years, 50% is to be added to his/ her income towards future prospects.

33. There is an issue further raised about non-grant of any compensation by the Tribunal under the conventional heads. Here again, the law down in **Pranay Sethi** is eloquent, where it has been 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 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 seems 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)

34. The next issue for consideration is compensation that is to be awarded for loss of consortium. This issue fell for consideration before their Lordships of 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)

35. Since 50% of the liability for the compensation payable to the claimants was

apportioned to the share of the UPSRTC, with whom the claimants have settled their claim fully and finally before the Lok Adalat, whatever compensation is found due on revision, would be payable by the owner and/ or the Insurers to the extent of 50% alone. Since it has been held that compensation is payable in the first instance by the Insurers, the Insurers are liable to satisfy the award to the extent payable by the owner with liberty to recover from the owner through a miscellaneous application to be made before the Tribunal, executing the award.

36. In view of the aforesaid conclusion, compensation payable to the claimants would have to be worked out in the following manner:

(i)	Monthly Income (of the deceased)	=	3000
(ii)	Monthly Income+Future Prospects (monthly income x 50%)	=	4500
			3000+1500
(iii)	Annual Income (of the deceased)	=	54000
	)		deceased) = 4500x12
(iv)	Annual Dependency	=	40500
	)		Annual Income – one-fourth deduction towards personal expenses of the deceased = 54000-13500
(v)	Total Dependency	=	60750
	)		Annual Dependency x Applied Multiplier = 40500x15
(vi)	Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents'	=	31000
			0

Consortium
 =15000+15000+40000x
 7

The total compensation = 91750
 would therefore, work out 0
 to a figure of Rs. 607500+
 Rs. 310000

Less 50% of the = 45875
 compensation apportioned 0
 to the share of the UPSRTC
 settled in Lok Adalat =
 917500/2

2. In the result, this appeal is **allowed in part**. The impugned award passed by the Tribunal is **modified** and the compensation awarded and payable is enhanced to a sum of **Rs. 4,58,750/-**. The aforesaid sum of money shall be payable in the first instance by the Insurers with liberty to recover from the owner through a miscellaneous application to be made before the Tribunal. The said 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 owner, pursuant to the impugned award, shall be adjusted against the award. The *inter se* apportionment of compensation shall be done in the same ratio as directed by the Tribunal. Costs easy.

(2023) 7 ILRA 242
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.04.2023

BEFORE

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

FAFO No. 1446 of 2003

Abdul Khaliq & Ors. ...Appellants
Versus
U.P.S.R.T.C. & Ors. ...Respondents

Counsel for the Appellants:
 No, Sri Sharve Singh

Counsel for the Respondents:
 Smt. Seema Mishra, Sri Ashok Kumar
 Jaiswal, Sri Sunil Kumar Mishra, Sri
 Siddharth Jaiswal

**A. Civil Law - Motor Vehicles Act, 1988-
 Sections 173- enhancement of
 compensation-** The claimants are three in
 number-So far as consortium is
 concerned, claimant mother has not been
 held entitled to any dependency, she has
 lost her daughter, and would be entitled
 to filial consortium-So far as minor
 claimant is concerned, she would be
 entitled to parental consortium-Amongst
 claimants, deceased uncle who has not
 been considered any kind of a dependent
 of deceased, is not entitled to anything
 towards consortium as well-He does not
 fall under any of known categories where
 compensation for loss of consortium is to
 be awarded- Thus, the total compensation
 would be 596000 -The impugned award
 passed by the Tribunal is modified and the
 compensation awarded and payable by
 the owner is enhanced to Rs. 2,98,000/-
 after deducting 50% of the compensation
 apportioned to the share of the UPSRTC
 settled in the Lok Adalat.

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Gyan Chand Jain & ors. Vs Permanand & ors. (2003) 1 TAC 490
2. Sarla Verma(Smt.) & ors. Vs DTC (2009) 6 SCC 121
3. Magma General Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors. (2018) 18 SCC 130
4. National Ins. Co. Vs Pranay Sethi & ors. (2017) 16 SCC 680
5. New India Assur. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC OnLine SC 822

6. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd & ors. (2017) 35 LCD 1311

7. P.O. Meera & anr. Vs Ananda P. Naik & ors. (2022) SCC OnLine Ker 546

8. Branch Manager, Future General India Ins. Co. Ltd. Bengaluru Vs Varsha S.L. (2019) SCC OnLine Kar 3498

9. Shashikala & ors. Vs Ganga-lakshmamma & anr.. (2015) 9 SCC 150

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

1. This is a claimants' appeal arising out of a judgment and award of Mr. S.C. Bose, District Judge of Allahabad, sitting as the Motor Accident Claims Tribunal, dated 6th January, 2003 passed in Motor Accident Claims Petition No.410 of 1999. The claimants seek enhancement of the compensation awarded.

2. Smt. Gulshan Bano, the deceased, was travelling on board Jeep No. UP-70N-7479 on 13.04.1999. At about 7:30 p.m., near a certain Village Gansiari within the local limits of Police Station Mau Aima, District Allahabad (now Prayagraj), a Bus bearing registration No. UGH-471, owned by the Uttar Pradesh State Road Transport Corporation (for short, 'the UPSRTC'), that was proceeding from Allahabad to Ayodhya, hit the Jeep. In consequence of the accident, Smt. Gulshan Bano sustained injuries, leading to her death. The Jeep aforesaid, whereon Gulshan Bano was travelling, was owned by one Alok Pandey and insured with the Oriental Insurance Company, Allahabad. The claimants are three in number, to wit, Abdul Khaliq aged about 45 years, an uncle of the deceased, Smt. Hamidunnisha aged about 40 years, the deceased's mother and Shaista, the deceased's minor daughter, aged about 8 months. They shall hereinafter be called

'the claimants', unless the context otherwise requires. It appears that the deceased was a divorcee and there is no claim laid on behalf of her husband.

3. It is the claimants' case that the deceased was a woman, who stayed home and did productive work of stitching etc., that yielded her an income of Rs.5000/- per month. All the claimants were dependent upon the deceased's income. The claimants have, therefore, demanded a compensation in the sum of Rs.10,00,000/-.

4. A separate written statement each was filed on behalf of the UPSRTC, the owner of the ill-fated Jeep, Alok Pandey and on behalf of the Oriental Insurance Company, who are the Insurers of the ill-fated Jeep. The owner of the Jeep and the Insurers shall hereinafter referred to as 'the owner' and 'the Insurers'.

5. The UPSRTC broadly took a stand that the accident happened on account of the Jeep driver's negligence, whereas the owner took the stand that the accident occurred due to the rash and negligent driving by the Bus driver. It was also urged that on the date of accident, the ill-fated Jeep was validly insured with the Insurers. The Insurers did a wholesome and inconsistent denial of everything that was urged to hold them liable. They denied insuring the ill-fated Jeep, the accident between the UPSRTC Bus and the ill-fated Jeep, and also the fact that the driver held a valid driving licence. In substance, the Insurers denied their liability to indemnify the owner of the Jeep regarding any liability, that might be apportioned to him.

6. On the pleadings of parties, the following issues were framed (translated into English from Hindi):

“1. Whether on 13.04.1999, at about 7:30 in the evening hours, the alleged accident happened on account of rash and negligent driving of Jeep No. UP-70N-7479?”

2. Whether the alleged accident, involving Jeep No. UP-70N-7479 and Bus No. UGH-471, happened due to the contributory negligence of both the vehicles? If yes, which vehicle is at fault and to what extent?

3. Whether Jeep No. UP-70N-7479 is owned by Alok Pandey and on the date of accident, it was insured with the Oriental Insurance Company?

4. Whether on the date of the accident, the driver had a valid driving licence?

5. Whether Jeep No. UP-70N-7479 was being operated in accordance with law, rules and its registration?

6. Whether the claimants are entitled to compensation? If yes, how much and from which of the parties?

7. To what relief are the claimants entitled?”

7. The Tribunal dealt with Issues Nos. 1 and 2 together and held that both the Bus and the ill-fated Jeep had an equal share of contributory negligence in the accident. Issue No.3 was answered in favour of the owner holding that the ill-fated Jeep was owned by him and validly insured with the Insurers. This issue was answered in this manner by the Tribunal on the Insurers' admission. Issue No.5 was decided in the manner that the ill-fated Jeep was registered in the owner's name as a vehicle for personal use. There is a further finding that on the date of accident, the ill-fated Jeep was being used to carry passengers. It was, therefore, held on this issue in conclusion that the ill-fated Jeep was not being operated in accordance with its

registered use. In answering Issue No.4, the Tribunal held that according to the evidence on record, the driver of the ill-fated Jeep, Shiv Shankar had a valid driving licence with him, which was valid for driving a private vehicle alone. The licence was not endorsed for driving a commercial vehicle carrying passengers. Issues Nos.6 and 7 were taken up together. The claimants were held entitled to compensation on account of Gulshan Bano's death.

8. A finding was returned that her husband had not presented any claim and there was an affidavit to show that the deceased's husband had divorced her. The deceased's income, that was claimed from her exertions that she did privately doing stitching jobs etc., was not accepted by the Tribunal. There is a remark that the fact that the deceased's had an income of Rs.5000/- per month, has not been traversed on behalf of the owner, the UPSRTC and the Insurers. It has also been noticed that there is nothing on record to show the deceased's age.

9. It has been remarked that the deceased being a divorcee, it is believable that she would be working to earn a livelihood for herself. Despite these remarks, the deceased's income as claimed, or for that matter any substantial income has been discounted. The Tribunal has held for the deceased a minimum income of Rs.15,000/- a year. On that basis, the Tribunal has determined the compensation payable to the claimants. One-third of the deceased's income has been deducted towards her personal and living expenses. The deceased's age has been opined to be 22 years given the fact that it was claimed to be 22 years and in the autopsy report, it was determined as 21 years. The Tribunal

has applied a multiplier of '17' to arrive at a substantive compensation of Rs.1,70,000/-. Nothing else has been awarded, except 10% simple interest from the date of institution of the claim petition until realization.

10. Heard Mr. Sharve Singh, learned Counsel for the claimants, Mr. Siddharth Jaiswal, Advocate holding brief of Mr. Ashok Kumar Jaiswal, learned Counsel for the Insurers and Mr. Sunil Kumar Mishra, learned Counsel appearing on behalf of the UPSRTC. No one appeared on behalf of the owner, though the name of Ms. Seema Misra, Advocate is printed in the cause list.

11. It is argued by the learned Counsel for the claimants that the principle of contributory negligence in this case is not applicable, because it is a case of composite negligence. The claimants are free to recover from either of the two vehicles notwithstanding the finding of contributory negligence apportioning a 50% liability. It is next submitted that breach of condition of the insurance policy that the Tribunal has found on account of the driving licence of the driver of the ill-fated Jeep not being endorsed for driving a commercial passenger vehicle, would not entitle the Insurers to an all out exoneration on the policy. Instead, it would give the Insurers a right to recover after paying of the claimants. The claimants have also criticized the Tribunal's finding about the deceased's annual income to be sum of Rs.15,000/-, rejecting evidence about her actual income. It is also said that the Tribunal has not taken into account future prospects of the deceased. The deduction towards personal expenses has been criticized as one much on the higher side. It is also urged that the Tribunal has

failed to award anything towards loss of love and affection, besides funeral expenses.

12. The learned Counsel appearing for the UPSRTC says that they are not liable to pay anything to the claimants towards the enhanced compensation, inasmuch as the claimants have accepted a sum of Rs.60,000/- on 04.03.2001 before the Lok Adalat in complete settlement of their claim against the UPSRTC.

13. The learned Counsel for the Insurers, on the other hand, has argued that the Jeep driver's licence being one for a private vehicle alone, without any endorsement for driving a commercial vehicle, there is a fundamental breach of the policy, entitling the Insurers to complete exoneration, as ordered by the Tribunal.

14. This Court has considered the submissions advanced on behalf of both sides. It is to be noticed that there is no appeal, either by the owner or the Insurers. It is true that so far as the claimants are concerned, it is a case of composite negligence, because the deceased was on board one of the vehicles, that has been found to have contributed to the negligence leading to the accident. The claimants are free to recover from any of the parties found to be in contributory negligence. The issue of apportionment of negligence and a fortiori the liability to pay compensation is a matter inter se the owner and the Insurers on one hand and the UPSRTC on the other. It is not an issue in this appeal at all.

15. What is different in this case is that the rights of the claimants have nevertheless been split into two parts, to

wit, one part against the owner and the Insurers and the other against the UPSRTC. There is on record a compromise inter se the claimants and the UPSRTC dated 04.03.2001 filed before the Lok Adalat, which has been accepted on the same day by the Lok Adalat. The terms of the settlement before the Lok Adalat show that the claimants have compromised their claim against the UPSRTC for a sum of Rs.60,000/- in all. The aforesaid compromise between the claimants and the UPSRTC is on record as paper No.14-Ga, on the reverse of which is the order passed by the Lok Adalat. The result is that the present appeal by the claimants for enhancement is confined to their claim against the owner and the Insurers.

16. This Court is of opinion that the Tribunal having returned a finding of contributory negligence to the extent of 50% each between the ill-fated Jeep and the UPSRTC Bus, it is difficult to disturb that finding in the absence of any positive evidence brought to the notice of this Court by the claimants to show that it was a different percentage of negligence on the part of the ill-fated Jeep's driver or it was cent per cent his fault. Even otherwise, it would now not be open to disturb that finding, because on the foot of it the claimants have settled the matter with the UPSRTC before the Lok Adalat. The claim, therefore, that now proceeds is confined to the owner and the Insurers.

17. Whatever enhancement of compensation is granted by this Court, if at all, the same would be limited to 50% of the determination, the other 50% having been settled in terms of the compromise with the UPSRTC.

18. The next question, which arises, is whether the Insurers have been rightly discharged of their liability by the Tribunal, or it is a case where the Insurers ought to be saddled with the liability of making good the compensation awarded with a right to recover from the owner. It is true that the driving licence held by the driver of the ill-fated Jeep was a licence to drive a motorcycle and a light motor vehicle, which authorizes a person to drive a private vehicle. It was not endorsed by the Licensing Authority, authorizing the licensee to drive a commercial light vehicle carrying passengers.

19. The Tribunal has recorded a finding that the facts and evidence on record show that the ill-fated Jeep was carrying gratuitous passengers, though there is nothing expressly said in the affidavit of Hamidunnisha, that has been filed in lieu of her examination-in-chief, that the deceased boarded the vehicle after paying some kind of a fare. This Court is inclined to agree with the Tribunal on this issue. The reason is that apparently the owner has not raised a specific plea in the written statement that he was carrying passengers, non-gratuitously or introducing circumstances to show some kind of a personal relationship between the deceased or her family and the owner. The Jeep was full of passengers unrelated to the owner from which a presumption about gratuitous carriage of passengers must be raised. There is nothing on record to rebut the presumption that the passengers on board the ill-fated Jeep, none of whom appear to be related to the owner, or his acquaintances or friends, were gratuitous. The Jeep was clearly being plied as a passenger vehicle for hire.

20. The Court's inference in this regard must also rest on judicial notice of the reputed fact that vehicles of this type are invariably used as passenger vehicles for hire, though registered as private ones. The Court, therefore, finds that while the driver of the Jeep may not be holding a valid licence, authorizing him to drive passenger vehicles used for commercial purposes, the ill-fated Jeep was nevertheless insured by the Insurers. At the same time, the driving licence not being one which was endorsed to drive a commercial or passenger vehicle, there is a breach of the insurance policy entitling the Insurers to exoneration from their liability to substantively indemnify in terms of the policy. But, they ought to be directed to pay the claimants and recover from the owner.

21. In **Shamanna and another v. Divisional Manager, Oriental Insurance Company Limited and others, (2018) 9 SCC 650**, the relevant facts were that the deceased was travelling by a Jeep, negligently driven by its driver. The door of the vehicle suddenly opened and the deceased was thrown out of the vehicle leading to his death. The deceased was a young man and his parents claimed compensation. The Tribunal awarded compensation with a direction to pay and recover since the Jeep driver had no valid driving licence, when the accident happened. On an appeal by the Insurance Company and by the claimants as well, the High Court enhanced the compensation, but set aside the direction to pay and recover. It was in those circumstances that on the claimants' appeal by special leave, the Supreme Court after referring to the decision in **National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297** held in **Shamanna (supra)**:

“11. In the present case, to deny the benefit of “pay and recover”, what seems to have substantially weighed with the High Court is the reference to larger Bench made by the two-Judge Bench in National Insurance Co. Ltd. v. Parvathneni [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] which doubted the correctness of the decisions which in exercise of jurisdiction under Article 142 of the Constitution of India directing insurance company to pay the compensation amount even though insurance company has no liability to pay. In Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943], the Supreme Court pointed out that Article 142 of the Constitution of India does not cover such type of cases and that : (SCC p. 786, para 5)

“5. If the insurance company has no liability to pay at all, then, it cannot be compelled by order of the court in exercise of its jurisdiction under Article 142 of the Constitution of India to pay the compensation amount and later on recover it from the owner of the vehicle.”

12. The above reference in Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] has been disposed of on 17-9-2013 [National Insurance Co. Ltd. v. Parvathneni, (2018) 9 SCC 657] by the three-Judge Bench keeping the questions of law open to be decided in an appropriate case.

13. Since the reference to the larger Bench in Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] has been disposed of by keeping the

questions of law open to be decided in an appropriate case, presently the decision in *Swaran Singh case* [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] followed in *Laxmi Narain Dhut* [National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700 : (2007) 2 SCC (Cri) 142] and other cases hold the field. The award passed by the Tribunal directing the insurance company to pay the compensation amount awarded to the claimants and thereafter, recover the same from the owner of the vehicle in question, is in accordance with the judgment passed by this Court in *Swaran Singh* [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] and *Laxmi Narain Dhut* [National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700 : (2007) 2 SCC (Cri) 142] cases. While so, in our view, the High Court ought not to have interfered with the award passed by the Tribunal directing the first respondent to pay and recover from the owner of the vehicle. The impugned judgment [Shamanna v. Laxman, 2016 SCC OnLine Kar 6928] of the High Court exonerating the insurance company from its liability and directing the claimants to recover the compensation from the owner of the vehicle is set aside and the award passed by the Tribunal is restored.

14. So far as the recovery of the amount from the owner of the vehicle, the insurance company shall recover as held in the decision in *Oriental Insurance Co. Ltd. v. Nanjappan* [Oriental Insurance Co. Ltd. v. Nanjappan, (2004) 13 SCC 224 : 2005 SCC (Cri) 148] wherein this Court held that : (SCC p. 226, para 8)

“8. ... For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the

executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer.”

22. Therefore, this Court is of opinion that whatever liability is found for the owner, the Insurers would be liable to make good the compensation awarded and recover the same from the owner through an application made to the Tribunal.

23. This spares for the Court the question whether compensation has been validly determined by the Tribunal. The claimants have sought enhancement and say that the compensation as assessed is far on the lower side. They say, it is against the settled principles.

24. The first determinant in order to work out the compensation is the monthly income of the deceased; or for that matter, her annual income. The Tribunal has considered the deceased to be a productive person earning something for herself, but has not believed the testimony of Hamidunnisha on affidavit, where she has claimed in Paragraph No.6 of the affidavit that the deceased would work as a tailor and earn Rs.5000/- a month. It is important to notice that Hamidunnisha has put in her affidavit dated 19.07.2002 in lieu of her oral testimony, but she has not been cross-examined either by the owner or the Insurers; not even by the UPSRTC. Her testimony, therefore, remains unrebutted on record. Normally, unrebutted testimony is to be accepted, but it is not to be accepted blindly. It is to be put in the scale of fair judgment, based on other facts, circumstances and contemporary human experience to believe the whole of it or so much of it as can be accepted.

25. The Tribunal has opined that the deceased was a divorced woman and, therefore, the likelihood of her engaging in some kind of productive work is there. It is on the said basis that the Tribunal has done a guesswork and determined the deceased's income at a figure of Rs.15,000/- per annum.

26. Regarding the income of a woman, mostly a housewife or a homemaker, principles have been laid down in **Arun Kumar Agrawal and another v. National Insurance Company Limited and others, (2010) 9 SCC 218**. After review of earlier authority on the issue in **Arun Kumar Agrawal (supra)**, it has been held:

“26. In India the courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by the wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of the husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean, etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.

27. It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. the husband and children. However, for the purpose of award of compensation to the dependants, some pecuniary estimate has to be made of the services of the housewife/mother. In that context, the term “services” is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier.

28. In Lata Wadhwa v. State of Bihar [(2001) 8 SCC 197] this Court considered the various issues raised in the writ petitions filed by the petitioners including the one relating to payment of compensation to the victims of the fire accident which occurred on 3-3-1989 resulting in the death of 60 persons and injuries to 113. By an interim order dated 15-12-1993, this Court requested the former Chief Justice of India, Shri Justice Y.V. Chandrachud to look into various issues including the amount of compensation payable to the victims. Although the petitioners filed objection to the report submitted by Shri Justice Y.V. Chandrachud, the Court overruled the same and accepted the report. On the issue of payment of compensation to the housewife, the Court observed: (SCC pp. 209-10, para 10)

“10. So far as the deceased housewives are concerned, in the absence

of any data and as the housewives were not earning any income, attempt has been made to determine the compensation on the basis of services rendered by them to the house. On the basis of the age group of the housewives, appropriate multiplier has been applied, but the estimation of the value of services rendered to the house by the housewives, which has been arrived at Rs. 12,000 per annum in cases of some and Rs. 10,000 for others, appears to us to be grossly low. It is true that the claimants, who ought to have given data for determination of compensation, did not assist in any manner by providing the data for estimating the value of services rendered by such housewives. But even in the absence of such data and taking into consideration the multifarious services rendered by the housewives for managing the entire family, even on a modest estimation, should be Rs. 3000 per month and Rs. 36,000 per annum. This would apply to all those housewives between the age group of 34 to 59 and as such who were active in life. The compensation awarded, therefore, should be recalculated, taking the value of services rendered per annum to be Rs. 36,000 and thereafter, applying the multiplier, as has been applied already, and so far as the conventional amount is concerned, the same should be Rs. 50,000 instead of Rs. 25,000 given under the Report. So far as the elderly ladies are concerned, in the age group of 62 to 72, the value of services rendered has been taken at Rs. 10,000 per annum and the multiplier applied is eight. Though, the multiplier applied is correct, but the values of services rendered at Rs. 10,000 per annum, cannot be held to be just and, we, therefore, enhance the same to Rs. 20,000 per annum. In their case, therefore, the total amount of compensation should be redetermined, taking the value of services

rendered at Rs. 20,000 per annum and then after applying the multiplier, as already applied and thereafter, adding Rs. 50,000 towards the conventional figure."

(emphasis supplied)

29. The judgment of *Lata Wadhwa* case [(2001) 8 SCC 197] was referred to with approval in *M.S. Grewal v. Deep Chand Sood* [(2001) 8 SCC 151 : 2001 SCC (Cri) 1426] for confirming the award of compensation of Rs. 5 lakhs in a case involving the death of school children by drowning due to negligence of teachers of the school. In *Municipal Corpn. of Greater Bombay v. Laxman Iyer* [(2003) 8 SCC 731 : 2004 SCC (Cri) 252] a two-Judge Bench while deciding the issue of award of compensation under Sections 110-A and 110-B of the Motor Vehicles Act, 1939, referred to the judgments in *Lata Wadhwa* case [(2001) 8 SCC 197] and *M.S. Grewal* case [(2001) 8 SCC 151 : 2001 SCC (Cri) 1426].

30. In *A. Rajam v. M. Manikya Reddy* [1989 ACJ 542 (AP)] , *M. Jagannadha Rao, J.* (as he then was) advocated giving of a wider meaning to the word "services" in cases relating to award of compensation to the dependants of a deceased wife/mother. Some of the observations made in that judgment are extracted below:

"The loss to the husband and children consequent upon the death of the housewife or mother has to be computed by estimating the loss of 'services' to the family, if there was reasonable prospect of such services being rendered freely in the future, but for the death. It must be remembered that any substitute to be so employed is not likely to be as economical as the housewife. Apart from the value of obtaining substituted services, the expense of giving accommodation or food to the substitute must also be computed. From

this total must be deducted the expense the family would have otherwise been spending for the deceased housewife.

While estimating the 'services' of the housewife, a narrow meaning should not be given to the meaning of the word 'services' but it should be construed broadly and one has to take into account the loss of 'personal care and attention' by the deceased to her children, as a mother and to her husband, as a wife. The award is not diminished merely because some close relation like a grandmother is prepared to render voluntary services."

33. In Chandra Singh v. Gurmeet Singh [(2003) 7 AD 222 (Del)] , Krishna Gupta v. Madan Lal [(2002) 96 DLT 829] , Captan Singh v. Oriental Insurance Co. Ltd. [(2004) 112 DLT 417] and Amar Singh Thukral v. Sandeep Chhatwal [(2004) 112 DLT 478] , the Single and Division Benches of the Delhi High Court declined to apply the judgment of this Court in Lata Wadhwa case [(2001) 8 SCC 197] for the purpose of award of compensation under the Act. In Krishna Gupta v. Madan Lal [(2002) 96 DLT 829] the Division Bench of the High Court observed as under: (DLT p. 834, para 24)

"24. ... The decision of the Apex Court in Lata Wadhwa [(2001) 8 SCC 197] in our considered opinion, cannot be said to have any application in the instant case. The Motor Vehicles Act, 1939 was the complete code by itself. It not only provides for the right of a victim and/or his legal heirs to obtain compensation in case of bodily injury or death arising out of use of motor vehicle, but the Forum therefor has been provided, as also the mode and manner in which the compensation to be awarded therefor. In such a situation, it would be inappropriate to rely upon a decision of the Apex Court, which had been rendered in an absolutely different fact

situation and in relation where to there did not exist any statutory compensation. Lata Wadhwa [(2001) 8 SCC 197] was decided in a matter where a fire occurred during a celebration. The liability of Tata Iron & Steel Co. Ltd. was not disputed. Compensation was awarded having regard to the peculiar feature obtaining in that case which has got nothing to do with the statutory compensation payable under the provisions of the Motor Vehicles Act."

34. In Amar Singh Thukral v. Sandeep Chhatwal [(2004) 112 DLT 478] , the learned Single Judge of the Delhi High Court adopted the yardstick of minimum rates of wages for the purpose of award of compensation in the case of death of a housewife and then proceeded to observe: (DLT p. 487, para 35)

"35. ... Since there is no scientific method of assessing the contribution of a housewife to her household, in cases such as the present, resort should be had to the wages of a skilled worker as per the minimum rates of wages in Delhi. Although, this may sound uncharitable, if not demeaning to a housewife, there is hardly any other option available in the absence of any statutory guidelines."

35. In our view, it is highly unfair, unjust and inappropriate to compute the compensation payable to the dependants of a deceased wife/mother, who does not have a regular income, by comparing her services with that of a housekeeper or a servant or an employee, who works for a fixed period. The gratuitous services rendered by the wife/mother to the husband and children cannot be equated with the services of an employee and no evidence or data can possibly be produced for estimating the value of such services. It is virtually impossible to measure in terms of money

the loss of personal care and attention suffered by the husband and children on the demise of the housewife. In its wisdom, the legislature had, as early as in 1994, fixed the notional income of a non-earning person at Rs. 15,000 per annum and in case of a spouse, 1/3rd income of the earning/surviving spouse for the purpose of computing the compensation.

36. Though Section 163-A does not, in terms apply to the cases in which claim for compensation is filed under Section 166 of the Act, in the absence of any other definite criteria for determination of compensation payable to the dependants of a non-earning housewife/mother, it would be reasonable to rely upon the criteria specified in Clause 6 of the Second Schedule and then apply an appropriate multiplier keeping in view the judgments of this Court in *Kerala SRTC v. Susamma Thomas* [(1994) 2 SCC 176 : 1994 SCC (Cri) 335], *U.P. SRTC v. Trilok Chandra* [(1996) 4 SCC 362], *Sarla Verma v. DTC* [(2009) 6 SCC 121 : (2009) 2 SCC (Cri) 1002] and also take guidance from the judgment in *Lata Wadhwa case* [(2001) 8 SCC 197]. The approach adopted by different Benches of the Delhi High Court to compute the compensation by relying upon the minimum wages payable to a skilled worker does not commend our approval because it is most unrealistic to compare the gratuitous services of the housewife/mother with the work of a skilled worker.”

27. The law regarding the income of a non-working housewife, who perished in a motor accident at the age of 22 years and was claimed by her family to be earning Rs.900/- per month from doing embroidery and knitting work was the subject matter of consideration by the Supreme Court in **Jitendra Khimshankar Trivedi and**

others v. Kasam Daud Kumbhar and others, (2015) 4 SCC 237. In **Jitendra Khimshankar Trivedi** (*supra*), it was held:

“7. Admittedly, the claimants adduced only oral testimony of the witnesses to substantiate their claim that the deceased was self-employed and was earning Rs 900 per month. Smt Godavariben Khimshankar Trivedi, mother-in-law and Shri Khimshankar Raguram Trivedi, father-in-law have deposed to the effect that the deceased at the time of accident was doing tailoring, embroidery and knitting and was earning Rs 900 per month. They further deposed that their daughters were also doing the same work as the deceased Jayvantiben Jitendra Trivedi was then doing and that their daughters were earning Rs 3000 per month and had the deceased been alive, she would have also earned Rs 3000 per month.

8. The Tribunal observed that in the district of Kachchh embroidery work, stitching work and local traditional embroidery work is doing well and had the deceased been alive she would have earned Rs 1500 per month. Deducting 1/3rd for personal expenses and adopting multiplier of 18, the Tribunal has calculated the loss of dependency at Rs 2,16,000 (Rs 1000 × 12 × 18). Though in their cross-examination, Smt Godavariben Khimshankar Trivedi and Khimshankar Raguram Trivedi deposed that they did not keep voucher and account books, reasoning of the Tribunal that the embroidery and tailoring work is doing well in the district of Kachchh and that the deceased would have earned not less than Rs 1500 per month is well merited. It is to be pointed out that the respondents have not adduced any evidence to prove that the deceased

was not doing any embroidery or tailoring work or the like. While so, in the light of the factual findings recorded by the Tribunal, the High Court was not justified in reducing the income of the deceased to Rs 1350 per month from Rs 1500.

10. Even assuming Jayvantiben Jitendra Trivedi was not self-employed doing embroidery and tailoring work, the fact remains that she was a housewife and a homemaker. It is hard to monetise the domestic work done by a house-mother. The services of the mother/wife is available 24 hours and her duties are never fixed. Courts have recognised the contribution made by the wife to the house is invaluable and that it cannot be computed in terms of money. A housewife/homemaker does not work by the clock and she is in constant attendance of the family throughout and such services rendered by the homemaker has to be necessarily kept in view while calculating the loss of dependency. Thus even otherwise, taking deceased Jayvantiben Jitendra Trivedi as the homemaker, it is reasonable to fix her income at Rs 3000 per month.

11. Recognising the services of the homemaker and that domestic services have to be recognised in terms of money, in *Arun Kumar Agrawal v. National Insurance Co. Ltd.* [(2010) 9 SCC 218 : (2010) 3 SCC (Civ) 664 : (2010) 3 SCC (Cri) 1313], this Court has held as under : (SCC p. 246, paras 62-63)

“62. The alternative to imputing money values is to measure the time taken to produce these services and compare these with the time that is taken to produce goods and services which are commercially viable. One has to admit that in the long run, the services rendered by women in the household sustain a supply of labour to the economy and keep human societies going by weaving the social fabric and keeping it

in good repair. If we take these services for granted and do not attach any value to this, this may escalate the unforeseen costs in terms of deterioration of both human capabilities and social fabric.

63. Household work performed by women throughout India is more than US \$612.8 billion per year (Evangelical Social Action Forum and Health Bridge, p. 17). We often forget that the time spent by women in doing household work as homemakers is the time which they can devote to paid work or to their education. This lack of sensitiveness and recognition of their work mainly contributes to women's high rate of poverty and their consequential oppression in society, as well as various physical, social and psychological problems. The courts and the Tribunals should do well to factor these considerations in assessing compensation for housewives who are victims of road accidents and quantifying the amount in the name of fixing ‘just compensation’.”

13. In order to award just and reasonable compensation income of the deceased is taken as Rs 3000 per month. Deducting 1/3rd for personal expenses contribution of the deceased to the family is calculated at Rs 2000 per month. At the time of her death deceased Jayvantiben was aged about 22 years, proper multiplier to be adopted is 18. Adopting multiplier of 18, total loss of dependency is calculated at Rs 4,32,000 (Rs 2000 × 12 × 18). With respect to the award of compensation under conventional heads, the Tribunal has awarded Rs 5000 towards loss of estate and Rs 3000 towards funeral expenses totalling Rs 8000. The High Court has awarded conventional damages of Rs 15,000 i.e. Rs 10,000 towards loss of estate and Rs 5000 towards funeral expenses. The courts below have not awarded any compensation towards loss of consortium

and towards love and affection. In Rajesh v. Rajbir Singh [(2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] and Jiju Kuruvila v. Kunjamma Mohan [(2013) 9 SCC 166 : (2013) 3 SCC (Cri) 849] , this Court has awarded substantial amount of Rs 1,00,000 towards loss of consortium and Rs 1,00,000 towards loss of love and affection. Following the same, in the case in hand, Rs 1,00,000 is awarded towards loss of consortium and Rs 1,00,000 towards loss of love and affection to the minor children. Towards loss of estate and funeral expenses, award of compensation of Rs 15,000 awarded by the High Court is maintained. Thus, the claimants are entitled to a total compensation of Rs 6,47,000."

28. The deceased here was a young woman of 22 years, a fact that is not in dispute. Whether she was stitching clothes or doing something else is not decisive about her income. The deceased was in very productive phase of her life and a divorcee. She had a young daughter as her dependent and they were staying with her mother and uncle. The Tribunal has rightly held for what this Court has observed hereinbefore, that the deceased would be engaged in some gainful pursuit to earn a livelihood for herself and support her daughter and her mother, with whom she was staying. There is affirmative evidence in the form of an affidavit by the mother, which says that the deceased was working as a tailor. Possibly, what the mother means is that she was stitching at home clothes and apparels for gain or reward that she received from whomsoever were her customers.

29. Normally, the unrebutted affidavit of Hamidunnisha, the deceased's mother,

should have been accepted, but as already remarked, an unrebutted statement in an affidavit has to be evaluated for the truth of it. There is no evidence *aliunde*, like some kind of proof of the receipt of labour charges for the deceased's exertions or any kind of receipts relating to the work done by her. Going by the practices in the unorganized labour sector, particularly, stitching and handcraft work done at home, formal evidence like books of account or ledgers showing receipts or balance-sheets are evidence never to be expected. But, that does not mean that whatever is asserted in the affidavit is to be accepted as true for every word of it. Testimony, whether oral or on affidavit about income on which claims are based, is known to be exaggerated and inflated. At the same time, the work that the deceased was doing and the overall circumstances, an income of Rs.5000/- per month in the year 1999 does not seem to be believable, but given the wages obtaining during the relevant period of time, in the Court's opinion, a sum of Rs.3000/- per month can be safely accepted to be what the deceased would be earning per month. It is on the aforesaid basis that the claimants' dependency is to be assessed.

30. The claimants are three in number, one of whom is the deceased's minor child and the other her mother. There is no difficulty in accepting the child's claim. So far as the mother is concerned, her husband Insanul Haq was also a victim in the same accident on board the same vehicle. He was a power loom mechanic and had a power loom of his own that he employed in business to earn his livelihood. Hamidunnisha has filed Claim Petition No.411 of 1999 along with the other dependents of Insanul Haq to claim compensation for his death in the same accident. She is, therefore, clearly a

dependent of Insanul Haq; not Gulshan Bano's. While Hamidunnisha is not entitled to claim any dependency upon Gulshan Bano, going by the settled principles, Gulshan Bano being her daughter, she would be entitled to some compensation on account of loss of filial consortium. The issue of filial consortium would be discussed with reference to authority relevant to the point later in this judgment.

31. The other claimant, Abdul Khaliq, the deceased's uncle, is her father's brother. He is a relatively young man of 45 years, still in the prime of his life. There is no reason why he should be regarded as a dependent of his divorced niece, who was staying with her parents' family after estrangement from her husband.

32. Therefore, this Court is of opinion that while the deceased's mother may be her heir, entitled to some compensation for the loss of filial consortium, the only dependent left behind by the deceased entitled to ask for compensation based on dependency, is the deceased's minor child, Shaista.

33. With an income of Rs.3000/- per month, the deceased would have to be credited with an annual income of Rs.36,000/-. Now, falls for consideration, the deduction to be made towards the deceased's personal and living expenses. The locus classicus on the point is the decision of the Supreme Court **Sarla Verma (Smt) v. Delhi Transport Corporation and another, (2009) 6 SCC 121**. The principles for deduction towards personal and living expenses have been set out in Paragraph No.30 of the report in **Sarla Verma (supra)**. The difficulty in this case arises from the fact that the deduction towards personal expenses for a married

person starts with the number of dependents being in the bracket of 2-3. The case of a solitary dependent is not dealt with in **Sarla Verma**.

34. What, therefore, would be the deduction where the deceased left behind a solitary dependent is the question to be answered. This issue fell for consideration before the Karnataka High Court in **Manager, National Insurance Co. Ltd. v. T. Chandranaika and others, 2018 SCC OnLine Kar 2295**. Referring to the guidance in **Sarla Verma**, the Karnataka High Court in **T. Chandranaika (supra)** has held:

“9. As emphasized by the Learned Counsel for the appellant Smt. Manjula N. Tejaswi, it is seen that the Tribunal has not deducted any amount towards personal and living expenses of the deceased, out of her income of Rs. 7,000/- per month. Though the deceased was a married woman, she has left behind only a single dependant, namely her husband. Her both sons are majors aged above 35 years and are independently earning and looking after their families. Hence, since the deceased has left behind a sole dependant-her husband, the deduction to be adopted towards personal and living expenses ought to be taken at 1/2.

This view is supported by the decision of the Hon'ble Apex Court in the case of Sarla Verma v. Delhi Transport Corporation [(2009) 6 SCC 121.] . The relevant paragraph of the said judgment reads as under:

“30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardised deductions. Having considered several

subsequent decisions of this court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased should be one-third ($\frac{1}{3}$ rd) where the number of dependent family members is 2 to 3, one fourth ($\frac{1}{4}$ th) where the number of dependent family members is 4 to 6, and one-fifth ($\frac{1}{5}$ th) where the number of dependent family members exceeds six."

(emphasis supplied)

This implies that when there is only one dependant of the deceased, the deduction towards personal and living expenses of the deceased should be taken as $\frac{1}{2}$.

Applying the above view in Sarla Verma, the law has been succinctly laid down in the case of New India Assurance Co. Ltd. v. Sri. David T. [ILR 2012 KAR 2859.] wherein the relevant paragraph reads as under:

"7. After going through the impugned judgment and award passed by Tribunal and after re-appreciation of the oral and documentary evidence available on file, I am of the considered view that the Tribunal has rightly assessed the monthly income of the deceased at Rs. 3,000/-, but erred in deducting $\frac{1}{3}$ rd towards the personal expenses of the deceased and taking the age of the deceased for adopting the multiplier instead of deducting 50% towards the personal expenses and adopting multiplier on the basis of the age of the husband of the deceased, as rightly pointed out by Learned Counsel for appellant-Insurer. In the light of the well settled law laid down by the Hon'ble Apex Court and this Court, in hosts of cases, whenever there is a sole claimant, 50% is to be deducted. Accordingly, I accept the monthly income of the deceased at Rs. 3,000/- and deduct 50% towards the

personal expenses of the deceased. Accordingly, if 50% (i.e. Rs. 1,500/-) is deducted from Rs. 3,000/- towards her personal expenses, the net income would be Rs. 1,500/- per month. Since the husband of the deceased was aged about 70 years, the proper multiplier applicable is '5' as per the decision of the Hon'ble Apex Court SARLA VERMA 'S CASE as against '10' adopted by Tribunal. Thus, the compensation towards loss of dependency would work out to Rs. 90,000/- (i.e., Rs. 1,500/- $\times$ 12 $\times$ '5') as against Rs. 2,40,000/- awarded by Tribunal."

10. In view of the above decisions, I find that the judgment of the Tribunal requires to be revisited on the aspect of compensation awarded under the head 'Loss of dependency' and the deduction towards personal and living expenses shall be taken at 50%.

Hence, the compensation payable towards 'loss of dependency' would come to Rs. 3,78,000/- ($\frac{1}{2} \times 7000 \times 9 \times 12$) as against Rs. 7,56,000/- awarded by the Tribunal. However, the compensation awarded by the tribunal under other conventional heads is just and proper and does not call for interference by this Court. Thus, the claimants-respondents are entitled to a total compensation of Rs. 4,18,000/- (Rupees four lakh eighteen thousand only) as against Rs. 7,96,000/- awarded by the Tribunal."

*35. There is similar reasoning adopted in a more recent decision of the Karnataka High Court in **Geeta Hukumchand Bagewadi v. Sundarawwa Shivaray Naikhe and others**, M.F.A. No. 20759 of 2020 (MV-D), decided on 15.04.2019, where **B.M. Shyam Prasad, J.** held:*

"8. The arguments as regards the deduction towards personal expenses in the

case of a sole dependent is based on the decision of the Hon'ble Supreme Court in the case of Sarla Verma and others v. Delhi Transport Corporation and another, reported in 2009 6 SCC 121. The Hon'ble Supreme Court has held that the deduction towards personal expenses should be 1/3rd when the dependents of the deceased are either two or three, 1/4th if the dependants are between 4 and 6 and 1/5th if the dependants are more than 6. A coordinate bench of this Court has considered this question of deduction towards personal expenses if the deceased is survived by a sole dependant in the light of the decision in Sarla Verma's case referred supra and deducted 50% towards personal expenses. This court can only agree with the submissions by the learned counsel for the Insurer that the deduction towards personal expenses in the case of a sole dependant should be 50% (or ½) of the Income as it stands to reason that if the permissible deduction in the case the number of dependants is either 2 or 3 should be 1/3rd, the deduction cannot be the same if the deceased is survived by a sole dependant. Of the two claimants, the Claimant No. 1 is the wife, and the other claimant is a major son. Therefore, only the wife would qualify as the dependant. As such the deduction towards personal expenses should be 50% (or ½) of the income. As such, the argument by the learned counsel for the Insurer in this regard is accepted."

36. The decisions of the two learned Single Judges of the Karnataka High Court, with utmost respect, are not very eloquent in their reasoning why in case of a single dependent, deduction of 50% is to be made towards personal expenses. To the understanding of this Court, the reasoning would proceed on slightly different premise

than that in the case of a bachelor, where 50% deduction is the rule in **Sarla Verma**. The reason for the rule in the case of bachelors is that they are pre-disposed to be spending more on themselves than married persons, who have to bear the responsibilities of a family. In case of a single dependent, the likelihood of the deceased sharing his income equally between himself and the dependent may serve as a valid basis to hold a 50% deduction towards personal and living expenses. Even otherwise, adopting the unit system for determining the deduction towards personal expenses, the deceased and the sole dependent can be regarded as two units, leading to the safe inference of 50% deduction towards the deceased's personal expenses.

37. The deceased's age being 22 years, where the applicable multiplier would again be governed by the Table in Paragraph No.40 of the report in **Sarla Verma** (*supra*). She would be placed in age bracket of 21-25 years, where the applicable multiplier is '18'. The Tribunal has, therefore, erred in adopting the multiplier of '17'.

38. Amongst the claimants, therefore, the deceased's daughter, who shall hereinafter be referred to as 'the minor claimant' is also entitled to addition of future prospects, which are no longer the preserve of the service class. These are also to be extended to the self-employed or those working on a fixed salary going by the principle laid down by the Supreme Court in **National Insurance Company v. Pranay Sethi and others** (2017) 16 SCC 680. In **Pranay Sethi** (*supra*), 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.

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 in Reshma 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.”*

39. The next point to be considered is whether future prospects, to which the minor 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 is no longer *res integra* in view of the decision of the Supreme Court in **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822**, where it is 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. *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.*

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.”*

40. It still remains to be examined whether Rule 220-A(3) of the Rules of 1998, introduced by Notification No. 777/XXX-4-2011-4(3)-2010 dated 26th September, 2011 i.e. The Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011, would apply retrospectively to

an accident that took place prior to the amendment. The issue was answered 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:

"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. Niranjana 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 take 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."

41. The law laid down by the Division Bench in **Sushil Kumar** (*supra*) binds this Court and computation of future prospects is, therefore, to be made in accordance with the Rule 220-A(3) of

Rules, 1998, even though the accident happened long before the amendment. Rule 220-A(3) stipulates that where the age of the deceased is less than 40 years, 50% is to be added to his/ her income towards future prospects.

42. There is an issue further raised about non-grant of any compensation by the Tribunal under the conventional heads. Here again, the law down in **Pranay Sethi** is eloquent, where it has been 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 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)

43. The next issue for consideration is compensation that is to be awarded for loss of consortium. This issue fell for consideration before their Lordships of 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)

44. In the opinion of this Court, so far as the consortium is concerned, though amongst the claimants, the claimant mother has not been held entitled to any dependency, she has lost her daughter and would, therefore, be entitled to filial consortium. So far as the minor claimant is concerned, she would, of course, be entitled to parental consortium. Amongst the claimants, the deceased's uncle (father's brother), who has not been considered any kind of a dependent of the deceased, is not entitled to anything towards consortium as well. He does not fall under any of the known categories, where compensation for the loss of consortium is to be awarded.

45. Since 50% of the liability for the compensation payable to the claimants was apportioned to the share of the UPSRTC, with whom the claimants have settled their claim fully and finally before the Lok Adalat, whatever compensation is found due on revision, would be payable by the owner and/ or the Insurers to the extent of 50% alone, most of it to the minor claimant, except the consortium, to which the claimant mother would also be entitled. The way this Court has held, whatever compensation towards the 50% of the dependency has been settled between the claimants and the UPSRTC, none of the

claimants, except the minor claimant, would be entitled to the said sum of money. Nevertheless, since 50% of the claim apportioned to the UPSRTC has been settled by the claimants through a compromise before the Lok Adalat, accepting a total of Rs.60,000/-, it is very difficult to further safeguard the minor claimant's interest in regard to that part of the compensation. This Court would rest content to hope and trust that the claimant's mother, who is the minor claimant's grandmother, would not tread upon the minor claimant's interest and work to safeguard it, being a higher mother. So much of the part of compensation in consequence of the settlement with the UPSRTC that the deceased's uncle has claimed and realized can also be best left to his own conscience.

46. Since it has been held that compensation is payable in the first instance by the Insurers, the Insurers are liable to satisfy the award to the extent payable by the owner with liberty to recover from the owner through a miscellaneous application to be made before the Tribunal, executing the award.

47. In view of the aforesaid conclusion, compensation payable to the claimants would have to be worked out in the following manner:

(i)	Monthly Income (of the deceased)	=	3000
(ii)	Monthly Income+Future Prospects (monthly income x 50%)	=	4500
			3000+1500
(iii)	Annual Income (of the deceased)	=	54000
	)		deceased) = 4500x12
(iv)	Annual Dependency	=	27000

) Annual Income – 50% deduction towards personal expenses of the deceased = 54000-27000

(v) Total Dependency = = **48600**
 Annual Dependency x **0**
 Applied Multiplier = 27000x18

(vi) Claimants' entitlement = **11000**
) towards conventional **0**
 heads = Loss of Estate + Funeral Expenses + dependents' Consortium
 = 15000+15000+40000x
 2

The total compensation = 59600
would therefore, work out 0
to a figure of Rs. 486000+
Rs. 110000

Less 50% of the = 29800
compensation apportioned 0
to the share of the UPSRTC
settled in the Lok Adalat
= 596000/2

48. In the result, this appeal is **allowed in part**. The impugned award passed by the Tribunal is **modified** and the compensation awarded and payable by the owner is enhanced to **Rs. 2,98,000/-**. The aforesaid sum of money shall be payable in the first instance by the Insurers with liberty to recover from the owner through a miscellaneous application to be made before the Tribunal. The said 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 owner, pursuant to the impugned award, shall be adjusted against the award.

49. The *inter se* apportionment of compensation ordered by the Tribunal is set aside and substituted by a direction that out of the total compensation, held payable to the claimants, the minor claimant shall be entitled to the whole of it, except a sum of Rs.20,000/- (50% of the filial consortium), which shall be payable to the claimant, Hamidunnisha. The sum of Rs.10,000/- directed to be paid to the claimant, Abdul Khaliq, if already paid, shall be refunded with interest @ 7% *per annum* to the minor claimant. Likewise, the sum of Rs.25,000/- payable to the claimant, Smt. Hamidunnisha, if paid, shall be refunded to the minor claimant with interest at the same rate, subject to the condition that a sum of Rs.20,000/-, in the event of refund shall be adjusted in favour of the claimant, Smt. Hamidunnisha.

50. Costs easy.

(2023) 7 ILRA 264
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2023

BEFORE

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

FAFO No. 2482 of 2003

Smt. Urmila Chaturvedi & Anr.

...Appellants

Versus

Ismail Khan & Ors.

...Respondents

Counsel for the Appellants:

Sri M.P. Sarraf, Sri Gulrez Khan, Sri Kartikeya Saran, Sri Pervez Husain Khan, Sri Satish Chandra Dubey

Counsel for the Respondents:

Ms. Jyotsna Srivastava, Sri S.D. Ojha, Sri Arvind Kumar, Sri J.H. Khan

A. Civil Law - Motor Vehicles Act, 1988- Sections 166, 168 & 173- enhancement of compensation-age of deceased-determination-Deceased who had not completed age of 31 years and about two months shy of that age as per High School Certificate-He has to be accepted as 30 years old-Applied multiplier of 17 for age bracket of 26-30 years as laid down in Sarla Verma case-Therefore, Tribunal erred in adopting a multiplier of 12, which ought to be 17 -Rule 220-A(3) is applicable retrospectively to an accident that happened much before amendment-The Rule 220-A(3) provides for addition of 50% of deceased income towards future prospects- Thus, The award passed by the Tribunal is modified and the compensation awarded enhanced to Rs.8,35,000/-. The af 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.(Para 1 to 31)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Gyan Chand Jain & ors. Vs Permanand & ors. (2003) 1 TAC 490
2. Sarla Verma(Smt.) & ors. Vs DTC (2009) 6 SCC 121
3. Magma General Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors. (2018) 18 SCC 130
4. National Ins. Co. Vs Pranay Sethi & ors. (2017) 16 SCC 680
5. New India Assur. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC OnLine SC 822
6. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd & ors. (2017) 35 LCD 1311
7. P.O. Meera & anr.Vs Ananda P. Naik & ors. (2022) SCC OnLine Ker 546
8. Branch Manager, Future General India Ins. Co. Ltd. Bengaluru Vs Varsha S.L. (2019) SCC OnLine Kar 3498

9. Shashikala & ors. Vs Ganga-lakshamma & anr.. (2015) 9 SCC 150

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

1. This is a claimants' appeal under Section 173 of the Motor Vehicle Act, 1988, seeking enhancement of compensation awarded by the Motor Accident Claims Tribunal, Jhansi in the case of a fatal motor accident.

2. The claim petition, being M.A.C.P. No.315 of 2000, was instituted by Smt. Urmila Chaturvedi, widow of the late S.K. Chaturvedi and Raj Kumar Chaturvedi, son of the late S.K. Chaturvedi, seeking compensation on account of the demise of Sanjay Chaturvedi, who died in a road accident in the night intervening 25/26.07.2000. Smt. Urmila Chaturvedi is the deceased's mother whereas Raj Kumar Chaturvedi is his brother. Smt. Urmila Chaturvedi was arrayed as claimant-petitioner No.1 before the Tribunal and is appellant No.1 before this Court. Raj Kumar Chaturvedi was claimant-petitioner No.2 before the Tribunal and is appellant No.2 before this Court. Smt. Urmila Chaturvedi and Raj Kumar Chaturvedi shall hereinafter be referred to as 'the claimants', unless the context requires a different or individual reference.

3. According to the claimants, in the intervening night 25/26.07.2000 at about half past one, Raj Kumar Chaturvedi was travelling with his brother and one Ankur Lal on board Maruti Car No. UP-93G-0711 from Kanpur to Jhansi. They were bound homewards. The Car was driven by the late Sanjay Kumar Chaturvedi. He was moving on his side according to the rule of the road. As the Car reached near Village Semari, within the local limits of Police Station Moth, District Jhansi, a Truck,

bearing registration No. MP-08A-6294, approached from the Jhansi side of the road, driven by its driver at a high speed, negligently and wantonly. The Truck, swerving to the wrong side of the road, hit the Car head on, but on its right side. The impact caused Sanjay and Raj Kumar Chaturvedi, claimant No.2 to sustain grievous injuries. The other passenger on board, Ankur Lal suffered simple injuries. Ankur Lal informed the deceased's home on telephone about the accident. This led members of the deceased's and the injured-claimant's family to reach the spot and conveyed both of them to the Medical College at about half past six in the morning. The two were taken to the emergency facility, where the deceased, who was then alive and the second claimant, Raj Kumar Chaturvedi, were admitted. Both were examined and were in a precarious condition. The family members, finding that the two injured were not receiving suitable treatment and care, moved them to the Sudha Nursing Home. Sanjay was managed at the Sudha Nursing Home until 04.08.2000, when at 7.30 in the evening hours, he was conveyed to the Nirmal Hospital for surgery. During the surgical procedure to take care of certain haemorrhagic injuries in his abdomen, he breathed his last. The second claimant, Raj Kumar Chaturvedi was discharged from the Sudha Nursing Home on 10.08.2000 with plaster cast to his injured limb. It is said that Sanjay Chaturvedi was a healthy man and would earn a sum of Rs.6000/- per month, teaching at the Rajeev Coaching Centre. He would spend the money earned to meet the needs of his family.

4. It is the claimants' case that Smt. Urmila Chaturvedi's husband and Raj Kumar Chaturvedi's father had died an untimely death on 06.04.2000. He was

employed as an Executive Engineer with the U.P. Power Corporation Limited. The late Sanjay Chaturvedi had applied for appointment on compassionate grounds and his claim had been accepted. The U.P. Power Corporation Limited had completed the necessary formalities. Sanjay Chaturvedi was on way to be appointed as an Assistant Engineer. He was awaiting his letter of appointment as such with the Parichha Thermal Power Project. Upon appointment to the said post, he would receive initially a salary of Rs.14,750/- per mensem. The claimants have been deprived of the benefits of the said appointment and ought to be compensated on that basis. The deceased's mother had already suffered because of the untimely demise of her husband and had now to face the spectre of her son's death. She had received a severe shock on this account and requires treatment. A sum of Rs.20,000/- was spent during hospitalization and treatment of the deceased. The claimants also prayed for compensation on account of the loss of consortium. A total sum of Rs.21,06,000/- was sought in compensation for Smt. Urmila Chaturvedi and a sum of Rs.9,16,000/- for Raj Kumar Chaturvedi, aggregating a sum of Rs.30,22,000/-, with interest of 15% per annum from the date of institution of the claim petition, until realization.

5. Ismail Khan, opposite party No.1, is the owner of the offending Truck whereas Iqbal Khan is the driver. They are arrayed as opposite parties Nos.1 and 2 to the claim petition and respondent Nos.1 and 2 to the appeal. Ismail Khan, shall hereinafter be referred to as 'the owner' and Iqbal Khan, 'the driver'. The offending Truck was insured with The New India Assurance Company Limited through its General Manager, Civil Lines, Jhansi. They

are the insurers of the offending Truck and shall hereinafter be called 'the Insurers'.

6. A joint written statement was filed on behalf of the owner and the driver, where the case in the claim petition was generally denied. In the additional pleas, it was asserted that the accident did not involve the offending Truck at all. The claimants have falsely set up the accident, involving the offending Truck. The ill-fated car had collided with some other vehicle, leading to Sanjay's death. Also, it was pleaded that the compensation claimed is exaggerated. The driver did not cause any accident. On the date of the accident, the offending Truck was insured with the Insurers.

7. The Insurers filed their own written statement, generally denying the claim. They have said in the additional pleas that it is incorrect to say that Sanjay Chaturvedi was a healthy man prior to the accident or that he was earning a sum of Rs.6000/- per month, working as a coaching master. The compensation claimed is inflated. The offending Truck was being driven by an unauthorized man. There was contributory negligence on the part of both the drivers. The Maruti Car's owner and its insurers have not been impleaded. The deceased was not aged 31 years, nor was he gainfully employed. He did not have an income of Rs.6000/- per month. The Maruti Car was driven by an unauthorized man. The claim, according to the Insurers, deserved to be rejected.

8. On the pleadings of parties, the following issues were framed (translated into English from Hindi):

“(1) Whether on 25/26.07.2000 in the night at about 1.30, the son/ brother of

the claimants, Sanjay Kumar Chaturvedi was proceeding on his Car, bearing registration No. UP-93G-0711 at a controlled speed and on his side, when, near Village Semari, within the local limits of Police Station Moth, Truck No. MP-08A-6294, proceeding from the Jhansi end of the road, driven by opposite party No.2 at a high speed, negligently and wantonly, moved to the wrong side of the road and hit the Maruti Car on the right side head on, leading the deceased, Sanjay and claimant No.2 to sustain grievous injuries and the other passenger, Ankur Lal simple injuries and that during treatment, he (Sanjay) died?*

(2) Whether on the date of the said accident, the driver of the said Truck had a valid driving licence? If yes, its effect?

(3) Whether on the date of the said accident, the said Truck was insured with the Insurance Company/ opposite party No.3 under a valid insurance policy? If yes, its effect?

(4) Whether the claimants are entitled to receive any compensation? If yes, how much and from whom?”

*[*added by Court for clarification's sake]*

9. The claimants have filed through a list of documents, bearing paper No.8C1, a photostat copy of the FIR, medical report, discharge ticket, High School certificate, B.E. Degree, certificate from Rajeev Coaching Centre, application form, and a notarized copy of the death certificate. Through another list of documents, paper No.35C1, certified copies of the FIR, charge sheet, technical report, a notarized copy of the death certificate, panchayatnama, papers summary, investigation report, cash memos and a notarized copy of the driving licence

relating to the late Sanjay Chaturvedi, were brought on record. Through a list, bearing paper No.31C2, a photostat copy of the injury report, showing the injuries sustained by Sanjay was filed on record. Still another list of documents, bearing paper No. 44C1, carries along with it the original certificate of pay dated 20.09.2000. Along with a list of documents, paper No. 57C1, a certified copy of the charge-sheet has been brought on record. Through another list, 68C1, certified copies of the statement of Raj Kumar has been filed, besides policy cover note No. 60112, bearing paper No.75-Ga and photostat copy of the driving licence No. 1-8/99/SUP-Va-1-262/96 (paper No.76-Ga).

10. The claimants examined in support of their case, PW-1 Ankur Lal, PW-2 Phool Chand, PW-3 Rajeev Gupta, PW-4 Madhukar Chaturvedi and PW-5, Raj Kumar Chaturvedi.

11. Issue No.1 was decided in favour of the claimants, whereas Issues Nos.2 and 3 were decided in favour of the owner and against the Insurers. In this appeal, the only issue pressed by parties is about the quantum of compensation, that is to say, Issue No.4.

12. Heard Mr. Ramanuj Pandey, Advocate holding brief of Mr. Pervez Husain Khan, learned Counsel for the claimants and Mr. S.D. Ojha, Advocate appearing for the Insurers. No one has appeared on behalf of the owner and the driver.

13. The Tribunal has apparently disbelieved the salary certificate issued by the Rajeev Coaching Centre dated 20.09.2000, bearing paper No.45C2, which shows the deceased's monthly salary as

Rs.6000/-. The said income for the deceased has been disbelieved without any cogent finding and merely by referring to submissions advanced on behalf of the Insurers. All that is said for a finding by the Tribunal about the deceased's income is that there is no authentic proof on record that the deceased was about to be appointed as an Assistant Engineer with the U.P. State Electricity Board. It has been remarked by the Tribunal that all that is brought on record to prove the prospects of the deceased's appointment is his application made for the purpose. However, there are no orders of the senior departmental officers to show that the deceased was indeed about to be appointed.

14. It has then been remarked that according to the medical papers, the deceased's age was about 28-30 years. There is then a cryptic finding by the Tribunal, based on a very illogical assumption, that the deceased's income would be Rs.24,000/- a year. So far as Smt. Urmila Chaturvedi, the deceased's mother is concerned, it has been opined that she is aged about 50 years. Raj Kumar Chaturvedi is the deceased's brother. There is nothing to show, in the opinion of the Tribunal, that Raj Kumar was dependent upon the deceased.

15. The Tribunal has referred to a decision of the Supreme Court in **Gyan Chand Jain and others v. Permanand and others, 2003 (1) TAC 490**, where, in the case of death of a 26 year old unmarried man, the mother and the father being 48 and 55 years, respectively, a multiplier of '12' was considered to be appropriate. The Tribunal has adopted the said multiplier. Assuming the deceased's income to be Rs.24,000/- *per annum*, one-third has been deducted towards personal and living

expenses a and two-thirds considered the annual dependency available to the deceased's mother. Adopting a multiplier of '12', dependency has been worked out at a sum of Rs.1,92,000/-. To this has been added a sum of Rs.2000/- towards funeral expenses and Rs.2500/- towards loss of estate. In this manner, the Tribunal has arrived at the figure of Rs.1,96,500/- payable in compensation to the deceased's mother along with 8% interest from the date of institution of the claim petition, until realization. In the award made, a sum of Rs.50,000/- has been ordered to be paid to the claimant, Smt. Urmila Chaturvedi through an account payee cheque, drawn on a nationalized bank and the balance directed to be invested in a fixed deposit with a nationalized bank for a period of three years, the quarterly interest whereon would be payable to the deceased's mother. The claim of the deceased's brother has been rejected.

16. Upon hearing learned Counsel for the parties, as already remarked hereinabove, this Court finds the reasons to disbelieve the deceased's claimed income to be hardly there and whatever reasons have been given, they are absolutely cryptic and laconic. The claimants have placed a certificate from the Coaching Centre, where the deceased taught, showing his income to be Rs.6000/- a month. The fact that the salary register also showed the owner of the Coaching Centre receiving the same salary, does not discredit the authenticity of the payment made towards salary to the deceased by the Coaching Centre. In his examination-in-chief, PW-3 Rajeev Gupta has proved the salary certificate and payment of salary in the sum of Rs.6000/- per month to the deceased. He has proved his signatures on the certificate dated 20.09.2000. In his cross-examination,

no doubt, PW-3 has admitted that the Coaching Centre is not registered and that he has not brought the account register or the balance sheets for the past three years. He has, nevertheless, stated that he pays income tax, but said that he has not brought along the income tax assessment for the last two years. The witness has generally supported the fact that Sanjay Kumar Chaturvedi taught in the named coaching institute, and that the register and salary certificate were genuine.

17. It is common to find in small-time or young coaching centres irregular maintenance of records. At the time, to which the incident relates, non-payment of income tax by many a small private enterprise was not an uncommon phenomenon. What is to be seen is that looking to the qualifications of the deceased, the salary claimed to have been received by him from the Coaching Centre is not at all an exaggerated figure. Judicial notice can be taken of the fact that for some decades past, there are coaching centres galore that have almost overtaken the formal system of education, wherein people do not repose much trust, particularly, when preparing to write certain competitive admission tests, like those for admission to engineering courses etc. For the self-employed in the unorganized sector, some kind of assessment about the income has to be done, based on their education and circumstances.

18. The deceased, as already noted, was an engineering graduate and it is believable that he was teaching at the Rajeev Coaching Centre, a fact proved by PW-3. Since there are no records, like balance-sheets or account register for the Coaching Centre produced, besides the income tax returns or assessments, this

Court considers it safe to hold the deceased's income to be a sum of Rs.5000/- per month. It is, accordingly, held. Given the monthly income of the deceased, the annual income would be Rs.60,000/-.

19. The Tribunal has erred in deducting a one-third towards and personal and living expenses of the deceased. The deceased was a bachelor, and going by the principles with regard to deduction towards personal and living expenses of the bachelors, as laid down by the Supreme Court in **Sarla Verma (Smt) v. Delhi Transport Corporation and another, (2009) 6 SCC 121**, 50% of the income has to be deducted towards personal and living expenses; not 'one-third'. This Court must say here that the deceased's brother, who is a matured and independent man, is in no manner one of his dependents. The finding of the Tribunal on this score is affirmed.

20. The Tribunal has applied a multiplier of '12' going by the claimant's age, who is the deceased's mother. The deceased was clearly aged, according to his High School Certificate, 30 years, 9 months 25 days, as on the date of his demise. The principle governing the reckoning of age beyond completed years, with added months, has received the attention of the Supreme Court in **Shashikala and others v. Ganga-lakshammamma and another, (2015) 9 SCC 150**. In **Shashikala (supra)**, it has been observed:

"16. Insofar as appropriate multiplier, the date of birth of the deceased as per driving licence was 16-6-1961. On the date of accident i.e. 14-12-2006, the deceased was aged 45 years 5 months and 28 days and the Tribunal has taken the age as 46 years. Since the deceased has completed only 45 years, the High Court

has rightly taken the age of the deceased as 45 years and adopted multiplier of 14 which is the appropriate multiplier and the same is maintained. Total loss of dependency is calculated at Rs 16,82,310 (Rs 1,20,165 × 14)."

21. A Division Bench of the Karnataka High Court in **Branch Manager, Future General India Insurance Company Limited, Bengaluru v. Varsha S.L., 2019 SCC OnLine Kar 3498**, has held:

"44. The next controversy is with regard to the appropriate multiplier to be applied in the instant case. As noted above, the contention of Sri A.N. Krishnaswamy, Learned Counsel for the Insurance Company is that the deceased was 40 years 7 months 5 days and therefore, he was 41 years and not 40 years and hence, the multiplier which is applicable for the age group 41 to 45 years being '14' had to be applied in the instant case, but the Tribunal has applied the multiplier of '15', which is for the age group of 35-40 years.

45. The contra submission of Learned Counsel for the claimants is that the completed age has to be taken into consideration for the purpose of applying the multiplier and not the running age. In the instant case, the deceased Ethendranath had completed 40 years and not 41 years. That he maybe 40 years and few months thereafter, but that does not mean that he had completed 41 years. Hence, the contention of Learned Counsel for the claimants is that multiplier '15' has been rightly applied by the Tribunal."

(emphasis by Court)

22. More recently, a learned Single Judge of the Kerala High Court in **P.O. Meera and another v. Ananda P. Naik**

and others, 2022 SCC OnLine Ker 546 had occasion to consider the issue, where it has been held:

“33. Sri. Rajan P. Kaliyath argued that since Madhavan had completed the age of 50 years and was running 51, the multiplier of ‘11’ adopted by the Tribunal is correct. He also contended that, if the above interpretation is not followed, there would be a vacuum in the age group between 50 - 51 years. The argument may sound attractive at the first blush, but is hard to be accepted for the following reasons.

*37. A reading of the table in Sarla Verma leaves no room for any speculation that it is only when the deceased/injured completes the age of 51 years, the multiplier would shift from ‘13’ to ‘11’ and not when the deceased/injured attains the age of 50 years and runs the said age till the previous night of his 51st birthday. (Read the interpretation given by the Honourable Supreme Court in Prabhu Dayal Sesma v. State of Rajasthan [(1986) 4 SCC 59 on the Indian Majority Act, 1875 and this Court in Jaison V. George v. State of Kerala [2019 (5) KHC 115] on the Juvenile Justice (Care and Protection of Children) Act, 2005, while computing the age of a person). In other words, the sine qua non to select the multiplier is the attainment of the specified age mentioned in the table and not the running of the age into the next group. It is also apposite to note, in **Pranay Sethi**, the age for awarding future prospects is segregated into three groups i.e., 16 - 39, 40 - 49 and 50 - 59. Therefore, if the argument of the learned Counsel for the Insurer is to be accepted, the same vacuum would also arise at the ages of 25, 30, 35, 40, 50, 55, 60 and 65 in selecting the multiplier and the ages of 39, 49 and 59 for awarding future prospects.*

This Court is bound to follow the law declared by the Honourable Supreme Court as enshrined under Article 141 of the Constitution of India and not to give a different interpretation or tinker with the well settled enunciation.”

23. It would, thus, be evident that the deceased, who had, going by his High School Certificate, not completed the age of 31 years and was about two months shy of that age, cannot be regarded as 31 years. He has to be accepted as 30 years old.

24. The applicable multiplier for the age bracket of 26-30 years, as laid down in the table in Paragraph No.40 of the report in **Sarla Verma** (*supra*) is '17'. There is, of course, no basis in law to apply a multiplier based on the parents' age. That principle has been given up long ago and **Sarla Verma** is an authority on the point, which has universally been followed for the choice of multiplier. The Tribunal, therefore, clearly erred in adopting a multiplier of '12', which ought to be '17'.

25. The next question to be considered is about the future prospects of the deceased, which has been urged by the claimants. According to the decision of the Supreme Court in **National Insurance Company v. Pranay Sethi and others (2017) 16 SCC 680**, future prospects are admissible in cases of persons, who are self-employed or those working on fixed salary. It is no longer the law that future prospects are reserved for the salaried class in government services alone or those employed in the lucrative private sector. In this connection, reference may be made to the holding in **Pranay Sethi** (*supra*), where it has been observed:

“56. The seminal issue is the fixation of future prospects in cases of

deceased who are self-employed or on a fixed salary. Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

57. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardisation, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing

capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardisation on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future

prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

58. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] thinks it appropriate not to add any amount and the same has been approved in Reshma 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.”

26. In the State of Uttar Pradesh, future prospects are governed by Rule 220-A (3) of the U.P. Motor Vehicles Rules, 1998 (for short, the Rules of 1998) as held by the Supreme Court in **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822**. Therefore, the computation has to be made in accordance with the Rules of 1998, and not the principles in **Pranay Sethi**.

27. After the decision of the Division Bench of this Court in **Sushil Kumar and others v. M/s. Sampark Lojastic Private Limited and others, 2017 (35) LCD 1311**, 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, is applicable retrospectively to an accident that happened much before the amendment. Rule 220-A (3) provides for addition of 50% of the deceased's income towards future prospects, where the deceased was aged less than 40 years. In the present case, the claimant, Smt. Urmila Chaturvedi is, therefore, held entitled to add 50% to the deceased's income.

28. The issue of award of compensation under the conventional heads was again the subject matter of consideration in **Pranay Sethi**, 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 seems 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)

29. There is then the question of compensation to be awarded on account of loss of consortium. Here, the deceased was claimant No.1's son and, therefore, she would be entitled to the award of filial consortium in accordance with the holding of the Supreme Court in **Magma General Insurance Company Ltd. v. Nanu Ram alias Chuhru Ram and others, (2018) 18 SCC 130.**

30. In view of the aforesaid conclusion, the compensation payable to the claimant-mother in this appeal is revised and shall be determined in the following manner:

(i)	Monthly Income (of the deceased)	=	5000
(ii)	Annual Income (of the deceased) = 5000x12	=	60000
(iii)	Annual Income+Future Prospects (annual income x 50%) = 60000+30000	=	90000
(iv)	Annual Dependency	=	45000

	Annual Income – 50% deduction towards personal expenses of the deceased = 90000-45000	
(v)	Total Dependency = = Annual Dependency x Applied Multiplier = 45000 x 17	765000
(vi)	Claimant's entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium =15000+15000+4 0000	70000
	The total compensation would therefore, work out to a figure of Rs.765000+ Rs.70000	= 835000

31. 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.8,35,000/-**. 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 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 it. The direction of the Tribunal for investment of the awarded compensation in fixed deposit shall stand **set aside** and the entire compensation, as enhanced by this

32. Costs easy.

(2023) 7 ILRA 276
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.07.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 2874 of 2010

Suresh Kumar ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
A.P. Singh, Amarendra Pratap Singh

Counsel for the Respondent:
C.S.C.

A. Service Law – Regularisation – U.P. Collection Peon Service Rules, 2004 - Rule 5(1) - 15 - Group –D Employees Service Rules, 1985 - U.P. Collection Peons Service (Second Amendment) Rules, 2016 - 2nd proviso to substituted Rule 5(ii) - The post of Seasonal Collection Peon is a Class IV / Group -D post under the service of the State, therefore, the minimum age limit prescribed for Class IV post employees in Group -D Employees Service Rules, 1985 shall be applicable and accordingly, in no manner the services rendered by the petitioner prior to his attaining the age of majority can be taken into account. (Para 27)

In the present case, it is clear that the petitioner has worked only for a period of one year three months and six days in Tehsil BKT. He worked as Seasonal Collection Peon

between the period 11-02-1991 and 11-03-1991 for a period of one month and eighteen days in Tehsil Malihabad. The date of birth of the petitioner as mentioned in High School Certificate is 23-03-1977, therefore, at the time when he started working at Tehsil Malihabad, he was minor and thus, the period of service rendered by him at Tehsil Malihabad cannot be calculated in the working period of the petitioner, therefore, the petitioner has worked for 3 & 1/2 fasali years. Even if the period provided herein above is also included in the working of the petitioner, the seniority position of the petitioner will not be altered. (Para 26, 27)

It is apparent on perusal of record that persons junior to the petitioner have not been considered and appointed on the post of Collection Peon under 50% quota. In the final seniority list of Seasonal Collection Peons of Tehsil BKT dated 02.09.2009, name of the petitioner finds place at Sr. No. 13 and the person, namely, Ram Kishore, who is at Sr. No. 12 in the said list, has worked more than 01 year 05 months and 01 day than the petitioner, therefore, services rendered by the petitioner even including the services rendered at Tehsil Malihabad i.e. 48 days is less than him, therefore, there appears to be no irregularity or illegality in the impugned order dated 03.09.2009. (Para 28)

Writ petition dismissed. (E-4)

Present petition challenges order dated 03.09.2009, passed by Respondent No. 2 and prays for direction to the respondents to consider afresh and appoint the petitioner on the post of Collection Peon under 50% quota by counting the service rendered by him as Seasonal Collection Peon in Tehsil Malihabad, District Lucknow from the due date with all benefits of service.

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri A.P. Singh, learned Senior Advocate assisted by Sri Amarendra Pratap Singh, learned counsel for the

petitioner and learned Additional C.S.C. for the respondent - State.

2. By means of present writ petition, the petitioner has prayed for issuance of a writ, order or direction in the nature of certiorari quashing the impugned order dated 03.09.2009, contained as Annexure-1 to the writ petition with a further prayer for issuance of a writ, order or direction in the nature of mandamus commanding the respondents, particularly, respondent No.2 to consider afresh and appoint the petitioner on the post of Collection Peon under 50% quota by counting the service rendered by him as Seasonal Collection Peon in Tehsil Malihabad, District Lucknow from the due date with all benefits of service.

3. Brief facts giving rise to the present writ petition are as under:

Sr. No.	Relevant Facts of the Case
a.	The petitioner was engaged as Seasonal Collection Peon in Tehsil Malihabad, District Lucknow on 11.02.1991.
b.	In the year 1995, a new Tehsil known as Bakshi Ka Talab (BKT), Lucknow was carved out, as a result of which, the area of the petitioner, where he was working as Seasonal Collection Peon fell in the area of newly created Tehsil.
c.	The petitioner worked as Seasonal Collection Peon in Tehsil BKT and had completed more than four fasals. Therefore, he is fully eligible for regular appointment to the post of Collection Peon under 50% quota.
d.	On 14.07.2008, Writ Petition No.6793 (S/S) of 2007 was filed by

	the petitioner, which was finally disposed of by commanding the respondents to consider the name of the petitioner for regular appointment to the post of Collection Peon under 50% quota.
e.	On 05.02.2010, a contempt petition was filed by the petitioner, which was dismissed as infructuous as respondent No.2 had passed the order rejecting the claim of the petitioner for regular appointment to the post of Collection Peon under 50% quota.
f.	Vide impugned order dated 03.09.2009, respondent No.2 rejected the claim of the petitioner for regular appointment on the post of Collection Peon under 50% quota.
g.	Hence, the present writ petition has been filed before this Court.

4. Submission of learned Senior Counsel for the petitioner is that the impugned order dated 03.09.2009 has been passed without any rhyme and reason and is *malafide* in nature and without any authority of law. He submitted that the impugned order is not legally sustainable as respondent No.2 has not computed the service rendered by the petitioner as Seasonal Collection Peon in Tehsil Malihabad, District Lucknow, however, the same is obligatory in view of Rule 15 of U.P. Collection Peon Service Rules, 2004.

5. He next submitted that the impugned order dated 03.09.2009 has been passed on surmises and conjectures and on the basis of imagination. He submitted that the petitioner is entitled for consideration of his claim for regular appointment on the post of Collection Peon under 50% quota

by counting the services rendered by him as Seasonal Collection Peon.

6. He further submitted that the persons junior to the petitioner have been considered and appointed on the post of Collection Peon under 50% quota, however, regular appointment has been denied to the petitioner on extraneous consideration.

7. On the other hand, learned Additional CSC submitted that on 03.09.2009, a selection committee was constituted, which considered the cases of Seasonal Collection Peons for selection as Collection Peons and passed the impugned order dated 03.09.2009, which is just and valid.

8. He further submitted that in Tehsil BKT and District Lucknow, there are 29 sanctioned posts of Collection Peons out of which, 18 Collection Peons were working at the time of meeting of the said selection committee. Out of 18 working Collection Peons, one Collection Peon, namely, Sri Rajvir is in jail and 6 Collection Peons are working under the orders of this Court. 12 Collection Peons have been appointed through direct recruitment and one directly recruited Collection Peon, namely, Lt. Sri Pramod Kumar died and on his place, his wife Smt. Pratima Tewari has been granted appointment.

9. He next submitted that under the provisions contained under Rule 5(1) of Rules of 2004, 50% posts of Collection Peons are reserved for Seasonal Collection Amins. Rule 5(ii) provides that recruitment to the posts in service shall be made from amongst such seasonal Collection Peons, who have worked satisfactorily for at least four fasalies and whose age on the first day

of July of the year in which selection is made not exceeds 45 years.

10. He further submitted that as per relevant government orders, 3% of the post of sanctioned strength of Collection Peons shall have been kept vacant and accordingly, in Tehsil BKT one post of Collection Peon is kept vacant, therefore, there are 10 vacancies against which selection has to be made.

11. He submitted that the duly constituted selection committee has considered the case of the petitioner for selection on the post of Collection Peon and found that the petitioner had worked for the following period:

Service Period	Working Period	Fasali Years
23-02-1996 to 31-02-1996	0 year - 1 month - 06 days	1/2
25-05-1996 to 30-06-1996 01-09-1996 to 30-09-1996	0 year - 01 month - 27 days 0 year - 01 month - 0 days	1/2
06-01-1997 to 31-03-1997	0 year - 02 months - 27 days	1/2
05-08-1997 to 30-09-1997	0 year - 01 month - 27 days	1/2
16-01-1998 to 31-03-1998	0 year - 02 months - 16 days	1/2
14-07-2005 to 31-08-2005	0 year - 01 month - 13 days	1/2
22-01-2007 to 31-03-2007	0 year - 02 months - 10 days	1/2

Total:	01 years - 03 months - 06 days	3 & 1/2

He submitted that from aforesaid chart, it is clear that the petitioner has worked only for a period of one year three months and six days in Tehsil BKT. He worked as Seasonal Collection Peon between the period 11-02-1991 and 11-03-1991 for a period of one month and eighteen days in Tehsil Malihabad.

12. He further submitted that the date of birth of the petitioner as mentioned in High School Certificate is 23-03-1977, therefore, at the time when the petitioner started working at Tehsil Malihabad, he was minor and thus, the period of service rendered by him at Tehsil Malihabad cannot be calculated in the working period of the petitioner, therefore, the petitioner has worked for 3 & 1/2 fasali years.

13. In addition to aforesaid, he submitted that even if the said period is also included in the working of the petitioner, the seniority position of the petitioner will not be altered. The post of Seasonal Collection Peon is a Class IV / Group -D post under the service of the State, therefore, the minimum age limit prescribed for Class IV post employees in Group -D Employees Service Rules, 1985 shall be applicable and accordingly, in no manner the services rendered by the petitioner prior to his attaining the age of majority can be taken into account. He submitted that the writ petition being misconceived, is liable to be dismissed.

14. He further submitted that the submission of learned Senior Counsel for the petitioner that persons junior to the petitioner have been considered for

regularization is also misconceived. In this regard, he has drawn attention of this Court towards Annexure-CA2.

15. He next submitted that in the final seniority list of Seasonal Collection Peons of Tehsil BKT dated 02.09.2009, name of the petitioner finds place at Sr. No.13 and submitted that the person, namely, Ram Kishore, who is at Sr. No.12 in the said list, has worked more than 01 year 05 months and 01 day than the petitioner and therefore, services rendered by the petitioner even including the services rendered at Tehsil Malihabad i.e. 48 days is less than him, therefore, no benefit can be granted to the petitioner.

16. He lastly submitted that since there are 10 posts of Seasonal Collection Peon and if regular selection on 10 posts is made, the petitioner will not be able to be regularized finding place at Sr. No.13 in the seniority list. He submitted that as per Government Order dated 08.11.2006, which provides criteria for regularization of Seasonal Collection Peons provides that the seniority list of Seasonal Collection Peons shall be prepared on the basis of their working days and it further provides that the meaning of satisfactory service is average 70% recovery in last four fasali years and since case of the petitioner is not covered under the said government order, the selection committee has rightly not recommended the name of the petitioner for regular selection.

17. In rebuttal, on the basis of rejoinder affidavit, submission of learned Senior Counsel for the petitioner is that the services rendered by the petitioner at Tehsil Malihabad has not been taken into account and his candidature has been wrongly rejected by the selection committee. He

further submitted that there is no minimum or maximum age limit for engagement of Seasonal Collection Peon. He added that if the services rendered by the petitioner at Tehsil Malihabad are taken into account, it will come to 509 days and on the basis of the same, case of the petitioner is liable to be considered.

18. He further submitted that the petitioner got information through Right to Information Act, 2005 that there are 11 posts of Collection Peon available under 50% quota. He submitted that the statutory rules cannot be overridden by the Government Order and selection of the petitioner should be made on the basis of statutory rules.

19. In reply to submissions advanced by learned Senior Counsel for the petitioner, learned Additional CSC submitted that in the 2nd proviso to substituted Rule 5(ii) of U.P. Collection Peons Service (Second Amendment) Rules, 2016 it is provided that, "
..... *provided further that all the existing vacancies available on the date of commencement of U.P. Collection Peon's Service (Second Amendment) Rules, 2016 shall, only as one time measure, be filled by selection through the selection committee from amongst Seasonal Collection Peons, who possess the requisite qualifications prescribed in clause (ii)*"

In furtherance of the said provision the final seniority list at the District Level was prepared and published, wherein the petitioner's name finds place at Sr. No.74. He submitted that the petitioner has not filed any objection against the said seniority list, therefore, the same attained finality in the eyes of law.

20. He further submitted that in Clause 2 of Government Order dated 08.09.2010, it has been prescribed that in future no further recruitment on Class-IV post (apart from Technical posts of Junior Category) would be made and all the Class-IV post falling vacant would be filled by out sourcing only. He submitted that a prohibition on all the appointments (except those to be made through Public Service Commission and under order passed by Hon'ble Court) was imposed vide Government Order dated 15.03.2012 with immediate effect. Subsequently, a relaxation from the Government Orders dated 08.09.2010 and 15.03.2012 was provided vide Government Order dated 07.10.2016 regarding recruitment of Seasonal Collection Peons on the post of Collection Peons to be made under regularization quota as provided in U.P. Collection Peon's Service Rules, 2004 as amended in year 2016. Thereafter, a Government Order dated 30.10.2017 was also issued, whereby the age relaxation provided under Government Order dated 30.05.2008 was quashed.

21. Thereafter, the Tehsildars of the District Lucknow sought guidance from the State Government for regularization of Seasonal Collection Peons as Collection Peons vide letter dated 14.03.2018 and a reminder in this regard was also sent on 07.04.2018 and in pursuance thereof, the State Government vide letter dated 13.06.2018 called a meeting on 10.04.2018 under the chairmanship of the Chief Secretary, wherein it was decided that the Seasonal Collection Amit is a Class - IV post and it was provided earlier that the Class - IV posts would be filled by way of out sourcing only. The U.P. Collection Peon's Service Rules, 2016 and Government Order dated 07.10.2016 be

quashed and the Class - IV posts be filled in accordance with Government Order dated 08.02.2010.

22. In reply to aforesaid submissions, learned Senior Counsel for the petitioner submitted that regularization of Seasonal Collection Peons is to be made at Tehsil level and not at District level. He submitted that Government of U.P. vide Government Order dated 26.02.2019 has provided that rules continues to be in force and Government Order dated 07.10.2016 continues to hold field and rules cannot be changed by executive orders. He submitted that the State Government vide Government Orders dated 27.02.2019 and 22.02.2019 issued directions for regularization of Seasonal Collection Peons in accordance with rules and granted relaxation in age and the petitioner has not crossed the upper age limit.

23. In reply to aforesaid submissions, learned Additional C.S.C. on the basis of supplementary counter affidavit dated 14.11.2022 submitted that a notification dated 05.10.2016 has been issued by the State Government providing that 100% regularization of Collection Peons will be made by selection through selection committee as a one time measure and in pursuance thereof, on the basis of recommendations of selection committee, selection of 48 Seasonal Collection Peons has been made on 10.12.2020 and in respect of regularization of 50% Collection Peons under the provisions contained in the rules, the consideration of the same is possible only by the selection committee constituted at district level.

24. He further submitted that the petitioner has worked on different dates and his name finds place at Sr. No.74 in

the district level seniority list and in pursuance of Rules of 2016, the proceeding for 100% regularization on 48 posts of Collection Peons has been made and available Seasonal Collection Peons up to Sr. No.62 in the seniority list have been regularized.

25. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

26. On overall consideration of the matter and on perusal of material on record, it is reflected that from the chart narrated above, it is clear that the petitioner has worked only for a period of one year three months and six days in Tehsil BKT. He worked as Seasonal Collection Peon between the period 11-02-1991 and 11-03-1991 for a period of one month and eighteen days in Tehsil Malihabad. The date of birth of the petitioner as mentioned in High School Certificate is 23-03-1977, therefore, at the time when he started working at Tehsil Malihabad, he was minor and thus, the period of service rendered by him at Tehsil Malihabad cannot be calculated in the working period of the petitioner, therefore, the petitioner has worked for 3 & 1/2 fasali years.

27. Even if the period provided herein above is also included in the working of the petitioner, the seniority position of the petitioner will not be altered. The post of Seasonal Collection Peon is a Class IV / Group -D post under the service of the State, therefore, the minimum age limit prescribed for Class IV post employees in Group -D Employees Service Rules, 1985 shall be applicable and accordingly, in no manner the services

rendered by the petitioner prior to his attaining the age of majority can be taken into account.

28. The objection taken by learned Senior counsel for the petitioner that persons junior to the petitioner have been considered and appointed on the post of Collection Peon under 50% quota, it is apparent on perusal of record that in the final seniority list of Seasonal Collection Peons of Tehsil BKT dated 02.09.2009, name of the petitioner finds place at Sr. No.13 and the person, namely, Ram Kishore, who is at Sr. No.12 in the said list, has worked more than 01 year 05 months and 01 day than the petitioner, therefore, services rendered by the petitioner even including the services rendered at Tehsil Malihabad i.e. 48 days is less than him, therefore, there appears to be no irregularity or illegality in the impugned order dated 03.09.2009, contained as Annexure-1 to the writ petition.

29. The writ petition lacks merit and is hereby *dismissed*.

(2023) 7 ILRA 282

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 23.05.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ-A No. 3292 of 2023

Arvind Kumar Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ravi Singh, Raj Kumar Singh Suryavanshi

Counsel for the Respondents:

C.S.C., Akhilesh Kumar Pandey

A. Service Law – Suspension - Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 -Rule 4 - Uttar Pradesh Secondary Education Service Commission (Removal of Difficulties) Order 1981 - Uttar Pradesh Secondary Education (Services Selection Boards) Act, 1982 - Sections 18 & 33-C(2)(a) - It is the duty of the State Government to find out illegal wealth accumulated by a government employee during his/her service period and take appropriate action against such an employee. (Para 22)

Considering the allegations leveled against the petitioner and also taking note of his status, reach and resources, the State Government has placed him under suspension. The impugned orders suffer from any illegality or arbitrariness which require an interference of this Court in exercise of its jurisdiction u/Article 226 of the Constitution of India. (Para 20)

Commercialization of education has eroded the very value of education. As a result, there are education mafias and nakal mafias in the system. Schools and colleges have become profit making establishments. It is the responsibility of the State and the Society to clean the education system. (Para 19)

Writ petition dismissed. (E-4)

Present petition assails order dated 15.04.2023 against suspension and institution of disciplinary proceedings. Also, order dated 18.04.2023, whereby the charge of Joint Director of Education, Ayodhya Division, Ayodhya has been given as an additional charge to Shri Manoj Kumar Dwivedi, Divisional Joint Director, Kanpur.

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

1. Heard Shri Ravi Singh, learned counsel for the petitioner and Shri Sandeep Sharma, learned Standing Counsel appearing for the State-respondents.

2. The petitioner-Shri Arvind Kumar Pandey while holding the post of Joint Director of Education, Ayodhya Division, Ayodhya has filed the present petition under Article 226 of the Constitution of India seeking quashing of the order dated 15.04.2023 for placing him under suspension under Rule 4 of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as “Rules, 1999”) and instituting the disciplinary proceedings against him. The petitioner has also challenged the order dated 18.04.2023 whereby the charge of Joint Director of Education, Ayodhya Division, Ayodhya has been given as an additional charge to Shri Manoj Kumar Dwivedi, Divisional Joint Director, Kanpur.

3. The petitioner had allegedly in abuse and misuse of his power for extraneous consideration had regularized 122 teachers who were illegally appointed by the Committees of Management of several schools/colleges after 07.08.1993, and these teachers were drawing salary only on the strength of interim orders passed by this Court in respect of payment of salary to such teachers. The petitioner allegedly in criminal conspiracy with the Committees of Management of several schools/colleges for extraneous consideration and against the notification dated 22.03.2016 had regularized the services of the said 122 teachers.

4. Against these illegal regularizations, one Shri Shashi Kant Pandey, Assistant Teacher, P.D. Inter College, Sonyasa, Rasoolabad, Ayodhya gave a complaint vide letter dated 05.12.2022 and another complaint dated 20.01.2023 made by Shri Shailesh Kumar Singh, Assistant Teacher, resident of

Village Kopa, Post-Alipur, District-Sultanpur was also received by the State Government in respect of illegal regularization of teachers by the petitioner.

5. The State Government with a view to find out the correctness, veracity and genuineness of the aforesaid two complaints, vide order dated 20.01.2023 directed the Commissioner, Ayodhya Division, Ayodhya to get the allegations labeled against the petitioner in the aforesaid two complaints enquired. The Commissioner, Ayodhya Division, Ayodhya vide letter dated 27.02.2023 constituted a Three Members Enquiry Committee comprising of (1) Shri Sunil Kumar Shukla, Additional Commissioner (Administration), (2) Shri Neeraj Srivastava, Additional Director, Treasury and Pension, Ayodhya Division, Ayodhya and (3) Shri Arvind Kumar John, Joint Development Commissioner, Ayodhya for making an enquiry into the allegations in two complaints against the petitioner and for submission of a report.

6. The Three Members Enquiry Committee in its report dated 03.03.2023 concluded that Shri Arvind Kumar Pandey-petitioner had regularized such teachers who were getting salary in compliance of interim orders passed by this Court. It was also noticed that as per the notification dated 22.03.2016, the State Government had directed that the teachers who were not appointed in accordance with the Uttar Pradesh Secondary Education Service Commission (Removal of Difficulties) Order 1981 or as per Section 18 of the Uttar Pradesh Secondary Education (Services Selection Boards) Act, 1982 would not be entitled for regularization. The petitioner had not adhered to the said directions issued by the State Government

and had regularized the services of teachers who were illegally appointed by the managements.

7. The petitioner in a well strategic move canceled the regularization of 34 teachers under his signatures without following the prescribed procedure and without constituting a committee so that these 34 teachers would get relief from the High Court. It appears that as per the well thought out strategies of the petitioner, these 34 teachers had obtained relief from this Court against the orders passed by the petitioner canceling their regularization without following due procedure.

8. It is relevant to take note of that for considering regularization of the teachers appointed on adhoc basis by the Committees of Management of several schools/colleges, the State Government had constituted a Four Member Committee under Section 33-C(2) (a) of the Uttar Pradesh Secondary Education (Service Selection Boards) Act, 1982 comprising of (A) Joint Director of Education, (B) Divisional Deputy Director of Education, (C) Divisional Assistant Director of Education (Basic), Ayodhya Region, Ayodhya and (D) District Inspector of Schools of concerned District. Such committees have been constituted for every division of the State. The petitioner constituted the Committee, wherein in place of the persons as directed by the State Government, their nominated members were part of the said Committee and the petitioner obtained their signatures for regularization of adhoc teachers who were illegally appointed by the Committees of Management of several schools/colleges after 07.08.1993.

9. Considering the illegal, arbitrary and malafide conduct of the petitioner for extraneous consideration, the State

Government had placed the petitioner under suspension vide impugned order dated 15.04.2023 under Rule 4 of the Rules, 1999 and has instituted disciplinary proceedings against him under Rule 7 of the Rules, 1999.

10. Vide Office Memorandum dated 01.05.2023, Shri Pawan Kumar, Director, (IAS) Social Welfare, Uttar Pradesh, Lucknow was nominated as the Enquiry Officer. With the approval of the appointing authority vide Office Memorandum dated 01.05.2023 charge-sheet has been issued to the petitioner containing five charges for illegal regularization of teachers with malafide for extraneous consideration.

11. The petitioner was given fifteen days' time to file his response/reply to the said charge-sheet. The State Government vide Office Memorandum dated 10.05.2023 had issued supplementary charge-sheet containing charge of illegal regularization of 34 adhoc teachers in District-Ambedkarnagar, Ayodhya and Sultanpur. The State Government has also constituted a vigilance enquiry vide letter dated 10.05.2023 in respect of movable and immovable properties illegally earned by the petitioner during his Government service. The Vigilance Department is conducting an open enquiry on the basis of various complaints received against the petitioner for amassing huge disproportionate assets by him during his service period.

12. Shri Ravi Singh, learned Counsel for the petitioner has submitted that the impugned suspension order is illegal. There is no allegation of embezzlement by the petitioner or accepting bribe for regularizing 122 teachers appointed by the

Committees of Management of several schools/colleges. He has further submitted that the charges, if proved, would not entail major penalty, therefore, placing the petitioner under suspension vide impugned order dated 15.04.2023 is wholly unjust, illegal and arbitrary. Since, some of the members of the Regularization Committee had withdrawn their membership and therefore, the petitioner had nominated persons in their place. It cannot be said that the petitioner had illegally acted in constituting the committee for regularization. He has further submitted that the petitioner was authorized by the State Government through the Committee for Regularization of the candidates that if any concealment or fabrication was found against a candidate(s), the petitioner could cancel the regularization of such candidate(s), therefore, the petitioner has canceled the regularization of 34 such teachers. The suspension order should not be a routine administrative order. An employee should be placed under suspension on consideration of gravity of misconduct or nature of allegations imputed to the delinquent employee. Considering the charges against the petitioner, it appears that the order has been passed as a routine administrative order, therefore, the same is liable to be set aside.

13. On the other hand, Shri Sandeep Sharma, learned Standing Counsel for the State-respondents has opposed the prayer made on behalf of the petitioner and has submitted that the petitioner had acted in a most illegal, arbitrary and malafide manner for extraneous consideration in illegally regularizing 122 teachers and thereafter, canceling the regularization of 34 teachers illegally just to benefit them in the writ court. He further submitted that charges, if proved, would entail major penalty.

Considering the influence, resources and wealth accumulated by the petitioner, the State Government in a well considered decision has placed him under suspension and has ordered an open vigilance enquiry for huge wealth amassed by him during his service period.

14. I have considered the submissions made on behalf of the parties.

15. The word 'mafia' is quite prevalent in India. There are Bahubalis and Mafias in politics who have amassed huge wealth from the proceeds of crime and their rein of terror runs deep into hearts and psyches of law abiding citizens. There are sub categories of Mafias, such as, land mafia, nakal mafia and education mafia etc. There are education mafias amongst the government servants who are required to be weeded out expeditiously.

16. The importance of education has been recognized in person's and society's life from time immemorial. In India tradition, an illiterate person is considered to be equal to an animal because without education, he will not be able to rise above his physical self. Hence, the belief that a person who is initiated into education is twice born, first time physically and second time spiritually. Without education one cannot acquire knowledge. Knowledge has to be used for the welfare of the world. Education is the soul of Indian Civilization. The education is a means for awakening humans to realize their potential and making them empowered and capable for outstanding contribution to their lives.

17. In Indian mythology also, significance and importance of education for a human being has been described in following Sanskrit verses:-

"विद्याविहीना बहवोऽपि पुत्राः कल्पायुषः सन्तु
पितुः किमेतैः।

क्षयिष्णुना वाऽपि कलावता वा तस्यः प्रमोदः
शशिनेव सिंधोः॥१॥

Transliteration-

Vidyāvihīnā Bahavo'api Putrāḥ Kalpāyūṣaḥ

Santu Pituh Kimetaih |

Kṣayiṣṇunā Vāpi Kalāvata Vā Tasyaḥ

Pramodaḥ Śaśineva Sindhoḥ ||

English Meaning-

Of what use is having many sons who are fools without any knowledge, but with longer lifespan. On the other hand, if they are experts in various arts, but with less lifespan, they bring extreme joy to their father just like the Moon gives to the Ocean.

"विद्या प्रशस्यते लोकैः विद्या सर्वत्र गौरवा।
विद्यया लभते सर्वं विद्वान् सर्वत्र पूज्यते॥२॥"

Transliterations-

Vidyā Praśasyate Lokaiḥ Vidyā Sarvatra

Gauravā |

Vidyayā Labhate Sarvaṁ Vidvāna Sarvatra

Pūjyate ||

English Meaning-

Knowledge is extolled by everyone, knowledge is considered great everywhere, one can attain everything with the help of knowledge person is person is respected everywhere.

"न चौरहार्यं न च राजहार्यं न च भ्रातृभाज्यं न
च भारकारि।

व्यये कृते वर्धत एव नित्यं विद्याधनं
सर्वधनप्रधानम्॥३॥"

Transliterations-

Na Caurahāryaṁ Na Ca Rājahāryaṁ Na Ca

Bhrātrbhājyaṁ Na Ca Bhārakāri |

Vyaye Kṛte Vardhat Eva Nityaṁ

Vidyādhanaṁ Sarvadhana Pradhānaṁ ||

English Meaning-

It can neither be plundered by a thief, nor can be squeezed by the king, can be divided by brothers or not, and does not fall on consumption. The more the education is spent, the more it grows.

18. Swami Vivekananda said "Educate and raise the masses, and thus alone the nation is possible". Education is considered to be an important means to achieve the four aims of human life, namely-Dharma (virtue), Artha (wealth), Karma (pleasure) and Moksh (spirituality). Knowledge is extolled by everyone, knowledge is considered great everywhere, one can attain everything with the help of knowledge and person with knowledge is respected everywhere.

19. Unfortunately commercialization of education started in big way with most accelerated speed in nineties. Commercialization of education has eroded the very value of education. As a result, there are education mafias and nakal mafias in the system. Schools and colleges have become profit making establishments. It is the responsibility of the State and the Society to clean the education system.

20. Considering the allegations leveled against the petitioner and also taking note of his status, reach and resources, the State Government has placed him under suspension. I do not find that the impugned orders suffer from any illegality or arbitrariness which require an interference of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

21. In view thereof, the present petition is hereby **dismissed**. The State Government is directed to complete the disciplinary proceedings initiated against

the petitioner expeditiously preferably within a period of four months from today and the Department of Home Affairs, Government of Uttar Pradesh is also directed to conclude the open vigilance enquiry initiated against the petitioner in a most expeditious manner preferably within a period of three months from today and take necessary action accordingly.

22. It is the duty of the State Government to find out illegal wealth accumulated by a government employee during his/her service period and take appropriate action against such an employee.

23. Let a copy of this order be transmitted to the Additional Chief Secretary/Principal Secretary, Department of Home Affairs, Government of Uttar Pradesh for necessary action.

(2023) 7 ILRA 287
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.07.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ-A No. 3814 of 2022

And

Writ-A No. 1305 of 2022 and 1514 of 2022

Krishna Kumar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sameer Kalia, Srideep Chatterjee

Counsel for the Respondents:
 C.S.C., Raj Kumar Upadhyaya (R.K. Upadhyaya), Ratnesh Chandra, Tushar Verma

A. Service Law – Appointment – Promotion - Uttar Pradesh Public Works Department "Group-B" Civil Engineering Service Rules – 2004 - Rule 5 - Sarvajanik Nirman Vibhag Sangdak Sewa Niyamawali, 1968 - Rules 5 - 19; Uttar Pradesh Sarvajanik Nirmaan Vibhaag Rekhanakan Adhithaan Sewa Niyamawali, 1984 - Rule 5 – The eligibility for promotion to the post of Assistant Engineer (Civil) as per Rule 5 of Rules, 2004 is seven years substantive service on the post of Junior Engineer (Technical)/Computer on the basis of seniority subject to rejection of unfit. The petitioners and the private opposite parties belonging to one cadre i.e. Junior Engineer (Technical). The petitioners were directly appointed to the post of Junior Engineer (Technical)/Computer, whereas the private opposite parties were promoted to the said post under the Rules, 1968. There is a common seniority list, which remains unchallenged. (Para 34)

B. There cannot be a class within class for the purpose of further promotion - The Rules, 1968 are not rescinded after enactment of Rules, 1984 and are very much in existence in the statute book - Rules, 1968 provide eligibility and the procedure for promotion to the post of Junior Engineer (Technical)/Computer from the post of Draftsman. Under Rules, 1984, one more avenue of promotion to the Draftsman i.e. Head Draftsman has been created. After promotion of the opposite parties from the post of Draftsman to the post of Junior Engineer (Technical)/Computer, the cadre of the petitioners and such promotees of Junior Engineer (Technical), became one i.e. the cadre of Junior Engineer (Technical). (Para 35)

C. The Court cannot lay down a new qualification for promotion, which is not prescribed under the statute/relevant service rules. This Court in Writ-A No.15161 of 2021 filed by the direct appointees of Junior Engineer (Technical), had given direction for forwarding the names of eighteen eligible candidates from the final seniority list of Junior Engineer (Technical)/Computer to the Public Service Commission for promotion to the post of

Assistant Engineer (Civil). In compliance of the said direction, names of opposite parties, who are eligible for promotion, have been included in the impugned requisition sent to the Public Service Commission for promotion. The said requisition does not suffer from any illegality and conforms to the statutory prescription. (Para 36)

No error is found in the impugned requisition dated 28.5.2022 as it has been sent strictly as per the mandate of Rule 5(2) of Rules, 2004. (Para 37)

Writ-A Nos. 3814 of 2022 and 1514 of 2022, are dismissed.

Writ-A No.1305 of 2022 is allowed. (E-4)

Present petition assails order dated 28.5.2022, issued by the State Government, by means of which the eligibility list including the names of promotee Junior Engineers (Technical) along with direct recruitee of Junior Engineer have been forwarded to the U.P. Public Service Commission for making promotion on the post of Assistant Engineer.

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

1. The core controversy involved in the present batch of writ petitions is promotion on the post of Assistant Engineer (Civil) in the U.P. Public Works Department under 50% quota as provided under the Uttar Pradesh Public Works Department "Group-B" Civil Engineering Service Rules, 2004 (for short 'Rules, 2004').

2. These writ petitions have been filed by the petitioners, who are Junior Engineers (Technical). The cadre of Junior Engineer (Technical) is consisting of two sets of Junior Engineers (i) Junior Engineer (Technical)/Computers having been

appointed under the Sarvajanik Nirman Vibhag Sangdak Sewa Niyamawali, 1968 (for short 'Rules, 1968') in the U.P. Public Works Department, who were directly recruited as Junior Engineer (Technical)/Computers through U.P. Public Service Commission; and (ii) who were initially appointed as Draftsman having two years Engineering Diploma in any trade (Civil/Mechanical/Draftsman) from Industrial Training Institute (ITI) or any other qualification as prescribed under the Rules, 1968 and, as per the provisions contained in Part-VI (Rule 19) of the Rules, 1968, who got promoted as Junior Engineer (Technical) under 20% quota prescribed for them having rendered ten years substantive service as Draftsman and, subject to passing of the departmental examination (condition of passing of departmental examination was relaxed in the year 1975) pursuant to the recommendations of the U.P. Public Service Commission.

3. Rules, 1968 were amended in the year 1992, whereby the promotion quota was increased from 20% to 50%. Part-VI (Rule 19) of the Rules, 1968 provides the eligibility and procedure for promotion of the Draftsman to the post of Junior Engineer (Technical). Appointment on the post of Draftsman is made under the Uttar Pradesh Sarvajanik Nirmaan Vibhaag Rekhanak Adhithaan Sewa Niyamawali, 1984 (for short 'Rules, 1984'). Rule 5 of the said Rules prescribes the source of recruitment and Rule 8 prescribes qualification for appointment on the post of Draftsman. The qualification as prescribed under Rule 8 of the Rules, 1984 is High School examination from the U.P. Board or any other examination recognized by the Government equivalent thereto and any other qualification as prescribed under Appendix-C of the said Rules. Appendix-C

of the said Rules, 1984 would read as under:-

“See Rule 8(2)

Certificates required for the post of Draftsman

(1) The Certificate of Draftsman from

(i)(a) Thompson College of Engineering, Roorkee or Roorkee University or Uttar Pradesh or any other institution recognized in Uttar Pradesh or any other State; or

(ii) Diploma in Architectural Design and Draftsman from Cultural Work and Scientific Research Department, Government of Uttar Pradesh; or

(iii) Diploma in Architectural Assistant from Uttar Pradesh Technical Education Board or similar Diploma from any other State ; or

(iv) Diploma in Civil Engineering or Draftsman from a University established by .. or

(v) Diploma in Draftsman (Civil) or Mechanical from ITI established by Training and Employment Directorate, Uttar Pradesh or similar Diploma from any other State from a recognized institution.”

4. The petitioners have challenged the order dated 28.5.2022 issued by the State Government, by means of which the eligibility list including the names of promotee Junior Engineers (Technical) along with direct recruitee of Junior Engineer have been forwarded to the U.P. Public Service Commission for making promotion on the post of Assistant Engineer.

5. Sri S.K. Kalia, learned Senior Advocate, assisted by S/Sri Sameer Kalia, Srideep Chatterjee, learned counsels appearing for the petitioners in Writ-A

Nos.3814 of 2022 and 1514 of 2022 has submitted that though the petitioners were appointed as Computer, but in terms of the Office Memorandum dated 16.6.1973 issued by the State Government, the Computers holding Diploma in Engineering were designated as Junior Engineer (Computers) as nomenclature of their post was changed to Junior Engineer (Computers). The petitioners having Diploma in Civil Engineering are the direct recruits on the post of Junior Engineer (Technical) through the U.P. Public Service Commission.

6. Rule 5 of Rules, 1968 lays down the source of recruitment for the post of Computer/Junior Engineer (Technical), which includes direct recruitment as well as promotion. Sub-rule(2) of Rule 5 provides that Engineer-in-Chief shall decide the source/feeder post from which promotion is to be made on the post of Computer and the promotion is to be carried out as per the provisions contained in Chapter-VI of the Rules, 1968. A conjoint reading of Rules 5 and 19 of the Rules, 1968 would make it clear that Draftsman is not the only feeder post from which promotion can be made to the post of Computer, but it is also the prerogative of the Engineer-in-Chief to decide the source/feeder post for promotion to the post of Computers.

7. Rule 19 of the Rules, 1968 only lays down certain essential eligibility conditions which are to be fulfilled in order to consider the Draftsman for promotion, as such, a harmonious reading of Rules 5 and 19 of the Rules, 1968 would make it clear that source/feeder post for promotion to the post of Computers/Junior Engineer (Technical) can also be any post other than Draftsman as may be decided by the Engineer-in-Chief.

8. The validity of Rule 5(2) of the Rules, 1968 was challenged by filing Civil Misc. Writ Petition No.9 of 1981 praying, inter alia, that the promotional quota should be increased to 100% as was available in Irrigation, Hydel and Rural Engineering Services Departments. This Court dismissed the said writ petition vide judgement and order dated 26.7.1984, however, left it open to the State Government to decide the question of increasing the quota of promotion. In the said writ petition, the State took a stand that the post of Draftsman is a non-technical post and percentage of 20% was fixed for promotion of Draftsman to Computer/Junior Engineer (Technical) to maintain the efficiency in service. After the said judgment, the State Government on 13.8.1984 framed the Rules, 1984 in supersession of all available Rules and orders, which regulated the terms and conditions of service of Draftsman, Head Draftsman, Tracer, Architectural Draftsman and Architectural Head Draftsman

9. Sri Kalia, learned Senior Counsel has further submitted that on coming into force the Rules, 1984, the channel of promotion as provided under Rule 19 of the Rules, 1968 for Draftsman to the post of Computer/Junior Engineer (Technical) stood rescinded. After coming into force the Rules, 1984, the Draftsman appointed under the said Rules or prior became members of the Rekhankan Adhishthan Sewa, which is a distinct service from the one which is regulated under the Rules 1968. The private opposite parties have been appointed on the post of Draftsman after coming into force of the Rules, 1984 and, therefore, they were members exclusively of the Uttar Pradesh Sarvajanic Nirman Vibhag Rekhankan Adhishthan Sewa. He has further submitted that

amendment was brought in Rules, 1968 on 2.7.1992, whereby the promotional quota to the post of Junior Engineer (Technical)/Computer was increased from 20% to 50%. However, this would not make the Draftsman eligible for promotion under the Rules, 1968 inasmuch as it is the sole prerogative of the Engineer-in-Chief to determine the source of feeder post for promotion to the post of Junior Engineer (Technical)/Computer. The channel of promotion to Draftsman is provided under Rule 5 of the Rules, 1984 itself, under which the private opposite parties are appointed i.e. promotion to the post of Head Draftsman.

10. Sri Kalia, learned Senior Counsel has further submitted that promotion of the private opposite parties to the post of Junior Engineer (Technical)/Computer was illegal and, therefore, challenge to the said promotion even after twelve years, would not be barred on the ground of inordinate delay or laches as there is no concept of adverse possession or holding over in service jurisprudence. The private opposite parties at the best, could have been promoted to the post of Computer and, therefore, nomenclature of Junior Engineer (Technical) given to them instead of Computer is wholly illegal. Rules, 1968 provide for promotion to the post of Computer and not to the post of Junior Engineer (Technical). In view of the Government Order of 1973, those Computers, who possess Diploma in Engineering are designated as Junior Engineer. Submission is that even if it is assumed that after promulgation of Rules, 1984, the avenue of promotion of Draftsman to the post of Computers is still available under Rules, 1968, then also the promotion can only be on the post of Computers and those Draftsman, who

possess Diploma in Engineering would be designated as Junior Engineer (Technical).

11. Sri Kalia, learned Senior Counsel has further submitted that under Uttar Pradesh Public Works Department Group-B Civil Engineer Service Rules, 2004 (Rules, 2004), 50% of the posts of Assistant Engineer (Civil) are to be filled up from amongst substantively appointed Junior Engineers (Technical), who have completed seven years substantive service on the first day of the year of recruitment. Out of these 50%, 90% posts of 50% promotional quota are to be filled up by Junior Engineer (Civil) and 10% of 50% is to be filled up by direct Junior Engineer (Technical). He has submitted that the private opposite parties are not the diploma holders and they are not the Junior Engineer (Technical) even after their promotion to the post of Computer under Rules, 1968 and they are only Computer. Rule 5 of Rules, 2004 does not provided promotion to the post of Assistant Engineer (Civil) from Computers and, therefore, including the names of Computers, who are not the diploma holders in the ineligibility list, is contrary to Rule 5 of Rules, 2004.

12. Sri Kalia, learned Senior Counsel has also submitted that the Engineer-in-Chief/Head of Department has forwarded the names of persons, who had been directly recruited on the post of Junior Engineer (Technical) before 2010 and whose seniority had been finalised much earlier to the State Government on 26.8.2021 for promotion. Though 18 posts were available, but only five direct recruit Junior Engineers (Technical) were found eligible for promotion and these five persons have been granted promotion vide Government Order dated 30.11.2021 to the post of Assistant Engineer (Civil). Learned

Senior Counsel has also made emphasis that till date promotee Junior Engineers (Technical) have never been considered for promotion to the posts of Assistant Engineer (Civil).

13. In pursuance to the order passed by this Court on 7.1.2022 in Writ-A No.15161 of 2021, the Engineer-in-Chief on 24.2.2022 forwarded the names of directly recruited Junior Engineers (Technical). The aforesaid order was challenged by a few Junior Engineers (Technical), who claimed to have to their credit Diploma in Civil Engineering by filing Writ-A No.1305 of 2022.

14. Sri Kalia, learned Senior Counsel has also relied upon paragraph 18 of the counter affidavit filed on behalf of the State in Writ-A No.1514 of 2022, in which the promotion granted to the private opposite parties to the post of Junior Engineer (Technical) is under challenge. It appears that the State Government has said that under Rules, 1984, promotion of Draftsman is to be made to the post of Head Draftsman and under the said Rules, there is no provision for further promotion to the post of Assistant Engineer and, therefore, Draftsman were not eligible for promotion to the post of Assistant Engineer.

15. The State Government has taken a 'U' turn and vide orders dated 8.4.2022 and 13.4.2022 directed the Engineer-in-Chief that recruitment whether it is to be made directly or by way of promotion to the post of Assistant Engineer (Civil), the same is to be made as per the provisions of Rule 5 of the Rules, 2004. In compliance to the said direction, the Engineer-in-Chief has forwarded the names of the promotee Junior Engineers (Technical) for promotion to the post of Assistant Engineer (Civil).

Despite admitting that the Draftsman cadre is a non-technical cadre in the counter affidavit filed in Writ-A No.1514 of 2022, the State Government has sent the list on 28.5.2022 to the U.P. Public Service Commission for promotion to the post of Assistant Engineer (Civil), which includes the names of private opposite parties. It is, therefore, submitted that the Draftsman, who are not eligible to be promoted to the post of Assistant Engineer (Civil), were illegally promoted to the post of Junior Engineer (Technical) and, therefore, their names should be struck off from the list of eligible persons to be promoted to the post of Assistant Engineer (Civil)

16. On the other hand, Sri V.K. Bajpai, learned Standing Counsel has submitted that the word “Draftsman” means a person, who draws plans and sketches as of machinery or structures. From perusal of the technical qualification, which has been mentioned and prescribed under the Rules, 1984 for appointment as Draftsman, it is evident that the cadre of Draftsman is a technical cadre and the only difference between the Draftsman’s qualification and to that of Junior Engineer (Technical)/Computer is that for initial appointment on the post of Draftsman, two years Diploma course from ITI or other institutions as mentioned in Appendix-C to Rules, 1984 is required, whereas for Junior Engineer (Technical)/Computers, three years diploma course is required. Both i.e. Junior Engineer (Technical)/Computer and the Draftsman are technical cadres.

17. Learned Standing Counsel has further submitted that by enacting the Rules, 1984, Rules, 1968 did not get omitted. Rules, 1968 prescribe the eligibility and procedure for promotion to the post of Junior Engineer

(Technical)/Computer from the post of Draftsman. Rules, 1968 got amended in the year 1992, whereby the earlier quota of 20% promotion for the post of Junior Engineer (Technical)/Computers got increased to 50%. He has further submitted that Rules, 1984 provide one more avenue of promotion to the Draftsman i.e. Head Draftsman, but that does not mean that Rules, 1968 were rescinded and the promotion of the Draftsman to the post of Junior Engineer (Technical)/Computers is not possible. After promotion of Draftsman to the post of Junior Engineer (Technical), they become the part of the same cadre i.e. Junior Engineer (Technical)/Computer and their promotion as per Rule 5 of Rules, 2004 is to be considered along with the directly appointed Junior Engineer (Technical)/Computer and there cannot be a class within the class for the purposes of further promotion.

18. Sri Bajpai has further submitted that the Draftsmen after their promotion to the post of Junior Engineer (Technical)/Computer and complete seven years on the post of Junior Engineer (Technical)/Computer as on the first day of the year of recruitment, they become eligible for promotion to the post of Assistant Engineer (Civil). He has further submitted that directly recruited Junior Engineers (Technical) had approached this Court at Allahabad by filing Writ-A No.15161 of 2021, Manoj Kumar Singh and others Vs. State of Uttar Pradesh and others and this Court vide order dated 7.1.2022 disposed of the said writ petition by following order:-

“In view of the above, therefore, there remains no controversy with regard to further recommendations, if made, against the remaining 18 vacant positions

of Assistant Engineer (Civil) as per the note made in the recommendations earlier made on 24th August, 2021 that promotion process on 18 vacant positions had been put on hold for finalization of the seniority list.

Accordingly, it is ordered that respondents concerned shall forward the name of further 18 candidates' names from the finalized seniority list of Junior Engineer (Technical) against the 18 vacant positions to the U.P. Public Service Commission, Prayagraj strictly in accordance with law looking to the criteria laid for the said purpose and then U.P. Public Service Commission shall proceed to finalize the matter of promotion accordingly.

Appropriate recommendations as ordered above shall be made within a period of 15 days from the date of production of certified copy of this order before appropriate authority.

With the aforesaid observations/ directions, this petition stands disposed of."

19. After the said judgement dated 7.1.2022, the earlier proposal dated 10.2.2022 forwarded by the Engineer-in-Chief to the State Government for promotion to the post of Assistant Engineer (Civil) from the Junior Engineer (Technical), which had names of only directly recruited Junior Engineer(Technical) was examined by the Department of Personnel and Appointment, Government of Uttar Pradesh. Vide letter dated 8.4.2022, the Government wrote to the Engineer-in-Chief (Design and Planing) for making available proposal as per the mandate of Rule 5 of the Rules, 2004 in order to ensure compliance of the order dated 7.1.2022 passed by this Court in Writ-A No.15161 of 2021. While the aforesaid process of forwarding the

requisition was under way, Manoj Kumar Singh and others filed Contempt Application (Civil) No.3107 of 2022 alleging therein the disobedience of the order passed by this Court dated 7.1.2022 in Writ-A No.15161 of 2021 and, this Court on 26.5.2022 issued contempt notice to the Engineer-in-Chief/Head of Department, U.P. Public Works Department.

20. Under the aforesaid circumstances, the requisition dated 28.5.2022 was forwarded to the U.P. Public Service Commission as per the direction issued by this Court vide order dated 7.1.2022 mentioning the names of the eligible candidates {Junior Engineer (Technical)} on the basis of their seniority in the cadre of Junior Engineer (Technical) irrespective of the fact that they are directly recruited or promotee {Junior Engineer (Technical)} treating them as one class as per mandate of Rule 5(ii) of Rules, 2004.

21. Sri Bajpai has further submitted that the State authorities have acted as per the mandate of the statutory rules framed under Article 309 of the Constitution of India and till the Rules are amended/modified, the authorities cannot deviate from the Rules. The requisition sent, is strictly in accordance with Rules, 2004 and there is no merit in the present writ petitions, which are liable to be dismissed.

22. Sri Ratnesh Chandra, learned counsel for the private opposite party nos.6 and 8 has submitted that opposite party nos.6 and 8, who were appointed as Draftsman on 6.3.1999 and 20.10.1987 respectively, were promoted to the post of Junior Engineer (Technical) on 13.8.2003 and 22.3.2010 respectively, and their

promotions have never been challenged till date. The tentative seniority list of Junior Engineer (Technical) was issued on 11.6.2008 and the final seniority list was issued on 10.8.2010. The petitioners never challenged the said seniority list nor objected to opposite parties being placed in the said seniority list. He has, therefore, submitted that it does not lie in the mouth of the petitioners to challenge the inclusion of the private opposite party nos.6 and 8 in the list of eligible candidates for promotion to the post of Assistant Engineer (Civil) from the post of Junior Engineer (Technical) as per the Rules, 2004.

23. Sri Ratnesh Chandra has further submitted that earlier also three persons, namely Bhageroo Ram, Narain Singh Jagpal and Babu Lal, who were placed in the seniority list dated 10.8.2010 at serial nos.143, 144 and 167 respectively and who were appointed as Draftsman, were promoted to the post of Assistant Engineer (Civil).

24. Second seniority list was published on 4.6.2020, which was finalized on 14.9.2021. The petitioners and the private opposite parties have been placed in the said seniority list as per their length of service on the post of Junior Engineer (Technical). It is only four Junior Engineers (Technical), who were initially appointed as Draftsman, are eligible to be promoted to the posts of Assistant Engineer (Civil) against the available vacancies from the post of Junior Engineer (Technical). There has been seldom any occasion that the candidates from the post Draftsman could get promoted to the post of Assistant Engineer (Civil) as they used to be promoted at the very belated stage from the post of Draftsman to the post of Junior Engineer (Technical) and, therefore, they

could not be eligible to be considered for promotion to the post of Assistant Engineer (Civil). He has further submitted that from the year 2010 till date, no Junior Engineer (Technical) from the cadre of Draftsman could be promoted to the post of Assistant Engineer (Civil) as no one was eligible in the cadre of Draftsman to be promoted to the post of Assistant Engineer (Civil).

25. In respect of the Rules, 1968, 1984 and 2004, Sri Ratnesh Chandra, learned counsel for the opposite parties has adopted the arguments of Sri V.K. Bajpai, learned Standing Counsel.

26. Sri Ratnesh Chandra, learned counsel for the private opposite parties has also submitted that the present writ petitions have been filed for the purpose of enforcing the amendment in Rules, 2004, wherein a proposal has been made that so far promotion on the post of Assistant Engineer (Civil) is concerned, the same should be granted only to the persons, who have got degree or Engineering from any University or they should possess the Diploma in Civil Engineering by any institute recognized by the Government. However, the Rules, 2004 have not been amended till date. These Rules are to be enforced as they stand on the statute book. Rules, 2004 do not prescribe any qualification or eligibility of Diploma or Degree in Engineering for being promoted to the post of Assistant Engineer (Civil). The eligibility is that a Junior Engineer (Technical) should have rendered seven years of substantive service on the said post for promotion to the post of Assistant Engineer (Civil). The criteria for promotion is seniority subject to rejection of unfit.

27. Sri Ratnesh Chandra has further submitted that this Court cannot issue

mandamus for amendment in the statutory Rules as it is the prerogative of the executive to amend the Rules. This Court should not take the legislative power in its hand. It is for the employer to prescribe the qualification and eligibility for a post and not the Court. So far the promotion to the post of Assistant Engineer (Civil) from the post of Junior Engineer (Technical) is concerned, the only criteria is seven years substantive service on the post of Junior Engineer (Technical) irrespective of the degree, diploma or any further qualification of the Junior Engineer (Technical). He, has, therefore, submitted that there is no substance in these writ petitions, which are liable to be dismissed.

28. Sri Tushar Verma, learned counsel appearing for opposite party nos.10 and 11 has also adopted the arguments of Sri Ratnesh Chandra, learned counsel for opposite party nos.6 and 8.

29. Sri G.C. Verma, learned counsel for opposite party nos.4 to 8 in Writ-A No.1514 of 2022 has submitted that opposite parties were promoted under the Rules, 1968 to the post of Junior Engineer (Technical) and their promotion to the post of Junior Engineer (Technical) cannot be challenged after a lapse of twelve years. The petitioners were also appointed under the Rules, 1968 vide appointment letters dated 22.7.2010 and 19.11.2013 respectively. Opposite parties were promoted vide order dated 22.3.2010. At the time of promotion of the opposite parties, the petitioners were not even born in the cadre of Junior Engineer (Technical) and, therefore, they cannot challenge the promotion of the opposite parties at this belated stage.

30. Sri G.C. Verma, learned counsel for opposite party nos.4 to 8 has further

submitted that these opposite parties are diploma holders and even otherwise they are entitled to be promoted to the post of Assistant Engineer (Civil). These opposite parties have filed Writ-A No.1305 of 2022 before this Court, wherein they have prayed for quashing of the order dated 10.2.2022 passed by the Engineer-in-Chief (Design and Planning), Public Works Department, U.P., Lucknow with further prayer for a writ of mandamus commanding the opposite parties to prepare the eligibility list for promotion on the post of Assistant Engineer (Civil) from the post of Junior Engineer (Technical) as per Rule 5 read with Rule 16 of the Rules, 2004 as per the seniority list dated 14.9.2021 issued by the Engineer-in-Chief Head of Department, Public Works Department, U.P., Lucknow and consider the case of the petitioners for promotion to the post of Assistant Engineer (Civil) as against eighteen posts for the Recruitment Year 2021-22. Even as per the petitioners' stand, the opposite parties are qualified to be promoted to the post of Assistant Engineer (Civil).

31. Sri G.C. Verma, learned counsel for the opposite parties has further submitted that the petitioners were appointed under the Rules, 1968, whereas the opposite parties were promoted under the said Rules. The petitioners cannot challenge the appointments and the promotions made under Rules, 1968 in absence of any challenge to the said Rules. He has, therefore, submitted that there is no substance in these writ petitions and as directed by this Court vide judgement and order dated 7.1.2022, the promotion to the post of Assistant Engineer (Civil) from the post of Junior Engineer (Technical) has to be made from the seniority list dated 10.8.2010 from the eligible Junior Engineer (Technical). He has, therefore, prayed for

dismissal of Writ-A Nos.3814 of 2022 and 1514 of 2022.

32. Sri R.K. Upadhyaya, learned counsel for the Public Service Commission has submitted that the Public Service Commission is a proforma party. However, he has submitted that in reference to the Government letter dated 28.5.2022 for holding the supplementary Departmental Promotion Committee for promotion to the post of Assistant Engineer (Civil) from the post of Junior Engineer (Technical) for the selection year 2021-22, certain discrepancies were required to be removed by the Government as per the Commission's letters dated 9.1.2023 and 8.2.2023 respectively, but till date the Government has not removed those discrepancies. He has further submitted that the Public Service Commission is to follow the statutory rules. Once the Government removes the discrepancies as pointed out, the Public Service Commission will make recommendation for promotion of the eligible candidates from the seniority list forwarded by the State Government for promotion to the post of Assistant Engineer (Civil).

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

34. The eligibility for promotion to the post of Assistant Engineer (Civil) as per Rule 5 of Rules, 2004 is seven years substantive service on the post of Junior Engineer (Technical)/Computer on the basis of seniority subject to rejection of unfit. The petitioners and the private opposite parties belonging to one cadre i.e. Junior Engineer (Technical). The petitioners were directly appointed to the post of Junior Engineer

(Technical)/Computer, whereas the private opposite parties were promoted to the said post under the Rules, 1968. There is a common seniority list, which remains unchallenged.

35. In view thereof, I do not find much substance in the submission of Sri Kalia, learned Senior Counsel for the petitioners that after enactment of Rules, 1984, Rules, 1968 got omitted. Rules, 1968 provide eligibility and the procedure for promotion to the post of Junior Engineer (Technical)/Computer from the post of Draftsman. Under Rules, 1984, one more avenue of promotion to the Draftsman i.e. Head Draftsman has been created, but the Rules, 1968 are not rescinded and very much in existence in the statute book. After promotion of the opposite parties from the post of Draftsman to the post of Junior Engineer (Technical)/Computer, the cadre of the petitioners and such promotees of Junior Engineer (Technical), became one i.e. the cadre of Junior Engineer (Technical). There cannot be a class within class for the purpose of further promotion.

36. The Court cannot lay down a new qualification for promotion, which is not prescribed under the statute/relevant service rules. This Court in Writ-A No.15161 of 2021 filed by the direct appointees of Junior Engineer (Technical), had given direction for forwarding the names of eighteen eligible candidates from the final seniority list of Junior Engineer (Technical)/Computer to the Public Service Commission for promotion to the post of Assistant Engineer (Civil). In compliance of the said direction, names of opposite parties, who are eligible for promotion, have been included in the impugned requisition sent to the Public Service Commission for promotion. I do not find

that said requisition suffers from any illegality or is against the statutory prescription.

37. In view thereof, I find no error in the impugned requisition dated 28.5.2022 as it has been sent strictly as per the mandate of Rule 5(2) of Rules, 2004.

38. Accordingly, I do not find any substance in *Writ-A Nos.3814 of 2022 and 1514 of 2022, which are hereby dismissed, whereas Writ-A No.1305 of 2022 is allowed.*

(2023) 7 ILRA 297

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.07.2023

BEFORE

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

Writ-A No. 4279 of 2023

Arun Kumar Srivastava **...Petitioner**
Versus
Managing Director, Uttar Pradesh Rajkiya
Nirman Nigam Ltd., Lucknow
...Respondent

Counsel for the Petitioner:

Sri Sangam Singh, Sri Ankur Jaiswal

Counsel for the Respondent:

Sri Vivek Saran

A. Service Law – Retiral dues – Arrears of salary – Gratuity - Pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but have become valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment.
(Para 11)

Delay in payment of post retiral benefits must carry adequate interest. So far as delay in payment of salary is concerned, a heavier obligation lies on the employer to compensate the employee. In both matters, penal interest ought to be awarded. (Para 11)

Since the date of retirement of every Government servant is very much known in advance, the process of collecting the requisite information and issuance of documents (L.P.C. (Last Pay Certificate) and N.L.C. (No Liability Certificate)) should be completed at least a week before the date of retirement so that the payment of gratuity amount could be made to the Government servant on the date he retires or on the following day and pension at the expiry of the following month. (Para 11)

B. If an employee serves at different stations and his service book goes to all those stations, the way every ACR and other remarks are written, the same way, his monthly salary and other dues ought also be posted in at and made available to him on time. (Para 10)

In the present case, the delay in paying the petitioner's arrears of salary and post retiral benefits is absolutely without justification. The fact that the petitioner had served at different stations, and therefore, his service records had to be verified on those stations is an obligation of the Corporation; not the petitioner's. The petitioner cannot be made to suffer the blame for this delay, the culpability whereof squarely lies on the shoulders of the Corporation. It is unimaginable that salary for a period of time while the employee was in service would be paid after his retirement. Likewise, payment of post retiral benefits have been unduly delayed and have been paid after ten years. (Para 10)

A mandamus is issued to the Managing Director, Uttar Pradesh Rajkiya Nirman Nigam Limited, ordering him to pay interest on the total sum of money detailed in petition, with simple interest at the rate of 10% per annum with effect from the date that each item of unpaid emoluments mentioned in the petition fell due, worked out until time when the relative payment was actually made. (Para 12)

Writ petition allowed. (E-4)

03.02.2010, in terms of the following order :

Precedent followed:

St. of Kerala & ors. Vs M. Padmanabhan Nair, (1985) 1 SCC 429 (Para 11)

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

Parties have exchanged affidavits.

2. Admit.

3. Heard forthwith.

4. Heard Mr. Sangam Singh, learned Counsel for the petitioner and Mr. Vivek Saran, learned Counsel appearing on behalf of the sole respondent.

5. The petitioner is an ex employee of the Uttar Pradesh Rajkiya Nirman Nigam Limited¹. He was initially appointed as a Sub-Engineer (Civil) in the service of the Corporation. He was posted at different stations throughout the State during the tenure of his employment. The petitioner retired from the post of Sub Engineer on 31.08.2009, upon attaining the age of superannuation. Admittedly, there were no disciplinary proceedings against him or any kind of a claim that the employers had to set-off against his post retiral dues. It is also not in dispute that prior of the petitioner's retirement, a No Dues Certificate was issued by the Office of the Corporation at New Delhi on 04.06.2009, that being the petitioner's last place of posting. The petitioner had an early grievance to make. Post retirement, his retiral dues as well as outstanding of arrears of salary due on the date of retirement were not paid. This led the petitioner to institute Writ - A No. 5590 of 2019, which, by a very usual order of this Court, was summarily parted with on

Heard learned counsel for the petitioner and learned Standing Counsel.

The petitioner has not been released his post retiral benefits after having retired on 31.8.2009. The respondent No.2 shall proceed to examine the claim of the petitioner and pass an appropriate order within 3 months. In the event the petitioner is found entitled for release of any amount, the same shall be released forthwith without any further delay.

With the aforesaid observations, the writ petition is disposed of.

6. After the order dated 03.02.2010 was passed and presumably received by the petitioner in the form of a certified copy, with no communication thereof through any official channel to the Corporation remained uncomplied with, leading the petitioner to prefer representations dated 08.03.2010, 18.05.2010 and 12.06.2010, virtually seeking to draw the Corporation's attention to the order of this Court dated 03.02.2010, earlier mentioned.

7. Since no action in compliance was taken, the petitioner had to move this Court, invoking our contempt jurisdiction vide Contempt Application (Civil) No. 3433 of 2010. Notice in the contempt matter was issued to the Corporation or the officer, so to speak, answerable on behalf of the Corporation, to carry out the orders of this Court. Pending rule issued in the contempt matter, the Corporation paid post retiral benefits to the petitioner under various heads, that include arrears of salary, gratuity and leave encashment. The arrears of salary were paid for various

periods of time that they had remained unpaid and all details of these periods are set out in tabular form by the petitioner in paragraph 14 of the writ petition. A perusal of this table shows that arrears of salary were paid for ten different periods of time that these had remained unpaid, apart from various heads, as already said, under which post retiral benefits were due to the petitioner.

8. The petitioner says that though the various sums of money indicated in para 14 have been paid to him, the payment has been made with an unexplained and culpable delay of ten years. The petitioner has, therefore, now come up claiming interest on this sum of money, which has been withheld. The petitioner attempted to enforce his claim for interest on account of the delayed payment of his post retiral dues as also unpaid arrears of salary, that ought to have been paid while in service, by representing the matter to the Corporation once again. The Corporation again, not heeding to the petitioner's plea for the payment of interest on his dues, paid much beyond the time of entitlement. Aggrieved, the petitioner invoked the contempt jurisdiction of this Court vide Contempt Application (Civil) No. 2435 of 2022. Pending the said application, the Corporation took a stand before the Court hearing the later contempt application that all dues, the petitioner was entitled to, have been paid to him. This Court, in the contempt matter, on occasion, was of opinion that the order on the writ side did not award any interest and, therefore, no case for contempt was made out. Accordingly, the contempt application was rejected vide order dated 11.11.2022. Nevertheless, before that happened, on 31.12.2021, by the order impugned, the Corporation rejected the petitioner's claim,

saying that they have paid all dues of the petitioner's unpaid salary that was in arrears in lieu of his service at different stations of the Corporation.

9. Notice in this case was issued to the Corporation vide order dated 17.05.2023, requiring them to file a return. In the counter affidavit filed on behalf of the Corporation by Mr. Vivek Saran, Advocate, it is stated in answer to paragraph 14 of the writ petition that during the period of service, the petitioner was posted at ten different units of the Corporation, and after retirement, his salary/arrears have been paid. It is further on said in paragraph 14 of the counter affidavit that since the service book of the petitioner was incomplete, time was spent to gather records and complete it. The delay, therefore, in settling the petitioner's salary overdues and post retiral benefits is said to have been occasioned on that account. This, in sum and substance, is the defence which the Corporation takes to justify the impugned order declining to grant interest. The Corporation, in the order impugned, hardly says anything in justification for declining to pay interest on the petitioner's dues, that have been paid after much delay.

10. Upon hearing learned Counsel for parties, this Court is of opinion that the delay in paying the petitioner's arrears of salary and post retiral benefits is absolutely without justification. The fact that the petitioner had served at different stations, and therefore, his service records had to be verified on those stations is an obligation of the Corporation; not the petitioner's. The petitioner cannot be made to suffer the blame for this delay, the culpability whereof squarely lies on the shoulders of the Corporation. If an employee serves at

different stations and his service book goes to all those stations, the way every ACR and other remarks are written, the same way, his monthly salary and other dues ought also be posted in at and made available to him on time. It is unimaginable that salary for a period of time while the employee was in service would be paid after his retirement. Presumably, the delay suffered by the petitioner in the matter of receipt of his salary at different stations is the hallmark of public employment, where the employer is more than an employer. In public employment like the Corporation's in this case, it is not just that the employer stands in the relationship of a master or an ordinary employer to a servant. Public employers behave like authorities, whom employees do not wish to annoy in any manner, while in service. Matters can go that far that even if salary is not paid to an employee for long spells of time, the employee believes that discretion is the better part of valour and he ought not to ask for his salary, lest he invite the wrath of authority, which the public employers are. Invariably, these Corporations are headed by administrative officers of the State, who find it difficult to distinguish their role from civil administrators into employers functioning in Corporations undertaking commercial business, where employees' welfare has to be looked after in a different way. In any event, even if it is pure State employment, it is not open to any employer to behave in this fashion and withhold an employee's salary, only to be paid after his retirement. This is precisely the case here. The petitioner has received his salary for different periods of time while he was posted at ten different stations, much after he has retired from service. This Court will not say that it is unfortunate. This Court will say that it is culpable and ought to invite penalty. Likewise, payment of post

retiral benefits have been unduly delayed and have been paid after ten years.

11. Gratuity, it is settled in **State of Kerala and others v. M. Padmanabhan Nair** is to be paid on the day following the retirement. It has been settled by the Supreme Court in a catena of decisions and also, by various High Courts across the country that delay in payment of post retiral benefits must carry adequate interest. So far as delay in payment of salary is concerned, a heavier obligation lies on the employer to compensate the employee. In both matters, penal interest ought to be awarded. In connection with the award of interest and penal interest, in the matter of late payment of post retiral benefits, it was held in **M. Padmanabhan Nair** (*supra*) thus :

1. Pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but have become, under the decisions of this Court, valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment.

2. Usually the delay occurs by reason of non-production of the L.P.C. (last pay certificate) and the N.L.C. (no liability certificate) from the concerned Departments but both these documents pertain to matters, records whereof would be with the concerned Government Departments. Since the date of retirement of every Government servant is very much known in advance we fail to appreciate why the process of collecting the requisite information and issuance of these two documents should not be completed at least a week before the date of retirement so that the payment of gratuity amount could be

made to the Government servant on the date he retires or on the following day and pension at the expiry of the following month. The necessity for prompt payment of the retirement dues to a Government servant immediately after his retirement cannot be over-emphasised and it would not be unreasonable to direct that the liability to pay penal interest on these dues at the current market rate should commence at the expiry of two months from the date of retirement.

12. In the circumstances, this writ petition **succeeds** and stands **allowed**. A mandamus is issued to the Managing Director, Uttar Pradesh Rajkiya Nirman Nigam Limited, ordering him to pay interest on the total sum of money detailed in paragraph 14, with simple interest at the rate of 10% per annum with effect from the date that each item of unpaid emoluments mentioned in the table in paragraph 14 fell due, worked out until time when the relative payment was actually made.

13. Since working out the interest on 25 different items of payments that have been delayed over varying periods of time is involved, let this matter be placed before the Registrar General of this Court, before whom both parties shall appear and workout the accounts. The Registrar General, in accordance with the orders of this Court, shall certify the total amount payable, and the said amount, subject to any objection which parties may wish to make before the Court, shall be the final amount payable by the Corporation to the petitioners within a period of two months.

14. Let a copy of this order be communicated to the Managing Director,

Uttar Pradesh Rajkiya Nirman Nigam Limited and the Registrar General for strict compliance.

(2023) 7 ILRA 301

ORIGINAL JURISDICTION

CIVIL SIDE

**DATED: ALLAHABAD 24.04.2023 &
25.05.2023**

BEFORE

**THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR - IV, J.**

Writ-A No. 4654 of 2023

**Union of India & Anr. ...Petitioners
Versus**

Manoj Pal & Anr. ...Respondents

Counsel for the Petitioners:

Sri Anupam Kumar

Counsel for the Respondents:

Sri Pawnesh Tiwari, Dr. D.K. Tiwari

A. Service Law – Suspension – Interpretation of statute - Central Civil Services (Classification, Control and Appeal) Rules, 1965 - Rule 10(6); Industrial Disputes Act, 1947 - Section 17 -Companies Act, 1956 - Section 108 - The tests for finding out a provision is mandatory or directory. The principles for which the provision has been made, its nature, the intention of the legislature in making the provision and the language of the provision are to be considered. While interpreting the word 'shall' or 'may', is whether mandatory or directory, court would have to ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. (Para 16, 18)

The question that arises for consideration is, as to **whether, the word 'shall' in Sub-rule (6) is mandatory or directory, read with Sub-rule (7) of Rule 10.** (Para 15)

Prohibition and negative words can rarely be directory. It has been aptly stated that there is one way to obey the command and that is completely to refrain from doing the forbidden act. Therefore, negative prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. (Para 19, 20)

From the mandate of Sub-rule (7) of Rule 10 of Rules 1965, employs negative and prohibitive words making the provision mandatory. After expiry of ninety days, the order of suspension shall not be valid in the eye of the Rule. In other words, the suspension order by operation of the Rule renders the suspension invalid for want of order of the competent authority on the recommendation of the Review Committee. (Para 21)

In the present case, the competent authority has merely communicated the recommendations of the Review Committee acting like a post office without either accepting or revoking the order of suspension. There is no application of mind as to whether the recommendation of the Review Committee is to be accepted or not. The competent authority has to pass an order either extending or revoking the suspension, though the order need not be a speaking and reasoned order. (Para 22)

Writ petition dismissed. (E-4)

Precedent followed:

1. C. Bright Vs District Collector & ors., 2021 (2) SCC 392 (Para 16)
2. Remington Rand of India Limited Vs Workmen, AIR 1968 SC 224 (Para 17)
3. Mannalal Khetan Vs Kedar Nath Khetan, (1860) 30 LJ Ch 379 (Para 19)
4. Raza Buland Sugar Co. Ltd. Vs Municipal Board, Rampur, AIR 1965 SC 895 (Para 19)
5. Bhikraj Jaipuria Vs U.O.I., AIR 1962 SC 113 (Para 19)

6. U.O.I. & ors. Vs A.K. Pandey, (2009) 10 SCC 552 (Para 20)

Present petition challenges order dated 10.11.2023, passed by Central Administrative Tribunal, Allahabad.

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

1. Heard learned counsel for the petitioner and Shri V.K. Tiwari, learned counsel for the original applicant.

2. Petitioner-Union of India/Department of Post Office, by the instant writ petition, is challenging the order dated 10 November 2023, passed by the Central Administrative Tribunal, Allahabad¹, whereby, the impugned suspension order before the Tribunal suspending the first respondent came to be set aside for the reason that Sub-rule (6) of Rule 10 of Central Civil Services (Classification, Control and Appeal) Rules 1965², was not complied. The operative portion of the order reads thus:

"24. Since the suspension order passed on 25.11.2019 was not extended within the expiry of 90 days by way of a formal order thus clearly contradicting the laid down procedures under Rule 6 and 7 of the CCS (CCA) Rules 1965, subsequent extension of the suspension order after expiry of the 90 days will not validate it as mere issuing of minutes of the review meeting cannot be treated as a formal order of the extension of suspension order passed at initial state. For this simple reason and considering the law laid down by the Hon'ble Apex Court and Hon'ble High Court as have been quoted hereinabove and comparing the same with the facts and circumstances of the present matter, I am of the view that plea taken by the applicant is liable to be allowed.

25. Accordingly, the instant original application is allowed and the impugned order dated 25.11.2019 is set aside. Respondents are further directed to reinstate the applicant to his original duties as he was discharging prior to the suspension order dated 25.11.2019 issued against him along with all consequential benefits as per the established rules and procedures."

3. The respondent employee/original applicant was working as a Postal Assistant, he came to be suspended vide order dated 25 November 2009, passed by the Superintendent of Post Offices, Varanasi. Rule 10 of Rules 1965, provides for suspension by the appointing authority or any authority to which it is subordinate or the disciplinary authority or any authority empowered in that behalf by general or special order.

4. Sub-rule (6), incorporated on 3 January 2004, provides that the suspension made or deemed to have been made under this Rule shall be reviewed by the authority which is competent to modify or revoke the suspension before expiry of ninety days from the date of order of suspension on the recommendation of the Review Committee.

5. The competent authority is required to pass an order on the recommendation of the Review Committee either extending or revoking the suspension. The Rule further provides extension of suspension, however, suspension shall not be for a period exceeding 180 days at a time. Sub-rule (7) further provides that suspension made under the Rule shall not be valid after period of ninety days, unless it is extended after review.

6. Sub-rule (6) and (7) of Rule 10 is extracted:

"6. An order of suspension made or deemed to have been made under this rule shall be reviewed by the authority which is competent to modify or revoke the suspension before expiry of ninety days from the date of order of suspension on the recommendation of the Review Committee constituted for the purpose and pass orders either extending or revoking the suspension. Subsequent reviews shall be made before expiry of the extended period of suspension. Extension of suspension shall not be for a period of exceeding one hundred and eighty days at a time.

7. Notwithstanding anything contained in Sub-rule (5)(a), an order of suspension made or deemed to have been made under Sub-Rule (1) or (2) of this rule shall not be valid after a period of ninety days unless it is extended after review, for a further period before the expiry of ninety days."

7. The learned Tribunal after perusal of the record was of the opinion that the mandate of Sub-rule (6) of Rule 10 was not complied as the order of suspension on the recommendation of the Review Committee, the competent authority had not passed any order thereon, either extending or revoking the suspension.

8. The minutes of Suspension Cases Reviewing Committee³ held on 20 February 2020, Varanasi West Division, has been placed on record.

9. The Review Committee of three members, considered the case of the respondent/original applicant and the committee having regard to the gravity of the case recommended continuance of

suspension of the official for next 180 days w.e.f. 23 February 2020, i.e., after expiry of ninety days from the date of suspension order (25 November, 2019).

10. On the very same minutes of the Review Committee, the competent authority, i.e., Superintend Post Office, Varanasi, made an endorsement marking the copy of the recommendation of the Review Committee to the respondent/original applicant and other officials. In other words, the competent authority did not pass any order either extending or revoking the suspension on the recommendations of the Reviewing Committee in terms of Sub-rule (6) of Rule 10 of Rules 1965.

11. Learned counsel appearing for the petitioner submits that by making an endorsement forwarding the copy of the Review Committee, would tantamount to deemed acceptance of the recommendation of the Reviewing Committee.

12. Submission of the learned counsel for the petitioner is devoid of merit and on misreading of Sub-rule (6) and (7) of Rule 10 of Rules 1965. Mere forwarding the recommendation to the employee by the competent authority does not tantamount to either accepting or revoking the suspension by the competent authority.

13. The Sub-rule (6) mandates that an order has to be passed on the recommendation of the Review Committee either to accept or revoke the suspension. Sub-rule (6) and (7) of Rule 10 is couched in such a manner making the Rule mandatory. In the event the suspension order is not extended or revoked within ninety days, negative consequences follow automatically, i.e., suspension made shall

not be valid after ninety days, notwithstanding any thing contained in Sub-rule 5(a) of Rules 1965.

14. Sub-section (6) employs the expression that suspension 'shall be reviewed' by the authority. The review is mandatorily required to be made in view of the consequences that follow in the event of failure to review the suspension within the stipulated time.

15. The question that arises for consideration is, as to whether, the word 'shall' in Sub-rule (6) is mandatory or directory, read with Sub-rule (7) of Rule 10.

16. In **C. Bright vs. District Collector and others**, Supreme Court was of the opinion that while interpreting the word 'shall' or 'may', is whether mandatory or directory, court would have to ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. Para-8 reads thus:

"A well settled rule of interpretation of the statutes is that the use of the word "shall" in a statute, does not necessarily mean that in every case it is mandatory that unless the words of the statute are literally followed, the proceeding or the outcome of the proceeding, would be invalid. It is not always correct to say that if the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid and that when a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the

whole scope of the statute. The principle of literal construction of the statute alone in all circumstances without examining the context and scheme of the statute may not serve the purpose of the statute."

17. In **Remington Rand of India Limited vs. Workmen**, the Supreme Court held that Section 17 of the Industrial Disputes Act, 1947 prescribing time limit of thirty days for publication of award by labour court is directory, inter alia, for the reason that the non-publication of the award within the period of thirty days does not entail any penalty.

18. The tests for finding out a provision is mandatory or directory. The principles for which the provision has been made, its nature, the intention of the legislature in making the provision and the language of the provision are to be considered.

19. In **Mannalal Khetan vs. Kedar Nath Khetan**, while dealing with Section 108 of the Companies Act, 1956, a three Judge Bench of Supreme Court referring to **Raza Buland Sugar Co. Limited vs. Municipal Board, Rampur**, held that prohibition and negative words can rarely be directory. It has been aptly stated that there is one way to obey the command and that is completely to refrain from doing the forbidden act. Therefore, negative prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. (Refer : Bhikraj Jaipuria vs. Union of India⁸)

20. The aforementioned authority was referred in **Union of India and others vs. A.K. Pandey**. In other words word 'shall' followed by negative or prohibitive

words are ordinarily indicative of mandatory intent of the provision.

21. Accordingly, from the mandate of Sub-rule (7) of Rule 10 of Rules 1965, employs negative and prohibitive words making the provision mandatory. After expiry of ninety days, the order of suspension shall not be valid in the eye of the Rule. In other words, the suspension order by operation of the Rule renders the suspension invalid for want of order of the competent authority on the recommendation of the Review Committee.

22. In the given facts of the present case, the competent authority has merely communicated the recommendations of the Review Committee acting like a post office without either accepting or revoking the order of suspension. There is no application of mind as to whether the recommendation of the Review Committee is to be accepted or not. The competent authority has to pass an order either extending or revoking the suspension, though the order need not be a speaking and reasoned order.

23. We do not find merit in the submission of the learned counsel for the petitioner.

24. The writ petition being devoid of merit is, accordingly, **dismissed**.

25. No cost.

1. Heard learned counsel for the petitioners.

2. Correction application is allowed.

3. In the first line of first paragraph "**Dr. D. K. Tiwari**" be read in place of

"Shri V.K. Tiwari", in the second line of second paragraph "2022" be read in place of "2023" and in the third line of third paragraph "2019" be read in place of "2009". All the corrections have been made in the order dated 24.04.2023.

(2023) 7 ILRA 306
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.07.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 5435 of 2010

Shivendra Vashishtha ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Vishal Verma

Counsel for the Respondent:
C.S.C., Mahendra Pratap, Sanjay Bhasin

A. Service Law – Appointment – Discrimination in allowing to join the post cannot be permitted in similarly situated selected candidates. It is evident that an advertisement was published and on the basis of appointment letter issued to the petitioner along with six other persons, four persons namely, Neeraj Kumar Gupta, Santosh Kumar Upadhyaya, Sanjeev Singh and Seema Verma, were given joining in Medical College, Azamgarh. Later on, their appointment has been cancelled vide order dated 22.05.2009. Subsequently, as a result of order of this Court in several writ petitions, the order dated 22.05.2009 was recalled by the respondents and the aforementioned four persons were permitted to re-join their respective post. However, the petitioner, whose name finds place at serial No. 4 in the aforesaid list, has not been permitted to join on the ground of technicalities. This fact itself has been admitted in the counter affidavit that four persons were

initially permitted to join on the instructions of higher authorities. Therefore, such kind of discrimination cannot be permitted to go on. (Para 13)

If the aforementioned four persons were the part of same selection under same advertisement and were permitted to join the post under same appointment letter, there is no occasion to not permit the petitioner to join his respective post. (Para 14)

Writ petition allowed. (E-4)

Present petition prays for issuance of a writ, order or direction in the nature of mandamus commanding the respondents to allow the petitioner to work on the post of Pharmacist in pursuance of appointment order dated 24.02.2009 and in the light of judgments and orders dated 16.07.2010, 22.02.2010 & 23.03.2010, with a direction to the respondents to issue joining letter to the petitioner and to consider and decide the representation dated 15.07.2010.

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Vishal Verma, learned counsel for the petitioner and learned Additional C.S.C. for the respondent - State.

2. By means of present writ petition, the petitioner has prayed for issuance of a writ, order or direction in the nature of mandamus commanding the respondents to allow the petitioner to work on the post of Pharmacist in pursuance of appointment order dated 24.02.2009 with a direction to the respondents to issue joining letter to the petitioner with a further prayer to issue a writ, order or direction in the nature of mandamus commanding the respondents to consider and decide the representation dated 15.07.2010 and to allow the petitioner to work on the post in the light of

judgments and orders dated 16.07.2010, 22.02.2010 & 23.03.2010.

3. Brief facts giving rise to the present writ petition are as under:

Sr. No.	Relevant Facts of the Case
a.	An advertisement was issued on 29.08.2008 by the Director General of Medical Education and Training (for short, "DGME"), Lucknow for the post of Pharmacist in Government Medical College, Kannauj.
b.	On 21.01.2009, a notification was issued that all the applicants who possess 62% marks in the diploma of pharmacy shall appear on 28.01.2009 to 03.02.2009.
c.	On 02.02.2009, a call letter was sent to the petitioner with other six persons by the DGME to appear in the interview for the post of Pharmacist and in pursuance thereof, the petitioner appeared in the interview.
d.	On 18.02.2009, a letter was endorsed to DGME by the Principal of Medical College, Azamgarh asking to fill the different posts from the waiting list of Medical College, Kannauj.
e.	On 24.02.2009, an appointment letter to the petitioner along with other six persons was issued by the Medical College, Kannauj to join on the post of Pharmacist in Medical College, Azamgarh. Thereafter, the petitioner was not allowed to join, however, four persons were allowed to join in pursuance to the said appointment letter.
f.	On 22.05.2009, the appointment of

	the four persons, who had join the services, was cancelled.
g.	On 25.06.2009, Hon'ble High Court has stayed the cancellation order dated 22.05.2009 and the four persons were allowed to rejoin on 04.11.2009.
h.	On 15.07.2010, the petitioner made representation to the concerned authorities, which is lying pending consideration and no order has been passed till date.
i.	Hence, the present writ petition has been filed before this Court.

4. Submission of learned counsel for the petitioner is that appointment of the petitioner was made after following due procedure and the petitioner has faced selection committee and appointment letter has been issued to him and on the ground of any lapse / technical objection on the part of the respondents, the petitioner should not be deprived.

5. He further submitted that there was no allegation against the petitioner for concealment or fraud, therefore, he should not be paralyzed by not allowing him to join the post.

6. He next submitted that name of the petitioner finds place at serial No.4 in the appointment letter issued to the petitioner along with six other persons. He submitted that under the order of this Hon'ble Court, four persons have been permitted to re-join the said post except the petitioner and in this regard the petitioner has made representation also, which is lying pending and no action has been taken thereupon. Therefore, the respondents cannot be permitted to adopt pick and choose formula adopting discriminatory policy by depriving the petitioner.

7. On the other hand, learned Additional C.S.C. submitted that the advertisement dated 29.08.2008 was published with regard to posts including the post of Pharmacist for appointing the candidates in Medical College, Kannauj. He submitted that case of the petitioner is that he has been appointed by Dr. R.K. Gupta, the Principal of Medical College, Kannauj from the waiting list prepared for appointments in Medical College, Kannauj. He submitted that respondent No.2 has never authorized to the Principal of Medical College, Kannauj to issue such appointment letters appointing the candidates for Medical College, Azamgarh and he was not the competent authority to do so.

8. He further submitted that similar situated persons to the petitioner, namely, Santosh Kumar Upadhyaya, Neeraj Gupta, Sandeep Kumar Singh and Sushri Seema Verma produced photocopy of the appointment letter and were permitted to join the post on the basis of instructions issued by higher authorities. He submitted that the petitioner has neither submitted original copy of the appointment letter nor the same is available with him. He further submitted that the appointment letters were having a rider to join within 15 days, and in case of non-joining within 15 days, the same will be automatically cancelled, therefore, the petitioner cannot benefit of the same after such a long period.

9. He next submitted that the appointment granted to similarly situated persons was cancelled by the respondents, which was stayed by this Hon'ble Court in various writ petitions, however, the case of the petitioner is not covered with those candidates, as neither the petitioner joined the post in question nor his appointment

was cancelled at any point of time. He submitted that the petitioner has filed the writ petition after more than one year and two months, therefore, no cause of action remains and the writ petition is liable to be dismissed.

10. He lastly submitted that the Principal of Medical College, Kannauj is not the appointing authority to an employee at Medical College, Azamgarh. He submitted that no procedure has been followed to appoint the candidates in Medical College, Azamgarh, as neither there was advertisement issued nor selection by interview, appointment letters and joining were conducted by the appointing authority.

11. Learned counsel for the petitioner on the basis of rejoinder affidavit submitted that the DGME has the full jurisdiction to fill vacancy in any Government Medical College running in the State. An appointment letter to the petitioner along with six other persons was issued by Principal, Medical College Kannauj on 24.02.2009 to join the post of Pharmacist in Medical College, Azamgarh. He submitted that authenticity of appointment letter dated 24.2.2009 is itself proved from joining of other four persons, namely, Neeraj Kumar Gupta, Santosh Kumar Upadhyaya, Sanjeev Singh and Seema Verma and the respondents have denied the joining to the petitioner on the basis of technical objections.

12. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

13. On perusal, it is evident that an advertisement was published and on the basis of appointment letter issued to the

Service Commission in consultation with the State Government does not reflect that the maximum capping limit of 21% for the post which is reserved for the Scheduled Caste, has ever been disturbed. (Para 15)

B. The preliminary ground for challenging the impugned order is the action of the respondents notifying the 4 posts for the post of Principal, Government Ayurvedic Medical College exclusively for unreserved category shall exceed the maximum capping of 50% of reservation in favour of the unreserved category and the same is contrary to the guiding principles laid down in the case of *Indra Sawhney Vs Union of India* (AIR 1993 SC 477). (Para 18)

The reservation applicable for reserved category especially for the Scheduled Caste is 21% which comes down in fraction to 1.68 and as such, 1 post out of 8 has to be kept reserved for reserved category candidate belongs to the Scheduled Caste and as per the factual narration, one Sri Suresh Chandra is already rendering his services as Principal, Government Ayurvedic Medical College and as such, there is a strict compliance of the reservation mandated under 21%. (Para 19)

So far as the application of roster is concerned, the same is also applied by way of de-categorization of the posts in reserved category, unreserved category and other backward classes. It is the admitted fact that one post has been already occupied by reserved category under Scheduled Caste and two posts under the Other Backward Classes are also occupied and as such, the notification issued for the four posts for unreserved category, cannot be termed as illegal. (Para 20)

C. Words and Phrases – ‘posts’, ‘vacancies’

- The expressions ‘posts’ and ‘vacancies’, often used in the executive instructions providing for reservations, are rather problematical. **The word ‘post’ means an appointment, job, office or employment. A position to which a person is appointed. ‘Vacancy’ means an unoccupied post or office.**

The plain meaning of the two expressions make it clear that there must be a ‘post’ in existence to enable the ‘vacancy’ to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence **the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of ‘vacancy’ has no relevance in operating the percentage of reservation.** (Para 6)

Writ petition dismissed. (E-4)

Precedent followed:

1. St. of U.P. & ors. Vs Sangam Nath Pandey & ors. connected with U.P. Public Service Commission Vs Manoj Kumar Singh & ors., 2012 (2) SCC 105 (Para 6)
2. M.R. Balaji Vs The St. of Mysore, 1963 AIR (SC) 649 (Para 13)
3. R.K. Sabharwal & ors. Vs St. of Punj. & ors., 1995 (2) SCC 745 (Para 15)
4. Indra Sawhney Vs U.O.I., AIR 1993 SC 477 (Para 18)

Present petition challenges Rolling Advertisement No. D-1/E-1/2023 dated 02.02.2023 in respect of Uttar Pradesh Medical Department (Ayurvedic Department) only and prays for directions to the Respondent no.2 to issue a fresh advertisement for the Posts Principal after considering the applied proper reservation policy accordingly.

(Delivered by Hon’ble Saurabh Srivastava, J.)

1. Heard Ms. Jigyasa Singh, learned counsel holding brief of Ms. Mamta, learned counsel for the petitioner, Sri Satyendra Kumar Tripathi, learned Standing Counsel appearing on behalf of the respondent nos.1 and 4 and Sri Fuzail

Ahmad Ansari, learned counsel appearing on behalf of the respondent no.2.

2. The present petition has been filed seeking the following relief:-

"a) Issue a writ, order or direction in the nature of certiorari, calling for record to quash the Rolling Advertisement No.D-1/E-1/2023 dated 02.02.2023 in respect of Uttar Pradesh Medical Department (Ayurvedic Department) only (Annexure -1 to the writ petition)

b) Issue a writ, order or direction in the nature of mandamus, to command the Respondent no.2 to issue a fresh advertisement for the Posts Principal after considering the applied proper reservation policy accordingly in respect of the Advertisement No.D-1/E-1/2023 dated 02.02.2023 in respect of Uttar Pradesh Medical Department (Ayurvedic Department)/or decide the representation/letter of the petitioner dated 17.02.2023 (Annexure No.5 to the writ petition)."

3. It is the case of the petitioner that the cadre strength of the Principal, Government Ayurvedic Medical College is 8 in number and as such, if the notification for advertising the vacancy for 4 posts which is exclusively for unreserved category shall violate the reservation policy along with the roster which is applicable for reserving at least one post out of four posts advertised through the impugned advertisement notification, in that case, the advertisement notification dated 02.02.2023 is bad in law.

4. For substantiating the arguments as raised on behalf of the petitioner, learned counsel for the petitioner apprised the

Court that the reservation may not be exceeded from 50% in any case if at all the same has been notified for the unreserved category, in the case it is 100% vacancies as notified are exclusively for unreserved category.

5. In absence of application of 100 point roster as defined under the 1994 Act¹ shall be applicable which crystal clearly defines that second, fourth, sixth and eighth posts shall only be filled up by unreserved category.

6. Learned counsel for the petitioner also relied upon the judgment rendered by Hon'ble the Supreme Court in case of **State of U.P. and others Vs. Sangam Nath Pandey and others connected with U.P. Public Service Commission Vs. Manoj Kumar Singh and others**. The extract of the abovementioned judgment which is related to the instant matter wherein the fraction of reservation along with the roster has been clarified by Hon'ble the Supreme Court is reproduced hereinbelow:-

"25. In order to determine as to what would be the backlog vacancies, it is necessary to have a look at the relevant provisions of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1994 as amended by the Act No. 1 of 2002.

"2 (d) "year of recruitment" in relation to a vacancy means a period of twelve months commencing on the first of July of a year within which the process of direct recruitment against which such vacancy is initiated.

3. Amendment of Section 3 - In Section 3 of the Principal Act, -

(a) for sub-sections (1), (2) and (3) the following sub-section shall be substituted, namely :-

(1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens -

(a) in the case of Scheduled Castes Twenty one percent

(b) in the case of Scheduled Tribes Two percent

(c) in the case of Other Backward Classes of citizens Twenty seven percent
Provided that the reservation under clause) shall not apply to the category of Other Backward Classes of citizens specified in Schedule II :

Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty percent of the total vacancies of that year as also fifty percent of the cadre strength of the services to which the recruitment is to be made.

(2) If, in respect of any year of recruitment any vacancy reserved for any category of persons under sub-section (1) remains unfilled, such vacancy shall be carried forward and be filled through special recruitments in that very year or in succeeding year or years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty percent reservation of the total vacancies of that year notwithstanding anything to the contrary contained in sub-section (1) ;

(3) Where a vacancy reserved for the Scheduled Tribes remains unfilled even after three special recruitments made under sub-section (2), such vacancy may be filled from amongst the persons belonging to the Scheduled Castes."

(b) (i) Sub-sections (3-A),(3-B) shall be omitted;

(ii) Sub-section (4) shall be omitted;

(c) for sub-section (5), the following sub-

section shall be substituted, namely :-

"(5) The State Government shall for applying the reservation under sub-section (1), by a notified order, issue a roster comprising the total cadre strength of the public service or post indicating therein the reserve points and the roster so issued shall be implemented in the form of a running account from year to year until the reservation for various categories of persons mentioned in sub-section (1) is achieved and the operation of the roster and the running account shall, thereafter, come to an end, and when a vacancy arises thereafter in public service or post the same shall be filled from amongst the persons belonging to the category to which the post belongs in the roster."

A bare perusal of the above would show that the Act regulates the extent of reservation in Public Services and Posts in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens and for matters connected therewith or incidental thereto. It also provides for a self-contained mechanism as to how the posts shall be distributed among the different categories according to 100 point roster."

7. In the abovementioned referred judgment as relied upon by learned counsel

for the petitioner, the position of vacancy in respect of reservation which has to be applicable as per the roster maintained in pursuance of the 100 point roster defined under the Act of 1994, Hon'ble the Supreme Court further clarified that the roster shall be applicable strictly in consonance with the reservation and if the same has to be properly given credence to the yearwise vacancy arising out of vacant posts created after retirement or vacated on any reason, the same has to be strictly filled up with the reservation available for each and every category and the same has been discussed in detail which is reproduced hereinbelow:-

"38. The exercise of identifying the year-wise and cadre-wise vacancies ought to have been conducted by the State prior to the issuance of the advertisement as rightly noticed by the learned single Judge. The purpose of introducing a roster system was to ensure that the percentages of reservation provided for various categories of persons is effectively and speedily achieved. This can only be done if the department concerned identifies the year-wise vacancies in the cadre. Once the vacancies are identified, it is enjoined upon the authorities to ensure that the selection procedure is completed speedily. This is necessary to avoid uncertainty to all categories of candidates.

39. General category, as well as, the reserved category candidates are likely to be adversely affected in case the vacancies are not filled within a reasonable period of time. As a result of undue delay, certain candidates will always be in the danger of becoming overage to apply for some particular posts falling in a particular year of recruitment. Unnecessary lethargy in filling up the posts would also lead to further uncertainty and

chaos among the recruits with regard to their seniority, confirmation and promotions. Such a situation only gives rise to unavoidable litigation, lasting for many long years. This case epitomizes such malaise.

40. In our opinion, the State Government, in the present case, ought to have initiated the necessary selection procedure upon due verification of the posts available for the reserved categories. It was not sufficient to merely send the requisition to the Public Service Commission. It was necessary for the State to pursue the matter with the Public Service Commission for completion of the selection process. Otherwise, the very purpose of introducing the roster system and a running account would be totally defeated. We may reiterate here the observations made by this Court in the case of R.K. Sabharwal (supra). With regard to the operation of the roster system, in the aforesaid case, it was observed as follows:-

"5. We see considerable force in the second contention raised by the learned counsel for the petitioners. The reservations provided under the impugned Government instructions are to be operated in accordance with the roster to be maintained in each Department. The roster is implemented in the form of running account from year to year. The purpose of "running account" is to make sure that the Scheduled Castes/Schedule Tribes and Backward Classes get their percentage of reserved posts. The concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. "16% of the posts ..." are reserved for members of the Scheduled Castes and Backward Classes. In a lot of 100 posts those falling at Serial Numbers 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 have been reserved and earmarked

in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Castes. To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive. The percentage of reservation is the desired representation of the Backward Classes in the State Services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the "running account" must come to an end thereafter. The vacancies arising in the cadre, after the

initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at roster points 1, 7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation.

6. The expressions 'posts' and 'vacancies', often used in the executive instructions providing for reservations, are rather problematical. The word 'post' means an appointment, job, office or employment. A position to which a person is appointed. 'Vacancy' means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation.

7. When all the roster points in a cadre are filled the required percentage of reservation is achieved. Once the total cadre has full representation of the Scheduled Castes/Tribes and Backward Classes in accordance with the reservation policy then the vacancies arising thereafter in the cadre are to be filled from amongst

the category of persons to whom the respective vacancies belong. Jeevan Reddy, J. speaking for the majority in Indra Sawhney v. Union of India (1992 Supp (3) SCC 217) observed as under: (SCC p. 737, para 814)

"Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e. 270 by Other Backward Classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of OBCs in the unit/service/category is only 50, a shortfall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all Backward Classes reaches 500, i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the members of open competition category would become age-barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% a year

should be taken as the unit and not the entire strength of the cadre, service or the unit as the case may be."

42. The facts narrated above would indicate is that the situation in the present case is almost as it was depicted by this Court in the case of Indra Sawhney (supra).

43. We, therefore, reiterate that it is necessary for the department to identify year-wise vacancies for the cadre. It is also necessary to fill up the posts speedily in order to avoid certain candidates being rendered ineligible as they may have become overage. It is for this reason that Section 3 has placed importance on the year of recruitment as also on the process of selection.

44. In our opinion, the authorities have been rather casual in their approach in implementing the reservation policy, in letter and spirit. We are, however, conscious of the fact that the 367 posts lying vacant for a number of years are meant only for the reserved categories. They have been calculated on the basis of the percentages reserved for various categories. In segregation of the aforesaid posts, none of the unreserved categories would be deprived of any posts which ought legitimately to have fallen to their share. Therefore, we are of the considered opinion that the interest of justice, in the peculiar facts of this case, demands that the course adopted by the State Government in segregating 367 posts for special recruitment ought not to be disturbed. "

8. Per contra, learned Standing Counsel as well as learned counsel appearing on behalf of the Commission vehemently opposed the prayer as made in the petition and supported the advertisement notification issued for recruitment of four vacant posts for the post

of Principal, Government Ayurvedic Medical College which has been strictly in accordance with the reservation available for the reserved category and in consonance with the 100 point roster which is mandatory to be applied at the time of filling up the cadre strength which is only 8 in numbers.

9. The vital aspect which has been mentioned at the time of hearing of the matter that the total cadre strength of the Principal, Government Ayurvedic Medical College is only 8 wherein as per the reserved category for Scheduled Caste that is maximum limit to 21%, it comes to 1.68 posts which is strictly defined under the Act of 1994 as mentioned under Section 3(1) which is also quoted hereinbelow:-

“3. Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes. - [(1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitment's are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens, -

(a)	<i>in the case of Scheduled Castes</i>	<i>Twenty- one per cent;</i>
(b)	<i>in the case of Scheduled Tribes</i>	<i>Two per cent;</i>
(c)	<i>in case of Other Backward Classes of citizens</i>	<i>Twenty- seven per cent;</i>

Provided that the reservation under clause (c) shall not apply to the

category of Other Backward Classes of citizens specified in Schedule II:

Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of the cadre strength of the service to which the recruitment is to be made.”

10. While substantiating the stand taken up by learned counsel appearing on behalf of the Commission, he also mentioned Section 3(5) of the 1994 Act which clearly says that the State Government shall for applying the reservation under sub-section (1) of Section 3 by a notified order, issue a roster, which shall be continuously applied till it is exhausted.

11. It is also the admitted fact and position which is to be taken into consideration that if the fraction comes to 1.68, it will be only one post shall be available for reserved category.

12. Learned Standing Counsel came up with specific instructions which are taken on record that one post of the reserved category has already been occupied wherein a regular incumbent is rendering his services as Principal, Government Ayurvedic Medical College and as such, the notification for selection of four posts for unreserved category for the same post is justified in nature and the same is in the strict compliance of the 1994 Act.

13. The entire stand which has been taken up by the respondent nos.2 is also based on the verdicts pronounced by Hon'ble the Supreme Court in the case of **M.R. Balaji Vs. The State of Mysore** and

R.K. Sabharwal and others Vs. State of Punjab and others.

14. After giving due consideration to the submissions extended by learned counsels for parties and giving regard to the judgments cited by both the counsels, the instant matter has to be testified only on two grounds:-

(i) Whether the number of posts as notified, is in accordance to the reservation available for reserved category?

(ii) The total cadre strength of the posts of Principal has been filled up, notified under the advertisement notification which is under challenged in the instant petition is fulfilling the roster or not?

15. The ratio of the judgment as relied upon by learned counsel for the petitioner in case of the **State of U.P. Vs. Sangam Nath Pandey connected with U.P. Public Service Commission Vs. Manoj Kumar Singh** (supra) clearly defines that the posts which are meant for the reserved category, would be offered only to the reserved category so long as the reserved roster point are not occupied by reserved category, but at the same time, there is hardly any whisper with regard to exceeding the limit of the reservation and the case as mentioned by learned counsel for the petitioner with regard to reserving two posts out of total cadre strength of the Principal, Government Ayurvedic Medical College which is 8 in number then in that case, the reservation shall available for reserved category i.e. specifically for the Scheduled Caste to the tune of 21% shall exceed to 25%, moreover, the roster as mentioned by learned counsel for the petitioner which is 100 point roster and the bifurcation of the posts available for the

reserved category as well as for the unreserved category shall be applicable for the 8 posts which is total cadre strength of the post of the Principal, Government Ayurvedic Medical College has to be recalculated in terms of 100 point roster, and as such, the entire exercise as initiated by the U.P. Public Service Commission in consultaion with the State Government does not reflect that the maximum capping limit of 21% for the post which is reserved for the Scheduled Caste, has ever been disturbed.

16. The ratio of the judgment as referred by learned counsel for the petitioner has already been given credence and the action of the respondents is strictly in accordance with the same.

17. The two judgments which have been relied upon by learned counsel appearing on behalf of the respondent no.2. the case of **R.K. Sabharwal** (supra) has already been discussed in the judgment of **Sangam Nath Pandey** (supra) as relied upon by learned counsel for the petitioner and the same is already discussed in the preceding paragraphs and action of the respondents is strictly in accordance with the same which needs not to be reiterated again. After having the judgment passed in **M.R. Balaji** (supra) rendered by Hon'ble the Supreme Court which is solely based on capping limit of reservation which is not in dispute at the time of challenging the advertisement notification in the instant petition.

18. The preliminary ground for challenging the order which impugned the present petition is the action of the respondents in shape of notifying the four posts for the post of Principal, Government Ayurvedic Medical College exclusively for

unreserved category shall exceed the maximum capping of 50% of reservation in favour of the unreserved category and the same is contrary to the guiding principles laid down in the case of **Indra Sawhney Vs. Union of India**.

19. Answering the abovementioned framed questions, it is crystal clear that the reservation applicable for reserved category especially for the Scheduled Caste which is 21% which comes down in fraction to 1.68 and as such, one post out of 8 has to be kept reserved for reserved category candidate belongs to the Scheduled Caste and as per the factual narration made by learned Standing Counsel, one Sri Suresh Chandra is already rendering his services as Principal, Government Ayurvedic Medical College and as such, there is a strict compliance of the reservation mandated under 21%.

20. So far as the application of roster is concerned, the same is also applied by way of de-categorization of the posts in reserved category, unreserved category and other backward classes. It is the admitted fact which has been narrated in the petition as well as apprised through the instructions by learned Standing Counsel that one post has been already occupied by reserved category under Scheduled Caste and two posts under the Other Backward Classes are also occupied and as such, the notification issued for the four posts for unreserved category, cannot be termed as illegal.

21. In view of the aforementioned observations, the writ petition stands dismissed.

(2023) 7 ILRA 318
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2023

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-A No. 6376 of 2023

**Arvind Kumar, Lekhpal, Tehsil- Bahedi,
 Distt: Bareilly ...Petitioner**

Versus

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

Counsel for the Petitioner:

Sri Adarsh Shukla, Sri Prabhakar Awasthi

Counsel for the Respondents:

C.S.C.

A. Service Law – Suspension – Disciplinary Proceedings - Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 - Rule 7 – The suspension order can be passed only on consideration of the charges as levelled against the petitioner. The suspension order cannot be passed merely on assumption. Moreover, at the time of passing the suspension order, the Disciplinary Authority has to exercise his discretion by way of applying his independent and free mind by way of quantifying that whether the suspension passed against the delinquent or not for substantiating his arguments. (Para 4, 5)

In the present case, the order of suspension has been passed by the Disciplinary Authority only on the recommendation of the Tehsildar who has been nominated as an Inquiry Officer vide order dated 27.02.2023 for conduction of fair inquiry, wherein it has been presumed by the Inquiry Officer that if the petitioner will remain at the services of posting where he is presently posted, he may tamper evidences which may not culminate into fair inquiry. (Para 10)

Since the recommendations for suspension have been made by the Inquiry Officer under the disciplinary proceedings initiated against the petitioner and not by any other authority, who is not related to disciplinary proceedings, there is hardly any scope for interference in the order impugned. (Para 11, 12)

Writ petition dismissed. (E-4)

Precedent distinguished:

V.N. Daipuria Vs St. of U.P. ors., Writ-A No. 58619 of 2015, decided on 27.10.2015 (Para 7, 9, 10)

Present petition assails suspension order dated 21.03.2023, passed by Sub Divisional Magistrate- Bahedi, Bareilly. And, prays for direction to respondents not to disturb peaceful continuance of petitioner as Lekhpal-Tehsil-Bahedi, District-Bareilly and also to pay him full salary.

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

1. Heard Shri Prabhakar Awasthi, learned counsel for the petitioner and Shri Anurag Pandey, learned Standing Counsel for the State respondents.

2. Present petition has been filed seeking the following reliefs:-

"i. Issue a writ, order or direction in the nature of Certiorari calling for the records of the case and to quash the impugned suspension order dated 21.03.2023 passed by the Sub Divisional Magistrate-Bahedi, Bareilly (Annexure No. 12 to the writ petition).

ii. Issue a writ, order or direction in the nature of Mandamus commanding the respondents not to disturb the peaceful continuance of petitioner as Lekhpal-Tehsil-Bahedi, District-Bareilly and also to pay him full salary month by month as and when same falls due."

3. It is the case of the petitioner that under some charges levelled against him on the basis of the report submitted by the Naib Tehsildar approved by the Tehsildar culminated into initiation of disciplinary

proceedings under Rule 7 of the U.P. Government Servant (Discipline & Appeal) Rule 1999 in which the chargesheet has been served upon the petitioner and the same has been replied. Thereafter, inquiry has been initiated by the Tehsildar who has been designated and appointed as an Inquiry Officer vide order dated 27.02.2023 at the time of framing charges against the petitioner.

4. On 21.03.2023, it has been reported by the Tehsildar/Inquiry Officer that there are ample chances of tampering of evidences by the petitioner and as such, he may be put under suspension for conduction of fair inquiry.

5. On receipt of the report as submitted by the Inquiry Officer, being the Disciplinary Authority, the respondent no. 2 passed the order dated 21.03.2023, through which the services of the petitioner has been suspended and the same has been put under challenge in the present petition, precisely on the ground that the suspension order can be passed only on consideration of the charges as levelled against the petitioner. The suspension order cannot be passed merely on assumption.

6. Moreover, at the time of passing the suspension order, the Disciplinary Authority has to exercise his discretion by way of applying his independent and free mind by way of quantifying that whether the suspension passed against the delinquent is necessary or not for substantiating his arguments as raised by the learned counsel for the petitioner.

7. The learned counsel for the petitioner has relied upon the judgment passed by the Division Bench of this Court in ***Writ A No. 58619 of 2015 (V.N.***

Daipuria versus State of U.P. & 3 Others) decided on 27.10.2015. The operative and decisive portion of the judgment is quoted herein-below:-

"On the parameters of the provisions as quoted as above, the order of suspension in question indicates that in the present case that State Government had been apprised of the factual situation and State Government on being apprised with the report against the petitioner, the State Government in its turn proceeded to pass an order mentioning therein that the petitioner should be placed under suspension with immediate effect and disciplinary action be initiated under Rule 7 of U.P. Government Servant (Discipline & Appeal) Rules 1999. After receipt of the said letter in question, the Additional Director of Education (Basic), U.P., Allahabad, the Appointing Authority has proceeded to pass the order of suspension and by means of order of suspension the Appointing Authority has proceeded to categorically mention this fact that the said authority of suspension is being exercised by him pursuant to the decision taken by the State Government on 30.09.2015. Once such is the factual situation in the present case that discretion has been taken away by the State Government from the Appointing Authority by giving mandatory directive for placing petitioner under suspension whereas 'discretion' as per Blacks Law Dictionary means, 'individual judgement: the power of free decision making'. The Appointing Authority has not proceeded to exercise his independent mind and has exercised authority of suspension on the directives of State Government. Division Bench of this Court in the case of Dr. Arvind Kumar Rana Vs. State of U.P., 2007 (4) AWC, in reference of same set of Rules has taken the view that authority of suspension cannot be exercised

on mere recommendation, the Appointing Authority is obligated to apply his own independent mind, the first proviso to Rule 4 (1) is mandatory and obligates Appointing Authority to prima facie record satisfaction about the seriousness of the allegations levelled and as to whether ultimately it may entail into awarding major penalty. Accordingly in the facts of the case passing of such suspension order has to be accepted being in breach of Rule 4 (1) of U.P. Government Servant (Discipline & Appeal) Rules 1999 as on its face value the discretion has not been independently exercised by the Appointing Authority in question. In view of this the order of suspension, based on this short ground is quashed but we leave it open to the Appointing Authority to apply his independent mind and if facts and circumstances do warrant to pass fresh order of suspension.

Writ petition is allowed, accordingly. "

8. Per contra, learned Standing Counsel vehemently opposed the prayer as made in the petition and supported the order dated 21.03.2023 passed by the respondent no. 2.

9. By bare perusal of the judgment passed by the Division Bench of this Court in V.N. Daipuria (Supra), it is crystal clear that the order of suspension has been held as illegal on the recommendation of the State Government and the same has been passed without invoking the discretion of the Disciplinary Authority and recording the reasons for suspension, the directions and the recommendations as made by the State Government only.

10. The judgment rendered by the Hon'ble Division Bench of this Court is not applicable in the present case, as the case in hand is slightly different. In the instant

matter the order of suspension has been passed by the Disciplinary Authority only on the recommendation of the Tehsildar who has been nominated as an Inquiry Officer vide order dated 27.02.2023 for conduction of fair inquiry, wherein it has been presumed by the Inquiry Officer that if the petitioner will remain at the services of posting where he is presently posted, he may tamper evidences which may not culminate into fair inquiry.

11. The recommendation made by the Inquiry Officer is different as made in the case relied upon by the learned counsel for the petitioner and as such, the case of V.N. Daipuria is not applicable in the instant matter, since the recommendations for suspension has been made by the Inquiry Officer under the disciplinary proceedings initiated against the petitioner not by any other authority who is not related to disciplinary proceedings as in the case mentioned by learned counsel for the petitioner.

12. In view of the aforesaid facts and circumstances, there is hardly any scope for interference in the order dated 21.03.2023 which impugned the present petition and as such, the writ petition is liable to be and is accordingly, **dismissed**.

13. However, it is made clear that the respondent no. 2 may take every steps for finalizing the disciplinary proceedings as initiated against the petitioner, as expeditiously as possible, preferably, within a period of four months from the date of production of certified copy of this order.

14. It is however made clear that the petitioner will extend all possible support in favour of the respondent no. 2 for

arriving over the directions as passed above.

(2023) 7 ILRA 321
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.07.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 8256 of 1992

O.P. Trivedi **...Petitioner**
Versus
Chairman, Bhagirath Gramin Bank & Ors.
...Respondents

Counsel for the Petitioner:

M.K. Shukla, Ashish Mishra, Deo Raj Singh,
 K.C. Jauhari, Ramesh Kumar Srivastava,
 V.P. Misra, Vijai Kumar

Counsel for the Respondents:

C.S.C., A.K. Chaturvedi

A. Service Law – Dismissal – Service benefits - Bhagirath Gramin Bank Staff Service Regulation, 1980 - Disciplinary proceeding breaks into two stages. The first stage ends, when the disciplinary authority arrives at its conclusion on the basis of evidence, Inquiry Officers report and the delinquent employees reply to it. The second stage begins when the disciplinary authority decide to impose penalty on the basis of its conclusion. If the disciplinary authority decides to drop the disciplinary proceeding, the second stage is not even reached. (Para 23)

While the right to represent against the finding in the report is part of reasonable opportunity during the first stage of the inquiry before the disciplinary authority takes into consideration the finding in the report. The first right is the right to prove innocence. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the

inquiry officer. **On receipt of Inquiry report, it is incumbent on the part of punishing authority to supply a copy of the inquiry report.** (Para 23)

In the present case, the petitioner was selected and appointed on the post of Junior Clerk on 10.02.1983 on probation for a period of 12 months. Allegation of embezzlement of certain amount has been made against the petitioner. Thereafter, the petitioner placed under suspension vide order dated 08.05.1984 which was followed by a charge-sheet dated 09.07.1994 indicating therein the certain the charges of embezzlement of Banks money, breach of discipline and indolence and intentional negligence in discharge of duties. Vide order dated 11.02.1991, the services of the petitioner has been dismissed which has been approved/upheld by the disciplinary authority. (Para 24)

B. The compliance of natural justice in domestic/disciplinary inquiry is necessary has long been established. Even there are no specific statutory rule requiring observance of natural justice, the compliance of natural justice is necessary.

The object of rules of natural justice is to ensure that an employee is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/ removal from service. It is a basic requirement of rules of natural justice that an employee should be given a reasonable opportunity of being heard in any proceeding which may culminate in a major punishment being imposed on the employee. (Para 27)

If an inquiry is vitiated by violation of principles of natural justice, it cannot be characterized as a proper domestic inquiry held. (Para 22)

A denial of enquiry officer's report before the disciplinary authority takes its decision on the charge, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice. When the enquiry officer is not the disciplinary authority,

the delinquent employee has a right to receive a copy of the enquiry officers report before the disciplinary authority arrives at its conclusion w.r.t. the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employees right to defend himself against the charges levelled against him. (Para 25, 26)

In present case, prior to passing of the dismissal order, neither the petitioner has been given any show cause notice nor enquiry report dated 10.12.2990 has been given. The petitioner has also not been afforded any adequate opportunity prior to the issuance of the order dated 11.02.1991 dismissing the petitioner from services. The enquiry report dated 10.12.1990 was submitted before the disciplinary authority and the disciplinary authority passed the punishment order dated 11.2.1991.

It is mandatory to provide enquiry report to the delinquent in order to provide an opportunity to submit reply to the same. In case the aforesaid has not been done and punishment order imposing major penalty has been passed, the said punishment order is not sustainable in the eyes of law. Therefore, from any angle the matter is to be looked into, the impugned order passed by the respondents are null and void, apart from the fact that they are in violation of the principles of natural justice. (Para 28)

Writ petition allowed. (E-4)

Precedent followed:

1. St. of Uttaranchal Vs Kharak Singh, (2008) 8 SCC 236 (Para 14)
2. Chamoli District Co-operative Bank Vs Raghunath Singh Rana, AIR 2016 SC 2510 (Para 14)
3. Om Prakash Gond Vs St. of U.P., 2019 4 ADJ 386 (Para 14)
4. Vikalp Kumar Vs St. of U.P., 2019 (11) ADJ 267 (Para 14)

Present petition challenges orders of dismissal dated 11.02.1992 and 08.09.1992.

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Shri Ramesh Kumar Srivastava, learned counsel for the petitioner and Shri A.K. Chaturvedi, learned Senior Advocate assisted by Shri Dharmendra Dixit, learned counsel for the respondents.

2. By means of the present writ petition, the petitioner has prayed for the following reliefs:

"(a) issue a writ, order or direction in the nature of mandamus directing the opposite parties to allow the petitioner to continue on the post of Junior Clerk in the Bhagirath Gramin Bank, District Sitapur

(b) issue a writ, order or direction in the nature of mandamus commanding the opposite parties to give all the service benefits which have been given to the persons, junior to the petitioner;

(c) issue a writ, order or direction in the nature of certiorari quashing and setting aside the impugned order of dismissal of the petitioner from services, dated 11.2.1992 and 8.9.1992 respectively, dismissing the service of the petitioner, contained in Annexure Nos.6 and 9 to the writ petition.

(d) issue or pass any other writ, order or direction in the nature and manner which may be deemed just and expedient in the circumstances of the case; and

(e) allow the writ petition with costs."

3. Facts of the case are that on 28.12.1979 the petitioner was appointed for a period of thirty days for term appointment and thereafter he was appointed for sixty days and 90 days and the appointment letters to the

said effect were issued for the said term. The appointment letters were issued to the petitioner from time to time in this regard. Thereafter, the interview of the petitioner was held on 10.1.1983 at 11.00a.m. and the petitioner was selected and appointed on the post of Junior Clerk on 10.2.1983 in the pay scale of Rs.354-550 plus dearness allowance and he was placed on probation for a period of twelve months.

One Shri D.S. Mishra who was the Manager of the Branch of the Bank in which the petitioner was working as a Junior Clerk developed malafide intention towards the petitioner and as the petitioner, who was working under him, he harassed the petitioner a good number of time in different ways and also alleged that the petitioner is responsible for the embezzlement of the alleged amount, while the petitioner had no knowledge of time.

The respondents did not give any show cause notice and the petitioner was also not given copy of the finding report of the enquiry report before passing the dismissal order and the petitioner was not also afforded any adequate opportunity prior to the issuance of the order dated 11.2.1991 dismissing the petitioner from his services. There is specific mention in the Bhagirath Gramin Bank Staff Service Regulation, 1980 that these regulations are not applicable to the employees who have been appointed temporarily or to the persons recruited on special contract.

The petitioner also submitted his appeal on dated 25.3.1991 against the said dismissal order of the petitioner from service, which has also been passed without passing any reasoned and speaking order on 8.9.1982

4. Learned counsel for the petitioner submitted that the respondents, in most illegal arbitrary and discriminatory manner,

dismissed the petitioner from services, which is in violation of the provisions, contained in Articles 14 and 16 of the Constitution of India.

5. Learned counsel for the petitioner next submitted that the Staff Service Regulation, 1980 could not made available for application to the petitioner who was employed temporarily or on special contract.

6. Learned counsel for the petitioner next submitted that there is specific provision under Staff Service Regulation, 1980 as not to apply such regulations on the employees, who have been employed temporarily on daily wages or recruited on special contract.

7. Learned counsel for the petitioner next submitted that there is specific provision under Staff Service Regulation, 1980 as not to apply such regulations on the employees who have been employed temporarily on daily wages or recruited on special contract.

8. Learned counsel for the petitioner next submitted that the petitioner was appointed temporarily and he was on special contract, when the said amount, as alleged by the opposite parties, was not shown in the record.

9. Learned counsel for the petitioner next submitted that the respondents did not give the petitioner documents, inspite of his asking for the same before passing order, dismissing the services of the petitioner. He next submitted that the petitioner was not given any show cause notice before passing of his dismissal order.

10. Learned counsel for the petitioner next submitted that the respondents did not supply copy of the finding or enquiry report, before passing of the impugned dismissal order. He next submitted that the opposite parties did not give the attendance register for the year 1981, 1982 to show that neither he was in employment nor he was on duty, when as stated by the respondents, the alleged discrepancy and alleged embezzlement have been committed.

11. Learned counsel for the petitioner next submitted that not giving the inquiry report amounts to cause prejudice to the petitioner and same is also considered by the punishing authority hence the petitioner is entitled the copy of the inquiry report.

12. Learned counsel for the petitioner next submitted that if inquiry report is given to the petitioner then result would be different and not giving inquiry report is caused prejudiced to the petitioner. He next submitted that non-giving the inquiry report caused prejudiced for non-making the representation to the punishing authority.

13. Learned counsel for the petitioner next submitted that the inquiry officer has not considered the reply of charge-sheet and defence brief of the petitioner, hence the report is perverse in nature. He next submitted that the punishment order is not speaking because reply to the charge sheet and defence brief of the petitioner has not considered and has been passed against the principle of natural justice.

14. In support of his submissions, learned counsel for the petitioner relied upon the following judgments:

(i) State of Uttaranchal v. Kharak Singh reported in 2008 Vol. 8 SCC Page-236

(ii) Chamoli District Co-operative Bank v. Raghunath Singh Rana reported in AIR 2016, Supreme Court Page 2510.

(iii) Om Prakash Gond v. State of U.P. reported in 2019 Vol.4 ADJ Page 386

(iv) Vikalp Kumar v. State of U.P. reported in 2019 (11) ADJ Page 267.

15. On the other hand, learned counsel for the respondents submitted that while the petitioner was posted in Neri Kalan Branch of the Bank, some serious complaints were received by the Chairman and as such, the petitioner was placed under suspension on 8.5.1984 which was followed by a charge-sheet dated 9.7.1994 indicating therein the charges of embezzlement of Bank's money, breach of discipline and indolence and intentional negligence in discharge of duties.

16. Learned counsel for the respondents next submitted that the petitioner was never pressurized by any Officer of the Bank to embezzle any amount. No person of common prudence will ever endanger his service by following another's instructions unless and until his self-motive is malafide.

17. Learned counsel for the respondents next submitted that the charge-sheet dated 2.1.1990 was issued to the petitioner containing the charges of embezzlement etc. and subsequently the petitioner was placed under suspension on 3.1.1990.

18. Learned counsel for the respondents next submitted that what prejudice has been caused to the petitioner by non-supply of the inquiry report to him. If no prejudice could be

indicated then the punishment order will not be set aside. In the present case, the petitioner already availed the opportunity of assiling the findings of the inquiry report dated 10.2.1990 while preferring the appeal dated 25.3.1991 and has not earlier assailed the said findings in any manner before this Court so as to demonstrate that prejudice has been caused to him. Thus, the punishment order dated 11.2.1991 is not bad and illegal.

19. Learned counsel for the respondents next submitted that the then Manager of the Brahmawali Branch, Sitapur had connivance and both of them misappropriated the bank money and defrauded the Bank.

20. Learned counsel for the respondents next submitted that no opportunity of personal hearing is required under the provisions of law after the submission of the inquiry report dated 10.12.1990 and before the dismissal order dated 11.2.1991. Learned counsel for the respondents next submitted that copy of the inquiry report dated 10.12.1990 was served upon the petitioner through dismissal order dated 11.2.1991.

21. I have considered the submissions advanced by learned counsel for the parties and perused the material on record as well as law-reports cited by learned counsel for the petitioners.

22. To resolve controversy involved in the present writ petition, operative portion of the judgments relied upon by learned counsel for the petitioner is as under:

(i) State of Uttaranchal v. Kharak Singh (supra):

10. The following observations and principles laid down by this Court in *Associated Cement Co. Ltd. v. The Workmen and Anr.* are relevant:

"... .. In the present case, the first serious infirmity from which the enquiry suffers proceeds from the fact that the three enquiry officers claimed that they themselves had witnessed the alleged misconduct of Malak Ram. Mr. Kolah contends that if the Manager and the other officers saw Malak Ram committing the act of misconduct, that itself would not disqualify them from holding the domestic enquiry. We are not prepared to accept this argument. If an officer himself sees the misconduct of a workman, it is desirable that the enquiry should be left to be held by some other person who does not claim to be an eye-witness of the impugned incident. As we have repeatedly emphasised, domestic enquiries must be conducted honestly and bona fide with a view to determine whether the charge framed against a particular employee is proved or not, and so, care must be taken to see that these enquiries do not become empty formalities. If an officer claims that he had himself seen the misconduct alleged against an employee, in fairness steps should be taken to see that the task of holding an enquiry is assigned to some other officer. How the knowledge claimed by the enquiry officer can vitiate the entire proceedings of the enquiry is illustrated by the present enquiry itself.

..... It is necessary to emphasise that in domestic enquiries, the employer should take steps first to lead evidence against the workman charged, give an opportunity to the workman to cross-examine the said evidence and then should the workman be asked whether he wants to give any explanation about the evidence led against him. It seems to us that it is not fair in domestic enquiries against industrial employees that at the very commencement of the enquiry, the employee should be closely cross-examined

even before any other evidence is led against him. In dealing with domestic enquiries held in such industrial matters, we cannot overlook the fact that in a large majority of cases, employees are likely to be ignorant, and so, it is necessary not to expose them to the risk of cross-examination in the manner adopted in the present enquiry proceedings. Therefore, we are satisfied that Mr. Sule is right in contending that the course adopted in the present enquiry proceedings by which Malak Ram was elaborately cross-examined at the outset constitutes another infirmity in this enquiry."

15. From the above decisions, the following principles would emerge:

(i).....

(ii).....

(iii).....

(iv) On receipt of the enquiry report, before further, it is incumbent on the part of the disciplinary/ punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.

(ii) Chamoli District Co-operative Bank (supra):

18. It is also relevant to note that after submission of reply dated 04.02.1993, Disciplinary Authority issued a show-cause notice on 04.05.1993 asking the employee/respondent No.1 to submit his reply. When the Inquiry Officer was appointed, conducting of the inquiry was mandatory and without conducting of an inquiry and without any inquiry report having been served on the employee/respondent No.1, Disciplinary Authority could not have proceeded to impose any punishment. The compliance of principles of natural justice by the appellant-Bank is not a mere formality, more so when the statutory provisions

specifically provides that disciplinary proceedings shall be conducted with due observations of the principles of natural justice.

19. The compliance of natural justice in domestic/disciplinary inquiry is necessary has long been established. This Court has held that even there are no specific statutory rule requiring observance of natural justice, the compliance of natural justice is necessary. Certain ingredients have been held to be constituting integral part of holding of an inquiry. The Apex Court in *Sur Enamel and Stamping Works Pvt. Ltd. v. Their Workmen* reported in (1964) 3 SCR 616 has laid down following:-

“... An enquiry cannot be said to have been properly held unless, (i) the employee proceeded against has been informed clearly of the charges levelled against him, (ii) the witnesses are examined – ordinarily in the presence of the employee – in respect of the charges, (iii) the employee is given a fair opportunity to cross-examine witnesses, (iv) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and (v) the inquiry officer records his findings with reasons for the same in his report.”

20. The Apex Court again in *State Bank of India Vs. R.K. Jain and Ors.*, reported in (1972) 4 SCC 304 held that if an inquiry is vitiated by violation of principles of natural justice or if no reasonable opportunity was provided to the delinquent to place his defence, it cannot be characterized as a proper domestic inquiry held in accordance with the rules of natural justice. In paragraph 23, the following was laid down:-

“.....As emphasised by this Court in *Ananda Bazar Patrika (P) Ltd. v. Its Workmen*, (1964) 3 SCR 601, the

termination of an employee's service must be preceded by a proper domestic inquiry held in accordance with the rules of natural justice. Therefore, it is evident that if the inquiry is vitiated by violation of the principles of natural justice or if no reasonable opportunity was provided to a delinquent to place his defence, it cannot be characterized as a proper domestic inquiry held in accordance with the rules of natural justice.....”

21. The Apex Court in *State of Uttranchal & Ors. Vs. Kharak Singh* reported in (2008) 8 SCC 236 had occasion to examine various contours of natural justice which need to be specified in a departmental inquiry. The Apex Court noticed earlier judgments where principles were laid down as to how inquiry is to be conducted. It is useful to refer paragraphs 9, 10, 11, 12, 13 and 15, which are to the following effect:-

“.....9. Before analyzing the correctness of the above submissions, it is useful to refer various principles laid down by this Court as to how enquiry is to be conducted and which procedures are to be followed.

10. The following observations and principles laid down by this Court in *Associated Cement Co. Ltd. v. The Workmen and Anr.* [1964] 3 SCR 652 are relevant:

“... ... In the present case, the first serious infirmity from which the enquiry suffers proceeds from the fact that the three enquiry officers claimed that they themselves had witnessed the alleged misconduct of Malak Ram. Mr. Kolah contends that if the Manager and the other officers saw Malak Ram committing the act of misconduct, that itself would not disqualify them from holding the domestic enquiry. We are not prepared to accept this argument. If an officer himself sees the

misconduct of a workman, it is desirable that the enquiry should be left to be held by some other person who does not claim to be an eye- witness of the impugned incident. As we have repeatedly emphasised, domestic enquiries must be conducted honestly and bona fide with a view to determine whether the charge framed against a particular employee is proved or not, and so, care must be taken to see that these enquiries do not become empty formalities. If an officer claims that he had himself seen the misconduct alleged against an employee, in fairness steps should be taken to see that the task of holding an enquiry is assigned to some other officer. How the knowledge claimed by the enquiry officer can vitiate the entire proceedings of the enquiry is illustrated by the present enquiry itself.

..... It is necessary to emphasise that in domestic enquiries, the employer should take steps first to lead evidence against the workman charged, give an opportunity to the workman to cross-examine the said evidence and then should the workman be asked whether he wants to give any explanation about the evidence led against him. It seems to us that it is not fair in domestic enquiries against industrial employees that at the very commencement of the enquiry, the employee should be closely cross- examined even before any other evidence is led against him. In dealing with domestic enquiries held in such industrial matters, we cannot overlook the fact that in a large majority of cases, employees are likely to be ignorant, and so, it is necessary not to expose them to the risk of cross- examination in the manner adopted in the present enquiry proceedings. Therefore, we are satisfied that Mr. Sule is right in contending that the course adopted in the present enquiry proceedings by which Malak Ram was

elaborately cross-examined at the outset constitutes another infirmity in this enquiry."

11) In ECIL v. B. Karunkar (1993) 4 SCC 727, it was held:

"(1) Where the enquiry officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached.

While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the Forty- second Amendment. The second stage consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and

not of opportunity of making representation on the report of the enquiry officer. The latter right was always there. But before the Forty-second Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage viz., the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence in respect of the charges.

* * *

Article 311(2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him". The findings on the charges given by a third person like the enquiry officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. The proviso to Article 311(2) in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the enquiry officer's report and consideration of such reply by the disciplinary authority

also constitute an integral part of such inquiry.

Hence, when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice."

15. From the above decisions, the following principles would emerge:

(i).....

(ii).....

(iii).....

(iv) On receipt of the enquiry report, before further, it is incumbent on the part of the disciplinary/ punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any."

(iii) Om Prakash Gond (supra):-

6. Not only the above, an ex-parte enquiry was concluded against the petitioner on 26.02.2001, as the copy of the original enquiry report was produced before this Court by the learned Additional Chief Standing Counsel. Since the enquiry report is dated 26.07.2001 and it has been produced before the Disciplinary Authority later on, the Disciplinary Authority passed an order of dismissal dated 29.03.2001 within a short span of time without providing a show cause notice to the petitioner seeking explanation as is mandatory under law.

13. Recently the entire law on the subject has been reviewed and reiterated in *Chamoli District Co-operative Bank Ltd. Vs. Raghunath Singh Rana and others*, AIR 2016 SC 2510 and the Hon'ble Apex Court has culled out certain principles as under:

"i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged and give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any."

15. Further, the enquiry report dated 26.03.2001 was submitted before the Disciplinary Authority and the Disciplinary Authority passed the punishment order dated 29.03.2001 without providing the second opportunity of hearing to the

petitioner strictly in accordance with law as no show cause notice along with enquiry report was served to the petitioner before passing the punishment order.

16. Looking into the entire facts and circumstances of the issue, I am of the considered view that the impugned punishment order dated 29.03.2001 has been passed without following the due procedure of law. To be more precised, the punishment order has been passed without conducting the departmental enquiry as per settled norms and this is absolute ex-parte departmental enquiry, therefore, it is liable to be quashed.

(iv) Vikalp Kumar (supra):-

7. Learned counsel for the petitioner has submitted that the aforesaid impugned order has been passed in violation of principles of natural justice inasmuch as before passing the order impugned, no opportunity of hearing of any kind whatsoever was afforded to the petitioner. He has not been provided any relevant documents including the copy of inquiry report, and he has also not been afforded an opportunity of oral hearing, therefore, he submitted that the impugned order is bad and is liable to be quashed. It was further contended that there is no bar against pursuing a degree course and a certificate course, simultaneously, in view of the resolution of University Grants Commission, New Delhi. He has also submitted that the petitioner has not played fraud or misrepresented before the respondents.

10. The question that needs to be answered first as to whether the disciplinary authority was justified in passing the impugned order of removal of petitioner from service without supplying the copy of the enquiry report and further whether the procedure prescribed under the Rules for holding departmental inquiry

in respect of imposition of major penalty have been followed or not.

13. *The enquiry officer submitted his report to the Disciplinary authority on 10.9.2018. The Disciplinary Authority i.e. District Basic Education Officer agreed with the findings of the enquiry report and without supplying the copy of the same and without issuing any show cause against the proposed punishment, passed the order dated 10.9.2018 terminating his services. Failure to supply copy of the inquiry report, before the disciplinary authority, takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a clear breach of the principles of natural justice.*

14. *The object of rules of natural justice is to ensure that an employee is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service. It is a basic requirement of rules of natural justice that an employee should be given a reasonable opportunity of being heard in any proceeding which may culminate in a major punishment being imposed on the employee. Thus, the disciplinary proceedings stood vitiated.*

15. *The Hon'ble Apex Court in the case of Union of India & Ors. Vs. Mohd. Ramzan Khan, (1991) 1 SCC 588, has held that it is mandatory to provide enquiry report to the delinquent in order to provide an opportunity to submit reply to the same. In case the punishment order imposing major penalty has been passed without providing enquiry report to the delinquent employee the said punishment order is not sustainable in the eyes of law. The relevant paragraphs read as under:-*

"14. This Court in Mazharul Islam Hashmi v. State of U.P. [(1979) 4

SCC 537 : 1980 SCC (L&S) 54] pointed out:

"Every person must know what he is to meet and he must have opportunity of meeting that case. The legislature, however, can exclude operation of these principles expressly or implicitly. But in the absence of any such exclusion, the principle of natural justice will have to be proved."

15. *Deletion of the second opportunity from the scheme of Article 311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Even though the second stage of the inquiry in Article 311(2) has been abolished by amendment, the delinquent is still entitled to represent against the conclusion of the Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the enquiry report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material behind the back of the delinquent is a position not countenanced by fair procedure. While by law application of natural justice could be totally ruled out or truncated, nothing has been done here which could be taken as keeping natural justice out of the proceedings and the series of pronouncements of this Court making rules of natural justice applicable to such an inquiry are not affected by the Forty-second Amendment. We, therefore, come to the conclusion that supply of a copy of the inquiry report along with recommendation, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the*

delinquent would, therefore, be entitled to the supply of a copy thereof. The Forty-second Amendment has not brought about any change in this position.

17. There have been several decisions in different High Courts which, following the Forty-second Amendment, have taken the view that it is no longer necessary to furnish a copy of the inquiry report to delinquent officers. Even on some occasions this Court has taken that view. Since we have reached a different conclusion the judgments in the different High Courts taking the contrary view must be taken to be no longer laying down good law. We have not been shown any decision of a coordinate or a larger bench of this Court taking this view. Therefore, the conclusion to the contrary reached by any two-Judge bench in this Court will also no longer be taken to be laying down good law, but this shall have prospective application and no punishment imposed shall be open to challenge on this ground.

18. We make it clear that wherever there has been an Inquiry Officer and he has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would amount to violation of rules of natural justice and make the final order liable to challenge hereafter."

17. The impugned order would also reflect that it proceeds on the charge that by appearing in two examinations simultaneously for the same year, petitioner has played fraud and lowered the image of the respondents-department. Further the petitioner also acted in

violation of the relevant Service Conduct Rules.

18. The reasoning given by the District Basic Education Officer is clearly unsustainable in as much as no such provision governing the petitioner's service has been brought to the notice of the Court, which may prohibit any such employee to undergo in the two examinations simultaneously. Infact the petitioner has relied upon the resolution of the University Grants Commission, New Delhi dated 28.12.2012, whereby a decision was taken that "a student pursuing a degree programme under regular mode may be allowed to pursue a maximum of one certificate/diploma/ advanced diploma/ PG Diploma programme simultaneously either in regular or open and distance mode in the same university or from other institutions" to contend that a student may pursue a degree course along with a certificate course.

21. The law laid by the Hon'ble Apex Court cited in the preceding paragraph is fully applicable to the facts and circumstances of the present case."

23. On bare perusal of the above-extracted judgments, it is crystal clear that disciplinary proceeding breaks into two stages. The first stage ends, when the disciplinary authority arrives at its conclusion on the basis of evidence, Inquiry Officers report and the delinquent employees reply to it. The second stage begins when the disciplinary authority decide to impose penalty on the basis of its conclusion. If the disciplinary authority decides to drop the disciplinary proceeding, the second stage is not even reached.

It is also crystal clear that while the right to represent against the finding in the report is part of reasonable opportunity

during the first stage of the inquiry before the disciplinary authority takes into consideration the finding in the report. The first right is the right to prove innocence. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the inquiry officer. On receipt of Inquiry report, it is incumbent on the part of punishing authority to supply a copy of the inquiry report.

24. Perusal of the record reveals that the petitioner was selected and appointed on the post of Junior Clerk on 10.2.1983 on probation for a period of 12 months. Allegation of embezzlement of certain amount has been made against the petitioner. Thereafter, the petitioner placed under suspension vide order dated 8.5.1984 which was followed by a charge-sheet dated 9.7.1994 indicating therein the certain the charges of embezzlement of Bank's money, breach of discipline and indolence and intentional negligence in discharge of duties. Vide order dated 11.2.1991, the services of the petitioner has been dismissed which has been approved/ upheld by the disciplinary authority.

Perusal of the record also reveals that prior to passing of the dismissal order, neither the petitioner has been given any show cause notice nor finding report of the enquiry report has been given. The petitioner has also not been afforded any adequate opportunity prior to the issuance of the order dated 11.2.1991 dismissing the petitioner from services. The enquiry report dated 10.12.1990 was submitted before the disciplinary authority and the disciplinary authority passed the punishment order dated 11.2.1991 without providing the second opportunity of hearing to the

petitioner strictly in accordance with law as no show cause notice along with enquiry report was served to the petitioner before passing the punishment order. In this view of the matter, the impugned orders have been passed without following the due procedure of law and without conducting the departmental as per the settled norms. The law-reports cited by the learned counsel for the parties are fully applicable to the present facts and circumstances of the case.

25. It has been repeated observed by the Hon'ble Supreme Court as well as this Court that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusion with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of enquiry officer's report before the disciplinary authority takes its decision on the charge, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

26. It has also been observed that on receipt of enquiry report, before further, it is incumbent on the part of the disciplinary/ punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his view, if any.

27. The object of rules of natural justice is to ensure that an employee is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/ removal from service.

It is a basic requirement of rules of natural justice that an employee should be given a reasonable opportunity of being heard in any proceeding which may culminate in a major punishment being imposed on the employee. Thus the disciplinary proceeding stood vitiated.

28. Considering in totalities of facts and circumstances as well as law-report cited by learned counsel for the petitioner, this Court is of the considered opinion that it is mandatory to provide enquiry report to the delinquent in order to provide an opportunity to submit reply to the same. In case the punishment order imposing major penalty has been passed without providing enquiry report to the delinquent employee the said punishment order is not sustainable in the eyes of law. Therefore, from any angle the matter is to be looked into, the impugned order passed by the respondents are null and void, apart from the fact that they are in violation of the principles of natural justice.

29. Accordingly, the writ petition is **allowed**. The orders dated 11.2.1992 and 8.9.1992 are hereby quashed.

30. It is however made clear that since this order is being passed for the reason that the departmental enquiry has not been conducted and concluded against the petitioner strictly in accordance with law, therefore, the authority concerned is directed to pass appropriate order in favour of the petitioner reinstating him in service forthwith and is at liberty to conduct the departmental enquiry, if it is so desired, but strictly in accordance with law from the stage of issuance of the enquiry report. The petitioner would be provided a copy of the enquiry report and he would be afforded an opportunity to submit his explanation to the

show cause notice which may be given to the petitioner along with copy of the enquiry report, if any, within fifteen days and the petitioner shall file his explanation to the show cause notice within the maximum period of one month thereafter. The authority concerned, shall thereafter, pass final order and shall intimate the petitioner forthwith.

(2023) 7 ILRA 334

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 10.07.2023

BEFORE

THE HON'BLE SIDDHARTH, J.

Writ-B No. 1601 of 1976

Keshav Prasad & Ors. ...Petitioners
Versus
Dy. Director of Consolidation & Ors.
...Respondents

Counsel for the Petitioners:

Sri V.D. Ojha, Sri Sanjeev Singh, Sri Z.A. Siddiqui

Counsel for the Respondents:

Sri G.C. Dwivedi, Sri R.P. Misra, S.C., Sri S.K. Tiwari, Sri S.P. Shukla, Sri Siddhartha Shukla, Sri Tripathi B G Bhai, Sri U.C. Misra

A. Consolidation Law – UP Consolidation Act, 1953 – Section 9-A(2) – Civil Procedure Code, 1908 – O. XXIII R. 3 – Correction of the revenue record sought on the basis compromise decree – Compromise decree was passed in a suit u/s 229-B of UP ZA & LR Act, 1950 – Petitioners had executed vakalatnama in favour of their counsel and on the same date the compromise was signed by their counsel and compromise decree was too passed – Permissibility – Object of O. XXIII R. 3 of CPC explained – Held, a compromise signed by the counsel on

behalf of his client before the Court is valid in law and for all purposes and the clients of such counsel cannot dispute the authority of their counsel to execute such a compromise – Object of the O. XXIII, R. 3 CPC is to curtail litigation between the parties by concluding litigation with consent. (Para 23)

B. Consolidation Law – UP Consolidation Act, 1953 – Section 48 – Revisional power – Scope – Deputy Director of Consolidation has very wide power to decide issue relating to fact and law both u/s 48 of the Act after re-appreciating the evidence on record – *Ram Jeet's case* relied upon – Held, the judgment of a Revisional Court has to open, go through and end like a judgment of reappraisal of what the two Courts or Authorities below have done – Impugned order reads like an original judgment written in the third instance. It does not give any reason to agree with what the Appellate Court and disagree with what the trial court has said – High Court while upholding the order of Consolidation Officer, quashed the order of appellate court and revisional court. (Para 32, 34 and 35)

Writ petition allowed. (E-1)

List of Cases cited:

1. Asharfi Lal Vs Smt. Koili(dead) By L.Rs; 1995 (4 SCC) 163
2. Ibne Hasan Vs Hasina Bibi & ors; MANU/0198/1984
3. Bande Siva Shankara Srinivasa Prasad Vs Ravi SuryaPrakash Babu & ors.; MANU/AP/07/2015
4. Ram Kumar & ors. Vs DDC, Gautam Buddh Nagar & ors.; 2010 (2) ADJ 74
5. Y. Sleebachen Vs Superintending Engineer; 2015 (5) SCC 747
6. Byram Pestonji Gariwala Vs U.O.I.; 1991 LAWS (SC)-9-21

7. Bakshi Dev Raj (2) & anr. Vs Sudheer Kumar; (2011) 8 SCC 679

8. Archies Greetings and Gifts Ltd Vs Garg Plastic, (Delhi) Law Finder Doc Id # 64115

9. Krishna Gajanana Vedeshwar Vs Narayan Gajanan Vedeshwar, Law Finder Doc Id # 165030

10. Ram Nath Vs Smt. Munni; Lucknow Law Report, February, 1976, Page 32 to 58

11. Writ B No. 42465 of 1999; Ram Jeet & others Vs Deputy Director of Consolidation, Jaunpur & ors. decided on 31.05.2013

(Delivered by Hon'ble Siddharth, J.)

1. This writ petition has been filed under Article 226 of the Constitution of India praying for quashing the judgement and order dated 25.09.1972 of Assistant Settlement Officer Consolidation, Basti, in Appeal Nos. 71 to 74 and judgement and order dated 23.06.1976 passed by Deputy Director of Consolidation, Basti, in revision nos. 47 to 50.

2. This writ petition arises out of the objections under Section 9-A(2) of the U.P. Consolidation Act, 1953 (for short, the Act). These objections are a total of six. The land in dispute comprises of *Gata* nos. 12, 14, 115, 70, 196, 11 and 111, all situate in Village Taraina, Pargana Bansi East, District Basti. Of these, three separate objections were filed by Ram Lagan, Ram Lal and Vijay Bahadur, all sons of Chulhai, respondents nos. 3, 4 and 5, respectively, to this petition. All the three objections last mentioned were filed on a common and identical cause of action and for the same relief, that is to say, that revenue entries relating to *Gata* nos. 12, 14 and 115 (*supra*) be corrected according to the compromise decree, dated 23.11.1959 passed by the

Judicial Officer, Bansi, District Basti in Suit No. 270 of 1959, under Section 229-B.

3. Two objections were filed by the petitioners. The first of these objections related to *Gata* nos. 70 and 196, and claimed co-tendency rights with the recorded tenure holders. The other objection claimed a 1/6th share in *Gata* nos. 11 and 111.

4. The last of the six objections, was filed by Kodai, respondent no. 6, laying claim to the entire Khata nos. 11 and 111 on the basis of a case that the petitioners have no right, title or interest therein, and that the aforesaid Khata numbers are self-acquired property of the sixth respondent.

5. The Consolidation Officer vide order dated 18.01.1969 dismissed the objections filed by respondents nos. 3, 4 and 5, that is to say, Ram Lagan, Ram Lal and Vijay Bahadur, in that order, now represented by their legal representatives, respondents nos. 3/1, 4/1 and 5/1, in relation to Khata nos. 12, 14 and 15. The claim of respondent nos. 3, 4 and 5 to Khata nos. 70 and 196, was also rejected with a direction that entries in their favour in the Revenue Records be expunged. On the other hand, the objections of the petitioners relating to Khata nos. 70 and 196 were allowed, and they were ordered to be recorded as co-tenants alongwith the recorded tenure holders. Likewise, the other objections of the petitioners relating to Khata no. 111 and Khata no. 11 were allowed with a direction that their names along with Shiv Mangal, Shiv Murat and Shiv Baran, then minors through their guardian and mother, besides names of Manorath son of Lal Bihari, Ram Dularey and Harihar, sons of Nageshar, be recorded as co-sharers. The sixth objection filed by

Kodai too was allowed, granting him a 1/3rd share in Khata nos. 12, 115, 70, 196, 111, besides Araj No. 725, admeasuring 0-14-8, part of Khata no.11.

6. Aggrieved by the judgment and order of the Consolidation Officer determining the sixth objection, four Appeals were filed by the respondent nos. 3, 4 and 5, that is to say, Ram Lagan, Ram Lal and Vijay Bahadur. These Appeals nos. 71, 72, 73 and 74 on the file of the Assistant Settlement Officer of Consolidation, Basti. The appeals were heard and allowed by the Assistant Settlement Officer of Consolidation vide judgment and order dated 25.09.1972. The judgment and order of the Consolidation Officer, dated 18.01.1969 was set aside. The names of the petitioners were directed to be expunged from Khata nos. 12, 14, 115, 70, 196, 11 and 111, besides Araj no. 725, admeasuring 0-14-8, part of Khata no. 11(for short, the land in dispute) and in their place, the names of respondents nos. 3, 4 and 5, Ram Lagan, Ram Lal and Vijay Bahadur, were ordered to be recorded. It was ordered that the share allotted to the petitioners be allotted to respondents nos. 3, 4 and 5 in terms done by the Consolidation Officer.

7. The petitioners put in issue the order of the Assistant Settlement Officer(Consolidation), dated 25.09.1972 before the Deputy Director of Consolidation, Basti, vide four revisions being Revisions nos. 47, 48, 49 and 50 by the petitioners. The order was also challenged by the respondent nos. 6, Kodai vide Revision no. 135. All the five Revisions preferred under Section 48 of the Act were heard and dismissed by the Deputy Director of Consolidation, Basti, vide judgment and order dated 23.06.1976.

8. Aggrieved, the present writ petition has been filed.

9. Heard Sri Sanjeev Singh, learned counsel for the petitioners and Sri Tripathi B.G. Bhai, learned counsel appearing on behalf of respondent No.s 3/1, Jai Prakash, who alone has contested this writ petition at the hearing.

10. In order to set the record straight, it must be mentioned here that early into these proceedings, a counter-affidavit dated 25.09.1977 was filed before this Court on behalf of respondent no. 10, Shiv Baran, but no one appeared on his behalf at the time of hearing.

11. The dispute between the parties centres around the validity of a compromise dated 23.11.1959 recorded in Suit No. 270/1959 under Section 229-B decided by the Judicial Officer, Bansi, District Basti. The petitioners on one hand and respondent nos. 3, 4 and 5 on the other are said to have entered into the said compromise on the basis of which the Judicial Officer entered judgment in Suit No. 270/1959. Before the Consolidation Officer the validity of the compromise dated 23.11.1959 urged by respondent nos. 3, 4 and 5 was impeached by the petitioners as fraudulent. The Consolidation Officer dealt with the said matter vide his findings on issue No. 2 and held in favour of the petitioners. He rejected the compromise as a product of fraud and, therefore, nonest. It is on this ground that the Consolidation Officer directed entries to be restored to what they were in the basic year *inter-se* the petitioner and respondent nos. 3, 4 and 5. It appears that the compromise entered in the suit was not recorded in the Khatauni relating to the basic year and on that account respondent nos. 3, 4 and 5 had

claimed rights to be recorded on the basis of the compromise decree dated 23.11.1959 relating to the land in dispute to be recorded. That claim was, however, rejected by the Consolidation Officer holding the compromise to be fraudulent.

12. The Consolidation Officer has broadly gone by the reasoning that if the compromise were genuine, then on the vakalatnama filed in Suit No. 270 of 1959 the signatures of the petitioners, Keshav Prasad, Ram Sumer, are there whereas it is thumb mark put by the second petitioner, Ayodhya Prasad but the day this Vakalatnama was signed, the memorandum of compromise was also verified. However, the memorandum of compromise does not bears the petitioners' signatures. Instead it is signed by their Counsel, Sri Girja Shankar, Mukhtar. In the opinion of the Consolidation Officer, it was beyond his understanding as to why the petitioners Keshav Prasad and the two others who were available in Court that day, were not made to sign the memorandum of compromise whereas other party to the agreement signed it. The Consolidation Officer has concluded that on these facts it appears that the signatures of the two petitioners on the Vakalatnama and the thumb impression of Ayodhya Prasad on the Vakalatnama are not those of three men. It has also remarked that the summons of the suit under Section 229B were never served on the petitioners who resided at Pratapgarh, whereas the Court was located at Basti. The Consolidation Officer also opined that signatures of the first petitioner, Keshav Prasad, on the various applications made before him in proceedings under Section 9A(2) of the Act did not resemble with those on the Vakalatnama. The Consolidation Officer also held respondent No. 6 to be in

collusion with respondent No. 3, 4 and 5 as the said respondent has been given certain rights in certain plot numbers detailed in the findings of the Consolidation Officer on issue no. 2 to the prejudice of the petitioners. The Consolidation Officer has concluded weighing the probabilities arising from the advantages flowing from the compromise to the parties that the compromise is not genuine, apart from other reasons to conclude so.

13. The Appellate Court writing in reversal of the findings by the lower Appellate Court about the genuineness of the compromise dated 23.11.1959 filed in Suit No. 270 of 1959 held that he had looked into the applications dated 18.11.1967, 14.10.1968 and 24.10.1968 filed by Keshav Prasad, on all these applications his signatures do not tally with each other. According to the Settlement Officer of Consolidation Keshav Prasad has also signed the ordersheet before the Consolidation Officer and those signatures are altogether different from his signatures on the applications that mentioned. The Settlement Officer, therefore, opined that from the commencement of these proceedings, the petitioner Keshav Prasad had taken precaution to disguise his signatures made in the lower Court so that the same may not tally with his signatures on the compromise dated 23.11.1959 filed in Suit No. 270 of 1959. The Settlement Officer also held that the other two petitioners, Ram Sumer and Ayodhya Prasad, have not put their thumb impressions or signatures on any of the applications moved in the proceedings before the Consolidation Officer. The Settlement Officer of Consolidation has justified his judgment of reversal on another limb of reasoning. He has remarked that there is a copy of a restoration

application dated 09.12.1968 filed by the petitioners Keshav Prasad, Ayodhya Prasad and Ram Sumer before the Judicial Officer, Basti, seeking to set aside the decree based on compromise passed by him in the Suit. It has been further remarked that Keshav Prasad and others have not filed any order allowing the aforesaid restoration application. From the said fact, he has drawn an inference that it appears that the above mentioned restoration application has been rejected.

14. In addition, the Settlement Officer of Consolidation has recorded a finding that he has perused the compromise dated 23.11.1959 and the Vakalatnama of the same date filed in those proceedings. He has held that the compromise was filed by Sri Girja Shankar Mukhtar on behalf of Keshav Prasad, Ram Sumer, Ayodhya Prasad, Nokhe, Raj Dulare, Harihar. None of these men, according to the Settlement Officer of Consolidation, have dared to examine Sri Girja Shankar Mukhtar in order to prove that he was not their Counsel in the suit before the Judicial Officer. Buttressing his reasoning, the Settlement Officer has taken note of the fact that the compromise decree dated 23.11.1959 had been incorporated in Khata Nos. 70 and 96. This fact, in the opinion of the Appellate Court, shows that the decree based on compromise was given effect to in revenue papers but by mistake it was not incorporated in the other Khata except those two.

15. The Appellate Court has also taken into consideration the discordant reports of two finger print experts filed before him. These reports and the statements to prove them by Sri Leela Ram Jagtyani, Finger Print Expert and Ashok Kashyap, another expert, have been looked

into by the Settlement Officer of Consolidation. He has opined that the report of Leela Ram is more reliable than that of Sri Ashok Kashyap. It is also remarked that the comparison done by the experts was at a distance of ten years when the compromise of 1959 was scripted. During this period of time, there would be some changes in the signatures of Keshav Prasad and Ram Sumer Pandey, a fact that would not detract from the validity of the compromise filed in Suit No. 270 of 1959. On these findings, the Appellate Court has reversed order of the Consolidation Officer.

16. The Revisional Court dismissed the revisions filed by the petitioner on the ground that the compromise filed in the Suit No. 270/1959 was genuine and on this there are signatures of Keshav Prasad, Ram Sumer and Ayodhya on the compromise which was duly verified by Girja Shankar, Advocate. The Deputy Director of Consolidation has further held that the compromise in dispute is voidable and only Civil Court has jurisdiction to cancel the same.

17. Learned counsel for the petitioner Sri Sanjeev Singh, has submitted that the finding of the Consolidation Officer regarding validity of compromise was in accordance with law. The compromise arrived in the Suit No. 270/1959 was fraudulent and therefore the Consolidation Officer rightly in the Consolidation proceedings, which was subsequent to the suit proceedings aforesaid, held it to be not binding on the parties. He has submitted that there was no necessity of getting the same set aside by instituting any proceeding before the Court. Being compromise obtained by fraud, it will not have any effect of res-judicata between the parties. He has relied upon the judgment

of the Apex Court in the Case of **Asharfi Lal Vs. Smt. Koili(dead) By L.Rs, 1995 (4 SCC) 163** wherein Apex Court had held that the judgment of a competent Court is normally binding on the parties to the proceedings and it operates as res-judicata in a subsequent proceedings between the same parties. An exception is engrafted under Section 44 of the Evidence Act which provides that any party to a suit or other proceeding may show that any judgment and order which is relevant under Sections 40, 41 and 42 of the Evidence Act and which has been proved by the adverse party as delivered by a Court not competent to deliver it or it was obtained by fraud or collusion is not binding on it. He has submitted that a judgment obtained by fraud or collusion does not operate as res-judicata and is not binding on the parties to the proceedings. Such a judgment can be avoided in subsequent proceedings by a party which is able to show that it was obtained by fraud or collusion. Institution of separate proceedings for getting it set aside is not necessary. Further reliance has been placed on the judgment of Division Bench of High Court of Kerala wherein, in paragraph 32 the same proposition has been reiterated. Reliance on the judgement of this Court in the case of **Ibne Hasan Vs. Hasina Bibi and Ors, and MANU/0198/1984** has also been made wherein the Division Bench of this Court had occasion to consider this question and answer the same in a reference from paragraph 6 to 11 as follows:

“ 6. Finding an apparent inconsistency between the two sets of judicial pronouncement the learned single Judge referred the following question to a Division Bench for its opinion.

"Whether a party to a decree or a person claiming through such party can, under Section 44 of the Evidence Act, be allowed to avoid the effect of the decree on grounds of fraud or collusion?"

The matter has thus come up before us for giving our opinion on the aforesaid question. Having heard counsel for the parties we are of opinion that the answer to the question aforesaid has to be in the affirmative. Now we proceed to give our reasons for this opinion. Sections 40 to 44 of the Evidence Act have been placed under the heading "Judgments of Courts of Justice when relevant". In the instant case we are concerned with Sections 40 and 44 and not with Sections 41 and 42. Even Section 43 will have some relevance for answering the question referred to us. As such for the sake of convenience Sections 40, 43 and 44 of the Evidence Act are being quoted. The illustrations given below Section 43 have been omitted:

"40. Previous judgments relevant to bar a second suit or trial.—The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is, whether such Court ought to take cognizance of such suit or to hold such trial.

43. Judgments etc., other than those mentioned in Sections 40 to 42 when relevant.—Judgments, orders or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.

44. Fraud or collusion in obtaining judgment, or in competency of

Court, may be proved.—Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under Section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

7. Previous judgments can be read in evidence in subsequent suits only if they are relevant under any of the Sections 40, 41 and 42. Judgments other than those mentioned therein would be irrelevant in view of Section 43 unless they fall in the category of judgments referred to in the latter part of Section 43.

Further, in view of Section 44 judgments referred to in Sections 40, 41 and 42 would not be relevant if it is established that they were delivered by a Court not competent to deliver the same or were obtained by fraud or collusion.

8. Section 40 of the Evidence Act even without using the term 'Res judicata' refers to the consequences of res judicata. It is because of Section 40 that a judgment, which is relied on by a party in a subsequent suit in support of its plea of res judicata, becomes relevant and can be read in evidence. A previous judgment operates as res judicata between the parties to the earlier suit as also to persons claiming title through any such party. When Section 44 of the Evidence Act permits a party to a subsequent suit to prove that any of the ingredients of the said section is made out even in respect of a judgment which is relevant under Section 40 there seems to be no escape from the conclusion that even such judgment, which would otherwise operate as res judicata and would not be possible to be avoided by the parties to the suit in which such

judgment was delivered or by persons claiming through any such party, can be avoided by them if any of the ingredients of Section 44 is made out. In that event such judgment would not be relevant and cannot form the basis of the plea of res judicata. The view which we take finds support from the decision of a Division Bench of this Court of which Sulaiman, J. who decided the case of Sahib Rai (AIR 1927 All 494) (supra) was a member, in Mt. Parbati v Gajrai (AIR 1937 All 28). White dealing with the scope of S. 11, C. P. C. it was held "In the first place it is always open to a party to show that a judgment was obtained by fraud or collusion or that there was want of Jurisdiction and in such cases we are of opinion that Section 11 would not apply".

9. There is another reason why this view should hold good. As seen above the decision of Ram Lall. J. in the case of Ch. Mohammad Afzal (AIR 1947 Lahore 117) (supra) was endorsed and approved by the Privy Council in the case of Beli Ram and Brothers (AIR 1948 PC 168) (supra). In Kishan Chand v. Ram Babu (1964 All LJ 389) : (AIR 1965 All 65) a Full Bench of this Court has held that even after the Constitution the law declared by the Judicial Committee continues to be the (sic) the High Court until the Supreme Court ruled otherwise. No decision of the Supreme Court taking a contrary view has been brought to our notice. In this view of the matter the decisions of learned single Judges of this Court in the cases of Sahib Rai (AIR 1927 All 494) (supra) and Smt. Chauhana (AIR 1971 All 439) (supra) taking a contrary view are overruled.

10. We may, however, point out that since Section 43 is not mentioned in

Section 44 of the Evidence Act a judgment would still be relevant under the exception contained in the later part of Section 43 namely "unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act." even if it may not be relevant under Sections 40, 41 and 42 of the Act because of the said Section 44. As such if the ingredients of estoppel are made out the defendant appellant will still not be in a position to avoid the effect of the judgment in suit No. 126 of 1952. This view finds support from the decision of a Division Bench of this Court in Darbari Lal v. Mahboob Ali Mian (AIR 1927 All 538 (2)).

11. In view of the foregoing discussion our answer to the question referred to us is that a party to a decree or a person claiming through such party can, under Section 44 of the Evidence Act, be allowed to avoid the effect of the decree on grounds of fraud or collusion and assert that the said decree cannot be relied on for the purpose contemplated by Section 40 thereof which includes providing the basis for the plea of res judicata, in view of the inclusion of Section 40 in Section 44 of the said Act. However, since Section 43 is not included in Section 44 of the said Act, collusive decree will still be relevant to support the plea of estoppel if the ingredients of estoppel are made out."

18. Learned counsel for the petitioner has further argued that the finding that there was difference in signatures of the Keshav Prasad, on the memorandum of compromise and his actual signature is an absurd finding. After ten years hand writing expert cannot give correct opinion in the absence of a contemporaneous

signature/handwriting of the witness concerned. He has relied upon the judgment of the High Court of Hyderabad in **Bande Siva Shankara Srinivasa Prasad Vs. Ravi Surya Prakash Babu and Ors.** MANU/AP/07/2015, wherein the Full Bench of the aforesaid High Court dealt with this issue and held that

“In cases involving forged signatures not only should comparison signatures be obtained from documents of similar importance, but if possible also from documents which are roughly contemporary with those in question. Writing of an adult will show an obvious steady change with passage of time. In these circumstances provision of a whole set of signatures written over a period of years will prove of inestimable value to the document examiner.

When serious illness occurs, a signature often undergoes a remarkable change in a very short period and if a suspect will is dated near the day of death, standard (admittedly genuine) signatures covering this period are essential if reliable evidence of the authenticity or otherwise of the signature is to be established.

Normally, in the case of a typical adult, basic writing habits change gradually. Therefore, material written two or three years before or after the disputed writing serve as satisfactory standards, but as the lapse of years between the date of standards and questioned material becomes greater, the standards have a tendency to be less representative. Consequently, an effort should always be made to procure some standards (admittedly genuine writings / signatures) written near in date to the disputed matter.

The gist of the experts opinion, emerging from the above Report, is to the effect that it is not always necessary to have contemporaneous handwritings/signatures for comparison. However, as a general rule, it would be desirable to undertake comparison of admitted handwritings/signatures with disputed handwritings/signatures which fall within the range of 2 or 3 years from each other. Therefore, there can be no hard and fast norm as to when comparison can or cannot be undertaken owing to the time lag between the two sets of handwritings/signatures. Various other factors would have to be taken into consideration, as opined by the experts, quoted hereinbefore. Each case would turn upon its own facts and circumstances relating to the time lag, the change in the handwriting/signature, the capability of correlating the two sets and ultimately, the opinion of the expert himself as to whether the two sets can be compared. It is therefore not open to the Court to refuse to entertain an application seeking comparison of disputed handwritings/signatures with admitted handwritings / signatures on the ground of a long lapse of time between the two sets of handwritings/signatures.

19. It has finally been submitted that by the learned counsel for the petitioners that before the hand writing expert, no documents signed by Keshav Prasad about the same period was produced to ascertain veracity of his signature. After more than ten years, there was bound to be change in his signature and therefore the entire procedure adopted by appellate court was not in accordance with law and the findings on the basis of report of such hand writing expert ought not to have been construed against the petitioners by the Settlement

Officer and Deputy Director of Consolidation, Basti. He has submitted that when Keshav Prasad, Ram Sumer and Ayodhya Prasad, were present in the Court and executed vakalatnama on the same date, why they were not made to appear before the Court and execute compromise themselves has not been considered by the Appellate and the Revisional Courts. The clear case of the petitioners is that they never entered into any such compromise and the memo of compromise was unauthorized and not in conformity with the provisions of Order XXIII read with Rule 3 CPC. Reliance upon the judgment of this Court in the case of **Ram Kumar and others Vs. DDC, Gautam Buddh Nagar and Others, [2010 (2) ADJ 74]** has been made wherein this Court has interpreted order XXIII, Rule 3 CPC and held that a compromise before the Court must be lawful and the Court has to record its satisfaction in respect of aforesaid compromise. He has submitted that in the present case, the Court although recorded the compromise, but no satisfaction was recorded that the same was lawful and not under cloud. He has submitted that the judgements and orders passed by the Appellate and Revisional Courts of consolidation are not in accordance with law and deserve to be set aside and the judgment of the Consolidation Officer deserves to be upheld.

20. Learned counsel for contesting Respondent No. 3/1, Sri Tripathi B.G. Bhai, has submitted that the parties belong to common ancestors some of them started living at District Pratapgarh and some remained and continued to live in village Bilauli, District- Basti. He has further submitted that the disputed property was recorded in the name of petitioners' side Keshav Prasad and others therefore, the

proceedings under Section 229-B of U.P. Zamindari Abolition and Land Reforms Act were initiated by the respondents for and expunging the name of the petitioners from the plots in dispute and some other plots and for recording their names over the disputed property. The parties had entered into legal compromise on 23.11.1959 before the Sub-Divisional Officer and order was passed on the same date on the basis of compromise. Subsequently, a restoration application was filed by the petitioners before the Sub-Divisional Officer which was dismissed and the compromise/ order dated 23.11.1959 attained the finality. Since in the basic year, the name of the petitioners remained recorded, the respondents filed objection before the Consolidation Officer for recording their names on the basis of compromise dated 23.11.1959. The Consolidation Officer illegally disbelieved the compromise, however, the Appellate and the Revisional Courts corrected the stand taken by the Consolidation Officer and set aside his order. He has submitted that the finding of the Appellate and Revisional Courts that the compromise dated 23.11.1959 was valid is in accordance with law. He has relied upon the judgment of the **Apex Court in the Case of Y. Sleebachen Vs. Superintending Engineer WRO/PWD, 2015 (5) SCC 747** wherein the Apex Court had held that a pleader can enter into compromise on behalf of his clients once he gets Power of Attorney/Authorization by his clients to appear in a matter. The signature of Advocate/Counsel on the compromise is deemed to be valid even when Order XXIII, Rule 3 CPC which requires a compromise to be in writing and signed by the parties. Further reliance has been placed on paragraphs 38, 39 and 40 the judgment of the Apex Court in the Case of **Byram Pestonji Gariwala Vs Union**

Bank of India of the Apex Court reported in 1991- LAWS (SC)-9-21.

21. Further reliance has been placed on the judgment of the Apex Court in the case of **Bakshi Dev Raj (2) and Another Vs Sudheer Kumar (2011) 8 SCC 679**. Reliance has been placed upon the judgment of **Delhi High Court in the Case of Archies Greetings and Gifts Ltd Vs. Garg Plastic, (Delhi) Law Finder Doc Id # 64115**.

22. Final reliance has been placed upon the judgment of Karnataka High Court in the case of **Krishna Gajanana Vedeshwar Vs Narayan Gajanan Vedeshwar, Law Finder Doc Id # 165030**.

23. After hearing the rival contentions this Court finds that there can be no dispute with the legal proposition that a compromise signed by the counsel on behalf of his client before the Court is valid in law and for all purposes and the clients of such counsel cannot dispute the authority of their counsel to execute such a compromise. However, the position becomes different when the allegation of practice of fraud, misrepresentation, etc., is made in the execution of compromise signed by the counsel for parties of one side and the parties themselves on the other side, as in the present case. It is on the record that on the date of execution of the disputed compromise dated 23.11.1959, the petitioners were present in Court, they had executed vakalatnama in favour of their counsel on the same day and on the same date i.e., 23.11.1959, the compromise was signed by their counsel on one hand and the other side on the other hand and compromise decree was passed. The object of the Order XXIII, Rule 3 CPC is to

curtail litigation between the parties by concluding litigation with consent. The Apex Court in the case of **Byram Pastonji Gariwala Vs. Union Bank of India (supra)** has held that the counsel duly authorized by his client by signing the agreement or compromise contributes to decreasing loss of time in litigation and avoiding inconvenience to the party by signing a compromise on his behalf. However, the act of the counsel is doing so should be beyond reproach as held in the judgment of **Byram Pastonji Gariwala (supra)** in paragraph 37, the Apex Court has held as follows:

“We may, however, hasten to add that it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of suit by agreement or compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted. This essential precaution will safeguard the personal reputation of counsel as well as uphold the prestige and dignity of the legal profession.”

24. This Court after going through the judgment of the Consolidation Officer finds that compromise dated 23.11.1959 passed in suit filed under Section 229B, being Suit No. 270/1959, is in dispute. The petitioners, who were defendants in suit, were not the residents of District- Basti, but of District-Pratapgarh. The Consolidation

Officer has recorded the finding that on the single vakalatnama, Kodai, Shiv Mangal, Ram Dulare, Keshav Prasad, Ayodhya and Ram Sumer have made signatures together when their interests were not the same but were different. The Consolidation Officer has recorded finding that all the aforesaid persons had colluded and proceeded against the petitioners, Keshav Prasad and others, in getting the disputed compromise executed. Due to execution of compromise except, Keshav Prasad, Ayodhya and Ram Sumer, the petitioners, all the parties to the compromise got benefitted. The Consolidation Officer further recorded the finding that Ram Lagan, etc., have colluded with Kodai, etc. Before the Consolidation Officer, Kodai, Ram Dulare admitted the share of Ram Lagan and stated that the compromise was correct. The Consolidation Officer found that because after cancellation of the names of Keshav Prasad, Ayodhya and Ram Sumer, the petitioners from the plot nos. 725, 211, 765, 864, 83 and 136, name of Shiv Mangal and others were recorded and on Plot No. 54, etc., the name of Ram Lagan etc., was recorded, therefore, all of them colluded and by filing a joint vakalatnama they succeeded in grabbing the land of Keshav Prasad and others, the petitioner. He has submitted that Ram Lagan and others had no right or title to plots in dispute, their rights and titles evolved except on the basis of the disputed compromise hence, the compromise was held to be unlawful and not binding by the Consolidation Officer on the petitioners.

25. This Court finds that the aforesaid findings of the Consolidation Officer have not been considered by the Settlement Officer nor they have been set aside. The Settlement Officer Consolidation has called for finger print experts report which were

bound to differ since in year 1959, when the compromise took place in the year 1959 much time had passed and signatures of Keshav Prasad and Ram Sumer on the compromise differed. The Appellate Court also recorded the finding that the compromise was given effect regarding some *Khata*s, but by mistake it was not given effect in remaining *Khata*s. Both the Appellate and the Revisional Court have held that the petitioners had filed restoration application for recalling the compromise dated 23.11.1959, but since there is nothing on record regarding the order passed on the aforesaid application, both the Courts presumed that their restoration application was rejected and therefore the compromise between the parties attained finality.

26. In case, the compromise was got fraudulently executed without knowledge and consent of the petitioners, a restoration application could also have been filed by the interested parties and got the same dismissed for want of prosecution or by not pressing the same without the knowledge of the petitioners. The counsel for petitioners got the vakalatnama of the petitioners' on 23.11.1959 which he filed on the same date and he also filed a compromise on their behalf and on the same date and got an order of compromise passed on the same date. The conduct of the counsel clearly comes under the cloud as held by the Apex Court in the Case of **Byram Pastonji Gariwala in paragraph 37 (supra)**. There is no finding recorded by the Court that compromise was arrived at by the parties with free consent and without any undue influence and fraud.

27. The Revisional Court has relied upon a case law reported in **Lucknow, Law Report, February, 1976, Page 32 to**

58, Ram Nath Vs. Smt. Munni and has held that decree dated 23.11.1959 was voidable and therefore only the Civil Court had jurisdiction to set aside the same and till it is set aside by the competent Court, it will be binding on the parties. Revisional Court further held that after the disputed compromise decree dated 23.11.1959 was passed an application for cancelling the same was filed on 09.12.1968. Both the parties have not been able to inform about the fate of application and therefore inference was drawn that the aforesaid application got dismissed. Had it been pending evidence of the same would have been filed before the Consolidation Officer. Thirdly, the Revisional Court considered the two finger prints expert reports submitted before the Settlement Officer Consolidation and believed the report against the petitioners. The death certificate of the father of the petitioners, namely, Musai, was produced before the revisional court to prove that he was alive when the compromise decree dated 23.11.1959 was passed and therefore, the petitioners had no right to enter into compromise. The death certificate of Musai was filed, proving his death on 14.09.1964, but the Revisional Court found that although the death certificate has been produced, but no such copy was found to be issued.

28. This Court finds that the finding recorded by the Deputy Director of Consolidation that a suit is required to be filed for setting aside the decree dated 23.11.1959 on the basis of some judgment of this Court is not in accordance with law. As discussed earlier, a document which is proved to have been obtained by way of fraud or misrepresentation can be ignored in subsequent proceedings as held by the Apex Court in the Case of **Asharfi Lal (supra)**, and Division Bench of this Court

in the case of **Ibne Hasan (supra)**. The second finding of the Revisional court that the restoration/recall application filed for recall of the compromise decree dated 23.11.1959 is deemed to be dismissed since both the parties have not produced any order is not correct since the case of the petitioners from the very beginning was that they were never aware of the filing of the Suit No. 70/1959, the filing of restoration was in the knowledge of the respondents. Instead of summoning record of the suit aforesaid, the Settlement Officer Consolidation as well as the Deputy Director Consolidation presumed that such restoration/recall application was dismissed. Even if it was dismissed the legal petition as per Section 44 of Evidence Act will not be affected.

29. The third finding regarding the signature expert reports was also not in accordance with law as discussed earlier in this judgment. The last finding regarding the death of the father of the petitioners' Musai, after the decree is not very relevant since the entirety of facts and circumstances of this case prove that the conduct of the alleged counsel for the petitioners was not fair. The engagement of the counsel, execution of compromise on behalf of petitioners by the counsel and passing of order or compromise on same date i.e., 23.11.1959, are clouded in suspicion.

30. Before parting with this case, this Court finds that it is a settled position of law that, an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the Appellant and therein all questions of fact and law decided by the trial court are open

for re-consideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons.

31. The Court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions. When the appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court. Expression of a general agreement with the reasons given by the trial court would ordinarily suffice. However, where it disagrees with the same elaborate reasons are regained to be given which has not been done in this case as considered above. The appellate Court has summoned new evidence in the form of hand writing expert's report and decided the Appeal without discussing and setting aside the findings of the Consolidation Officer.

32. The Revisional Court has also failed to exercise the jurisdiction vested in it by law. Wide scope of the revisional powers of the Deputy Director of Consolidation under Section 48 of the Act has been endorsed by this Court in *Ram Jeet & others vs. Deputy Director of Consolidation, Jaunpur and others*, Writ - B No.42465 of 1999, decided on 31.05.2013, where it has been held thus:

"Supreme Court in Ram Dular Vs. DDC and others, 1994 (Supplement) (2) SCC 198, Preetam Singh Vs. DDC and others, (1996) 2 SCC 270, Sheo Nand Vs. DDC and others, (2000) 3 SCC 103,

Gulzar Singh Vs. DDC and others, (2009) 12 SCC 590 has consistently held that Deputy Director of Consolidation has very wide power to decide issue relating to fact and law both under Section 48 of the Act after re-appreciating the evidence on record. Apart from it Explanation III has been added in Section 48 of the Act with retrospective effect from 10.11.1980 which provides that the power under this Section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority and also includes the power to re-appreciate any oral or documentary evidence."

33. There is another aspect of the matter, which is far reaching import about the manner in which the Deputy Director of Consolidation has written his judgment.

34. The judgment of a Revisional Court has to open, go through and end like a judgment of reappraisal of what the two Courts or Authorities below have done. The approach of reappraisal has to be supervisory, and not open appellate. May be, in the case of a revision under Section 48 of the Act, the standard of reappraisal is wider than that traditionally associated with exercise of Revisional jurisdiction. But, all the same, a revisional court cannot decide and write its judgment as if it were a Court of first instance, without referring to and affirming or reversing the findings of the two Authorities below. In the present case, the impugned judgment has precisely done that. It reads like an original judgment written in the third instance. It does not give any reason to agree with what the Appellate Court and disagree with what the trial court has said. It has given in its own

reasons and new ground that compromise decree in dispute was voidable and required to be set aside by competent court. It has not considered whether the appellate court has considered properly the findings recorded by the trial court. It has also not itself exercised its jurisdiction of reappraisal of both the judgments of the courts below.

34. In view of the above consideration, this court finds that the orders passed by the Settlement Officer Consolidation, Basti and the Deputy Director of Consolidation, Basti, impugned in the writ petition cannot be sustained and are hereby, **quashed**.

35. The order of the Consolidation Officer is **upheld**.

36. The writ petition is **allowed**.

(2023) 7 ILRA 348
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 31.03.2023

BEFORE

THE HON'BLE SURYA PRAKASH
KESARWANI, J.

THE HON'BLE ANISH KUMAR GUPTA, J.

Writ-C No. 4426 of 2023

Vijendra Kapoor & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Devesh Kumar Shukla

Counsel for the Respondents:
 C.S.C., Sri Sanjay Singh

A. Banking Law – Criminal Procedure
Code 1973 – Section 102 – Scope – Freezing

of the Bank Account – Basis of freezing the account is involvement of the petitioners in the matter of hooch tragedy on account of sale of ethyl alcohol and rectified spirit – Held, scope and object of Section 102 is to help and assist investigation and to enable a police officer to collect evidence to be produced to prove charge complained of – Held further, once the investigation is complete and Police report is submitted to the Court concerned it is open for the person whose account has been frozen during investigation, to apply for defreezing of the bank account before the concerned Magistrate in terms of Section 102 (3) of Cr.P.C. – High Court permitted the petitioner to move an application before the concerned court to defreeze the account in the light of *Teesta Atul Setalvad's case*. [Para 3, 11, 16(viii) and 17]

Writ petition disposed of. (E-1)

List of Cases cited:

1. St. of Maharashtra Vs Tapas D. Neogy; (1999) 7 SCC 685 (Para 6 & 12)
2. M.T. Enrica Lexie Vs Doramma; (2012) 6 SCC 760 (Para 14)
3. Teesta Atul Setalvad Vs St. of Gujarat; (2018) 2 SCC 372 (Para 20 & 26)
4. Nevada Properties Pvt. Ltd. Vs St. of Mah. & anr.; (2019) 20 SCC 119 (Para 28 to 34 & 42)

(Delivered by Hon'ble Surya Prakash
 Kesarwani, J.
 &
 Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Devesh Kumar Shukla, learned counsel for the petitioners, Sri Rajiv Gupta, learned Additional Chief Standing Counsel for the State - respondents and Sri Sanjay Singh, learned counsel for the respondent No.4/Bank.

2. Petitioner No.1 is the husband of the petitioner no.2. They have filed the

present writ petition praying for the following reliefs :

"i. Issue a writ, order or direction in the nature of certiorari, quashing the order dated 18-06-2021, passed by the respondent no-3, whereby the bank account of the petitioners has been frozen.

ii. Issue a writ, order or direction in the nature of mandamus commanding the respondent authorities to pass an appropriate orders of defreezing the account of the petitioners forthwith.

iii. Issue a writ, order of direction in the nature of mandamus commanding the respondent authorities as well as Bank, not to interfere in the peaceful use of his bank account in any manner."

3. By the impugned order dated 18.06.2021 the Senior Superintendent of Police, Aligarh, has frozen the joint saving bank account of the petitioners on the ground of some involvement of the petitioners in the matter of hooch tragedy on account of sale of ethyl alcohol and rectified spirit, has been recorded and investigation is under process. As per records of the writ petition, the joint saving bank account of the petitioners is the saving bank account from which the petitioners pay their monthly instalment towards housing loan. The balance standing in the saving bank account as on 04.07.2021 was Rs.1354.58(CR). A charge sheet against the petitioner no.1 has been filed in case crime no.224/2021 P.S. Harduaganj, under Sections 60 A, 62 U.P. Excise Act and Sections 120-B, 272, 273, 304, 420, 467, 468 and 471 I.P.C.

4. Learned Additional Chief Standing Counsel has produced before us instructions of the concerned police station as forwarded by the Joint Director of

Prosecution, Aligarh, which is kept on record.

5. In paragraphs 4, 5, 15 and 16 of the instructions the respondents have stated as under :

"4. प्रस्तर संख्या-4 में याची का कथन है कि याचीगण का संयुक्त खाता संख्या-6563000100013382 पंजाब नेशनल बैंक रामघाट रोड शाखा में है, जिसमें याचीगण का आधार कार्ड सं०-5842 5760 7982 व मो० सं०-8477036000 पंजीकृत है। परन्तु यह कथन असत्य है कि याची संख्या-1 को अवैध शराब विक्रय के आपराधिक मुकदमों में झूठा फँसाया गया है। बल्कि सत्यता यह है कि याची, गिराहबंद, सरकश, हिस्ट्रीशीटर, अपनी फैक्ट्री में वरदान इंक एण्ड सालवेंट प्रा० लि० पता डी 132-133 सै०-1 यू०पी०एस०आई०डी०सी० ताला नगरी जनपद अलीगढ़ में हेंड सेनेटाइजर व अन्य उत्पादनों के निर्माण की आड़ में मिथाइल एल्कोहल/रेक्टीफाइड स्पिरिट, व अन्य कई प्रकार के हानिकारक रासायनिक कैमीकलों जैसे मानव जीवन के लिये घातक पदार्थों से भरे हुये 203 (नाप 200 ली० प्रत्येक ड्रम) ड्रमों के भारी भरकम स्टॉक को अवैध देशी शराब अपमिश्रण करने वाले माफियाओं को चोरी छिपे बिना किसी अधिकारिता के अवैध रूप से राजस्व को हानि पहुँचा कर सप्लाई करने वाला अपराधी प्रवृत्ति का व्यक्ति है। वर्ष 2021 में थाना हरदुआगंज पुलिस द्वारा प्रशासनिक उच्चाधिकारियों के आदेशानुसार मु०अ०सं०-224/2021 में दविश देकर याची की उपरोक्त फैक्ट्री से एथाइल एल्कोहल/रेक्टीफाइड स्पिरिट, जैसे मानव जीवन के लिये उच्च स्तरीय घातक रसायन से भरे हुए 203 ड्रम व कुछ ड्रमों में

कई प्रकार के हानिकारक रासायनिक कैमीकल भरे हुये बरामद किये गये हैं, तथा विश्लेषण से ज्ञात हुआ है कि याची मानव जीवन लिये अति घातक उपरोक्त रसायनों को जनपद के शराब माफियाओं को अवैध व अनुचित लाभ प्राप्ति हेतु महंगे दामों में विक्रय करना पाया गया है। याची के उक्त कृत्य से जनपद में अवैध अपमिश्रित देशी मदिरा के चोरी छिपे कारोबार में जबरदस्त उछाल आया है, जिसके कारण जनपद में काफी निर्दोष गरीब लोगों की मृत्यु हो गयी है तथा काफी संख्या में गंभीर रूप से बीमार हुये हैं। तथा आँखों की रोशनी चली गयी है, याची द्वारा सप्लाई किये गये उक्त रसायन से निर्मित अवैध अपमिश्रित जहरीली नकली देशी शराब के सेवन से निरीह व निर्दोष लोगों के साथ सिसरोई ईट भट्टा शराब मजदूर काण्ड जैसी घटनाएं अमल में आयी हैं। इसके विरुद्ध जनपद के विभिन्न थानों में लम्बा आपराधिक इतिहास में आपराधिक मुकदमे पंजीकृत हैं।

5. प्रस्तर संख्या-5 में याची का कथन है कि उपरोक्त खाता याची की दुकान से संबंधित नहीं है शराब व्यवसाय की खरीद विक्री से संबंधित अलग एमाउण्ट संचालित है। उक्त वर्तमान बैंक खाते का संबंध याची के शराब कारोबार संबंधी व्यवसायिक लेन देन से नहीं है। इस संबंध में कथन करना है कि उक्त कथन का संबंधित याचीगण के वर्तमान बैंक खाते से संबंधी बैंक लेन देन से है, जिसके संबंध में याचीगण के अतिरिक्त यह वास्तविकता कोई नहीं जान सकता कि याचीगण द्वारा खाते में से किया गया लेने देन किस मद में व्यय किया जा रहा है।

15. प्रस्तर संख्या-15 में अंकित याचीगण का कथन है कि फ्रीज खाता केस

प्रापटी न होने के कारण धारा-102 CrPc के प्राविधानुसार अवैध है तथा मान० न्यायालय द्वारा हस्तक्षेप किये जाने योग्य है। इस संबंध में कथन करना है उक्त कथन कानून से संबंधित है कोई टिप्पणी नहीं करनी है।

16. प्रस्तर संख्या-16 में अंकित याचीगण का कथन है कि याचीगण उच्चस्तरीय रेजीडेंसियल पिलर हैं तथा प्रश्नगत खाते को डिफ्रीज करने हेतु दर-दर भटक रहे हैं। परन्तु यह कथन असत्य है कि याचीगण को उत्पीड़ित रखने की गरज से अकारण ही उनकी प्रार्थना को हवा में उड़ा दिया गया है। बल्कि सत्यता यह है कि शासन/प्रशासन द्वारा आदेश याची संख्या-1 द्वारा जिले के सम्पूर्ण शासन/प्रशासन व जनता जनार्दन को हिला देने वाले आपराधिक कृत्य के कारण जारी किया गया है जो जिला स्तर के उच्चतम अधिकारीगण द्वारा क्षेत्रीय सामाजिक शान्ति व कानून व्यवस्था को बनाये रखने हेतु जारी किया गया है। अतः उपरोक्त बैंक शाखा को उक्त आदेश के विरुद्ध जाकर याचीगण के प्रार्थना पत्र को स्वीकार करने का कानूनन कोई अधिकार नहीं है।"

6. Section 102 of the Criminal Procedure Code provides as under :

"102. Power of police officer to seize certain property.

(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, 2[or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation], he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same:]

[Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.]"

7. Sub Section (1) of Section 102 of the Criminal Procedure Code empowers any police officer to seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the Commission of any offence. Sub Section (2) requires such police officer, if subordinate to the officer in charge of a police station, to report forthwith the seizure to that officer.

9. Sub Section (3) provides that Officer acting under Sub-Section (1) **shall forthwith report the seizure to the Magistrate** having

jurisdiction and where the property seized is such that it cannot be, conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same.

10. The proviso to sub Rule (3) that deals with situation the property ceased under sub Section (1) is subject to speedy and natural decay.

11. Thus, property including a bank account creating suspicion about commission of an offence may be seized by the investigating officer or he may prohibit operation of such bank account of any person who may be found under circumstances creating suspicion of commission of any offence. The scope and object of Section 102 is to help and assist investigation and to enable a police officer to collect evidence to be produced to prove charge complained of and set up in the charge sheet. Plain reading of sub Section 1 of Section 102 makes it clear that the property seized must be suspected to have been stolen or which may be found under circumstances which creates suspicion of the commission of any offence.

12. In the case of **State of Maharashtra Vs. Tapas D. Neogy (1999) 7 SCC 685** (paragraphs 6 & 12) Hon'ble Supreme Court held as under :

"6. A plain reading of sub-section (1) of Section 102 indicates that the police

officer has the power to seize any property which may be found under circumstances creating suspicion of the commission of any offence. The legislature having used the expression "any property" and "any offence" have made the applicability of the provisions wide enough to cover offences created under any Act. But the two preconditions for applicability of Section 102(1) are that it must be "property" and secondly, in respect of the said property there must have been suspicion of commission of any offence. In this view of the matter the two further questions that arise for consideration are whether the bank account of an accused or of his relation can be said to be "property" within the meaning of sub-section (1) of Section 102 CrPC and secondly, whether circumstances exist, creating suspicion of commission of any offence in relation to the same.

12. Having considered the divergent views taken by different High Courts with regard to the power of seizure under Section 102 of the Code of Criminal Procedure, and whether the bank account can be held to be "property" within the meaning of the said Section 102(1), we see no justification to give any narrow interpretation to the provisions of the Criminal Procedure Code. It is well known that corruption in public offices has become so rampant that it has become difficult to cope up with the same. Then again the time consumed by the courts in concluding the trials is another factor which should be borne in mind in interpreting the provisions of Section 102 of the Criminal Procedure Code and the underlying object engrafted therein, inasmuch as if there can be no order of seizure of the bank account of the accused then the entire money deposited in a bank which is ultimately held in the trial to be

the outcome of the illegal gratification, could be withdrawn by the accused and the courts would be powerless to get the said money which has any direct link with the commission of the offence committed by the accused as a public officer. We are, therefore, persuaded to take the view that the bank account of the accused or any of his relations is "property" within the meaning of Section 102 of the Criminal Procedure Code and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the police officer is investigating into. The contrary view expressed by the Karnataka, Gauhati and Allahabad High Courts, does not represent the correct law. It may also be seen that under the Prevention of Corruption Act, 1988, in the matter of imposition of fine under sub-section (2) of Section 13, the legislatures have provided that the courts in fixing the amount of fine shall take into consideration the amount or the value of the property which the accused person has obtained by committing the offence or where the conviction is for an offence referred to in clause (e) of sub-section (1) of Section 13, the pecuniary resources or property for which the accused person is unable to account satisfactorily. The interpretation given by us in respect of the power of seizure under Section 102 of the Criminal Procedure Code is in accordance with the intention of the legislature engrafted in Section 16 of the Prevention of Corruption Act referred to above. In the aforesaid premises, we have no hesitation to come to the conclusion that the High Court of Bombay committed error in holding that the police officer could not have seized the bank account or could not have issued any direction to the bank officer, prohibiting

the account of the accused from being operated upon. Though we have laid down the law, but so far as the present case is concerned, the order impugned has already been given effect to and the accused has been operating his account, and so, we do not interfere with the same."

13. In the case of **M.T. Enrica Lexie Vs. Doramma, (2012) 6 SCC 760 (para 14)** Hon'ble Supreme Court explained the object, purpose and scope of Section 102 Cr.P.C., and held as under :

14. The police officer in course of investigation can seize any property under Section 102 if such property is alleged to be stolen or is suspected to be stolen or is the object of the crime under investigation or has direct link with the commission of offence for which the police officer is investigating into. A property not suspected of commission of the offence which is being investigated into by the police officer cannot be seized. Under Section 102 of the Code, the police officer can seize such property which is covered by Section 102(1) and no other.

14. In the case of **Teesta Atul Setalvad Vs. State of Gujarat (2018) 2 SCC 372 (paragraphs 20 & 26)** Hon'ble Supreme Court considered the scope and effect of Section 102 Cr.P.C., and following the law laid down in the case of **State of Maharashtra Vs. Tapas D. Neogy (supra)** held as under :

"20. As regards the procedure for issuing instructions to freeze the bank accounts, it is noticed that the same has been followed by giving intimation to the Magistrate concerned on 21-11-2014 as required in terms of Section 102 of the Code. There is nothing in Section 102

which mandates giving of prior notice to the account-holder before the seizure of his bank account. The Magistrate after noticing that the principle stated by the Division Bench of the Bombay High Court in Shashikant D. Karnik v. State of Maharashtra has been overruled in terms of the Full Bench judgment of the Bombay High Court in Vinodkumar Ramachandran Valluvar, rightly negated that contention. The Full Bench of the Bombay High Court has expounded that Section 102 does not require issuance of notice to a person before or simultaneously with the action attaching his bank account. In Adarsh Coop. Housing Society Ltd. v. Union of India , the Division Bench of the Bombay High Court once again considered the issue and rejected the argument that prior notice to the account-holder was required to be given before seizure of his bank account. It also noted that the bank account need not be only of the accused but it can be any account creating suspicion about the commission of an offence. The view so taken commends us.

26. Although both sides have adverted to statement of accounts and vouchers to buttress their respective submissions, we do not deem it necessary nor think it appropriate to analyse the same while considering the matter on hand which emanates from an application preferred by the appellants to defreeze the stated bank accounts pending investigation of the case. Indisputably, the investigation is still in progress. The appellants will have to explain their position to the investigating agency and after investigation is complete, the matter can proceed further depending on the material gathered during the investigation. The suspicion entertained by the investigating agency as to how the appellants appropriated huge funds, which in fact were meant to be disbursed to the

unfortunate victims of 2002 riots will have to be explained by the appellants. Further, once the investigation is complete and police report is submitted to the court concerned, it would be open to the appellants to apply for defreezing of the bank accounts and persuade the court concerned that the said bank accounts are no more necessary for the purpose of investigation, as provided in sub-section (3) of Section 102 of the Code. It will be open to the court concerned to consider that request in accordance with law after hearing the investigating agency, including to impose conditions as may be warranted in the fact situation of the case."

(emphasis supplied by us)

15. In the case of **Nevada Properties Private Limited through its Directors Vs. State of Maharashtra and another (2019) 20 SCC 119 (paragraphs 28 to 34 & 42)**, Hon'ble Supreme Court held as under :

"28. The first part of sub-section (1) of Section 102 of the Code relates to the property which may be alleged or suspected to have been stolen. Immovable property certainly cannot be stolen and cannot fall in this part. The second part relates to the property which may be found by a police officer under circumstances which create suspicion of the commission of any offence. We have already referred to the judgments of the Delhi High Court in P.K. Parmar [P.K. Parmar v. Union of India, 1992 SCC OnLine Del 136 : 1992 Cri LJ 2499] , Swaran Sabharwal [Swaran Sabharwal v. Commr. of Police, 1987 SCC OnLine Del 221 : 1988 Cri LJ 241] and Jagdish Chander [Jagdish Chander v. State, 1989 SCC OnLine Del 403 : (1990) 40 DLT 233] , which have elucidated and in a restricted and narrow manner defined

the requirement for invoking the second part. However, we have come across a decision of this Court in Teesta Atul Setalvad v. State of Gujarat [Teesta Atul Setalvad v. State of Gujarat, (2018) 2 SCC 372 : (2018) 1 SCC (Cri) 718] , on an appeal from the judgment [Teesta Atul Setalvad v. State of Gujarat, 2015 SCC OnLine Guj 6283] of the Gujarat High Court and had dealt with a situation when an act of freezing the accounts was a sequel to the crime as the crime was detected earlier. The Gujarat High Court took a somewhat contrary view, by not interfering and directing defreezing, observing that even if the action of the investigating agency at the inception to seize may not be regular, the court cannot be oblivious to the collection of substantial material by the investigating agency which justifies its action under Section 102 of the Code. Further when the investigation had progressed to a material point, defreezing the bank accounts on the basis of such arguments would paralyse the investigation which would not be in the interest of justice. After referring to the factual matrix in Teesta Atul Setalvad [Teesta Atul Setalvad v. State of Gujarat, (2018) 2 SCC 372 : (2018) 1 SCC (Cri) 718] , this Court observed that the investigating officer was in possession of material pointing out to the circumstances that had created suspicion of the commission of an offence, in particular the one under investigation, and therefore exercise of power under Section 102 of the Code would be in law legitimate as it was exercised after following the procedure prescribed in sub-sections (2) and (3) of the same provision.

29. Section 102 postulates seizure of the property. Immovable property cannot, in its strict sense, be seized, though documents of title, etc. relating to immovable property can be seized, taken

into custody and produced. Immovable property can be attached and also locked/sealed. It could be argued that the word "seize" would include such action of attachment and sealing. Seizure of immovable property in this sense and manner would in law require dispossession of the person in occupation/possession of the immovable property, unless there are no claimants, which would be rare. Language of Section 102 of the Code does not support the interpretation that the police officer has the power to dispossess a person in occupation and take possession of an immovable property in order to seize it. In the absence of the legislature conferring this express or implied power under Section 102 of the Code to the police officer, we would hesitate and not hold that this power should be inferred and is implicit in the power to effect seizure.

30. Equally important, for the purpose of interpretation is the scope and object of Section 102 of the Code, which is to help and assist investigation and to enable the police officer to collect and collate evidence to be produced to prove the charge complained of and set up in the charge-sheet. The section is a part of the provisions concerning investigation undertaken by the police officer. After the charge-sheet is filed, the prosecution leads and produces evidence to secure conviction. Section 102 is not, per se, an enabling provision by which the police officer acts to seize the property to do justice and to hand over the property to a person whom the police officer feels is the rightful and true owner. This is clear from the objective behind Section 102, use of the words in the section and the scope and ambit of the power conferred on the criminal court vide Sections 451 to 459 of the Code.

31. The expression "circumstances which create suspicion of the commission of any offence" in Section 102 does not refer to a firm opinion or an adjudication/finding by a police officer to ascertain whether or not "any property" is required to be seized. The word "suspicion" is a weaker and a broader expression than "reasonable belief" or "satisfaction". The police officer is an investigator and not an adjudicator or a decision maker. This is the reason why the Ordinance was enacted to deal with attachment of money and immovable properties in cases of scheduled offences.

32. In case and if we allow the police officer to "seize" immovable property on a mere "suspicion of the commission of any offence", it would mean and imply giving a drastic and extreme power to dispossess, etc. to the police officer on a mere conjecture and surmise, that is, on suspicion, which has hitherto not been exercised. We have hardly come across any case where immovable property was seized vide an attachment order that was treated as a seizure order by police officer under Section 102 of the Code. The reason is obvious. Disputes relating to title, possession, etc., of immovable property are civil disputes which have to be decided and adjudicated in civil courts. We must discourage and stall any attempt to convert civil disputes into criminal cases to put pressure on the other side (see Binod Kumar v. State of Bihar [Binod Kumar v. State of Bihar, (2014) 10 SCC 663 : (2015) 1 SCC (Cri) 203]). Thus, it will not be proper to hold that Section 102 of the Code empowers a police officer to seize immovable property, land, plots, residential houses, streets or similar properties. Given the nature of criminal litigation, such seizure of an immovable property by the police officer in the form of an attachment

and dispossession would not facilitate investigation to collect evidence/material to be produced during inquiry and trial.

33. As far as possession of the immovable property is concerned, specific provisions in the form of Sections 145 and 146 of the Code can be invoked as per and in accordance with law. Section 102 of the Code is not a general provision which enables and authorises the police officer to seize immovable property for being able to be produced in the criminal court during trial. This, however, would not bar or prohibit the police officer from seizing documents/papers of title relating to immovable property, as it is distinct and different from seizure of immovable property. Disputes and matters relating to the physical and legal possession and title of the property must be adjudicated upon by a civil court.

34. In view of the aforesaid discussion, the reference is answered by holding that the power of a police officer under Section 102 of the Code to seize any property, which may be found under circumstances that create suspicion of the commission of any offence, would not include the power to attach, seize and seal an immovable property.

42. Section 102 has been in the statute book for more than a century. Section 102 corresponds to Section 550 of the Code of Criminal Procedure, 1898. For more than a century the courts have read the words "any property" to mean movable property [*Textile Traders Syndicate Ltd. v. State of U.P.*, 1959 SCC OnLine All 207 : AIR 1960 All 405] , [*Kuriachan Chacko v. State of Kerala*, 2012 SCC OnLine Ker 31708 : (2012) 3 KLJ 620] , [*Brajesh Kumar Srivastava v. State of Bihar*, 2016 SCC OnLine Pat 2900 : (2016) 3 Pat LJR 464] and no decision to the contrary was brought to our notice. Reliance is only

placed on the judgment of this Court in *State of Maharashtra v. Tapas D. Neogy* [*State of Maharashtra v. Tapas D. Neogy*, (1999) 7 SCC 685 : 1999 SCC (Cri) 1352] . In that case, the question was totally different and this Court only decided that a bank account of an accused was property within the meaning of Section 102. The Court did not go into the question of movable or immovable property and, therefore, this judgment would not be applicable.

16. The legal position as emerges from the plain reading of Section 102 Cr.P.C. and also on perusal of law laid down by Hon'ble Supreme Court in the judgments aforesaid, is briefly summarized as under:

(i) The Police officer has the power to freeze "any" property either stolen or which may be found under the circumstances creating suspicion of commission of any offence. By using the words "any property" and "any offence", the legislature has made the applicability of Section 102 wide enough to cover any offences under any Act.

(ii) The preconditions for applicability of Section 102 of Cr.P.C. are:

(a) that there must be a property and

(b) that property is alleged or suspected to have been stolen or which may be found under circumstances which create suspicion of the commission of any offence.

(iii) Undoubtedly, a bank account is covered within the meaning of "property" under Section 102 (1) of Cr.P.C.

(iv) The Police Officer in course of investigation can seize any property under Section 102 Cr.P.C. if:

(a) such property is alleged to be stolen or

*(b) is suspected to be stolen or
(c) is the object of the crime
under investigation or*

*(d) has direct link with
commission of offence for which the Police
Officer is investigating*

*(v) So far as the procedure of
issuing instructions to freeze the bank
accounts, the Police Officer is required to
give an intimation of such freezing of
account to the concerned Magistrate.*

*(vi) Before issuing instructions to
bank for freezing the bank account there is
no requirement of issuing any prior notice
to the account holder before freezing of the
bank account.*

*(vii) Under Section 102 of
Cr.P.C. immovable property in its strict
sense cannot be seized though the
documents of title relating to immovable
property can be seized. Power under
Section 102 would not include the power to
attach, seize and seal an immovable
property.*

*(viii) Once the investigation is
complete and Police report is submitted to the
Court concerned it is open for the person whose
account has been frozen during investigation,
to apply for defreezing of the bank account
before the concerned Magistrate in terms of
Section 102 (3) of Cr.P.C. and persuade the
Court concerned that the said bank account is
no more necessary for the purpose of
investigation. If such application is filed, the
Court concerned shall consider the request in
accordance with law, and after hearing the
investigation agency, may allow the application
and direct defreezing of such bank account.
While doing so, the Court concerned may
impose conditions as may be warranted in the
facts and situations of the case.*

17. Since it is admitted case of the parties that a charge sheet has already been filed, therefore, we permit the petitioners to

move an application before the concerned court for release of their bank account in the light of the law laid down by Hon'ble Supreme Court in the case of **Teesta Atul Setalvad (supra)**.

18. In the event such an application is filed by the petitioners before the concerned Court/Magistrate, it shall be decided by the concerned Court/Magistrate in accordance with law, expeditiously, preferably within two months from the date of submission of the application.

19. The writ petition is **disposed** of with the observations made above.

(2023) 7 ILRA 357

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.05.2023

BEFORE

**THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS BUDHWAR, J.**

Writ-C No. 6415 of 2023

And

Writ-C No. 3217 of 2023

Pramod Sharma & Ors. ...Petitioners

Versus

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

Counsel for the Petitioners:

Sri Anil Kumar Shukla, Sri Anuj Srivastava,
Sri Ramesh Kumar

Counsel for the Respondents:

C.S.C., Sri Mahesh Narain Singh, Sri Ravi
Prakash Pandey

**Civil Law - Land Acquisition Act, 1894 -
Sections 11(2), 18 & 28A - The Uttar
Pradesh Land Acquisition (Determination
of Compensation and Declaration of
Award by Agreement), 1997 Key Issues: 1.**

Whether petitioners who accepted compensation under the Karar Niyamawali without protest can claim enhanced compensation determined by the reference court for other claimants ? 2. Whether merely being a "person interested" under the Act is sufficient to claim re-determination of compensation under Section 28A ? *Held:* Petitioners, having accepted the compensation without protest, are not "aggrieved persons" within the meaning of the Act and therefore cannot claim enhanced compensation. Petitioners who received compensation without objection fall outside the definition of "aggrieved persons" under the Act. Entire proceedings were completed before the insertion of Section 28A into the Land Acquisition Act, 1894. Being an "interested person" does not automatically entitle a landowner to redetermination of compensation; they must also be "aggrieved."

Dismissed. (E-5)

List of Cases cited:

1. *Babua Ram & ors. Vs St. of U.P.* (1995) 2 SCC 689

2. *Special Land Acquisition Officer Vs Lakshmanbabu Gayakward & ors.*, judgment dated 14.11.2006

3. *Ranveer Singh Vs St. of U.P.*, AIR 2016 SC 3753

4. *Ishwarilal Premchand Shah & ors. Vs. St. of Guj. & ors.*, (1996) 4 SCC 174

5. *Kainash Ram Kochar Vs St. of U.P. & ors.*, 2011 (8) ADJ 9

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Since common question of law is involved in both the petitions, the same are being decided by a composite order.

2. For the sake of clarity Writ-C No.6415 of 2023 is being treated as a leading petition.

3. The present petition under Article 226 of the Constitution of India was presented on 28th February, 2023 and on 3.3.2023 this Court proceeded to pass the following order:-

“The order of rejection of the application under Section 28A filed by the petitioner herein indicates that the petitioners have accepted the award prepared by the Collector under Section 11(2) of the Land Acquisition Act. The issue, therefore, is as to whether after accepting compensation under the Karar Niyamawali, the petitioners can claim higher compensation determined under the reference court award, filed by such persons who did not accept the award.

Learned counsel for the petitioners prays for and is granted adjournment for the day to enable him to go through the matter to make his submission.

As prayed, put up this matter as fresh on 20.03.2023.”

4. Thereafter the matter was taken on 21.4.2023 wherein this Court passed an order which is extracted as below:-

“Case is called out. No one appears on behalf of the petitioners to press the case.

Sri Apurva Hajela, learned Standing Counsel appears for the State-respondents.

Put up this case in the additional cause list on 27.04.2023 at 02:00PM.”

5. Today when the matter has been taken up, nobody appears either in the

leading writ petition or in the connected writ petition, despite that on earlier occasion also the learned counsel for the writ petitioners were not present. Since both the cases are connected together and were directed to be placed on 27.4.2023 as a date fixed matter at 2.00 p.m. nobody appeared for the petitioners thus after hearing Sri Apoorv Hajela learned Standing Counsel for the State-respondents and Sri M.N. Singh, who appears for the third respondent, Ghaziabad Development Authority, Ghaziabad, the court is proceeding to decide the matters.

6. The case of the writ petitioners in the leading writ petition is that, they claim to be the recorded owners of certain piece of land situate in Tehsil Loni, Pargana and District Ghaziabad. As per the pleadings, acquisition proceedings were initiated by the State of U.P. under the provisions of the Land Acquisition Act, 1894 (In Short the Act, 1894) for public purpose. The notification purported to be under Section 4(I) of the Act, 1894 was issued on 9.2.1962. Possession of the acquired land was taken on 26.5.1963, the award was made on 1.2.1964 for 236.7735 acres of land and a total compensation of Rs.7,35,707.24 was awarded.

7. It is the case of the writ petitioners that the compensation was initially awarded @ Rs.1.92 per square yard for the first belt, Rs.0.96 per square yard for the second belt and 0.48 per sq. yard for third belt which was found to be inadequate, so references were made under Section 18 of the Act, 1894 before the District Judge, Ghaziabad by various claimants.

8. It is further the case of the writ petitioners, that they did not prefer any objection under Section 18 of the Act, 1894.

The objections of the land owners (not the writ petitioners) were registered as LAR No.172 of 1989 which was connected with other land acquisition references and by virtue of the order dated 10.4.1992 passed in LAR No.172 of 1989 and LAR No.18 of 1989, the reference court enhanced the compensation to the tune of Rs.40 per square yard, the claimants were also made entitled to additional amount calculated at the rate of 12% per annum from the date of the acquisition under Section 4(I) of the Act, 1894 i.e. 9.2.1962 to the date of taking possession on 26.5.1993, solatium at the rate 30% on the market value of the land sought to be acquired while further entitling the claimants to get interest at @ 9% per annum w.e.f. the date of taking of possession and @ 15% per annum w.e.f. 26.5.1964 till the date of the payment made within a period of six weeks, from the passing of the award in question.

9. In paragraph 8 of the writ petition the writ petitioners have come up with stand that they preferred an application under Section 28A of the Act, 1894 for redetermination of the amount of compensation on the basis of the award of the reference court. It is further the case of the writ petitioners that against the order of the reference court dated 10.4.1992 the third respondent, Ghaziabad Development Authority, Ghaziabad preferred Appeals under Section 54 of the Act, 1894 before this Court which was registered as First Appeal No.525 of 1992, Ghaziabad Development Authority vs. Ram Krishna (Dead) and the land owners also filed appeal for enhancement of compensation which came to be dismissed by Division Bench of this Court on 1.12.2014,

10. Aggrieved, against judgement and order dated 1.12.2014 passed in First Appeal No.525 of 1992, Ghaziabad

Development Authority vs. Ram Krishna (Dead) along with the connected appeals, the third respondent, Ghaziabad Development Authority approached the Hon'ble Apex Court while filing Civil Appeal No.1710 of 2016, Ghaziabad Development Authority vs. Ram Krishna (Dead) and others which along with the connected appeals came to be decided by virtue of the judgement and order dated 23rd February, 2016 determining compensation @ Rs.42.50 per sq. Yard.

11. However, on 2.5.2022 the second respondent, Collector/ (ADM) LA, Ghaziabad proceeded to reject the application preferred by the writ petitioners under Section 28A of the Act, 1894.

12. Questioning the said order, the writ petitioners have filed the present writ petition inter alia with the following reliefs:-

“I. Issue a writ of certiorari for quashing of the impugned order dated 02.05.2022 passed by the respondent no. 2 upon Application No. 67 of 1992 preferred under Section 28A of the Land Acquisition Act, 1894 (Annexure No. 2 to this Writ Petition).

II. Issue a writ order or direction in the nature of mandamus directing the respondents to re-determine the compensation in the light of judgment and order passed by this Hon'ble Court in First Appeal No. 525 of 1992 and the judgment and order passed by Hon'ble Apex Court in Civil Appeal No. 1710 of 2016, (GDA Vs. Ram Kishan and others).

III. Issue a writ, order or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

IV. Award the cost of the writ petition to the petitioner.”

13. Pleadings in the writ petition reveals that the principal ground of challenge made to the order dated 2.5.2022 of the second respondent, Collector/A.D.M. (L.A.) Ghaziabad in the proceedings purported to be under Section 28 of the Act, 1894 is on the premise that once the land of the writ petitioners was put to acquisition by the same notification whereupon the land of the claimants who had preferred application under Section 18 of the Act, 1894 culminated into grant of enhanced compensation, then the writ petitioners being similarly situated are entitled to get enhance compensation in view of the provisions of Section 28A of the Act, 1894.

14. It has also been averred in the writ petition that Section 28A of the Act, 1894 is a beneficial section which enjoins the court to redetermine the amount of compensation on the basis of the award of the court and it is not dependent upon the fact as to whether the land owner has accepted compensation either under protest or without protest. What is material for attracting the said provision is that the land which is put to acquisition should be relatable to the same notification which on the motion of the other land owners while seeking reference under Section 18 of the Act, 1894 were made entitled to higher compensation.

15. Sri Apoorv Hajela learned Standing Counsel, who appears for the State-respondents on the other submits that the order passed by the second respondent, Collector/ADM (LA) Ghaziabad does not suffer from any illegality particularly in view of the fact that once as per the own

saying of the writ petitioners, they have accepted the compensation under Section 11(2) of the Act without any protest in terms of an agreement (Karar Niyamawali) then they have acquiesced to the quantum and determination of the compensation, and would not come within the definition of aggrieved persons so as to claim benefit under Section 28A of the Act, 1894.

16. Reliance has also been placed upon the judgement in the case of **Babua Ram and others vs. State of U.P. & another reported in (1995) 2 SCC 689**, followed by a Division Bench Judgement of the Karnataka High Court in the case of the **Special Land Acquisition Officer vs. Lakshmanbabu Gayakward and others** decided on 14th November, 2006, **Ranveer Singh vs. State of U.P.** reported in **AIR 2016 Supreme Court 3753**, **Ishwarilal Premchand Shah and others vs. State of Gujarat and others** reported in **(1996) 4 SCC 174**, and **Kainash Ram Kochar vs. State of U.P. and others** reported in **2011 (8) ADJ 9, Writ-C 16574 of 2017 Prakash vs. State of U.P.** decided on 20.4.2023.

17. Before delving into the issues raised in the writ petition, it would be appropriate to notice the relevant statutory provisions of the Land Acquisition Act, 1894 which are germane to the issue in question:-

3(b) the expression “person interested” included all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act; and a person shall be deemed to be interested in land if he is interested in an easement affecting the land.

11. Enquiry and award by Collector.-(1)] On the day so fixed, or any

other day to which the enquiry has been adjourned, the Collector shall proceed to enquire into the objections (if any) which any person interested has stated pursuant to a notice given under section 9 to the measurements made under section 8, and into the value of the land '[at the date of the publication of the notification under section 4, sub-section (1)], and into the respective interests of the persons claiming the compensation and shall make an award under his of-

(i) the true area of the land;

(ii) the compensation which in his opinion should be allowed for the land; and

(iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him:

Provided that no award shall be made by the Collector under this sub section without the previous approval of the appropriate Government or of such officer as the appropriate Government may authorise in this behalf:

Provided further that it shall be competent for the appropriate Government to direct that the Collector may make such award without such approval in such class of cases as the appropriate Government may specify in this behalf.

(2) Notwithstanding anything contained in sub-section (1), if at any stage of the proceedings, the Collector is satisfied that all the persons interested in the land who appeared before him have agreed in writing on the matters to be included in the award of the Collector in the form prescribed by rules made by the appropriate Government, he may, without making further enquiry, make an award according to the terms of such agreement.

(3) The determination of compensation for any land under sub-section (2) shall not in any way affect the determination of compensation in respect of other lands in the same locality or elsewhere in accordance with the other provisions of this Act.]

(4) Notwithstanding anything contained in the Registration Act, 1908 (16 of 1908), no agreement made under sub-section (2) shall be liable to registration under that Act.]

18. Reference to Court.-(1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made,—

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire.

28A. Re-determination of the amount of compensation on the basis of the award of the Court.—(1) Where in an award under this Part, the Court allows to the applicant any amount of compensation

in excess of the amount awarded by the Collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application the Collector under section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the Court:

Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.

(2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard, and make an award determining the amount of compensation payable to the applicants.

(3) Any person who has not accepted the award under sub-section (2) may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court and the provisions of sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under section 18.]

**The Uttar Pradesh Land Acquisition
(Determination of Compensation and
Declaration of Award By Agreement),
1997**

A short title, extent and commencement.—(1) These rules may be called the Uttar Pradesh Land Acquisition (Determination of compensation and

Declaration of Award by Agreement) Rules, 1997

(2) They shall extend to the whole of the Uttar Pradesh.

(3) They shall come into force with effect from the date of their publication in the Gazette.

2. The body or Department for which the land if being acquired may, any stage of the proceedings settle down the terms and conditions and terms of the land under acquisition, with the land owners and appear before the Collectors and make an application indicating the terms and conditions so settled down and its readiness and willingness for termination of compensation and declaration of award in accordance with agreement. The Collector shall, if satisfied, issue notice to the persons interested in the land under acquisition to express their readiness and willingness to execute the agreement in writing, on the matters to be included in the award.

3. The Collector may, after hearing the parties, and upon being satisfied that the persons interested in the land are ready and willing to execute the agreement, grant the permission unless, for reasons to be recorded in writing he decides to refuse it.

4. (1) The Collector shall, where he grants the permission inform the persons interested in the land by registered post, about date, time and place for the execution of the agreement.

(2) The agreement shall be executed in the form appended to these rules, with necessary details as to whether possession has, or has not, been taken before the award.

(3) If the persons so informed fail to turn up and execute the agreement on such date, time and place or the extended date, as the case may be, the Collector shall proceed to make enquiry under Section 11

from the stage, at which the application under Rule 2 was made.

5. The amount of compensation to be settled in the agreement shall, always abide by the instructions issued by the State Government of Uttar Pradesh from time to time.

6. (1) When an agreement is discovered to have been fraudulently executed, the Collector shall, suo motu, or on an application made in that behalf, cancel the agreement after affording a reasonable opportunity of being heard to the persons who have executed the agreement.

(2) In case of cancellation of the agreement under sub-rule (1) the executants shall have no right to claim any compensation or damages from the State Government.

FORM OF AGREEMENT

[See Rule 4 (2)]

Agreement to be executed when land is acquired for public purposes by interested and the acquiring body.

This agreement made this day of.....corresponding to Saka samvat the day of 20.....between (1)

.....(2)..... etc. hereinafter called the owner/owners (which expression shall unless repugnant to the context or meaning thereof excludes his/their heirs, executors and administrators) and (1).....

.....(2).....etc..... hereinafter called the interested party/parties', which expression shall unless repugnant to the context or meaning thereof includes his/their successors and assignees (to be scored out if there is no interested party) of the one part and the Governor of Uttar Pradesh acting through..... hereinafter called the 'Government' of the other part;

And whereas the right, title and interest of the owner/owners and the interested party/parties in the following land/lands hereinafter called the said land/lands, is/are as specified below :

(a)

(b)

Now, therefore, the owner/owners and/or interested party/parties does/do hereby agrees/agree with the Government as follows:

(1)

(2)

(3) that the owner/owners and interested party/parties shall not claim any amount in addition to the amount agreed upon as aforesaid as compensation and accept it without any protest:

(4) if hereafter or after the payment of compensation as per the award it transpires that the owner/owners and/or the interested party/parties is/are not entitled at all or is/are not exclusively entitled to the entire amount of compensation awarded by the Land Acquisition Officer..... in the term of this agreement in respect of the said land/lands as mentioned at the end, and the Government is required to pay any compensation to any other person, the owner/owners and the interested party/parties shall on demand refund to the Government the entire amount of money received by him/them or such amount as may be determined by the Land Acquisition Officer.....as refundable by him/them and against all proceedings and abilities of any loss or damage suffered or any costs, charges or expenses incurred by Government by reason of the payment to him/them and the owner/owners and the interested party/parties shall pay the interest at the rate of 9% on the amount so refundable for

the first year and at the rate of 15% for the subsequent years;

5)

6)

7)

8)

18. It is the own case of the writ petitioners, that the acquisition proceeding of the land of the writ petitioners was undertaken under the provisions of the Act, 1894 while issuing the notification under Section 4(1) of the Act, on 9.2.1962, the possession of the land was taken on 26.5.1963 and award was made on 1.2.1964. The order impugned under Section 28A of the Act, 1894 of the second respondent itself records a categorical finding that the ancestors of the writ petitioners have themselves accepted the award in pursuance of an agreement (Karan Niyamawali) executed with the respondents.

19. The only question which arises for determination is as to whether the writ petitioners can claim enhanced compensation on the premise that the other co-land owners pursuant to the order of the court of law were paid higher compensation.

20. Section 11 of the Act, 1894 is in two parts. The first part referable to Sub-Section (1) envisages the procedure to be adopted while taking recourse for passing award after making necessary inquiries by the Collector in view of the different parameters to be arrived for awarding compensation. The second part being, Section 11(2) pertains to the inquiry and award by the Collector, pre-supposes a contingency wherein notwithstanding anything contained in the first part in any stage of the proceedings, the Collector is

satisfied that all the persons interested in the land who had appeared before it have agreed in writing on the matter to be included in the award of the Collector in the form prescribed by the Rules made by the appropriate authority, the Collector is empowered to make further inquiry and proceed to declare an award according to the terms of the agreement.

21. As a matter of fact Sub-Section (2) of Section 11 of the Act, 1894 is dependent upon the offer made by the Collector and the acceptance of the said offer by the land owner upon the terms of the award which also includes the amount of compensation to be paid to the land owner.

22. Further Section 18 of the Act, 1894 contemplates reference to the Court at the instance of a person who is interested and who has not accepted the award while filing a written application to the Collector requiring the matter to be referred by the Collector for the determination of the Court with regard to the amount of compensation to the persons, whom it is payable or the apportionment of the compensation amount to the interested persons.

23. Then comes Section 28A of the Act, 1894 which deals with re-determination of the amount of compensation on the basis of the award of the court.

24. Section 28A of the Act, 1894 provides that pursuant to the declaration of an award, the Court allows to an applicant an amount of compensation in excess of the amount awarded by the Collector under Section 11 of the Act, 1894, the persons interested in all the other land covered by the same notification under Section 4(1) of

the Act, 1894 and who are also aggrieved by the award may notwithstanding that they had not made an application to the Collector under Section 18 of the Act, 1894 by written application to the Collector within three months from the date of the award of the Collector, require that the amount of compensation payable to them may be redetermined on the basis of the amount of compensation awarded by the court.

25. The words employed “aggrieved” in Section 28A of the Act, 1894 clinches the entire issue. Though the word “aggrieved” has not been defined in the Act, 1894, but the definitions of “aggrieved” is to be borrowed from the various dictionaries which are often cited.

26. A conjoint reading of Section 11(2), Section 18 and 28A of the Act, 1894 shows that the word aggrieved is to be read in-conformity and conjunction with compensation. Section 11(2) is an exception and it starts with the word “notwithstanding” having overriding effect.

27. The legislature was quiet conscious and oblivious of the contingencies which might arise when a section of land owners did not intend to enter into long drawn legal battle challenging the award with respect to the acquisition proceedings as well as the amount of compensation being awarded to them and in turn wanted to settle the compensation in lieu of the land acquired thus these circumstances occasioned insertion of Sub-Section (2) in the Section 11 of the Act, 1894.

28. As already discussed, Sub-Section (2) of Section 11 of the Act, 1894 starts

with the word “notwithstanding anything contained in Sub-Section (1)” meaning thereby that it has a overriding effect so as to give a window to the land owners whose land is being acquired to enter into negotiation by mode of agreement settling their issues with regard to compensation. The agreement envisaged under Section 11(2) (Karar Niyamawali) has a statutory backing from Section 11(2) of the 1894 Act. Notably the said agreement also confirms to the provisions of the Contract Act, 1872 and thus the principles enshrined for making it a concluded contract stands applied, namely, floating of an offer by one party and the acceptance of the same by the second party.

29. Nonetheless, post independence in exercise of the powers conferred by Sub-Section (1) of Section 55 of the Act 1894, the Governor was pleased to frame the Uttar Pradesh Land Acquisition (Determination of Compensation and Declaration of Award By Agreement), 1997 which contained a specific stipulation, that the amount of compensation accepted by the land owner through consent and agreement would be final and it would be without protest.

30. Though the word “aggrieved” has not been defined in the Act, 1894 but the word “person interested” has been defined under Sub-Clause (b) of Section 3 of the Act, 1894.

31. As per the definition assigned to “person interested” it includes all persons claiming an interest in compensation to be made on account of acquisition of the land under the Act and a person shall be deemed to be interested in land if he is interested in easement affecting the land.

32. The words “person interested” finds place in Sub-Section (1) and (2) of

Section 11 and Section 18. However, in Section 28A of the Act, 1894 besides the word “persons interested” the words “aggrieved” are employed. The words “person interested” in all other land and “aggrieved” by the award of the Collector are crucial and they are to govern the controversy at hand. Merely being an interested person would not ipso facto cloth the land owner for redetermination of the compensation as along with it he should be “aggrieved” also. The basic purpose of insertion of both the words “interested person” as well as aggrieved is relatable to the fact that a person may be interested but in order to be aggrieved party it should sustain a legal injury for putting the legal action in motion. Since the writ petitioners belong to a section who have received the compensation without protest thus they might be an interested person but they do not come within the definition of aggrieved persons.

33. The word ‘aggrieved’ employed in Section 28 of the Act, 1894 has been considered in detail by the Hon’ble Supreme Court in the case of **Babua Ram and others (Supra)** wherein following has been observed as under:

16. In *Krapa Rangiah v. Special Dy. Collector, Land Acquisition*¹¹ this Court observed that in an acquisition proceedings, lands situated in the same locality and in the neighbouring locality when are possessed of the same comparable advantages, the owners of the former lands are entitled to the same rate of compensation as the owners of other lands as determined by the judgment of the High Court which had become final as otherwise, it would be inequitable and discriminatory. In other words, the owners of the lands possessing the same kind and same quality

etc. are entitled to parity in payment of compensation for their lands. Section 28-A(1) is intended to overcome the hurdle created by Section 18(1) and 2nd proviso to Section 31(2) in the matter of obtaining equal compensation for similar acquired lands. Equal compensation for similar acquired lands could be got by all the interested persons, if their lands are acquired under the same notification. In other words, if an owner fails to avail of the right and remedy under Section 18(1), Section 28-A(1) grants an extra right and remedy for redetermination of the compensation payable to him for his land on the basis of an award of the court giving to an owner of another land covered by the same notification under Section 4(1) and under the same award. The payment of higher compensation to his neighbouring landowner makes an applicant an aggrieved person to claim redetermination of the compensation payable to him for his land. The person aggrieved, therefore, in this context, would mean a person who had suffered legal injury or one who has been unjustly deprived or denied of something, which he would be interested to obtain in the usual course or similar benefits or advantage or results in wrongful affectation of his title to compensation.

(17. In Collin's English Dictionary, the word 'aggrieved' has been defined to mean "to ensure unjustly especially by infringing a person's legal rights". In Webster's Comprehensive Dictionary, International Edition at page 28, aggrieved person is defined to mean "subjected to ill-treatment, feeling an injury or injustice. Injured, as by legal decision adversely infringing upon one's rights". In Stroud's Judicial Dictionary, 5th Edn., Vol. 1, pages 83-84, person aggrieved means "person injured or damaged in a legal sense". In Black's Law Dictionary, 6th Edn.

at page 65, aggrieved has been defined to mean "having suffered loss or injury; damnified; injured" and aggrieved person has been defined to mean:

"One whose legal right is invaded by an act complained of, or whose pecuniary interest is directly and adversely affected by a decree or judgment. One whose right of property may be established or divested. The word 'aggrieved' refers to a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition upon a party of a burden or obligation."

18. The person aggrieved must, therefore, be one who has suffered a legal grievance because of a decision pronounced by civil court giving higher compensation for the acquired lands similar to his own while he is denied of such higher compensation for his land because of operation of Section 18 read with Section 31 of the Act resulting in affectation of his pecuniary interest in his acquired land directly and adversely by that award of the Collector made under Section 11. As such he becomes an aggrieved person entitled to avail of the right and remedy conferred upon him under Section 28-A(1) to make good his denied right to receive compensation in excess of the amount awarded by the Collector/LAO. Acceptance of the contention of Shri G.L. Sanghi, learned Senior Counsel and his companions, that persons who under protest received payment of compensation for their lands but failed to avail of the right and remedy under Section 18 waiting in the wings for success of the landowners of the adjoining lands to get higher compensation under Section 28-A(1) as person aggrieved robs the poor and inarticulate who by reason of their poverty or ignorance failed to avail of the right and remedy under Section 18, and creates not only invidious

discrimination between same class of persons similarly situated but would be highly unjust and arbitrary offending Article 14 of the Constitution, apart from flying in the face of express animation of the statute as espoused in its Statement of Objects and Reasons and the Financial Memorandum. In this a context, we make it clear that we have looked into Statement of Objects and Reasons and the Financial Memorandum to know what is it that induced the introduction of the Bill but not as an aid to interpret Section 28-A(1). Therefore, we have no hesitation to hold that any interested person in the land acquired under the same notification published under Section 4(1) who failed to avail the right and remedy under Section 18(1) read with second b proviso to Section 31(2), becomes a person aggrieved under Section 28-A(1) of the Act when the owner of the other land covered by the same notification is awarded higher compensation by the civil court on a reference got made by him under Section 18.

19. The next question is as to when the period of limitation of three months begins to run under Section 28-A and whether successive awards c made by civil court at different times in respect of the land covered by the same notification furnish separate causes of action for making applications under Section 28-A. Let us consider the meaning of the words "an award under this part" referred to in Section 28-A(1) which is Part III of the Act. The heading to that part begins by reference to court and its procedure. The 'court' means a principal civil court of original jurisdiction or a special d judicial officer appointed to perform the functions of the court under the Act as becomes clear as is noticed already. What are the matters to be considered in determining the

compensation on a reference made to it under Section 18, is detailed in Section 23 while matters to be neglected in determining such compensation are indicated in Section 24. By operation of sub-section (2) of Section 26, the award made determining the amount of compensation shall be deemed to be a decree while the statement of the grounds of every such award is deemed to be the judgment, for the purpose of Code of Civil Procedure. The above perspectives from Part III make it clear that the award of the court is that of the civil court of original jurisdiction in that part. It is a decree for the purpose of an appeal under Section 54 which falls in Part VIII of the Act (Miscellaneous). The decree as defined in Section 2(2) CPC is the f decree of the High Court, which shall be appealable to the Supreme Court under Articles 132, 133 and 136 read with Order 45 CPC. Hence, the award of the court referred to in sub-section (1) of Section 28-A is only the award of the civil court of original jurisdiction or of judicial officer performing the functions of such court under the Act on reference received by it under Section 18 and an award and decree pronounced under Section 26 of the Act.

Since, the judgment and decree of the High Court under Section 54 or of this Court do not come in Part III of the Act, they stand excluded from an award envisaged under sub-section (1) of Section 28-A. The aggrieved interested person, therefore, is entitled to the right and remedy of making an application under Section 28-A for redetermination of compensation for his acquired land only on the basis of the award of the civil court or judicial h officer which is a judgment and decree under Section 26 when such award grants compensation in excess of the amount awarded by the Collector under

Section 11. When such an application is made in writing by the aggrieved person, notwithstanding the fact of his having received compensation under Section 31 without protest and of not availing the right and remedy of the a reference under Section 18, the redetermination of the compensation under Section 28-A(1) is required to be done.

34. Following the said judgement the Karnataka High Court in the case of **Lakshmanbabu Gayakward (Supra)** had held as under :-

24. In our considered opinion, when a person interested in the land having opted for consent award under Section 11(2) of the Act, is not entitled to seek any reference for enhancement of the compensation under Section 18 read with Section 23(1) of the Act, and cannot be an 'aggrieved person' to claim re-determination of the amount of compensation on the basis of the award of the Civil Court.

25. The award made under Section 11(2) of the Act in terms of the agreement is a valid award under the Act. It has all the ingredients of a 'composition deed', a deed by which one party compounds with another. This term is normally used when there is an agreement between a debtor and a creditor. It simply means an agreement made by the debtor with the creditor to pay specified amount and which is accepted by the creditor in satisfaction of their entire claims whatever thus proffered. A creditor having accepted the offer made, thereafter cannot contend that he was unjustly deprived of his claims and then agitate the matter in a law suit. A case law nearer to the point is the one decided by a Full Bench of this Court in the case of *S.V. Bagi v. State of Karnataka* 87

STC 138, while explaining whether a person, who had opted for composition, can he be called an aggrieved person, has observed that, "a person, who had opted for composition in lieu of prosecutions and penalties, etc., cannot be an aggrieved person". Further, the Full Bench of this Court has stated, that "the process of compounding is completed only when the money that is agreed upon actually changes hands. If this is so, there can never be a situation where the person who has committed or is reasonably suspected of having committed an offence under the Act can be an aggrieved person"

35. Nonetheless, in the case of **Ranveer Singh (Supra)** Hon'ble Apex Court in paragraph 11 observed as under-

11. On its face the aforesaid contentions appears to be attractive but on a closer analysis of Section 11 as well as Section 23 it is found to have no merits. Section 23 is for guidance of the court which gets jurisdiction to determine compensation afresh only if there is a protest against the award and the payment is received with protest. This section does not control the determination of just compensation by the Collector under Section 11 which requires the Collector to enquire into objections (if any) on different issues such as measurement and interests of the person claiming compensation and then further requires the collector to make an award which is required to reflect, inter alia, "the compensation which in his opinion should be allowed for the land." But it is more appropriate and relevant to notice sub-section (2) of Section 11 which is as follows:

"Notwithstanding anything contained in sub-section (1), if at any stage of the proceedings, the Collector is satisfied

that all the persons interested in the land who appeared before him have agreed in writing on the matters to be included in the award of the Collector in the form prescribed by rules made by the appropriate Government, he may, without making further enquiry, make an award according to the terms of such agreement.

This sub-section (2) of S. 11 begins with a non-obstante clause which makes it free of the requirements of sub-section (1) if all the persons interested in the land agree in writing as to what matters should be included in the award of the Collector. Thereupon the Collector is competent to make an award as per agreement without making further enquiry. In view of such clear provision that permits agreement to determine all the matters to be included in the award, all the inclusions and omissions in the consent award must be treated as based upon agreement of the parties and the final amount determined by way of agreement must be taken as a completely just compensation inclusive of the statutory interest payable to the claimant for the concerned land at least on the date of agreement. Since the agreed compensation amount is accepted without protest with a clear stipulation not to claim any additional amount, it has to be deemed that the compensation reflected in the consent award has taken into account all relevant factors including interest till the date of agreement. Moreover the right to seek reference for enhancement itself gets lost by accepting the compensation without protest especially when there is an agreement that the land owner shall not claim any amount in addition to the amount agreed upon as compensation and shall accept the compensation without any protest. In such circumstances agreed amount has to be treated as a just compensation permitting no addition or

substitution whatsoever. In other words, not only the remedy under the Act of seeking enhancement is lost but the substantive cause of action also vanishes when the land owner agrees for a consent award and the amount of compensation is accepted without any protest.”

36. In the case of **Ishwarilal Premchand Shah (Supra)** the Hon’ble Apex Court had the occasion to consider the import of the agreement entered under Section 11(2) of the Act, 1894 with regard to payment of additional amounts which was not the part and parcel of the agreement entered into between the parties. The following was observed:-

9. This Court in *State of Gujarat and Ors. v. Daya Shamji Bhai and Ors.* AIR1996SC133 had considered the similar contentions and held that once the parties have agreed under Section 11(2) of the Act, the Land Acquisition Officer has power under Section 11(2) to pass the award in terms thereof and that the award need not contain payment of interest, solatium and additional amount unless it is also part of the contract between the parties. The same ratio applies to the facts in this case. In view of the above clauses in the agreements the appellants are not entitled to the payment of additional amounts by way of solatium, interest and additional amount under the provisions of the Act.

37. As regards, the case of **Kainash Ram Kochar (Supra)** it holds that right and the entitlement to seek reference under Section 18 would only arise once the amount of compensation was received under the protest in writing with the intention of the owner for the non-acceptance of the award. Paragraphs 20 and 21 the following were observed:

“20. The right and entitlement to seek reference would, therefore, arise when the amount of compensation was received under protest in writing which would manifest the intention of the owner of non-acceptance of the award. Section 11(2) opens with an non-obstante of non-obstante clause "notwithstanding anything contained in sub-section (1)" and provides that if at any stage of the proceedings, the Collector is satisfied that all the persons interested in the land who appeared before him have agreed in writing on the matters to be included in the award of the Collector in the form prescribed by rules made by the appropriate Government, he may, without making further enquiry, make an award according to the terms of such agreement. By virtue of sub-section (4), "notwithstanding anything contained in the Registration Act, 1908, no agreement made under sub-section (2) shall be liable to registration under that Act". The award made under Section 11(2) in terms of the agreement is, therefore, an award with consent obviating the necessity of reference under Section 18.

21. The above case clearly lays down that once an agreement was entered by , 6, the que question of objection to receive compensation does not arise and they have right to make a reference under Section 18./The judgment of the Apex Court MANU/SC/0236/2005: State of Karnataka & Anr. v. Sangappa Dyavappa Biradar & Ors., was also a case of consent award.”

38. The reliance placed by the learned Standing Counsel who appears for the State respondents upon the judgement in the case of Prakash (Supra) mandates that once the compensation has been received pursuant to the Karar Niyamawali then the question with regard to the practising of fraud is not

open to be raised in writ jurisdiction as for the said purpose the affected party has a remedy of filing civil suit. The said judgement is not applicable in the facts of the case particularly when there is no challenge to the agreement on allegation of fraud.

39. Another issue which needs to be also noticed at the stage is that Section 28A of the Act, 1894 was inserted by Act no.68 of 1984 w.e.f. 24.9.1984. As per the pleadings in the writ petition the acquisition proceedings were initiated while issuance the notification under Section 4(1) of Act on 9.2.1962 possession whereof was taken on 26.5.1963 and award was declared on 1.2.1964 thus the entire acquisition proceedings came to an end prior to the insertion of the Section 28A of the Act, 1894. Moreover once a specific finding has been recorded that the ancestors of the writ petitioners have already accepted the compensation pursuant to the agreement on their freewill and open eyes then in the circumstances even otherwise the writ petitioners are not entitled to invoke Section 28A of the Act, 1894.

40. Notably on both the counts namely in absence of being the aggrieved party while accepting the compensation and further the entire proceedings stood completed prior to insertion of Section 28A of the Act, 1894, the writ petitioners are not entitled for being granted enhanced compensation.

41. Accordingly, we do not find that the order passed by the second respondent, Collector/ (ADM) LA, Ghaziabad rejecting the application of the writ petitioner under Section 28A of the Act, 1894 suffers from any patent illegality or error of law.

42. The writ petition is accordingly, **dismissed**.

43. No order as to cost.

(2023) 7 ILRA 372

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 11.07.2023

BEFORE

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

Writ-C No. 11008 of 2023

Ram Naresh Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Anant Vijay, Sri Ishir Sripat, Sri Pramod Kumar Srivastava, Sri Shiv Singh, Sri Rahul Sripat (Senior Adv.)

Counsel for the Respondents:

C.S.C.

A. Local Body – UP Panchayat Raj Act, 1947 – Section 95 (1)(g) – UP Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 – Rules 3, 4 & 5 – Removal of Pradhan – Seizure of administrative and financial power – Preliminary enquiry – Block Development Officer constituted the enquiry committee, on the report of which the District Magistrate passed the impugned order of seizing the power – Permissibility – Held, the preliminary enquiry as is required to be conducted by an Enquiry Officer contemplated under Rule 2(c) of the Rules, 1997 namely either the District Panchayat Raj Officer or any other district level officer to be nominated by the District Magistrate, has not been conducted in the present case – An elected representative can be removed only and strictly in accordance with law –

The enquiry report dated 14.11.2022 can only be treated as a complaint made by the Block Development Officer, i.e. public servant – High Court quashed the impugned order declaring it bad in law. (Para 24, 26, 27 and 28)

B. Interpretation of Statute – Circular – Contradiction with the provision of an Act and Rules – Applicability – Held, Circular dated 28.02.2014 cannot prevail over the provisions of the relevant Act and Rules as the same is having no statutory force. (Para 25)

C. Practice and Procedure – Constitution of India, 1950 – Article 226 – Writ – Matter arising out of the action against the Gram Pradhan – Locus standi of a member of Gaon Sabha – Impleadment sought – Permissibility – High Court rejected impleadment application of the person claiming as a member of Gaon Sabha – *Narendra Kumar's case* relied upon. (Para 2 and 3)

Writ petition allowed. (E-1)

List of Cases cited:

1. Narendra Kumar Vs St. of U.P. & ors.; 2013(1) ADJ 228
2. Writ C No. 30938 of 2018; Mahmood Ansari Vs St. of U.P. & ors. decided on 21.12.2018

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

1. This impleadment application has been filed by one of the members of the Gaon Sabha.
2. Learned counsel for the petitioner submits that member of the Gaon Sabha cannot file a petition as he has no locus and has placed reliance upon the judgment of this Court in the case of ***Narendra Kumar vs. State of U.P. and others reported in 2013(1) ADJ 228.***

3. In view of the above, the impleadment application is *rejected*.

Order on the writ petition

1. Heard Sri Rahul Sripat, learned Senior Advocate assisted by Sri Ishir Sripat, learned Advocate, learned counsel for the petitioner and Sri P.K. Giri, learned Additional Advocate General assisted by Sri Rishi Kumar, learned Additional Chief Standing Counsel for the State-respondents.

2. This writ petition has been filed by the petitioner with a prayer to quash the impugned order dated 23.03.2023 passed by District Magistrate, District-Chitrakoot, seizing the administrative and financial power of the petitioner as Gram Pradhan and appointing three members committee for discharging the duty of Gram Pradhan.

3. The facts, in brief, are that the petitioner was duly elected as *Gram Pradhan* in Village- Pahari Bujurg, District-Chitrakoot in the general panchayat election held in the year 2021. Subsequently, some irregularities were found in the maintenance of Gaushala by the concerned Block Development Officer, therefore, to enquire about the matter, the Block Development Officer entrusted the same to a three member committee and accordingly, the committee submitted a report/complaint by letter dated 29.11.2022 informing the Chief Development Officer, Chitrakoot that the Gram Pradhan and Gram Panchayat Adhikari are not taking interest in the work under the “Swachha Bharat Mission”. The aforesaid complaint dated 14.11.2022 as well as letter dated 29.11.2022 was submitted before the District Magistrate, Chitrakoot, who in turn, vide order dated 30.12.2022, after recording prima facie satisfaction regarding

dereliction of duty as per Section 95 (1) (g) of the Uttar Pradesh Panchayat Raj Act, 1947 (hereinafter referred to as “the Act, 1947”), issue notice calling upon the petitioner to submit his explanation alongwith relevant documents within 28 days. Pursuant to the aforesaid notice dated 30.12.2022, the petitioner submitted explanation through registered post dated 16.01.2023, which was received on 23.01.2023 in the office of District Magistrate, Chitrakoot. After considering the explanation as submitted by the petitioner, the District Magistrate, Chitrakoot, based on the complaint of the Block Development Officer, found that the petitioner was prima facie guilty of misusing his post and he in totality failed to fulfil the duty and responsibilities attached to his post and passed the order dated 23.03.2023 seizing his power to exercise financial and administrative functions under “the Act, 1947”. Hence the present writ petition has been filed.

4. Learned counsel for the petitioner submits that as per the provisions of Section 95 (1)(g) of the U.P. Panchayat Raj Act, 1947, which provides for the removal of *Pradhan*, the District Magistrate is empowered to pass an order of removal of an elected *Pradhan* and pending final enquiry, the financial and administrative functions are to be performed by a Committee consisting of three Members as indicated in the proviso of Section 95(1)(g) of “the Act, 1947”. The learned counsel for the petitioner has drawn the attention of this Court to Rule 3 of the U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 19972 (hereinafter referred as “the Rule”), which provides for a complaint to be made by a complainant duly supported by an affidavit of the complainant as well as the affidavit

of any other person from whom the information is said to have derived.

5. Rule 4 of the said Rules provides for the manner in which the District Magistrate shall proceed after the receipt of the complaint referred to in Rule 3. The provision of Rule 4 is that on receiving a report referred to in Rule 3, the State Government or the District Magistrate shall order an enquiry to be conducted known as 'preliminary enquiry' with a view to finding, if there is *prima-facie* case for a proper enquiry in the matter. The said enquiry is to be conducted by Enquiry Officer. The term of Enquiry Officer is defined in Section (2) (c) of the Rules which defines Enquiry Officers means Deputy Panchayat Raj Officer or any other District level officer, to be nominated by the District Magistrate.

6. It is relevant to quote here Rule 2 (c) of the Rule, 1997, which reads as under:-

“Enquiry Officer' means the District Panchayat Raj Officer or any other district level officer, to be nominated by the District Magistrate.”

7. In view of the specific provisions of the Rules, counsel for the petitioner has argued that the Rules are mandatory and the Enquiry Officer who has conducted the enquiry and on whose enquiry the impugned order has been passed is not an officer, who is competent under the Rules and thus, the impugned order relying upon an enquiry which is without jurisdiction, is liable to be held bad in law.

8. Learned counsel for the petitioner further submits that in the present case, it is the Block Development Officer, who has

constituted a committee to conduct preliminary enquiry, which is clear violation of the provisions of the aforesaid rule as the Block Development Officer cannot be taken as enquiry officer as defined Rules 2(c) of Rules 1997.

9. Learned counsel for the petitioner has drawn attention of the Court to the proviso of Section 95 (1)(G) of the Act, 1947, which provides that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan or Up-Pradhan is *prima facie* found to have committed financial and other irregularities such Pradhan or Up-Pradhan 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 members of Gram Panchayat appointed by the State Government.

10. Explaining the aforesaid provision, learned counsel for the petitioner submits that as the alleged preliminary enquiry has not been conducted in the manner as provided in the Rules 1997, therefore, the impugned order cannot be sustained. However, ignoring the aforesaid, if the enquiry conducted by the committee constituted by the Block Development Officer is accepted, no *prima facie* satisfaction has been recorded by the District Magistrate, Chitrakoot regarding any financial irregularities done by the Gram Pradhan. Thus the impugned order cannot be sustained on the aforesaid ground also.

11. In support of his submissions, learned counsel for the petitioner has relied upon the judgement of this Court in the case of *Mahmood Ansari vs. State of U.P.*

and others. He lastly submits that prima facie, the allegations levelled against the petitioner do not invoke any clause of Section 95(1)(G) of the Act, 1947, thus the impugned order dated 23.03.2023 is liable to be set aside.

12. On the other hand, learned Standing Counsel submits that there is no illegality in the order impugned in view of Rule 3 (6) of the Rules 1997. It is relevant to quote here Rule 3 of the Rule, 1997, which reads as under:-

"3. Procedure relating to complaints.- (1) Any person making a complaint against a Pradhan or Up-Pradhan may send his complaint to the State Government or any officer empowered in this behalf by the State Government.

(2) Every complaint referred to in sub-rule (1) shall be accompanied by the complainant's own affidavits in support thereof and also affidavits of all persons from whom he claims to have received information of facts relating to the accusation, verified before a notary, together with all documents in his possession or power pertaining to the accusation."

(3) Every complaint and affidavit under this rule as well as any schedule or annexure thereto shall be verified in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings and affidavits, respectively.

(4) Not less than three copies of complaint as well as each of its annexures shall be submitted by the complainant.

(5) A complaint which does not comply with any of the foregoing provisions of this rules shall not be entertained.

(6) It shall not be necessary to follow the procedure laid down in the foregoing provisions of this rule, if a complaint against a Pradhan or Up-Pradhan is made by a public servant."

13. Learned Standing Counsel, therefore, submits that in the present case where the complaint is made by the Block Development Officer, who in order to verify as to whether the petitioner has failed to perform the duty imposed by the Act, constituted a three member committee, wherein it was found that in the concerned Gram Panchayat Bujurg 395 progeny (Govansh) were preserved in the Mandi Samiti Campus, Pahari, but in the morning of 14.11.2022 at about 10:00 a.m., they were made to run away, hence the petitioner has not co-operated in functioning of the aforesaid Gaushala. Thus the aforesaid report being placed by the Block Development Officer before the Chief Development Officer as well as the District Magistrate, Chitrakoot, can be taken as a complaint by the public servant. Hence as per the rule 3 (6) of the Rules 1997, the same can be treated as a complaint.

14. As regards the argument placed by the learned counsel for the petitioner regarding the fact that the financial and administrative powers of the Pradhan cannot be seized unless there is financial irregularities, learned Standing Counsel submits that in the proviso of Section 95(1)(g) of the Act, 1947 itself the word "other irregularities" included, the aforesaid situation wherein the petitioner has not performed his duties and has abused his position. Therefore, the aforesaid provision is attracted in the facts of the present case. He has drawn attention

of the Court to Rule 95 (1)(g) of the Act, 1947, which is as follow:-

“95. *Inspection – (1) The State Government may –*

(g) remove a Pradhan, Up-Pradhan or member of a Gram Panchayat or a Joint Committee or Bhumi Prabandhak Samiti, or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he -

i- absents himself without sufficient cause for more than three consecutive meetings or sittings.

ii- refuses to act or becomes incapable of acting for any reason whatsoever or if he is accused of or charged for an offence involving moral turpitude.

iii- has abused his position as such or has persistently failed to perform the duties imposed by this Act or rules made thereunder or his continuance as such is not desirable in public interest, or

[iii-a has taken the benefit of reservation under sub-section (2) of Section 11-A or sub-section (5) or Section 12, as the case may be, on the basis of a false declaration subscribed by him stating that he is a member of Scheduled Castes, the Scheduled Tribes or the backward classes, as the case may be.]

iv- being a Sahayak Sarpanch or a Sarpanch of the Nyaya Panchayat takes active part in politics, or

v- suffers from any of the disqualifications mentioned in Clauses (a) to (m) of Section 5-A;

Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan or Up-Pradhan is prima facie found to have committed financial and other irregularities such Pradhan or Up-Pradhan 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 members of Gram Panchayat appointed by the State Government.”

15. He, therefore, submits that in the present situation, the petitioner has not performed his duty of looking into the proper functioning of the Gaushala from where the cattles were made to run, thus there is no illegality in the order impugned passed by the respondent no.2.

16. He has also drawn attention of the Court to para 3 of the Circular Dated 28.02.2014 issued by the State Government to all the District Magistrates, which is as under:-

“3. प्रारंभिक जांच के आधार पर या अन्यथा जहाँ राज्य सरकार/जिला मजिस्ट्रेट की यह राय हो कि धारा 95 की उपधारा (1) के खंड (छ) के प्रतिबन्धात्मक खंड के अधीन किसी प्रधान या उप प्रधान के विरुद्ध जाँच की जानी चाहिए अर्थात् की गयी किसी प्रारंभिक जांच में प्रधान प्रथम दृष्ट्या वित्तीय और अन्य अनियमितता का दोषी पाया जाए, वहां ऐसा प्रधान वित्तीय और प्रशासनिक शक्तियों का प्रयोग और कृत्यों का संपादन नहीं करेगा और जब तक की वह अंतिम जांच में आरोपों से मुक्त न हो जाये, ऐसी शक्तियों का प्रयोग और कृत्यों का संपादन राज्य सरकार/जिला मजिस्ट्रेट द्वारा इस निमित्त नियुक्त ग्राम पंचायत के तीन सदस्यों की एक समिति द्वारा किया जायेगा”

17. As per the aforesaid circular, the financial and administrative powers of the

Pradhan can be seized, when State Government/District Magistrate records *prima facie* satisfaction and finds, on the basis of preliminary enquiry or otherwise, that the Pradhan has committed financial and other irregularities. Therefore, no illegality, infirmity or perversity is found in the impugned order, hence no interference is required by this Court.

18. To the aforesaid submission, learned counsel for the petitioner submits that the Circular dated 28.02.2014 as relied upon the learned Standing Counsel does not have statutory force as the same is simply guidelines/directions to be followed while conducting an enquiry against the Pradhan on the complaint made in accordance with the provision of Rule 3 of the Rules 1997.

19. I have heard learned counsel for the petitioner and learned Standing Counsel and perused the records.

20. Perusal of the records goes to show that the Block Development Officer has constituted a committee to enquire into the conduct of the petitioner and the same has been placed before the District Magistrate, Chitrakoot relying upon which the impugned order has been passed.

21. This Court feels that though the aforesaid complaint may be treated as proper complaint as per Rule 3 of the Rules, 1997 by a public servant, the District Magistrate, Chitrakoot, on the receipt of the complaint or report referred to in Rule 3, or otherwise, order the Enquiry Officer to conduct a preliminary enquiry with a view to find out if there is a *prima facie* case for a formal enquiry in the matter. Under Rule 5 of the Rules, 1997, where the District Magistrate is of the opinion, on the basis of

the report referred to in sub-rule (2) of Rule 4 or otherwise, that an enquiry should be held against a Pradhan or Up-Pradhan or Member, he shall forthwith constitute a Three Member Committee and by an order ask an Enquiry Officer, other than the Enquiry Officer nominated earlier, to hold the enquiry. The enquiry officer for conducting the preliminary enquiry should be the District Panchayat Raj Officer or any other 'district level officer' to be nominated by the District Magistrate.

22. It is, therefore, to be examined whether the aforesaid provisions of the Rules had been followed by the District Magistrate while passing the order under Section 95(1)(g) of the Act.

23. The records indicate that the Block Development Officer on receiving some complaint, in order to verify the same constituted a three member committee, and the report of the committee was placed before the District Magistrate, on the basis of which, impugned order has been passed.

24. The preliminary enquiry as is required to be conducted by an Enquiry Officer contemplated under Rule 2(c) of the Rules, 1997 namely either the District Panchayat Raj Officer or any other district level officer to be nominated by the District Magistrate, has not been conducted in the present case. The District Magistrate could find his *prima facie* satisfaction for holding a final enquiry only on the basis of the report submitted by the Enquiry Officer defined under Rule 2(c) of the Rules, 1997.

25. As regards the Circular dated 28.02.2014 as mentioned in the order impugned, the Court is of the opinion that the same cannot prevail over the provisions of the relevant Act and Rules as the same is

having no statutory force and being simply a direction issued by the Chief Secretary/State Government to be followed by all the District Magistrates while conducting enquiry against the Pradhan.

26. This Court finds that the report dated 14.11.2022 placed by the Block Development Officer before the District Magistrate, Chitrakoot can be treated as proper complaint as per Sub-rule (6) of Rule 3, hence the District Magistrate, Chitrakoot ought to have appointed an Enquiry Officer under Rule 2(c) of the Rule 1997 to conduct a preliminary enquiry.

27. On perusal of the Act and the Rules, the Court is of the clear view that an elected representative can be removed only and strictly in accordance with law and in this regard the law which provides for removal of an elected representative has to be strictly construed. The enquiry report dated 14.11.2022 can only be treated as a complaint made by the Block Development Officer, i.e. public servant. However, the error in the impugned order is apparent to the extent that the Inquiry Committee constituted is not in terms of rule 2-C of the Rules, 1997 and the order impugned is based upon the said enquiry report dated 14.11.2022, therefore, the order impugned is held to be bad in law.

28. In view of the above, the impugned order dated 23.03.2023 passed by the respondent no.2 seizing financial and administrative powers of the petitioner is hereby **quashed**. However, the District Magistrate/Collector, i.e. respondent no.2 is directed to proceed afresh with the inquiry by constituting an Inquiry Committee or appoint an Inquiry Officer in terms of rule 2-C of the Rules, 1997 within 15 days on receipt of a certified copy of this order,

who shall, thereafter, conduct an enquiry in the matter with the assistance of other Revenue officers/authorities as the District Magistrate may provide and submit the inquiry report to the District Magistrate within a period of next four weeks. Based on such inquiry report, after following proper procedure, a decision shall be taken by the District Magistrate under the proviso to Section 95(1)(g) of the Act, 1947 read with the Rules, 1997 as to whether the financial and administrative powers of the petitioner are required to be seized or not? Consequences shall follow accordingly, in accordance with law.

29. With the aforesaid observations and directions, the writ petition is **allowed**.

30. Office is directed to give a copy of this order to learned Chief Standing Counsel, who shall communicate this order forthwith to the respondent no.2, i.e. District Magistrate, Chitrakoot for compliance.

(2023) 7 ILRA 378
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ-C No. 12380 of 2023

Windsor Park Residents Welfare Association **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Sri Abhijeet Mukherji, Ms. Sushmita Mukherjee

Counsel for the Respondents:

C.S.C., Sri Dinesh Kumar Mishra

A. Constitution of India, 1950 – Article 226 – Writ – Locus standi – Matter arising out of the election dispute of society – How far a member of society can contest the case – Held, a member of the society had the locus standi to make a complaint before the Deputy Registrar, Chits Firms and Societies and can legitimately contest the writ petition. (Para 9)

B. Local Bodies Law – Societies Registration Act, 1860 – Section 25(1) – Scope – Election dispute – Jurisdiction of Deputy Registrar – Deputy Registrar referred the matter to Prescribed Authority – Legality challenged – Held, if a dispute is raised with regard to the election or continuance in office of an office-bearer of a society registered in Uttar Pradesh, the same has to be decided only by the Prescribed Authority under S. 25 (1) and not by the Registrar, save, of course, to the decision of the Prescribed Authority being subject to the result of a civil suit – *All India Council's case* relied upon. (Para 14 and 15)

C. Local Bodies Law – UP Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 – Model Bye-Laws – Election of Society – Election of only 1/3 rd of the posts of Board of management was held – Permissibility – Held, regular elections on an annual basis to all 10 posts in the Board of Management make all Board members constantly accountable to the residents – It secure the democratic underpinnings of the society administration – Failure to hold elections to fill all 10 posts of the Board of Management vitiates the elections dated 26.02.2022 . (Para 26 and 34)

Writ petition dismissed. (E-1)

List of Cases cited:

1. All India Council & anr. Vs Assistant Registrar, Firms, Societies and Chits, Varanasi Region, Varanasi and another; AIR 1988 All. 236

2. Gram Shiksha Sudhar Samiti, Junior High School, Skandra & anr. Vs Registrar, Firms, Societies and Chits, U.P., Lucknow & ors.; 2010 (7) ADJ 643 (DB)

3. Special Appeal No. 1224 of 2018; The Management Board, Windsor Park Residents Welfare Association Vs St. of U.P. & ors. decided on 11.03.2019

4. Civil Appeal No. 1442 of 2020; The Management Board, Windsor Park Residents Welfare Association Vs St. of U.P. & ors. decided on 11.02.2020

5. Kunhayammed & ors. Vs St. of Kerala & anr.; (2000) 6 SCC 359

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The judgement is being structured in the following conceptual framework to facilitate the discussion:

I	Introduction
II	Submissions of learned counsels
III	Locus Standi
IV	Facts
V	Issues arising for consideration
VI	Legality of Reference to the Prescribed Authority
VII	Elections under the Apartment Act and Model Bye-Laws: Analysis
VIII	The judgment entered by this Court in Special Appeal No.1224 of 2018 & the Hon'ble Supreme Court in Civil Appeal No. 1442 of 2020
IX	Conclusions & Directions

I. Introduction

2. By the impugned order dated 29.10.2022 the respondent No.2-Deputy Registrar, Firms, Societies and Chits, Meerut referred the election dispute of the

petitioner-society to the Prescribed Authority/Sub-Divisional Magistrate/respondent No.3 under Section 25(1) of the Societies Registration Act, 1860.

3. By the impugned order dated 08.02.2023 the respondent No.3-Sub-Divisional Magistrate, Ghaziabad/prescribed authority in exercise of powers under Section 25(1) of the Societies Registration Act, while deciding the reference made by the Deputy Registrar, Firms, Societies and Chits, Meerut has invalidated the elections to the Board of Management of the petitioner-society held on 26.06.2022. The said impugned order further directed the Deputy Registrar, Firms, Societies and Chits, Meerut to hold the elections to all 10 posts of Board of Management of the Windsor Park Residents Welfare Association.

4. The impugned order dated 14.03.2023 passed by the respondent No.2-Deputy Registrar, Firms, Societies and Chits, Meerut directs the holding of elections to all 10 posts of Board of Directors of the Windsor Park Residents Welfare Association under Section 25(2) of the Societies Registration Act and the said order has been passed in compliance of the order dated 08.02.2023 entered by the Sub-Divisional Magistrate/prescribed authority.

5. The impugned order dated 08.02.2023 finds that the annual elections of 26.06.2022 were held only to three posts instead of all 10 posts of the Board of Management.

II. Submissions

6. Shri Abhijeet Mukherji, learned counsel for the petitioner has made the

following submissions assailing the impugned orders:

(i). Reference to the Prescribed Authority was unlawful.

(ii). As per the Uttar Pradesh Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010, read with Model Bye-laws, the elections to only 1/3rd (3 out of 10) of the posts of the Board of Management have to be held on an yearly basis.

(iii). 2/3rd of the members of the Board of Management are not liable to face annual elections.

(iv). No office bearer has held a post continuously for more than two years.

v. Respondent No.5 has no locus standi in the matter.

7. Shri Vinit Garg-respondent No.5 in person has made the following submissions in support of the impugned orders and against the actions of the petitioner:

(i). Respondent No.5 is an owner of a flat in the Windsor Apartment and is a member of the society.

(ii). The reference was within the ambit of Section 25(1) of the Societies Registration Act, 1860.

(iii). The Uttar Pradesh Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010, read with Model Bye-Laws mandates that the elections to all 10 posts of Board of Management have to be held on annual basis.

(iv). Elections dated 26.02.2022 are not consistent with the said Act and Model Bye-Laws.

(v). A number of persons have continued in the Board of Management but have evaded elections for past two years.

8. Learned Standing Counsel for the State-respondents has defended the impugned orders by adopting the arguments of the respondent No.5.

III. Locus Standi

9. The respondent No. 5 is a flat owner in Windsor Manor Park Apartment. He is a member of the Windsor Manor Park Residents Welfare Association. He had the locus standi to make a complaint before the Deputy Registrar, Chits Firms and Societies, Meerut and can legitimately contest the writ petition.

IV. Facts

10. The facts in this case are confined to a narrow compass. There exists a society running under the name and style of Windsor Park Residents Welfare Association registered under the Societies Registration Act, 1860. The Board of Management which runs the affairs of the society is an elected body comprised of 10 members. Composition of Board of Management of the petitioner-society is: President, Vice President, Secretary and Treasurer and six members of the Board of Management.

11. The elections to various offices of the Board of Management of the said society have been held from time to time. The elections to fill all 10 posts of the Board of Management were held on 09.07.2020, by the Deputy Registrar, Firms, Societies and Chits, Meerut and results were declared on 16.09.2020. However, in the year 2021 the elections were held only for three posts vacated by members who retired that year and not for all the 10 posts of the Board of

Management. The election results were declared on 26.06.2021.

12. The same procedure was repeated in the year 2022. Annual election of 2022 for the Board of Management was notified only to fill 3 posts which fell vacant on the annual retirement of said members of the Board of Management. The results of the election of 2022 to the aforesaid 3 posts were announced on 26.06.2022. The elections of 2021 & 2022 were held by the Board of Management.

V. Issues arising for consideration

13. The issues arising for consideration are:

I. Whether the reference made by the Deputy Registrar, Firms, Societies and Chits, Meerut-respondent No.2 to the Prescribed Authority/Sub-Divisional Magistrate, Ghaziabad-respondent No.3 under Section 25(1) of the Societies Registration Act, 1860 was lawful and valid?

II. Whether elections to all 10 posts of the Board of Management are liable to be held on an annual basis as per the scheme of the Uttar Pradesh Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010, read with Model Bye-Laws dated 16th November, 2011 framed thereunder?

III. Whether the elections to fill only 1/3rd of the posts of the Board of Management on vacancies caused by annual retirements were in consonance with the provisions of Uttar Pradesh Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010, read with Model Bye-Laws dated 16th November, 2011 framed thereunder?

VI. Legality of the Reference to the Prescribed Authority

14. The dispute laid before the Deputy Registrar, Firms, Societies and Chits, Meerut-respondent No.2 pertained to elections of the Board of Management of the society and continuance of the elected office bearers of the said society. The legislature created a specific forum and provided a meticulous procedure for determination of election disputes in societies by the Prescribed Authority under Section 25(1) of the Societies Registration Act.

15. The statutory mandate is explicit. Good authorities have settled the law. Reference to cases in point can be profitably made to fortify the narrative. This Court in **All India Council and another v. Assistant Registrar, Firms, Societies and Chits, Varanasi Region, Varanasi and another**, while interpreting the scope of Section 25(1) of the Societies Registration Act, 1860 held:

"7. It will, therefore, be seen that insofar as disputes or doubts in respect of the election or continuance in office of the office-bearers of a society registered in Uttar Pradesh are concerned, the Legislature has created a specific forum and laid down an exhaustive procedure for determination of the same under S.25. There is no other provision, express or otherwise, providing for determination of such disputes specifically. It is settled law that where, as here, the Legislature creates a specific forum and lays an exhaustive procedure for determination of a particular class of disputes in respect of matters covered by the statute, such disputes can be determined only in that forum and in the manner prescribed thereunder and not

otherwise. If, therefore, a dispute is raised with regard to the election or continuance in office of an office-bearer of a society registered in Uttar Pradesh, the same has to be decided only by the Prescribed Authority under S. 25 (1) and not by the Registrar, save, of course, to the decision of the Prescribed Authority being subject to the result of a civil suit."

[Also see: **Gram Shiksha Sudhar Samiti, Junior High School, Skandra, District Kanpur Dehat and another v. Registrar, Firms, Societies and Chits, U.P., Lucknow and others**]

16. The impugned order dated 29.10.2022 discloses that a dispute had arisen as to the legality elections to the society & also the continuance of elected office bearers pursuant to the said elections.

17. The Deputy Registrar, Firms, Societies and Chits, Meerut by passing the impugned order dated 29.10.2022 and referencing the election dispute to the Prescribed Authority has lawfully exercised powers vested in it by virtue of Section 25(1) of the Societies Registration Act, 1860 and acted in conformity with the law laid down by this Court in **All India Council (supra) & Gram Shiksha Sudhar Samiti (supra)**.

VII. Elections under the Apartment Act and Model Bye-Laws : Analysis

18. Dilemma faced by societies and nations with the introduction of high-rise apartments culture was recalled at length by the former Prime Minister of Singapore Lee Kuan Yew in his memoirs.

19. The proliferation of high-rise apartment societies are reflective of current economic realities and portend future social

challenges. The legislature was cognizant of possible disruptive effects of apartment life and also the complexities in working such societies. The requirement of regulating affairs of such apartment societies was the felt need of the time, causing the legislature to enact the Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 (hereinafter referred to as Apartment Act, 2010) and Model Bye-Laws dated 16th November, 2011 notified by the Government thereunder. The scheme of elections to the Board of Management of the said society are governed and regulated by the Apartment Act, 2010 and the Model Bye-Laws framed thereunder.

20. The legislature while enacting the scheme for elections to various posts in the Board of Management of the society have addressed the issues relating to the governance of apartment societies, and aligned them to the needs of a thriving community. The constitution of apartment societies is democratic in conception and transparent in functioning.

21. The relevant provisions of the Apartment Act, 2010 & the Model Bye-laws dated 16th November, 2011 notified by the Government thereunder are reproduced hereinbelow:

"Section 2(f) of the Apartment Act, 2010-"Board" means the Board of Management of an Association of Apartment Owners elected by its members under the bye-laws;

Section 2(h) of the Apartment Act, 2010-"bye-laws" means the bye-laws made under this Act;

Clause 4 of the Model Bye-Laws. Members of Association-

(1) All persons who have purchased apartments in Condominium and executed a deed of apartment, shall automatically be the members of the Association and will pay the entrance fee of one thousand rupees. Each apartment owner shall receive a copy of the bye-laws.

(2) Upon the sale, bequest or transfer of apartment, the purchaser of the apartment or the grantee or legatee or the transferee shall automatically become the member of the Association and shall be admitted as member on payment of the entrance fee of one thousand rupees.

Clause 13 of the Model Bye-Laws. Annual Meetings -The first meeting of the Association shall be held on.....(date).....Thereafter the annual meetings of the Association shall be held on such date as the Association may decide. At such meetings Board of Management shall be elected by ballot of the apartment owners in accordance with the requirements of bye-law 23. The owners may also transact such other business of the association as may properly come before them.

Clause 18 of the Model Bye-Laws. Management of Association- The affairs of the association shall be governed by a Board. The Board of Management shall comprise of neither less than 4, nor more than 10 persons to be constituted and elected by the members by simple majority in the General Body Meeting. The principal office bearer of the Association shall be a President, a Vice-President, a Secretary and a Treasurer, all of whom shall be elected by and from the Board. The Board may appoint an Assistant Secretary and an Assistant Treasurer and such other Office bearer as the Board may consider necessary.

Clause 26 of the Model Bye-Laws. Election and term of office-

(i) The annual general meeting of the Association, to be held in the first quarter of each financial year, shall elect neither less than 4, nor more than 10 members including the President, Vice President, Secretary, and Treasurer from Members of the Association. Provided that no member shall be eligible for election if he has been found guilty of misusing the post during his previous term. The term of office of the office-bearers of the Board shall be one year from the date of assuming office and they will be eligible for re-election. Provided that a person can not hold the same post continuously for more than 2 years.

(emphasis supplied)

(ii) An arrangement shall be made by the board to ensure that one third of members of the board retire annually.

(iii) The office bearers shall hold office until their successors have been elected and hold their first meeting."

22. The requirement of registration of an association of apartment owners and the bye-laws are provided in Section 14 of the Apartment Act, 2010.

23. The aforesaid statutory scheme discloses the following distinct features:

(I). The Board of Management is composed of the 10 elected members. (Ref. Section 2(f) of the Apartment Act, 2010)

(II) Term of office of the Board of Management is one year. After expiry of the term of elected office the entire Board has to face elections. Elections to all ten posts in the Board of Management shall be held on an annual basis.

(III). Arrangements have to be made by the Board of Management for retiring 1/3rd of its members on an annual basis.

(IV). There is a restriction on continuance of a person on the same post for more than two years.

(V). The office bearers continue in office till their successors have been elected and hold their first meeting. This prevents a vacuum in the society and ensures continuity in existence and functioning.

24. Two salient aspects are evident in the said statutory election scheme. Regularity in holding elections to fill all 10 posts in the Board of Management on an yearly basis. Secondly the right to run for elected office is subject to restrictions.

25. The statutory scheme of the elections encourages a participative culture responsive to the needs of all residents, and eschews any exclusive class catering to personal ambitions of individual members.

26. Regular elections on an annual basis to all 10 posts in the Board of Management make all Board members constantly accountable to the residents. Consent of the governed is the basis of governance of the society, and the Board draws its legitimacy from elections. Yearly elections to fill all posts in the Board of Management secure the democratic underpinnings of the society administration, and also alert the residents/members to their social obligation of participating in the community event.

27. The right to run for elections is restricted and prioritizes community needs over selfish aspirations by providing for a cooling period. 1/3rd of Board members

have to retire annually, and cannot contest elections in that year. Similarly office bearers are restrained from entering electoral fray after two successive years in office. Easing out the said members from the electoral fray every year enlarges voter choices, embraces diversity of opinions and churns the composition of the Board by inducting fresh faces.

28. The election rights are structured for wide participation in community life, but also ensure that politics do not monopolize daily life. Elections conducted regularly to fill all posts in the Board of Management and contested restrictively by those made eligible by statute foster interconnectness from arising from cooperative endeavours and avoids fissures created by professional political processes.

29. The said scheme of elections and the election rights amalgamates elements which are essential to shaping a harmonious environment in a gated community, and also critical to achieve efficient functioning and collective solutions to common problems.

VIII. The judgment entered by this Court in Special Appeal No.1224 of 2018 & the Hon'ble Supreme Court in Civil Appeal No. 1442 of 2020

30. The judgement rendered in **Special Appeal No.1224 of 2018** (The Management Board, Windsor Park Residents Welfare Association Vs. State of U.P. and others) on 11.03.2019 does not come to the aid of the petitioner. The Hon'ble Supreme Court on 11.02.2020 in **Civil Appeal No. 1442 of 2020** (The Management Board, Windsor Park Residents Welfare Association Vs. State of U.P. and others) while examining the said

judgement (Special Appeal No.1224 of 2018) entered by the learned Division Bench of this Court took a contrary view and held as under:

“8. We, therefore consider it appropriate to set aside order dated 13.03.2018 and all consequential proceedings arising therefrom, passed by the Deputy Registrar, Firms, Societies and Chits, Meerut, as affirmed by order dated 13.11.2018 passed by the learned Single Judge and order dated 11.03.2019 passed by the Division Bench of the High Court, and direct that the matter may be reconsidered by the Registrar and appropriate orders for holding election be passed after hearing both sides. Till the elections are held, the Registrar shall take over the Management of the Association in question either himself or through a duly authorized representative. The Registrar may pass an order within a period of six weeks from the date the parties appear before him. We further direct that the elections to the Board of Management shall be held by the appropriate authority in accordance with law and the further elections to the office bearers too shall be held by the appropriate authority in accordance with law.”

31. The judgement of the learned Division Bench of this Court in **Windsor (supra)** has merged in the judgement of the Supreme Court. [See: **Kunhayammed and others v. State of Kerala and another**]

IX. Conclusions & Directions

32. Admittedly on 26.02.2022 the elections were held only to fill 1/3rd of the posts in the Board of Management. 2/3rd members of the Board of the Management evaded the annual elections in 2022.

33. Facts in the record establish that this ingenious and illegal method of elections has been in vogue since 2021, and has enabled some members of the Board of Management to continue in the Board without contesting annual elections for two years. Further there is no certainty when the said members would face elections. The system of elections adopted by the petitioner creates an entitled class which is entrenched in elected office but avoids electoral contest and abjures accountability of elected representatives. The legislature assiduously sought to curb this evil with the promulgation of the Apartment Act, 2010 read with Model Bye-Laws dated 16th November, 2011 notified thereunder.

34. In the wake of the preceding narrative failure to hold elections to fill all 10 posts of the Board of Management vitiates the elections dated 26.02.2022. The elections dated 26.02.2022 being in contravention of the Apartment Act, 2010, read with Model Bye-Laws dated 16th November, 2011 notified thereunder were lawfully set aside by the impugned order dated 08.02.2023, and accordingly the direction in the impugned order dated 08.02.2023 to conduct fresh elections cannot be faulted.

35. The impugned order dated 14.03.2023 was passed by the Deputy Registrar, Firms, Societies and Chits, Meerut-respondent No.2 in compliance of direction and the order of the prescribed authority/Sub Divisional Magistrate, Ghaziabad dated 08.02.2023 upheld earlier, and in lawful exercise of powers under Section 25(2) of the Societies Registration Act to conduct the elections of the society. The challenge to the said order also fails.

36. In the interest of justice this Court commands the respondents to execute the following directions:

(I) The respondent No.2-Deputy Registrar, Firms, Societies and Chits, Meerut shall hold the elections to fill the 10 posts in the Board of Management of the society. The election schedule shall be notified within a period of 15 days from the date of receipt of a certified copy of this order, and the elections shall be conducted in the manner discussed in the earlier part of the judgement.

(II) The District Administration shall offer full support in the holding of fair and peaceful elections of the society.

(III) Elections to the 10 posts in the Board of Management shall be held annually in future, and in light of this judgement and in accordance with the Apartment Act, 2010, read with Model Bye-Laws dated 16th November, 2011 notified thereunder.

37. The writ petition is liable to be dismissed and is dismissed subject to above observations.

38. Registry is directed to send a copy of this order to the Deputy Registrar, Firms, Societies and Chits, Meerut for compliance.

(2023) 7 ILRA 386

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 12.07.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 19080 of 2023

Committee of Management, Darul Ulum Samadhiya & Anr. ...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Sri Jitendra Kumar Singh, Sri Abhishek Bhushan, Sri Anil Bhushan (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Prabhakar Awasthi, Sri Rafeek Ahmad Khan

A. Local Bodies Law – Societies Registration Act, 1860 – Amendment in Bye-laws – Validity of meeting dated 25.12.2021 questioned – Practice of playing fraud alleged – Effect – Assistant Registrar set aside the list of office bearers registered at the behest of the petitioners and also the impugned Bye-laws of the Society by recording a finding that the same had been obtained on the basis of fabricated documents – Legality challenged – Held, once Kudrat Ullah & ors. had submitted affidavits to the effect that meetings including the meeting dated 25.12.2021 had not actually been held and the signatures of the persons allegedly present in the meeting had been fabricated, the Assistant Registrar was justified in not only making observations with regard to the meeting dated 25.12.2021 but also regarding the proceedings held subsequent thereto. (Para 2 and 9)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Rex Vs Duchess of Kingston; 2 Smith L.C. 687
2. Kinch Vs Walcott; 1929 APPEAL CASES 482
3. Paranjpe Vs Kanade; ILR 6 BOMBAY 148
4. Lakshmi Charan Saha Vs Nur Ali; ILR 38 Calcutta 936
5. Manindra Nath Mittra Vs Hari Mondal; 24 Calcutta Weekly Notes 133
6. Esmile-Ud-Din Biswas & anr. Vs Shajoran Nessa Bewa & ors.; 132 Indian Cases 897
7. Nemchand Tantia Vs Kishinchand Chellaram (India) Ltd.; 63 Calcutta Weekly Notes 740
8. S.P. Chengalvaraya Naidu (Dead) by LRs. Vs Jagannath (Dead) by LRs & Ors.; (1993) Supp. 3 SCR 422

9. Ram Preeti Yadav Vs U.P. Board of High School and Intermediate Education & ors.; (2003) Supp. 3 SCR 352

10. St. of A.P. & anr. Vs T. Suryachandra Rao; (2005) 6 SCC 149

11. Patch Vs Ward; 1867 (3) L.R. Chancery Appeals 203

12. Bhaurao Dagdu Paralkar Vs St. of Maharashtra & ors.; 2005 (7) SCC 605

13. Hamza Haji Vs St. of Kerala; JT 2006 (8) SC 215

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Anil Bhushan, learned Senior Counsel assisted by Shri Jitendra Kumar Singh, learned counsel for the petitioners, learned Standing Counsel for respondent nos.1 and 2 and Shri Prabhakar Awasthi, learned counsel representing respondent no.3.

2. The order under challenge in the present writ petition is dated 10.04.2023 whereby the Assistant Registrar, Firms, Societies and Chits, Jhansi in furtherance of directions issued by this Court in Writ C No.1887 of 2023 (C/M Darul Uloom Samadia & 2 Ors. v. State of U.P. & 3 Ors.), has set aside the list of office bearers registered at the behest of the petitioners and also the impugned Bye-laws of the Society by recording a finding that the same had been obtained on the basis of fabricated documents.

3. The submission of learned Senior Counsel is to the effect that elections of the Society were held in the year 2021 from a Body of seven office bearers and the list was registered on 25.03.2022, whereafter, amendments were made in the Bye-laws by a list of 11 office bearers and the same

were registered in the office of Assistant Registrar on 30.12.2022. It is contended that a complaint was moved by respondent no.3 and, thereafter, a direction was sought from this Court for taking a decision on the complaint and it is in pursuance of the said complaint and the direction that the order impugned has been passed. It is further contended that insofar as, the complaint is concerned, it was with respect to the meeting dated 25.12.2021 to the effect that the said meeting was not held in accordance with law; that the President of the Society namely Kudrat Ullah had no knowledge about the same and that his signatures were forged in the proceedings. Various other allegations were also levelled in the complaint and according to learned Senior Counsel, the scope of complaint was limited to examine the validity of meeting dated 25.12.2021, whereas, the Assistant Registrar has transgressed his powers and jurisdiction to go beyond the scope of complaint and has, infact, reviewed the earlier decision whereby the list of office bearers was registered on 25.03.2022 and, further proceedings were held on 08.09.2022 and 07.10.2022.

4. As regards the meeting dated 25.12.2021, it has been argued that at that time, seven members were there, out of whom, five were present and, therefore, the quorum being complete, the meeting was held in accordance with law, and certain decisions were taken including the decision of resignation of Vice President and Manager owing to their sickness and inability to perform and discharge their duties. It is further contended that order impugned has been passed committing violation of principles of natural justice and even the documents filed by the contesting-respondents were not provided to the petitioners.

5. *Per contra*, Shri Prabhakar Awasthi, learned counsel for respondent no.3 has referred to the proceedings of meeting dated 25.12.2021 as contained in 'Annexure No.17' to the writ petition. He submits that initial two lines of the said proceedings clearly disclose that the meeting was held under the Presidentship of Kudrat Ullah as President of the Society but there is no reference of his name in the entire proceedings, except, that he was again elected/nominated in the list of office bearers. It has been shown to the Court that even the proceedings of the previous meeting were read over by the Vice President and Agenda No.2 was also put by him. It is, therefore, contended that if Kudrat Ullah as President was present in the meeting, there was no occasion for Vice President to conduct the proceedings of the meeting. It has not been disputed that prior to the meeting dated 25.12.2021, Mohammad Anees happened to be Vice President and his father Noor Mohammad happened to be Manager, whereas, in the said meeting, these two posts/office bearership were reversed that is to say Noor Mohammed was elected as Vice President and Mohammad Anees as Manager.

6. He further submits that on the basis of the said proceedings, subsequent proceedings including making amendment in the Bye-laws were held and since the complainants had submitted their affidavits before the Assistant Registrar to the effect that even signatures of Kudrat Ullah had been fabricated and forged in the meeting dated 25.12.2021, the entire proceedings were null and void.

7. Learned Standing Counsel has supported the impugned order by arguing that once the fraud committed by the petitioners came to the notice of Assistant

Registrar pursuant to the complaint and the documents filed by the contesting respondents, he was justified in setting aside the entire proceedings in pursuance of the meeting dated 25.12.2021.

8. Having heard learned counsel for the parties, I find that the basis of amending the Bye-laws as well as holding the subsequent proceedings has its genesis in the meeting dated 25.12.2021. A bare perusal of the said document reflects that apart from the fact that the meeting was shown to have been held under the Presidentship of Kudrat Ullah, it was mentioned that Vice President and Manager had submitted their resignations owing to their sickness and inability in discharge of duties and performance of functions and their resignations had been accepted in the meeting. Surprisingly, the persons whose resignations were accepted were again nominated in the same meeting but with a reverse description of office bearership. The Court expresses its surprise as to when these persons were not able to perform their duties as to what persuaded anyone to again include them in the Committee/Society.

9. Even ignoring the aforesaid aspect, I find that once Kudrat Ullah and others had submitted affidavits to the effect that meetings including the meeting dated 25.12.2021 had not actually been held and the signatures of the persons allegedly present in the meeting had been fabricated, the Assistant Registrar was justified in not only making observations with regard to the meeting dated 25.12.2021 but also regarding the proceedings held subsequent thereto.

10. It is well settled that fraud vitiates even the most solemn act. *De Grey, C.J., in Rex Vs. Duchess of Kingston [2 Smith*

L.C. 687] observed that 'Fraud' is an intrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical and temporal".

12. In *Kerr on Fraud and Mistake*, it is stated that "in applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud."

13. It is also clear as indicated in *Kinch Vs. Walcott [1929 APPEAL CASES 482]* that it would be in the power of a party to a decree vitiated by fraud to apply directly to the Court which pronounced it to vacate it. According to Kerr, "In order to sustain an action to impeach a judgment, actual fraud must be shown; mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury."

(See the Seventh Edition, Pages 416-417)

14. In *Corpus Juris Secundum, Volume 49, paragraph 265*, it is acknowledged that, "Courts of record or of general jurisdiction have inherent power to vacate or set aside their own judgements".

In paragraph 269, it is further stated, "Fraud or collusion in obtaining judgment is a sufficient ground for opening or vacating it, even after the term at which it was rendered, provided the fraud was

extrinsic and collateral to the matter tried and not a matter actually or potentially in issue in the action. "

It is also stated: "Fraud practiced on the court is always ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair".

15. In *American Jurisprudence, 2nd Edition, Volume 46, paragraph 825*, it is stated, "Indeed, the connection of fraud with a judgment constitutes one of the chief causes for interference by a court of equity with the operation of a judgment. The power of courts of equity in granting such relief is inherent, and frequent applications for equitable relief against judgments on this ground were made in equity before the practice of awarding new trials was introduced into the courts of common law. Where fraud is involved, it has been held, in some cases, that a remedy at law by appeal, error, or certiorari does not preclude relief in equity from the judgment. Nor, it has been said, is there any reason why a judgment obtained by fraud cannot be the subject of a direct attack by an action in equity even though the judgment has been satisfied."

16. The law in India is not different. In *Paranjpe Vs. Kanade [ILR 6 BOMBAY 148]*, it was held that it is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud. In *Lakshmi Charan Saha Vs. Nur Ali [ILR 38 Calcutta 936]*, it was held that the jurisdiction of the Court in trying a suit questioning the earlier decision as being vitiated by fraud, was not limited to an

investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree.

17. In *Manindra Nath Mitra Vs. Hari Mondal [24 Calcutta Weekly Notes 133]*, the Court explained the elements to be proved before a plea of a prior decision being vitiated by fraud could be upheld. The Court said-

"with respect to the question as to what constitutes fraud for which a decree can be set aside, two propositions appear to be well established. The first is that although it is not permitted to show that the Court (in the former suit) was mistaken, it may be shown that it was misled, in other words where the Court has been intentionally misled by the fraud of a party, and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence".

18. The position was reiterated by the same High Court in *Esmile- Ud-Din Biswas and Anr. Vs. Shajoran Nessa Bewa & Ors. [132 INDIAN CASES 897]*. It was held that it must be shown that fraud was practised in relation to the proceedings in the Court and the decree must be shown to have been procured by practising fraud of some sort upon the Court. In *Nemchand Tantia Vs. Kishinchand Chellaram (India) Ltd. [63 Calcutta Weekly Notes 740]*, it was held that a decree can be re-opened by a new action when the court passing it had been misled by fraud, but it cannot be re-

opened when the Court is simply mistaken; when the decree was passed by relying on perjured evidence, it cannot be said that the court was misled.

19. It is not necessary to multiply authorities on this question since the matter has come up for consideration before the Apex Court on various occasions. In ***S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs & Ors. [(1993) Supp. 3 SCR 422]***, this Court stated that,

"it is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decreed --- by the first court or by the highest court --- has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

The Court went on to observe that the High Court in that case was totally in error when it stated that there was no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence. Their Lordships stated, "The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property grabbers, tax evaders, Bank loan dodgers, and other unscrupulous persons from all walks of life find the court- process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation".

20. In ***Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate***

Education & Others [(2003) Supp. 3 SCR 352], the Apex Court after quoting the relevant passage from ***Lazarus Estates Ltd. Vs. Beasley [(1956) 1 All ER 341]*** and after referring to ***S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs & Ors. (supra)*** reiterated that fraud avoids all judicial acts. In ***State of A.P. & Anr. Vs. T. Suryachandra Rao [(2005) 6 SCC 149]***, the Supreme Court after referring to the earlier decisions held that suppression of a material document could also amount to a fraud on the Court. It also quoted the observations of ***Lord Denning in Lazarus Estates Ltd. Vs. Beasley (supra)*** that.

"No judgment of a Court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

21. According to ***Story's Equity Jurisprudence, 14th Edn., Volume 1, paragraph 263***: "Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."

22. In ***Patch Vs. Ward [1867 (3) L.R. Chancery Appeals 203]***, Sir John Rolt, L.J. held that: "Fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and obtaining that decree by that contrivance."

23. The Supreme Court in ***Bhaurao Dagdu Paralkar Vs. State of Maharashtra & Ors. [2005 (7) SCC 605]*** held that:

"Suppression of a material document would also amount to a fraud on the court.

Although, negligence is not fraud, it can be evidence of fraud."

24. The aforesaid Authorities have been considered by the Apex Court in the case of *Hamza Haji v. State of Kerala* reported in *JT 2006 (8) SC 215*.

25. The Assistant Registrar, though not a court of law, exercises quasi judicial or even administrative powers under Societies Registration Act, 1860, hence the ratio of law referred to hereinabove shall also apply to the proceedings giving rise to the instant writ petition.

26. The submission of learned Senior Counsel that the Assistant Registrar has traveled beyond his power and jurisdiction does not impress the Court in the facts and circumstances of the case as the scope of the complaint made by respondent no.3 was to examine the validity of the meeting dated 25.12.2021 and, once, cogent reasoning has been assigned and as also observed by this Court by perusing the said proceedings that the same were full of infirmities, I do not find any ground to interfere in the order impugned.

27. The writ petition lacks merit and is, accordingly, *dismissed*.

(2023) 7 ILRA 392

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 13.07.2023

BEFORE

**THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.**

Writ-C No. 24761 of 2003

Smt. Chan Muni ...Petitioner
Versus
Allahabad Development Authority & Ors.
...Respondents

Counsel for the Petitioner:

Sri J.P. Pandey

Counsel for the Respondents:

Sri S.K. Dwivedi

Civil Law - Constitution of India, 1950 - Article 265 - U.P. Urban Planning and Development Act, 1973 - Section 15(2-A) - Authority shall be entitled to levy development fees, mutation charges, stacking fees and water fees- Held: Development Authority can demand only external development fees, stacking fees and water fees at the time of sanctioning the map and no other fees/charges can be demanded by the Development Authority. Levy of other charges which are not mentioned u/s 15(2-A) of the Act, 1973 are hit by Article 265 of the Constitution of India. Article 265 clearly prohibits levy of tax/fees/charges except in accordance with law and/or as provided under the statute. Demand notice issued by the Development Authority so far as it asks the petitioner to deposit fees and charges other than external development fees, stacking fees and water fees, such as permit fee, sub-division charge, inspection fee and open area penalty quashed (Para 8, 9)

Allowed. (E-5)

List of Cases cited:

1. Mathura Vrindavan Development Authority & anr. Vs Rajesh Sharma & ors. 2023 SCC OnLine SC 530
2. Sri Krishna Kant Verma & anr. Vs St. of U.P. Thru. Secy. Nagar Vikas & ors. (Writ C No. 9617 of 2010) dt 24.05.2023
3. Ravi Agrawal Vs St. of U.P. Thru Secy. & ors. (Writ C No. 36358 of 2013) dt 4.7.2023

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

1. Heard learned counsel for the parties.

2. Through present writ petition, the petitioner has challenged the demand notice dated 30.5.2003 which was issued to him by Allahabad Development Authority at the time of sanctioning the map submitted by the petitioner.

3. The aforesaid demand notice issued by the Allahabad Development Authority, demanded permit fee, water charge, stacking fee, sub-division charge, development charge, inspection fee and open area penalty.

4. Learned counsel for the petitioner has challenged the aforesaid demand notice on the ground that only those charges/fees can be demanded by the Development Authority which are referable to Section 15(2-A) of the U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as "Act, 1973"). Learned counsel for the petitioner, therefore, submits that only those charges/fees can be levied at the time of sanctioning the map by the Development Authority for which the Act, 1973 authorises the Development Authority and the State Government in exercise of power u/s 41 of the Act, 1973 cannot authorise/permit the Development Authority to levy charges/fees which are not mentioned in the Act, 1973. Section 15(2-A) of the Act, 1973 is being quoted as below:-

"15(2-A). The Authority shall be entitled to levy development fees, mutation charges, stacking fees and water fees in

such manner and at such rates as may be prescribed:

Provided that the amount of stacking fees levied in respect of an area which is not being developed or has not been developed, by the Authority, shall be transferred to the local authority within whose local limits such area is situated."

5. In support of his contention, learned counsel for the petitioner relied upon the judgement of Hon'ble Supreme Court in ***Mathura Vrindavan Development Authority & Anr. vs. Rajesh Sharma & Ors. 2023 SCC OnLine SC 530*** in which the Apex Court held that except the charges mentioned in the Section 15(2-A) of the Act, 1973, namely, development fees/charges, mutation charges, stacking fees and water charges, no other charge can be levied by the Development Authority.

6. We have perused the demand notice and the judgments referred by the counsel for the petitioner and find force in the contention of the counsel for the petitioner that the Development Authority has no jurisdiction to demand charges, other than external development fees, stacking fees and water fees. Section 15(2-A) of the Act, 1973 very clearly prescribes the charges which can be levied by the Development Authority like development fees, mutation charges, stacking fees and water fees, therefore, even the State Government u/s 41 of the Act, 1973 cannot issue direction or permission to the Development Authority to levy the charges which are not mentioned in Section 15(2-A) of the Act, 1973. Hon'ble Supreme Court also in the judgement of ***Mathura Vrindavan Development Authority (Supra)*** in paragraph Nos. 23, 24 and 25 observed as under: -

"23. Under the circumstances, in exercise of powers under Section 41 of the Act, 1973, the State could not have issued the orders permitting/allowing the Development Authorities to levy the charges/fees other than provided under Section 15(2-A) of the Act, 1973. At this stage, it is required to be noted that the levy of fees/charges provided under Section 15(2-A), all of them have been specifically defined under Section 2 of the Act, 1973. Therefore, the intention of the Act is to levy only those charges/fees provided/mentioned under Section 15(2-A) of the Act, 1973, otherwise the other charges also would have been defined under the Act, 1973. Levy of such other charges can be said to be hit by Article 265 of the Constitution of India. As per Article 265 of the Constitution of India, there shall not be any levy of tax/fees/charges except in accordance with law and/or as provided under the statute. Under the circumstances and in view of the above, the High Court has rightly set aside the various demand notices by way of levy of inspection fee/supervision fee while granting of sanction layout plan, sub-division charges, impact fee etc.

24. In view of the above and for the reasons stated above, the levy of development charges/fees by the various Development Authorities of the State of U.P. is hereby confirmed. The decision of the High Court in the case of *Rekha Rani (supra)* (Civil Appeal No. 4489/2014) quashing and setting aside the levy of development charges/fees is hereby quashed and set aside to that extent. The impugned judgments and orders passed by the High Court quashing and setting aside the demand notices/levy of other charges/fees, namely, inspection fee/supervision fee while granting of sanction layout plan, sub-division

charges, impact fee etc. (other than development charges/fees) are hereby confirmed.

25. It is observed and directed that any amount already paid by the respective original writ petitioners other than the development charges/fees and the charges provided under Section 15(2-A), now be refunded to the respective original writ petitioners with 6% interest per annum, within a period of twelve months from today, of course after adjusting development charges/fees. It is made clear that we have not expressed anything on the levy of betterment charges, which, as such, is otherwise permissible under section 35 of the Act, 1973. It is also made clear that the order of refund shall be applicable only with respect to those original writ petitioners/persons who have challenged the demand notices and who were before the High Court. It is also observed and it is made clear that if any individual/original writ petitioner has any other grievances, it will be open for them to approach the High Court by way of independent proceedings." (emphasis added)

7. This Court in the judgement of *Sri Krishna Kant Verma and Anr. Vs. State of U.P. Thru. Secy. Nagar Vikas and Ors.* (Writ C No. 9617 of 2010) decided on 24.05.2023 as well as in the judgement of *Ravi Agrawal vs. State of U.P. Thru Secy. and 4 others* (Writ C No. 36358 of 2013) decided on 4.7.2023 quashed similar demand notices relying upon the judgement of *Mathura Vrindavan Development Authority (Supra)*.

8. This Court is of the considered view that levy of other charges which are not mentioned u/s 15(2-A) of the Act, 1973 are hit by Article 265 of the Constitution of India because Article 265 clearly prohibits

levy of tax/fees/charges except in accordance with law and/or as provided under the statute. *Therefore, the Development Authority can demand only external development fees, stacking fees and water fees at the time of sanctioning the map and no other fees/charges can be demanded by the Development Authority.*

9. In view of the above, the demand notice dated 30.5.2003, issued by the Allahabad Development Authority so far as it asks the petitioner to deposit fees and charges other than external development fees, stacking fees and water fees, is hereby quashed and the notice, so far as it demands external development fees, stacking fees and water fees, is valid and the petitioner is liable to pay the same.

10. Any deposit made by the petitioner, under the heads for which the demand notice is quashed by this Court, shall be returned to the petitioner by the Allahabad Development Authority with 6% simple interest per annum within a period of three months from today.

11. With the aforesaid observations, the writ petition is **allowed**.

(2023) 7 ILRA 395

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 13.07.2023

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Application u/s 482 No. 398 of 2023
and
Application u/s 482 No. 8168 of 2023

Prabhakant & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:

Sri Shailendra Kumar Tripathi, Sri Anujrag Dubey

Counsel for the Opp. Parties:

G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections - 161, 173(2) & 482 - UP Revenue Code, 2006 - Sections 4(14), 67, 67(1), 67(2), 145 & 210 - Prevention of Damages to Public Property Act, 1984 - Sections 2(b), 3, 3(2)A, 4, 5 & 6:-

Application U/s 482 – challenging the entire criminal proceeding as well as the charge-sheet & impugned summoning orders – Encroachment over Govt. lands – FIR – Investigation – charge-sheet – Whether the charge-sheeted accused persons could be branded as they have committed the wrongful occupation and possession or mischief by encroaching upon land belonging to Central Govt./St. Govt. or any other local authorities or its undertaking - court finds that – taking into gravity of offence and its nature in which there is no criminality as such and the apt remedy would be to proceed against erring so called encroacher u/s 67 of UP Revenue Code and get the land in dispute demarcated - it is the case exclusively falls within domain of concerned revenue authority to impose fine, if any, after taking whole exercise as per the provisions of law - held, - needles to mention on the previous occasions at least a dozen of the cases of different Benches of this Court in different proceedings have condemned and deprecated this practice of taking cognizance on a printed proforma, but it seems that the concern Magistrate repeatedly in utter defiance of the directions of this Court are still taking cognizance on a printed proforma without applying their judicial mind – this is wholly unacceptable - consequently, these applications u/s 482 Cr.P.C. stands allowed – the matter remanded back for fresh consideration by the court concerned directions issued accordingly. (Para – 19, 22, 23, 24)

Applications u/s 482 allowed. (E-11)

List of Cases cited:

1. In Re. Destruction of Public and Private Properties, In Re. Vs St. of A.P. & ors.(2009 vol. 5 SCC 212),

2. Kodungallur Film Society & anr.Vs U.O.I. & ors.(2018 vol. 10 SCC 713),

3. Abdul Rashid Vs St. of UP, 2010 SCC online Alld. 2819,

4. Bhushan Kumar Vs St. of (NCT of Delhi), 2012 vol. 5 SCC 424),

5. Sunil Bharti Mittal Vs C.B.I., AIR 2015 SC 923.

(Delivered by Hon'ble Rahul Chaturvedi, J.)

(1). In these two applications u/s 482 Cr.P.C. the petitioners are assailing the legality and validity of summoning/cognizance orders passed by the respective courts below summoning the accused-applicants u/s 3(2)A of the Prevention of Damages to Public Property Act, 1984. Since there is common legal question involved in both the petitions that cognizance orders passed by the respective Magistrates are not sustainable in the eyes of law as the same have been passed on a printed proforma without applying its judicial application of mind. Therefore, under these circumstances, both these petitions are being decided by this common judgment.

(2). Heard S/Shri Anurag Dubey and Nitin Sharma, learned counsel for the respective applicants; S/Shri Satendra Tiwari, Faraz Kazmi and Ajay Kumar Sharma, learned Additional Government Advocates. Perused the entire record of the case.

(3). To appreciate the controversy involved it is imperative to give a bird's eye view to the factual aspects of the issue and respective proceedings.

(4). FACTS OF APPLICATION U/S 482 No.-398 of 2023 :

By means of the present application the extraordinary powers of this Court is being invoked seeking the quashing of entire criminal proceeding of Case No.1588 of 2018 (State vs. Bhawarpal Singh and others), charge sheet dated 20.6.2016, arising out of Case Crime No.149 of 2016, u/s 3(2)A of Prevention of Damages to Public Property Act, Police Station Tirwa, District Kannauj, pending in the Court of Additional Chief Judicial Magistrate, Kannauj and summoning/cognizance order dated 27.10.2018.

(5). Long and short of this case is that the applicant along with other co-villagers have allegedly encroached upon a land of pond situated over Gata No.2029 (Mi) having area 0.490 hectare. On this score an F.I.R. was lodged for an unknown time and date of the incident, by opposite party no.2 on 22.3.2016 at 16.50 hours against the applicants and 21 others.

(a) After lodging of the F.I.R., investigating Officer of the case has visited the place of incident and prepare a site plan. In addition to this, the Investigating Officer of the case has recorded the statement of the then Village Pradhan on 21.4.2016 u/s 161 Cr.P.C. Investigating Officer without holding in-depth probe into the matter and without holding any proper measurement of the land in dispute, in a most cursory and perfunctory manner, has submitted a report u/s 173(2) Cr.P.C. on 20.6.2016. After submission of report u/s 173(2) Cr.P.C., as per prevalent practice now-a-days, the learned A.C.J.M., Kannauj on a printed proforma, after filling in the blanks, on 27.10.2018 has taken cognizance of the offences u/s 3(2)A of the Prevention of Damages to Public Property Act, 1984 (for the sake of brevity hereinafter referred to as 'PDPP Act'),

against the applicants and others. It is argued by the counsel for applicant that there is total non-application of judicial mind while taking cognizance of the offence.

(b) It is interesting to point out here, that the concerned Magistrate has not even named the charge-sheeted accused persons in his cognizance order and calling upon them to face the criminal trial. It is argued by learned counsel for the applicant, that it is the height of total non application of mind by the concerned Magistrate, who has not even named the accused persons in the cognizance order. It has been strenuously submitted by learned counsel for the applicant that through various judgments this Court has time and again have deprecated this practice of taking cognizance on a printed proforma in a most cursory and perfunctory fashion. Further submission is that learned Magistrate ought to have at least named the persons against whom he is going to prosecute for the alleged offence u/s 3(2)A of PDPP Act. Since the way and manner in which the cognizance was taken by the concerned Magistrate, all the accused persons were unaware that any such proceeding is pending against them and only after coming to know, off late all the accused persons have contacted their local counsels to inquire about the truthfulness of the alleged cognizance order.

(6). FACTS OF CRL. MISC. APPLICATION U/S 482 NO.8168 OF 2023:

In the instant 482 application, there are as many as nine applicants, who are jointly assailing the charge sheet No.406 of 2018 dated 03.09.2018 and entire proceeding of Criminal Case No.8511 of 2022 (Sate vs. Sajid and others), arising out of Case Crime

No.0432 of 2018, u/s 3 of the Prevention of Damage to Public Property Act, 1984, Police Station Kairana, District Shamli along with cognizance and summoning order dated 04.10.2018 passed by the Civil Judge (S.D.)/Additional Chief Judicial Magistrate, Shamli.

(a) The prosecution story in brief is that one Baleshwar Das (Area Lekhpal) has lodged an F.I.R. at Police Station Kairana, District Shamli on 27.7.2018 which was registered as Case Crime No.0432 of 2018 u/s 3 of the Prevention of Damage to Public Property Act, 1984. From the F.I.R. it is clear that it was registered as many as 11 named accused persons including the name of Ashraf and Jamila, who died much prior to lodging of the F.I.R. After lodging of the F.I.R., the police have conducted a superficial perfunctory investigation and completed its homework after recording the statements u/s 161 Cr.P.C. of the informant, Jahid and Revenue Inspector Ashutosh Kumar, who have supported the prosecution story, as mentioned in the F.I.R. that the named accused persons have encroached upon a public dran passing through Khata No.176 and chak road passing through Khata No.177 and are cultivating their crops over the said encroached land. Despite of the fact that they were warned by the Tehsildar to remove the encroachment, they have simply ignored the warning given by Tehsildar, maintained their possession over the property in question. The I.O. of the case have visited the place of incident on 03.9.2018 and recorded that there was no demarcation between the agricultural land of the accused persons and the public drain as well as chak road. From this, the Investigating Officer has inferred that the accused persons have encroached upon the land and are tilling the same. This inference

is literally unfounded and whimsical. Though the accused persons have got their agricultural land adjacent to the chak road and public drain, but there is no line of demarcation, therefore, it cannot be said with certainty that the boundaries demarcating the fields as well as chak road might have been blurred and its identity cannot be ascertained.

(b). It is contended by learned counsel for the applicant that the Investigating Officer of the case has got no mechanism to demarcate the land and prima facie it seems that accused persons have transgressed their limits and encroached upon the land. It is not expected from the I.O. that he would make a physical measurement of the land and get it demarcated. On this, learned counsel for the applicant has argued that the undercurrent of entire controversy is purely a revenue dispute and no criminality could be attached to it. But the Investigating Officer of the case without ascertaining the allegations of the F.I.R., on a demarcated line, proceeded and submitted a charge sheet against the applicants on 3.9.2018 u/s 3(2)A of PDPP Act. Contention is that after submission of charge sheet, the Additional Chief Judicial Magistrate, Shamli again on a printed proforma without mentioning that under what section the cognizance has been taken by him. This cognizance order was passed on 04.10.2018 on a printed proforma after filling in the blanks, clearly indicative of the fact that there is total non application of mind by the concerned Magistrate. This practice has been condemned and deprecated by the Hon'ble Apex Court as well as this Court in a number of decisions, but it seems that those decisions have got no value for the concerned Magistrate and he is still proceeding and taking cognizance in an old fashion.

LEGAL DISCUSSION :

(7). From the above factual background and the contentions advanced by learned counsel for the applicants, the following questions of law involved in the present matter have cropped up for consideration :

(i). Whether the charge-sheeted accused persons could be branded as they have committed the wrongful occupation and possession or mischief by encroaching upon the land belonging to the Central Government/State Government or any local authority or corporation or institution established by the Central, Provincial or State Act or its undertaking.

(ii). Object and reasons of the Prevention of Damages to Public Property Act, 1984.

(iii) Section 3 of the Prevention of Damages to Public Property Act, 1984 QUA Section 67 of the Uttar Pradesh Revenue Code and Rules.

(iv) Whether the I.O. of the case is empowered to hold actual physical measurement over the land in question and declare that the accused-applicants were the real and actual encroachers of the land.

(v) Taking the allegations per se on the face of the F.I.R., it could be rectified only after having the actual physical measurement of the land in dispute by a competent authority.

(vi) Whether the concerned Magistrate was justified in taking the cognizance of the offences on a printed proforma by filling in the blanks.

Let's examine these legal aspects of the issue one by one.

(8). The allegations made in the F.I.R. against the applicants are that they are in wrongful occupation of the land in dispute belonging to the local authority, cannot

come within the realm of mischief or wrongful occupation, till such time its actual physical measurement is not conducted by the authority concerned. Site plan prepared by the Investigating officer is only a narration of the fact that the applicants are conducting their farming and cultivating over the land in dispute, but the Investigating Officer cannot decide it unless and until actual demarcation is being done by the competent revenue authority after holding the exercise of measurement and establishing its identity. In absence of this vital link, it cannot be said with certainty that charge-sheeted accused persons have swelled their limits and encroached upon the land of others.

(9). The underline object and idea of enacting the Prevention of Damages to Public Property Act, 1984 is to curb acts of vandalism and damage to public property including destruction and damage caused during riots and public commotion. A need was felt to strengthen the law to enable the authorities to deal with cases of damage to public property. The “public property” as defined under Section 2(b) of the P.D.P.P. Act, 1984 means any property, whether immovable or movable (including any machinery) which is owned by or in possession of or under the control of the Central or State Government or any local authority or any Corporation or any institution established by the Central, Provincial or State Act or its undertaking. Section 3 of the P.D.P.P. Act, 1984 provides that anyone who commits mischief by doing any act in respect of any ‘public property’ including the nature referred in subsection (2) in the said section shall be punished with imprisonment and a fine depending upon the nature of the property as per sub-section (1) and sub-section (2) of Section 3 of the P.D.P.P. Act, 1984. Section

4 provides punishment for an act of ‘Mischief’ causing damage to public property by fire or explosive substance. The P.D.P.P. Act, 1984 is, thus, a Special Act enacted to punish for the offence committed under Sections 3 and 4 of the said Act by doing any act of vandalism including the destruction or damage during any riots or public demonstration in the name of agitations, bandhs, hartals and the like. The “Mischief” has been defined under Section 2(a) of the P.D.P.P. Act, 1984 having the same meaning as in Section 425 of the Indian Penal Code (45 of 1860). Section 6 is the saving clause which says that the Act, 1984 covers the offence committed under it and the provisions of it are in addition to any other law which provides for any proceeding (whether by way of investigation or otherwise) which may be instituted or taken against the offender, apart from this Act. Special provisions with regard to disposal of a prayer for bail made by a person accused or commission of offence under the Act, 1984 has been provided under Section 5 of the P.D.P.P. Act, 1984. The provisions oblige a person found guilty of commission of offence to pay the damage or loss caused to the public property. This Act, thus, covers the specific area of damage or loss or destruction of public property and recovery of such damages from the person(s) who is/are found guilty of such damage during the course of any public demonstration in the name of agitations, bandhs, hartals and the like.

(10). In *Re. Destruction of Public and Private Properties, In Re vs. State of Andhra Pradesh and others, 2009 (5) SCC 212*. Taking a serious note of various instances where there was a large scale destruction of public and private properties in the name of agitations, bandhs, hartals

and the like, suo motu proceedings had been initiated by the Apex Court and two committees were appointed to give suggestions on strengthening of the legal provisions of P.D.P.P. Act to effectively deal with such instances. The recommendation of two committees were considered and it was observed that the suggestions were extremely important and they constitute sufficient guidelines which need to be adopted. It was left open to the appropriate authorities to take effective steps for their implementation.

(11). In a recent decision in ***Kodungallur Film Society and another vs. Union of India and others, 2018 (10) SCC 713***, the relief was sought to issue a mandamus to the appropriate authorities to strictly follow and implement the guidelines formulated by ***the Apex Court “Destruction of Public & Private Properties In re:”***, with regard to measures to be taken to prevent destruction of public and private properties in mass protests and demonstrations and also regarding the modalities of fixing liability and recovering compensation for damages caused to public and private properties during such demonstration and protests.

(12). It was acknowledged in ***Kodungallur Film Society*** that the recommendations of the Committee noted in the said judgment traversed the length and breadth of the issue at hand and, if implemented in their entirety, would go a long way in removing the bane of violence caused against persons and property. As far as implementation of the said recommendations, the Union had advised the States to follow the same in its letter and spirit. Issuing directions to implement recommendations made by the Apex Court in both the above decisions. Direction was

issued in ***Kodungallur Film Society*** to both the Central and the State Government to do the same at the earliest.

(13). From the aforesaid it is clear that the underline purpose and idea of enacting the Prevention of Damages to Public Property Act, 1984 is to provide benefits to those persons or to take a suitable remedial action to prevent the destruction of public and private properties in mass protest, demonstration, hartal, agitation and in this damage to the public and private properties, pursuant to the ratio laid down by Hon’ble Apex Court in the case of ***Kodungallur Film Society (supra)*** the State Governments were granted liberty to form a committee to carry out and implement the recommendations made by the Hon’ble Apex Court in the above decision. Accordingly, the State of Uttar Pradesh too has notified “Uttar Pradesh Recovery of Damages to Public and Private Property Rules, 2020” with a view to provide for recovery of damages to public and private property during hartal, bundh, riots, public commotion, protests etc. in regard to property and imposition of fine. The said Rules provides for constitution of the claims tribunal to investigate the damages caused and to award compensation related thereto.

(14). Now coming to yet another aspect of the issue, learned counsel for the applicants in order to buttress their contention have drawn attention of the Court to the provisions of Section 67 of the U.P. Revenue Code which speaks about the power to prevent damages, misappropriation and wrongful occupation of Gram Panchayat property:-

(i) *Where any property entrusted or deemed to be entrusted under the provisions of this Code to a Gram*

Panchayator other local authority is damaged or misappropriated, or where any Gram Panchayator other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(ii) Where from the information received under sub-section (i) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (i) 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.

(iii) If the person to whom a notice has been issued under sub-section (ii) 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.

(iv) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or

misappropriation or wrongful occupation referred to in the notice under sub-section (ii), he shall discharge the notice.

(v) Any person aggrieved by an order of the Assistant Collector under Sub-section (iii) or Sub-Section (iv), may within thirty days from the date of such order, prefer an appeal to the Collector.

(vi) Notwithstanding anything contained in any other provisions of this Code, and subject to the provisions of this section every order of the Sub-Divisional Officer under this section shall, subject to the provisions of sub-section (5) be final.

(vii) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

Explanation.- For the purposes of this section, the word "land" shall include the trees and building standing thereon."

(15). Further, under Rule 67(1) of U.P. Revenue Code, 2016, it is incumbent upon the Assistant Collector to make an inquiry as he deems proper and obtain further information regarding the following issues :

(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."

(16). Thus, from the above it is clear that as per the U.P. Revenue Code, it is the Assistant Collector of the area who is the authority concerned to act a pivotal role in demarcation and holding and declaring the land in dispute is encroached by the applicants. The Investigating Officer of criminal cases is not even remotely connected to conduct this exercise. The entire procedure has been laid down in Section 67(2) that only after getting a reply from the alleged encroacher, the Assistant Commissioner/Sub Divisional Officer has to pass an order giving reasons for not exceeding the explanation, if so offered by the person concerned. The eviction from the land in dispute can only be recorded after disposal of the explanation offered by the person concerned keeping in line with the cardinal principle of natural justice by passing a well reasoned and speaking order while disposing of the said explanation. The Act is itself contained the amount of compensation of damage or misappropriation of the property or for wrongful occupation, as the case may be, may be recovered from such person as arrears of land revenue. Section 210 of the Revenue Code, 2006 confers supervisory power on the Board or the Commissioner to call for the record of any proceeding decided by the subordinate revenue court in which no appeal lies for the purpose of satisfying itself or himself as to the legality or propriety of any order passed in such suit or proceeding.

(17). A careful reading of the provisions of the Revenue Code, 2006, thus, makes it clear that the proceeding for causing damage to the public property can be undertaken against any person who is in wrongful occupation of the same or causes damage or misappropriations to the said property. The nature of eviction proceeding

under Section 67 of the Revenue Code, 2006, is, however, summary in nature. The rights of the parties claimed, if gives rise to a dispute requiring adjudication on the questions of fact, a suit for declaration has to be instituted against such person. The Gram Sabha may institute a suit under Section 145 of the U.P. Revenue Code, 2006 for declaration of its right or to seek any further relief. In case of institution of such a suit, a temporary injunction may be granted by the Court concerned to prevent wastage, damage or alienation of the suit property. The Revenue Code, 2006 is a Special enactment providing for the law relating to the 'land' defined under Section 4(14) of the Code.

(18). As far as criminal proceeding for illegal encroachment, damage or trespass over the land belonging to Gram Sabha is concerned, the same can be undertaken but it would be subject to the adjudication of rights of the parties over the land in dispute as the said determination can be done only by the revenue Court.

LEGALITY OF CRYPTIC/
SUMMONING ORDER ON A PRINTED
PROFORMA :

(19). In addition to above, learned counsel for the applicants have drawn attention of the Court to the impugned summoning order whereby the concerned Magistrate, despite of the repeated directions of the Hon'ble Apex Court as well as of this Court, have adhered to the old fashion by taking the cognizance of offences on a printed proforma. Needless to mention here that on the previous occasion at least a dozen of the cases of different Benches of this Court in different proceedings have condemned and deprecated this practice of taking

cognizance on a printed proforma, but it seems that the concerned Magistrates repeatedly in utter defiance of the directions of this Court are still taking cognizance on a printed praforma without applying their judicial mind. This is wholly unacceptable and condemned in strong term. The Session Judges of respective sessions divisions are required to look into the matter and issue an specific order that the cognizance order must be speaking and showing application of judicial mind.

(20). It was noted by Hon'ble Apex Court in the case of *Abdul Rashid vs. State of U.P., 2010 SCC online Alld 2819*, wherein it has been held that the judicial order cannot be allowed to be passed in a mechanical fashion either by filling in the blanks in a printed proforma or by affixing a readymade 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 judicial mind to the facts of the case but is also against the settled judicial norms.

(21). Similarly in the case of *Bhushan Kumar vs. State (NCT of Delhi), 2012 5 SCC 424*, wherein the Hon'ble Apex Court has observed 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. While explaining the true import of expression "sufficient ground for proceeding" the Hon'ble Apex Court in the case of *Sunil Bharti Mittal vs. Central Bureau of Investigation, AIR 2015 sc 923* has held 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 swtated in the order itself...."

(22). As mentioned above, taking into account the gravity of offence and its nature in which there is no criminality as such and the apt remedy would be to proceed against the erring so called encroacher u/s 67 of the U.P. Revenue Code and get the land in dispute demarcated. It is the case exclusively falls within the domain of concerned revenue authority to impose the fine, if any, after taking the whole exercise as per the provisions of law contained u/s 67 of the U.P. Revenue Code.

(23). Thus, after having heard the arguments advanced by learned counsel for the applicants and with the help of guidelines and the law laid down by the Hon'ble Apex Court in abovementioned cases and also keeping in view the totality of facts and circumstances of the case, I have got no hesitation to allow these applications u/s 482 Cr.P.C. and quash the impugned summoning/cognizance orders as well as proceedings challenged therein. Accordingly, the impugned summoning/cognizance order dated 27.10.2018 as well as entire criminal proceeding of Case No.1588 of 2018 (State vs. Bhawarpal Singh and others), charge sheet dated 20.6.2016, arising out of Case Crime No.149 of 2016, u/s 3(2)A of Prevention of Damages to Public Property Act, Police Station Tirwa, District Kannauj, pending in the Court of Additional Chief Judicial Magistrate, Kannauj and the summoning/cognizance order dated

(24). The instant applications u/s 482 Cr.P.C. stand allowed. The matter is remanded back for fresh consideration by the court concerned, after strictly adhering to the observations of this order, within next FOUR MONTHS.

(2023) 7 ILRA 404
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.07.2023

THE HON'BLE SHREE PRAKASH SINGH, J.

Application u/s 482 No. 1968 of 2018

Kazim Mehndi ...Applicant
Versus
Zubedia Begum & Anr. ...Opp. Parties

Counsel for the Applicant:
Vijay Kumar Pandey

Counsel for the Opp. Parties:

G.A., Anil Kumar Sharma, Arvind Kumar, Bajhul Siddiqui, Mohammad Abbas Zaidi, Shivendra Pratap Singh

Criminal Law - Criminal Procedure Code, 1973 - Sections 156(3), 200, 202 & 482 - UP Zamindari Abolition and Land Reforms Act, 1950 - Sections 210, 171 & 172: - Application U/s 482 – challenging the criminal proceeding initiated against the applicant – complaint – allegation of submission of forged

and fabricated death certificate – during proceeding of a dispute which is purely civil in nature and several set of litigations are pending between the parties – court finds that, - prima facie there seems to be civil dispute in between the parties but so far as getting prepared the death certificate is concern, it was prepared wilfully and dishonestly, therefor the same was cancelled – held, - it is trite law that the testimony of the witnesses cannot be examined by this court and deciding the fate of the trial while giving finding that those testimonies are baseless is not proper at this stage and further the criminal and civil proceedings can go on as there are different consequences of the same – hence, court finds no merit in this case – accordingly, application is hereby dismissed. (Para – 21, 22, 23, 24)

Application u/s 482 dismissed. (E-11)

List of Cases cited:

1. Devendra & ors.Vs St. of UP & anr.(2009 vol. 7 SCC 495),
2. Inder Mohand Goswami & anr.Vs St. of Uttarakhand & ors.(2007 col. 12 SCC 1),

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

1. Heard Sri Vijay Kumar Pandey, learned counsel for the applicant-petitioner, Sri Anil Kumar Sharma and Bajhul Quamar Siddiqui for opposite parties, Sri Nirmal Kumar Pandey, learned A.G.A. for the State and perused the material placed on record.
2. Instant application has been filed with prayer to quash the order dated 06.03.2018 passed by Judicial Magistrate, Court No.2, Sitapur in a Criminal Case No. 6395 of 2017, Smt. Zubeda Begum, versus Kazim Mehndi, and further prayed to stay the operation and implementation of impugned order dated 06.03.2018 passed by Judicial Magistrate, Court No.2, Sitapur

in a Criminal Case No. 6395 of 2017, Smt. Zubeda Begum, versus Kazim Mehndi.

3. Learned counsel appearing for the applicant submits that the factual matrix of the case is that on 15.04.1990, on the basis of an application of the petitioner moved before Nagar Palika Parishad, Mehmudabad, Sitapur, an inquiry was made with respect to the death certificate which was issued to the petitioner regarding the death of Taqi Hussain wherein the date of death of Taqi Hussain was shown 02.04.1993. He further added that it is an admitted fact that daughter of Raja Hussain is admittedly died on 06.04.2007 and the Tehsildar under certain misconception and while misreading the provisions of section 171 and 172 of U.P.Z.A & L.R. Act has presumed as Taqi Hussain as successor who was not alive on the date of death of Kaniz Raja thereafter, the applicant-petitioner filed a case under section 210 of U.P.Z.A & L.R. Act, against the order of Tehsildar dated 27.01.2015 thereby, agitating the issue that the succession which was open on the date of death of Kaniz Raza i.e. on 07.04.2007, on that point of time Taqi Hussain was not alive. Therefore, the present applicant being sister's son admittedly was alive on the death of Kaniz Hassan and thus, being the nearest heir, learned appellate court allowed the appeal and set aside the order passed by the Tehsildar dated 27.01.2015 and against the same, a revision was filed which was also dismissed on 07.09.2015 by the revisional court and thereafter, on 26.05.2015, a claim of Mutation has also been raised. He added that in between the death certificate which was issued in collusion with the ex- chairman of Nagar Palika Parishad, was got cancelled and against the same the present applicant has instituted the writ petition before this Court

which is pending consideration. He added that since the present applicant are the nearest heirs of the deceased Kaniz Raja and therefore, there was no occasion to submit any forged or fabricated death certificate in his favour. He further added that in fact it is a dispute which is purely of civil in nature and several set of litigations are pending between the parties and this can only be decided after the issue is finally decided which is pending consideration at different stages.

4. While further adverting the fact that the order dated 06.03.2018 has been passed without considering the facts in its right perspective as the learned trial court has not considered the fact that the present applicant is the nearer heir of the deceased and thus, after the death of Kaniz Raja, he applied for Mutation.

5. He added that the trial court has also ignored the fact that there was no occasion for the present applicant to submit any kind of forged or fabricated death certificate as he by operation of law, is the legal heir of the deceased, Adding his argument, he submits that impugned order dated 06.03.2018 has been passed without thoroughly giving the reasons.

6. In support of his submission, he has placed reliance on a judgment reported in **Devendra and Others versus State of U.P. and another (2009) 7 SCC** page 495 and has referred paragraph 24.

7. Paragraph 24 is quoted herein under:-

There is no dispute with regard to the aforementioned propositions of law. However, it is now well settled that the High Court ordinarily would exercise its

jurisdiction under Section 482 of the Code of Criminal Procedure if the allegations made in the first information report, even if given face value and taken to be correct in their entirety, do not make out any offence. When the allegations made in the first information report or the evidences collected 'during investigation do not satisfy the ingredients of an offence, the superior courts would not encourage harassment of a person in a criminal court for nothing.

8. Referring the aforesaid, he submits that the Apex Court in so many word has held that the superior courts would not encourage harassment of a person in a criminal court if there is no substance.

9. He has further placed reliance on a judgment reported in **Inder Mohan Goswami and another versus State of Uttaranchal and others (2007) 12 SCC 1** and has referred paragraph 42.

10. Paragraph 42 is quoted herein under:-

On a reading of the aforesaid section, it is manifest that in the definition there are two separate classes of acts which the person deceived may be induced to do. In the first class of acts he may be induced fraudulently or dishonestly to deliver property to any person. The second class of acts is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but need not be fraudulent or dishonest. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he

had a 7 fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one cannot presume that he all along had a culpable intention to break the promise from the beginning.

11. Referring the aforesaid, he submits that the intention is a key point to map out the criminal and civil act of a person. He added that the Apex Court has also held that fraud and cheating can said to be committed once, such a person had fraudulent or dishonest intention. He submits that there was no question with respect to any gain by the applicant and thus, it could not be said that there was any criminal intent of the applicant for committing the alleged offence.

12. Concluding his argument, he submits that since the matter is sub-judice in civil suit and the learned trial court without considering the aforesaid facts and circumstances that the case is purely of civil in nature and has passed the order dated 06.03.2018 therefore, the same may be set aside.

13. Leamed counsel for the opposite parties has vehemently opposed the submission aforesaid and submits that the present applicant moved an application for mutation whereby, the death certificate of Taqi Hussain was annexed. He added that once the same was challenged before the court of Civil Judge, J.D., Mehmudabad, Sitapur, after considering the facts and circumstances the order was passed on 12.05.2015, while discussing the fact that the death certificate of Taqi Mohd is forged which was produced by the applicant at the time of executing the Mutation application. Learned counsel has placed the supplementary affidavit dated 13.07.2023

annexing therein the photocopy of the judgment and order dated 12.05.2015, which is taken on record.

14. Attention has been drawn during course of hearing that the trial court directed the Executive Officer of Nagar Palika Parishad, Medmudabad, Sitapur to submit its report regarding the death certificate of Taqi Hussain and in response thereof, it was intimated and reported that the death certificate which was submitted by the present applicant is a forged and that was cancelled. The relevant paragraph of the aforesaid order is quoted here in under:-

यदि वादीगण एवं प्रतिवादीगण के द्वारा प्रस्तुत अभिलेखीय साक्ष्य प उनके द्वारा प्रस्तुत तर्कों को देखा जाए तो प्रस्तुत बाद में श्री तकी हुसैन के सम्बन्ध में प्रतिवादीगण द्वारा मृत्यु प्रमाण पत्र 42 ग-1 दाखिल किया गया है. जिसमें श्री तकी हुसैन की मृत्यु की तिथि 15.04.1990 अंकित है. जबकि वादीगण द्वारा तकी हुसैन का मृत्यु प्रमाण पत्र 48 ग-1 दाखिल किया गया है, जिसमें उनकी मृत्यु की तिथि दि० 02.04.1993 अंकित है। न्यायालय द्वारा इस तथ्य को स्पष्ट करने के लिए अधिशाषी अधिकारी नगर पालिका परिषद महमूदाबाद सीतापुर को पत्र का० सं० 60 ग-2 में लिखा गया कि जो उभय पक्ष द्वारा एक ही व्यक्ति तकी हुसैन के दो मृत्यु प्रमाण पत्र दाखिल किये गये हैं, उनकी प्रामाणिकता क्या है। इसके अलोक में अधिशाषी अधिकारी नगर मालिका परिषद महमूदाबाद, सीतापुर की आख्या 61 ग-2 प्राप्त हुआ, जिन्होंने अपनी आख्या दी कि श्री तकी हुसैन के मृत्यु की तिथि 15.04.1990 गलत है, इस मृत्यु प्रमाण पत्र को कार्यालय के पत्र सं० 125 दि० 26.03.2015 द्वारा निरस्त किया जा चुका है। इस प्रकार श्री तकी हुसैन के मृत्यु की तिथि 02.04.1993 ही सही है तथा मृत्यु की तिथि 15.04.1990 पूर्णतया गलत है।

15. Referring the he submits that it is prima facie evident from the judgment and the report of the executive officer that the death certificate of Taqi Mohammad, which was produced was found forged and therefore, the complaint which has been instituted by the complainant thereafter, the

same was treated as complaint case, the statement of the complainant and witnesses were recorded and there is no deviation regarding the allegation with respect to preparing of forged death certificate of Taqi Mohammad.

16. Learned counsel appearing for the opposite party further submits that prima facie perusal of the order dated 06.03.2018, it transpires that the fact and the reasons have been discussed exhaustively. He further added that while passing the order the learned trial court has also gone into the statement of the complainant and the witnesses which was recorded under section 200 and 202 of the Cr.P.C.

17. Concluding the arguments, he submits that the criminal and civil proceeding can go on simultaneously, and once it has prima facie from the report of Executive Officer that the death certificate is forged and that was cancelled, the order passed dated 06.03.2018 by the learned trial court, is quashed, adhering the provisions of law and thus, the same is not entitled to be set aside.

18. On the other hand, learned counsel appearing for the State has also vehemently opposed the contentions of learned counsel for the applicant and submits that the order dated 06.03.2018 passed by the learned trial court is assailed and about five years have been passed and after 12.01.2023, there is no interim order in this application. Adding his argument, he submits that it is apparent from the criminal proceeding itself that forged certificate was prepared by the applicant and later on it was cancelled by the Executive Officer, Nagar Palika Parishad, further the statement of witnesses and complainant are intact and there seems to be no deviation

thereof. Thus, the learned trial court has no occasion, not to believe on the statement of complainant and the witnesses recorded under section 200 and 202 of Cr.P.C. The criminal intent after preparing the forged document i.e. death certificate is prima facie evident that the same was prepared for wrongful gain and thus, this cannot be decided at this stage that the statement of the witnesses and the complainant are incorrect because there is no erroneousness in the summoning order dated 06.03.2018 passed by the learned trial court.

19. Adding his argument, he submits that the factual dispute has been raised before this Court which cannot be entertained and examined at this stage and furthermore, the civil and criminal proceedings are there consequences and that can be go on simultaneously as the law is very clear on this point, might be any dispute in between the parties in respect to the civil matter, but this does not mean that on the carve of the aforesaid dispute of persons is allowed to commit forgery. Therefore, his submission is that the applicant is not entitled for any relief.

20. Having heard learned counsels for the parties and after perusal of material placed on record, it emerges that the criminal case has been instituted against the present applicant with an allegations that he with a view to inherit the property has got prepared the forged death certificate of Taqi Hussain, and an application was instituted by the complainant under section 156 (3) of Cr.P.C. which was treated as complaint case, wherein the statement of the complainant and the witnesses were recorded. From perusal of the statements, it is evident that those, supports the version of the complainant and there is no deviation in the same.

21. Undoubtedly, prima facie there seems to be civil dispute in between the parties but so far as getting prepared the death certificate of Taqi Hussain by the present applicant is concerned, it prima facie show that the same was prepared willfully and dishonestly. The Executive Officer of Nagar Palika Parishad, Mehmudabad, Sitapur, cancelled the forged death certificate vide letter no. 125 dated 26.03.2015. This fact is evident from the interim order dated 12.05.2015 passed in civil suit no. 101 of 2015 annexed along with the supplementary affidavit dated 13.07.2023 wherein, during the proceeding this fact was also got verified, while calling the report from Executive Officer of Nagar Palika Parishad, Mehmudabad, Sitapur, wherein it was informed that the death certificate of Taqi Hussain, wherein the date of death was shown as 15.07.1990 was wrong and therefore, the same was cancelled.

So far as the submissions of learned counsel for the applicant is concerned that the applicant is heir by operation of law and there was no need to submit any kind of forged documents with respect to the death of Taqi Mohammad, is not sustainable, as then what was the occasion for the present applicant to submit a forged death certificate, which indicates that there was some expectation of wrongful gain by him.

22. In support of the submissions, the applicant has also referred the judgments of **Devendra and Others versus State of U.P. and another and Inder Mohan Goswami and another versus State of Uttaranchal and others (Supra)**, which do not attract in the instant matter as the fraudulent and dishonest intention is apparent from getting prepared the death

certificate and submitting the same before the public authority for wrongful gain is very overt. The Hon'ble Apex Court in aforesaid cases has very categorically distinguished the 'the intention of doing any wrong and fraudulent or dishonest intention. Vide the aforesaid judgments it has very clearly been held that the superior courts shall ensure that criminal prosecution is not used as an instrument of harassment, but on the other hand it has also been held that inherent jurisdiction under section 482 of Cr.P.C. be exercised sparingly and carefully. It has also been held that there can be no hard and fast rule and each case has to be considered on its own merits. It is further said that the genuine complaint, keeping in view of the purport and object, would not be interfered. This court has also noticed that the counsel for the applicant has also failed to demonstrate that how any cognizable offence was not made out as the statements of the witnesses and the complainant are intact and prima facie there is a record which is said to be forged and the applicant seems to be beneficiary.

23. It is trite law that the testimony of the witnesses cannot be examined by this Court and deciding the fate of the trial while giving finding that those testimonies are baseless is not proper at this stage and further the criminal and civil proceedings can go on as there are different consequences of the same.

24. Before parting with the judgments, it is clarified that the observations made hereinabove would have no bearing on the merit of the criminal case no 6395 of 2017 pending before the trial court.

25. Considering above said submissions and discussions, this Court

finds no merit in this case and thus, the instant application is hereby **dismissed**.

(2023) 7 ILRA 409
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.07.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application u/s 482 No. 6191 of 2023

Mohd. Khalid @ Khalid **...Applicant**
Versus
Union of India & Anr. **...Opp. Parties**

Counsel for the Applicant:
Anil Kumar Pandey

Counsel for the Opp. Parties:
S M Singh Royekwar

Criminal Law - Criminal Procedure Code, 1973 - Sections 211, 215, 464 & 482. - Indian Penal Code, 1860 - Sections 34, 302 & 323 - Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 8 & 21: - Application – for quashing the charge-sheet – offence of murder – punishment of voluntarily causing hurt - FIR - search & arrest - recovery memo – investigation – framing charges – NBW - effect of omission/error to frame charge – even after regular presence of the present applicant before the trial court, non bailable warrant has been issued for only one day delay, which is too harsh – applicant give undertaking that he will remain present before the trial court on each and every date and he will not take any unnecessary adjournment and therefore, the NBW issued against the applicant may not be given effect - court finds that, so far as the provision of section 215 Cr.P.C. is concerned, unless the accused is misled by such omission or any prejudice is caused to him, errors can be rectified at subsequent stage – held, provision of section 464 Cr.P.C. provides mechanism for rectifying the error even at the stage of appeal or revision – thus, court is of considered opinion that error and omission in 'charge' can be

rectified, if no material prejudice is caused to accused – and it also trite law that incorrectness in framing of ‘charge’ would not vitiate conviction if no prejudice is caused to accused as procedure prescribed in Cr.P.c. is with the object to fulfil ends of interest of justice and not to frustrate it on ground of endless technicalities - court do not find any error and unlawfulness in the order impugned – accordingly, Application is dismissed.

(Para – 21, 22, 24)

Application u/s 482 dismissed. (E-11)

List of Cases cited:

1. Kammari Brahmaiah & ors.Vs Public Prosecution, High Court of A.P. (1999 vol. 2 SCC 522),
2. Kamil Vs St. of U.P. (2019 vol. 12 SCC 600),
3. Santosh Kumari Vs St. of J.& K. & ors.(2011 vol. 9 SCC 234).

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

1. Supplementary affidavit filed by counsel for the applicant, today, is taken on record.

2. Heard Sri Anil Kumar Pandey, learned counsel for the applicant, Sri S.M. Singh Royekwar, learned counsel for the opposite party no.1 and perused the material placed on record.

3. Notice issued to the opposite party no.2 is hereby dispensed with.

4. By means of this application, the applicant has assailed the charge dated 23.3.2022 framed by the Additional District and Sessions Judge, Court No.09/Special Judge N.D.P.S. Act, Lucknow, in Criminal Case No.194 of 2015 (Union of India Vs. Nasreen Bano and others), initiated on the basis of complaint filed by the opposite

party in C.B.N. Crime No.8 of 2014, under Section 8/21 of N.D.P.S. Act.

5. Factual matrix as per the prosecution story is that on 13.12.2014, while receiving information through mukhbir, co-accused Nasreen Bano was arrested with contraband substance and while preparing the recovery memo, the police team also recorded the statement, wherein the name of the applicant came into light. House of the applicant was searched on 28.4.2015 but the officers of the Department could not recover any contraband or incriminating articles. The trial court has taken cognizance on 5.6.2015 on charge sheet filed by the Investigating Officer, which was assailed by applicant before this Court and the same was set aside, while giving liberty to pass fresh order and, thereafter, fresh order was passed, as per the version of the applicant, without following the procedure of law. On 22.12.2021, the applicant was enlarged on bail and he kept on appearing before the trial court, while participating in the trial proceedings. Thereafter, on 22.2.2022, the trial of the applicant was separated from the co-accused Nasreen Bano and the applicant was summoned through warrant B. On 23.3.2022, the charge was framed though neither the contents of the charges were told to the applicant nor even his name is mentioned in the charges, which is evident from the order itself, though the applicant has signed over the order of charge on the same day. The order of charge dated 23.3.2022 is under challenge, in this application.

6. Learned counsel for the applicant submits that impugned order dated 23.3.2022 has been passed without mentioning the name of the present applicant in the contents of the charges. He

added that though the signature of the present applicant is on the said order but he has not been told/informed regarding the contents of the charges whereas it is not a case that the present applicant avoided the criminal proceedings instituted against him, as he, after the aforesaid order, is appearing on each and every date before the trial court. Further he submits that in fact, the provisions prescribed under Section 211 of the Cr.P.C. has clearly been violated by the trial court while passing the impugned order. Drawing attention towards the impugned order, he submits that name of one of the co-accused Nasreen Bano is mentioned therein as charges have been framed against Nasreen Bano only and only by averring that the signature of the present application is on the order of framing of charges, does not mean that the provisions of Section 211 Cr.P.C. has been complied with.

7. He further added that the trial court is proceeding in a hasty manner, which is evident from the fact that just after framing of the charges on 7.7.2023, non-bailable warrant has been issued, vide order dated 10.7.2023, though there is no history of the applicant that he has ever avoided the proceedings of the trial court and even there is no apprehension that he will escape away from the criminal proceedings. Thus, submission is that the order of charge dated 23.3.2022 vitiates in the eyes of law and the same may be set aside.

8. Learned counsel for the opposite party no.1, Sri S.M. Singh Royekwar has vehemently opposed the contentions aforesaid and submits that the order dated 23.3.2022, by which charges have been framed, has rightly been passed. He pointed out that the signature of the present applicant is there and, thus, he has no

occasion to say that the charges were not brought in the knowledge of the applicant. He submits that it seems that due to inadvertence, the name of the present applicant could not be transcribed in the order dated 23.3.2022 and it was corrected later on. The applicant kept on appearing before the trial court for about more than one year. The effect of the errors in 'charge' has been given in Section 215 of the Cr.P.C. Section 215 Cr.P.C. which reads as under:-

"215. Effect of errors. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."

9. Referring the aforesaid provisions, he submits that it has been provided in so many words that the error committed in this Chapter can be rectified unless the accused was infact misled by such error or omission and it has occasioned the failure of justice. He further submits that even the error can be rectified at the stage of appeal or revision as envisaged under Section 464 of the Cr.P.C. Section 464 of the Cr.P.C. is quoted as under:-

"464. Effect of omission to frame, or absence of, or error in, charge.

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a

failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

10. The abovesaid provisions provide that if the court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may, in the case of an omission to frame a charge, order that the charge be framed and that the trial be recommended from the point immediately after the framing of charge and in case of an error, omission or irregularity in the charge, direct a new trial to be had upon in whatever manner it thinks fit.

11. He submits that in fact this was in the mind of the legislature that while framing the charge by the court, how the errors can be rectified in case of any error/omission by the trial court, therefore, there is no hard rule that the error in the charge cannot be rectified.

12. In support of his contention, he has placed reliance on a Judgment of the Apex Court rendered in the case of

Kammari Brahmaiah and others Vs. Public Prosecutor, High Court of A.P. reported in (1999) 2 SCC 522 and referred para 6 thereof, which is quoted as under:-

"6. The aforesaid section is in mandatory terms and it specifically provides what is to be done in cases where charge is not framed or there is an error, omission or irregularity in framing of the charge. From the unequivocal terms of the section, it can be stated that finding, sentence or order could be set aside only in those cases where the facts are such that no valid charge could be preferred against the accused in respect of the facts proved. Secondly, if the facts are such that charge could be framed and yet it is not framed but there is no failure of justice, has in fact been occasioned thereby, the finding sentence or order of the court of competent jurisdiction is not to be set aside on that ground. Thirdly, if there is failure of justice occasioned by not framing of the charge or in case an error, omission or irregularity in charge re-trial of the case is to be directed as provided under sub-section (2)."

13. Submission is that Hon'ble Apex Court has dealt with the eventualities, where the charges have not been framed in any offence or there is error, omission or irregularity in framing of charges, thereby holding in so many words that if there is failure of justice by not framing of charges, in any offence or in case of any error, omission or irregularity, re-trial of the case is to be directed, under sub section 2 of Section 464 of Cr.P.C. He submits that keeping in mind that whole proceeding may not become redundant, the mechanism has been provided and so is the Apex Court, while interpreting the same, has also upheld by way of aforesaid verdict.

14. Placing reliance on the Judgment of the Apex Court, rendered in the case of **Kamil Vs. State of Uttar Pradesh reported in (2019) 12 SCC 600**, he referred paras 11, 14, 16 and 18, which are quoted as under:-

"11. Absence of charge would vitiate the conviction only if it has caused prejudice to the accused and has in fact been occasioned thereby. In Willie (William) Slaney v. State of Madhya Pradesh, the Constitution Bench explained the concept of "prejudice caused to the accused" and "failure of justice" and held as under:-

"6. Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based." (emphasis supplied)

14. After considering the meaning of the expression "failure of justice" and after referring to the Constitution Bench in Willie Slaney and Gurbachan Singh, this Court in Main Pal v. State of Haryana, held as under:(Main Pal case, SCC pp. 137-138, paras 15-17)

"15. In Shamsaheb M. Multtani v. State of Karnataka, this Court considered the meaning of the expression "failure of justice" occurring in Section 464 Cr.PC. This Court held thus:

'22. ... a conviction would be valid even if there is any omission or irregularity in the charge, provided it did not occasion a failure of justice.

23. ... The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.'

16. The above principles are reiterated in several decisions of this Court, including State of W.B. and Another v. Laisal Haque, State of A.P. v. Thakkidiram Reddy, Dalbir Singh v. State of U.P., Dumpala Chandra Reddy v. Nimakayala Balireddy and Sanichar Shani v. State of Bihar.

17. The following principles relating to Sections 212, 215 and 464 of the Code, relevant to this case, become evident from the said enunciations:

(i) The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(ii) The accused is entitled to know with certainty and accuracy, the exact

nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge.

(iii) In judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself." (emphasis supplied)

16. The question falling for consideration is whether non-framing of charge has caused prejudice in the present case. In order to judge whether a failure of justice has been occasioned, it is relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether they were explained to him and whether he got a fair chance to defend. The crux of the issue is whether in this case, omission to frame charge under Section 302 IPC has vitiated conviction of the appellant/accused.

18. As seen from the above, charge was not framed against the appellant under Section 302 read with Section 34 IPC. But

it is for the accused to prove that omission to frame charge has occasioned in a failure of justice. Though specific charge under Section 302 read with Section 34 IPC was not framed, the gist of the charge sheet filed against the appellant/accused clearly shows that the accused has been charged for the offence under Section 302 read with Section 34 IPC as seen from the following:-

"Sir, On 03.01.1986, the complainant came to the Police Station Kotwali and orally informed that his niece went to take water from the tap. She was teased by the accused but they did not make it an issue due to the respect in the society. However, there was an ugly quarrel over there. He pacified his niece. I along with Adil and Akhlaq today were going to my shop situated at Jogipuraat about 04.00 PM, when we reached near Lalpur Mandir, accused mentioned in Column No.2 and 3 were present there. Kamil was carrying a Danda Nasir was carrying a hockey and Rashid was carrying knife in their hands. They surrounded us. They abused my nephew Adil. Adil protested about abusing and said that it would not be good if you continue. On this accused hit my nephew with danda. I snatched danda from Kamil to save my nephew. Accused Nasir and Adil caught hold my nephew and Rashid poked the knife in his chest. My nephew sat down on the earth and his condition started deteriorating. I carried him to hospital where he died. On the basis of this information a crime case No.2/86 u/s 302/323/34 IPC. Accused Rashid and others were arrested and were sent to jail. Accused Kamil is not available and the investigation is going on against him. The charge sheet is filed u/s 302/323/34 IPC against these accused persons. Dated 13.01.1986." (emphasis supplied)

In the charges framed, even if the appellant and accused Nasir were charged

only under Section 323 read with Section 34 IPC, the gist of the charge sheet clearly alleges their sharing of common intention in committing the murder of Akhlaq with the first accused Rashid."

15. The Apex Court dealing with the issue regarding omission, in framing the charges, has held that same can be rectified even at the stage of appeal and revision.

16. Further referring the Judgment of the Apex Court rendered in the case of **Santosh Kumari Vs. State of Jammu and Kashmir and others reported in (2011) 9 SCC 234** has placed reliance on paras 17 and 18, which read as under:-

"17. Like all procedural laws, the Code of Criminal Procedure is devised to subserve the ends of justice and not to frustrate them by mere technicalities. It regards some of its provisions as vital but others not, and a breach of the latter is a curable irregularity unless the accused is prejudiced thereby. It places errors in the charge, or even a total absence of a charge in the curable class. That is why we have provisions like Sections 215 and 464 in the Code of Criminal Procedure, 1973.

18. The object of the charge is to give the accused notice of the matter he is charged with and does not touch jurisdiction. If, therefore, the necessary information is conveyed to him in other ways and there is no prejudice, the framing of the charge is not invalidated. The essential part of this part of law is not any technical formula of words but the reality, whether the matter was explained to the accused and whether he understood what he was being tried for. Sections 34, 114 and 149 of the IPC provide for criminal liability viewed from different angles as regards actual participants, accessories

and men actuated by a common object or a common intention; and as explained by five Judge Constitution Bench of this Court in Willie Slavey Vs. The State of M.P. SCR at p.1189, the charge is a rolled-up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable."

17. Vide the abovesaid Judgment, it has been held by the Apex Court that if the necessary information is conveyed to the accused in other ways and no prejudice is caused to him, the framing of the charges could not be invalidated as the object of the charge is to provide the notice of the matter to the accused.

18. Next contention of the learned counsel for the opposite party no.1 is that no prejudice is caused to the applicant as he had knowledge otherwise that charges have been framed against him as he has put his signature over the order of 'charge'. He further added that it is a fact that the present applicant has also examined some of the prosecution witnesses and about one year passed, but he did not raise this objection within such period of time. He submits that now additional charges have been framed, vide order dated 7.7.2023 and, as such, each and every grievance, which has been raised by the applicant, is of no avail. The grievance as raised by the applicant is on non est ground and, thus, instant application has no merit and the same may be dismissed.

19. Having heard learned counsel for the parties and after perusal of the record, it transpires that on 23.3.2022, the charges were framed, wherein the name of one co-accused Nasreen Bano is mentioned, but the name of the applicant does not find

place. It is further apparent that the signature of the applicant, namely, Mohd. Khalid is on the order of charge and this fact has not been denied by the counsel for the applicant. It is also an admitted fact that the prosecution witnesses were produced and they were examined by the applicant, meaning thereby that the fact with respect to framing of 'charges' was very well in the knowledge of the present applicant. This Court has also noticed that later on, vide order dated 7.7.2023, the additional charges were framed and the trial court is proceeding in the matter.

20. It emerges from the several verdicts of the Apex Court as well as relevant provisions of Cr.P.C., as envisaged under Section 215 and Section 464 which says that the omission or error can be rectified even at the stage of revision and appeal. So far as the provisions of Section 215 of Cr.P.C. is concerned, it clearly says that unless the accused is misled by such omission or any prejudice is caused to him, errors can be rectified at subsequent stage. Provision of Section 464 of Cr.P.C. provides mechanism for rectifying the error even at the stage of appeal or revision.

21. This Court is of the considered opinion that the error and omission in 'charge' can be rectified, if no material prejudice is caused to the accused. It is also trite law that incorrectness in framing of 'charge' would not vitiate the conviction if no prejudice is caused to the accused as the procedure prescribed in Cr.P.C. is with object to fulfill the ends of interest of justice and not to frustrate it on the ground of endless technicalities. Every criminal law is evolved, designed and promulgated so that the same remains fair to the accused, fair to the State and fair to the society at large, as the same is the ultimate achievement. The trial court must be cautious

while considering the prejudice caused to the accused, as no injustice can prevail.

22. In view of the above said submissions and discussions, I do not find any error and unlawfulness in the order impugned, after it has been rectified, vide order dated 7.7.2023, thus, there is no merit in this application.

23. Resultantly, the application is hereby dismissed.

24. However, it has been stated that even after the regular presence of the present applicant before the trial court, non bailable warrant has been issued for only delay of one day, which is too harsh. He submits that the present applicant undertakes that he will remain present before the trial court on each and every date and he will not take any unnecessary adjournment and, therefore, the non-bailable warrant issued against the applicant may not be given effect too.

25. Learned counsel for the opposite party no.1 has fairly submitted that he has no objection as prayed abovesaid, though the applicant may be directed to co-operate with the trial proceedings.

26. In view of the aforesaid submissions, non bailable warrant issued, vide order dated 10.7.2023 is kept in abeyance. In case of further non presence of the applicant, the trial court is at liberty to take fresh recourse.

27. It is further clarified that the findings given as above would have no bearing on the merits of the case, pending before the trial court.

for last 11 years. The applicant, Ajit Kumar Gupta and co-accused, Narendra Kumar Singh and Kanhaiya Gupta, have occupied her house situated in Anandpuri, Transport Nagar, Kanpur, with the help of gangsters . It was further alleged that accused persons have fabricated documents to justify their illegal occupation. Her mother never signed any document in their favour and her signatures have been digitally created. The aforesaid FIR was registered after a letter was sent to the Chief Minister of the State by the opposite party no.2 from United State of America.

3. Learned counsel for the applicant submits that after investigation charge-sheet no. 38/16 dated 27.5.2016 was submitted by the police only against co-accused, Narendra Kumar Singh and the applicant was exonerated. At the behest of co-accused, further investigation was conducted by the police and supplementary charge-sheet No. 38-A/16 dated 28.8.2016 was filed before the Additional Chief Metropolitan Magistrate, Court No.2/Additional Judge, Kanpur Nagar, who took cognizance of the same on 28.9.2016 and summoned the applicant. In the disputed house, co-accused, Narendra Kumar Singh, is in possession on the basis of an agreement to sell dated 31.5.2004 executed by mother of opposite party no.2. The name of the applicant is mentioned in the agreement in block letters without any signature, purportedly as a witness of the agreement. Civil dispute is pending between the mother of the opposite party no.2 and co-accused, Narendra Kumar Singh. In the supplementary charge-sheet, the applicant has been charge-sheeted solely on the basis of the statement of co-accused, Narendra Kumar Singh and supplementary charge-sheet was

submitted against him. The court below has summoned the applicant on its basis.

4. Learned counsel for the applicant has submitted that even if it is assumed that the applicant signed the disputed agreement to sell as a witness, even then it is unregistered document written on stamp of Rs.100/- and no title of the property has passed on its basis in favour of the applicant or any of the co-accused. The applicant claims that he has no criminal history.

5. Learned counsel for the applicant has submitted that further investigation in the case was done without any order of Magistrate and supplementary charge-sheet was illegally submitted against the applicant. He has pointed out to the order dated 12.1.2023 passed by this Court wherein a report was called from the Magistrate concerned as to whether any direction for further investigation was given by the court or not. The Chief Metropolitan Magistrate, Kanpur Nagar, has sent report dated 15.4.2023 informing that there is no order found on the record of the case directing further investigation in this case by the Investigating Officer.

6. Learned counsel for the applicant has submitted that filing of supplementary charge-sheet against the applicant on the basis of unauthorized further investigation is bad in law. In the case of *Vinay Tyagi Vs. Irshad Ali and others, (2013)5 SCC 762* such a course adopted has been deprecated and it has been held by Apex Court that :

“40. Having analysed the provisions of the Code and the various judgments as afore-indicated, we would state the following conclusions in regard to the

powers of a magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code :

40.1. The Magistrate has no power to direct 'reinvestigation' or 'fresh investigation' (de novo) in the case initiated on the basis of a police report.

40.2. A Magistrate has the power to direct 'further investigation' after filing of a police report in terms of Section 173(6) of the Code.

40.3. The view expressed in (2) above is in conformity with the principle of law stated in Bhagwant Singh's case (supra) by a three Judge Bench and thus in conformity with the doctrine of precedence.

40.4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).

40.5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the Court to the extent that even where the facts of the case and the ends of justice demand, the Court can still not direct the investigating agency to conduct further investigation which it could do on its own.

40.6. It has been a procedure of proprietary that the police has to seek permission of the Court to continue 'further investigation' and file supplementary

chargesheet. This approach has been approved by this Court in a number of judgments. This as such would support the view that we are taking in the present case.

(Emphasis supplied)

XXXXXXXXXXXXXX

49. Now, we may examine another significant aspect which is how the provisions of Section 173(8) have been understood and applied by the courts and investigating agencies. It is true that though there is no specific requirement in the provisions of Section 173(8) of the Code to conduct 'further investigation' or file supplementary report with the leave of the Court, the investigating agencies have not only understood but also adopted it as a legal practice to seek permission of the courts to conduct 'further investigation' and file 'supplementary report' with the leave of the court. The courts, in some of the decisions, have also taken a similar view. The requirement of seeking prior leave of the Court to conduct 'further investigation' and/or to file a 'supplementary report' will have to be read into, and is a necessary implication of the provisions of Section 173(8) of the Code. The doctrine of contemporanea expositio will fully come to the aid of such interpretation as the matters which are understood and implemented for a long time, and such practice that is supported by law should be accepted as part of the interpretative process.

50. Such a view can be supported from two different points of view. Firstly, through the doctrine of precedence, as afore-noticed, since quite often the courts have taken such a view, and, secondly, the investigating agencies which have also so understood and applied the principle. The matters which are understood and implemented as a legal practice and are not

opposed to the basic rule of law would be good practice and such interpretation would be permissible with the aid of doctrine of contemporanea expositio. Even otherwise, to seek such leave of the court would meet the ends of justice and also provide adequate safeguard against a suspect/accused.”

6A. The case of **Vinubhai Haribhai Malviya and others Vs. State of Gujarat and Another, (2019) 17 SCC 1** has also been relied upon by the counsel for the applicant in support of his contention wherein it has been held:

“38. There is no good reason given by the Court in these decisions as to why a Magistrate’s powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences. Such a view would not accord with the earlier judgments of this Court, in particular, *Sakiri (supra)*, *Samaj Parivartan Samudaya (supra)*, *Vinay Tyagi (supra)*, and *Hardeep Singh (supra)*; *Hardeep Singh (supra)* having clearly held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What is not given any importance at all in the recent judgments of this Court is Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate’s nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly

ceases mid- way through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h), and Section 173(8) of the CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculcating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in *Hasanbhai Valibhai Qureshi (supra)*. Therefore, to the extent that the judgments in *Amrutbhai Shambubhai Patel (supra)*, *Athul Rao (supra)* and *Bikash Ranjan Rout (supra)* have held to the contrary, they stand overruled. Needless to add, *Randhir Singh Rana v. State (Delhi Administration)* (1997) 1 SCC 361 and *Reeta Nag v. State of West Bengal and Ors.* (2009) 9 SCC 129 also stand overruled.”

7. Finally reliance on a recent judgement of Apex Court in the case of **Peethambaran Vs. State of Kerela and**

Another, (Criminal Appeal No.1381 of 2023), has been made wherein it has been held:

“19. The Chief Police Officer of a district is the Superintendent of Police who is an officer of the Indian Police Service. Needless to state, an order from the District Police Chief is not the same as an order issued by the concerned Magistrate. Referring to Vinay Tyagi (supra), this Court in Devendra Nath Singh v. State of Bihar and Ors.9 noted that there is no specific requirement to seek leave of the court for further investigation or to file a supplementary report but investigation agencies, have not only understood it to be so but have also adopted the same as a legal requirement. The doctrine of contemporanea exposito aids such an interpretation of matters which have been long understood and implemented in a particular manner to be accepted into the interpretive process. In other words, the requirement of permission for further investigation or to file a supplementary report is accepted within law and is therefore required to be complied with.”

8. It has further been argued that the implication of the applicant on the basis of confession of co-accused, Narendra Kumar Singh, is hit by Section 25 of Evidence Act. Finally reliance on the judgement of of the Apex Court in the case of **State of Haryana Vs. Bhajan Lal, 1992 Supp (1) SCC 335** has been made in support of the argument that even if all the allegations made in the FIR and supplementary charge-sheet are taken to be correct, no offence is made out against the appellants.”

9. Learned AGA has vehemently opposed the submissions made by learned

counsel for the applicant alongwith opposite party no.2.

10. Learned counsel for opposite party no.2 has submitted that no permission is required for further investigation from the Metropolitan Magistrate by the police. He has submitted that the police has unfettered power of investigation and such investigation can continue even after the charge-sheet has been filed under Section 173 (2) Cr.P.C. and cognizance has been taken thereon by the Magistrate. Reliance has been place on the judgement of Apex Court in the case of **Rama Chaudhary Vs. State of Bihar, (2009) 6 SCC 346** wherein it has been held that:

“Among other sub-sections, we are very much concerned about sub- section (8) which reads as under:-

“(8) 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).”

8) A mere reading of the above provision makes it clear that irrespective of report under sub-section (2) forwarded to the Magistrate, if the officer in-charge of the police station obtains further evidence, it is incumbent on his part to forward the same to the Magistrate with a further

report with regard to such evidence in the form prescribed.

9) The above said provision also makes it clear that further investigation is permissible, however, reinvestigation is prohibited. The law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out a further investigation even after filing of the charge-sheet is a statutory right of the police. Reinvestigation without prior permission is prohibited. On the other hand, further investigation is permissible.

10) From a plain reading of sub-section (2) and sub-section (8) of Section 173, it is evident that even after submission of police report under sub-section (2) on completion of investigation, the police has a right to "further" investigation under sub-section (8) of Section 173 but not "fresh investigation" or "reinvestigation". The meaning of "Further" is additional; more; or supplemental. "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. Sub-section (8) of Section 173 clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a "further" report and not fresh report regarding the "further" evidence obtained during such investigation.

11) As observed in Hasanbhai Valibhai Qureshi vs. State of Gujarat and Others, (2004) 5 SCC 347, the prime consideration for further investigation is to arrive at the truth and do real and substantial justice. The hands of investigating agency for further investigation should not be tied down on the ground of mere delay. In other words, the mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation

if that would help the court in arriving at the truth and do real and substantial as well as effective justice.

12) If we consider the above legal principles, the order dated 19.02.2008 of the trial Court summoning the witnesses named in the supplementary charge-sheet cannot be faulted with. It is true that after enquiry and investigation charges were framed on 11.03.2004 and thereafter in the course of trial about 21 witnesses were examined. In the meantime, Police submitted supplementary charge-sheet with certain new materials and on the basis of supplementary charge-sheet, the prosecution filed an application on 12.01.2008 in a pending Sessions Trial No. 63 of 2004 to the trial Court for summoning the persons named in the charge-sheet for their examination as prosecution witnesses. On a careful perusal of the application, the trial Court, by order dated 19.02.2008, allowed the same and has summoned those witnesses named in the supplementary charge-sheet.

13) The law does not mandate taking prior permission from the Magistrate for further investigation. It is settled law that carrying out further investigation even after filing of the charge-sheet is a statutory right of the Police. [vide K. Chandrasekhar vs. State of Kerala and Others, (1998) 5 SCC 223.] The material collected in further investigation cannot be rejected only because it has been filed at the stage of trial. The facts and circumstances show that the trial Court is fully justified to summon witnesses examined in the course of further investigation. It is also clear from Section 231 of the Cr.P.C. that the prosecution is entitled to produce any person as witness even though such person is not named in the earlier charge-sheet. All those relevant aspects have been taken note of by the learned Magistrate while

summoning the witnesses based on supplementary charge-sheet. This was correctly appreciated by the High Court by rightly rejecting the revision. We fully agree with the said conclusion."

11. Finally reliance on the judgement in the case of **Dharampal Vs. State of Haryana, (2016) 4 SCC 160** has been made by learned counsel for opposite party no.2 as follows"-

17. In this context, we may notice the statutory scheme pertaining to investigation. Section 173 Cr.P.C. empowers the Police Officer conducting investigation to file a report on completion of the investigation with the Magistrate empowered to take cognizance of the offence. Section 173(8) Cr.P.C. empowers the office-in-charge to conduct further investigation even after filing of a report under Section 173(2) Cr.P.C. if he obtains further evidence, oral or documentary. Thus, the power of the Police Officer under Section 173(8) Cr.P.C. is unrestricted. Needless to say, the Magistrate has no power to interfere but it would be appropriate on the part of the investigating officer to inform the Court. It has been so stated in *Rama Chaudhary v. State of Bihar*⁴.

18. In *Vinay Tyagi v. Irshad Ali*⁵, wherein a two-Judge Bench, after referring to the decision in *Bhagwant Singh v. Commr. Of*⁴ (2009) 6 SCC 346 5 (2013) 5 SCC 762 Police⁶ has held thus:-

"However, having given our considered thought to the principles stated in these judgments, we are of the view that the Magistrate before whom a report under Section 173(2) of the Code is filed, is empowered in law to direct "further investigation" and require the police to submit a further or a supplementary report.

A three-Judge Bench of this Court in Bhagwant Singh has, in no uncertain terms, stated that principle, as aforenoticed."

19. In the said case, the question had arisen whether a Magistrate can direct for re-investigation. While dealing with the said issue, the Court has observed:-

"At this stage, we may also state another well-settled canon of the criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct "further investigation", "fresh" or "de novo" and even "reinvestigation". "Fresh", "de novo" and "reinvestigation" are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection." [Emphasis supplied] And again:-

"Whether the Magistrate should direct "further investigation" or not is again a matter which will depend upon the facts of a given case. The learned Magistrate or the higher court of competent jurisdiction would direct "further investigation" or "reinvestigation" as the case may be (1985) 2 SCC 537 be, on the facts of a given case. Where the Magistrate can only direct further investigation, the courts of higher jurisdiction can direct further, reinvestigation or even investigation de novo depending on the facts of a given case. It will be the specific order of the court that would determine the nature of investigation."

12. After hearing rival contentions and going through the authorities cited at

the bar, this Court finds that in the present case, the first question required to be decided is (I) whether the action of the Investigating Officer of proceeding with further investigation and filing supplementary charge-sheet after once submitting a charge-sheet against co-accused is permissible in law or not. The second question, which is required to be decided is (ii) whether a mere signatory to an agreement to sell can be held liable for the same offence as allegedly committed by the beneficiary of the agreement to sell, the co-accused in this case.

13. Proceeding with the first question, this Court finds that the Apex Court in the case of *Vinay Tyagi (Supra)* and *Peethambaran (Supra)* has held that leave of the Magistrate is required to conduct further investigation or to file supplementary report while the judgement of other set of judgements relied by counsel for opposite party no.2 in the cases of *Rama Chaudhary (Supra)*, *Hasanbhai Valibbhai Qureshi (Supra)*, *Dharampal (Supra)* provide otherwise. The second set of the judgements of the Apex Court mandates that Section 173(8) Cr.P.C. empowers the Investigating Officer to conduct further investigation even after filing of a report under Section 173(2) Cr.P.C. if he obtains further evidence, oral or documentary. No orders are required for further investigation by the Investigating Officer from the Magistrate.

14. This Court finds that the judgements of the Apex Court in the case of *Vinay Tyagi (Supra)* and *Peethambaran (Supra)* have not considered the law of the Apex in the case of *Rama Chaudhary (Supra)*. The observation in the judgement of *Dharampal (Supra)* made by the Apex Court that it would be appropriate for the

Investigating Officer to inform the court before proceeding with further investigation as stated in *Rama Chaudhary (Supra)* is not borne out from the record. The judgement of Vinubhai Haribhai Malviya and others (*Supra*) cited by learned counsel for the applicant is on a different issue as to whether the Magistrate has discretion to order further investigation even after submission of police report under Section 173(2) Cr.P.C. or not.

15. The power of the Magistrate is not in dispute in the present case to order further investigation. The dispute is whether the Investigating Officer can conduct further investigation without orders of Magistrate or not. A perusal of Section 173 (8) shows that it provides for further investigation by the Investigating Officer after submission of report. It nowhere provides for prior permission of Magistrate to do so. The Apex Court in the case of *Rama Chaudhary (Supra)* has relied on the same. In the judgement of *Hasanbhai Valibbhai Qureshi (Supra)* it has held that the power can be exercised by Investigating Officer to conduct further investigation without any order from the Magistrate. Even otherwise the Apex Court in the case of *Vinay Tyagi (Supra)* held that it has been a procedure of propriety that the police has to seek permission of the Court to continue 'further investigation' and file supplementary charge-sheet, which has been approved by Apex Court in a number of judgments. The judgements of both the sets cited at the bar are of Benches of equal strength.

16. In view of the above consideration, the first question raised by learned counsel for the applicant is answered in negative and held that there was no fault on the part of the Investigating

Officer to conduct further investigation and file supplementary charge-sheet against the applicant.

17. Now adverting to the second question, this Court finds that a perusal of Section 54 of the Transfer of Property Act, 1882, clearly proves that a contract for the sale of immoveable property is only a contract that sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. Therefore, it is clear that an agreement to sell does not creates any right or title in favour of intending buyer. It is only a document creating right to get another document of sale from seller on fulfilment of terms and conditions specified therein. On the strength of such an agreement, a buyer does not becomes the owner of the property. The ownership remains with the seller. It will be transferred to the buyer only on the execution of the sale deed by the seller. The buyer obtains only right to get sale deed executed in his favour.

18. Admittedly, the applicant is neither the seller nor the buyer of the property in dispute. Co-accused, Narendra Kumar Singh, is the intended purchaser of the property and the applicant is only alleged to be the witness to the agreement to sell allegedly executed by mother of opposite party no.2 in favour of co-accused, Narendra Kumar Singh. A witness of an agreement to sell only testifies to due execution of the document before him by the seller and buyer. This Court further finds that the attesting witness of an agreement to sell or any other document cannot be criminally prosecuted unless there is allegation of conspiracy under Section 120-B IPC. The witness is not necessarily

required to know what is contained in the document. He stands witness to due execution of the document before him. In the present case, the applicant claims that only his name has been mentioned in block letters as attesting witness in the disputed agreement to sell. He has not signed the same. He had no interest in the property nor he is in possession over the same. It is the co-accused, who is in possession over the property in dispute and not the applicant. The applicant could have been held liable for the alleged offence only if it was found that he had some interest in the property in dispute and he attested the agreement to sell only to protect his interest. It is not the case here.

19. Hence it is clear that no criminal liability can be attributed to the applicant for allegedly attesting an unregistered agreement to sell allegedly executed by mother of opposite party no.2 in favour of co-accused, Narendra Kumar Singh. The second question framed above is answered accordingly.

20. The Apex Court in the case of *Bhajan Lal Vs. State of Haryana (Supra)*, has clearly laid down the para meters where the proceedings against an accused can be quashed and this case comes within the same.

21. This Court concludes that further investigation conducted against applicant is on the basis of statement of co-accused, Narendra Kumar Singh and submission of supplementary charge-sheet on its basis were in accordance with law, but no offence is made out against the applicant from the allegations of fact on record and the relevant law of execution of agreement to sell. Hence supplementary charge-sheet

dated 28.8.2016 and summoning order dated 28.9.2016 are hereby quashed.

22. The application is allowed.

(2023) 7 ILRA 426

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 24.07.2023

BEFORE

THE HON'BLE SURYA PRAKASH

KESARWANI, J.

THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Appeal No. 559 of 1996

Vinod & Ors. ...Appellants

Versus

State of U.P. ...Respondent

Counsel for the Appellants:

Sri G.S. Chaturvedi, Sri Anurag Shukla

Counsel for the Respondent:

G.A., Sri Jitendra Shanker Pandey, Ms. Seema Singh

Criminal Law - Indian Penal Code, 1860 - Sections 302/34, 307/34 & 323/34 - Appeal against conviction - Rigorous imprisonment - Indian Evidence Act, 1872 - Section 145 - Code of Criminal Procedure, 1973 - Sections 161, 313 - As per prosecution, PW-1 was cousin of PW-2 and P.W.-3 - All three have their separate agricultural land as evident from evidence of PW2 - Accused wished to purchase agricultural land but it was purchased by PW-2 - Strained relationship was only against PW-2, but he St.d in cross examination that neither anyone exhorted to beat him nor anyone has beaten him - Further St.d appellant no. 1 spoken to take revenge - According to him, "revenge" mean appellant no. 1 will not allow crop to cut - Dispute arose between them on issue of cutting of crop - Motive for commission of offence appears doubtful - Nothing on record

show that apart from allegation of strained relationship, there was any other cause - PW-1 in cross-examination St.d PW-2 was present on spot when incident occurred and Rekhpal Singh not fired at PW-2 and none beaten PW-2 and appellant no. 1 exhorted to beat - PW-3 assigned role of exhortation to appellant no. 1 who exhorted to beat to take revenge - No exhortation to kill deceased has been alleged against appellants. (Para 35, 36, 37)

No evidence to establish prior conspiracy formed either prior to or in course of crime, to kill deceased - Evidence of PW-1, PW-2 and PW-3 are consistent to effect that simple injuries by lathi was caused by appellant no.1 on right arm of PW-3 and appellant no.2 caused simple injury on left arm of PW-3 and on leg of injured Sanwaliya by lathi and injuries proved by PW-4. (Para 38, 51)

Appeal partly allowed. (E-13)

List of Cases cited:

1. Malkhan Singh Vs St. (1975) 3 SCC 311 (Para 7)
2. Parasa Raja Manikyala Rao & anr. Vs St. of A.P. (2003) 12 SCC 306 (Para 11 and 12)
3. Suresh Vs St. of U.P., (2001) 3 SCC 673, (Para 24 and 40)
4. Lallan Rai Vs St. of Bihar, (2003) 1 SCC 268, (Para 22)
5. Chhota Ahirwar Vs St. of M.P., (2020) 4 SCC 126, (Para 24)
6. Barendra Kumar Ghosh Vs King Emperor, AIR 1925 PC 1
7. Mahbub Shah Vs Emperor, AIR 1945 PC 118
8. Rambilas Singh & ors. Vs St. of Bihar, (1989) 3 SCC 605, (Para 7)
9. Krishnan & anr. Vs St. of Kerala, (1996) 10 SCC 508, (Para 15)

10. Surendra Chauhan Vs St. of M.P., (2000) 4 SCC 110, (Para 11)
11. Gopi Nath @ Jhallar Vs St. of U.P. ,(2001) 6 SCC 620, (Para 8)
12. Ramesh Singh @ Photti Vs St. of A.P., (2004) 11 SCC 305, (Para 12)
13. Nand Kishore Vs St. of M.P., (2011) 12 SCC 120, (Para 20 to 23)
14. Shyamal Ghosh Vs St. of W. B.I, (2012) 7 SCC 646, (Para 87)
15. Jasdeep Singh @ Jassu Vs The St. of Pun., (2022) 2 SCC 545 (Para 19 to 27)
16. Gulab Vs St. of U. P., (2022) 12 SCC 677 (Para 20, 23, 27.1, 27.2, 27.3, 27.4 and 28)
17. Nagaraja Vs St. of Karn., (2008) 17 SCC 277 (Para 18 and 19)

(Delivered by Hon'ble Surya Prakash
Kesarwani, J.)

1. Heard Sri Gopal Swaroop Chaturvedi, learned Senior Advocate assisted by Sri Anurag Shukla, learned counsel for the appellant Nos.1 and 2, Smt. Manju Thakur, learned A.G.A. for the opposite party/ State and Sri Jitendra Shankar Pandey, learned counsel for the informant.

2. This appeal has been filed praying to set aside the judgment and order dated 09.02.1996 in Session Trial No.167 of 1993 passed by the Sessions Judge, Mathura convicting the accused Rekhpal for offences under Sections 302, 307/34 and 323/34 I.P.C., accused Vinod for offences under Sections 302/34, 307/34 and 323 I.P.C. and the accused persons Pramod and Manoj under Sections 302/34, 307/34 and 323/34 I.P.C. The accused Rekhpal had separately filed a Criminal Appeal No.575

of 1996 (Rekhpal vs. State of U.P.), which was abated by order dated 03.04.2019 on account of his death. Present criminal appeal has been filed by three accused persons namely Vinod son of Rekhpal, Pramod son of Ragghi @ Raghubir and Manoj son of Natthi. During pendency of the present appeal, the accused appellant No.3 Manoj died and as such by order dated 09.12.2019, the appeal was abated qua the accused appellant Manoj. Thus, the present appeal survives and is being pressed by learned counsel for the appellant only for the appellant Nos.1 and 2, namely Vinod son of Rekhpal and Pramod son of Ragghi @ Raghubir.

Facts:-

3. Briefly stated facts of the present case are that according to the prosecution, on 17.10.1992 at about 03:00 P.M. the injured eyewitness-PW-1 Bhikampal Singh son of Raj Pal Singh, the deceased Om Prakash, the injured eyewitnesses PW-2 Shespal Singh son of Sanwal Singh and the injured eyewitnesses PW-3 Munesh Pal @ Muniya son of Sanwal Singh were returning to their homes after working on their respective agricultural fields and when they reached on public way near the agricultural land of one Jimipal, then the accused Rekhpal with DBBL gun, his relative Manoj son of Natthi with country-made pistol, Pramod son of Raghubir @ Ragghi with country-made pistol and lathi and Vinod son of Rekhpal came on a red-colour bullet motorcycle which was being driven by the accused Vinod son of Rekhpal. Motorcycle was stopped near the aforesaid victims. Accused Vinod exhorted to take revenge and to beat. Pramod started beating Sanwaliya and when the victims ran to save Sanwaliya, then Vinod snatched country-made pistol from Pramod and fired

at Munesh Pal @ Muniya. Subsequently Rekhpal fired with his DBBL gun at the back of Om Prakash. Consequently Om Prakash died on spot. Hearing the fire sound when people started coming on the spot, all the four accused persons fled away.

4. In support of the case, the prosecution examined three eye-witnesses, namely Bhikampal Singh PW-1, Shespal Singh PW-2 and Munesh Pal @ Muniya PW-3. Formal witnesses, i.e. PW-4 Dr. D.S. Verma who medically examined the injuries of Munesh Pal son of Sanwal Singh, PW-5 Investigating Officer Amarjit Singh, S.H.O. Narhauli, Mathura, PW-6 Head Constable Ramesh Chandra who entered the First Information Report, P.W.-7 Second Investigating Officer Sri Umesh Kumar Singh, S.H.O. P.S. Kagarol Agra and P.W.-8 Dr. R.C. Sharma who conducted postmortem on the body of Om Prakash (deceased), were examined by the prosecution. Thus, the prosecution examined three eyewitnesses and five formal witnesses. Statements of accused persons under Section 313, Cr.P.C. were recorded. From the defence side, three witnesses i.e. DW-1 Dr. R.B. Sharma who examined injuries of the accused persons Rekhpal Singh and Vinod, DW-2 Matindra Bhardwaj, surgeon who examined injuries of Shakuntala wife of Rekhpal Singh and DW-3 Ladan Singh, were examined. Learned Trial Court heard the matter and convicted all the four accused persons, namely Rekhpal Singh, Vinod, Pramod and Manoj awarding punishment as mentioned in the impugned judgment and order dated 09.02.1996. Aggrieved, the appellants herein have filed the present appeal.

Submissions:-

5. Learned counsel for the appellants submits as under:-

(i) There is complete absence of motive. The real incident was that as stated by the accused Rekhpal Singh in his statement dated 24.02.2005 under Section 313 Cr.P.C. PW-1, PW-2 and PW-3 are not eyewitnesses. No injury was received from country-made pistol by PW-1, PW-2 or PW-3. The evidence of PW-1, PW-2 and PW-3 are inconsistent.

(ii) The prosecution has completely failed to prove common intention for commission of the alleged offence under Sections 302/307/34 I.P.C. In the absence of common intention, the accused appellant Nos.1 and 2 cannot be convicted under Section 302 or 307 I.P.C.

(iii) The entire case of the prosecution is based on falsehood and the appellants have been falsely implicated. The evidence of PW-1, 2 and 3 does not prove common intention.

(iv) The prosecution has completely failed to explain injuries received by the accused Rekhpal Singh, Vinod and one Shakuntala, wife of Rekhpal Singh, which is fatal to the prosecution case.

(v) No case under Section 307 I.P.C. has been made out.

6. Learned A.G.A. supports the impugned judgment and order passed by the Trial Court.

7. Learned counsel for the informant submits that the motive for the offence committed by the accused was that the PW-2 purchased a land about a year before the date of incident, which the accused persons were willing to purchase and Rekhpal objected to the mutation proceedings with respect to that land. He further submits that the prosecution has established his case beyond reasonable doubt and as such, the impugned judgment and order requires no interference.

Discussion and Findings:-

8. We have carefully considered the submissions of the learned counsels for the parties and perused the record of the appeal.

9. The eyewitness PW-1 Bhikampal Singh and the deceased Om Prakash are stated to be real brothers. The eyewitnesses PW-2 Shespal Singh son of Sanwal Singh is the cousin of the PW-3. Munesh Pal @ Muniya son of Sanwaliya and is stated to be an injured eyewitness. As per first information report, the first injury was caused to Sanwaliya, who has not been examined by the prosecution. Thus, according to the prosecution in the incident in question, Om Prakash died and Munesh Pal @ Muniya and Sanwal Singh (Sanwaliya) were injured, who were examined in Civil Dispensary Baldeo on 17.10.1992 by the PW-4 Dr. D.S. Verma and the injuries found were as under:

Injuries of Muneshpal @ Muniya:-

"1. Lacerated wound 2"x1/10" bone deep over left of head 3-3/4 above from the left ear.

2. Abraded contusion 1-1/4"x-1/4" over left forearm outer middle part.

3. Abrasion 1-1/2"x-1/2" over right arm lower outer part.

Injuries of Sanwaliya:-

Contusion 1 1/2'' x 1/2'' over left leg front middle part.

10. The accused persons Rekhpal Singh, Vinod and Manoj were arrested on the day of incident i.e. on 17.10.1992 at about 06:30 P.M. by the Investigating Officer SI Amarjit Singh without any resistance from the accused persons and one licensed DBBL gun from Rekhpal

Singh and one twelve bore country-made pistol allegedly from the accused Vinod and certain cartridges were recovered from them. One wooden stick (danda) in length about four balista, four angul was recovered from the accused Manoj. Bullet motorcycle bearing registration No.UHL 5211 was also recovered from them on the same day about 06:30 P.M. The accused persons were brought to police station. In his evidence in cross-examination, the PW-6 has clearly admitted that the injuries of the accused Rekhpal Singh were entered in the GD in presence of the Investigating Officer and Daroga at the police station. He stated that injuries of Rekhpal Singh were simple and as such he was not sent for medical examination, although the accused persons Rekhpal Singh and Vinod were medically examined at the District Hospital, Mathura by DW-1 Dr. R.B. Sharma, Medical Officer and the wife of the accused Rekhpal Singh, i.e. Smt. Shakuntala was examined on 22.10.1992 at the District Hospital, Mathura by DW-2 Dr. Matindra Bhardwaj, Surgeon. As per medical examination report, the injuries of the accused persons Rekhpal Singh, Vinod and Shakuntala were as under:-

Injuries of the accused Rekhpal:-

1. Scabbed abrasion 2cm x1.5cm on outer aspect of left forearm 4 cm above wrist joint. The scab is firm.

2. Scabbed abrasion 2, cmx1.5cm on front of left leg. in lower 2/3.

3. Lacerated wound-1 cm x0. 3cm x skin deep on front of right leg surrounded by abrasion in the size of 4 cm x 2 cm in lower 2/3 of front of right leg.

4. Abrasion 1 cm x 1cm on medial aspect of right leg 3 cm above the ankle joint.

Injuries of the accused Vinod:-

1. Abrasion in the area of 2cm x 1-5cm on front of right shoulder. The seat is firm and dried up.

2. Linear abrasion 1.5cm long on medial aspect of right elbow joint.

3. Laceration with firm no dried up seat 1.5cm x 1 cm left side back 3 cm above and liberally from iliac crest.

4. Abrasion 1.5 cm x 1/2cm on front of right knee joint region.

Injuries of Shakuntala:-

1. A traumatic swelling at the distal part of left forearm on ulna aspect size 3cm x 2.5cm. Colour is deep brown.

2. A traumatic swelling at the lateral aspect of left elbow joint 4cm x 3cm. Colour is deep brown.

3. An abraded contusion with scab formation in the back of lower part of left chest size 6cm x 2.5cm. Colour is deep brown.

4. An abraded contusion with scap formation on the back of lower part of right chest size 4cm x 2cm Colour is deep brown.

11. The DW-1 and DW-2, both have proved the injuries of the aforesaid three accused persons and opined the injuries to be simple.

12. The injuries of PW-3 Munesh Pal @ Muniya and one Sanwaliya were proved by PW-4 Dr. D.S. Verma who opined that injury Nos.2 and 3 of Munesh Pal @ Muniya are simple caused by friction or by blunt weapon and the injury No.1 needs observation. In his evidence, he further stated that the injury Nos.1 and 2 of Munesh Pal @ Muniya are possible by lathi. He stated that injury No.3 may be caused by rubbing of a bullet but in his cross-examination, he admitted that this injury cannot be caused by pellets and this

injury may be self made. With regard to the injuries of Sanwal Singh, he stated that the injury is simple caused by blunt object. Thus, the case of the prosecution that the accused Vinod fired at Munesh Pal @ Muniya from country-made pistol of twelve bore is not corroborated with medical report. Any injury caused by a twelve bore country-made pistol was neither found on the body of Munesh Pal @ Muniya nor it could be proved. Thus, the use of country-made pistol by the accused Vinod to cause injury to Munesh Pal @ Muniya son of Sanwaliya could not be proved by the prosecution.

13. The postmortem on the body of the deceased Om Prakash was conducted by PW-8 Dr. R.C. Sharma on 18.10.1992 at 12'O clock and following ante-mortem injuries were found by the doctor on the body of the deceased Om Prakash:

1. Multiple fire arm wounds in an area of 5.5 cm x 7cm (five half x seven) of entry (size varying 1.5cm x 1cm to 3.5cm x 2 cm on the back of chest (scapular wall just in front of scapular region below shoulder on top and 10 cm lateral (left) from midline and back, bone (total number of wounds five including the five one noted above.

Metallic pellets five in number were also recovered from the back of chest wall on right side of scapular region upper part of chest.

It was opined by the doctor that death might have taken place about one day before and he found pasty food in the intestines. It has also been opined by the doctor that the death of the deceased had taken place on account of shock and haemorrhage on account of ante mortem injuries.

14. The postmortem report was proved by PW-8 who in his cross-

examination, has also opined that weapon would have been fired from a distance of more than twelve feet. He also stated that five large pellets (exhibits 23 to 27) were found from the body of the deceased. He also stated that there was no blackening and the weapon would have been fired from the backside of the deceased.

15. In his evidence in cross-examination, the PW-5 has stated that in the site plan, he has not shown the place from where gun was fired and whether the blood was found on the earth. He also stated that he has not mentioned in the site plan regarding blood found on the earth. He stated that he has not sent the gun and cartridges to ballistic expert for examination. The DW-3 Head Constable Ladan Singh, Sadar Malkhana, Mathura has stated that there is no entry in the malkhana register for sending the recovered gun to ballistic expert for examination. No ballistic expert report with regard to the gun and cartridges recovered were filed by the prosecution during trial.

Section 34: Common Intention:-

16. Section 34 of the I.P.C. reads as under:

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

17. In the case of **Malkhan Singh vs. State (1975) 3 SCC 311 (Para-7)**, Hon'ble Supreme Court held that no vicarious liability under Section 34 of the I.P.C. can be fastened on accused for the shot fired by

another accused to kill the deceased in the absence of furtherance of common intention shared between the accused inasmuch as **intention to fire was not shared.**

18. In the case of **Parasa Raja Manikyala Rao And Anr vs State Of A.P. (2003) 12 SCC 306 (Paras 11 & 12)**, Hon'ble Supreme Court explained the meaning of “common intention” with reference to Section 34 I.P.C. and held as under:-

“11.The Section really means that if two or more persons intentionally do a common thing jointly, it is just the same as if each of them had done it individually. It is a well recognized canon of criminal jurisprudence that the Courts cannot distinguish between co- conspirators, nor can they inquire, even if it were possible as to the part taken by each in the crime. Where parties go with a common purpose to execute a common object each and every person becomes responsible for the act of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. All are guilty of the principal offence, not of abetment only. The participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence may be necessary, but such is not the case in respect of other offences when the offence consists of diverse acts which may be done at different times and places. The physical presence at the scene of offence of the offender sought to be rendered liable under this Section is not one of the conditions of its applicability in every case. Before a man can be held liable for acts done by another, under the

provisions of this Section, it must be established that (i) there was common intention in the sense of a pre-arranged plan between the two, and (ii) the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this Section cannot apply.

12. "Common intention" implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Under this Section a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of offence showing a pre-arranged plan and prior concert. (See *Krishna Govind Patil v. State of Maharashtra* (AIR 1963 SC 1413). In *Amrit Singh and Ors. v. State of Punjab* (1972) CrL.J. 465 (SC) it has been held that common intention pre-supposes prior concert. Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bonds is often very thin, nevertheless the distinction is real and substantial, and if overlooked will result in miscarriage of justice. **To constitute common intention, it is necessary that intention of each one of them be known to the rest of them and shared by them. Undoubtedly, it is a difficult thing to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. But however difficult may be the task, the prosecution must lead evidence of facts, circumstances and conduct of the accused**

from which their common intention can be safely gathered. In *Maqsoodan and Ors. v. State of U.P.* (AIR 1983 SC 126) it was observed that prosecution must lead evidence from which the common intention of the accused can be safely gathered. **In most cases it has to be inferred from the act, conduct or other relevant circumstances of the case in hand. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether the accused had a common intention to commit offence for which they can be convicted.** The facts and circumstances of cases vary and each case has to be decided keeping in view of the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law. In *Bhaba Nanda sarma and Ors. v. The State of Assam* (AIR 1977 SC 2252) it was observed that prosecution must prove facts to justify an inference that all participants of the acts had shared a common intention to commit the criminal act which was finally committed by one or more of the participants. **Mere presence of a person at the time of commission of an offence by his confederates is not, in itself sufficient to bring his case within the purview of Section 34, unless community of designs is proved against him** (See *Malkhan and Anr. v. State of Uttar Pradesh* (AIR 1975 SC 12). In the Oxford English Dictionary, the word "furtherance" is defined as 'action of helping forward'. Adopting this definition, Russel says that "it indicates some kind of aid or assistance producing an effect in future" and adds that any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken, for the purpose of "effecting that felony. (Russel on Crime 12th Edn. Vol.I pp.487 and 488). In *Shankarlal Kacharabhai and Ors. v. The State of Gujarat* (AIR 1965

SC 1260) this Court has interpreted the word "furtherance" as 'advancement of promotion'."

(Emphasis supplied)

19. In the case of **Suresh v State of U.P., (2001) 3 SCC 673**, Hon'ble Supreme Court held as under:

"24. **Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section.** But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34IPC.

xxx xxx xxx

40. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. "

(Emphasis supplied)

20. In the case of **Lallan Rai v. State of Bihar, [(2003) 1 SCC 268]**, Hon'ble Supreme Court held as under:

"22. The above discussion in fine thus culminates to the effect that the **requirement of statute is sharing the common intention upon being present at the place of occurrence. Mere distancing himself from the scene cannot absolve the accused** — though the same however depends upon the fact situation of the matter under consideration and no rule steadfast can be laid down therefor."

(Emphasis supplied)

21. In the case of **Chhota Ahirwar v. State of M.P., [(2020) 4 SCC 126]**, Hon'ble Supreme Court held as under:

"24. **The essence of liability under Section 34 is simultaneous consensus of the minds of persons participating in the criminal act to bring about a particular result, which consensus can even be developed at the spot as held in Lallan Rai v. State of Bihar, (2003) 1 SCC 268. There must be a common intention to commit the particular offence. To constitute common intention, it is absolutely necessary that the intention of each one of the accused should be known to the rest of the accused.**"

(Emphasis supplied)

22. In the case of **Barendra Kumar Ghosh v. King Emperor (AIR 1925 PC 1)**, it was held, as under:

"..... the words of S. 34 are not to be eviscerated by reading them in this exceedingly limited sense. By S. 33 a criminal act in S. 34 includes a series of acts and, further, "act" includes omissions to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By S. 37, when any offence is committed by means of several acts whoever intentionally co-operates in

the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait". By S. 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. S. 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. S. 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. S. 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

23. In the case of **Mahbub Shah v. Emperor**(AIR 1945 PC 118), it was held, as under:

"..... To invoke the aid of S. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the

furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone."

24. In the case of **Rambilas Singh & Ors. v. State of Bihar**[(1989) 3 SCC 605], Hon'ble Supreme Court held as under:

"7...It is true that in order to convict persons vicariously under section 34 of section 149 IPC, it is not necessary to prove that each and every one of them had indulged in overt acts. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly..."

25. In the case of **Krishnan & Another v. State of Kerala**[(1996) 10 SCC 508], Hon'ble Supreme Court held as under:

"15. Question is whether it is obligatory on the part of the prosecution to establish commission of overt act to press into service section 34 of the Penal Code. It is no doubt true that court likes to know about overt act to decide whether the concerned person had shared the common intention in question. Question is whether overt act has always to be established? I am of the view that establishment of an overt act is not a requirement of law to allow section 34 to operate inasmuch this section gets attracted when "a criminal act is done by several persons in furtherance of common intention of all". What has to be, therefore, established by the prosecution is that all the concerned persons had shared the common intention. Court's mind

regarding the sharing of common intention gets satisfied when overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: res ipsa loquitur."

26. In the case of **Surendra Chauhan v. State of M.P.** [(2000) 4 SCC 110], Hon'ble Supreme Court held as under:

"11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture...."

27. In the case of **Gopi Nath @ Jhallar v. State of U.P.** [(2001) 6 SCC 620], Hon'ble Supreme Court held as under:

"8. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case."

(Emphasis supplied)

28. In the case of **Ramesh Singh @ Photti v. State of A.P.** [(2004) 11 SCC 305], Hon'ble Supreme Court held as under:

"12. ...As a general principle in a case of criminal liability it is the primary responsibility of the person who actually

commits the offence and only that person who has committed the crime can be held guilty. By introducing Section 34 in the Penal Code the legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention, then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration....."

(Emphasis supplied)

29. In the case of **Nand Kishore V. State Of Madhya Pradesh** [(2011) 12 SCC 120], Hon'ble Supreme Court held as under:

"20. A bare reading of this section shows that the section could be dissected as follows:

(a) Criminal act is done by several persons;

(b) Such act is done in furtherance of the common intention of all; and

(c) Each of such persons is liable for that act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court in determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according

to Section 34 IPC must be done by several persons. The emphasis in this part of the section is on the word "done". It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. **Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity.**

21. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally i.e. he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. **But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between "common intention" on the one hand and "mens rea" as understood in criminal jurisprudence on the other. Common intention is not alike or identical to mens rea.** The latter may be coincidental with or collateral to the former but they are distinct and different.

22. Section 34 also deals with constructive criminal liability.

23. Another aspect which the court has to keep in mind while dealing with such cases is that **the common intention or state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any predetermined plan to commit such an offence. This will always**

depend on the facts and circumstances of the case..."

(Emphasis supplied)

30. In the case of **Shyamal Ghosh V. State of West Bengal [(2012) 7 SCC 646]**, Hon'ble Supreme Court held as under:

"87. Section 34 IPC applies where two or more accused are present and two factors must be established i.e. common intention and participation of the accused in the crime. The phrase "common intention" means a pre-oriented plan and acting in pursuance to the plan, thus, common intention must exist prior to the commission of the act in a point of time. The common intention to give effect to a particular act may even develop on the spur of moment between a number of persons with reference to the facts of a given case."

31. In **Jasdeep Singh @ Jassu vs The State Of Punjab (2022) 2 SCC 545 (paras 19 to 27)**, Hon'ble Supreme Court considered its various earlier judgments relating to Section 34 I.P.C. and held as under:

"19. Before we deal further with Section 34 IPC, a peep at Section 33 IPC may give a better understanding. Section 33 IPC brings into its fold a series of acts as that of a single one. Therefore, in order to attract Section 34 to 39 IPC, a series of acts done by several persons would be related to a single act which constitutes a criminal offense. A similar meaning is also given to the word 'omission', meaning thereby, a series of omissions would also mean a single omission. This provision would thus make it clear that an act would mean and include other acts along with it.

20. Section 34IPC creates a deeming fiction by infusing and importing a criminal act constituting an offence committed by one, into others, in pursuance to a common intention. Onus is on the prosecution to prove the common intention to the satisfaction of the court. The quality of evidence will have to be substantial, concrete, definite and clear. When a part of evidence produced by the prosecution to bring the accused within the fold of Section 34IPC is disbelieved, the remaining part will have to be examined with adequate care and caution, as we are dealing with a case of vicarious liability fastened on the accused by treating him at par with the one who actually committed the offence.

21. What is required is the proof of common intention. Thus, there may be an offence without common intention, in which case Section 34IPC does not get attracted.

24. Normally, in an offence committed physically, the presence of an accused charged under Section 34IPC is required, especially in a case where the act attributed to the accused is one of instigation/exhortation. However, there are exceptions, in particular, when an offence consists of diverse acts done at different times and places. Therefore, it has to be seen on a case to case basis.

25. The word “**furtherance**” indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion.

26. There may be cases where all acts, in general, would not come under the purview of Section 34IPC, but only those done in furtherance of the common intention having adequate connectivity. When we speak of intention it has to be one of criminality with adequacy of knowledge of any existing fact necessary for the

proposed offense. **Such an intention is meant to assist, encourage, promote and facilitate the commission of a crime with the requisite knowledge as aforesaid.**

27. **The existence of common intention is obviously the duty of the prosecution to prove.** However, a court has to analyse and assess the evidence before implicating a person under Section 34IPC. **A mere common intention per se may not attract Section 34IPC, sans an action in furtherance. There may also be cases where a person despite being an active participant in forming a common intention to commit a crime, may actually withdraw from it later.** Of course, this is also one of the facts for the consideration of the court. Further, the fact that all accused charged with an offence read with Section 34IPC are present at the commission of the crime, without dissuading themselves or others might well be a relevant circumstance, provided a prior common intention is duly proved. **Once again, this is an aspect which is required to be looked into by the court on the evidence placed before it. It may not be required on the part of the defence to specifically raise such a plea in a case where adequate evidence is available before the court.”**

(Emphasis supplied)

32. In **Gulab vs. State of Uttar Pradesh, (2022) 12 SCC 677 (Paras 20, 23, 27.1, 27.2, 27.3, 27.4 and 28)**, Hon'ble Supreme Court has held as under:-

“23. The present case is not one where despite the recovery of a firearm, or of the cartridge, the prosecution had failed to produce a report of the ballistic expert. Therefore, the failure to produce a report by a ballistic expert who can testify to the fatal injuries being caused by a particular

weapon is not sufficient to impeach the credible evidence of the direct eyewitnesses.

27. Emphasizing the fundamental principles underlying Section 34, this Court held that:

27.1 **Section 34 does not create a distinct offence**, but is a principle of constructive liability;

27.2 In order to incur a joint liability for an offence **there must be a pre-arranged and pre-mediated concert** between the accused persons for doing the act actually done;

27.3 There may not be a long interval between the act and the pre-meditation and the plan may be formed suddenly. **In order for Section 34 to apply, it is not necessary that the prosecution must prove an act was done by a particular person; and**

27.4 **The provision is intended to cover cases where a number of persons act together and on the facts of the case, it is not possible for the prosecution to prove who actually committed the crime.**"

(Emphasis supplied)

33. In **Nagaraja vs State Of Karnataka, (2008) 17 SCC 277 (Paras 18 and 19)**, Hon'ble Supreme Court held as under:

"18. For invoking the provisions of Section 34 of the IPC, at least two factors must be established; (1) common intention, and (2) participation of the accused in the commission of an offence. For the aforementioned purpose although no overt act is required to be attributed to the individual accused but then before a person is convicted by applying the doctrine of vicarious liability **not only his participation in the crime must be proved but presence of common intention must be established**. It is true that for proving

formation of common intention, direct evidence may not be available but then there cannot be any doubt whatsoever that **to attract the said provision, prosecution is under a bounden duty to prove that participants had shared a common intention**. It is also well settled that only the presence of the accused by itself would not attract the provisions of Section 34 of the I.P.C. Other factors should also be taken into consideration for arriving at the said conclusion. Accused persons were not related to each other; they did not have any family connection; they have different vocations. It has not been established that they held any common animosity towards the deceased.

19. **A general and vague statement made by one of the prosecution witnesses would not prove motive**. It may be true that the common intention may develop suddenly at the spot **but for the said purpose, the genesis of the occurrence should have been proved. The prosecution has failed to establish why and how a quarrel has started**. The prosecution even has not proved as to why the accused No. 1 was carrying the iron rod even before the quarrel with the deceased started or as to whether the appellant was aware of this. It has also not been shown that he along with other accused persons came to assault the deceased. Appellant ordinarily was expected to be at his work place only. His presence at the spot, therefore, has sufficiently been explained."

(Emphasis supplied)

34. Thus, Section 34 I.P.C. does not create a distinct offence, but is a principle of constructive liability. In order to incur a joint liability for an offence there must be a pre-arranged and pre-mediated concert between the accused persons for doing the act actually done. For the applicability of

Section 34 I.P.C., it is not that the prosecution must prove that an act was done by a particular person inasmuch as the provision is intended to cover cases where a number of persons act together and on the facts of the case. Thus, when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The word **“furtherance”** indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion. The words **“common intention”** implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of offence showing a pre-arranged plan and prior concert. To constitute common intention, it is necessary that intention of each one of them be known to the rest of them and shared by them. Common intention has to be inferred from the act, conduct or other relevant circumstances of the case in hand. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether the accused persons had a common intention to commit offence for which they can be convicted. Therefore, to attract the provisions of Section 34 I.P.C., it must be shown that (a) criminal act is done by several persons; (b) such act is done in furtherance of the common intention of all; and (c) each of such persons is liable for that act in the same manner as if it were done by him alone. While first two acts are attributable and

have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. But it must be kept in mind the fine distinction between “common intention” on the one hand and “mens rea” as understood in criminal jurisprudence on the other. Common intention is not alike or identical to mens rea. Mens rea may be coincidental with or collateral to the “common intention” but they are distinct and different. The common intention or state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any predetermined plan to commit such an offence but this will always depend on the facts and circumstances of the case. Such an intention is meant to assist, encourage, promote and facilitate the commission of a crime with the requisite knowledge as aforesaid. A mere common intention per se may not attract Section 34 IPC, sans an action in furtherance. There may also be cases where a person despite being an active participant in forming a common intention to commit a crime, may actually withdraw from it later. The duty is of the prosecution to prove existence of common intention. It is for the court to determine it on the basis of the evidence placed before it. This is the effect of Section 34 I.P.C. that if two or more persons intentionally do a common thing jointly, it is just the same as if each of them had done it individually. Presence of common intention or the sharing of common intention is the prerequisite to invoke Section 34 I.P.C. If in a given case, common intention to fire was not shared, then no vicarious liability under Section 34 I.P.C. can be fastened on an accused for shot fired by another accused to kill the deceased in the absence

of furtherance of common intention shared between the accused when the common intention to fire was not shared.

35. It is the case of the prosecution that the PW-1 Bhikampal Singh is the cousin of PW-2 Sheshpal Singh and P.W.-3 Muneshpal @ Muniya. All the three have their separate agricultural land as evident from the evidence of PW-2 Sheshpal Singh who stated in his cross-examination that he, his brothers and the deceased Om Prakash have cut millet from their respective agricultural land and he and his father have cut one bigha millet whereas Om Prakash and Bhikampal Singh have cut millet three fourth of a bigha. The PW-2 in his cross-examination has stated that:

“..... मेरी मुलजिमान से खेत की रंजिश है। और कोई रंजिश नहीं है। उस जमीन का दाखिल खारिज का मुकदमा लक्ष्मी से चला था जिसे मुलजिमान ने चलवाया था। उससे मुलजिमान ने अपने नाम से कोई एतराज नहीं दाखिल नहीं किया था। लेकिन लक्ष्मी की पैरवी करते थे। मैंने दरोगा जी को बताया था कि मुलजिमान वही खेत खरीदना चाहते थे जो मैंने खरीदा है। खेत का झगड़ा कत्ल से 3-4 महीने पहले का था। पुरानी इनसे कोई रंजिश नहीं है।

..... मैंने और मेरे भाईयों ने बाजरा काटा था। ओम प्रकाश ने भी बाजरा काटा था। उसने अपने खेत में काटा था और मैंने अपने खेत में काटा था।

मुलजिमानों को मय हथियार के एक खेत की दूरी पर आते देख लिया। मुलजिमान ने 5-6, 7-8 कदम की दूरी से मोटर साईकिल रूकी, उतर कर कहा कि मारो सालो को। ओमप्रकाश, मुनेश और सोवलिया साथ-साथ थे और उससे 2-4 कदम की दूरी पर हम लोग थे। फिर उन्होंने तुरन्त मारना शुरू कर दिया इसलिये भागने का मौका ही नहीं था। सबसे पहले मेरे पिता को लाठियों से मारा था। पास आकर मेरे पिता को लाठी से मारा। उस समय बाकी मुलजिमान मेरे पिता के पास ही थे। मुनेश को लाठी और तमन्चा दोनों से मारा था। मुनेश को एक ने लाठी मारी और दूसरे ने तमन्चा आगे पीछे मारा। जैसे ही लाठी मारी, तुरन्त ही फायर हो गया। हम लोग आगे बचाने के लिये बड़े भागे नहीं। जिस समय लाठी से मुनेश और सामलिया को मार रहे थे उस समय रेखपाल 6-7 कदम की दूरी पर था। वहीं से उसने फायर कर दिया। मुझे किसी ने नहीं मारा

और न किसी ने मारने के लिये कहा। विनोद ने यह कहा था कि बदला ले लो। उसका मतलब था कि खेत को हम कटने नहीं देंगे। मैंने पिछली तारीख को अदालत को ब्यान दिया था कि मोटर साईकिल हम लोगों के पास आकर रूकी तो विनोद बोला आज बदला ले लो। इस पर प्रमोद ने मोटर साईकिल से उतर कर सोवल सिंह को मारना शुरू कर दिया। बदला लेने वाली बात विनोद ने मोटर साईकिल से उतरते हुए कही थी। मुनेश को पहले लाठी लगी फिर तमन्चा मारा। मुनेश को केवल एक लाठी मारी थी। लाठी मारने वाले मुनेश के पास से हटा नहीं था। मुनेश पर 2-4 कदम से फायर किया था। उस समय हम लोग मुनेश के पास ही थे चीख पुकार कर रहे थे। मुनेश पर दो फायर हुआ थे। एक मनोज ने एक विनोद ने किया था। मुनेश को एक फायर सिर में लगा था और एक हाथ में लगा था। किसी ने भी रेखी व उसकी पत्नी को नहीं मारा था। मैंने उनके शरीर पर चोट नहीं देखी। मुझे मालूम पड़ा था कि रेखी उसी दिन गिरफ्तार हो गया। यह नहीं मालूम कि वह थाने रिपोर्ट करने गया था तभी गिरफ्तार हुआ था। मौके पर कोई छर्चा, टिकली या कारतूस नहीं मिला था। दरोगा जी ने केवल एक जगह से खून वाली मिट्टी ली थी।”

36. Thus, as per own case of the prosecution, strained relationship was on account of some agricultural land purchased by the PW-2. The reason for strained relationship has been alleged to be that the accused wished to purchase the said land but it was purchased by the PW-2. Thus the alleged cause of strained relationship could be only against PW-2 Sheshpal but the PW-2 has himself stated in his cross examination that neither anyone exhorted to beat him nor anyone has beaten him. He also stated that the accused Vinod has spoken to take revenge. He further stated in his cross examination that by the word “revenge” he mean that he (Vinod) will not allow the crop to cut. This statement indicates that there arose some dispute between two groups on the issue of cutting of some crop. Thus, the very genesis of the motive assigned by the prosecution against the accused for commission of the offence in question, itself appears to be doubtful. There is nothing on record to show that apart from

the aforesaid allegation of strained relationship, there is any other cause for strained relationship. The PW-1 in his cross-examination has stated that the PW-2 was present on the spot when the incident occurred and the accused Rekhpal Singh has not fired at the PW-2 Sheshpal and none beaten Sheshpal. He alleged that the accused Vinod exhorted to beat. In his cross-examination, he stated that “उस दिन या उससे पहले हमारा मुलजिमान से कोई झगड़ा नहीं हुआ था” PW-3 Munesh Pal @ Muniya has also assigned the role of exhortation to the accused Vinod who exhorted only to beat to take revenge.

37. Thus, the evidence of PW-1, PW-2 and PW-3 is that the **accused Vinod exhorted to beat**. The PW-1 has admitted that on the date of occurrence of the incident or prior to that, he was having no enmity with the accused. The PW-2 has stated the cause of strained relationship between him and the accused that he purchased an agricultural land which the accused wanted to purchase, but no evidence in this regard were led or particulars were disclosed except making allegations. The PW-2 in his cross-examination himself admitted that **none has beaten him nor anyone exhorted to beat him**. He further explained in his statement that Vinod exhorted to take revenge, which he meant that millet crop shall not be allowed to cut (खेत को हम कटने नहीं देंगे). **Thus, the exhortation alleged by PW-1, PW-2 and PW-3 is only against the accused Vinod that he exhorted to beat. None of the alleged eyewitnesses, namely PW-1, PW-2 and PW-3 have stated that the accused Vinod exhorted to kill.** According to their own evidence, the accused started beating by danda/ lathi and subsequently the accused Rekhpal Singh

fired at deceased Om Prakash from the backside. **No exhortation to kill the deceased Om Prakash has been alleged against the accused appellants.** Instead, in his cross-examination; the PW-2 himself stated that neither any accused exhorted to beat him nor any accused beaten him while he was standing 2-3 steps away from the accused. This **firstly** goes to show that **there was no exhortation by any of the accused against the main person PW-2 nor the accused Vinod, as per own case of the prosecution; exhorted to kill any person and instead he merely exhorted to beat.**

38. Thus, in such facts and circumstances, the ingredients of Section 34 I.P.C., i.e. the common intention to kill the deceased Om Prakash is not established from the evidences. At best, as per prosecution case, the exhortation was to beat. No evidence was led by the prosecution that during the course of alleged beating, any of the accused appellants herein have exhorted or instigated the accused Rekhpal Singh to kill the deceased Om Prakash. In such facts and circumstances, even if it is assumed that the accused Rekhpal fired by his licensed DBBL gun to kill Om Prakash, then it was an unilateral act of the accused Rekhpal. Thus, the alleged gun shot injury allegedly caused by the accused Rekhpal to the deceased Om Prakash, is not in furtherance of common intention shared by the accused appellants Vinod and Pramod. In the absence of any common intention of the accused anterior in time to kill the deceased, showing a pre-arranged plan and prior concert. No evidence could be led by the prosecution to establish a prior conspiracy or pre-meditation or common intention formed either prior to or in the course of occurrence of the crime, to kill

the deceased Om Prakash. In the absence of meeting of minds or sharing of common intention by the accused appellants to kill the deceased, Section 34 I.P.C. could not be invoked. Consequently, the accused appellants cannot be convicted under Section 302 I.P.C. inasmuch as it is not the case of the prosecution that the accused appellants have killed the deceased Om Prakash.

39. Apart from above, we also find that as per case set up by the prosecution, the grievance of the accused persons was mainly against the PW-2 Shespal who, as per prosecution case; purchased same land which the accused Rekhpal wished to purchase, but the PW-2 Shespal himself has stated in his cross-examination that neither any one exhorted to beat him nor any one has beaten him. This also renders the prosecution story regarding the alleged exhortation against the accused appellant No.1 to be doubtful.

Whether the accused appellant No.1 – Vinod and/ or the accused appellant No.2 Pramod have committed offence under Section 307/34 I.P.C. :-

40. The trial court framed charges against the accused appellant No.1 Vinod on 18.08.1993 for the offences under Section 302/34 I.P.C. and also under Section 307/34 I.P.C. for causing fire arm injury to Muneshpal @ Muniya. He was also charged that he along with the co-accused Pramod hurt to Sanwaliya by means of lathi.

41. Similar charge on the same day was framed against the accused appellant No.2 – Pramod.

42. The PW-1 Bhikampal (informant) in his Examination-in-Chief has stated that

Pramod has beaten his uncle Sanwaliya by lathi. He further stated that accused Vinod had taken away country-made pistol from the accused Pramod and fired at the PW-3 Muneshpal @ Muniya with intention to kill. In his cross-examination, the **PW-3 stated** that none has beaten the PW-2 Shespal nor fired at him, that the accused Pramod has beaten Sanwal by danda and accused Vinod has fired at Muneshpal @ Muniya and the Muneshpal @ Muniya received gun-shot injury in his both hands and also received injuries of lathi at his forehead, that country-made pistol was not loaded after the accused came. He also stated in his cross-examination that **it is not only accused Pramod who beaten Sanwaliya by lathi**. The alleged injured Sawanliya was not examined.

43. **The PW-2 Shespal** has also assigned to the accused Pramod the role of beating with *lathis* to Sanwal. He assigned the role to the accused Vinod of fire by a country-made pistol causing injuries to the PW-3 Muneshpal @ Muniya. **In his cross-examination**, he stated that he was standing at a distance of 2-4 steps away from the deceased Om Prakash, injured Muneshpal and Sanwaliya who all the three were together, Muneshpal received one injury by lathi and another injury by tamancha (country-made pistol). He stated that the accused Pramod beaten Sanwaliya by lathi but has not stated that who beaten the PW-3 Muniya. In his further cross-examination, he stated that the accused Vinod and the accused Manoj, both have fired on Muneshpal. The injured eyewitness PW-3 Muneshpal @ Muniya son of Sanwaliya in his Examination-in-Chief has assigned the role to the accused Pramod for beating Sanwaliya by danda/ lathi. He assigned the role to the accused Vinod to fire at him by tamancha (country-made

pistol) and also by the accused Manoj. **In his cross-examination, he stated that the accused Vinod fired at his right hand whereas the accused Manoj fired at his left hand and the head. Thus, in his cross-examination, he confined the role of accused Vinod to fire at his right hand only and to the accused Manoj to fire at his left hand and head.**

44. The PW-4 Dr. D.S. Verma, Medical Officer In-charge, Civil Hospital, Baldeo who examined the injuries of PW-3 has found the injury Nos.2 and 3 i.e. the injuries in the left forearm and right arm to be simple by friction or by blunt weapon. He found the injury No.1 on the head of the PW-3 Muneshpal. **In his cross-examination, he stated that the injury No.3 may be caused by abrasion of a bullet but it cannot be caused by pellets. He also opined that it may be self-made injury.**

45. The **first Investigating Officer P.W.-5** Amarjit Singh Sarna has stated in his cross-examination that as per recovery memo dated 17.10.1992, the DBBL Gun No.1522-87 (licensee gun) was recovered and in its barrel, one 12 bore cartridge and one 12 bore khokha (empty cartridge) was found. He shown recovery of 12 bore tamancha (country-made pistol) from the accused Vinod and in its barrel, he found one khokha of 12 bore. He also recovered some cartridges also. He stated that the accused have given no resistance at the time of arrest. He stated that he has not shown in site map that from where the gun was fired or where he found blood on the earth nor he has made any mention of blood found at the place of incident. In his further cross-examination, he stated that he has not sent the gun and cartridges for examination by ballistic expert. He

admitted that seal of katta/tamancha and cartridges recovered from the accused Vinod, bears only his signature.

46. **PW-7 Umesh Kumar Singh S.H.O. -- second Investigating Officer** has stated that the gun was sent from police station to ballistic expert for examination. But the ballistic expert report has not been filed in evidence by the prosecution nor it has been stated that any ballistic expert report has been obtained or received. He further stated in his Examination-in-Chief that **Muneshpal @ Muniya has made a statement that luckily he has not received any gun-shot injury.**

47. **The PW-8 Dr. R.C. Sharma** has stated in Examination-in-Chief that he was posted on 18.10.1992 at District Hospital, Mathura and he has conducted post-mortem. He proved the injuries received by the deceased Om Prakash and stated that it was a gun-shot injury and five large pellets were found in the body of Om Prakash.

48. As per evidence of PW-1, PW-2 and PW-3, the injury by a fire arm (*tamancha*) was caused by the accused Vinod in the right arm of the PW-3 (Muneshpal @ Muniya). This evidence does not find support from the scientific evidence, i.e. the evidence of PW-4 who opined that the injury caused in the right arm is a simple injury, which is possible by lathi. Thus, the prosecution has completely failed to establish any fire arm injury on the right arm of the PW-3 Muneshpal @ Muniya whereas the case set up by the prosecution against the accused appellant Vinod was that the accused Vinod had caused gun-shot injury by a tamancha to the PW-3. The injury No.2 caused in the left arm of PW-3 Munesh was also found by the PW-4 to be simple injury, possible to

be caused by lathi. So far as the injury on the head of the PW-3 Muneshpal is concerned, the PW-4 stated in his evidence that it can be caused by abrasion of a bullet but it cannot be caused by pellets and this injury may be a self made injury. The PW-4 himself has ruled out the possibility of the injury No.1 to be by pellets. He further expressed that this injury may be self made. Therefore, it is extremely doubtful and totally unproved that the accused Vinod has fired at the PW-3 Muneshpal @ Muniya by a country-made pistol with intent to cause death.

49. The injury allegedly caused by the accused Vinod at the right arm lower outer part of the PW-3 Muneshpal @ Muniya is a simple injury which cannot constitute offence under Section 307 I.P.C. It could not be proved by the prosecution that the injury allegedly caused by the accused Vinod by danda was with intent to cause death of the PW-3 Muneshpal @ Muniya. Therefore, the accused appellant No.1 Vinod cannot be convicted for offence under section 307 I.P.C.

50. The PW-1, PW-2 and PW-3, all have made allegations against the appellant No.2 that he had beaten Sanwaliya by a *danda/ lathi*. It was stated that he had hit by *lathi* to Sanwaliya two or three times. The injury of Sanwaliya as examined by the Medical Officer, In-charge, Civil Dispensary, Baldeo, District Mathura on 17.10.1992 is the contusion 1-1/2'' x 1/2'' over left leg middle part. The Medical officer opined that the injury is simple and caused by some blunt object. The injuries of Sanwaliya as found by the Medical Officer while examining his injuries, are not on any vital part of the body of Sanwal Singh. Evidence of alleged eyewitnesses, i.e. PW-1, PW-2 and PW-3, does not

contain any material which may indicate existence of ingredients of Section 307 I.P.C. on account of the injury allegedly caused by the accused appellant Pramod to the injured Sanwaliya (Sanwal Singh). Thus, no offence under Section 307 I.P.C. has been committed by the accused Pramod.

Whether the accused appellant No.1 and the appellant No.2 are guilty of offences under Section 323 I.P.C.:-

51. Evidence of PW-1, PW-2 and PW-3 are consistent to the effect that simple injuries by *lathi/ danda* was caused by the accused appellant No.1 Vinod on the right arm of the injured Muneshpal @ Muniya and the accused appellant No.2 caused simple injury on the left arm of the injured Muneshpal @ Muniya and on the leg of the injured Sanwaliya by *lathi*. The injuries so received have also been proved by the PW-4, i.e. The Medical Officer who examined the injuries. Under the circumstances, we hold that the accused appellant No.1 and the accused appellant No.2 are guilty of committing offences under Section 323 I.P.C. Accordingly their conviction under Section 323 I.P.C. for three months' RI under the impugned judgment and order dated 09.02.1996 in Session Trial No.167 of 1993 (State vs. Sri Rekhpal and 3 others) passed by the Sessions Judge arising out of Case Crime No.150 of 1992, P.S. Baldeo, District Mathura passed by the Session Judge, Mathura, is upheld.

52. In result, **the appeal of the accused appellant No.1 and the accused appellant No.2 are partly allowed.** The conviction of the accused appellant No.1 Vinod under Section 302/34, 307/34 I.P.C. and the conviction of the accused appellant No.2 under Section 302/34 and 307/34

I.P.C. by the impugned judgment and order dated 09.02.1996 in the aforesaid Session Trial No.167 of 1993 arising out Case Crime No.150 of 1992, P.S. Baldeo, District Mathura is hereby set aside and both are acquitted of the charge of offence under sections 302/34 and 307/34 I.P.C. The conviction of the accused appellant No.1 Vinod under section 323 I.P.C. and sentence of three months' R.I. is affirmed. The conviction and sentence of the appellant No.2 Pramod is altered and he is convicted under Section 323 I.P.C. instead of Section 323/34 I.P.C. and sentenced to three months' R.I. If the accused appellant No.1 and the accused appellant No.2 have not undergone imprisonment for three months either during trial or during pendency of this appeal, then they shall surrender forthwith before the court concerned and shall be sent to jail to undergo the sentence under Section 323 I.P.C. awarded by the trial court and affirmed by us. In the event, they have already completed three months' sentence, then they need not to surrender or to be arrested. Their personal bonds and sureties shall be cancelled.

53. Office is directed to communicate this order to the court concerned forthwith for compliance and also send back the trial court record.

(2023) 7 ILRA 445

**APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.07.2023**

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 876 of 2022

**Mantu Verma @ Vivek Verma ...Appellant
Versus**

State of U.P. & Anr.

...Respondents

Counsel for the Appellant:

Upendra Prakash Pathak, Atul Verma, Hari Krishna Verma, Sanjeet Kumar Patel

Counsel for the Respondents:

G.A., Nisha Srivastava

Criminal Law - Indian Penal Code,1860 - Sections 302 & 120 B - Punishment for murder - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(2)(V) - Code of Criminal Procedure, 1973 - Section 161 - Appeal against rejection of bail - F.I.R. lodged by brother of deceased and alleged that his brother was murdered by someone and there was injury on his neck and suspicion was caused on one person who called deceased by mobile phone - Appellant submitted that during investigation blood stained shoes recovered and false recovery of blood stained knife has shown on his pointing, witnesses St.d same facts as given by complainant. (Para 5, 11)

Held, the name of appellant was not in F.I.R. nor there was any whisper in F.I.R. regarding his role - At the time of inquest his name was not in picture - In St.ment of complainant first time his name came in picture and fact that wife of deceased used to talk on mobile phone with appellant due to this reason there was always fight took place between deceased and his wife and it cannot be said that appellant was involved in alleged crime - No one has seen appellant near dead body of deceased nor any witness has seen appellant accompanying deceased nor it was case of prosecution that mobile phone was of appellant - The person by whose phone last call was made to deceased was enlarged on bail - No ingredients under SC/ST Act was attracted, as no one has seen alleged incident at public place. (Para 21)

Appeal allowed. (E-13)

List of Cases cited:

1. Sharad Birdhichand Sarda Vs St. of Mah., 1984 Cri. L.J. 178

2. Kamal Vs St. of Har., 2004 (13) SCC 526, (Para 2)

3. Takht Singh Vs St. of M.P., 2001 (10) SCC 463, (Para 2)

4. Hitesh Verma Vs The St. of Uttrakhand reported in (2020) 10 SCC, (Para 15)

5. Swaran Singh & ors. Vs St. (2008) 8SCC 435

6. Dataram Singh Vs St. of U.P. & anr., reported in (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Atul Verma, the learned counsel for the appellant as well as Mrs. Nisha Srivastava, learned counsel for the opposite party No.2 and Sri Ashok Kumar Srivastava, the learned A.G.A. for the State-opposite party No. 1 and perused the entire record.

2. The pleadings have been exchanged between the parties.

3. The present criminal appeal under Section 14-A (2) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act has been preferred against the impugned order dated 15.01.2022 passed by the Special Judge Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Barabanki in Bail Application No.146 of 2022 (Mantu Verma Alias Vivek Verma Vs. State of U.P.), arising out of Case Crime No.722/2021, under Section 302, 120 B I.P.C. and Section 3 (2) (v) SC/ST Act, Police Station Kotwali Nagar, District Barabanki, whereby the bail application of the appellant has been rejected.

4. Learned counsel for the appellant submits that the appellant is innocent and

has been falsely implicated in the present case. The entire prosecution story is false and fabricated and lodged only with the intention to falsely implicate the appellant.

5. Learned counsel for the appellant further submits that an F.I.R. dated 05.09.2021 was lodged by the brother of the deceased regarding an incident dated 04.09.2021 in which he has stated that he has lodged a missing report of his brother and it was clearly stated that after search it was found that his brother was murdered by someone and his body was lying in the Village Naare Ka Purwa near hen farm and there is injury on his neck and a suspicion was caused on one Pankaj Kumar, who called the deceased by mobile phone.

6. Learned counsel for the appellant further submits that in the F.I.R. name of Pankaj Kumar was only mentioned and the name of the appellant was not found place in the F.I.R. nor there is any whisper in the F.I.R. regarding the role of the appellant. He further submits that the at the time of inquest also the name of the appellant was not in picture and at the time of inquest the complainant was witness of the inquest. Thereafter, the body of the deceased was sent for the post-mortem and the post-mortem was conducted on 05.09.2021. As per post-mortem report the cause of death was shock due to ante-mortem injuries and three injuries were seen on the body of the deceased.

7. Learned counsel for the appellant further submits that the Investigating Officer recorded the statement of the complainant under Section 161 Cr.P.C. in which a new story has been build up by the complainant and first time the name of the appellant came in picture that the wife of the deceased used to talk on mobile phone

with the appellant and it was also stated that she also used to talk to several other persons, as she is a woman of modern time and since she used to talk to the appellant due to this reason there was always fight took place between the deceased and his wife.

8. Learned counsel for the appellant further submits that only on the statement of the complainant that the appellant used to talk with the wife of the deceased it cannot be said that the appellant is involved in the alleged crime.

9. Learned counsel for the appellant further submits that the other witness, namely Sadhna Verma has also only stated this fact that the appellant used to talk with the wife of the deceased and due to their conspiracy he was killed. Another witness Durgesh also stated almost the same thing which was stated by Sadhna Verma in her statement recorded under Section 161 Cr.P.C.

10. Learned counsel for the appellant while placing reliance upon the judgment of Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra : 1984 Cri. L.J. 178** has argued that it is a case of circumstantial evidence and the chain of evidence is totally broken, the police has also failed to complete the chain of evidence to connect the appellant in the present crime. No one has seen the appellant near the dead body of the deceased nor any witness has seen the appellant accompanying the deceased nor it is a case of prosecution that the mobile phone, which was recovered is of the appellant. He further submits that there is no any direct witness of the alleged crime, thus it cannot be said that the appellant is involved in the present case.

The appellant is roped by the police only to give gravity of the offence.

11. Learned counsel for the appellant further submits that during investigation blood stained shoes was recovered but the shoes was not belonged to the appellant. He further submits that a false recovery of blood stained knife has been shown on the pointing out of the appellant, whereas the appellant did not have any knife.

12. Learned counsel for the appellant further submits that the person who was named in the F.I.R., namely, Pankaj Kumar @ Rajnit Yadav by whose phone the last call was made to the deceased was already enlarged on bail by a co-ordinate Bench of this Court in Criminal Appeal No. 2141 of 2021 vide order dated 28.03.2022. The copy of the said order is annexed as Annexure 9 to the affidavit filed in support of the bail application. He further submits that the case of the appellant is not on the worst footing than that of the other co-accused, Pankaj Kumar @ Rajnit Yadav who has been already granted bail by co-ordinate Bench of this Court.

13. Learned counsel for the appellant further submits that accused/appellant is languishing in jail since 08.09.2021, who has no previous criminal history, and in case the appellant is enlarged on bail, he shall not misuse the liberty of bail and he shall also fully cooperate with the trial. He has further submitted that there is no possibility of the appellant to intimidate or pressurize the witnesses or any other persons acquainted with the facts of the present case.

14. Learned counsel for the applicant further submits that the applicant is in jail since 08.09.2021 and has by now done a

substantial period of incarceration. In support of his argument, he has placed reliance of Hon'ble Apex Court judgment in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

15. Learned counsel for the appellant has also placed reliance of Hon'ble Apex Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463**, and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the

applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Seohore. The appeal is disposed of accordingly."

16. Learned counsel for the appellant further submits that ratio of law applicable in above those cases is also applicable in the case of the appellant, therefore, the instant criminal appeal deserves to be allowed and the order dated 15.01.2022 passed by the Special Judge Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Barabanki in Bail Application No.146 of 2022 (Mantu Verma Alias Vivek Verma Vs. State of U.P.), arising out of Case Crime No.722/2021, under Section 302, 120 B I.P.C. and Section 3 (2) (v) SC/ST Act, Police Station Kotwali Nagar, District Barabanki, deserve to be set aside and consequently, the accused/appellant deserves to be enlarged on bail during pendency of the trial.

17. Several other submissions in order to demonstrate the falsity of the allegations made against the appellant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the appellant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to

impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 08.09.2021 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

18. Learned counsel for the appellant has drawn attention of this Court towards the judgment of the Hon'ble Apex Court in the case of **Hitesh Verma Vs. The State of Uttarakhand reported in (2020) 10 SCC**, wherein in para 15 relying on the judgment passed in **Swaran Singh and others Vs. State (2008) 8SCC 435** has held as under:

"as per the F.I.R., the allegations of abusing the informant were within the four walls of her building. It is not the case of the informant that there was any member of the public (nor merely relatives or friends) at the time of the incident in the house. Therefore, the basic ingredient that the words were uttered in any place within public view is not made out. In the list of witnesses appended to the charge-sheet, certain witnesses are named but it could not be said that those were the persons present within the four walls of the building. The offence is alleged to have taken place within the four walls of the building. Therefore, in view of the judgment of this Court in Swaran Singh, it cannot be said to be a place within public view as none was said of be present within the four walls of the building as per the FIR and/or charge-sheet."

19. Learned counsel for the appellant further submits that no ingredients under Section 3 (2) (v) SC/ST Act is attracted against the appellant, as no one has seen the alleged incident committed by the appellant at a public place or public view.

20. Per contra, Mrs. Nisha Srivastava, learned counsel for the opposite party No.2 has vehemently opposed the prayer and submits that the accused/ appellant is not entitled to be enlarged on bail but did not dispute this fact that it is a case of circumstantial evidence and no any independent witness has assign the role of the appellant in committing the alleged crime along with the co-accused Pankan Kumar @ Rankit Yadav and she also did not dispute this fact that the person who was named in the F.I.R., namely, Pankaj Kumar @ Rajnit Yadav by whose phone the last call was made to the deceased was already enlarged on bail by a co-ordinate Bench of this Court in Criminal Appeal No. 2141 of 2021 vide order dated 28.03.2022. The same argument has been advanced by Sri Ashok Kumar Srivastava, learned A.G.A. for the State and submits that the accused/ appellant is not entitled to get any relief by this Court.

21. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, unlikelihood of early conclusion of trial and also in absence of any convincing material to indicate the possibility of tampering with the evidence and considering the fact that the name of the appellant was not found place in the F.I.R. nor there is any whisper in the F.I.R. regarding the role of the appellant. At the time of inquest also the name of the appellant was not in picture, in the statement of the complainant recorded under Section 161 Cr.P.C. first time the name of the appellant came in picture and the fact that the wife of the deceased used to talk on mobile phone with the appellant due to this reason there was always fight

took place between the deceased and his wife and considering the fact the appellant used to talk with the wife of the deceased it cannot be said that the appellant is involved in the alleged crime and further considering that it is a case of circumstantial evidence and no one has seen the appellant near the dead body of the deceased nor any witness has seen the appellant accompanying the deceased nor it is a case of prosecution that the mobile phone, which was recovered is of the appellant and considering the fact that the person who was named in the F.I.R., namely, Pankaj Kumar @ Rajnit Yadav by whose phone the last call was made to the deceased was already enlarged on bail by a co-ordinate Bench of this Court in Criminal Appeal No. 2141 of 2021 vide order dated 28.03.2022 and considering the fact that no ingredients under Section 3 (2) (v) SC/ST Act is attracted against the appellant, as no one has seen the alleged incident committed by the appellant at a public place or public view and further considering the fact that appellant is in jail since 08.09.2021 and has now by done a substantial period of detention and further considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Sharad Birdhichand Sarda** (supra), **Kamal** (supra), **Takht Singh** (supra), and **Dataram Singh vs. State of U.P.** and another, reported in **(2018) 3 SCC 22, Hitesh Verma (supra)**, this Court is of the view that the learned court below has failed to appreciate the material available on record, the impugned order passed by the trial court is liable to be set aside.

22. Accordingly, the appeal is **allowed**. Consequently, the order dated order dated 15.01.2022 passed by the Special Judge Scheduled Castes and

Scheduled Tribes (Prevention of Atrocities) Act, Barabanki in Bail Application No.146 of 2022 (Mantu Verma Alias Vivek Verma Vs. State of U.P.), arising out of Case Crime No.722/2021, under Section 302, 120 B I.P.C. and Section 3 (2) (v) SC/ST Act, Police Station Kotwali Nagar, District Barabanki is hereby reversed and set aside.

23. Let the appellant, **Mantu Verma @ Vivek Verma**, be enlarged on bail in Case Crime No.722/2021, under Section 302, 120 B I.P.C. and Section 3 (2) (v) SC/ST Act, Police Station Kotwali Nagar, District Barabanki with the following conditions:-

(i) The appellant shall furnish a personal bond with two sureties each of like amount to the satisfaction of the court concerned.

(ii) The appellant shall appear and strictly comply following terms of bond executed under section 437 sub section 3 of Chapter- 33 of Cr.P.C.:-

(a) The appellant shall attend in accordance with the conditions of the bond executed under this Chapter.

(b) The appellant shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

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

(iii) The appellant shall cooperate with investigation /trial.

(iv) The appellant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it

shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(v) The appellant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

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

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

24. The trial court is also directed to expedite the trial of the aforesaid case, within a period of one year from today, by following the provisions of Section 309 Cr.P.C., strictly without granting any unnecessary adjournments to the parties, in case there is no other legal impediment.

(2023) 7 ILRA 451

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 16.03.2023

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Criminal Appeal No. 1290 of 2023

Mukund Singh & Ors.

...Appellants

Versus

State of U.P. & Anr.

...Respondents

Counsel for the Appellants:

Sri Jaysingh Yadav

Counsel for the Respondents:

G.A., Sri Ashutosh Kumar Tiwari

Criminal Law - Indian Penal Code, 1860 - Sections 323, 504, 506 & 325 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sections 14-A, 3(1)(r), (s) - Constitution of India, 1950 - Article 142 - Code of Criminal Procedure, 1973 - Section 320 - In instant case, setting aside of impugned order has been prayed for on basis of compromise - In compromise, incident alleged to have transpired, based on which FIR registered, not contested rather admitted that quarrel had ensued between parties that led to institution of instant proceedings - Conflict was that informant side not doing their job instead taking away tractor-trolley to upload bricks, they were abused, beaten and threatened on their caste indicative words by appellants - Contention by appellants that both parties known to each other and are neighbours, due to some misunderstanding quarrel took place between them, no intention to hurt informant, complainant amicably settled disputes with appellants vide compromise-cum-settlement, out of his own free will, without coercion. (Para 3, 4, 12, 27)

Held, offence preceded by criminal intent of humiliating victim on basis of his caste and committed solely on account of caste of victim - Compromise does not indicate settlement of any civil dispute and possibility of informant side being coerced to enter into compromise cannot be ruled out as appellant No.2 has criminal history of two cases and appellant no.4 has criminal history of 14 case - No rationale as to why continuation of legal

proceedings would be abuse of process of law - No provision for compounding offences under said Act. (Para 29, 30, 32)

Appeal dismissed. (E-13)

List of Cases cited:

1. Ramawatar Vs St. of M.P. (Criminal Appeal No. 1393 of 2011), dated 25.10.2021
2. Hitesh Verma Vs St. of Uttarakhand, (2020) 10 SCC 710, (Para 10)
3. Prathvi Raj Chauhan Vs U.O.I., (2020) 4 SCC 727
4. Ramgopal & Anr Vs The St. of M.P. (Criminal Appeal No. 1489 of 2012), dated 29.09.2021, (Para 11, 19)

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

1. The present Criminal Appeal has been filed under Section 14-A (1) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the "SC/ST Act") on behalf of the appellants praying for setting aside impugned order dated 16.01.2023 passed by ADJ/Spl Judge SC and ST, Lalitpur in S.S.T.No.260/2018 (State vs Jandail Singh and others) arising out of case crime No.41 of 2018 u/s 323,504,506,325 IPC and 3(1)(r),(s) of ST/ST Act PS-Jakhlaun, District Lalitpur.

2. As per the FIR, the prosecution story is as follows:

The First Informant Puran s/o Kanchhedi Ahirwar was a resident of Village Nunawali. On 10.04.2018, at about 08 a.m., when he (informant) along with his father Kanchhedi, brothers Tilak and Ajay and Bhadai s/o Punu Ahirwar was going on his tractor-trolley to upload the bricks, on the way, appellants and other co-

accused persons, namely, Jaidan Singh s/o Lakhan Singh, Mukund singh s/o Lakhan singh, Bablu s/o Sammar Singh and Lakhan Singh s/o Dev Singh Thakur, who are residents of Village-Nunawali, had intercepted, insulted, intimidated and abused them by using caste indicative words, were saying that why are you going to upload the bricks and why you do not not go to do our job. Thereafter, with common intention, they beat them with kicks, fists & sticks and after threatening them, they ran away from the spot, as a result, complainant/informant's side sustained grievous injuries and, thereafter treatment were given to them at District hospital, Lalitpur, fromwhere looking to the seriousness of the victims namely, Kanchhedi and Tilak were referred to Jhansi Medical College and given treatment. When they returned their home, lodged the instant FIR bearing No.0041 of 2018, under Sections 323,504,506,325 IPC and Section 3(1)(r)(s) of ST/ST Act PS Jakhlaun, District Lalitpur.

3. Learned counsel appearing on behalf of the appellants submitted that the appellants and Complainant/Respondent No. 2 are known to each other and are neighbours. It is submitted that due to some misunderstanding the quarrel took place between them, however, there was no intention to hurt the respondent No.2 (first informant).

4. Learned counsel further submitted that in the present case, the respondent No. 2 has amicably settled all his grievances/disputes and differences with the appellants vide compromise-cum-settlement, out of his own free will and without any coercion.

5. While buttressing his arguments, learned counsel has also placed reliance on

the judgment of Hon"ble Supreme Court passed in **Ramawatar v. State of Madhya Pradesh (Criminal Appeal No. 1393 of 2011)** dated 25.10.2021, which has been dealt with subsequently.

6. Learned counsel appearing on behalf of the first informant/respondent No.2 has stated that he has no objection, whatsoever to the settlement deed, the complainant has willfully entered into the said compromise, as such, the impugned order and present criminal proceedings be quashed on the basis of the said compromise.

7. Per Contra, learned AGA appearing on behalf of the State vehemently opposed the instant Criminal Appeal and submitted that: The SC/ST Act is a special legislation passed to check and deter crimes against scheduled castes and scheduled tribes. The legislative intent to implement a specialized law has been to curb the incidents of indignities, humiliation and harassment meted out to the members of these communities. The present FIR is a classic case of mischief sought to be criminalized by this special statute, where accused persons tried to bully the First Informant side just on the basis of their caste. In the instant case, the appellants have intentionally terrorized and humiliated the first informant's side in pursuance of doing their work. The criminal offences of such grave nature cannot be compounded on the basis of settlement between the parties, otherwise if quashing is allowed on the basis of compromise, it would send a wrong message in the society; that the case of Ramawatar (**supra**), is on a different footing altogether wherein the civil dispute led to the altercation and the said judgment was passed by the Hon"ble Supreme Court in exercise of its powers under Article 142

of the Constitution, is distinguishable from the facts at hand and hence, is not binding to the instant case.

8. Heard learned counsels appearing on behalf of parties at length and perused the record.

9. The Appellants by way of the instant Criminal Appeal have prayed that the impugned order be quashed based on compromise and no other averments as to the merits of the case have been made. Thus, the task before the Court is limited to the extent of adjudicating that - whether in the facts of this case, the impugned order and the criminal proceedings under the SC/ST Act can be quashed on the basis of compromise between the parties.

10. Before scrutinizing the facts of the present case and analyzing the powers exercisable by the High Court under Section 14 -A (1) of SC/ST Act, it is pertinent to refer to and analyse the mandate of Section 320 of the Cr.P.C.

"320. Compounding of offences.--

(1) The offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that Table:...

(2) The offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the Table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that Table:...

(3) When an offence is compoundable under this section, the abetment of such offence or an attempt to commit such

offence (when such attempt is itself an offence) or where the accused is liable under section 34 or 149 of the Indian Penal Code (45 of 1860) may be compounded in like manner.

(4) (a) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may, with the permission of the Court, compound such offence. (b) When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908 (5 of 1908) of such person may, with the consent of the Court, compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(6) A High Court or Court of Session acting in the exercise of its powers of revision under section 401 may allow any person to compound any offence which such person is competent to compound under this section.

(7) No offence shall be compounded if the accused is, by reason of a previous conviction, liable either to enhanced punishment or to a punishment of a different kind for such offence.

(8) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(9) No offence shall be compounded except as provided by this section."

11. On a bare perusal of sub-Section (9) of Section 320 of Cr.P.C, it is evident

that offences which are "non-compoundable" cannot be compounded by a Criminal Court. Any such attempt by the Court would amount to alteration, addition, and modification of Section 320 of Cr.P.C, which is the exclusive domain of the legislature. However, the High Court, in exercise of its inherent powers under Section 482 of Cr.P.C., keeping in view the peculiar facts and circumstances of case and for justifiable reasons, can quash the criminal proceedings to prevent abuse of the process of any Court and/or to secure the ends of justice.

12. In the instant case, setting aside of impugned order and quashing has been prayed for on the basis of compromise. In the said compromise, the factum of the incident alleged to have transpired, based on which the instant FIR has been registered, has not been contested rather it has been admitted that a quarrel had ensued between the parties that led to the institution of the instant proceedings. Considering the same, there is no requirement of entering into the merits of the case. Hence, the question of any abuse of process does not arise.

13. Since, quashing of the Criminal Proceedings wherein the offence has been stated to be committed under Section 3(1)(r) and (3)(1)(s) of the SC/ST Act is in question, it is pertinent to refer to the legislative intent behind the said legislation. The intent can be gauged from the Statement of Objects and Reasons of the Act, which is mentioned hereunder:

"Statement of Objects and Reasons.--*Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are*

denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons. 2. Because of the awareness created amongst the Scheduled Castes and the Scheduled Tribes through spread of education, etc. they are trying to assert their rights and this is not being taken very kindly by the others. When they assert their rights and resist practices of untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them. When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the Government allotted land by the Scheduled Castes and the Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests. Of late, there has been an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Castes persons eat inedible substances like human excreta and attacks on and mass killings of helpless Scheduled Castes and the Scheduled Tribes and rape of women belonging to the Scheduled Castes and the Scheduled Tribes. Under the circumstances, the existing laws like the Protection of Civil Rights Act, 1955 and the normal provisions of the Penal Code, 1860 have been found to be inadequate to check these crimes. A special legislation to check and deter crimes against them committed by non-Scheduled Castes and

non-Scheduled Tribes has, therefore, become necessary."

14. The legislative intent has also been referred to by the Hon"ble Supreme Court in the case of **Hitesh Verma v. State of Uttarakhand, (2020) 10 SCC 710**, wherein the Hon"ble Court held as under:

"10. The Act was enacted to improve the social economic conditions of the vulnerable sections of the society as they have been subjected to various offences such as 11 indignities, humiliations and harassment. They have been deprived of life and property as well. The object of the Act is thus to punish the violators who inflict indignities, humiliations and harassment and commit the offence as defined under Section 3 of the Act. The Act is thus intended to punish the acts of the upper caste against the vulnerable section of the society for the reason that they belong to a particular community."

15. The long title of the Act makes it evident that the Act is intended to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes communities to provide for Special Courts and Exclusive Special Courts for the trial of such offences and for ensuring relief and rehabilitation of the victims of such offences. The object of the Act is to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes as they are denied their civil rights. Thus, an offence under the Act would be made out whenever a member of the vulnerable section of the society is subjected to indignities, humiliations, and harassment.

16. The founding fathers of the Constitution were conscious of the harsh realities of the society and the discrimination that the members of the Scheduled Castes and the Scheduled Tribes have been subjected to. At the time of independence, the lofty ideals of liberty, equality and fraternity were just utopian principles that were although guaranteed by law, but not present on ground. It was for the welfare of the downtrodden and vulnerable that the ameliorative and remedial measures were brought in to ensure that their civil rights are protected and equality in principle is adopted in practice.

17. One of the objectives of the Preamble of Constitution is "fraternity assuring the dignity of the individual and the unity and integrity of the nation". The Preamble did not originally contain the expression "fraternity" rather it was subsequently inserted by the Drafting Committee. It is relevant to refer to the explanation given by Dr. Bhimrao Ramji Ambedkar for the word "fraternity" wherein he stated that "fraternity means a sense of common brotherhood of all Indians". In a country like ours with the vivid diversity and the plethora of fault lines, it is necessary to emphasise and re-emphasize that the unity and integrity of India can be preserved only by a spirit of brotherhood.

18. As stated by the Hon^{ble} Supreme Court in **Prathvi Raj Chauhan v. Union of India**, (2020) 4 SCC 727, to achieve this ideal of fraternity, three provisions namely - Articles 15, 17 and 24 were included in the Constitution of India. Despite these provisions being in place, the founding fathers of the Constitution expected the Legislature to enact effective measures to

root out the caste-based discrimination in the society. First attempt by the Parliament to achieve that end was the enactment of the Untouchability (Offences) Act, 1955 wherein the burden of proof was fixed on the accused and not on the prosecution. Next came the Protection of Civil Rights Act, 1955, that made provisions for outlawing and penalising the social practices associated with untouchability and disabilities. Subsequently, it was felt that the 1955 Act (which was amended in 1976) did not provide for sufficient deterrence to the 12 caste-based discriminatory practices against the Scheduled Castes and Scheduled Tribes communities.

19. Finally, to plug in the loophole, and to ensure the rights which the Constitution has guaranteed to the people, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 was enacted to prevent the commission of atrocities against members of Scheduled Castes and Tribes, to provide for Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences. The Act has also for the first time laid down an expansive definition of "atrocities" to cover the multiple manners through which the members of Scheduled Castes and Scheduled Tribes have been humiliated, oppressed and downtrodden for centuries.

20. In light of the aforesaid, it is important to reiterate that unless the provisions of the Act are enforced in their true letter and spirit, and the legislative intent underlying the Act is manifested, the vision of a society free of caste-based discrimination will only remain a distant dream.

21. Learned counsel for the petitioner has extensively placed reliance on the

judgment of the Hon"ble Supreme Court in Ramawatar (**supra**), and hence it is crucial to analyse the same at length.

22. The Hon"ble Supreme Court while deciding the said Appeal was faced with two questions, first whether the jurisdiction of the Hon"ble Supreme Court under Article 142 of the Constitution can be invoked for quashing of criminal proceedings arising out of a non compoundable offence; and if the answer to the first question is in affirmative, second whether the power to quash proceedings can be extended to offences arising out of special statutes such as the SC/ST Act.

23. In response to the first question, the Hon"ble Supreme Court reiterated the finding of **Ramgopal & Anr v. The State of Madhya Pradesh (Criminal Appeal No. 1489 of 2012)** dated 29.09.2021, and while holding that Section 320 of Cr.P.C. cannot be construed as a bar on invocation of the inherent powers vested in the Court also held that the touchstone for exercise of the extra-ordinary powers under the inherent jurisdiction would be to do complete justice. The Hon"ble Supreme Court reiterated the note of caution, that the Court must take into consideration while exercising the powers under the provisions, and held:

"11. The Court in Ramgopal (Supra) further postulated that criminal proceedings involving non heinous offences or offences which are predominantly of a private nature, could be set aside at any stage of the proceedings, including at the appellate level. The Court, however, being conscious of the fact that unscrupulous offenders may attempt to escape their criminal liabilities by securing a compromise through brute force, threats,

bribes, or other such unethical and illegal means, cautioned that in cases where a settlement is struck post conviction, the Courts should, inter alia, carefully examine the fashion in which the compromise has been arrived at, as well as, the conduct of the accused before and after the incident in question. While concluding, the Court also formulated certain guidelines and held:

19... Nonetheless, we reiterate that such powers of wide amplitude ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind: (i) Nature and effect of the offence on the conscious of the society; (ii) Seriousness of the injury, if any; (iii) Voluntary nature of compromise between the accused and the victim; & (iv) Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations."

24. As regards the second question the Hon"ble Supreme Court in the said judgment has observed as under:

"15. Ordinarily, when dealing with offences arising out of special statutes such as the SC/ST Act, the Court will be extremely circumspect in its approach. The SC/ST Act has been specifically enacted to deter acts of indignity, humiliation and harassment against members of Scheduled Castes and Scheduled Tribes. The Act is also a recognition of the depressing reality that despite undertaking several measures, the Scheduled Castes/Scheduled Tribes to be subjected to various atrocities at the hands of upper castes. The Courts have to be mindful of the fact that the Act has been enacted keeping in view the express constitutional safeguards enumerated in Articles 15, 17 and 21 of the Constitution, with a twin fold objective of protecting the members of these vulnerable communities

as well as to provide relief and rehabilitation to the victims of caste based atrocities.

18. We may hasten to add that in cases such as the present, the Courts ought to be even more vigilant to ensure that the complainant victim has entered into the compromise on the volition of his/her free will and not on account of any duress. It cannot be understated that since members of the Scheduled Caste and Scheduled Tribe belong to the weaker sections of our country, they are more prone to acts of coercion, and therefore ought to be accorded a higher level of protection. If the Courts find even a hint of compulsion or force, no relief can be given to the accused party. What factors the Courts should consider, would depend on the facts and circumstances of each case."

25. The Hon"ble Supreme Court in the said judgment as regards the second question further held that:

"16. On the other hand, where it appears to the Court that the offence in question, although covered under the SC/ST Act, is primarily private or civil in nature, or where the alleged offence has not been committed on account of the caste of the victim, or where the continuation of the legal proceedings would be an abuse of the process of law, the Court can exercise its powers to quash the proceedings. On similar lines, when considering a prayer for quashing on the basis of a compromise/settlement, if the Court is satisfied that the underlying objective of the Act would not be contravened or diminished even if the felony in question goes unpunished, the mere fact that the offence is covered under a 'special statute' would not refrain this Court or the High Court, from exercising their respective

powers under Article 142 of the Constitution or Section 482 Cr.P.C. is held that whether has held that though offences under the SC/ST Act can be quashed if the offence is primarily private or civil in nature, however, before quashing, the Court must be satisfied that the victim has not been put under pressure to enter into the settlement. Having considered the peculiar facts and circumstances of the present case in light of the afore stated principles, as well as having meditated on the application for compromise, we are inclined to invoke the powers under Article 142 and quash the instant Criminal proceedings with the sole objective of doing complete justice between the parties before us...."

26. Upon a detailed deliberation on the question of quashing of criminal proceedings in offences under the SC/ST Act and in light of the judgments discussed herein above, the following principles emerge:

(i) While dealing with the quashing of the criminal proceedings under the SC/ST Act, the Court should be extremely circumspect in its approach and cognizant of the legislative intent of the said Act.

(ii) In cases involving the offences under special legislations like the SC/ST Act, while considering the quashing of criminal proceedings, the social discrimination that prevails and the vulnerability of the weaker sections of the society as being prone to coercion, the Court should be more vigilant to ensure that the victim has entered into the compromise on one's own volition and free will and not on account of any duress. If, while considering the same, there is an iota of apprehension of compulsion or coercion, no relief can be given to the accused. The

factors to determine the volition/free consent of the victim would depend on the facts and circumstances and would vary from case to case.

(iii) Upon the aforesaid analysis, in the opinion of the Court, it is found that:

first, if the offence although covered under the SC/ST Act is primarily private or civil in nature; or,

second, where the offence has not been committed on account of the caste of the victim; or,

third, where the continuation of the legal proceedings would be an abuse of process of law; and,

fourth, if the underlying objective of the Act would not be contravened or diminished even if the felony in question goes unpunished, then the mere fact that the offence is covered under a "special statute" would not be a bar on the exercise of the inherent jurisdiction, and the Court can exercise its powers to quash the proceedings.

26. This Court has considered the case at hand, the case laws and principles of law referred above and specifically the judgment of the Hon"ble Supreme Court in Ramawatar (supra). What emerges is that when dealing with offences arising out of special statutes such as the SC/ST Act, the Court should be extremely circumspect in exercising its extraordinary jurisdiction to quash the criminal proceedings.

27. In the Ramawatar's case (**supra**), there was a pre-existing property dispute between the parties which led to the conflict and the said turn of events which led to the initiation of criminal proceedings under SC/ST Act. However, in the instant case the root of conflict was that First Informant side was not doing their job instead taking away the tractor-trolley to

upload bricks and they were abused, beaten and threatened on their caste lines by the appellants.

28. Further, in light of the peculiar facts and circumstances of the Ramawatar's case (**Supra**), the powers were exercised by the Hon"ble Supreme Court under Article 142 to quash the criminal proceedings with the sole objective of doing complete justice between the parties before it. However, in this case there is neither any cogent reason nor any travesty of justice being caused or any abuse of process that needs to be prevented thus warranting the exercise of the inherent jurisdiction of this Court.

29. In the instant case, what appears is that the humiliation of the Victim/First Informant side was totally unprovoked, uncalled for, with the sole intention of humiliating the victim for not doing their job. The offence in the instant case was preceded by a criminal intent of humiliating the victim on the basis of his caste and has been committed solely and consciously on account of the caste of the victim.

30. Furthermore, having regard to the legislative intent underlying the SC/ST Act to deter the acts of indignity, humiliation, and harassment against members of the Schedule Caste and Schedule Tribes, and the facts in the instant case, the compromise does not indicate the settlement of any civil dispute and the possibility of the First Informant side being coerced to enter into the compromise cannot be ruled out as appellant No.2 Lakhn Singh has criminal history of two cases and appellant no.4 Jandail Singh has criminal history of 14 case, which is evident from para 19 of the criminal appeal. There is no rationale as to why the

31. Therefore, the offence in the instant case being not of a pre-dominantly civil nature and being committed solely on the basis of caste of victim, the rigours of SC/ST Act being a Special statute, enacted with a specific noble legislative intent that must be given effect in its letter and spirit, cannot be diluted by quashing the Criminal Proceedings in question on the basis of compromise. Thus, in the instant case, a case for exercise of extraordinary jurisdiction under Section 482 of the Code of Criminal Procedure is not made out, as in this case a Criminal Appeal has been filed under S.14-A (1) SC/ST Act, which reads as follows:-

32. In the Scheme of SC/ST Act, there is no provision for compounding the offences under the Act.

33. In the light of the analysis made above and as appellants have failed to point out any illegality, infirmity or perversity in the impugned order dated 16.01.2023, I am of the view that Appeal being devoid of merits which is liable to be dismissed and is, hereby, **dismissed**.

33. It is made clear that the observations made herein while dismissing the instant Criminal Appeal shall have no bearing whatsoever on the merits of the case during trial.

Held, none of villagers or any independent person had seen viral video clip or photograph of appellant and deceased nor any complaint was made by police that some video or photograph were taken by appellant on his mobile phone and on that basis he threatened her - Husband of deceased St.d he received video clip from appellant which after seeing it he deleted, but he had not informed this to police,

further St.d appellant made physical relations with his wife but he has not made any complaint, St.ment doubtful - Investigating Officer St.d after recovering mobile phone of appellant from his house, handed over by his mother, he without putting in sealed cover send it to forensic lab, authenticity of report was doubtful. (Para 32)

Appeal allowed. (E-13)

List of Cases cited:

1. Sharad Birdhichand Sarda Vs St. of Mah., 1984 Cri. L.J. 178
2. Ude Singh & ors. Vs St. of Har.; (2019) 17 SCC 301
3. Hitesh Verma Vs St. of Uttarakhand & anr., (2020) 10 SCC 710,
4. Kamal Vs St. of Har., 2004 (13) SCC 526, (Para 2)
5. Takht Singh Vs St. of M.P., 2001 (10) SCC 463, (Para 2)
6. Dataram Singh Vs St. of U.P. & anr., reported in (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Counter affidavit filed on behalf of State is already on record and in reply thereto, the learned counsel for the appellant has filed rejoinder affidavit today in Court, which is taken on record.

2. Shri Alok Srivastava, the learned counsel for the opposite party No. 2 was already granted time to file counter affidavit on 02.03.2023, since then the case listed 3-4 times, but he has not filed any counter affidavit. He submits that he will argue the matter in absence of any counter affidavit.

4. Heard Shri Amrendra Nath Singh, learned Senior Advocate, assisted by Shri

Ravi Kant Pandey, the learned counsel for the appellant, Ms. Shikha Sinha, the learned A.G.A. for the State-opposite party No. 1 as well as Shri Alok Srivastava, the learned counsel for the opposite party No. 2 and perused the record.

5. The present criminal appeal under Section 14-A (2) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act has been preferred by the appellant-Satyam Singh, against the impugned order dated 28.05.2021 passed by the court of learned Special Judge, SC/ST Act, Gonda in Bail Application No. 1193 of 2021, arising out of Case Crime No. 85 of 2021, under Sections 306, 376(2) I.P.C. read with Section 3(2)(5) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and Section 67 of I.T. Act, Police Station Tarabganj, District Gonda, whereby bail application of the appellant has been rejected.

6. Learned counsel for the appellant submits that appellant is a student of B.Sc. in a reputed college and was pursuing his studies. He has falsely been implicated in the present case due to enmity and village party bandi. The entire allegation as levelled by the prosecution against the appellant is false and fabricated and has been made only with intention to ruin the entire future of the appellant.

7. Learned counsel further submits that the first information report was lodged by the opposite party No. 2-Pappu Paswan against the appellant on 24.03.2021 at 03:19 a.m. showing the incident of 23.03.2021, under Section 306 I.P.C. read with Section 3(2)(5) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act at Police Station Tarabganj, District Gonda, alleging therein that in the

intervening night of 23/24.03.2021 brother-in-law of his brother, Pujari, called him on his mobile to talk with his sister, over which he went to the house of his brother, then neighbour informed him that wife and daughter of his brother, namely, Phoola Devi and Khushboo had gone towards field, then he went in their search towards south side and saw that in the field of Ishardeen Paswan from the tree of jackfruit (Katahal), wife and daughter of his brother were hanging. On account of harassment of Satyam Singh, wife and daughter of his brother namely Phoola Devi and Khushboo hanged themselves and committed suicide.

8. Learned counsel for the appellant further argued that the first information report was lodged after a much delay without giving any plausible explanation. On the information of death of both the deceased the police of Police Station Tarabaganj came and conducted inquest proceedings and prepared inquest report, thereafter, the dead bodies of both the deceased were sent for postmortem examination, which was done on 24.03.2021.

9. Learned counsel for the appellant further submits that as per the postmortem report of the deceased-Khushboo, her cause of death was found to be asphyxia due to ante mortem hanging with one ligature mark of size 29.0 c.m. x 1.5 c.m. all around the neck, which is mentioned at page-59 of the paper book of the present appeal. He further submits that the concerned doctor has opined that no external and internal injury seen on genitals, hymen was torn and uterus was non gravid. This report is given at page-60 of the paper book. Thus, learned counsel for the appellant submits that as per the post mortem report cause of death of the deceased-Khushboo is

asphyxia due to hanging without any injuries.

10. Learned counsel for the appellant further submits that postmortem of the deceased-Phoola Devi was also conducted, in which apart from one ligature mark of size 30.0 c.m. x 1.0 c.m. all around the neck, three other simple injuries were seen on the left knee.

11. Learned counsel for the appellant further submits that there is no role of the appellant in the death of above two deceased and the appellant has falsely been implicated in the present case.

12. Learned counsel for the appellant further submits that the statement under Section 161 Cr.P.C. of the complainant, namely, Pappu Paswan was recorded by the Investigating Officer on 24.03.2021 in which he has also made suspicion that some photographs and video clip was prepared by the appellant and he was having affairs with the deceased-Khushboo and in the garb of that video clip and photographs the appellant was blackmailing her, thus, due to this humiliation she committed suicide. But in his statement recorded under Section 161 Cr.P.C. the complainant-Pappu Paswan has not disclosed which type of video or clip of deceased-Khushboo was made by the appellant, or whether he had seen the same from his own eyes or any other villager had seen any obscene video clip or photographs of the said deceased. Thus, it has been argued by the learned counsel for the appellant that on the basis of suspicion the entire statement has been made by the complainant.

13. Learned counsel for the appellant further submits that thereafter statement of

wife of the complainant, namely Smt. Mala Devi was also recorded in which she has also stated that there was some affair of appellant with the deceased-Khushboo, he used to torture the deceased-Khushboo and also made physical relations with her and made video clip and also took some photographs, and he also threatened the deceased to make viral the said video clip and photographs. Learned counsel further argued that in her entire statement Smt. Mala Devi has not stated that she had ever seen any video clip or photograph of appellant along with the deceased-Khushboo or had ever seen them in a compromising situation.

14. Learned counsel for the appellant further submits that Smt. Mala in her statement has further stated that the appellant had committed rape of the deceased-Khushboo several times, but no any F.I.R. or complaint was ever made by the deceased-Khushboo or her family members against the appellant to the police, which also falsifies the statement of Smt. Mala Devi and thus it shows that appellant has first time falsely been implicated in the case.

15. Learned counsel for the appellant further submits that the reasons of death of deceased is totally unknown. However, there was some property dispute that is why both were killed by their family members.

16. Learned counsel for the appellant further submits that another witness, namely, Km. Reena in her statement recorded under Section 161 Cr.P.C. has also repeated the same version as given by Smt. Mala Devi in her statement recorded under Section 161 Cr.P.C., but she has not stated anything that she had seen any video clip or photograph of appellant along with the

deceased-Khushboo in a compromising situation.

17. Learned counsel for the appellant further submits that the statement of witness, namely, Mohit, who is husband of the deceased-Khushboo, was also recorded under Section 161 Cr.P.C. on 07.05.2021, in which to save his skin he stated first time that he had received one video clip from the appellant which after seeing it he had deleted, but he has not informed the police earlier regarding this video clip. He has only stated that the appellant made physical relations with his wife-Khushboo, but he has not ever made any complaint or lodged the F.I.R., thus, the statement given by the husband of the deceased appears to be doubtful and it is not possible that the husband keep quite on the obscene video of her wife with the appellant and does not take legal action against the culprit.

18. Learned counsel for the appellant further submits that none of the villagers or any independent person had ever seen any viral video clip or photograph of appellant and the deceased-Khushboo, nor any such complaint was ever made by the police that some video or photograph were taken by the appellant on his mobile phone and on the basis of which he was threatening her to viral the same and was humiliating the deceased-Khushboo.

19. Learned counsel for the appellant further submits that in para-24 of the affidavit filed in support of the bail application it is clearly stated that no any obscene video allegedly prepared by the appellant is on the record, but the Investigating Officer has wrongly submitted the charge sheet under Section 67 of the I.T. Act, and in reply to para-24 of the aforesaid affidavit, learned A.G.A. has

given its reply in para-12 of counter affidavit in which there is no any specific denial of the said averment and only a vague statement has been given.

20. Learned counsel for the appellant further submits that the statement of the Investigating Officer was also recorded before the court below in which he has stated that he recovered the mobile phone of the appellant on 18.05.2021 from his house, the appellant was not present but his mother handed over one Redmi blue colour mobile phone which he has taken without putting the same in sealed cover and send it the same to the forensic lab. Thus, it has been argued that authenticity of the alleged report of forensic laboratory is doubtful as the said mobile phone was not given to the same in sealed cover, which fact has been stated in page-13 and 14 of the rejoinder affidavit. Thus, it has been argued that entire case as set up by the prosecution is false and fabricated. The appellant is a student and no such incident happened and he has falsely been implicated in the present case, thus, the bail application of the present appellant may be allowed by this Court sympathetically and the impugned bail rejection order passed by the trial court may be set aside.

21. Learned counsel for the appellant further submits that it is a case of circumstantial evidence, there is no independent eye witness of the alleged crime, even though informant and other witnesses are not the eye witness. The chain of circumstances are not complete.

22. Learned counsel for the appellant while placing reliance upon the judgment of Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra : 1984 Cri. L.J. 178** has

further argued that no one had seen the commission of crime, there is no connecting link to indicate the involvement of applicant in the commission of crime, it is a case of circumstantial evidence and the chain of evidence is totally broken, the police has also failed to complete the chain of evidence to connect the applicant in the present crime.

23. Learned counsel for the appellant further submits that applicant has never abetted both the deceased to commit suicide. From perusal of F.I.R. and from the statements of complainant and other witnesses no case under Section 306 I.P.C. is made out. Even prosecution has failed to prove that case under Section 306 I.P.C. is made out as the essential ingredients for proving the said provisions are not fulfilled either on perusal of the F.I.R. or on perusal of statements of complainant and witnesses. The entire prosecution story is false and fabricated and has been cooked up with malafide intention.

24. Learned counsel for the appellant further submits that in the light of the statement of complainant and other witnesses even assuming to the said allegations to be a gospel truth, the same will not constitute offence under Section 306 IPC read with Section 107 IPC. He argues that the scope of Section 306 IPC has been duly considered by the Hon'ble Supreme Court in the case of **Ude Singh and others vs State of Haryana; (2019) 17 SCC 301**.

25. Learned counsel for the appellant further submits that provisions of Section 3(2)(5) of S.C./S.T. Act are not attracted in the present case as in the entire statements of complainant and other witnesses there is no whisper that none of the villagers or any

independent person had ever seen any video clip or photograph of appellant and the deceased-Khushboo, on the basis of which it can be said that appellant was threatening her to viral the same and was humiliating the deceased-Khushboo. In support of his arguments, the learned counsel for the appellant while referring the judgment of Hon'ble Supreme Court in the case of **Hitesh Verma Vs. State of Uttarakhand and another, (2020) 10 SCC 710**. Thus, it has further been argued that the applicant has falsely been implicated with malafide intention.

26. Learned counsel for the appellant further submits that the appellant is in jail since 25.03.2021 and has by now done a substantial period of incarceration. In support of his argument, he has placed reliance of Hon'ble Apex Court judgment in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

27. Learned counsel for the applicant has also placed reliance of Hon'ble Apex

Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463**, and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

28. Learned counsel for the appellant further submits that ratio of law applicable in above those cases is also applicable in the case of the appellant, therefore, the appellant may be enlarged on bail by this Court sympathetically.

29. Several other submissions in order to demonstrate the falsity of the allegations made against the appellant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the appellant that he is ready to cooperate with

the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is having criminal history of one case, which has been explained in para-32 of the affidavit filed in support of the bail application. It has further been argued that appellant is in jail since 25.03.2021 and that in the wake of heavy pendency of cases in the court, there is no likelihood of any early conclusion of trial.

30. Learned A.G.A. for the State submits that bail application of the appellant may be rejected as there is evidence against the appellant.

31. Shri Alok Srivastava, the learned counsel for the opposite party No. 2 submits that appellant is involved in heinous crime, therefore, his bail application may be rejected.

32. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, nature of evidence, period of detention already undergone, unlikelihood of early conclusion of trial and also in absence of any convincing material to indicate the possibility of tampering with the evidence and considering that none of the villagers or any independent person had ever seen any viral video clip or photograph of appellant and the deceased-Khushboo, nor any such complaint was ever made by the police that some video or photograph were taken by the appellant on his mobile phone and on the basis of which he was threatening her to viral the same and was humiliating the deceased-Khushboo;

further Mohit who is husband of the deceased-Khushboo had stated that he had received one video clip from the appellant which after seeing it he had deleted, but he had not informed the police earlier regarding this video clip and had also stated that the appellant made physical relations with his wife-Khushboo but he has not ever made any complaint or lodged the F.I.R., thus, there appears force in the argument of learned counsel for the appellant that the statement given by the husband of the deceased appears to be doubtful and it is not possible that the husband keep quite on the obscene video of her wife with the appellant and does not take legal action against the culprit; further the Investigating Officer in his statement recorded before the court below has stated that after recovering the mobile phone of appellant from his house which was handed over by the mother of appellant he without putting the same in sealed cover send it to the forensic lab, thus there appears force in the argument of learned counsel for the appellant that authenticity of the alleged report of forensic laboratory is doubtful; there appears force in the submission of learned counsel for the appellant that as per the version of the F.I.R. and as per the statements of complainant and other witnesses no case under Section 306 I.P.C. is made out as essential ingredients for proving the said offence are not fulfilled; there appears also force in the submission of learned counsel for the appellant that in the entire statements of complainant and other witnesses there is no whisper that none of the villagers or any independent person had ever seen any video clip or photograph of appellant and the deceased-Khushboo, on the basis of which it can be said that appellant was threatening her to viral the same and was humiliating the deceased-Khushboo, thus, provisions of

Section 3(2)(5) of S.C./S.T. Act are also not attracted and also chain of circumstances are not complete and thus it is a case of circumstantial evidence; further considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Sharad Birdhichand Sarda (supra)**, **Ude Singh and others (supra)**, **Hitesh Verma (supra)**, **Kamal (supra)**, **Takht Singh (supra)** and **Dataram Singh Vs. State of UP and another, reported in (2018) 3 SCC 22**, this Court is of the view that the learned trial court has failed to appreciate the material available on record. Thus, the impugned bail rejection order passed by the trial court is liable to be set aside.

33. Accordingly, the appeal is **allowed**. Consequently, the impugned judgment and order dated 28.05.2021 passed by the court of learned Special Judge, SC/ST Act, Gonda in Bail Application No. 1193 of 2021, arising out of Case Crime No. 85 of 2021, under Sections 306, 376(2) I.P.C. read with Section 3(2)(5) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and Section 67 of I.T. Act, Police Station Tarabganj, District Gonda, is hereby set aside and reversed.

34. Let the appellant, **Satyam Singh**, be enlarged on bail in Case Crime No. 85 of 2021, under Sections 306, 376(2) I.P.C. read with Section 3(2)(5) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and Section 67 of I.T. Act, Police Station Tarabganj, District Gonda, with the following conditions:-

(i) The appellant shall furnish a personal bond with two sureties each of

like amount to the satisfaction of the court concerned.

(ii) The appellant shall appear and strictly comply following terms of bond executed under section 437 sub section 3 of Chapter- 33 of Cr.P.C.:-

(a) The appellant shall attend in accordance with the conditions of the bond executed under this Chapter.

(b) The appellant shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

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

(iii) The appellant shall cooperate with investigation /trial.

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

(v) The appellant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

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

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

35. The trial court is also directed to expedite the trial of the aforesaid case by following the provisions of Section 309 Cr.P.C., strictly without granting any unnecessary adjournments to the parties, in case there is no other legal impediment.

(2023) 7 ILRA 468

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 21.07.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 2049 of 2003

Bhaggal & Anr.	...Appellants
State of U.P.	...Respondent

Counsel for the Appellants:
Sanjay Pandey, Rajiv Raman Srivastava

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 - Section 307 r/w 34 - Appeal against conviction - Rigorous imprisonment - Indian Evidence Act, 1872 - Section 145 - Code of Criminal Procedure, 1973 - Sections 161, 313 - Benefit of doubt - According to prosecution appellant no.1 had fired upon P.W.1 due to previous enmity that his bua had been taken away by his uncle - PW-1

admitted he was only 2-3 years old and appellants would have 5-6 years old - No FIR lodged earlier - Victim not mentioned this incident as cause of present incident - Informant has died, he could not be examined and controverted, who St.d to IO that one day before incident, altercation took place between victim and accused and victim was warned by accused for not visiting village in future - Genesis of commission of offence not established - Direct evidence, no motive to be proved by prosecution. (Para 27)

No firearm injury caused by appellant no. 2 to injured - All four accused persons fired while leaving place of occurrence, no empty cartridges found - No recovery of fire-arm from appellant no. 2 - Both witnesses of fact turned hostile and no evidence except evidence of informant that appellant no. 1 fired upon him on exhortation of appellant no. 2. (Para 28)

In FIR, four persons named as accused and informant and victim St.d to IO that in addition to appellants, other accused were also present on spot and committed crime - Some arrangements took place out of court, therefore, PW-1 deposed except appellants, rest two accused persons covered their faces, he could not recognize them. (Para 29)

No active role except role of exhortation mentioned against appellant no.2, not corroborated by independent evidence, not proved beyond reasonable doubt from evidence available on record. (Para 31)

Appeal allowed. (E-13)

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

1. Heard learned counsel for the appellants, learned AGA for the State and perused the record.

2. This appeal has been preferred against the order of conviction and

sentencing dated 19.11.2003 passed by the Additional Sessions Judge, Court No.6, Sitapur in Sessions Trial No.689 of 1999 (State Vs. Ram Naresh and others) arising out of Case Crime No.187 of 1997, under Section 307 IPC, Police Station Ramkot, District Sitapur convicting the appellants Bhaggal and Ashok Kumar under Section 307 read with Section 34 IPC and sentencing to undergo rigorous imprisonment of 10 years each and Rs.5,000/- fine to each of the accused and to undergo six months simple imprisonment each in case of default of payment of fine.

3. During the pendency of appeal, appellant no.1, Bhaggal has died and the appeal in respect of appellant no.1, Bhaggal has been abated. Thus, the appeal survives only in respect of appellant no.2, Ashok Kumar.

4. In brief, facts of the case are that the informant Chandra Bhushan lodged an FIR on 17.08.1997 that the informant, his son Ram Gopal and Kalicharan alongwith Rakesh of his village had gone to purchase a buffalo. After seeing the buffalo of Devi Sahai Shukla when they were coming back and reached near the house of Gokaran Prasad Shukla at Village Arthana, Bhaggal, Ram Naresh, Anand and Ashok residents of village Arthana armed with country-made pistol reached and exhorted to kill them in revenge. Hearing this, Bhaggal fired upon his son from the country-made pistol with the intention to kill him which hit Ram Gopal and he fell down. After hearing hue and cries, the accused persons ran away towards their houses while firing from their country-made pistols. Several persons of the village have seen the occurrence and FIR was lodged.

5. Ram Gopal was medically examined by Dr. Ashok Agrawal, three firearm pellet injuries were found on the lower chest and upper abdomen and on left arm of the injured collar abrasion was also present. There was fresh bleeding from the wounds. Blackening and tattooing were not present.

6. After lodging the FIR, PW-7, investigating officer (IO) SI Umakant Upadhyay started investigation, recorded the statements, collected the oral and documentary evidences and submitted the charge sheet Ex.Ka-7 and Ex.Ka-8.

7. Following witnesses have been produced to prove the prosecution case:-

1	PW-1	Ram Gopal
2	PW-2	Kali Charan
3	PW-3	Sarvesh Kumar
4	PW-4	HC Rajaram
5	PW-5	Dr. AK Nigam, Radiologist
6	PW-6	Umashankar, SI
7	PW-7	Umakant Upadhyay, SI
8	PW-8	AK Srivastava, Radiologist

8. Following documentary evidences have been produced by the prosecution:-

1	Ex.Ka-1	Written Complaint
2	Ex.Ka-2	Chik FIR
3	Ex.Ka-3	Copy GD
4	Ex.Ka-4	Injury Report
5	Ex.Ka-5	

6	Ex.Ka-6	Site Plan
7	Ex.Ka-7-8	Charge Sheet
8	Ex.Ka-9	X-Ray Report
9	M.Exs.1-2	X-Ray Plates

9. Statements of the accused persons have been recorded under Section 313 CrPC in which they denied the allegations, evidence and charge. Accused Bhaggal stated that since he had testified himself against the informant, hence he has been falsely implicated. Accused Ram Naresh stated that he was the relative of Bhaggal, hence he has been falsely implicated. Accused Ashok stated that he was the real brother of Bhaggal, hence he has been falsely implicated.

10. In this case four accused were named in the FIR but only accused Bhaggal and Ashok have been convicted and sentenced. Rest two accused persons Ram Naresh and Anand have been exonerated and no appeal/revision has been filed by the State or the informant against the judgment and order of acquittal in favour of these two accused persons.

11. In this case PW-2, Kali Charan and PW-3, Sarvesh Kumar have completely not supported the prosecution version, hence this case is based only on the direct evidence of Ram Gopal, PW-1, the sole injured. The informant Chandra Bhushan had died before the examination of the witnesses, hence he could not be examined.

12. In brief, the evidences of the witnesses are reproduced herein below:-

13. (I) The informant, Chandra Bhushan has not been examined. PW-2, Kalicharan has deposed in his cross-

examination that informant had been killed after this incident. It was not in the evidence that as to who killed the informant. Therefore, he could not be examined as eye-witness.

14.(II) Injured Ram Gopal has been examined as PW-1 who deposed that when he was coming back after seeing buffalo of Devi Sahai Shukla and reached near the house of Gokaran Prasad, accused Bhaggal, Ashok and two other unknown persons covering their faces armed with country-made pistol came before them; Ashok exhorted on which Bhaggal fired upon him which hit in his left arm pit with the intention to kill him. The report was lodged by father of this witness. This witness recognized the signature of his father on the written complaint Ex.Ka-1 and proved it. In cross-examination this witness has disclosed old enmity with Bhaggal that sister of Bhikhari who was father of the accused Bhaggal had been kidnapped by his uncle Badkau for which they had enmity with each other. According to this witness, there was no enmity with regard to election. He has further deposed that at the time of such abduction of bua of the accused Bhaggal and Ashok they both were about 5-6 years old. He denied that Ram Naresh and Anand were the persons who had covered their faces at the time of occurrence. This witness had admitted that he was accused in a case under Section 307 IPC and Section 25 Arms Act. He expressed ignorance as to whether accused Bhaggal was a witness in the case under Section 25 of the Arms Act or not. This witness could not remember the day and time of the incident. This witness denied that he was fired from the distance of 16 steps. According to this witness, the shot would have been fired 2-3 steps away.

15. It is noteworthy that no blackening, tattooing, charring or scorching were found on the fire-arm wounds though collar abrasion was present. Though this witness and his father late Chandra Bhushan had stated to the IO that rest two accused persons were Ram Naresh and Anand. This witness has further deposed that due to fire holes had been made upon shirt and blood had also been fallen on the shirt. This witness denied the statement given to the IO that rest two accused persons were Ram Naresh and Anand and they were present on the spot without covering their faces. According to him IO had not taken the blood stained clothes. This witness denied that one day before he had met with Bhaggal and others and an altercation had taken place while in the statement under Section 161 CrPC. The informant Chandra Bhushan had stated that one day before this incident an altercation had taken place between his injured son Ram Gopal and accused Bhaggal.

16. (III) PW-2, Kalicharan has not supported the prosecution version and has been declared hostile. This witness has accepted in cross-examination on behalf of the accused that the informant Chandra Bhushan had been killed after this incident. There are several criminal cases against the injured Ram Gopal.

17. (IV) PW-3, Sarvesh has also not supported the prosecution version and has been declared hostile.

18. (VI) PW-4, HCP Rajaram Yadav has deposed about the preparation of chik FIR Ex.Ka-2 and kaymi GD.

19. (VII) PW-5, Dr. AK Nigam, Radiologist had medically examined the injured PW-1, Ram Gopal and found three

fire-arm pellet injuries on the left lower part of the chest and upper part of the stomach of the injured in an area of 20cm x 16cm which were almost muscle-deep. PW-2 had one pellet muscle-deep wound 0.3cm. 0.3cm on the front of the upper left arm 5cm above from the elbow. PW-3 had two pellet muscle-deep injuries wound 0.3cm. 0.3cm on the upper part in front of upper part left forearm. Collar abrasion was present but no fresh blood, blackening or tattooing were present. This witness proved the injury report Ex.Ka-4 and opined that injury no.1 was on the vital part of the body. This witness could not state the distance from which these injuries would have been caused.

20. (VIII) PW-6, SI Uma Shankar had conducted the investigation. He deposed that he has copied the chik FIR, statement of writer and the informant, inspected the place of occurrence and prepared map Ex.Ka-5, proved the document Ex.Ka-5, searched the accused persons. Copied the injury report and the fact regarding surrender by the accused Bhaggal and Ashok in the court thereafter the investigation had been transferred to SIS, Sitapur by the order of SP, Sitapur. In cross-examination this witness has admitted that he neither inspected the clothes of the victim nor took it in his possession. Therefore, he cannot say the position of hole in the clothes. According to him, witness Gokaran Prasad resident of Village Arthana had confirmed the incident. Though he was not an eye-witness.

21. (IX) PW-7, SI Umakant Upadhyay, second IO has deposed that he had recorded the statement of Kalicharan, investigated the case and again he became IO on 03.11.1997. After that he recorded the statement of injured Ram Gopal and after

completing other formalities he submitted charge sheet no.7 of 1997 Ex.Ka-7 against the accused Bhaggal and Ashok under Section 307 IPC. He had also submitted a charge sheet no.7A of 1997 Ex.Ka-8 against the accused Ram Naresh and Anand.

22. In cross-examination this witness deposed that he had not recorded statement of the informant. He had not taken clothes of the injured. He admitted that what was the cause of commission of the crime, could not be ascertained. He further deposed that injured Ram Gopal had named accused Ram Naresh and Anand.

23. (X) PW-9, Dr. RK Srivastava, Radiologist has deposed that he had done X-Ray of the injured and had seen radio opec shadow on all the three injuries. This witness has proved the X-Ray report as Ex.Ka-9 and has also proved X-Ray plates as M.Exs.1, 2 and 3. In cross-examination this witness has deposed that as per X-Ray report, the radio opec shadow were not fatal. Though the chest and stomach are the vital part of the body.

24. After closure of the oral evidence the statement of the witness, accused persons were recorded under Section 313 CrPC in which accused Bhaggal (now deceased) had denied the charges and allegations and has stated that witness were deposing on account of enmity. Since he had given statement against Ram Gopal therefore he was falsely implicated. Accused Ashok has also denied the allegations and has said that since he is the real brother of the accused Bhaggal, therefore, he has also been falsely implicated. Accused Ram Naresh has also denied the charges and has stated that since Bhaggal is his relative, sister of father of

the accused Bhaggal had been wedded to his uncle, therefore, he has also been falsely implicated on account of enmity.

25. Accused Anand Kumar has also denied the charges and allegations and has stated that he has been falsely implicated.

26. After closure of the prosecution evidence argument were heard, accused Ram Naresh and Anand were acquitted from the charges under Section 307 read with Section 34 IPC and accused Bhaggal and Ashok were convicted under Section 307 read with Section 34 IPC and were awarded ten years rigorous imprisonment each with fine of Rs.5,000/- to each of the accused with an alternative punishment in case of default of payment of fine, they shall undergo six months simple imprisonment each.

27. In this case according to the prosecution accused Bhaggal had fired upon the injured on account of previous enmity that his bua had been taken away by uncle of the injured Ram Gopal. The victim PW-1 has admitted that at that time he was only about 2-3 years old and accused Bhaggal and Ashok Kumar would have been 5-6 years old. He has also deposed that no FIR had been lodged in this regard. The victim has also not mentioned this incident as a cause of this incident. There is no contradiction of injured PW-1 under Section 145 of the Indian Evidence Act regarding an incident which appears to have occurred one day before this incident. Since the informant has died, hence he could not be examined and could not be controverted under Section 145 of The Indian Evidence Act who had stated to the IO under Section 161 CrPC that one day before the incident the victim had visited Village Arthana where an altercation had

taken place between the victim and accused Bhaggal and the victim was warned by the accused Bhaggal for not visiting Village Arthana in future. Thus so far as the genesis of commission of this offence is concerned, it could not be established. Since it is a case of direct evidence, therefore, no motive is required to be proved by the prosecution. However, it has been proved from the office report dated 06.02.2023 that accused Bhaggal has died and the appeal remains only in respect of accused Ashok Kumar.

28. It has been proved from the evidence that no fire-arm injury has been caused by the appellant Ashok Kumar to the injured Ram Gopal. Though it has come in evidence that all the four accused persons had fired while leaving the place of occurrence but no empty cartridges were found on the spot. There is no recovery of any fire-arm from the accused Ashok. It is noteworthy that both the witnesses of fact have turned hostile and have not supported the prosecution version and there is no iota of evidence except the evidence of informant PW-1 that Bhaggal had fired upon him on the exhortation of appellant Ashok Kumar.

29. It is worth mentioning that in the FIR four persons have been named as accused and the informant as well as the victim have stated to the IO that in addition to Bhaggal and Ashok, accused Anand and Ram Naresh were also present on the spot and committed the crime and fired on the place of occurrence. It appears that some arrangements took place out of the court, therefore, the victim, PW-1 deposed that except accused Bhaggal and Ashok Kumar rest two accused persons had covered their faces, therefore, he could not recognize them.

30. According to the prosecution, accused Ashok Kumar had an illegal fire-arm but no such fire-arm could be recovered from his possession though the recovery of such fire-arm is not condition precedent to record a conviction under Section 307 read with Section 34 IPC.

31. According to this Court, generally in a day-light occurrence accused do not want to establish their identity. If two accused persons would have covered their faces, similar facility was also available for rest of the accused persons namely Bhaggal and Ashok Kumar. PW-1 deposed that Bhaggal has fired upon him with the intention to kill him. According to this witness Ashok Kumar had also fire-arm and he had exhorted his brother Bhaggal to kill him. If it was so and accused Ashok Kumar would have been present on the spot, he would also have fired upon the victim to get a positive result. There is no case of the prosecution that any fire-arm injury made by appellant Ashok Kumar had hit the victim. The accused Ashok Kumar has been assigned only role of exhortation. Since according to the prosecution and the victim there was previous enmity between the family of accused Bhaggal, Ashok and the victim and the enmity is a double edged weapon, therefore, there is also a possibility of false implication of other accused persons in addition to the main accused Bhaggal. According to this Court since no active role or participation except the role of exhortation has been mentioned against the appellant Ashok Kumar which has not been corroborated by any independent evidence as the independent witnesses have been turned hostile, this court is of the view that the role of exhortation assigned to the accused appellant Ashok Kumar has not been

proved beyond reasonable doubt from the evidence available on record.

32. In the above circumstances, the benefit of doubt must be given to the surviving accused Ashok Kumar. According to this Court, since there was enmity between both the parties, therefore, in absence of any corroboration from the independent witness it would not be proper to uphold the conviction and sentencing of the accused who had been assigned only the role of exhortation. Thus, the appeal is liable to be allowed and the order of conviction and sentencing passed in respect of the surviving appellant Ashok Kumar is liable to be quashed.

33. The appeal is allowed with regard to the accused appellant Ashok Kumar and the order of conviction and sentencing passed by the Additional Sessions Judge-IV, Sitapur is hereby set aside.

34. Let the bail bonds and personal bond executed on behalf of accused appellant Ashok Kumar are cancelled and sureties are set free.

35. A copy of this order alongwith lower court record be sent back to the court concerned.

(2023) 7 ILRA 474

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 12.07.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.**

Criminal Appeal No. 4017 of 2016

**Mritunjaya @ Tinku ...Appellant
Versus**

State of U.P.

...Respondent

Counsel for the Appellant:

Sri Satya Srivastava, Sri Deena Nath, Sri Manoj Kumar

Counsel for the Respondent:

G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 498-A, 304-B, 302/34, 323, 506 & 326 - Appeal against conviction - Dowry Prohibition Act, 1961 - Section 3/4 - Dowry death - Relevancy of dying declaration - Indian Evidence Act, 1872 - Section 106 - Code of Criminal Procedure, 1973 - Sections 161, 313 - On 26.05.2012 husband of deceased and his family members quarrelled with her for dowry and threatened her - Informant along with his son and brother-in-law went to meet her, not permitted him to meet her and again demanded dowry - Deceased informed his father about cruelty committed by her in-laws - On 12.6.2012 informant received information that she burnt by her in-laws - Contention, neither dowry demanded nor she was burnt to death by them - Deceased herself got burnt due to depression. (Para 2, 5)

Learned Trial Court did not consider dying declaration, relied on St.ments of witnesses of fact (P.Ws. 1 to 3), not present on spot - She St.d that due to quarrel with husband she was set ablaze and not due to demand of dowry - Dying declaration would prevail upon St.ments of witnesses and evidence recorded by I.O. (Para 9)

As per dying declaration, deceased died after three days of its recording - Remained alive for three days after making dying declaration, truthfulness of dying declaration proved - Fit mental condition to make St.ment at relevant time. (Para 17)

None of witnesses or authorities involved in recording dying declaration had turned hostile, supported prosecution - Dying declaration was reliable, voluntarily made

by deceased, sole basis of conviction. (Para 18)

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

Fire put out by appellant and deceased was admitted to hospital in injured condition by appellant and his family members, no intention to kill deceased - Deceased died after six days and during this period, she was admitted in hospital and under treatment - Doctor conducted post-mortem, mentioned cause of death as "Shock" - Death was not premeditated, had knowledge and intention to cause bodily harm but did not want to do away with deceased. (Para 24, 26)

Appeal partly allowed. (E-13)

List of Cases cited:

1. Lakhan Vs St. of M.P., (2010) 8 Supreme Court Cases 514
2. Trimukh Maruti Kirken Vs St. of Mah., 2006 (3) 1426 SC
3. Krishan Vs St. of Har., (2013) 3 Supreme Court Cases 280
4. Ramilaben Hasmukhbhai Khristi Vs St. of Guj., (2002) 7 SCC 56
5. Tukaram and Ors Vs St. of Mah., reported in (2011) 4 SCC 250
6. B.N. Kavatakar & anr. Vs St. of Karn., reported in 1994 SUPP (1) SCC 304
7. Veeran & ors. Vs St. of M.P. Decided, (2011) 5 SCR 300
8. Gautam Manubhai Makwana Vs St. of Guj., (Criminal Appeal No.83 of 2008), decided on 11.9.2013, (Para 12 to 17)
9. Anversinh Vs St. of Guj., (2021) 3 SCC 12
10. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529
11. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

1. This appeal has been preferred against the judgment and order of conviction and sentencing dated 25.07.2016 passed by Additional Sessions Judge/Fast Track Court, Jaunpur in S.T. No. 279/2012 (State Vs. Mritunjaya @ Tinku) Case Crime No. 275/2012 under Section 498-A, 304-B, 302/34, 323, 506, 326 I.P.C. and Section 3/4 of D.P. Act, Police Station – Jalalpur, District – Jaunpur whereby the appellant has been convicted and sentenced to undergo imprisonment for one year with fine of Rs. 1,000/- under Section 498-A I.P.C., to undergo imprisonment for life under Section 304-B I.P.C. and to undergo imprisonment for six months with fine of Rs. 500/- under Section 4 D.P. Act with default stipulation.

2. In brief, facts of the case are that Geeta Devi daughter of the informant Shyammilan was married to Tinku son of Ram Sahai on 13.6.2011 after giving gifts, dowry and other household articles as per his capacity. On 26.5.2012 Geeta Devi went to her marital house after marriage where family members of her husband started quarreling with her for dowry and also tendered threatening to her. After five days when informant alongwith his son and brother-in-law went to the marital house of his daughter, the family members of her husband did not permit to meet with his daughter and started demanding dowry. Anyhow when he met with his daughter, she informed about the maltreatment, cruelty committed by her in-laws and non providing of food to her and when the informant wanted to talk with the family members of his daughter, her husband became angry, her father-in-law started threatening that if Rs. 50,000/ and golden

chain are not provided, they shall burn his daughter to death. On 12.6.2017 at about 11-12 P.M., the informant received the information that his daughter had been burnt by her in-laws. He came to District Hospital, Jaunpur and saw that his daughter was in serious condition.

3. Thereafter, he moved the written complaint Ex. Ka-1 whereupon F.I.R. Ex. Ka-2 was lodged and Kayami G.D. Ex. Ka-3, site plan Ex. Ka-6 & 7 were prepared and after recording the statement, charge-sheet Ex. Ka-8, under Section 498A, 323, 506, 326, 304 B I.P.C. and Section $\frac{3}{4}$ D.P. Act was submitted by the I.O.

4. On 31.8.2012 the case was committed to the Court of Sessions by C.J.M. Jaunpur, where on 7.12.2012 charges were framed in the aforesaid Sections alongwith Section 302/34 I.P.C. The accused persons denied the charges and sought trial, hence, trial began and following witnesses were examined.

1	Shaymmilal	PW1
2	Laxmi Devi	PW2
3	Vidhya Devi	PW3
4	H.C.P. Shailendra Kumar	PW4
5	Dr. Nem Singh	PW5
6	Kamla Prasad	PW6
7	Dr. Udaibhan Singh	PW7
8	C.O., Anand Kumar	PW8
9	Retired Tehsildar Mahadev Singh Yadav	PW9

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

1	Written Report	Ex.Ka1
2	Chick F.I.R.	Ex.Ka.2
3	Corbon G.D.	Ex. Ka.3
4		Ex.Ka.4
5	Dying Declaration of Deceased Geeta Devi	Ex.Ka.5
6	Map	Ex.Ka.6 & 7
7	Charge-sheet	Ex.Ka.8
8	Medical Report of doctor	Ex.Ka.9
9	Inquest	Ex.Ka.10
10	Letters to R.I, C.M.O. and Police Form 13	Ex.Ka. 11 to 13

5. After closure of the prosecution evidence, statement of the accused persons under 313 Cr.P.C. was recorded who claimed to be innocent. They have further stated that on 12.6.2012 there was marriage ceremony of daughter of their neighbour namely Nan d Lal where they had gone. There was a quarrel between the deceased-wife and her husband for living at Aurangabad and when they were busy in the marriage ceremony, at about 7:00 P.M., Kavita came out shouting that 'Geeta Bhabhi got burnt', they immediately came and extinguished fire and took the injured in the Car to Sadar Hospital Jaunpur for treatment. Neither any dowry was demanded nor she was burnt to death by them. The deceased herself got burnt due to depression. In defence two witnesses D.W.1 Nandlal and D.W.-2 Sanjay have been examined.

6. In brief, oral evidence produced by the prosecution as well as defence, is as under;

(a) P.W.1- Informant, Shyammilan, father of the deceased, has deposed that he had solemnized marriage of his daughter Geeta Devi on 13.6.2011 with accused Tinku @ Mrityunjaya and had given gifts as per his capacity. Next day of the marriage, at the time of departure of the bride, accused Ram Sahai refused to take the bride to his house demanding Rs. 50,000/- and golden chain as dowry, however, anyhow the bride could be departed on the assurance that demand would be fulfilled in future. His daughter remained there for one month and thereafter came to her parental house. On 26.5.2012 when she was again departed for her marital house, Ram Sahai made same demand but anyhow she could be departed. After five days when he, his son Ram Ratan and his brother-in-law Arvind went to meet his daughter, the father-in-law, husband and aunt Shanti Devi, demanded Rs. 50,000/- and a golden chain and did not allow the informant to meet his daughter. However, they somehow managed to meet Geeta who informed that her in-laws used to beat her in regards with the aforesaid demand and do not provide food on time. When the informant tried to talk regarding dowry, accused Tinku became angry and accused Ram Sahai threatened that if the demand was not fulfilled, his daughter would be killed. On 12.6.2012 at around 11-12 P.M. someone informed him from the hospital that his daughter was burnt by her in-laws and she was admitted in Sadar Hospital. Thereafter he alongwith his mother, brother, Shivmilan, Hawaldar, his Bhabhi and Champa Devi reached the hospital and saw that Geeta was in very serious condition and was not able to speak. She was badly burnt. Seeing it, he became mentally disturbed. The doctor said that the condition of the patient is worrying,

thereafter he prepared an application and gave it to the police station Jalalpur. It was in his handwriting and signature. It was exhibited as Ex. Ka-1.

(b) P.W.-2, Laxmi Devi, grandmother of the deceased, had given similar statement to that of P.W.-1. In addition to that she deposed that when they went to District Hospital, Jaunpur, accused Tinku and his mother were present. On being asked, Tinku told that he had done whatever he wanted, do whatever you want and started quarreling. After quarrel, Tinku left the hospital and Shyammilan remained there. They used to visit the hospital however on 18.6.2012 Geeta died in the hospital and the dead body was cremated by Shyammilan and others.

(c) P.W.-3, Vidhya Devi, mother of the deceased, had also given similar statement to that of P.W.-1. In addition to that she has deposed that when she reached the hospital, she saw that her daughter was admitted in a burnt condition who told her that Ram Sahai, Mrityunjay, Shanti Devi and Manti Devi had set her ablaze for dowry.

(d) P.W.-4, H.C.P. Shailendra Singh, has proved chick F.I.R. and G.D. Ex. Ka-2.

(e) P.W.-5, Dr. Nem Singh, has deposed that he has done postmortem of the dead body of Geeta Devi. There were superficial to deep flame burning on the face, neck, upper part of hands, breast and stomach, back and the upper portion of the body had been burnt. In the internal part of the dead body superficial to deep flame burn injuries were present. Pluera and trachea were found congested and swollen. Lungs were congested and full of blood. Uterus was normal. According to this witness the deceased would have died on 19.6.2012 at about 7:45 P.M. The cause of death was due to burn injuries. The dead body was 60% burnt. Postmortem report

was prepared by Dr. Pankaj Kumar Pawan in his own handwriting. This witness proved post-mortem report as Ex. Ka-4.

(f) P.W.-6, Kamla Prasad, retired S.I. and I.O. of the case has deposed that he had prepared paper no. 1 of the case-diary on 13.6.2012 and had copied the chick F.I.R., recorded the statement of injured Geeta Devi which he has proved as Ex.Ka-5. He recorded the statement of the informant Shyammial, inspected the place of occurrence on the pointing of villagers and prepared map Ex. Ka-6. Recorded the statement of accused Tinku @Mritunjaya & Ram Sahai after their arrest. Copied the inquest in case-diary and added Section 304-B I.P.C., thereafter, the investigation was transferred to C.O. Police.

(g) P.W.7, Dr. Udai Bhan Singh, has proved the medical examination report as Ex. Ka-9 and deposed that on 13.6.2012, he was posted as Emergency Doctor in Amar Shahid Umanath Singh District Hospital, Jaunpur. Before recording the statement of the injured, he had medically examined the injured, she was in full consciousness and was capable of giving statement which he had mentioned in paper no. 146.

(h) P.W.-8, Anand Kumar, C.O., the I.O. of the case has deposed that on 27.6.2012 he received the investigation of the case and perused the previous paper of case-diary, recorded the statement of accused Manti, Shanti Devi, Laxmi Devi, Ram Ratan, Shakuntala Devi, Champa Devi and previous investigating officer. He inspected the place of occurrence and prepared map Ex. Ka-7, in parcha no. 10, recorded statement of witness Ram Milan, Arvind Kumar, Hawaldar, Rajendra Kumar and Ramlagan alongwith the statements of Naib Tehslidar Mahadev Singh Yadav, Dr.Nem Singh, Dr. Pankaj Kumar and Constable Lalbabu Yadav. In C.D. no.11 dated 14.7.2012, he recorded the statement

of Shailendra Singh. After finding the commission of alleged crime, he submitted charge-sheet Ex. Ka-8 against the accused persons under Section 498A, 323, 506, 326, 304B and Section 3/4 D.P. Act, Police Station Jalapur District Jaunpur.

(i) P.W.-9, Retired Tehsildar Mahadev Singh Yadav, deposed that on 13.6.2012, he was posted as Naib Tehsildar Sadar Jaunpur, He went to District Hospital Jaunpur where the deceased was admitted in burnt condition in burn ward no. 2. After getting the fitness certificate from Dr. U.B. Singh, he recorded the dying declaration at 1:45 P.M. and after reading it out to the injured her thumb impression was taken on it, he certified it. This witness has proved the dying declaration Ex. Ka-9.

After receiving the death report of Geeta Devi, he went to mortuary at District Hospital Jaunpur where S.I. Ramjeet and constable Lal Bahadur Yadav alongwith family member of the deceased were present. He appointed five persons as punchas and Panchayatnama was written by speaking to S.I. Ramjeet and related documents were prepared. The dead body was sealed and specimen seal was prepared, thereafter the dead body was sent to postmortem house through constable 814 Lal Bahadur Yadav. This witness recognized his signature and proved the inquest as Ex. Ka-10. Papers relating to Panchayatnama were also proved by this witness as Ex. Ka-11 to Ka-13.

(j) D.W.-1, Nand Lal, neighbour of the accused, deposed that no demand of dowry was made. On the fateful day there was marriage ceremony of his two daughters namely Soni and Rekha. The accused persons were busy at his house regarding arrangement of marriage ceremony. Kavita, younger daughter of Ram Sahai came crying out of her house and informed that

Bhabhi was burning. Hearing this when he alongwith accused persons reached on the spot, they saw that Geeta was ablazed, they extinguished the fire by putting the bedsheet on her body. They arranged a Car and went to District Hospital Jaunpur where after 6-7 days Geeta died during the treatment. Geeta wanted to go to Aurnagabad with Tinku but due to lack of residence, he expressed his inability for which Geeta had a quarrel and in a fit of anger she burnt herself by putting herself on fire.

(k) D.W.-2 Sanjay, nephew of D.W.-1 has given similar statement to that of D.W.-1.

7. After hearing the arguments, the Trial Court convicted the accused-appellant under Section 498-A, 304B I.P.C. and Section 4 of the Dowry Prohibition Act.

8. Heard Sri Amit Kumar Pandey, learned counsel for the appellant and learned A.G.A. for the State.

9. Learned Trial Court concluded that it was a case of dowry death but he ignored the dying declaration that due to quarrel with the husband, the wife-deceased was set ablazed by the accused-appellant. The learned Trial Court did not properly consider the dying declaration and relied on the statements of the witnesses of fact who were not present on the spot. The dying declaration is in question-answer form in which she has clearly stated that due to quarrel with husband she was set ablazed. She has nowhere stated that she was set ablazed due to demand of dowry. The allegation of the prosecution that demand of dowry of Rs. 50,000/- and a golden chain was made and for the fulfillment of the aforesaid demand, the deceased was killed by setting herself into fire, has not

been stated by the deceased before her death. Though the I.O. Kamla Prasad has recorded the statement of the deceased under Section 161 Cr.P.C. wherein it has been written that the deceased was tortured for the demand of dowry. Her husband used to demand vehicle and golden chain but it is not the case of the prosecution that any vehicle was also demanded as dowry. Since beginning it is the case of the prosecution that the family members of the accused were demanding Rs. 50,000/- and golden chain. This statement has not been proved as Dying Declaration, therefore, this statement under Section 161 Cr.P.C. can not be treated to be at par to the statement of Dying Declaration recorded by the Magistrate soon before the death of the injured. Witnesses of fact P.Ws. 1 to 3, were not present on the spot at the time of occurrence, therefore, this Court is of the view that the dying declaration made by the deceased would prevail upon the statements of the witnesses and the evidence recorded by the I.O. under Section 161 Cr.P.C.

10. Learned counsel for the appellants has argued that dying declaration is doubtful and is not corroborated by the witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble Apex Court has summarized the law regarding dying declaration in **Lakhan vs. State of Madhya Pradesh [(2010) 8 Supreme Court Cases 514]**, in this case, Hon'ble Apex Court held that the doctrine of dying declaration is enshrined in the legal maxim *nemo moriturus praesumitur mentire*, which means, "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined

in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

11. 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.

12. It is very much clear and has been established that after the incident the deceased was admitted to the District Hospital by in-laws. The incident had taken place on 12.6.2012 and the deceased had died on 19.6.2022. There were 65 percent injuries on the person of the deceased.

13. Learned counsel for the appellant argued that it is not a case of murder or dowry death, virtually when the deceased-wife was not permitted to go to Aurngabad

with her husband-accused, she set herself ablazed. If there have been mens rea of murder, she would have been killed in any other manner and she would have not been admitted to the District Hospital for her treatment by the accused-appellant. Learned counsel has further argued that the Trial Court has wrongly relied on the citation **Trimukh Maruti Kirken Vs. State of Maharashtra, 2006 (3) 1426 SC**, as the appellant was not present in the house at the time of occurrence. The place of occurrence and the house of D.W.-1 are adjacent thus it was very much easy for the accused to commit the crime and join the marriage ceremony of the daughters of D.W.1. In this regard Section 106 of the Indian Evidence Act is relevant which is noted herein below:

Applicability of Section 106, Evidence Act: *"Section 106 of the Evidence Act is not intended to relive the prosecution of its burden to prove the guilt of the accused, but the section would apply to cases where prosecution has succeeded in proving facts for which reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a difference inference."*

It is lastly submitted that at the most punishment can be under Section 304 II or Section 304 I of I.P.C. If the Court feels, as the accused have been in jail for more than 11 years without remission, they may be granted fixed term punishment of incarceration.

14. Deceased survived for 6 days after the incident took place. Her dying declaration was recorded by Mahadev

Singh Yadav, Naib Tehsildar after obtaining the certificate of medical fitness from the concerned doctor. This dying declaration was proved by PW-9, Mahadev Singh Yadav,, Naib Tehsildar. These witnesses have absolutely independent witnesses. In the wake of aforesaid judgments of Lakhan (supra), dying declaration cannot be disbelieved, when it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble Apex Court held in **Krishan vs. State of Haryana [(2013) 3 Supreme Court Cases 280]** that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

15. 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 form 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.

16. From the above precedents, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

17. In dying declaration of the deceased, it is also relevant to note that deceased died after three days of its recording. It means that she remained alive for three days after making dying declaration, therefore, truthfulness of dying declaration can further be evaluated from the fact that she survived for three days. After making it from which it can reasonably be inferred that she was in a fit mental condition to make the statement at the relevant time.

18. As already noticed, none of the witnesses or the authorities involved in recording the dying declaration had turned

hostile. On 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-9 and convicting the accused-appellants on the basis of it.

19. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant.

20. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

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

21. The academic distinction between ‘murder’ and ‘culpable homicide not amounting to murder’ has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning

of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.

INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it

	must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

22. 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.

23. In the case in hand, after perusal of dying declaration of the deceased it is not revealed as to why the appellant had poured the kerosene oil on the deceased and set her ablazed. Moreover, it is stated by the deceased in dying declaration that fire was also put out by the appellant himself, hence, there is no dispute to the fact that fire was put out by the appellant and as per the dying declaration, it is also not in dispute that appellant and his family members had taken the deceased to the District Hospital, Jaunpur, for treatment and she was admitted by them.

24. Keeping in view of the aforesaid fact that fire was put out by the appellant

himself and deceased was admitted to the hospital in injured condition by the appellant and his family members, it is transpired that appellant had no intention to kill the deceased. The deceased died after six days of the occurrence and during this period, she constantly remained admitted in District Hospital and was under treatment. Doctor conducted the post-mortem, has also mentioned the cause of death as "Shock".

25. On the basis of above scrutiny of the facts and circumstances of the case coupled with the opinion of the medical officer and considering the principle laid down by the Hon'ble Apex Court in the case of **Tuka Ram and others vs. State of Maharashtra [(2011) 4 SCC 250]** and in the case of **BN Kavadakar and another vs. State of Karnataka [1994 Supp (1) 304]**, we are of the considered opinion that the offence would be punishable under Section 304 (Part-I) IPC because the burn injuries were caused to the deceased by appellant with the intention to cause such bodily injuries as were likely to cause death and, therefore, the instant case falls under the Exceptions 4 of Section 300 IPC.

26. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused though had knowledge and intention to 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.

27. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

*"12. In fact, in the case of **Krishan vs. State of Haryana reported in (2013) 3 SCC 280**, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.*

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the

medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the

aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants – original accused under section 452 of Indian Penal Code is upheld. The appellants – original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section

304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants – original accused. R & P to be sent back to the trial court forthwith."

28. In latest decision in **Khokan@ Khokhan (Supra)** where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardianship, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also ensure for the benefit of the accused.

29. Thus we come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellant would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but is culpable homicide under Section 304 of the I.P.C. and, therefore, sentence of the accused appellant is reduced to the period he has already undergone. The total amount of fine Rs. 1500/- be deposited within 30 days from today otherwise the appellant shall undergo to the additional period of incarceration as directed by the Trial Court.

30. The appeal is accordingly **partly allowed**. Record and proceedings be sent back to the Court below forthwith.

31. A copy of this judgment be sent to the concerned Court for compliance and keeping it with original records.

(2023) 7 ILRA 486

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 20.04.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Appeal No. 9188 of 2022

Dr. Divya Nand Yadav & Anr. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:
Sri Ram Kishore Pandey

Counsel for the Respondents:
G.A., Sri Janardan Yadav

Criminal Law - Indian Penal Code, 1860 - Sections 323, 504 & 506 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - 3(1)(da) and

3(1)(dha) - Code of Criminal Procedure, 1973 - Sections 151, 156(3), 200, 202 - Against summoning order - PW1 submitted that he was raising construction on his own land when incident happened - There was dispute over land - His mother (PW1) and brother (PW2), supported St.ments of complainant and said that appellants with co-accused beat them mercilessly - Except those bald St.ments uncorroborated with medical evidence, nothing mentioned on record - As per police report appellant no. 1 purchased land situated near land of complainant - Appellants got their land measured by revenue officials and 2 biswas of land illegally encroached upon by complainant - Complainant and his family members took away some of harvested wheat crop lying there - Wife of appellant no. 1 lodged FIR, the instant false case lodged by complainant against appellants. (Para 11)

Complaint (instant case) lodged against appellants alleging incident which took place on 15.03.2021 - With similar allegations another complaint by grandfather of complainant lodged regarding incident took place on 22.02.2021 alleging that when he was raising construction, appellants came and abusing them with casteist words, complainant mentioned that earlier false case of stealing wheat crops filed against him - On basis of aforesaid complaint, appellants have been summoned. (Para 12)

The judicial process should not become tool for oppression or avoidable harassment - Not sufficient material on record to proceed to take cognizance and summon accused persons, hence, impugned order set aside. (Para 15)

Appeal allowed. (E-13)

List of Cases cited:

1. Fiona Shrikhande Vs St. of Mah. & anr.; (2013) 14 SCC 44

2. Pepsi Food Ltd. & anr. Vs Special Judicial Magistrate & ors.; (1998) 5 SCC 749

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

1. Heard Sri Ram Kishore Pandey, learned counsel for the appellants, Sri Janardan Yadav, learned counsel for respondent no. 2 and Sri O.P. Mishra, learned AGA for the State.

2. By means of this criminal appeal, an order dated 09.11.2022 passed by the Special Judge (SC/ST Act), Azamgarh in complaint case no. 131 of 2021 (Prem Kumar vs. Dr. Divya Nand Yadav and Others), Police Station Jiyanpur, District Azamgarh, whereby the appellant accused persons have been summoned under Sections 323, 504, 506 IPC and Section 3(1)(da) and 3(1)(dha) of the SC/ST (Prevention of Atrocities) Act, is under challenge.

3. The relevant facts as emerging from record are as below:-

The complainant Prem Kumar filed an application under Section 156(3) Cr.P.C. against the present revisionists with the allegations that on account of old enmity, the accused persons, one of whom is a doctor by profession and is having relations with underworld and land mafia came to him on 15.03.2021 at about 07.00 in the evening and began hurling abusive and derogatory words relating to his caste and began to assault him; the complainant rushed inside to save himself, however the assailants followed them and attacked the complainant and women of the house; they left after extending threats to his life; the application was registered as complaint case and statement of witnesses under

Sections 200 and 202 Cr.P.C. have been recorded; the court, after considering the evidence given on behalf of the complainant passed the summoning order which is now under challenge before this court.

4. Besides other arguments, it has been vehemently contended on behalf of the appellants that the police submitted a final report that the story put up by the complainant is false and concocted one; the real facts are that about a month before the alleged incident, the complainant and his family members were challaned under Section 151 Cr.P.C. over a dispute relating to a land; Shashi Yadav late wife of Dr. Divya Nand Yadav (appellant no.1) had purchased a plot no. 256 and her name was mutated in revenue records; Prem Kumar- the complainant (respondent no. 2) has been illegally interfering in the peaceful possession of the appellants; this complaint on the basis of an application under Section 156(3) Cr.P.C. with a false story, has been filed with ulterior motives and to sully the image of appellant nos. 1 and 2, who run a private nursing home; It is argued that the entire proceedings is malafide and gross abuse of process of law.

5. This is a settled position of law that at the stage of summoning in a complaint case, the court has to confine itself to the evidence produced on behalf of the complainant. It may be noted that at this stage the accused or a proposed accused have no say in the matter. They do not have any opportunity to present their side before the trial court. They do not have any opportunity to cross-examine the witnesses and the court is, therefore handicapped to some extent to check the veracity of the allegations. The court ordinarily has no option but to depend upon the statement of

the witnesses. But this impediment is sought to be diminished by law itself. It may be noted that section 200 Cr.P.C. speaks of examination of complainant and the witnesses present. The provisions says that the Magistrate shall examine on oath the complainant and the witnesses present, if any. Experience shows that though not always but in a number of cases, for various reasons, which need not be elaborated here, the complainant is not examined by the Magistrate himself instead the complainant either just gives a statement on his own or is led by his counsel to parrot a story which suits him and such statement acquires legal sanctity as statement under Section 200 Cr.P.C.

6. There is certain purpose behind enacting this provision in this manner. When a Magistrate who is trained in law, himself asks the questions he may elicit the facts which are nearer to truth. Obviously then there are much better chance to check the veracity of allegations, the evaluation of evidence before him and thereby come to the right conclusion for summoning the real culprits and at the same time putting his foot down that no innocent person is summoned unnecessarily. The purpose is lost when this power is not utilized.

7. The same is true for the examination of witnesses under Section 202 Cr.P.C. Section 202 Cr.P.C. speaks of an inquiry to be conducted by the Magistrate himself, if it thinks fit (or direct for investigation by a police officer) for the purpose of deciding whether or not there is sufficient ground for proceeding. Section 202 Cr.P.C. and Section 202 (2) are as below:-

"(1) Any Magistrate, on receipt of a complaint of an offence of which he is

*authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and **either inquire into the case himself** or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding **whether or not there is sufficient ground for proceeding:** Provided that no such direction for investigation shall be made,--*

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

"(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."

8. It is clear that the examination of witnesses under Section 202 Cr.P.C., as is popularly known, is in fact part of inquiry which a Magistrate may conduct in cases he does not find enough of grounds to immediately proceed to summon the accused. Though not always, this part of procedure too has become a routine matter. In almost all the cases based on complaint, the witnesses are examined without realizing the fact that such a step shall be unnecessary if the Magistrate/the court concerned is satisfied that prima facie case is made out, on the basis of the examination of the complainant and his witnesses at previous stage of the case i.e. section 200 Cr.P.C. Where the Magistrate finds himself short of requisite level of 'satisfaction' then

only he may decide to further probe into by ordering for examination of more witnesses. The reasons behind jumping to the next step of Section 202 Cr.P.C. have gone in to oblivion in the rush of work and almost routinization of things.

9. The phrase occurring in Section 202 Cr.P.C. "inquire into the case himself" enjoins the Magistrate that he actually plays its part by examining the witnesses himself, rather than depending upon the statements which might be clouded, cryptic, obscure or ambiguous and sometime very direct and bald. The experience in courts strengthens the impression that more often than not unsupervised, one sided statement may have more to conceal than to reveal. It is said that law is a living being. It grows and develops according to the exigencies of the times. It will not be out of context to mention that the superior courts have observed in a number of cases that the trial courts ought to be quite alert when they decide to take cognizance or summon the accused persons, may be at the stage of Section 204 Cr.P.C. or otherwise. The superior courts have consistently kept on cautioning the courts to be quite circumspect, careful, alert and wakeful while putting the legal machinery in motion. The vicissitudes of cases, peculiar facts and situations do impact the interpretations of law and contribute towards the developments and progress of legal arena.

10. There cannot be two opinions on the settled legal position that the Magistrate has to decide whether prima facie any case is made out or not, before proceeding to summon the accused persons. The meaning of prima facie case must be understood in the right perspective. There may be cases

where the Magistrate finds that in literal sense of the words occurring in the statements the ingredients of an offence are there but he feels not so satisfied with them. The Hon'ble Supreme Court in para-11 of the judgment passed in ***Fiona Shrikhande vs. State of Maharashtra and Another; (2013) 14 SCC 44***, observed as below:-

"At the complaint stage, the Magistrate is merely concerned with the allegations made out in the complaint and has only to "prima facie satisfy" whether there are "sufficient grounds to proceed" against the accused and it is not the province of the Magistrate to enquire into a detailed discussion on the merits or demerits of the case. The scope of enquiry under Section 202 is extremely limited in the sense that the Magistrate, at this stage, is expected to examine prima facie the truth or falsehood of the allegations made in the complaint."

The Supreme Court has used the phrase arriving at "**prima facie satisfaction**" whether there are "**sufficient grounds to proceed**"! Section 204 Cr.P.C. nowhere said that the Magistrate shall take cognizance and summon the accused if prima facie case is made out, instead Section 204 Cr.P.C. says that the Magistrate may take cognizance if there is sufficient ground for proceeding, **hence in my view the prima facie case must be construed to mean "prima facie satisfaction"** arrived at by the Magistrate. In other words the Magistrate shall proceed only if he finds that there is sufficient ground for the same. This is not to say that the proposed accused shall have any right to be heard at that stage or that any evidence in defence can be considered. It merely means that the Magistrate shall assess all the material

before it and apply its mind to find out whether time has come to proceed and take cognizance. In that view of the matter the Supreme Court in the case as aforesaid has instead of using the word "prima facie case" has found fit to use the phrase "prima facie satisfaction" and of course this satisfaction has to be arrived at while acting within the four corners of law i.e., by adopting the procedure as provided under Sections 200 and 202 Cr.P.C. In my view, the Magistrate is not powerless to examine the truth or falsehood of the case made in the complaint. And to fully utilize this power the Magistrate has to play its role of examining himself the complaint and his witnesses under Sections 200 Cr.P.C., and if required to further inquire into by calling more witnesses and examining them or even by ordering investigation. The steering wheel of the inquiry cannot be left at the hands of the complainant. For the reason that at that stage, the accused has no say in the matter and the court has no opportunity to hear the other side, therefore he ought to remain very cautious, circumspect and alert. The broad probabilities or improbabilities of the story of course may be seen at this stage.

The relative scope of Sections 203 and 204 Cr.P.C. were noted and considered by the Supreme Court in ***Pepsi Food Limited and another vs. Special Judicial Magistrate and others; (1998) 5 SCC 749***, is as below:-

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused

must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

The Supreme Court emphasized the need that the Magistrate should not sit like a silent spectator.

11. Though as far as this case is concerned and keeping in mind that the court cannot go beyond the material on record, some facts are revealed which should have alerted the Magistrate/the court concerned, while exercising his powers. The court did not consider the fact that there has not been any medical evidence of physical assault; PW1 has referred to the fact that he was raising construction on his own land when the incident happened; Admittedly there lied a dispute over land; His mother (PW1) and his brother (PW2), who were examined under Section 202 Cr.P.C have supported the statements given by the complainant and said that Dr. Divya Nand Yadav, Shashi Yadav (wife of appellant no. 1) and one Shiva Nand beat them mercilessly. Except those bald statements uncorroborated with any medical evidence, there is nothing worth

mention on record; On the other hand there is a report from concerned police station which says that Dr. Divya Nand Yadav (appellant no. 1) had purchased a land situated near the land of the complainant; The appellants got his land measured by a team of revenue officials and it was found that almost 2 biswas of land was illegally encroached upon by the complainant, on which a wheat crop was standing; The report also says that the complainant and his family members took away some of the harvested wheat crop lying there. Shashi Yadav W/o Dr. Divya Nand Yadav, therefore lodged an FIR case crime no. 116 of 2021 under Sections 379, 504 and 506 IPC; therefore this false case has been lodged by the complainant against them for ulterior motives.

12. Moreover certain other facts have come before this court which cannot be ignored. The complaint in the instant case has been lodged by Prem Kumar against Dr. Divya Nand Yadav, Dr. Shivanand Yadav and Shashi Yadav alleging an incident which took place on 15.03.2021 at about 7.00 in the evening. With strikingly similar allegations another complaint by one Vindhyachal Ram has been lodged regarding an incident which allegedly took place on 22.02.2021 at about 10.00 in the morning alleging that when he was raising construction, Shashi Yadav came to his place claiming the land as her own and that Dr. Divya Nand Yadav, Shivanand and one Akhilesh Sharma came there abusing them with casteist words and the complainant too mentioned that earlier also Dr. Divya Nand Yadav had filed a (false) case of stealing the wheat crops against him. Admittedly on the basis of aforesaid complaint by Vindhyachal Ram (grandfather of the instant complainant-Prem Kumar), another complaint case no. 129 of 2021 is pending

against the revisionists, in which they have been summoned exactly for the same kind of offences and that another Criminal Appeal No. 9201 of 2022 filed by Dr. Divya Nand Yadav and 2 others challenging the summoning order is pending.

13. Though it is agreed that at the stage of appeal, other side has an opportunity to be heard and point out or bring before the court the facts more clearly, which the trial court, obviously lacks, hence the appellate court is better equipped in coming to the right conclusion. I must add a word of caution here. The aforesaid advantage available to the appellate court, especially in a complaint case cannot be a justification, for the trial court, who has not played its part in a diligent manner to pass orders which stand on shaky grounds. Firstly, by not asking the questions himself and by not playing an active role as is expected from a Magistrate/court while conducting an inquiry. Secondly, on the basis of whatever material which has come before the trial court, the trial court shall arrive at a satisfaction whether there is sufficient ground to proceed or not; The Magistrate/court cannot draw a conclusion of prima facie case by depending upon literal meaning of statements. A dias has to be held by a Magistrate/Judge not a robot.

14. The fact of the matter is that the court shall not proceed in a mechanical or a routine manner. It shall apply its mind, which is called a judicial mind and discretion as well. The court/the Magistrate, though shall not go deep into the evidence given and shall not weigh the evidentiary value in a meticulous manner. Except this rider, there is no other obstacles before the court below for arriving at the

"prima facie satisfaction" a word which can be equated with the word "prima facie case".

15. In my view, the judicial process should not become a tool for oppression or avoidable harassment. I am of the opinion that there was not sufficient material to proceed to take cognizance and summon the accused persons, hence the impugned order is hereby, **set aside**.

(2023) 7 ILRA 492

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 21.07.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Revision No. 79 of 2011

**Ram Pratap @ Pratap Yadav ...Revisionist
Versus**

State of U.P. ...Respondent

Counsel for the Revisionist:

Sunil Kumar Singh, Jitendra Bahadur Singh,
Seraj Ahmad Khan

Counsel for the Respondent:

G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 323, 325 & 504 - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Section 360 - Order to release on probation of good conduct or after admonition, Section 361 - Special reasons to be recorded in certain cases - Where in any case the Court could have dealt with, Probation of Offenders Act, 1958 - Sections 3 - Power of court to release certain offenders after admonition, Section 4 - Power of court to release certain offenders on probation of good conduct, Uttar Pradesh First Offenders' Probation Act, 1938 - Sections 3 - Power of court to release certain

offenders after admonition, Section 4 - Power of court to release certain offenders on probation of good conduct - examination of the investigating officer is not necessary if no prejudice is caused to the accused. (Para -15)

F.I.R. lodged - after finding fracture on right hand of informant - N.C.R. converted into F.I.R. - Section 325 added - Court ruled - non-examination of I.O. not fatal for prosecution, as oral, documentary, and medical evidence supported each other - accused not prejudiced by non-examination of I.O. - case of year 1998 - more than 25 years passed - accused-revisionist suffered matter for almost past two and half decades - no other pre or post criminal antecedent of accused revisionist - not appropriate to send revisionist in jail. **(Para - 15,27)**

HELD:- Court finds no illegality, perversity, or infirmity in conviction part of order passed by courts. Sentence inflicted on accused-revisionist requires modification. Revisionist-accused's conviction upheld. Sentence modified to include Section 4 of the UP Probation of Offenders Act. Released on probation with condition of maintaining peace and good conduct for one year. If breached, revisionist will face same sentence as directed by courts. **(Para-28, 29)**

Revision partly allowed with modifications. (E-7)

List of Cases cited:

1. Bihari Prasad & ors. Vs St. of Bihar, 1996 (2) SCC 317
2. Raj Kishor Jha Vs St. of Bihar, 2003, (47) ACC, 1068
3. St. of Karn. Vs Muddappa, (1999) 5 SCC 732
4. Mohd. Monir Alam Vs St. of Bihar, (2010) 12 SCC 26
5. Krishna Deo & Ors. Vs St. of U.P., Criminal Appeal No. 735 of 1982
6. St. of U.P. Vs Misri Lal & ors., 1982 CrLJ 1420

7. Sitaram Paswan & anr. Vs St. of Bihar, AIR 2005 SC 3534

8. Mohd. Hashim Vs St. of U.P & ors., AIR 2017 SC 660

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

1. Heard learned counsel for the revisionist, learned AGA and perused the records.

2. This criminal revision has been filed against the judgment and order dated 19.02.2010 passed by Additional Chief Judicial Magistrate-IV, Faizabad, in Criminal Misc. Case No. 82 of 1998, convicting the revisionist-accused under Section 323 I.P.C. for six months simple imprisonment with fine of Rs. 500/- and under Section 325 I.P.C. for three years simple imprisonment with fine of Rs. 1,000/- with default stipulation as well as the judgment and order dated 28.01.2011 passed by Additional Sessions Judge, Court No.5. Faizabad in Criminal Appeal No. 33 of 2010 whereby the Appellate Court has affirmed the judgment and order of learned Trial Court.

3. In brief, facts of the case are that the informant Smt. Ram Rati lodged an F.I.R. at Police Station Haidarganj, Faizabad, that when her grand daughter namely Km. Kamlesh was grazing cattle and they entered the field of accused Ram Pratap, he beat up her grand daughter by punches and slaps. When her grand daughter narrated her, she went to the house of accused to reprimand him, the accused also beaten her with sticks. On her hue and cry when villagers reached there, the accused fled away abusing the informant. The informant received injury in

her right hand. The F.I.R. was lodged and during the course of investigation, after finding fracture at the lower part of her right hand, the N.C.R. was converted into F.I.R. and Section 325 I.P.C. was added and the I.O. submitted charge-sheet under Section 323, 325 and 504 I.P.C.

4. The concerned Magistrate framed the charges under the aforesaid Sections. The prosecution, in order to prove the guilt, examined following witnesses.

P.W.-1	Km. Kamlesh
P.W.-2	Ram Rati
P.W.-3	S.I. K.P. Singh
P.W.-4	Constable Ram Saran Bharti
P.W.-5	Dr. A.K. Srivastava

5. The prosecution produced following documentary evidence:

Ex. Ka-1	Medical report
Ex. Ka-2	Carbon Copy N.C.R.
Ex. Ka-3	Carbon Copy Kayami G.D.
Ex. Ka-4	Carbon Copy Radiologist report

6. The statement of the accused was recorded under Section 313 Cr.P.C. wherein he denied the allegations and charges and stated that the witnesses have deposed due to enmity. No defence evidence was produced from the side of the accused.

7. Before the Trial Court, it has been argued that since the copy of the N.C.R. is not on record and G.D had not been produced and no order under Section 155 (2) Cr.P.C. was on record, hence, the

investigation is faulty and the accused is entitled to the benefit of doubt.

8. This argument was answered by the trial Court that the case was initially registered as N.C.R. but on the basis of fracture and radiologist's report, the case was converted into Section 325, 323 and 504 I.P.C. and a crime no. 82 of 1998 was allotted. It has been satisfactorily answered that carbon copy of N.C.R. was available on record which was admissible in evidence under Section 65 of The Indian Evidence Act.

9. Another objection was raised by the counsel for the accused that carbon copy of the G.D. is not available on record. It is proved that the G.D. are weeded out after five years. Hence original G.D. was not available. Carbon copy of the G.D. is prepared in the same process, therefore, carbon copy of the G.D. can be treated as original.

10. It was further argued before the trial Court that the place of occurrence has not been proved and there are serious contradictions about the place of occurrence in the statements of the witnesses of facts.

There are only two witnesses of fact namely P.W.1, Km. Kamlesh and P.W.2, informant, Ram Rati. It has been written in the N.C.R. that the informant was going to reprimand the accused at his home when he started beating her by sticks. P.W.1 has deposed that accused had beaten at her hand, she further deposed that after getting information from her grand daughter, she had not gone to the house of the accused. She denied that such statement was given by her to the I.O. This witness deposed that when she reached on the field, no one was there. Km. Kamlesh, P.W.1, has deposed that when her grand mother asked about the beating from the accused, the accused

also beaten her before reaching the field. This witness has clearly deposed that her grandmother had not gone to the house of the accused. Thus, from the evidence of both the witnesses it has been clearly established that Ram Rati was beaten by the accused in between his house and his field.

Thus the trial Court did not find any discrepancy about the place of occurrence in the evidence of both the witnesses of fact.

11. It was further argued before the Court that as per the N.C.R., the occurrence took place at about 3:00 P.M. whereas the informant had stated under Section 161 Cr.P.C. that the occurrence had taken place at about 4:00 P.M.

The learned trial Court has concluded that the statement given in the Court would prevail over the statement recorded under Section 161 Cr.P.C.

According to this Court, P.W.-2 is an illiterate, rustic villager, there is no evidence that at the time of incident, she was wearing a watch, hence, one hour variation in time of incident is immaterial and on account of such variation, it can not be said that time of occurrence has been substantially changed. According to this Court on account of such variation, the prosecution case can not be said to be suspicious or doubtful.

12. It was further argued before the trial Court that the evidence of P.W.5, Dr. A.K.Srivastava is not admissible in evidence as there was difference in name of the doctor.

On the injury report, the name of the doctor has been written to be Dr. A.K. Srivastava whereas by slip of pen his name

has been written to be S.K.Srivastava on the back of the charge-sheet. It has not been established that there were two doctors, therefore, only on account of slip of pen no benefit can be given to the accused.

According to the prosecution when the informant Ram Rati went to reprimand the accused for beating her grand daughter, he attacked with sticks on her right hand due to which her hand was broken. It has also been proved from the evidence of Dr. A.K. Srivastava. Further injury report & x-ray plate were also on record which have been proved by the concerned witnesses.

According to the accused, the witnesses were falsely deposing on account of enmity but he could not disclose any prior enmity between him and the informant which may be a cause of false implication.

13. On the basis of above discussions, the learned Trial Court convicted the accused under Section 323 and 325 I.P.C.

14. Being aggrieved the accused-revisionist filed Appeal No. 33 of 2010 (Ram Pratap Vs. State of U.P.) which was decided by Additional Sessions Judge Court No.5, Faizabad by judgment and order dated 28.01.2011 affirming the order of conviction and sentencing passed by the Trial Court.

15. During the appeal, a ground was taken by the accused-revisionist-appellant that since the investigating officer has not been examined and the charge-sheet has not been proved, hence, he is not liable to be convicted and the appeal was liable to be allowed.

In this regard, the Appellate Court relied on the following judicial precedents:

(i) **Bihari Prasad and Others Vs. State of Bihar, 1996 (2) SCC 317.**

(ii) **Raj Kishor Jha Vs. State of Bihar, 2003, (47) ACC, 1068.**

In both the cases it has been held that in each and every case, examination of the investigating officer is not necessary if no prejudice is caused to the accused.

According to this Court, in the case in hand, a prompt F.I.R. has been lodged and after finding fracture on right hand of the informant, the case was converted into Section 325 I.P.C. This Court is of the view that non-examination of the I.O. is not fatal for the prosecution as in this case the oral, documentary and medical evidence are in support of each other. Hence, accused not been prejudiced by non-examination of the I.O.

16. On the basis of above discussion, this Court is of the view that the judgment and order of both the Courts below are factually and legally correct and no other opinion in favour of the revisionist can be formed. Thus, the conviction awarded by the learned Trial Court and upheld by the Appellant Court, is affirmed.

17. At this juncture, learned counsel for the revisionist argued that it is a case of the year 1998 and 25 years have been elapsed and the accused has become an old (senior citizen). There is no previous or past criminal history of the accused, the occurrence had taken place in a fit of anger due to wastage of crop of the accused-revisionist on account of grazing by the cattle of the informant, hence, a lenient view should be adopted regarding sentence. He further argued that no useful purpose would be served by sending the accused-revisionist in jail and he may be released on probation of good conduct.

18. In this regard learned counsel for the accused-revisionist has placed reliance on the following judgments:

(a) State of Karnataka Vs. Muddappa, (1999) 5 SCC 732,

In this case, the offence under Section 302 I.P.C. was converted into Section 304 Part II I.P.C. Relevant portion is being quoted hereinbelow:

“2. The learned Counsel for the appellant is not in a position to assail the acquittal of the accused under Section 302 I.P.C., but he vehemently contends that the Court did not bear in mind germane considerations for releasing the accused on probation after convicting him under Section 304 Part II I.P.C. Whether the benefit of the Probation of Offenders Act could be extended in any particular case depends upon the circumstances of that case. Admittedly, there is no statutory bar for application of the Act to an offence under Section 304 Part II where the maximum punishment is neither death nor imprisonment for life. In that view of the matter and on examining the impugned judgment of the High Court, we find that the Court did consider the relevant material and then came to the conclusion that the accused should be released on probation by applying the provisions of Section 4 of the Probation of Offenders Act. We see no infirmity with that order to be interfered with by this Court after this length of time, more so when nothing has been pointed out as to whether the accused has, in any way, violated the terms and conditions of allowing him on probation.”

(b) Mohd. Monir Alam Vs. State of Bihar, (2010) 12 SCC 26.

In this case the offence under Section 302 I.P.C was converted into Section 304 part II and the Apex Court found it fit to

enlarge the appellant on probation instead of sending him to jail for serving the sentence. Relevant part of this judgment is reproduced hereinbelow:

“8. We have considered Mr. Suri's submissions very carefully. We see from the documents that the appellant has secured a Doctorate and is presently employed as a Senior Assistant Professor in the Department of Strategic and Regional Studies, University of Jammu and that he had secured this appointment in the year 1997. His profession qualifications have also been provided to us which show his expertise in his speciality and also portray his association with prestigious organisations worldwide in the field of strategic studies. We are, therefore, of the opinion that his conduct that his conduct and attainments after his involvement in this matter justify his release on probation. We, accordingly, dismiss the appeal but direct that he shall be released on probation under Section 4 of the Probation of Offenders Act, 1958 on terms to be settled by the trial court.”

(c) Krishna Deo and Others Vs. State of U.P., judgment dated 11.08.2017, passed in Criminal Appeal No. 735 of 1982, passed by Division Bench of this Court. Relevant portion of this judgment is reproduced as follows:

“23. We are also not interfering with the conviction of appellants- Smt. Jaikali and Smt. Bhagwande under Section 147 & 323/149 of the IPC. As discussed above, considering the facts and circumstances of the case, instead of sentencing the appellant no. 1 for the offence under Section 304 Part-II r/w Section 34, 147, 323/149 of the IPC., we think it proper in the interest of justice to release the

appellant- Krishnadeo, after giving him the benefit of Section 4 of the Probation of Offenders Act. We are not inclined to interfere with the sentence passed against the appellant- Smt. Jaikali, Smt. Bhagwande, who were only directed to pay fine. Appellant-Krishna Deo is directed to surrender in the court below. The learned court below is directed to release him as per the provisions of Section 4 of the Probation of Offenders Act. The learned court below shall take all coercive steps for realizing the fine from appellants-Jaikali and Bhagwande, if the same has not been deposited by them."

19. From the aforesaid discussions, it is very much clear that the High Court and Hon'ble the Supreme Court have enlarged the accused on probation instead of sending them in jail even in case of culpable homicide not amounting to murder which had fallen under Section 304 part II I.P.C. In the present case the accused has been held guilty only under Section 323 and 325 I.P.C. therefore, the case of the accused-revisionist is at better footing.

20. Section 360 and 361 of the Code of Criminal Procedure are relevant for the purpose of probation to first offenders. Both these sections are reproduced as under:-

"360. Order to release on probation of good conduct or after admonition.—(1) When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if

it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub-section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years, imprisonment or any

offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law: Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub-section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of

his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960) or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

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, 135 but has not done so, it shall record in its judgment the special reasons for not having done so."

21. There is one central Legislation on the subject in the name of "Probation of Offenders Act, 1958", relevant Sections 3 and 4 thereof are extracted hereunder:-

"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.

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."

22. There is one more legislation on the subject namely "Uttar Pradesh First Offenders' Probation Act, 1938". Sections 3

and 4 of the Act are reproduced herein below:-

"3. Power of court to release certain offenders after admonition.—In any case in which a person is found guilty of the offences of theft, dishonesty, misappropriation or cheating, punishable under the Indian Penal Code, or of any offence punishable with not more than two years imprisonment and no previous conviction is proved against him, the court by which he is found guilty 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. Power of court to release certain offenders on probation of good conduct.—

(1) When any person 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, antecedents or physical or mental condition 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 the court shall not direct the release of an offender under this section

unless it is satisfied that the offender, or his surety, has a fixed place of abode and 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 :

Provided also that if a person under twenty-one years of age is convicted of any offence under the Indian Penal Code, or any other enactments prescribed in this behalf under rules made by the State Government, which is punishable with imprisonment not exceeding six months, the court shall take action under this section unless, for special reasons to be recorded in writing, it does not consider it proper to do so.

(2) Where the offender ordered to be released under sub-section (1) is under twenty-four years of age, the court may make a supervision order directing that such offender shall be under the supervision of such probation officer as may be named in the order during the period specified therein and imposing such other conditions for securing such supervision as may be specified in the order:

Provided that the period so specified shall not extend beyond the date on which, in the opinion of the court, the offender will attain the age of twenty-five years.

(3) A court making an order under sub-section (2) shall require the offender, before he is released to enter into a bond, with or without sureties, to observe the condition with respect to residence, abstention from intoxicants and any other matters as the court may, having regard to the particular circumstances of the case, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(4) A court making an order under sub-section (2) shall furnish to the offender

and the sureties, if any, a notice in writing stating in simple terms the conditions of the bond.

A perusal of these legislations will leave a student of Law in a confused state of mind. All these legislations are dealing with the same subject and on first sight looks encroaching each other. Looking closely, one may get that Section 360 of the Code relates only to persons not under twenty one years of age is convicted for an offence punishable with fine 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 for an offence not punishable with death or imprisonment for life, and no previous conviction is proved, may be released on probation, taking into consideration the facts and circumstances of the case, character of the offender and the gravity of the offence committed by him. Section 4 of the Probation of Offenders Act is having a much wider scope as it applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. If I look further deep into Section 360 CrPC we will find that in sub-section (10) it has been provided that nothing in this section shall affect the provisions of the Probation of Offenders Act."

23. A Division Bench of this Court in State of Uttar Pradesh Vs. Misri Lal and others, 1982 CrLJ 1420 held as under:-

"26. ...The application of Section 360 in Uttar Pradesh was taken away by an Ordinance of the year 1975. The Ordinance was repealed and replaced by the Criminal P.C. (Uttar Pradesh Amendment) Act, No. 16 of 1976. This Act received the assent of the President on 30-4-1975 and published in the Uttar Pradesh Extraordinary Gazette

dated 1-5-1976. Section 12 of this Act repealed the Ordinance and laid down that notwithstanding such repeal, anything done or any action taken under the Ordinance shall be deemed to have been done or taken under the provisions of this Act as if this Act had come into force on November, 28, 1975. The learned trial judge decided the case on 2-2-1976. Section 10 of the Amending Act No. 16 of 1976 amended S.484 of the Code and inserted the following clause (e) after clause (d) :-

"(e) ...the United Provinces First Offenders' Probation Act 1938.....shall continue in force in the State of Uttar Pradesh and accordingly the provisions of Section 360 of this Code shall not apply to that State and the provisions of Section 361 shall apply with the substitution or reference to the Central Acts named therein by references to the corresponding Act in force in that State".

Section 361 of the CrPC lays down that where in any case the Court could have dealt with an accused person under Section 360 or under the provisions of the Probation of Offenders Act, 1958, or a youthful offender under the Children Act, 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 judgement the special reasons for not having done so.

It follows from this provision read with clause (e) of S.484 mentioned above, the Court is required to record special reasons for not extending the benefit of the provisions of the Uttar Pradesh First Offenders' Probation Act, 1938."

24. Thus, provisions of UP Probation of First Offenders' Act shall be followed, in the geographical area where that has been made applicable and not Section 360 of the CrPC. In this way enforcement of

Probation Act in some particular area, thus excludes the applicability of the provisions of Section 360 of the Code in that particular area, however it will be the bounden duty of the Court to consider as to why not to proceed to grant the benefit of Probation of Offenders Act, as provided under Section 361 of the CrPC.

25. Coming to the point of desirability of extending the benefit of Probation Act to the accused/revisionist in **Sitaram Paswan and another Vs. State of Bihar, AIR 2005 SC 3534** Hon'ble Supreme Court held as under:-

"For exercising the power which is discretionary, the Court has to consider circumstances of the case, the nature of the offence and the character of the offender. While considering the nature of the offence, the Court must take a realistic view of the gravity of the offence, the impact which the offence had on the victim. The benefit available to the accused under Section 4 of the Probation of Offenders Act is subject to the limitation embodied in the provisions and the word "may" clearly indicates that the discretion vests with the Court whether to release the offender in exercise of the powers under Section 3 or 4 of the Probation of Offenders Act, having regard to the nature of the offence and the character of the offender and overall circumstances of the case. The powers under Section 4 of the Probation of Offenders Act vest with the Court when any person is found guilty of the offence committed, not punishable with death or imprisonment for life. This power can be exercised by the Courts while finding the person guilty and if the Court thinks that having regard to the circumstances of the case, including the nature of the offence and the character of the offender, benefit

should be extended to the accused, the power can be exercised by the Court even at the appellate or revisional stage and also by this Court while hearing appeal under Article 136 of the Constitution of India."

26. In **Mohd. Hashim Vs. State of U.P and others, AIR 2017 SC 660**, Hon'ble Supreme Court opined as under:-

"20. ...In Rattan Lal v. State of Punjab AIR 1965 SC 444. Subba Rao, J., speaking for the majority, opined thus:-

"The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. Broadly stated, the Act distinguishes offenders below 21 years of age and those above that age, and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. While in the case of offenders who are above the age of 21 years absolute discretion is given to the court to release them after admonition or on probation of good conduct, subject to the conditions laid down in the appropriate provisions of the Act, in the case of offenders below the age of 21 years an injunction is issued to the court not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case; including the nature of the offence and the character of the offenders, it is not desirable to deal with them under Sections 3 and 4 of the Act."

27. This is a case of the year 1998 and more than 25 years have passed. The incident took place way back in the year 1998. The accused-revisionist has suffered

in the matter for almost past two and half decades and there is no other pre or post criminal antecedent of the accused revisionist. Therefore, it would not be appropriate to send the revisionist in jail.

28. As far as the conviction part is concerned, this Court does not find any illegality, perversity or infirmity in the order passed by the courts below but keeping in view the discussion made above, the sentence inflicted on the accused-revisionist requires modification.

29. The revision is partly allowed with following modifications:-

29.1. The conviction of the accused-revisionist by courts below is upheld. The sentence of revisionist-accused is modified to the tune that he is provided benefit of Section 4 of the UP Probation of Offenders Act and is released on probation on the condition that he will keep peace and good conduct for one year from today and shall file two sureties to the tune of Rs.10,000/- each along with his personal bond before the court below and also an undertaking to the effect that he shall maintain peace and good behaviour during the period of one year from today. In case of breach of any of the conditions mentioned above, the revisionist will be subjected to undergo the sentence as directed by the courts below. The bonds aforesaid will be filed by the revisionist-accused within one month from today, before the District Probation Officer, Ayodhya, UP under the intimation to the concerned court.

30. A certified copy of the order be also sent to the court concerned and District Probation Officer, Ayodhya, UP for compliance.

(2023) 7 ILRA 503
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.07.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Revision No. 423 of 1993

Rakesh & Ors.		...Revisionists
	Versus	
State of U.P.		...Respondent

Counsel for the Revisionists:

Sri V.K. Sharma, Sri Surendra Kumar Tripathi, Sri Sushil Kumar Chaturvedi

Counsel for the Respondent:

A.G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 149, 436, 427 & 452 -The Code of criminal procedure, 1973 - Section 397/401 - Revision , Section 435, 436 - if any damage is caused to any property to the amount of Rs.100/- or upwards the accused shall be punished under Section 435 IPC - if the destruction by fire or any explosive substance has been caused to any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, the accused shall be punished under Section 436 IPC - chance witness - non-examination of IO is relevant when the place of occurrence, site plan or other materials and other objective findings are concerned - On account of non-examination of the IO if prejudice is caused to the accused in some matters, then the Court will give benefit of doubt to the accused.(Para - 22,27,28)

Informant present in her hut - accused persons alleged to set hut on fire - no prejudice - FIR lodged - Trial court found all accused persons guilty and convicted and sentenced - order challenged in criminal appeal - partially allowed - convicts prefer revision - alleged hut belongs to nazul land - cannot provide evidence of

ownership - accused did not remove hut after complaints - Palika removed it on the spot - no question of setting it on fire - No fire injury on the person of the witnesses - creates doubt in mind of Court - about commission of alleged occurrence by revisionists - IO not examined - no evidence of samples or ashes sent to FSL - Trial judge records PW-4's evidence - recognizing SI's writing and signature, despite not knowing the case - completing formalities. **(Para -5,6,15,19,21)**

HELD:- Prosecution cannot prove case beyond reasonable doubt; revisionists have the benefit of doubt, making trial and appellate court convictions quashed. **(Para - 31,32)**

Revision allowed. (E-7)

List of Cases cited:

1. Bhagwan Jagannath Markad Vs St. of Maha., (2016) 10 SCC 537
2. Dahari & ors. Vs St. of U.P., AIR 2013 SC 308
3. Shyamal Ghosh Vs St. Of W.B., AIR 2012 SC 3539
4. Ratha Jena Vs St. of Orissa, (1986) 1 Crimes 299
5. Rajwa Kebat Vs St. of Bihar, 1988 CrLJ 1288
6. Nagina Sharma Vs St. of Bihar, 1991 CrLJ 1195 (Patna)
7. Jashmero Vs St. of Punj., 1980 CrLJ (NOC) 46 (P&H)

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

1. This criminal revision has been preferred against the judgment and order of conviction and sentencing dated 29.10.1992 passed by the Assistant Sessions Judge-IV, Agra in Sessions Trial No.166 of 1992 (State Vs. Rakesh and others), under Sections 149, 436, 427, 452

IPC as well as the judgment and order dated 27.03.1993 passed by Additional Sessions Judge-IV, Agra in Criminal Appeal No.61 of 1992 (Rakesh and others Vs. State of UP). The trial Judge convicted and sentenced all the the accused persons under Section 436 read with Section 149 IPC and sentenced to undergo three and half years rigorous imprisonment each, under Section 452 read with Section 149 IPC for six months rigorous imprisonment each, under Section 427 read with Section 149 IPC they were directed to undergo three months rigorous imprisonment each. It was also directed that all the sentences shall run concurrently.

2. The appeal was partly allowed with regard to accused Veeru and the conviction and sentencing under Section 452 read with Section 149 IPC was also quashed.

3. Being aggrieved by both the order the convicted accused persons have preferred this revision. During the pendency of this revision, accused-revisionist no.6, Kalua had died and this revision in respect of revisionist no.6 has been abated and the same survives in respect of revisionist nos.1 to 5.

4. The revisionists have taken ground that in this case investigating officer (IO) has not been examined, recovery memo is not proved, no independent witness has been examined, the disputed land was a nazul land and the temporary hut installed by the informant was already removed by the Nazul Department/Nagar Maha Palika, site plan has not been proved. Section 436 IPC is not made out as the alleged occurrence is said to have been committed in a hut. Witnesses are highly partitioned witnesses and their statement cannot be relied on and more so their statements are

also self-contradictory. PW-2, Banshi husband of the informant is said to have reached on the spot just after the incident. He was a chance witness. Presence of the alleged witnesses is not established. One of the accused Veeru has been exonerated. Hence, the revision be allowed and the impugned judgments and orders of conviction and sentencing passed by the trial court and the appellate court as well be set aside.

5. In brief, facts of the case are that when the informant Smt. Vidyawati was present in her hut situated in Village Jaganpur on 17.04.1988 at about 08:30 a.m. and her husband had gone out of the house, accused Rakesh, Ravi, Veeru, Naubat, Harvir, Kalloo and Kalua alongwith 10-12 persons came at her jhopadi (hut) and directed to vacate the same. She was tying cattle therein. The accused intended to pass through the land of the hut. All the accused persons set the hut on fire which reduced to ashes and her utensils and cash etc. were burnt. Her cattle were united and led to run. The occurrence was witnessed by Natthi, Rajni and some others. There was a loss of Rs.4,000/-. Present FIR was lodged at Police Station New Agra on 17.04.1988 at 10:30 a.m. The Assistant Sessions Judge after recording and appreciating the evidence found all the accused persons guilty and convicted and sentenced them accordingly.

6. The order of the trial court was challenged in the aforementioned criminal appeal which was partly allowed as mentioned above. Being aggrieved this revision has been preferred by the convicts.

7. In this case some witnesses i.e. PW-1, Vidyawati, informant; PW-2, Banshi - husband of the informant; PW-3, Rajni -

daughter of the informant; PW-4, Head Constable, Desh Raj Khanna - secondary evidence have been examined.

8. PW-1, Smt. Vidyawati - informant has deposed that on the date and time of occurrence accused persons wanted to vacate the hut when she did not vacate, they set the hut on fire due to which Rs.2,000/-, 17 k.g. grains, 30 k.g. bran (chuni) were burnt. She had lodged FIR. She recognized her thumb impression on the written complaint Ex.Ka-1.

9. PW-2, Banshi has deposed that at the time of occurrence he had gone to distribute milk. As soon as he returned, he saw that his hut was burning and people were running therefrom. According to him, accused persons were recognized when they were running away.

10. PW-3, Rajni has deposed that at the time of incident she was making tea when accused persons came and directed to come out and threatened to put the hut into fire. When she refused, the accused persons set the hut on fire. She and her mother came out due to fire due to which about 70 k.g. grain, 40 k.g. bran and Rs.2,000/- cash, books and two bhagona had been burnt.

11. PW-4, HC, Desh Raj Khanna has proved chik FIR, GD map and charge sheet as secondary evidence. He has proved secondary evidence on the ground that he had worked with SI Rajaram and Jagdish Narayan Sharma and recognizes their writing and signature.

12. The prosecution did not try to summon the formal witnesses and closed the evidence thereafter statement of the accused persons were recorded under Section 313 CrPC in which accused

persons averred that the land of the hut belonged to the nazul land. Accused persons had made complaint to the Nagar Maha Palika upon which the hut had already been removed. According to the accused persons at the time of the alleged occurrence there was no hut on the alleged place of occurrence.

13. After hearing the arguments, the accused persons were convicted and sentenced accordingly and the appeal was partly allowed and partly rejected. Hence, this revision has been preferred.

14. Heard learned counsel for the parties and perused the records.

15. This case is decided as under:-

15.1.(i) It is admitted to the prosecution that the land of the alleged hut belonged to nazul land. The prosecution could not produce any evidence of ownership in favour of the informant. There is no denial that after complaint being made by the accused persons the alleged hut was not removed by the Nagar Maha Palika. It is a clear case of the defence that on the complaint of the accused persons Nagar Maha Palika had taken action and had removed the hut and it was not on the spot, therefore, no question arises to set the alleged hut on fire.

15.2. Learned counsel for the revisionists argued that if the alleged hut was there and was set on fire, some photographs or FSL report would have been obtained and burnt articles would have been produced as material exhibits and would have been proved in the Court during the course of trial.

15.3.(ii) PW-2, Banshi was the chance witness. It is not averred as to when he left

the house and went for distribution of milk and when he returned.

15.4. Considering the facts and circumstances of the case, it appears that PW-2 was a chance witness and he had not seen the occurrence. He has just repeated the version of his wife and daughter. This conclusion finds support from the fact that he did not make any effort to stop the accused persons and extinguish the fire.

15.5.(iii) According to the prosecution, all the accused persons set the hut on fire but PW-3 Rajni has deposed that only Rakesh had set the hut on fire. Thus there is vast difference between the averments of the complaint, evidence of rest of the witnesses and the evidence of PW-3, Rajni and thus the statement of PW-3 is also self-contradictory. It is not established that accused persons had made up the mind to commit an offence under Section 436 IPC on the place of occurrence. If for the sake of argument the prosecution story is accepted in toto, there is no evidence that rest of the accused persons were knowing that accused Rakesh had any matchstick to lit the fire. According to PW-1 and PW-3 the hut was set on fire before them. In that case they would be knowing as to how and on which method their hut was burnt. Whether any explosive substance was thrown on the hut or only fire was lit by matchstick. It is also nowhere mentioned and there is no evidence that when accused persons set the hut on fire, why they were not prevented by the informant and her daughter. Why no attempt to put off the fire was made and more so when just after the incident husband of the informant had reached on the spot why he had not attempted to extinguish the fire. It has not come into evidence that the informant, her daughter or her husband tried to extinguish the fire and save the hut while they were

not forcibly prevented by the accused persons.

15.6.(iv) The trial court and the appellate court has accepted the evidence of the witnesses as gospel truth while they are the family members of the informant. They all were inimical to the accused persons, therefore, the statement of witnesses of fact would not be accepted without careful and cautious scrutiny. In that case their corroboration from other independent evidence was necessary before recording the conviction and sentencing of the revisionists.

16. In **Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537; Dahari and others Vs. State of UP, AIR 2013 SC 308; and Shyamal Ghosh Vs. State Of West Bengal, AIR 2012 SC 3539** the Apex Court has held that in such case, Court has to adopt careful approach in analysing and accepting the evidence of such interested witnesses and if the testimony of the related witnesses is otherwise found credible, only then the accused can be convicted on the basis of testimony of such related witness.

17. In this case neither any documentary or material evidence nor evidence of independent witnesses such as Natthi and other persons present on the spot is available on record. The prosecution did not try to examine witnesses Natthi and other persons present on the spot. In such circumstance presumption under Section 114(g) of The Indian Evidence Act, 1872 arises against the prosecution and it would be presumed that the independent witnesses were not ready to tell a lie in favour of the prosecution and the informant. Hence, they were not examined.

18. It is not a case that independent witness were won over by the accused

persons, therefore they were not ready to depose against them.

19. It is established from the above discussion that PW-1 to 3 were inimical to the accused persons though enmity of the witnesses with the accused is not a ground to reject their testimony, if on proper scrutiny the testimony of such witnesses is found reliable. However, the possibility of falsely involving some persons in the crime or exaggerating role of some of the accused by such witnesses should be kept in mind. It is not a case that witnesses PW-1 to 3 tried to extinguish the fire. If a house of any person is set on fire he would try his best to save the house. Such hostile act of the informant and the witnesses creates doubt in the mind of the Court that at the time of occurrence there was no such hut, therefore, witnesses did not try to save the same otherwise they would have tried their best to save the hut and they would also have received fire injuries. No fire injury on the person of the witnesses also creates doubt in the mind of the Court about the commission of alleged occurrence by the revisionists.

20. It is also material that if the accused persons had adopted legal recourse regarding removal of the hut and according to them the same was removed by the officials of Nagar Maha Palika why they would try to take law in their hands. Generally it is seen that such arsoning act are done in the night when no one is present in the house but here according to the prosecution accused persons had set the hut on fire in day-light and had also not put masks on their faces to hide their identity. Generally it is seen and it is a human conduct and behaviour that the persons do not commit offence of robbery and arsoning in day-light and if they do so with

any familiar person, they hide their faces and try their best to hide their identity. It is noteworthy that PW-1, informant has accepted that she used to tie cattle in the alleged hut.

21. In this case the IO has not been examined. There is no evidence that samples from the place of occurrence or ashes and burnt articles were taken and were sent to FSL. The trial judge has completed mere formalities by recording the evidence of PW-4 who knows nothing about the case, he only recognizes the writing and signature of the concerned SI.

22. In **Ratha Jena Vs. State of Orissa, (1986) 1 Crimes 299; Rajwa Kebat Vs. State of Bihar, 1988 CrLJ 1288** it has been held that non-examination of the IO when entail deprivation of an opportunity to show contradiction between a court evidence and his statement recorded under Section 161 CrPC, non-examination of IO is fatal to the prosecution. In **Nagina Sharma Vs. State of Bihar, 1991 CrLJ 1195 (Patna)** it has been held that non-examination of IO is relevant when the place of occurrence, site plan or other materials and other objective findings are concerned. On account of non-examination of the IO if prejudice is caused to the accused in some matters, then the Court will give benefit of doubt to the accused.

23. In **Nagina Sharma (supra)** it has also been held that if examination of the IO is very essential and if he is not appearing, the court has power to adopt coercive measures for his appearance as and when it is required.

24. In this case the trial judge has lamented a lot that the IO, SI Rajaram and JN Sharma have not been examined by ADGC

and he had not written any application to SSP for their appearance as witness and also did not try to send message for their appearance.

25. According to this Court the trial court has faulted in extending liability upon ADGC for not summoning the IO for their examination. It is duty of the court and power rests in the court to summon the witnesses by adopting proper and coercive method as already narrated by the High Court of Judicature at Patna.

26. The trial Judge neither issued summons or warrants to the IOs nor wrote a letter to the SSP, DGP or DG prosecution. He did not care that material exhibits are not produced in the court and have not been proved, therefore, due to non-examination of the IO and non-production of the independent witnesses and material exhibits the accused revisionists have been prejudiced and it can be very well concluded that no fair trial has been done by the trial court.

27. Sections 435 and 436 IPC are read as under:-

“435. Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees.—Whoever commits mischief by fire or any explosive substance intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards or (where the property is agricultural produce) ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

436. Mischief by fire or explosive substance with intent to destroy house, etc.—Whoever commits mischief by fire or

any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

28. From perusal of both the sections it is quite clear that if any damage is caused to any property to the amount of Rs.100/- or upwards the accused shall be punished under Section 435 IPC and if the destruction by fire or any explosive substance has been caused to any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, the accused shall be punished under Section 436 IPC.

29. In this case the informant PW-1 has accepted that she used to tie cattle in the alleged hut, hence according to this Court even if for the sake of argument it is accepted that the offence had been caused by the accused persons, it would not be an offence punishable under Section 436 IPC. More so, if accused persons had permitted to save the cattle and if some materials would also have been kept there, the same would also have been taken out by the informant. It has already been said that no material had been produced during the trial to prove that some grains, bran and money etc. were there.

30. In **Jashmero Vs. State of Punjab, 1980 CrLJ (NOC) 46 (P&H)** it has been held that a structure made straw and not of bricks and mortar may be considered a building if it has got the necessary furnishings

needed for a building such as door bars etc. An ordinary thatched shed resting on bamboos or wooden or brick pillars having no doors etc. cannot be treated as a building within the meaning of the terms used in Section 436 IPC but as the bullocks therein died in consequence of the fire, the accused could be convicted under Section 435 IPC. Here no harm was being caused to any of the cattle to the informant and it has not been proved that any material of the informant had been burnt in the alleged arsoning.

31. On the basis of above discussion, this Court is of the view that the prosecution has not able to prove the case and charge against the accused persons beyond the reasonable doubt. The revisionists are entitled to benefit of doubt and the order of conviction and sentencing passed by the trial court and the appellate court as well are liable to be quashed.

32. Accordingly, this revision succeeds and is **allowed**. The impugned judgments and orders of conviction and sentencing dated 29.10.1992 and 27.03.1993 passed by the trial court as well as by the appellate court, respectively are quashed.

33. A copy of this order be sent to the court below for necessary compliance, if any.

(2023) 7 ILRA 509

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED:LUCKNOW 10.07.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Revision No. 432 of 2009

Kapil Dev Pandey

...Revisionist

Versus

State of U.P.

...Respondent

Counsel for the Revisionist:

Naveen Kumar Pandey, Dinesh Kr. Chaudhary

Counsel for the Respondents:

G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision, Section 360 - Order to release on probation of good conduct or after admonition, Section 361 - Special reasons to be recorded in certain cases - Where in any case the Court could have dealt with, Probation of Offenders Act, 1958 - Sections 3 - Power of court to release certain offenders after admonition, Section 4 - Power of court to release certain offenders on probation of good conduct, Uttar Pradesh First Offenders' Probation Act, 1938 - Sections 3 - Power of court to release certain offenders after admonition, Section 4 - Power of court to release certain offenders on probation of good conduct - Railway Property (Unlawful Possession) Act, 1966 - Section 3 - Penalty for theft, dishonest misappropriation or unlawful possession of railway property.

Two individuals arrested - carrying heavy articles - FIR lodged under Section 3 of Railway Property Act - case of year 1996 - more than 26 years passed - accused-revisionist suffered matter for past three decades - no other pre or post criminal antecedent of accused revisionist - not appropriate to send revisionist in jail. **(Para -3,15)**

HELD:- Court finds no illegality, perversity, or infirmity in conviction part of order passed by courts. Sentence inflicted on accused-revisionist requires modification. Revisionist-accused's conviction upheld. Sentence modified to include Section 4 of the UP Probation of Offenders Act. Released on probation with condition of maintaining peace and good conduct for one year. If breached, revisionist will face same sentence as directed by courts. **(Para - 16,17)**

Revision partly allowed with modifications. (E-7)

List of Cases cited:

1. St. of U.P. Vs Misri Lal & ors. ,1982 CrLJ 1420
2. Sitaram Paswan & anr. Vs St. of Bihar, AIR 2005 SC 3534
3. Mohd. Hashim Vs St. of U.P & ors. , AIR 2017 SC 660

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

1. Heard learned counsel for the revisionist, learned AGA and perused the records.

2. This criminal revision has been filed against the judgment and order dated 24.04.2009 passed by the ACM (Northern Railway), Gonda in Criminal Case No.371 of 1997 (State Vs. Kapil Dev Pandey and another) as well as the judgment and order dated 07.08.2009 passed by the Additional Sessions Judge, Court No.6, Gonda in Criminal Appeal No.14 of 2009 (Kapil Dev Pandey Vs. State of UP).

3. The brief facts of the case are that on 03.10.1996 the informant, Kailash Prasad, deployed as gangman gang no.13 as gateman at gate no.113-C, at about 19:30 hour saw two persons in suspicious condition bringing some heavy article towards the gate. Upon some doubt, when he asked them to stop, both of them tried to run away but were caught by him with the help of Harishchandra - gangman, gang no.13 and Baijnath, gateman gate no.113-C. Upon being inquired, they both told their names as Kapil Dev Pandey and Ramesh Kumar Shukla and from the possession of Kapil Dev Pandey IRS(T)50R written one bearing plate and from the other accused one simple bearing plate was recovered. The accused persons informed that the recovered articles were stolen from railway line near the bridge which was confirmed

by the informant. Thereafter FIR was lodged at Crime No.05 of 1996, under Section 3 Railway Property (Unlawful Possession) Act, 1966 (for short 'the Act, 1966'), Police Station Tulsipur, District Gonda (Balrampur). After investigation charge sheet was submitted, charge was framed under Section 3 of the Act, 1966 against the accused which was denied by them and they sought for trial.

4. During the trial prosecution adduced oral and documentary evidence and after closure of evidence their statement under Section 313 CrPC was recorded and after hearing the argument, the accuseds were convicted and sentenced on 24.04.2009 with simple imprisonment of one year each and fine of Rs.1,500/- each for committing an offence under Section 3 of the Act, 1966.

5. The order dated 24.04.2009 was challenged by the revisionist, Kapil Dev Pandey before Additional Sessions Judge, Court No.6, Gonda (Balrampur) in Criminal Appeal No.14 of 2009 which was dismissed and the judgment and order dated 24.04.2009 was confirmed. Hence, this criminal revision has been preferred.

6. Learned counsel for revisionist submitted that the impugned judgement and order dated 24.04.2009 passed by trial court and the order dated 07.08.2009 passed by the appellate court are illegal, perverse and against the facts and evidence on record. The courts below have failed to appreciate the defence evidence which was more probable than that of prosecution evidence. The appellate court has committed illegality in maintaining the order of conviction passed by the trial court. It is also submitted that the appellate court as well as the trial court both have

committed manifest error of law in refusing the benefit of Probation of Offenders Act to the revisionist without recording any reason for the same. Learned counsel for the revisionist further submitted that the revisionist was on bail during trial and never misused the liberty of bail. However, after arguing at some length, learned counsel for the revisionist submits that the revisionist may be extended the benefit of UP Probation of Offenders Act. He has further submitted that during the pendency of revision, there is no criminal antecedents and the revisionist is living as a law abiding citizen.

7. Learned AGA opposed the revision and submitted that there is no material irregularity or illegality in the impugned judgments and orders of the courts below and keeping in view the evidence on record, the revisionist was rightly convicted.

8. Section 360 and 361 of the Code of Criminal Procedure are relevant for the purpose of probation to first offenders. Both these sections are reproduced as under:-

"360. Order to release on probation of good conduct or after admonition.—(1) When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender; if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the

offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub-section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years, imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the

age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law: Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub-section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought

forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960) or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

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, 135 but has not done so, it shall record in its judgment the special reasons for not having done so."

9. There is one central Legislation on the subject in the name of "Probation of Offenders Act, 1958", relevant Sections 3 and 4 thereof are extracted hereunder:-

"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.

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."

10. There is one more legislation on the subject namely "Uttar Pradesh First Offenders' Probation Act, 1938". Sections 3 and 4 of the Act are reproduced herein below:-

"3. Power of court to release certain offenders after admonition.—In any case in which a person is found guilty of the offences of theft, dishonesty, misappropriation or

cheating, punishable under the Indian Penal Code, or of any offence punishable with not more than two years imprisonment and no previous conviction is proved against him, the court by which he is found guilty 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. Power of court to release certain offenders on probation of good conduct.—

(1) When any person 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, antecedents or physical or mental condition 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 the court shall not direct the release of an offender under this section unless it is satisfied that the offender, or his surety, has a fixed place of abode and 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 :

Provided also that if a person under twenty-one years of age is convicted of any offence under the Indian Penal Code, or any other enactments prescribed in this

behalf under rules made by the State Government, which is punishable with imprisonment not exceeding six months, the court shall take action under this section unless, for special reasons to be recorded in writing, it does not consider it proper to do so.

(2) Where the offender ordered to be released under sub-section (1) is under twenty-four years of age, the court may make a supervision order directing that such offender shall be under the supervision of such probation officer as may be named in the order during the period specified therein and imposing such other conditions for securing such supervision as may be specified in the order:

Provided that the period so specified shall not extend beyond the date on which, in the opinion of the court, the offender will attain the age of twenty-five years.

(3) A court making an order under sub-section (2) shall require the offender, before he is released to enter into a bond, with or without sureties, to observe the condition with respect to residence, abstention from intoxicants and any other matters as the court may, having regard to the particular circumstances of the case, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(4) A court making an order under sub-section (2) shall furnish to the offender and the sureties, if any, a notice in writing stating in simple terms the conditions of the bond.

A perusal of these legislations will leave a student of Law in a confused state of mind. All these legislations are dealing with the same subject and on first sight looks encroaching each other. Looking closely, one may get that Section 360 of the

Code relates only to persons not under twenty one years of age is convicted for an offence punishable with fine 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 for an offence not punishable with death or imprisonment for life, and no previous conviction is proved, may be released on probation, taking into consideration the facts and circumstances of the case, character of the offender and the gravity of the offence committed by him. Section 4 of the Probation of Offenders Act is having a much wider scope as it applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. If I look further deep into Section 360 CrPC we will find that in sub-section (10) it has been provided that nothing in this section shall affect the provisions of the Probation of Offenders Act."

11. A Division Bench of this Court in State of Uttar Pradesh Vs. Misri Lal and others, 1982 CrLJ 1420 held as under:-

"26. ...The application of Section 360 in Uttar Pradesh was taken away by an Ordinance of the year 1975. The Ordinance was repealed and replaced by the Criminal P.C. (Uttar Pradesh Amendment) Act, No. 16 of 1976. This Act received the assent of the President on 30-4-1975 and published in the Uttar Pradesh Extraordinary Gazette dated 1-5-1976. Section 12 of this Act repealed the Ordinance and laid down that notwithstanding such repeal, anything done or any action taken under the Ordinance shall be deemed to have been done or taken under the provisions of this Act as if this Act had come into force on November, 28, 1975. The learned trial judge decided the case on 2-2-1976. Section 10 of the

Amending Act No. 16 of 1976 amended S.484 of the Code and inserted the following clause (e) after clause (d) :-

"(e) ...the United Provinces First Offenders' Probation Act 1938.....shall continue in force in the State of Uttar Pradesh and accordingly the provisions of Section 360 of this Code shall not apply to that State and the provisions of Section 361 shall apply with the substitution or reference to the Central Acts named therein by references to the corresponding Act in force in that State".

Section 361 of the CrPC lays down that where in any case the Court could have dealt with an accused person under Section 360 or under the provisions of the Probation of Offenders Act, 1958, or a youthful offender under the Children Act, 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 judgement the special reasons for not having done so.

It follows from this provision read with clause (e) of S.484 mentioned above, the Court is required to record special reasons for not extending the benefit of the provisions of the Uttar Pradesh First Offenders' Probation Act, 1938."

12. Thus, provisions of UP Probation of First Offenders' Act shall be followed, in the geographical area where that has been made applicable and not Section 360 of the CrPC. In this way enforcement of Probation Act in some particular area, thus excludes the applicability of the provisions of Section 360 of the Code in that particular area, however it will be the bounden duty of the Court to consider as to why not to proceed to grant the benefit of Probation of Offenders Act, as provided under Section 361 of the CrPC.

13. Coming to the point of desirability of extending the benefit of Probation Act to the accused/revisionist in **Sitaram Paswan and another Vs. State of Bihar, AIR 2005 SC 3534** Supreme Court held as under:-

"For exercising the power which is discretionary, the Court has to consider circumstances of the case, the nature of the offence and the character of the offender. While considering the nature of the offence, the Court must take a realistic view of the gravity of the offence, the impact which the offence had on the victim. The benefit available to the accused under Section 4 of the Probation of Offenders Act is subject to the limitation embodied in the provisions and the word "may" clearly indicates that the discretion vests with the Court whether to release the offender in exercise of the powers under Section 3 or 4 of the Probation of Offenders Act, having regard to the nature of the offence and the character of the offender and overall circumstances of the case. The powers under Section 4 of the Probation of Offenders Act vest with the Court when any person is found guilty of the offence committed, not punishable with death or imprisonment for life. This power can be exercised by the Courts while finding the person guilty and if the Court thinks that having regard to the circumstances of the case, including the nature of the offence and the character of the offender, benefit should be extended to the accused, the power can be exercised by the Court even at the appellate or revisional stage and also by this Court while hearing appeal under Article 136 of the Constitution of India."

14. In **Mohd. Hashim Vs. State of U.P and others, AIR 2017 SC 660** Supreme Court opined as under:-

"20. ...In Rattan Lal v. State of Punjab AIR 1965 SC 444. Subba Rao, J., speaking for the majority, opined thus:-

"The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. Broadly stated, the Act distinguishes offenders below 21 years of age and those above that age, and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. While in the case of offenders who are above the age of 21 years absolute discretion is given to the court to release them after admonition or on probation of good conduct, subject to the conditions laid down in the appropriate provisions of the Act, in the case of offenders below the age of 21 years an injunction is issued to the court not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case; including the nature of the offence and the character of the offenders, it is not desirable to deal with them under Sections 3 and 4 of the Act."

15. This is a case of the year 1996 and more than 26 years have passed. The incident took place way back in the year 1996. The accused-revisionist has suffered in matter for past three decades and there is no other pre or post criminal antecedent of the accused revisionist. Therefore, it would not be appropriate to send the revisionist in jail.

16. So far as the conviction part is concerned, this Court does not find any illegality, perversity or infirmity in the order passed by the courts below but keeping in view the discussion made above, the sentence inflicted on the accused-revisionist requires modification.

17. The revision is partly **allowed** with following modifications:-

17.1. The conviction of the accused-revisionist by courts below is upheld. The sentence of revisionist-accused is modified to the tune that he is provided benefit of Section 4 of the UP Probation of Offenders Act and is released on probation on the condition that he will keep peace and good conduct for one year from today and shall file two sureties to the tune of Rs.30,000/- each along with his personal bond before the court below and also an undertaking to the effect that he shall maintain peace and good behaviour during the period of one year from today. In case of breach of any of the conditions mentioned above, the revisionist will be subjected to undergo the sentence as directed by the courts below. The bonds aforesaid will be filed by the revisionist-accused within one month from today, before the District Probation Officer, Balrampur, UP under the intimation to the concerned court.

18. A certified copy of the order be also sent to the court concerned and District Probation Officer, Balrampur, UP for compliance.

(2023) 7 ILRA 517
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.05.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 731 of 2023

Rohit Yadav @ Ravi & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionists:

Sri Yogesh Kumar Srivastava, Sri Noor Muhammad

1. Indra Sharma Vs V.K.V. Sharma, AIR 2014 SC 309

Counsel for the Respondents:

G.A., Sri Kamlesh Singh Jadaun

2. Satish Chandra Ahuja Vs Sneha Ahuja, AIR 2020 SC 2483

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

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401-Revision - Protection of Women from Domestic Violence Act, 2005 - Sections 2, 3, 12, 14, 15, 17, 18, 19, 20, 21, 22 & 23 - Object and purpose - to grant a right to aggrieved person, a woman of residence in shared households - The wife is entitled to claim a right to residence in a share households belonging to relatives of her husband. (Para - 19)

Opposite Party No. 2 filed a petition against revisionists (relatives of her late husband) - seeking protection, right to reside in share households, monetary relief, residence order, and compensation orders - harassed by her relatives - subjected to rape by her brothers-in-law - forced to leave her matrimonial home - property dispute between revisionists and respondent no. 2 - in-laws of respondent no. 2 - court passed an ex-parte judgment against revisionists - failed to file any written statements - no recall against ex-parte order - court proceed with ex-parte evidence - decided case against revisionists - no specific averments - regarding maintenance quantum or inability to pay amount to respondent no. 2. **(Para - 4,20)**

HELD:-No error found in maintenance quantification awarded by Nyayadhikari and affirmed by Appellate Court. Impugned order can be modified to limit relief to revisionists 1 to 3, and exempt them from complying with order for maintenance and accommodation in shared households. Revision partially allowed for opposite party 4 and 5 but order remains valid for revisionists 1 to 3. No illegality, irregularity, or proprietary issues in the challenged judgments. **(Para -20,21)**

Revision partly allowed with modifications. (E-7)

List of Cases cited:

1. Heard learned counsel for the revisionist, learned counsel for the opposite party no. 2 and learned A.G.A. for the State.

2. Present criminal revision has been preferred against order dated 8.1.2022 passed by learned Additional Sessions Judge, Court No. 9, Firozabad, in Crl. Appeal No. 51 of 2021, (Rohit Yadav @ Ravi Vs. Smt. Deepika Yadav) as well as order dated 1.11.2021 passed by Nyayadhikari (Judicial Officer), Rural Court Tundla, District Firozabad, in Case No. 367 of 2020, under Sections 12/14/15/17/18/19/20/21/22 Protection of Women from Domestic Violence Act, P.S. Tundla, District Firozabad. By the impugned order dated 1.11.2021, learned Nyayadhikari/Judicial Magistrate allowed the petition under aforesaid sections filed by petitioner Smt. Deepika Yadav, ex-parte against present revisionists, who were respondent in Case No. 637 of 2020 before court of Nyayadhikari and directed them to pay Rs. 7,000/- as monetary compensation towards fooding, clothing, medical and daily needs of opposite party and her two minor daughters Ishanika and Joshika, aged around 7 years and 3 years respectively, from the time of filing of petition in the year 2020.

3. Learned court below also directed the respondents/revisionists to stay away from dispossessing the petitioners/opposite

party from shared households where she was residing in a room and were also directed to refrain from harassing the petitioner/opposite party physically or mentally on account of any dispute over property of her late husband Sapan Yadav.

4. Factual matrix of the case which are essential for disposal of present criminal revision is that the Opposite Party No. 2 filed a petition before Nyayadhikari under various provisions of Protection of Women from Domestic Violence Act against the revisionists who are relatives of her late husband, with prayer for issuing necessary orders admissible under provisions of Act like protection order under Section 18, Right to Reside in the share households under Section 17, Monetary relief under Section 20, residence order under Section 19, Compensation order under Section 22 of the Act. In the petition petitioner had stated that her marriage with Sapan Singh was solemnized on 25.12.2010 and from their wedlock two female child born. Unfortunately her husband died on 18.9.2019. After death of her husband, respondents/revisionists who are mother-in-law, brother-in-law (dewar), sister-in-law (devrani), sister-in-law (nanand) and brother-in-law (nandoi) started harassing her. The relatives of her husband are persons of bad character. She has not been in a position to maintain herself. The respondents/revisionists started harassing her both physically and mentally in various ways. She was subjected to rape by respondent nos. 1 (Rohit) and 5 (Vipul Yadav), her brothers-in-law, with collusion of women of shared households and ultimately she was forced to leave her matrimonial home and consequently she was compelled to take shelter in her parental home situated at Anand Nagar, Tundla, Distrcit Firozabad. She filed

present petition for above stated reliefs on 11.11.2020 before learned magistrate.

5. The appellants/respondents after service of notice appeared before the trial Court, but not filed objections/W.S.. On 6.9.2021, appellants/respondents filed adjournment before lower Court and learned lower Court has allowed the adjournment and fix 07.09.2021 for W.S./objection. On 07.09.2021, appellants/respondents again filed the adjournment and the same was rejected by the lower Court and proceeded the case ex-parte against the appellants/respondents.

6. During the trial the applicant Deepika Yadav examined herself as PW-1. After hearing the arguments, learned Magistrate has passed impugned order by allowing the petition against appellants.

7. Feeling aggrieved by the various protection order passed by learned Magistrate, present revisionist filed a Crl. Appeal No. 51 of 2019 before Court of Session, Firozabad on ground that the trial court has failed to appreciate facts and law placed before it. The order passed by learned magistrate is highly illegal and same has not been passed on correct appreciation of facts and law. Learned Trial Judge has failed to observe the aspect of income of the petitioner/opposite party no. 2 and has not given any opportunity of hearing to the appellants/revisionists and passed impugned order arbitrarily and on these grounds they claimed that their appeal may kindly be allowed and order passed by trial court may be set aside. The appellants/revisionists committed no domestic violence against the respondent no. 2. The petitioner/opposite party no. 2 failed to prove any case of domestic violence made against appellants, therefore,

the trial court has committed error in granting relief of maintenance and residence order in favour of petitioner/opposite party no. 2. Appellants/revisionists were not given any opportunity of hearing and for filing any written statements in petition.

8. Learned first appellate court after hearing arguments of both sides concluded that learned lower court was justified to proceed the case ex-parte against appellants/revisionists as the appellants/revisionists had filed an adjournment on 9.4.2021 and opposite party nos. 4 and 5 had filed discharge application 16-A. Learned court below vide order dated 26.8.2021 dismissed application 16-A and fixed 6.9.2021 for filing the written statement. On 6.9.2021 opposite parties have filed adjournment which was allowed by the learned lower court with cost. On the next date i.e. 7.9.2021, opposite party had again filed the adjournment and same was rejected by learned lower court holding that opposite parties are delaying the process and proceeded the case ex-parte against opposite parties, therefore, grounds taken by appellants regarding knowledge of the case are false and fabricated because it is apparent from perusal of record of lower court that they appeared before lower court and moved the adjournments. On 6.9.2021 learned lower court has given last opportunity to opposite parties to file written statement but on the next date they failed to file any written statements and rather they moved adjournment again before court below. It appears from conduct of opposite party that they tried to delay the proceedings of the case deliberately while the court below had given proper opportunity to opposite parties for filing objection/written statement. It is

noteworthy that the appellants had not filed any appeal against ex-parte order while they could have filed the appeal against the said ex-parte order dated 7.9.2021. Therefore, it is clear that learned court below was justified to proceed the case ex-parte against opposite parties/appellants. Learned court below also inferred on the basis of evidence on record that learned trial court has rightly passed the maintenance order in favour of the petitioner. Court below also concluded that the appeal is liable to be dismissed and impugned order passed by learned magistrate deserves to be affirmed.

9. Feeling aggrieved by impugned orders passed by court below, revisionists who are respondents before trial court, have filed present criminal revision on grounds that after death of husband of respondent no. 2, all the property which was in the name of her husband was given to her and she took all the articles and ornaments and started living with her children at her parental house. There is dispute between revisionist and respondent no. 2 regarding the property for which several round of mediation was carried out. The respondent no. 2 even lodged a false F.I.R. against revisionist on 21.8.2020 registered as Case Crime No. 181 of 2020, under Sections 498-A, 342, 323, 504, 506 IPC, .P.S. South, District Firozabad in which Section 164 IPC was further added on the basis of statement of respondent no. 2 during investigation. The revisionist challenged the charge sheet filed in said criminal case by police after investigation before this Court in Application U/S 482 Cr.P.C. No. 16933 of 2022, in which interim relief was granted to revisionist vide order dated 20.7.2022 to the effect that till the next date of listing, no coercive action shall be taken against the applicants in said criminal case. The said

application was filed by the revisionist Rohit Yadav, devar of respondent no. 2, Smt. Arti Yadav, sister-in-law (devrani) of respondent no. 2 and Smt. Madhubala (mother-in-law of respondent no. 2). Respondents being relatives of husband of respondent no. 2 cannot be held accountable for providing maintenance. The respondent no. 2 has already taken the share/property, all the insurance money and bank deposits lying in the name of her late husband and she has filed present case only to harass the revisionists but this facts were overlooked by learned court below. The impugned orders are liable to be set aside and revision should be allowed in the interest of justice.

10. Learned counsel for the revisionist stated grounds mentioned in criminal revision in support of his arguments and prayed for allowing present revision and to discharge the revisionists from any liability with which they are **saddled** by orders of court below in respect of respondent no. 2.

11. Per contra, learned counsel for the respondents and learned A.G.A. submitted that courts below have committed no irregularity, illegality or perversity while passing impugned order which is based on material on record and the impugned order passed by court of first instance towards maintenance of the respondent and her minor daughters is very reasonable and affordable by the revisionists. The impugned order passed by learned Nyayadhikari/Magistrate is preceded by proper appreciation of facts and law placed before it. Trial court has rightly held that original petitioner/respondent no. 2 is living separately due to being subjected to domestic violence and in hands of respondents/revisionists and she is unable to maintain herself as well as her minor

daughters. Learned counsel for the respondent no. 2 also contended that the present revisionists have neglected the respondent no. 2 totally and looking to this aspect of the matter trial court has granted the maintenance to the respondent no. 2. Impugned orders are just and proper and do not deserve any interference in present revision as that will add to plight of revisionists who are victim of domestic violence. He prayed for dismissing the present revision.

12. Object and reason clause of Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005 came into force on 26.10.2006) provides that “an act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.”

13. In Section 2 which is definition clause, following expressions are defined as under:-

(a) “aggrieved person” means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

(f) “domestic relationship” has means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

(q) “respondent” means any adult male person who is, or has been, in a domestic relationship with the aggrieved

person and against whom the aggrieved person has sought any relief under this Act:

Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

(s) “shared household” means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.”

14. The domestic violence is defined under Section 3 of the Act which includes physical abuse, sexual abuse, verbal abuse, emotional abuse and economic abuse on aggrieved by respondents.

15. Section 20 provides for monetary reliefs which is reproduced as under:-

“Monetary reliefs.-

(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include but is not limited to—

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed. (3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

(4) The Magistrate shall send a copy of the order for monetary relief made under sub-section (1) to the parties to the application and to the in-charge of the police station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.”

16. Section 23 empowers the magistrate to grant interim and ex-parte

orders on the basis of affidavit in such form, as may be prescribed, of the aggrieved person under Sections 18, 19, 20, 21 or as the case may be, Section 22 against the respondents. Section 28 provides that same as otherwise provided in this Act, all proceedings under Section 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of Cr.P.C., 1973, however, sub-section (2) clarifies that nothing in sub-section (1) shall prevent the court from laying down its own proviso for disposal of an application under Section 12 or under sub-section (2) of Section 23.

17. The revisionist has not stated in revision memo that they are not financially capable to provide for maintenance awarded by learned magistrate instead they have raised some technical objections against impugned orders passed by court below, for providing maintenance and residence order in favour of present respondent no. 2. They were given ample opportunity by the court of first instance to file written statements and participate in hearing of the case before court below but have failed to ever file written statement against averment made in petition filed by the petitioner, who is respondent no. 2, presently. They had obtained several adjournments for filing written statements and participate in process of hearing of the case but even after being aware of the case and hearing before court below, they did not try to defend themselves and court had to proceed ex-parte against them and decide the case ex-parte against present revisionists who were respondents before court of first instance.

18. The respondent no. 2 has stated in her original application before court of first instance seeking various sort of protection

order in respect of matters under controversy and that respondent nos. 1 to 3 are resident of 1/682, Suhagnagar, District Firozabad, who are her brother-in-law, sister-in-law and mother-in-law. Respondent nos. 4 and 5 are her sister-in-law (nanand) and brother-in-law (nandoi) who reside in Vipulkhand. She was also residing in the same house which belongs to respondent nos. 1 and 2, after her marriage with her husband and even thereafter due to taking view of harassment and torture meted out to her by opposite parties, she was compelled to leave her matrimonial home on 12.7.2020 and shifted to the place of her parents along with her minor daughters. Opposite party nos. 1 and 2 who are her brother-in-law (dewar) and mother-in-law who have ancestral property at village Chamraula, Tehsil Atmadpur, District Agra, Village Itayli, Tehsil- Bah, District Agra, Village Alampur Jarkhi, District Firozabad, Village Pachawan, District Firozabad, Mauza Ushayni, Tehsil Tundla, District Firozabad. One house at Firozabad along with six shops and a number of immovable property in city Firozabad from which they earn sufficient income through rents. They do not pay any money for maintenance of the applicant and her minor children. In report submitted by D.P.O., the factum of allegation of domestic violence made in the complaint filed by the present respondent no. 2 was found to have established. Courts below have given a finding that applicant (Smt. Deepika Yadav) is unable to maintain herself along with her children. She has supported the version of complaint by way of her evidence before the court which has been filed in the form of affidavit evidence and same was un-controverted as opposite parties had failed to participate in the process of hearing. In *Indra Sharma Vs. V.K.V. Sharma, AIR 2014 SC 309*, Hon'ble

Apex Court held that Protection of Women from Domestic Violence Act has been enacted to provide a remedy in civil law for protection of women from being victims of Domestic Violence Act and to prevent occurrence of domestic violence in the society. The act has been enacted also to provide an effective protection of the rights of women who are victims of violence on any kind, occurring within the family.

19. In *Satish Chandra Ahuja Vs. Sneha Ahuja*, AIR 2020 SC 2483, Hon'ble Apex Court held that S.R. Batra and Anr. Vs. Taruna Batra, (2007) 3 SCC 169, has not correctly interpreted the provisions of Section 2(s) of Domestic Violence Act and does not lay down correct law, where the court held that wife is only entitled to claim a right to residence, share households would only mean the house belonging to or taken on rent by the husband, or the house which belongs to joint family of which husband is a member. Hon'ble Apex Court further held in Satish Chandra Ahuja's case (supra) that definition of share household as noticed in section 2(s) does not indicate that a share household shall be one which belongs to or taken on rent by the husband. We have noticed the definition of "respondent" under the Act. Respondent in a proceedings under the Domestic Violence Act can be any relative of the husband. In event the shared households belongs to any relative of the husband with whom in a domestic relationship, the women has lived, the conditions mentioned in sub-section 2(s) are satisfied and the said house will become a shared household and from provisions of Section 2(s) it is clear that for a shared household there is no such requirement that the house may be owned singly or jointly by the husband or taken on rent by the husband. The object and

purpose of the Act was to grant a right to aggrieved person, a woman of residence in shared households. The interpretation which is put by this Court in S.R. Batra's Case (supra), if accepted, shall clearly frustrate the object and purpose of the Act. The wife is entitled to claim a right to residence in a share households belonging to relatives of her husband.

20. In present case, the revisionists have not taken a stand that they are unable to pay the amount of maintenance awarded by the court of first instance against them which is payable to respondent no. 2 for maintenance of herself and her two minor daughters. The main thrust of contention raised on behalf of revisionists is that there is property dispute between the revisionists and respondent no. 2 as revisionists are in-laws of respondent no. 2 and the impugned order passed by court below and affirmed by first appellate court is ex-parte. Courts below have properly addressed the issue that why the court had to pass ex-parte judgment against the revisionists as even after appearance in the court, the revisionists failed to file any written statement. They took several adjournments for filing written statements and subsequently absented themselves and even after passing of order with effect that case will be heard ex-parte against them, they did not file any application for recall of ex-parte order dated 7.9.2021, therefore, the court was left with no option but to proceed to receive ex-parte evidence and decide the case ex-parte against present revisionists. Revisionists have not made any specific averments regarding quantum of maintenance as ordered by court below or inability to pay the amount of maintenance to respondent no. 2, therefore, I find no factual or legal error regarding quantification of amount of maintenance

awarded by learned Nyayadhipari and affirmed by Appellate Court. However, this fact cannot be lost sight that revisionist nos. 4 and 5, who are impleaded as opposite party no. 4 and 5 before court below, are married sisters-in-law (nanand and nandoi) of the complainant/respondent no. 2. They admittedly reside at some other place and their address have been given by the complainant herself in Vipulkhand, Lucknow as the revisionist nos. 1 to 3 as well as respondent no. 2 are presently residing in district Firozabad, therefore, it cannot be said that revisionist nos. 4 and 5 were in domestic relationship with the complainant/respondent no. 2, particularly in absence of specific pleadings and evidence in this regard. The shared households where respondent no. 2 has stated to have lived after marriage with her late husband and thereafter for sometime with revisionist nos. 1 to 3 belongs to Revisionist No. 1 and 2 according to version of the complainant herself. Respondent nos. 4 and 5 being family members of her late husband cannot be **saddled** with the responsibility of providing maintenance awarded to the complainant/respondent no. 2 in impugned judgment of court of first instance nor they can be held accountable to provide an accommodation to her in shared household which does not belong to them, therefore, the impugned order is liable to be modified to the extent that relief granted by court below in impugned judgment will be confined to in respect of revisionist nos. 1 to 3 and revisionist nos. 4 and 5 are exempted from complying with impugned order passed by court below providing maintenance and accommodation in shared households to the complainant, therefore, the revision stands **partly allowed** to the extent that impugned order is quashed with regard to opposite party nos. 4 and 5 in

Complaint Case no. 637 of 2020, who are revisionist nos. 4 and 5 before this Court, however, impugned order shall held good in respect of revisionist nos. 1 to 3, who are opposite party nos. 1 to 3 before court below.

21. With this modification, this Court does not find any illegality, irregularity, or in propriety in the impugned judgments passed by court below which are under challenged before this Court. The impugned order shall be binding upon respondent nos. 1 to 3 and will be executable against them on application made by respondent no. 2 in this respect, however, it is made clear that observations made while deciding this revision are only for purpose of present revision and will not be any bearing on criminal case filed by the complainant against the revisionists.

(2023) 7 ILRA 525
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED:ALLAHABAD 31.05.2023

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Recall/Restoration Application No. 5 of 2023
in
Criminal Revision No. 1839 of 2023

Govind @ Arvind & Ors. ...Revisionists
Versus
The State of U.P. & Anr. ...Respondents

Counsel for the Revisionists:

Sri Amit Rana, Sri Anand Prakash Dubey, Sri Neeraj Srivastava, Sri Suhel Ahmad Azmi

Counsel for the Respondents:

G.A., Sri Adesh Kumar, Barkha Chaudhary

(A) Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149, 302, 506 & 120B - The Code of criminal procedure,

1973 - Section 362 - Court not to alter judgment - Criminal justice delivery system does not empower the Court to add or delete any words, except to correct the clerical or arithmetical error as has specifically been provided under the statute itself that after pronouncement of the judgement the Judge becomes functus officio - Any mistake or glaring omission is left to be corrected only by the appropriate forum in accordance with law.(Para - 16)

Application moved by prosecution/complainant - revisionist/applicant was summoned - summoning order challenged by filing Criminal Revision - disposed of by Court - hence restoration application - revisionist/applicant wants Court to rehear the case afresh on merits.(Para - 2,6)

HELD:- Court not inclined to recall it's order, disposing of the revision, due to Supreme Court pronouncements and Section 362 Cr.P.C. provisions.(Para -17)

Recall application rejected. (E-7)

List of Cases cited:

1. Satender Kumar Antil Vs CBI & anr. , 2021 SCC Online SC 922
2. St. of Orissa Vs Ram Chander Agarwala & ors. , 1979 SCR (1) 1114
3. Moti Lal Vs St. of M.P., AIR 1994 SC 1544
4. Naresh & anr. Vs St. of U.P., AIR 1981 SC 1385
5. Smt. Sooraj Devi Vs Pyare Lal & anr. , AIR 1981 SC 736
6. Hari Singh Mann Vs Harbhajan Singh Bajwa & ors. , 2001 (1) SCC 169
7. St. represented by D.S.P. Vs K.V. Rajendran & ors. ,Criminal Appeal No. 1389 of 2008
8. St. of Punj. Vs Davinder Pal Singh Bhullar, (2011) 14 SCC 770

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

1. By means of this application, the applicant/revisionist has prayed for recall of the order dated 28.9.2022 passed by this Court in Criminal Revision No. 1839 of 2022.

2. The facts giving rise to the present restoration application are that on an application moved by the prosecution/complainant, the revisionist/applicant was summoned by the learned Additional Sessions Judge, Court No. 6, Meerut vide order dated 07.4.2022 to face the trial in Case Crime No. 610 of 2020, under Section 147, 148, 149, 302, 506, 120B IPC. The aforesaid summoning order was challenged by the revisionist/applicant by filing Criminal Revision No. 1839 of 2022 through advocate Shri Amit Rana, which was disposed of by this Court vide order dated 28.9.2022.

3. By means of this application, the applicant has prayed for recall of the order dated 28.9.2022 passed by this Court in Criminal Revision No. 1839 of 2022. At the time of hearing of the revision, learned counsel for the applicant gave up his challenge to the aforesaid impugned order and confined his submission to the disposal of his bail application in accordance with the guidelines laid down by the Apex Court in the case of **Satender Kumar Antil Vs. Central Bureau of Investigation and another**, 2021 SCC Online SC 922. The said revision was disposed of by this Court vide order dated 28.9.2022. The order sought to be recalled reads thus:

"Heard learned counsel for the revisionists, learned Additional

Government Advocate for the State of U.P./opposite party no.1 and perused the record.

The instant criminal revision under Section 397/401 Cr.P.C. has been preferred by the revisionists namely Govind @ Arvind, Ankit, Manish and Anil against the judgment and order dated 07.04.2022 passed by Additional Sessions Judge, Court No. 06, Meerut in Sessions Trial No. 186 of 2021, arising out of Case Crime No. 610 of By means of this application, the applicant has prayed for recall of the order dated 28.9.2022 passed by this Court in Crimin2020 (State vs. Pankaj), under Sections 302, 147, 148, 149, 506, 120-B IPC, Police Station Kankarkhera, District Meerut whereby the revisionists have been summoned as an additional accused.

At the outset, learned counsel for the revisionists gave up his challenge to the aforesaid impugned order and confined his submission requesting to grant some protection to the revisionists to surrender before the concerned court below. The learned counsel for the revisionists further stated at the Bar that he is not pressing any other prayer on merits and prayed that a direction may be issued to the concerned court below to consider and decide the bail application of the revisionists expeditiously.

Learned A.G.A. for the State of U.P. submits that in case the revisionists is not pressing the relief as sought for by on merits and wants to surrender before the concerned court below, he has no objection if the Court grants protection to them for a short period.

However considering the aforesaid prayer made by learned counsel for the revisionists, it is directed that the revisionists-Govind @ Arvind, Ankit, Manish and Anil shall surrender before the concerned court below within three weeks' from today and in case they apply for bail,

the same shall be disposed of expeditiously by the courts below in accordance with law and keeping in view the guidelines as laid down by the Apex Court in the case of Satender Kumar Antil vs Central Bureau of Investigation and another, reported in 2021 SCC Online SC 922.

For the period of three weeks' from today or till the revisionists surrender before the court concerned, whichever is earlier, they shall not be arrested in the aforesaid case.

With the above observations and directions, the instant criminal revision stands disposed of."

4. It appears that the revisionist has not complied with the order of this Court dated 28.9.2022 and filed this restoration application through another advocate namely Smt. Gunjan Sharma with the prayer to recall the order dated 28.9.2022 and decide Criminal Revision No. 1839 of 2022 afresh on merits.

5. Before discussing the case law on the subject, it would be useful to quote section 362 of Code of Criminal Procedure:

362. Court not to alter judgment:- 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 judgement or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.

6. Perusal of Section 362 Cr.P.C. it is crystal clear that no Court after it has signed its judgement or final order disposing of a case, shall not alter or review the same except to correct a clerical or arithmetical error. By means of this recall application, the revisionist/applicant wants

this Court to rehear the case afresh on merits. If the contention of the learned counsel for the applicant is accepted and Court hears the case on merits and pass order, that would amount to reviewing its earlier order altering it, which is totally prohibited by Section 362 Cr.P.C.

7. It is settled by Hon'ble Supreme Court in plethora of judgement that the Court should not review its earlier order.

8. In **State of Orissa Vs. Ram Chander Agarwala and others**, 1979 SCR (1) 1114, the accused therein after being convicted filed an appeal before the learned Sessions Judge. Learned Sessions Judge while dismissing the appeals found that the law required imposition of a minimum sentence of fine of Rs. 1000/-for each offence and as the sentence passed by the Trial Court was not in accordance with the law, he referred the matter to the High Court for passing an appropriate sentence. The accused preferred a revision against the order of Sessions Judge. Both the proceedings were heard together and the High Court dismissed the revision petition preferred by the accused and accepted the reference by the Sessions Judge and enhanced the sentence so far as the firms are concerned to a sum of Rs. 3900/-. As regard the Managers or the managing partners the High Court sentenced them to six months rigorous imprisonment. The Manager and Managing partners filed petitions before the High Court for review of its order. The High court accepted the petition for review and recalled its previous judgement imposing sentence of six months and instead imposed a fine of Rs. 3000/-.

9. Hon'ble Supreme Court while quashing the subsequent order of the High Court has held as under:

"That once a judgement has been pronounced by a High Court either in exercise of its appellate or its revisional jurisdiction, no review or revision can be entertained against that judgement as there are no provisions in the Criminal Procedure Code which would enable the High Court to review the same or to exercise revisional jurisdiction."

10. In **Moti Lal Vs. State of Madhya Pradesh**, AIR 1994 SC 1544, Hon'ble Supreme Court held that Section 362 Cr.P.C. in clear terms lays down that the Court cannot alter judgement after the same has been signed except to correct clerical or arithmetical error. That being the position the High Court had no jurisdiction under Section 482 Cr.P.C. to alter the earlier judgment.

11. A three Judge Bench of Hon'ble Supreme Court in **Naresh and another Vs. State of Uttar Pradesh**, AIR 1981 SC 1385, held as under:

"We are entirely at a loss to understand the order dated April 14, 1989. In their judgement dated February 25, 1980 while discussing the case against Naresh the learned Judge had given a specific and express finding that he intended to kill the deceased Bahadur and, therefore, had committed an offence punishable under Section 302 Indian Penal code. The operative part of the judgment also said the same thing. We do not understand what the learned Judges mean when they state in their order dated April 14, 1980, " there is clerical mistake in the operative part of the judgment." The High Court was wholly wrong in altering the judgment pronounced by them disposing of the Criminal Appeals. That was clearly in contravention of the provisions of Section

362 Cr.P.C. what was worse, the High court acted in purported exercise of the power to correct clerical mistakes when in fact there was none. The conviction under Section 302 Indian Penal Code was perfectly correct and the conviction had been rightly affirmed by the High Court in the first instance. There was no occasion at all for the purported exercise of power to correct a clerical mistake and alter the conviction under Section 302 to one under Section 304 Indian Penal Code. We are greatly concerned that the High court should have committed this grievous error. There is, however, nothing that we can do about it at this juncture as the State has not chosen to file any appeal against the order dated April 14, 1980."

12. In **Smt. Sooraj Devi Vs. Pyare Lal and another**, AIR 1981 SC 736, Hon'ble Apex Court held that the prohibition in Section 362 Cr.P.C. against the Court altering or reviewing its judgement, is subject to what is "otherwise provided by this code or by any other law for the time being in force". Those words, however, refer to those provisions only where the Court has been expressly authorised by the Code or other law to alter or review its judgement. The inherent power of the Court is not contemplated by the saving provision contained in Section 362 Cr.P.C. and, therefore, the attempt to invoke that power can be of no avail.

13. **Hari Singh Mann Vs. Harbhajan Singh Bajwa and others**, 2001 (1) SCC 169, was a case in which after disposal of the petition filed by the applicant therein by the High Court and consequently action was taken thereof, the applicant filed another petition, which was entertained and disposed of by the same learned Single Judge. Hon'ble Apex Court

while setting aside the order passed by the High Court held as under:

"We have noted with disgust that the impugned orders were passed completely ignoring the basic principles of criminal law. No review of an order is contemplated under the Code of Criminal Procedure. After the disposal of the main petition on 7.1.1999, there was no lis pending in the High Court wherein the respondent could have filed any miscellaneous petition. The filing of a miscellaneous petition not referable to any provision of Code of Criminal Procedure or the rules of the Court, cannot be resorted to as a substitute of fresh litigation. The record of the proceedings produced before us shows that directions in the case filed by the respondents were issued apparently without notice to any of the respondents in the petition. Merely because the respondent No. 1 was an Advocate, did not justify the issuance of directions at his request without notice of the other side. The impugned orders dated 30th April, 1999 and 21st July, 1999 could not have been passed by the High Court under its inherent power under Section 482 of the Code of Criminal Procedure. The practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the court.

There is no provision in the Code of Criminal Procedure authorizing the High Court to review its judgment passed either in exercise of its appellate or revisional or original criminal jurisdiction. Such a power cannot be exercised with the aid or under the cloak of Section 482 of the Code.

The Court further held thus:

"Section 362 of the Code mandates that 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. The Section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error."

14. Hon'ble Supreme Court in **State represented by D.S.P. Vs. K.V. Rajendran and others, (Criminal Appeal No. 1389 of 2008)**, decided on 02.9.2008, while dealing with a question as to whether in exercise of the inherent powers under Section 482 of the code of Criminal Procedure, an order disposing of a criminal petition, refusing to grant any relief, could be modified and, thereafter, an investigation, which was with the State Police authorities could be transferred to the Central Bureau of Investigation. The Court after discussing a catena of judgement observed thus:

"As noted herein earlier, Section 362 of the code prohibits reopening of a final order except in the cases of clerical or arithmetical errors. Such being the position and in view of the expressed prohibition in the code itself in the form of Section 362, exercise of power under Section 482 of the

Code cannot be exercised to reopen or alter an order disposing of a petition decided on merits."

15. In **State of Punjab Vs. Davinder Pal Singh Bhullar**, (2011) 14 SCC 770 the Hon'ble Apex Court held as under:

"There is no power of review with the criminal court after the judgement has been rendered. The High Court can alter or review its judgement before it is signed. When an order is passed, it cannot be reviewed. Section 362 Cr.P.C. is based on an acknowledged principle of law that once a matter is finally disposed of by a court, the said court in the absence of a specific statutory provision becomes functus officio and is disentitled to entertain a fresh prayer for any relief unless the former order of final disposal is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes functus officio the moment the order for disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. There is also no provision for modification of the judgement."

16. Thus, the law on the issue can be summarized to the effect that the criminal justice delivery system does not empower the Court to add or delete any words, except to correct the clerical or arithmetical error as has specifically been provided under the statute itself that after pronouncement of the judgement the Judge becomes functus officio. Any mistake or glaring omission is left to be corrected only by the appropriate forum in accordance with law.

17. In view of the aforesaid pronouncements of Hon'ble Supreme Court

coupled with the provisions of Section 362 Cr.P.C., I am not inclined to recall my order dated 28.9.2022 disposing of the revision.

18. Accordingly, this recall application is *rejected*.

(2023) 7 ILRA 531
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.07.2023

BEFORE

**THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Criminal Revision No. 5132 of 2022

Irshad Khan & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionists:
 Mohammad Sadab Khan

Counsel for the Respondents:
 G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Sections 107, 116 & 151 - Challan by local police, Section 111 - issuance of notice, Section 193 - Cognizance of offences by Courts of Session, Section 207 - Supply to the accused of copy of police report and other documents, Indian Penal Code, 1860 - Sections 147, 148, 149, 307, 336, 332, 353, 420, 447, 504, 506, Criminal Law Amendment Act - Section 7 - In cases triable by court of session as provided in schedule of the Code - Magistrate has no power to try the case - he is required to commit the case before the court of session where trial may take place - Magistrate is empowered to take cognizance of any offence unless otherwise provided including the offence exclusively triable by the court of sessions. (Para -13)

Accused persons (revisionists) filed 24kha discharge application - dismissed by court (C.J.M.) - charged under various sections of Criminal Law Amendment Act - not heard by Court of Session - issued bailable warrant against absentee accused - criminal revision filed - against order of C.J.M. **(Para - 4,5,6,7)**

HELD:- Magistrate committed legal error while deciding discharge application moved by accused persons inter-alia under section 307 IPC, which is triable by court of session. Proper course was to commit the case to Court of Session, quoting court orders. Magistrate court instructed to commit case to Court of Session after ensuring compliance with section 207 Cr.P.C. Court of session to hear and dispose of discharge application under section 227 Cr.P.C. after hearing both sides. **(Para -19,20,21)**

Revision allowed. (E-7)

List of Cases cited:

1. Dharampal Vs St. of Har., (2014) 3 SC 306
2. Sukhbir Singh Vs St. of U.P. & anr., Section 482 No. 21859 of 2021

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

1. Heard learned counsel for the revisionists and learned AGA for the State.
2. None appeared on behalf of respondent no. 2 to contest this criminal revision today.
3. Counter affidavit has already been filed by respondent no. 2 in this case. Learned counsel for the revisionists has submitted that he is not inclined to file rejoinder affidavit and prayed for hearing the matter on merits.
4. The present criminal revision is filed against the order dated 4.11.2022 passed by learned C.J.M., Jalaun at Orai in

Misc. Case no. 327 of 2019 (State vs. Irshad Khan and others) arising out of Case Crime no. 162 of 2018 under Sections 147, 148, 149, 307, 336, 332, 353, 420, 447, 504, 506 IPC and Section 7 of Criminal Law Amendment Act, P.S. Kotwali Kalpi, District Jalaun. By the impugned order, learned C.J.M. has dismissed the discharge application 24 kha moved by the accused persons and issued bailable warrant against absentee accused Nausad.

5. The brief facts of the case is that the informant lodged an FIR on the basis of written report on 18.7.2018 stating that he is Lekhpal of Kasba Kalpi and plot no. 38/4 area 0.170 and plot no. 38/6 area 0.210 hectare, total area 0.380 hectare come under his area (Halka) and are recorded in the column of Banjar in the revenue record, out of which, some portion has been encroached by Irshad Khan and others without any authority regarding which a report has been given to SDM Kalpi on 18.7.2018; Upziladhikari and other officials of the department accompanied by SHO concerned visited the spot with police force and tried to remove the illegal encroachment by JCB Machine. In the meanwhile at 12:00 hours said Irsad and others, who had encroached a portion of land, engaged in abusing and marpeet with the official team and engaged in brick bating in which some persons received injuries. Inasmuch as Irshad exhorted his wife to tear her clothes so that he could implicate the persons, who had come to remove the encroachment in false case of molestation. The accused persons Irshad and four persons filed an application under Section 482 No. 4289 of 2021 before this Court with prayer to quash the charge-sheet filed by the IO in aforesaid sections which was disposed of by this Court vide order dated 23.3.2021 with observation that Court did not find any

grounds to quash the charge-sheet and cognizance taking order passed by the learned Magistrate, therefore, prayer for quashing the same is refused. However, if the applicants appear and move an application under Section 239 Cr.P.C. for discharge through counsel before the court below within two weeks from the date of receipt of certified copy of the order then the application for discharge shall be considered and decided within a period of three months from the date of filing of application in accordance with law. No coercive action shall be taken against the applicants till disposal of said application or for a period of four months from the date of receipt of the order or whichever is earlier; applicants were permitted to file discharge application through counsel.

6. In compliance of the order of this Court, accused persons filed discharge application before the court of first instance, which was dismissed by the impugned order passed by learned C.J.M. with observation that on the basis of evidence collected by the I.O. during investigation, charges under Sections 147, 148, 149, 307, 336, 332, 353, 420, 447, 504, 506 IPC and Section 7 of Criminal Law Amendment Act are made out against the applicants accused for which charge-sheet has been filed and cognizance has already been taken by the court in said criminal case on the basis of charge-sheet. As the matter is triable by the court of session, this court did not have jurisdiction to hear the discharge application, therefore, the said discharge application 24kha is dismissed, case was fixed for committal / appearance of the accused persons.

7. The accused persons have filed present revision feeling aggrieved by the aforesaid order passed by the learned C.J.M. under Section 397/401 Cr.P.C.

8. Learned counsel for the revisionists submitted that on 6.4.2021 revisionist has filed discharge application in the court below in pursuance of the order of this Court and a copy of said application is filed as annexure-12 to the revision on the ground that civil suit no. 62 of 2018 has been filed before the Civil Judge, Jalaun at Orai with regard to the plot in question with prayer to issue a prohibitory injunction against the defendants from interfering in possession of the applicant no. 1 and his three brothers and the court below passed the order for maintaining status quo over the plot in question vide order dated 26.4.2019. However, on 8.4.2018 applicant nos. 1 and 3 others, who were challaned by local police under sections 107, 116, 151 Cr.P.C. and challan report was submitted by him before the court of SDM, Kalpi and on the same day, SDM concerned passed an order with regard to issuance of notice under section 111 Cr.P.C. against the applicant nos. 1 and 3 others with observations that there was apprehension to commit breach of peace and disturbance of public tranquility, they must be sent to jail; they were directed to execute two sureties, which are to be verified by the Tehsildar Kalpi but they were sent to jail due to pending verification of surety bond.

9. The revisionists filed a application under section 482 No. 13535 of 2018 before this Court in which interim order was passed on 20.4.2018 and notices were issued to SDM and Tehsildar Kalpi on 4.5.2018 and SDM was directed to comply with the order dated 20.4.2018 to appear in person before the Court on the next date. In view of passing the order dated 20.4.2018 by this Court the SDM and Tehsildar, Kalpi had became inimical to the revisionists and at their behest, the present FIR has been lodged by Lekhpal

Pramod Kumar Dubey on false and fabricated facts; the petitioner's shop was not constructed over the plot no. 38/4 and 38/6 as alleged in the FIR but same was constructed over the plot no. 38/1 and 17/1 and thus the SDM and Tehsildar had got said shop demolished only to take revenge from the revisionists and iron scrap worth of Rs. 50 lakhs was removed by them with help of police personnel.

10. No notice was served on revisionists regarding alleged unauthorized occupation; the revisionists had not interfered in the work of government officials, therefore no offence under section 353 IPC is made out against them; plot no. 38/4 and 38/6 are away about 300 metre from the plot no. 38/1 and 17/1 Mauza Alampur, Kalpi but false allegation is made in the FIR that the applicants had occupied plot no. 38/4 and 38/6; revisionists had never caused any unlawful assembly or any use of force or violation; they had not caused any obstruction in performance of public duty of public servant. He further submitted that impugned order passed by learned C.J.M. is manifestly error on the face of record and deserves to be set aside by this Court as the impugned order is devoid of any reasoning and finding and has been passed in mechanical routine manner without application of judicial mind. On the basis of materials on record, no offence as alleged in the charge-sheet, is made out against the applicants, who has committed no offence; all the proceedings in this case, were initiated at the behest of SDM and Tehsildar, therefore, it is prayed for that this revision be allowed and impugned order passed by learned C.J.M. be set aside.

11. Per contra, learned AGA submitted that as in penal sections in the case include inter-alia charge under section

307 IPC which is triable by the court of session therefore learned Magistrate was not empowered to discharge the accused applicant in such case and only course open to him was that to commit case before the court of session where discharge application could be legally moved.

12. For the purposes of deciding present revision, certain provisions of Criminal Procedure Code are relevant to be reproduced hereinunder:-

Section 193-Cognizance of offences by Courts of Session. Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code..

207. Supply to the accused of copy of police report and other documents. In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

- (i) the police report;
- (ii) the first information report recorded under section 154;
- (iii) the statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section 173;
- (iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173: Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused: Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

209. Commitment of case to Court of Session when offence is triable exclusively by it. When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

(a) I commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;]

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

13. From the perusal of above provisions, it is obvious that in cases triable

by court of session as provided in schedule of the Code, the Magistrate has no power to try the case and he is required to commit the case before the court of session where trial may take place. However, Magistrate is empowered to take cognizance of any offence unless otherwise provided including the offence exclusively triable by the court of sessions.

14. In **Dharampal vs. State of Haryana** reported in (2014) 3 SC 306, the Hon'ble Apex Court has held that cognizance under Section 193 Cr.P.C. has been related to cognizance of offence and not to commitment order passed by the Magistrate. For offence exclusively triable by the court of session; the court of session is competent for arraignment of such persons as accused from and during cognizance as such itself under section 193 (upon committal of Magistrate) and then during course of inquiry and trial, under section 319 Cr.P.C.

15. This Court in **Sukhbir Singh vs. State of U.P. and another** in application under Section 482 No. 21859 of 2021 decided on 22.7.2022 held that in view of Section 209 Cr.P.C. there is no ambiguity that "who is trial court". In the present case, since the offence is triable by the Session court, the trial court is session court. While hearing the application of discharge, the Magistrate committed error by assuming the jurisdiction of session court. The session court has to apply its mind whether applicant is liable to be discharged or whether application is liable to be rejected. The Magisterial court committed error by deciding the case itself.

16. In present case learned Magistrate has committed legal error while dismissing the discharge application moved by the

accused revisionists on assumption of jurisdiction, although it has not decided the discharge application on merits and observed that court has no jurisdiction to hear the case as the case was triable by the court of session.

17. From perusal of the record it appears that discharge application was filed by the revisionists pursuant to order of this court passed in application u/s 482 No. 4289 of 2021 where they were given liberty to move an application of discharge before the court below under section 239 Cr.P.C. and permitted to appear through counsel before the court below or till disposal of the discharge application or for a period of four months from the date of passing of order whichever is earlier.

18. In session triable of cases the discharge application is maintainable under section 227 Cr.P.C. which provides that in a trial before the court of session, if upon considering record of the case and documents submitted therewith and after hearing the submission of accused and prosecution in this behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so.

19. In view of the aforesaid factual and legal discussions, I am of the opinion that learned Magistrate committed legal error while deciding the discharge application moved by the accused persons inter-alia under section 307 IPC, which is triable by the court of session; the proper course before the learned Magistrate was to commit the case before the court of session after quoting the orders of this Court passed in application u/s 482 as stated aforesaid, through counsel as accused persons were

given liberty to appear before the court below for filing discharge application. On committal of case by learned Magistrate through counsel, without insisting personal appearance of the accused persons as they are not enlarged on bail as yet, the discharge application was liable to be decided by the court of session and all pleas taken in discharge application were to be taken before the court of session.

20. Consequently present revision is **allowed**. The impugned order passed by learned Magistrate dated 4.11.2022 dismissing discharge application 24kh moved by the accused persons is set aside.

21. Learned Magistrate court is directed to commit the case before the court of session after ensuring compliance of provision under section 207 Cr.P.C. and discharge application moved by the accused persons before the court below in pursuance of the direction of this Court will be taken up by the court of session as if filed under section 227 Cr.P.C. and same will be disposed of after giving opportunity of hearing to accused applicants as well as prosecution side.

22. Keeping in view of the delay already occasioned in the case learned Magistrate will commit the case as far as possible within one month from the date of production of certified copy of this order and after committal of the case learned session court will hear and decide the said discharge application in the light of the above observations within a period of three months provided there is no legal impediment. If the discharge application is dismissed then accused revisionists will be directed to surrender and will be taken into custody and their bail application will be decided in accordance with law.

(2023) 7 ILRA 536

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 24.04.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Crl. Misc. Writ Petition No. 4947 of 2023
connected with

Crl. Misc. Writ Petition No. 4949 of 2023

Jaya Jain		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:
Sri Rohan Gupta

Counsel for the Respondents:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 274, 275 & 276, The Drugs - and Cosmetics Act, 1940 - Sections 17, 17(a), 17(b) & 32 - No first information report can be lodged regarding a non-cognizable offence and that prosecution is permissible only by means of a complaint before a Magistrate or a competent court. (Para -21, 23)

FIR lodged by a Drug Inspector - Test Analysis Report - offences under Indian Penal Code are non-cognizable offences - offences alleged under provisions of Drugs and Cosmetics Act - can be prosecuted only by means of a complaint and not an FIR. **(Para -22)**

HELD:-Apex Court's direction prevents quashing the FIR, stating that petitioners cannot be prosecuted or arrested unless they have been convicted under Chapter IV. First information report will only be acted upon if the petitioners have already been convicted. Drug Inspector can proceed by filing a complaint with the appropriate forum for prosecution. **(Para - 24)**

Petition disposed of. (E-7)

List of Cases cited:

U.O.I. Vs Ashok Kumar Sharma

(Delivered by Hon'ble Anjani Kumar Mishra, J. & Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard learned counsel for the petitioner and learned AGA.

2. Both these writ petitions arise out of same FIR and, therefore, they have been heard and are being decided together.

3. The writ petitions seek quashing of the first information report dated 02.03.2023 giving rise to Case Crime No.92 of 2023, under Sections 274, 275 & 276 of I.P.C. and Section 17, 17(a), 17(b) of the Drugs and Cosmetics Act, 1940, Police Station- Phase-3 Sector 71 Noida, Noida Commissionerate, District Gautam Buddh Nagar.

4. The contention of learned counsel for the petitioner is that the FIR has been lodged on the basis of Test Analysis Report dated 14.01.2023 of the Govt. Analyst, Regional Drugs Testing Laboratory, Chandigarh. This test report is alleged to pertain to "DOK-1 Max Syrup" and 'Ambroxol Hydrochloride Syrup (Ambronol Syrup)'.

5. It has also vehemently urged that the report merely states that the drugs on analysis were found 'not of standard quality'.

6. The first submission is that the report of the Drug Analyst would attract Section 17-A and 17-B of the Act of 1940 but the FIR has been registered under Section 17, 17(a) and 17(b) of the Act.

7. The second contention is that in the complaint filed contains no allegations as regards the facts which would constitute the offence alleged. In any case, the test analyst report does not state that the drugs upon analysis were found adulterated or spurious.

8. It is next contended that the Govt. Analysts' Report is not conclusive and an opportunity is required to be given to controvert the report. It is only thereafter that the report becomes final.

9. It has also been submitted that infringement of Section 17, 17(a) and 17(b) of the Drugs and Cosmetics Act are not cognizable offences.

10. Relying upon the decision of the Apex Court in ***Union of India Vs. Ashok Kumar Sharma***, it has been submitted that an offence under Chapter IV of the Act can only be prosecuted by means of a complaint by a Drug Inspector and the police cannot lodge an FIR in that regard nor can the police prosecute offenders regarding such an offence. For the same reason, the police officers do not have any power to arrest.

11. It is next contended that no offence has been committed within the territorial jurisdiction of the concerned police station as the drugs in question were meant exclusively for export and were not to be sold internally. Therefore, no offence has been committed in India.

12. It is next contended that the petitioners are merely Directors in Marion Biotech Pvt. Ltd., which company has not been arrayed in the FIR. The company manufacturing the allegedly sub-standard drug was in any case a necessary party and

in its absence also the FIR is not sustainable.

13. It is also sought to be contended that there is no allegation in the FIR insofar as the role of the petitioners, the Directors in Marion Biotech Pvt. Ltd. is concerned, which is relevant because a Director in a case of an offence by a company must be in charge and responsible for the conduct of the business of the company and the offence was committed within his or her knowledge. No knowledge, consent or connivance of the petitioners has been alleged in the FIR.

14. Learned AGA on the other hand has submitted that the FIR has been lodged as the drugs manufactured by the company were no doubt meant for export and were duly exported to Kazakhstan where 54 children are said to have been died after consuming the drugs in issue. The search was conducted and specimen of the drugs were obtained and tested in relation to those deaths.

15. We have considered the submissions made by learned counsel for the parties and perused the record.

16. Insofar as the first submission of counsel for the petitioner noticed herein above is concerned, it may be noticed that in the body of the FIR the sections mentioned as 17-A & 17-B but in the column 2 of the FIR they have been transcribed as 17(a) and 17(b), which appears to be a typographical error.

17. The judgment cited by learned counsel for the petitioner has merely been held that insofar as an offence falling within Chapter IV of the Act is concerned, the prosecution can be lodged only by an Inspector. The word Inspector has been defined under the Drugs and Cosmetics Act in Section 3(e)(ii), which is

relevant for the purposes of the case, reads as follows:-

"in relation to any other drugs or cosmetics, an inspector appointed by the Central Government or a State Government under Section 21."

18. This definition in our considered opinion, will take the word 'inspector occurring in Section 32 of the Act, which deals with cognizance of offence beyond the purview of an Inspector of Police.

19. The FIR definitely alleges to have been lodged by a Drug Inspector namely an Inspector specified in Section 32 of the Act.

20. Moreover, sub-section 3 of Section 32 provides that prosecution under the provisions of the Drugs and Cosmetics Act, 1940 as specified under Chapter IV of the Act, shall not preclude prosecution of a person under any other law for any act or omission, which constitutes also an offence under Chapter IV.

21. The other sections which have been invoked in the impugned FIR are Sections 274, 275 and 276 of the Indian Penal Code. In view of Section 32(3), such prosecution is permitted. However, these three sections are non cognizable and bailable offences under the Indian Penal Code. It is settled law that no first information report can be lodged regarding a non cognizable offence and that prosecution is permissible only by means of a complaint before a Magistrate or a competent court.

22. Therefore, in our considered opinion, the FIR should not have been registered by the police as the offences under the Indian Penal Code are non cognizable offences while offences alleged under the provisions of the Drugs and

Cosmetics Act, can be prosecuted only by means of a complaint and not an FIR as is clear from the perusal of the judgment cited by learned counsel for the petitioners as also Section 32 of the Act.

23. Having said so, the issue, which arises is as to what relief is liable to be granted in the writ petition.

24. It would be relevant to state that the other submissions made by learned counsel for the petitioner are not being adverted to as the same are rendered purely academic in view of the finding arrived at herein above.

25. Normally, in view of the finding arrived at, the most logical approach would be to quash the impugned FIR. However, the Apex Court in the judgment cited in paragraph 141 has observed as follows:-

"141. This process of interpretation would produce the result of harmonizing two seemingly irreconcilable commands from the Law-Giver. This interpretation commends itself to us for the reason that the investigation into offences, under Chapter IV of the Act, would commence, be carried out and would culminate in, in the safe hands of the competent and qualified Statutory Authority, as designated by law. It would also avoid an outside agency like a Police Officer, being obliged to register an FIR, for the reason that where arrest has to be made, a FIR is to be registered, and, when the registering of the FIR carries with it an unattainable object of preferring a Final Report under Section 173 of the CrPC, as far as the Police Officer is concerned. We make it clear that if a Police Officer is approached with regard to a complaint regarding commission of an offence falling under Chapter IV of the Act, he is not to register an FIR unless it be that a cognizable

offence, other than an offence falling under Chapter IV of the Act, is also made out. He must makeover the complaint to the competent Drug Inspector so that action in according with law is immediately taken where only offences under Chapter IV are made out."

24. In view of the aforesaid direction given by the Apex Court, we refrain from quashing the FIR and only direct that the petitioners shall not be prosecuted or arrested consequent to the impugned FIR and the first information report shall not be acted upon by the police authorities unless, the petitioners have already been convicted on an offence(s) under Chapter IV, as is provided by the U.P. Amendment of Section 30 of the Act. It is left open for the Drug Inspector, the first informant in the FIR to proceed in accordance with law by lodging a complaint before the appropriate forum for the prosecution of the petitioners in these two petitions.

(2023) 7 ILRA 539
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Crl. Misc. Writ Petition No. 19080 of 2011

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

Counsel for the Petitioners:

Sri Sanjeev K. Tiwari, Sri S.K. Singh, Sri Shashi Kant Dwivedi

Counsel for the Respondents:

Govt. Advocate, Sri Gokaran Singh

(A) Criminal Law - Indian Penal Code, 1860 - Sections 120 - B ,397, 418 , 420 , 504 & 506 - The Code of Criminal

Procedure, 1973 - Sections 245(1) & 245(2) - Order of civil court could be challenged under Article 227 of the Constitution of India and not under original writ jurisdiction under Article 226 of the Constitution of India - Non-mentioning or wrong mentioning of provisions of law should not come in the path of granting appropriate relief, if the litigant otherwise is entitled for the same - Even while exercising powers under Article 227 of the Constitution of India, the Courts are not permitted to go deep into the matter and test the arguments advanced by the parties on the anvil of evidence or decide disputed questions of fact.(Para -7,8,9)

Criminal complaint against co-accused - sold her house to complainant's aunt - accused-petitioner no.1 stood as marginal witness - purchaser was in possession - accused-petitioner no.1 was tenant in that house - demanded rent - not paid - instead filed civil suit - marginal witness of sale deed - fraudulently obtained receipt by depositing house tax - got his name mutated - accused persons intruded in his house/shop - removed Rs.4000/- from cash counter - threatened to settle matter or to face consequences - Magistrate summoned only petitioner and his wife (co-accused) - revision - summoning order set aside by session court - Magistrate to pass afresh order - passed second order - summoning petitioner no.1, his wife and petitioners no.2 - Criminal Revision - dismissed - hence petition under Section 226 of Constitution of India.(Para - 4)

HELD:- Attempt to drag petitioner in a criminal case, whereas dispute is essentially civil in nature. Court refrained from interfering in the revisional court's order in a second round of litigation. Petitioners seeking bail must appear before the court within a month and be considered expeditiously without unnecessary adjournment. Petitioners can apply for discharge under section 245(1) or 245(2) Cr.P.C., and the Magistrate/Court will decide by passing a reasoned and speaking order.(Para - 9)

Petition disposed of. (E-7)

List of Cases cited:

Radhey Shyam & anr. Vs Chhabi Nath & ors., (2015) 5 SCC 423

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

01. Heard Sri Shashi Kant Dwivedi, learned counsel for the petitioner and Sri Gokaran Singh, learned counsel for the respondent no.2 and learned A.G.A. for the State and perused the record.

02. This criminal writ petition under Article 226 of the Constitution of India has been filed against the judgment and order dated 05.09.2011 passed in criminal revision no. 222 of 2010, Ajay Kumar and others vs. State of U.P. and another) by Additional District & Sessions Judge, court no.3, Mau whereby the order of Chief Judicial Magistrate, Mau passed in complaint case no.4289 of 2008 dated 31.08.2010 was not interfered at and the revision was dismissed.

03. The petitioner has prayed for issuance of direction in the nature of certiorari to quash both the orders dated 05.09.2011 and 31.08.2010.

04. For clarity following relevant facts are being narrated:-

(i) Respondent no.2 Angnoo Singh Yadav filed a criminal complaint before C.J.M, Mau alleging that co-accused Dhanauti Devi sold her house to complainant's aunt Buddha Devi in 1986; accused-petitioner no.1 Angad stood as marginal witness, and Buddha Devi sold that house to complainant's bhabhi Radha Devi in 2007 and since then purchaser was in possession thereof; accused-petitioner no.1 was tenant in that house; when the purchaser demanded rent from him he did

not pay the same and instead filed a case in civil court; he who himself was the marginal witness of the sale deed of 1986 fraudulently obtained receipt by depositing house tax of the house in question and got his name mutated in the Nagar Palika papers; On 03.12.2008 all the accused persons intruded in his house/shop and removed Rs.4000/- from cash counter and threatened him either to settle the matter or to face the consequences.

(ii) Learned Magistrate summoned only Angad and Dhanauti Devi for the offence under Section 397, 504 and 506 I.P.C. The complainant filed a revision and the court of sessions set aside the summoning order and called upon the Magistrate to pass an order afresh. The Magistrate passed second order on 31.08.2010 summoning the petitioner no.1 Angad and his wife Dhanauti Devi under Section 418 and 420 I.P.C. and petitioners no.2 to 4 and Dhanauti Devi under Section 397, 504,506 and 120-B I.P.C.. Challenging the above orders the petitioner preferred Criminal Revision no.222 of 2010 but the same was dismissed by order dated 05.09.2011. Now the petitioners are before this Court by means of this criminal writ petition under Section 226 of the Constitution of India

05. It is contended on behalf of the petitioners that both the orders have been passed without application of mind. At the most controversy is only civil in nature. This complaint has been filed to harass and humiliate them. The entire story is false and concocted and in fact no prima facie case is made out against them. Subject matter of the sale deeds is house no.94/1 and petitioners' house is numbered as 94.

06. The contentions of the petitioners are opposed by respondent no.2 on the

ground that in a judicial order this Court is not allowed to interfere while exercising writ jurisdiction under Article 226 of the Constitution of India. Hence, the petition should be dismissed at the very threshold. To stress above point. Judgement of Hon'ble Supreme Court in the case of ***Radhey Shyam and another vs. Chhabhi Nath and others, (2015) 5 SCC 423*** has been referred to. The apex court in the aforesaid judgment held that writ of certiorari lies to bring decisions of an "Inferior court", tribunal, public authority or any other body of persons for review so that the court may determine whether they should be quashed or not. However, expression "interference" the court is not referable to the judicial courts Writ of certiorari lies against patently erroneous or without jurisdiction orders of tribunals or authorities or courts other than judicial courts. The Apex Court in para 25 further observed as below:-

"25. All courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of Tribunals or authorities or courts other than judicial courts. There are no precedents in India for High Courts to issue writs to subordinate courts. Control of working of subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts.

While appellate or revisional jurisdiction is regulated by statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to judicial courts,

07. Thus it has been clearly laid down that order of civil court could be challenged under Article 227 of the Constitution of India and not under original writ jurisdiction under Article 226 of the Constitution of India.

08. Certain facts attract attention of this Court :-

This writ petition was filed on 26.09.2011 and it is pending since then, i.e., since more than 11 years now. All this while, this legal point was neither raised nor realized that this writ petitions seeks to invoke powers under Article 226 instead of Article 227 Constitution of India . This is settled law that non-mentioning or wrong mentioning of provisions of law should not come in the path of granting appropriate relief, if the litigant otherwise is entitled for the same. In my view, an ordinary litigant cannot be expected of having too minute knowledge of provisions of law. This question has always been troubling my judicial conscience that what a common man or ordinary litigant has to do with the provision of law under which he may be entitled for relief. This should be the concern of the Court of law or Court of justice or his counsel/advocate. Where no other deterrent except non mentioning or wrong mentioning of law poses a hurdle in the winding path to justice, the judge ought to play its expected role. The Judge or the Court shall be failing in its duty towards an ordinary man/litigant by not looking for solutions and dismissing the writ on technical ground. In this view of the matter,

I find it fit to treat this petition as one moved under Article 227 of the Constitution of India.

9. Quite a number of arguments have been placed before me touching upon the merits of this matter including the one that in this case, there is a clear attempt to drag the petitioner in a criminal case, whereas the dispute, if any, is essentially civil in nature. Considering the settled law that even while exercising powers under Article 227 of the Constitution of India, the Courts are not permitted to go deep into the matter and test the arguments advanced by the parties on the anvil of evidence or decide disputed questions of fact, I, therefore refrain from interfering in the order passed by the revisional court in a second round of litigation between the parties. At the same time, I find it irresistible to mention that there are certain contentions which may have some substance as far as merits of the matter are concerned and which could have been seen by the trial court as well as by the revisional court. Hence, I find it fit to dispose of this writ petition in the manner as below:-

(I) The prayer for issuance of writ of certiorari is hereby refused.

(II) In case, the petitioners appear before the court concerned and apply for bail within a month from today, their bail application shall be considered and disposed of as expeditiously as possible without granting any unnecessary adjournment to either sides.

(III) In case, during the course of proceedings before the court concerned at appropriate stage the petitioners apply for their discharge by moving a suitable application under the provisions of section-245(1) or 245(2) Cr.P.C. as the case may be, the same shall be decided by the

concerned Magistrate/Court by passing a reasoned and speaking order.

10 . Accordingly this writ petition is disposed of.

(2023) 7 ILRA 543

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 01.05.2023

BEFORE

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

First Appeal from Order No. 165 of 2006

Arun Kumar Dwivedi & Anr. ...Appellants
Versus
Sri Bharat Bhushan Khanna & Anr.
...Respondents

Counsel for the Appellants:

Sri Arun Kumar Mishra, Sri Vidya Kant Shukla

Counsel for the Respondents:

Sri Saurabh Srivastava

A. Civil Law - Motor Vehicles Act, 1988- Sections 173- enhancement of compensation-deceased was a son of the claimants/parents- He was the student of Class 11th-Annual income of the deceased is considered to be Rs. 60,000/- 50% added towards future prospects as per Rules 220-A(3) of 1998-Hence , total compensation granted Rs. 9,20,000/- @ 7%.(Para 1 to 33)

B. 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.(Para 31)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Saroj Devi & ors. Vs Royal Sundaram Alliance Ins. Co. Ltd. & anr. (2016) 2 TAC 281 All..
2. V. Mekala Vs M. Malathi & Anr. (2014) 11 SCC 178
3. M.R. Krishna Murthi Vs New India Assur. Co. Ltd & ors. (2020) 15 SCC 493
4. Gopalpuri Jai Prakash & ors. Vs The Managing Dir, APSRTC & ors., MACMA. No. 694 of 2011
5. Meena Pawaia & ors. Vs Ashraf Ali & ors. (2021) SCC OnLine SC 1083
6. Gyan Chand Jain & ors. Vs Permanand & ors. (2003) 1 TAC 490
7. Sarla Verma(Smt.) & ors. Vs DTC (2009) 6 SCC 121
8. `Magma General Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors. (2018) 18 SCC 130
9. National Ins. Co. Vs Pranay Sethi & ors. (2017) 16 SCC 680
10. New India Assur. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC OnLine SC 822
11. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd & ors. (2017) 35 LCD 1311
12. P.O. Meera & anr..Vs Ananda P. Naik & ors. (2022) SCC OnLine Ker 546
13. Branch Manager, Future General India Ins. Co. Ltd. Bengaluru Vs Varsha S.L. (2019) SCC OnLine Kar 3498
14. Shashikala & ors. Vs Ganga-lakshammamma & anr.. (2015) 9 SCC 150

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

This is a claimants appeal arising out of a judgment and award passed by the learned District Judge/ Motor Accident

Claims Tribunal, Kanpur Nagar dated 29.08.2005 passed in M.A.C.P. No. 103 of 2005, seeking enhancement of the compensation awarded.

2. The claimants-appellants are the claimant-petitioners of M.A.C.P. No. 103 of 2005 instituted before the Tribunal seeking compensation on account of the death of their son in a motor accident. The claimants-appellants are the father and mother of the deceased and shall hereinafter be referred to as the “claimants.”

3. The claimants’ case briefly put is this:

Mohit Dwivedi was a student of Class XI at Woodbine Gardenia School, situate at G.T. Road, Kalyanpur, Kanpur Nagar. On November, the 9th, 2004, after attending school, he was proceeding to attend his coaching classes near Gurudev Palace, Kakadev by a Scooter, bearing Registration No. UP-78AM-9142. The aforesaid scooter was owned by the deceased’s father, Arun Kumar Dwivedi, one of the claimants. At about 01:45 in the afternoon as Mohit reached a place facing Dalhan Anusandhan Railway Crossing, a truck bearing Registration No. UP-70L-9527 moving from the opposite direction, swerved to the wrong side of the road and hit Mohit’s scooter. As a result of the impact, Mohit was thrown down from the scooter and sustained grievous injuries. The scooter was also damaged. A multitude of persons gathered at the site of the accident and the offending truck was apprehended on the spot. Some of those men conveyed Mohit to the hospital but he passed away in transit. He was the claimants’ elder son and very intelligent. He was reading to write his competitive test for admission to the

Bachelor of Engineering course. He would attend coaching class after school hours for the said purpose. Besides studies, Mohit would take part in extracurricular activities. The deceased would have gone on to become an Engineer and earn an approximate sum of Rs 50,000/- per month but for his untimely demise. The claimants say that they have been deprived of his services and financial help in their old days. They have suffered physical and mental agony, which cannot be compensated in monetary terms. At the time of his demise, the deceased was aged about 19 years. His monthly income was Rs. 25,000/-. An FIR about the incident was lodged at P.S. Kalyanpur, leading to registration of Crime No. 692 of 2004, under Sections 279, 304-A and 302 IPC against Ram Magan, the truck driver on 09.11.2004 at 04:00 p.m.

4. The claimants prayed that a sum of Rs. 32,76,000/- along with interest @ 18% per annum be awarded to them in compensation.

5. One Bharat Bhushan Khanna is the owner of the offending vehicle. He was impleaded as opposite party no. 1 to the claim petition. Before us he is impleaded as respondent no. 1 to the appeal. The truck owner shall hereinafter be called as the ‘owner’. The New India Assurance Company Limited through its Regional Officer, Kanpur Nagar are the insurers of the offending truck. They were impleaded as opposite party no. 2 to the claim petition and respondent no. 2 to this appeal. The aforesaid Insurance Company shall hereinafter be called as the ‘Insurers’.

6. A written statement was filed on behalf of the owner. He has admitted being the registered owner of the offending truck.

He has pleaded that the offending truck was insured with the Insurers from 04.04.2004 to 03.04.2005. According to the owner, the accident did not take place on account of rash and negligent driving by the truck driver. The driver of the truck held a valid driving license. He was an experienced driver. The accident was caused due to the negligence of the deceased. A plea has been raised that the registered owner of the scooter and its Insurer have not been impleaded as parties to the claim petition, rendering it bad for non-joinder of the necessary parties. The compensation claimed is excessive. It is pleaded that if the owner be found liable, the burden would go to the Insurers. The Insurers have filed a separate written statement and generally denied the claimants' case. According to the Insurers, the factum of the accident and the involvement of the offending truck therein is denied. They have pleaded that no accident was caused by the offending truck in the manner alleged by the claimants. There is in the alternative a plea to the effect that the accident, if any, was caused due to the deceased's negligence. The driver of the offending truck was not holding a valid and effective license on the date of the accident.

7. There is a plea on behalf of the Insurers that Mohit Dwivedi was a minor and did not hold a driving license on the date of the accident.. The accident took place involving the offending truck and the ill-fated scooter but the Owner and the Insurer of the scooter have not been impleaded as opposite-parties to the claim-petition. The Insurers also pleaded that they do not admit the insurance policy claimed by the owner due to want of particulars. The amount of

compensation claimed is castigated as excessive. The Insurers say that the claim petition deserved to be rejected.

8. On the pleadings of parties, the Tribunal framed the following issues:

“1. Whether the accident took place on 9.11.04 at about 1.45 AM (sic PM) on the G.T.Road, in front of DALHAN ANUSANDHAN Railway Crossing, within the local limits of P.S. Kalyanpur, Kanpur-Nagar, due to rash and negligent driving of Truck No. UP-70L-9527 by its driver, as alleged in the petition? If so, whether the death of Sri Mohit Dwivedi has been caused, as a result of the said accident?

2. Whether the accident in question took place due to rash and negligent driving of Scooter No. UP-78AM-9142 by the deceased himself?

3. Whether the driver of the truck in question was not holding a valid and effective driving licence on the date of accident?

4. Whether the petitioners are entitled to get any compensation? If so, from whom and to what extent?

5. To what relief, if any, is the petitioners entitled?”

9. The claimants examined in support of their case, Arun Kumar Dwivedi as PW-1 and Ritesh Kumar as PW-2. Documentary evidence was also produced which will be discussed during the course of judgment as much as is relevant to the issue involved in this appeal. The Insurers did not produce any evidence and against the owner, the claim proceeded ex parte before the Tribunal.

10. Issues nos. 1 and 2 that pertain to negligence and contributory negligence were taken up together by the Tribunal

holding that the accident was caused due to rash and negligent driving of the truck driver and Mohit's death was caused on account of injuries sustained in consequence of the said accident. It was further held that the accident did not happen due to rash and negligent driving by the deceased. Thus, the case of contributory negligence was negated by the Tribunal.

11. Issue no. 3 was answered in the affirmative holding that the driver of the offending truck held a valid and effective driving license on the date of accident. Issue nos. 4 and 5 which are overlapping were decided holding that claimants are entitled to compensation in the sum of Rs. 1,54,500/-, which the Insurers are liable to indemnify. The claim petition was, accordingly, allowed with 7% interest per annum on the compensation awarded, reckoned from the date of institution of the claim petition, until realization. There is a further direction in the award impugned made by the Tribunal, directing apportionment of compensation payable to the extent of 50% each between the two claimants.

12. Heard Mr. Vidya Kant Shukla, learned Counsel for the claimants and Mr. Saurabh Srivastava, learned counsel for the Insurers. No one appeared for the owner.

13. It must be noticed at the outset that no cross appeal or cross objection has been preferred, either on behalf of the Insurers or the owner. As such, there is no cause or occasion for this Court to examine the findings of the Tribunal recorded on Issues Nos. 1, 2 and 3. Those must be held to have attained finality inter partes.

14. This appeal has been pressed on behalf of the claimants, seeking

enhancement of the compensation awarded. While returning findings on Issue No. 4, the Tribunal has taken note of the fact that the deceased was a promising student, reading in Class XI at Woodbine Gardenia School, Kalyanpur at the time of his untimely demise. He was also preparing to write his entrance examination for admission to the undergraduate engineering course. The Tribunal has remarked that the life and career of a person is fraught with uncertainties. According to the Tribunal in due course after earning his degrees, the deceased may have established himself in life and gone on to help the claimants in the future. The Tribunal has then said that since the deceased had no income, his notional income shall be deemed to be 15000/- per annum. To this a multiplier of 15 has been applied and a deduction of 1/3rd made towards personal and living expenses. It is on the foot of the aforesaid parameters that a substantive dependency of Rs. 1,50,000/- has been determined by the Tribunal. In addition, a sum of Rs. 2000/- has been awarded towards funeral expenses, Rs. 2000/- towards loss of estate and general damages. It is in this manner that a total of sum of Rs. 1,54,000/- has been assessed to be the compensation payable by the owner and Insurers, with obligation on the Insurers to satisfy the award.

15. Learned Counsel for the claimants has criticized the Tribunal's approach in assessing the compensation based on a very conservative notional income for the deceased. It is also argued that the Tribunal ought to have awarded future prospects which ought to be awarded even in those cases that proceed on the foot of a notional income. Learned counsel for the claimants has placed reliance in support of his contention upon a Bench decision of this Court in **Saroj Devi and others v. Royal**

Sundaram Alliance Insurance Co. Ltd. and Another, 2016 (2) TAC (281)(All.). In **Saroj Devi (supra)**, it was held that the notional income could not be less than Rs. 3000/- per month and future prospects would have to be added to the extent of 50%.

16. Learned Counsel for the Insurers has supported the impugned judgment and submitted that in the absence of an income in presenti, there cannot be an award of future prospects based on conjecture about a student's prospective income. It must be remarked here that students in the middle class Indian society are looked upon with suspicion about their future productivity, even if it be almost certain from their current progression that they would have a rewarding career. Also, there is distinct concept in middle class Indian society about being a 'mere student'. A student is not a class by itself and a man could be productive at any stage of his life. The new world has opened up vistas of opportunity for the youngsters to actually earn, while they study, doing both serious work and entertainment business, equally rewarding. Sadly, the pedantic outlook about being a student and then a productive man at a certain age of the human life with the certain and dependable productivity being inferred for Government servants alone paid out of the State exchequer is a lingering legacy of a colonial past and a different world. Keeping aside the idea of a new world of opportunities and the actually productive young men, who earn while they study, because there is no evidence about that in this case, we think that the notional income of Rs. 15,000/- a year for a student of Class XI, aged about 19 years, is a very pessimistic assessment about the young man's income-even notional.

17. In **V. Mekala v. M. Malathi and another, (2014) 11 SCC 178**, which was a

case about a claim for compensation in an injury case of a 16 years old girl, who was a promising student of Class XI and left 70% permanently disabled by the accident, it was held by their Lordships of the Supreme Court, thus:

"17. Further, having regard to the undisputed fact that there has been inflation of money in the country since the occurrence of the accident, the same has to be taken into account by the Tribunal and appellate court while awarding compensation to the appellant claimant as per the principle laid down by this Court in *Govind Yadav* [*Govind Yadav v. New India Insurance Co. Ltd.*, (2011) 10 SCC 683 : (2012) 3 SCC (Civ) 1082 : (2012) 1 SCC (Cri) 82 : (2012) 1 SCC (L&S) 422] which has reiterated the position of *Reshma Kumari v. Madan Mohan* [*Reshma Kumari v. Madan Mohan*, (2009) 13 SCC 422 : (2009) 5 SCC (Civ) 143 : (2010) 1 SCC (Cri) 1044] , the relevant paragraph of which reads as under: (*Reshma Kumari case* [*Reshma Kumari v. Madan Mohan*, (2009) 13 SCC 422 : (2009) 5 SCC (Civ) 143 : (2010) 1 SCC (Cri) 1044] , SCC pp. 440-41, para 46)

"46. In the Indian context several other factors should be taken into consideration including education of the dependants and the nature of job. In the wake of changed societal conditions and global scenario, future prospects may have to be taken into consideration not only having regard to the status of the employee, his educational qualification; his past performance but also other relevant factors, namely, the higher salaries and perks which are being offered by the private companies these days. In fact while determining the multiplicand this Court in *Oriental Insurance Co. Ltd. v. Jashuben* [(2008) 4 SCC 162 : (2008) 2 SCC (Cri) 752] held that even dearness

allowance and perks with regard thereto from which the family would have derived monthly benefit, must be taken into consideration.”

18. The fact that the appellant was a brilliant student at the time of the accident should also be taken into consideration while awarding compensation to her. Therefore, taking Rs 6000 as monthly notional income by the Tribunal for the purpose of awarding compensation under this head is too meagre an amount. The learned counsel appearing for Respondent 2 contended that the appellant can still finish her education and find employment and therefore, there is no necessity to enhance the amount of compensation under the head of “loss of income” and “future prospects”. It is pertinent to reiterate here that the appellant claimant has undergone and is still undergoing substantial pain and suffering due to the accident which has rendered both her legs dysfunctional. This has reduced the scope of her future prospects including her marriage substantially. Moreover, a tortfeasor is not entitled to dictate the terms of the appellant claimant's career as has been held by the Karnataka High Court in *K. Narasimha Murthy v. Oriental Insurance Co. Ltd.* [ILR 2004 KAR 2471], the relevant paragraph of which reads as under: (ILR pp. 2490-91, para 41)

“41. ... Further, it needs to be emphasised that it is not the right of the tortfeasor or a person who has taken over the liability of the tortfeasor in terms of and under the Act to dictate that the injured person should do some other work, manual or otherwise, it does not matter, may be with pain and discomfort, in order to minimise his or its liability. Such insistence is untenable in law and if such is the case, it would violate basic human rights of the injured person. In this case, the appellant is

reduced to such a state that he is unable to do any work, manual or otherwise, without subjecting himself to pain and suffering, agony and discomfort. In an accident, if a man is disabled for a work which he was doing before the accident, that he has no talents, skill, experience or training for anything else and he is unable to find any work, manual or clerical, such a man for all practical purposes has lost all earning capacity he possessed before and he is required to be compensated on the basis of total loss. In reaching this conclusion we may derive support from the judgments in *Daniels v. Sir Robert McAlpine and Sons Ltd.* [(1971) 11 KIR 141] and *Blair v. FJC Lilley (Marine) Ltd.* [1981 SLT 90] Secondly, the physical incapacity to earn income sustained by the appellant is not temporary, but permanent and complete as per Ext. P-43. Thirdly, it cannot be said that since the appellant has sustained only 54% permanent physical disability in respect of the whole body as per PW 3, the court should take into account functional disability also at 54% only while assessing the loss of earning capacity. Such hypothesis does not stand to reason nor can it be accepted as valid in terms of law. An injured person is compensated for the loss which he incurs as a result of physical injury and not for physical injury itself. In other words, compensation is given only for what is lost due to accident in terms of an equivalent in money insofar as the nature of money admits for the loss sustained. In an accident, if a person loses a limb or eye or sustains an injury, the court while computing damages for the loss of organs or physical injury, does not value a limb or eye in isolation, but only values totality of the harm which the loss has entailed the loss of amenities of life and infliction of pain and suffering: the loss of

the good things of life, joys of life and the positive infliction of pain and distress.”

19. Further, it has been held in Reshma Kumari [Reshma Kumari v. Madan Mohan, (2009) 13 SCC 422 : (2009) 5 SCC (Civ) 143 : (2010) 1 SCC (Cri) 1044] that certain relevant factors should be taken into consideration while awarding compensation under the head of future prospect of income. The relevant paragraph reads as under: (SCC pp. 431-32, para 27)

“27. The question as to the methodology required to be applied for determination of compensation as regards prospective loss of future earnings, however, as far as possible should be based on certain principles. A person may have a bright future prospect; he might have become eligible to promotion immediately; there might have been chances of an immediate pay revision, whereas in another (sic situation) the nature of employment was such that he might not have continued in service; his chance of promotion, having regard to the nature of employment may be distant or remote. It is, therefore, difficult for any court to lay down rigid tests which should be applied in all situations. There are divergent views. In some cases it has been suggested that some sort of hypotheses or guesswork may be inevitable. That may be so.”

20. Therefore, in the light of the principles laid down in the aforesaid case, it would be just and proper for this Court, and keeping in mind her past results we take Rs 10,000 as her monthly notional income for computation of just and reasonable compensation under the head of loss of income. Further, the High Court has failed to take into consideration the future prospects of income based on the principles laid down by this Court in the catena of cases referred to supra. Therefore, the appellant is justified in seeking for re-

enhancement under this head as well and we hold that the appellant claimant is entitled to 50% increase under this head as per the principle laid down by this Court in 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] . The relevant paragraph reads as under: (SCC pp. 426-27, para 13)

“13. In Sarla Verma case [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] , another two-Judge Bench considered various factors relevant for determining the compensation payable in cases involving motor accidents, noticed apparent divergence in the views expressed by this Court in different cases, referred to large number of precedents including the judgments in U.P. SRTC v. Trilok Chandra [(1996) 4 SCC 362] , Nance v. British Columbia Electric Railway Co. Ltd. [1951 AC 601 : (1951) 2 All ER 448 (PC)] , Davies v. Powell Duffryn Associated Collieries Ltd. (No. 2) [1942 AC 601 : (1942) 1 All ER 657 (HL)] and made an attempt to limit the exercise of discretion by the Tribunals and the High Courts in the matter of award of compensation by laying down a straitjacket formula under different headings, some of which are enumerated below: (Sarla Verma case [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] , SCC pp. 133-34, para 24)

‘Question (i)—Addition to income for future prospects

24. In Susamma Thomas [Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176 : 1994 SCC (Cri) 335] this Court increased the income by nearly 100%, in Sarla Dixit [Sarla Dixit v. Balwant Yadav, (1996) 3 SCC 179] the income was

increased only by 50% and in *Abati Bezbaruah* [*Abati Bezbaruah v. Geological Survey of India*, (2003) 3 SCC 148 : 2003 SCC (Cri) 746] the income was increased by a mere 7%. In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. (Where the annual income is in the taxable range, the words “actual salary” should be read as “actual salary less tax”.) The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of the deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardise the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments, etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances.”

Therefore, taking both the aspects into account, the total amount of compensation under this head is calculated as Rs 22,68,000 [(Rs 10,000 × 70/100 + Rs 10,000 × 70/100 × 50/100) × 12 × 18]”

18. The principles regarding assessment of compensation in case of persons, who do not have an income in present, but are students, was considered by the Supreme Court in **M.R. Krishna Murthi v. New India Assurance Company Limited and others**, (2020) 15 SCC 493, where it was held:

“24. From the conjoint reading of the aforesaid judgments, inter alia, the following principles can be culled out which would be relevant for deciding the instant appeal:

24.1. In those cases where the victim of the accident is not an earning person but a student, while assessing the compensation for loss of future earning, the focus of the examination would be the career prospect and the likely earning of such a person in future. For example, where the claimant is pursuing a particular professional course, the poser would be: what would have been his income had he joined a service commensurating with the said course. That can be the future earning.

24.2. There may be cases where the victim is not, at that stage, doing any such course to get a particular job. He or she may be studying in a school. In such a case, future career would depend upon multiple factors like the family background, choice/interest of the complainant to pursue a particular career, facilities available to him/her for adopting such a career, the favourable surrounding circumstances to see which would have enabled the claimant to successfully pick up the said career, etc. If the chosen field is employment, then the future earning can be taken on the basis of salary and allowances which are payable for such calling. In case, career is a particular profession, the future earning would depend on host of other factors on the basis of which chances to achieve success in such a profession can be ascertained.

24.3. There may be cases like *Deo Patodi* [*Oriental Insurance Co. Ltd. v. Deo Patodi*, (2009) 13 SCC 123 : (2009) 5 SCC (Civ) 29 : (2010) 1 SCC (Cri) 963] where even a student, the claimant would have made earnings on part-time basis or would have received offer for a particular job. In

such cases, these factors would also assume relevance.

24.4. After ascertaining the likely earning of the victim in the aforesaid manner, the nature of injuries and disability suffered as a result thereof would be kept in mind while determining as to how much earning has been affected thereby. Here, impact of injuries on functional disability is to be seen. In case of death of victim, it would result in total loss of earning. In the case of injuries, the nature of disability becomes important. Such an exercise was undertaken in N. Manjegowda case [N. Manjegowda v. United India Insurance Co. Ltd., (2014) 3 SCC 584 : (2014) 2 SCC (Civ) 297 : (2014) 4 SCC (Cri) 634].”

19. In **Gopalpuri Jai Prakash and others v. The Managing Director, APSRTC and others, MACMA. No. 694 of 2011, decided on 08.09.2022**, the Telangana High Court considered the income of a student studying in the intermediate course for the purpose of award of compensation to his legal representatives. The student in that case had died in a motor accident on 21.10.2006. While considering the question of income of student in Gopalpuri Jai Prakash (supra), it was observed:

“9. The petitioners stated that by the date of the accident Prakash/deceased was aged 18 years and was brilliant student studying intermediate. Further by giving tuitions, he used to earn Rs. 6,000/- per month.

10. Out of the documents filed by the petitioners, the driving licence/Ex. A-5, S.S.C. certificate/Ex. A-7 and passport/Ex. A-10 are reflecting that the date of birth of Prakash/deceased is 09.10.1989. Thus, the age of Prakash/deceased by the date of the accident is 18 years. With regard to income

though the petitioners placed the evidence of PW-2 to support the claim that the deceased was giving tuitions, the material particulars as to how many students and the fees per student were missing. However, having regard to the pleaded academic record in Ex. A-7, A-8 and A-9 a monthly income of Rs. 5,000/- can safely be taken on notional basis.”

20. Though **Gopalpuri Jai Prakash** was a case where it was asserted that the deceased had an actual income earned out of providing private tuitions, but the Court assessed his income on a notional basis at a figure of Rs.5000/- considering his academic record. Here, the deceased was a student of Class XI. This Court finds on a perusal of his mark-sheets for the High School Examination, 2004 conducted by the Central Board of Secondary Education dated 28.05.2004 that the deceased had averaged between C and D Grade, also earning a B, but nevertheless was a student of a good school, affiliated to the Central Board of Secondary Education. He had interest in extracurricular activities and there are certificates on record of his participation in these activities.

21. PW-1, the deceased's father Arun Kumar Dwivedi has said in his examination-in-chief that his son was reading in Class-XI in the Woodbine Gardenia School, Kanpur and was taking a foundation course to upgrade his skills in writing his Engineering Entrance Examination. In his examination-in-chief, it is further said that his son had read from Nursery to Class X in the Sir Padampat Singhania Education Centre, Kanpur, U.P., affiliated to the CBSE. The witness has also stated that after passing his Engineering Examination, his son wanted to join the NDA. Considering the totality of evidence,

it must be remarked that the deceased was a student, reading in a good institution at the intermediate level. Going by the guidelines in Paragraph No.24.2 of the report in **M.R. Krishna Murthi** (*supra*), it must be remarked that the deceased had an inclination to seek admission to an Engineering Course and aspired to join the NDA. The fact that he had passed his High School from a good institution and was pursuing his studies to earn his Intermediate Examination Certificate also from a good institution, both affiliated to the Central Board of Secondary Education, besides the fact that his family were spending money, providing him auxiliary coaching to upgrade his skills for the purpose of writing his competitive examination for selection to the Engineering Course, all go to show that he had good prospects of being selected in an Engineering Course and securing a rewarding job for himself. The mere fact that the deceased's High School Certificate does not carry very high grades is not an index about his future performance. The schools where he was studying and the fact that his family were funding his education in a good school, are dependable factors to infer a good future for the deceased in terms of his productivity.

22. In the opinion of this Court, bearing in mind the guidance on high authority regarding assessment to be made about the income of students on a notional basis and the circumstances of the deceased, the time when the accident happened, that is to say, the year 2004, when an unskilled daily-wagers would be earning about Rs.3000/- per month, it would be fair to find for the deceased a notional income of Rs.5000/- per month.

23. The monthly income of the deceased being Rs.5000/-, the annual income would work out to a figure of

Rs.60,000/-. The deceased was bachelor and the claimants are his parents. Going by the principle with regard to deductions for personal and living expenses relating to bachelors laid down in **Sarla Verma (Smt) v. Delhi Transport Corporation and another, (2009) 6 SCC 121**, a 50% deduction is to be made from the deceased's income. The deceased was aged 19 years and going by the Table in Paragraph No.40 of the report in **Sarla Verma** (*supra*), the applicable multiplier would be that set out for the age bracket of 15-20 years. It is '18'.

24. The Tribunal has directed a deduction of one-third towards personal and living expenses and adopted a multiplier of '15', going by the age of the parents, that was 44 years for the father and 43 for the mother. The settled principles in **Sarla Verma** and subsequent authorities would indicate that the Tribunal was in error on both counts. The appropriate deduction to be made towards personal and living expenses, has already been indicated and so also the multiplier, which has to be '18'; not '15'.

25. Nothing has been awarded by the Tribunal towards the future prospects of the deceased. In view of the decision of the Supreme Court in **National Insurance Company v. Pranay Sethi and others (2017) 16 SCC 680**, the benefit of future prospects have been extended to the self-employed and those working on a fixed salary, but here the deceased was neither self-employed nor a person working on a fixed salary. He was a young boy with a future to look to and, therefore, his income has been assessed notionally. The question is whether in the case of notional income, future prospects are to be granted as well. This question fell for consideration of the Supreme Court in **Meena Pawaia and**

others v. Ashraf Ali and Others, 2021 SCC OnLine SC 1083. The question and the holding figure in Paragraph Nos.11 and 13 of the report of their Lordships' decision in **Meena Pawaia** (*supra*), where it has been observed:

“11. The next question which is posed for the consideration before this court is whether anything further is required to be added towards the future rise in income? It is submitted that on behalf of the Union of India that as the deceased was not serving and earning at the time of accident/death nothing further is to be added towards the future prospect/future rise in income. The aforesaid cannot be accepted.

13. We see no reason why the aforesaid principle may not be applied, which apply to the salaried person and/or deceased self employed and/or a fixed salaried deceased, to the deceased who was not serving and/or was not having any income at the time of accident/death. In case of a deceased, who was not earning and/or not doing any job and/or self employed at the time of accident/death, as observed herein above his income is to be determined on the guesswork looking to the circumstances narrated hereinabove. Once such an amount is arrived at he shall be entitled to the addition over the future prospect/future rise in income. It cannot be disputed that the rise in cost of living would also affect such a person. As observed by this court in the case of Pranay Sethi (*Supra*), 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 Motor Vehicles Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment and/or in case of a deceased who

was on a fixed salary and/or self employed would only get the benefit of future prospects and the legal representatives of the deceased who was not serving at the relevant time as he died at a young age and was studying, could not be entitled to the benefit of the future prospects for the purpose of computation of compensation would be inapposite. Because the price rise does affect them also and there is always an incessant effort to enhance one's income for sustenance. It is not expected that the deceased who was not serving at all, his income is likely to remain static and his income would remain stagnant. As observed in Pranay Sethi (*Supra*) 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. Therefore we are of the opinion that even in case of a deceased who was not serving at the time of death and had no income at the time of death, their legal heirs shall also be entitled to future prospects by adding future rise in income as held by this court in the case of Pranay Sethi (*supra*) i.e. addition of 40% of the income determined on guesswork considering the educational qualification, family background etc., where the deceased was below the age of 40 years.”

(emphasis by Court)

26. Given the principle that future prospects are to be added to the deceased's income even in a case where it is notional on account of the deceased being a non-earning member at the time of his demise. The question that still falls for consideration is if in the State of Uttar Pradesh, the future prospects ought to be governed by the principle in Pranay Sethi or Rule 220-A(3) of the U.P. Motor

Vehicles Rules, 1998 (for short the 'Rules of 1998'). The issue was answered by the Supreme Court in the context of future prospects, generally to be awarded in the State of Uttar Pradesh, in **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822**, where it has been 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 Sethi* cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in *Pranay Sethi* cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and

dismiss this appeal without any order as to costs."

27. To the understanding of this Court, there is no reason to limit the rule in **Urmila Shukla (supra)** to cases where future prospects are awarded in case of salaried persons, those self-employed, or still more, the ones working on a fixed salary, once future prospects have been held payable in case of those credited with a notional income. There is no rational cause or reason not to extend the principle in **Urmila Shukla** to such cases. In this Court's opinion, therefore, future prospects in the State of Uttar Pradesh have to be calculated according to Rule 220-A(3) of the Rules of 1998 in a case where the income has been assessed notionally for a non-earning deceased, who is a student.

28. The next issue which arises for consideration is whether the Rules of 1998, that were enforced in the year 2011 vide Notification No. 777/XXX4-2011-4(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 before the amendment. This question was answered 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 take 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."

29. Nothing has been pointed out to this Court that the law laid down by the Division Bench in **Sushil Kumar (supra)**, which is otherwise binding on this Court, has been overruled by a Larger Bench or the Supreme Court. The deceased was aged 19 years and, therefore, much less than 40 years. The future prospects, which the claimants are entitled to add to the deceased's notional income, going by Rule 220-A(3) of Rules, would be 50%. It is held, accordingly.

30. The next issue that arises for consideration is the entitlement of the deceased under the conventional heads. This question was again the subject matter of the consideration in **Pranay Sethi**, 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 seems 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)

31. The issue of award of compensation for the loss of consortium came up before the Supreme Court in **Magma General Insurance Company Ltd. v. Nanu Ram alias Chuhru Ram and others**, (2018) 18 SCC 130, where it was observed:

“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)

32. In view of the aforesaid conclusion, the compensation payable to the claimants in this appeal are revised and would have to be determined in the following manner:

- (i) Monthly Income (of **5000** the deceased) =
- (ii) Annual Income (of the **60000** deceased) = 5000×12 =
- (iii) Annual **90000** Income+Future Prospects (annual income x 50%) = $60000 + 30000$ =
- (iv) Annual Dependency = **45000**
Annual Income – 50% deduction towards personal expenses of the deceased = $90000 - 45000$ =
- (v) Total Dependency = **810000**
Annual Dependency x Applied Multiplier = 45000×18 =
- (vi) Claimant's entitlement **110000** towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium
= $15000 + 15000 + 40000 \times 2$ =

The total compensation **920000** would therefore, work out to a figure of **Rs.810000+Rs.110000** =

33. 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.9,20,000/-**. 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 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. The other directions of the Tribunal carried in the impugned award shall remain intact. Costs easy.

(2023) 7 ILRA 558
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.07.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No.1981 of 2023

Gayatri Prasad Prajapati ...Applicant
Versus
Directorate Of Enforcement Thru.
Representative Asstt. Director Lko.
...Opposite Party

Counsel for the Applicant:

Sri Indu Prakash Singh, Sri Salil Shekhar Singh

Counsel for the Opposite Party:

Sri Kuldeep Srivastava

Criminal Law - Criminal Procedure Code, 1973 - Sections 227, 228, 173, 300 & 482 – Prevention of Corruption Act, 1988 – Sections 13(1)(b) & 13(2) – Prevention of Money Laundering act, 2002 - Sections 3, 4 & 50: - Application – against rejection of Discharge Application as well as against the proceedings initiated under PMLA Act, - The applicant has committed the offence of money laundering by amassing unexplained and unaccounted properties in the name of his family members and related companies – plea of double jeopardy – court finds that, there appears to be no illegality in the order passed by the trial court rejecting the application for discharge and framing charges against him – held, there is no averment regarding earlier complaints had been closed after a full-fledged enquiry and summary closure of complaint or

withdrawal thereof without any finding of innocence would be of no consequence - it would also not amount to double jeopardy and Principle of res-judicate does not apply to the proceedings before the Hon'ble Lokayukta – whereas the Hon'ble Lokayukta is not a 'court' within the meaning of the expression used in Section 300 of Cr.P.C. - for attracting the principle of double jeopardy, the person must have been tried by a 'court of competent jurisdiction' and convicted or acquitted of such offence – hence, there appears to be no illegality in the order passed by the trial court rejecting the discharge application and framing charges against the applicant – application lacks merit – accordingly, rejected. (Para –28, 29, 30, 31)

Application u/s 482 dismissed. (E-11)

List of Cases cited:

1. Amit kappor Vs Ramesh Chander (2012 9 SCC 460),
2. Vijay Madanlal Chaudhary & ors.Vs U.O.I. (2022 SCC online SC 929),
3. St. of Mah.Vs Som Nath Thapa (1996 4 SCC 659),
4. Nikesh Tarachand Shah Vs U.O.I. (2018 11 SCC 1).

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

1. Heard Sri Malay Prasad, Ms. Saloni Mathur, Ms. Tanya Makkar, Sri Piyush Kumar Shukla and Sri. Kaustubh Singh Advocates for the applicant and Sri Kuldeep Srivastava, the learned counsel representing the respondent - Directorate of Enforcement (hereinafter referred to as 'E.D.').

2. By means of the instant application filed under Section 482 of the Criminal Procedure Code, the applicant has challenged validity of the order dated 22.12.2022 passed by the Sessions Judge / Special Judge, Prevention of Money Laundering Act,

Lucknow in Sessions Case No. 1220/2021, rejecting the application for discharge filed by the applicant. The applicant has also assailed another order passed in the aforesaid case on the same date framing charge of commission of offence under Section 3 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'PMLA') against the applicant.

3. Briefly stated, facts of the case are that on 26.11.2020, an Inspector in the U. P. Vigilance Establishment filed a First Information Report (F.I.R.) No. 0003 of 2020 under Sections 13 (2) and 13 (1) (b) of the Prevention of Corruption Act 1988, Police Station Lucknow Sector, Vigilance Establishment, against the applicant stating that by means of a Government order dated 08.06.2018, U. P. Vigilance Establishment was directed to conduct an open enquiry against the applicant, who was the then Minister for Mining in U. P. Government. It was found in enquiry that while working as a public servant, the applicant had earned ₹49,93,149/- from his known and valid sources of income, but he spent ₹3,48,21,760/- on acquisition of properties and maintenance during the same period. Thus the applicant spent ₹2,98,28,511/- in excess of his known income, which is disproportionate to his income from the known and valid sources. The applicant could not give any satisfactory reply regarding disproportionate expenditure and acquisition of properties. Besides this, there was prima facie evidence that the applicant had acquired benami properties also. The F.I.R. states that the aforesaid acts of the applicant amount to commission of offence under Section 13 (1) (b) of the Prevention of Corruption Act, 1988.

4. On 14.01.2022, the Directorate of Enforcement registered an Enforcement

Case Information Report (ECIR) bearing number ECIR/LKZO/04/2021 in furtherance of the aforesaid F.I.R. No. 0003 of 2020. It is recorded in the ECIR that from the averments made in the F.I.R., it appears that it is expedient to make inquiries against the applicant relating to illegal earnings, which are “proceeds of crime”, i.e., tainted money, earned out of criminal activities and on the basis of the aforesaid information, a prima facie case of commission an offence of money-laundering under Section 3 of the PMLA appears to have been made out.

5. The E.D. carried out investigation and on 08.04.2021, it filed a Complaint No. 94 of 2021 in the Special Court for Prevention of Money Laundering cases at Lucknow stating that the applicant has committed the offence of money-laundering and he is liable to be prosecuted and punished under Section 4 of the PMLA. It is inter-alia stated in the complaint that the relevant documents/evidences were collected from various authorities, including Banks, Registrar of Companies, District Registration Authorities etc. and those were examined. There is another case bearing number ECIR/LKZO/08/2019 in respect of illegal mining in District Fatehpur, Uttar Pradesh, which was lodged on the basis of C.B.I. F.I.R. number RC 04 (A)/2019/SC-III/ND, in which the applicant is one of the named accused persons. The documents collected during the course of investigation in the aforesaid ECIR and the statements recorded under Section 50 of PMLA and Section 17 of PMLA during searches conducted on 30.01.2020 have also been taken into consideration during investigation.

6. The complaint contains a list of 57 bank accounts, of which 7 are in the name of the applicant's wife, 6 are in the name of

his son Anil Kumar Prajapati, 6 are in the name of his other son Anurag Prajapati, 5 are in the name of the applicant's daughter Ankita Prajapati, 5 are in the name of his other daughter Sudha Prajapati, 14 are in the name of the applicant and rest of the accounts are in the name of some other persons and companies and a total of ₹ 3,50,17,045.48 is deposited in those bank accounts. The complaint also contains a list of 60 immovable properties worth ₹ 33,44,52,827/-, out of which 4 properties are in the name of the applicant's son Anurag Prajapati, 9 properties are in the name of his other son Anil Kumar Prajapati, 2 properties stand in the name of the applicant's wife, 2 are in the name of his daughter Sudha Prajapati, 1 property stands in the name of his other daughter Ankita and 1 property stands in the name of the applicant's daughter-in-law Shilpa and rest of the properties are in the names of some other persons and some companies, in which the applicant's sons are directors.

7. The complaint states that the applicant was examined during custodial remand and he was confronted with various documents and with two of his benami holders and his manager Hari Sharan Shukla. The statements of several persons were recorded under Section 50 of the PMLA and voluminous records/documents were scrutinised.

8. Both the applicant's daughters stated that they were students having no source of income and they had signed the tax related documents under directions of the applicant and after the applicant was taken into custody, on the directions of the applicant's son Anil Kumar Prajapati. The applicant's daughter-in-law stated that she is a housewife and she had signed the income tax documents showing income of

rupees 2.20 Crores, on the directions of her husband Anil Prajapati and she doesn't know about the source of income.

9. The applicant expressed ignorance about the source of money deposited in the bank accounts of himself and of his family members shown in the affidavit filed by him during 2017 elections and about the mode of payment of money for purchase of properties in his name and in the names of his family members.

10. The complaint states that the applicant became a member of the legislative assembly in the year 2012 and in the year 2013, he was appointed as Minister of State for Irrigation and later he was appointed as the Minister of State for Mining. The applicant remained a Minister till 2017 and on 15.03.2017, he was arrested in connection with a different F.I.R. registered by U. P. Police. During the period the applicant was a Minister, he misused his official position and unlawfully gained several Crores of Rupees in cash, which was deposited in the bank accounts of his family members, his employees and companies, in which his sons were directors. Investigation revealed that the applicant rose exponentially in wealth ever since he became a minister. The total income of the applicant during the period he was a Minister, was ₹ 72.38 lakhs whereas the assets standing in the name of the applicant, his family members and benami holders and of some companies in which the applicant's sons are directors, is ₹ 35 crores approximately. The applicant has committed the offence of money-laundering by amassing unexplained and unaccounted properties in the name of his family members and related companies.

11. The applicant filed an application for discharge under Section 227 of the Criminal Procedure Code, 1973 inter alia on the grounds that no charge-sheet has been filed in furtherance of the F.I.R. lodged by the vigilance establishment; that the allegations leveled in the complaint are false and there is no allegation and material which could associate the applicant with the offence alleged and establish his guilt even prima facie.

12. A supplementary affidavit was filed in support of the application for discharge wherein it was stated that as no police report has been filed in furtherance of the FI are No. 03/2020, trial of the case under PMLA should be postponed.

13. The application for discharge has been rejected by means of the order dated 22.12.2022 passed by the trial Court on the ground that as per the law laid down by the Hon'ble Supreme Court in Vijay Madanlal Choudhary and others versus Union of India, 2022 SCC OnLine SC 929, a person can be prosecuted under PMLA, if a case is registered with the jurisdictional police. The trial court has framed a charge against the applicant that while being a Minister during the period February 2013 to March 2017, the applicant generated unaccounted money to the tune of approximately ₹ 35 Crores, which was invested in bank accounts in the name of his family members and companies controlled by his sons and in several shell companies and was also used for purchasing properties in the name of his family members and benami holders, and the applicant has directly been involved in possession, acquisition and use of proceeds of crime and projecting the same as untainted, thereby committing offence under Section

3 of PMLA, Punishable under Section 4 of the Act.

14. The applicant has challenged both the aforesaid orders rejecting his discharge application and framing charge against him, by filing the application under Section 482, Cr.P.C. and in the affidavit filed in support of the application, he has inter alia stated that the alleged benami holders are not even known to the applicant and they are individuals operating on their own in their businesses; that the failure of Vigilance Establishment in filing a report under Section 173 of Cr.P.C. prima facie shows that the applicant has not committed any offence; that the allegations leveled against him are false and that the case has been registered due to political animosity. It has also been stated in the affidavit that multiple complaints had been filed before the Hon'ble Lokayukta against the applicant but all those complaints were either closed or were withdrawn by the complainants. Multiple fresh complaints were filed on the same set of facts and the Hon'ble Lokayukta passed an ex-parte order referring the matter to the Hon'ble Chief Minister of the State for carrying out vigilance enquiry against the applicant, which forms the basis for initiation of the present proceedings.

15. The respondent – Directorate of enforcement has filed a counter affidavit inter alia stating that the complaint was filed on the basis of investigation in respect of laundering of proceeds of crime acquired by the applicant during his tenure as a Minister. The properties identified as proceeds of crime in the hands of the applicant and other related persons have been provisionally attached by means of an order dated 07.04.2021 and further investigation in respect of further proceeds

of crime and culpability of other persons in the offence of money laundering is still in progress. It has further been stated in the counter affidavit that the condition precedent for filing a complaint alleging commission of offence of money laundering is that either there should be an F.I.R. or there should be a police report under Section 173 Cr.P.C. As there is a F.I.R. in the present case, the applicant can be tried for the commission of the offence of money laundering. No rejoinder affidavit has been filed on behalf of the applicant.

16. Assailing the aforesaid orders dated 22.12.2022, Shri Malay Prasad, the learned counsel for the applicant, has submitted that a person can be charged with commission of offence under the PMLA if he is involved, either directly or indirectly, in any process or activity connected with proceeds of crime and he projects or claims such proceeds of crime as untainted property. Although a F.I.R. No. 003/2020 was registered on 26.11.2020, no report under Section 173 of the Criminal Procedure Code has been submitted till date. He has submitted that a complaint under PMLA can be filed only after a charge-sheet has been submitted in furtherance of the F.I.R. in respect of the Scheduled offence because existence of 'proceeds of crime' can be established only after submission of charge-sheet in the case in respect of the Scheduled offence.

17. The second submission of Sri Malay Prasad is that projection of claim of the proceeds of crime is essential for making out an offence under Section 3 of the PMLA and there is no such allegation against the applicant in the present case. In support of the submission, the learned counsel for the applicant has placed reliance on the following passage from the

judgment of the Hon'ble Supreme Court in the case of **Nikesh Tarachand Shah versus Union of India, (2018) 11 SCC 1**:-

“11. Having heard the learned counsel for both sides, it is important to first understand what constitutes the offence of money laundering. Under Section 3 of the Act, the kind of persons responsible for money laundering is extremely wide. Words such as “whosoever”, “directly or indirectly” and “attempts to indulge” would show that all persons who are even remotely involved in this offence are sought to be roped in. An important ingredient of the offence is that these persons must be knowingly or actually involved in any process or activity connected with proceeds of crime and “proceeds of crime” is defined under the Act, by Section 2(1)(u) thereof, to mean any property derived or obtained directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence (which is referred to in our judgment as the predicate offence). Thus, whosoever is involved as aforesaid, in a process or activity connected with “proceeds of crime” as defined, which would include concealing, possessing, acquiring or using such property, would be guilty of the offence, provided such persons also project or claim such property as untainted property. Section 3, therefore, contains all the aforesaid ingredients, and before somebody can be adjudged as guilty under the said provision, the said person must not only be involved in any process or activity connected with proceeds of crime, but must also project or claim it as being untainted property.”

18. The learned counsel for the applicant has submitted in his written submissions that E.D. did not supply a copy

of the ECIR to the applicant before recording his statement under Section 50 of the Act.

19. Per contra, Sri. Kuldeep Srivastava, the learned Counsel for the E.D. has submitted that F.I.R. No. 003/2020 was registered against the applicant alleging commission of offence under Section 13 (2) read with Section 13 (1) (b) of the Prevention of Corruption Act, 1988, which are scheduled offences under the PMLA. The E.D. has conducted an investigation and has filed a complaint number 1220/2021 and the trial court has taken cognizance of the case on 06.09.2021 and has framed charge against the applicant on 22.12.2022. The learned counsel for the E.D. has submitted that there is no requirement under the PMLA to wait for submission of charge-sheet in respect of the scheduled offence before filing a complaint under the Act as offence under the PMLA is a separate and independent offence, distinct from the scheduled offence. He has further submitted that The trial is proceeding and 3 witnesses have already been examined. Shri Srivastava has also relied upon the judgment of the Hon'ble Supreme Court in the case of **Vijay Madanlal Choudhary (Supra)**.

20. In **Vijay Madanlal Choudhary and others versus Union of India, 2022 SCC OnLine SC 929**, the Hon'ble Supreme Court has discussed all the earlier judgments, including the judgment in the case of Nikesh Tarachand Shah, and has summarised its conclusions in paragraph 467 of the judgment, which is being reproduced here: -

“CONCLUSION

467. In light of the above analysis, we now proceed to summarise our conclusion on seminal points in issue in the following terms:—

(i) *The question as to whether some of the amendments to the Prevention of Money laundering Act, 2002 could not have been enacted by the Parliament by way of a Finance Act has not been examined in this judgment. The same is left open for being examined along with or after the decision of the Larger Bench (seven Judges) of this Court in the case of Rojer Mathew.*

(ii) *The expression “proceedings” occurring in Clause (na) of Section 2(1) of the 2002 Act is contextual and is required to be given expansive meaning to include inquiry procedure followed by the Authorities of ED, the Adjudicating Authority, and the Special Court.*

(iii) *The expression “investigation” in Clause (na) of Section 2(1) of the 2002 Act does not limit itself to the matter of investigation concerning the offence under the Act and is interchangeable with the function of “inquiry” to be undertaken by the Authorities under the Act.*

(iv) *The Explanation inserted to Clause (u) of Section 2(1) of the 2002 Act does not travel beyond the main provision predicated tracking and reaching upto the property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence.*

(v) (a) *Section 3 of the 2002 Act has a wider reach and captures every process and activity, direct or indirect, in dealing with the proceeds of crime and is not limited to the happening of the final act of integration of tainted property in the formal economy. The Explanation inserted to Section 3 by way of amendment of 2019*

does not expand the purport of Section 3 but is only clarificatory in nature. It clarifies the word “and” preceding the expression projecting or claiming as “or”; and being a clarificatory amendment, it would make no difference even if it is introduced by way of Finance Act or otherwise.

(b) *Independent of the above, we are clearly of the view that the expression “and” occurring in Section 3 has to be construed as “or”, to give full play to the said provision so as to include “every” process or activity indulged into by anyone. **Projecting or claiming the property as untainted property would constitute an offence of money laundering on its own, being an independent process or activity.***

(c) *The interpretation suggested by the petitioners, that only upon projecting or claiming the property in question as untainted property that the offence of Section 3 would be complete, stands rejected.*

(d) *The offence under Section 3 of the 2002 Act is dependent on illegal gain of property as a result of criminal activity relating to a scheduled offence. It is concerning the process or activity connected with such property, which constitutes the offence of money laundering. The Authorities under the 2002 Act cannot prosecute any person on notional basis or on the assumption that a scheduled offence has been committed, unless it is so registered with the jurisdictional police and/or pending enquiry/trial including by way of criminal complaint before the competent forum. If the person is finally discharged/acquitted of the scheduled offence or the criminal case against him is quashed by the Court of*

competent jurisdiction, there can be no offence of money laundering against him or any one claiming such property being the property linked to stated scheduled offence through him.

(vi) Section 5 of the 2002 Act is constitutionally valid. It provides for a balancing arrangement to secure the interests of the person as also ensures that the proceeds of crime remain available to be dealt with in the manner provided by the 2002 Act. The procedural safeguards as delineated by us hereinabove are effective measures to protect the interests of person concerned.

(vii) The challenge to the validity of sub-Section (4) of Section 8 of the 2002 Act is also rejected subject to Section 8 being invoked and operated in accordance with the meaning assigned to it hereinabove.

(viii) The challenge to deletion of proviso to sub-Section (1) of Section 17 of the 2002 Act stands rejected. There are stringent safeguards provided in Section 17 and Rules framed thereunder. Moreover, the pre-condition in the proviso to Rule 3(2) of the 2005 Rules cannot be read into Section 17 after its amendment. The Central Government may take necessary corrective steps to obviate confusion caused in that regard.

(ix) The challenge to deletion of proviso to sub-Section (1) of Section 18 of the 2002 Act also stands rejected. There are similar safeguards provided in Section 18. We hold that the amended provision does not suffer from the vice of arbitrariness.

(x) The challenge to the constitutional validity of Section 19 of the 2002 Act is also rejected. There are

stringent safeguards provided in Section 19. The provision does not suffer from the vice of arbitrariness.

(xi) Section 24 of the 2002 Act has reasonable nexus with the purposes and objects sought to be achieved by the 2002 Act and cannot be regarded as manifestly arbitrary or unconstitutional.

(xii) (a) The proviso in Clause (a) of sub-Section (1) of Section 44 of the 2002 Act is to be regarded as directory in nature and this provision is also read down to mean that the Special Court may exercise judicial discretion on case-to-case basis.

(b) We do not find merit in the challenge to Section 44 being arbitrary or unconstitutional. However, the eventualities referred to in this Section shall be dealt with by the Court concerned and by the Authority concerned in accordance with the interpretation given in this judgment.

(xiii) (a) The reasons which weighed with this Court in Nikesht Tarachand Shah for declaring the twin conditions in Section 45(1) of the 2002 Act, as it stood at the relevant time, as unconstitutional in no way obliterated the provision from the statute book; and it was open to the Parliament to cure the defect noted by this Court so as to revive the same provision in the existing form.

(b) We are unable to agree with the observations in Nikesht Tarachand Shah distinguishing the enunciation of the Constitution Bench decision in Kartar Singh; and other observations suggestive of doubting the perception of Parliament in regard to the seriousness of the offence of money laundering, including about it

posing serious threat to the sovereignty and integrity of the country.

(c) The provision in the form of Section 45 of the 2002 Act, as applicable post amendment of 2018, is reasonable and has direct nexus with the purposes and objects sought to be achieved by the 2002 Act and does not suffer from the vice of arbitrariness or unreasonableness.

(d) As regards the prayer for grant of bail, irrespective of the nature of proceedings, including those under Section 438 of the 1973 Code or even upon invoking the jurisdiction of Constitutional Courts, the underlying principles and rigours of Section 45 may apply.

(xiv) The beneficial provision of Section 436A of the 1973 Code could be invoked by the accused arrested for offence punishable under the 2002 Act.

(xv) (a) The process envisaged by Section 50 of the 2002 Act is in the nature of an inquiry against the proceeds of crime and is not “investigation” in strict sense of the term for initiating prosecution; and the Authorities under the 2002 Act (referred to in Section 48), are not police officers as such.

(b) The statements recorded by the Authorities under the 2002 Act are not hit by Article 20(3) or Article 21 of the Constitution of India.

(xvi) Section 63 of the 2002 Act providing for punishment regarding false information or failure to give information does not suffer from any vice of arbitrariness.

(xvii) The inclusion or exclusion of any particular offence in the Schedule to the

2002 Act is a matter of legislative policy; and the nature or class of any predicate offence has no bearing on the validity of the Schedule or any prescription thereunder.

(xviii) (a) In view of special mechanism envisaged by the 2002 Act, ECIR cannot be equated with an F.I.R. under the 1973 Code. ECIR is an internal document of the ED and the fact that F.I.R. in respect of scheduled offence has not been recorded does not come in the way of the Authorities referred to in Section 48 to commence inquiry/investigation for initiating “civil action” of “provisional attachment” of property being proceeds of crime.

(b) Supply of a copy of ECIR in every case to the person concerned is not mandatory, it is enough if ED at the time of arrest, discloses the grounds of such arrest.

(c) However, when the arrested person is produced before the Special Court, it is open to the Special Court to look into the relevant records presented by the authorised representative of ED for answering the issue of need for his/her continued detention in connection with the offence of money laundering.

(xix) Even when ED manual is not to be published being an internal departmental document issued for the guidance of the Authorities (ED officials), the department ought to explore the desirability of placing information on its website which may broadly outline the scope of the authority of the functionaries under the Act and measures to be adopted by them as also the options/remedies available to the person concerned before the Authority and before the Special Court.

(xx) The petitioners are justified in expressing serious concern bordering on

causing injustice owing to the vacancies in the Appellate Tribunal. We deem it necessary to impress upon the executive to take corrective measures in this regard expeditiously.

(xxi) The argument about proportionality of punishment with reference to the nature of scheduled offence is wholly unfounded and stands rejected.”

(Emphasis supplied)

21. The first submission of the learned counsel for the applicant that a person cannot be prosecuted for the offence under Section 3 of the PMLA unless a charge-sheet is filed in respect of the Scheduled offence, is negated by the judgment of the Hon’ble Supreme Court in **Vijay Madanlal Choudhary** (Supra), wherein the Hon’ble Supreme Court has held that the only condition for prosecution of a person under PMLA is that a case regarding scheduled offence is registered with the jurisdictional police and/or pending enquiry/trial including by way of criminal complaint before the competent forum. As F.I.R. No. 003/2020 under Sections 13 (2) and 13 (1) (b) of the Prevention of Corruption Act 1988 has already been registered with the jurisdictional police, the applicant can be tried under PMLA and filing of a report under Section 173 of the Criminal Procedure Code in furtherance of the F.I.R. alleging commission of scheduled offence is not a prerequisite for initiation of proceedings under PMLA.

22. The second submission of the learned counsel for the applicant is that there is no allegation or material that the applicant has projected or claimed proceeds of crime as untainted money whereas the

same is essential for constituting an offence under Section 3 of the PMLA. Although in **Nikesh Tarachand Shah** (Supra), the Hon’ble Supreme Court had observed that before somebody can be adjudged as guilty under the said provision, the person must not only be involved in any process or activity connected with proceeds of crime, but must also project or claim it as being untainted property. Subsequent to the decision in **Nikesh Tarachand Shah**, Section 3 of the PMLA has been amended by means of Section 193 of the Finance Act (No. 2), 2019, with effect from 01.08.2019, whereby an Explanation has been inserted in it. Section 3 of the PMLA as it exists presently, is as follows: -

“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 including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money laundering.*

Explanation.—For the removal of doubts, it is hereby clarified that,—

(i) a person shall be guilty of offence of money laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—

(a) concealment; or

(b) possession; or

- (c) acquisition; or
 - (d) use; or
 - (e) projecting as untainted property; or
 - (f) claiming as untainted property,
- in any manner whatsoever;*

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.”

23. In **Vijay Madanlal Choudhary**, the Hon’ble Supreme Court has held that in **Nikesh Tarachand Shah**, the questions raised were not in respect of the meaning of money laundering and moreover, Section 3 has been amended by inserting the Explanation post the judgment in **Nikesh Tarachand Shah**. The Hon’ble Supreme Court has held that Section 3 of the PMLA captures every process and activity, direct or indirect, in dealing with the proceeds of crime and is not limited to the happening of the final act of integration of tainted property in the formal economy. The expression “and” occurring in Section 3 has to be construed as “or” so as to include “every” process or activity indulged into by anyone. Projecting or claiming the property as untainted property would constitute an offence of money laundering on its own, being an independent process or activity. The interpretation suggested by the learned counsel for the applicant, that only

upon projecting or claiming the property in question as untainted property that the offence of Section 3 would be complete, stands rejected.

24. The last submission of the learned counsel for the applicant is that ED did not supply a copy of the ECIR to the applicant before recording his statement under Section 50 of the Act. This submission is also without force in view of the law laid down in **Vijay Madanlal Choudhary** (Supra) that in view of special mechanism envisaged by the 2002 Act, ECIR cannot be equated with an F.I.R. under the 1973 Code. ECIR is an internal document of the ED. Supply of a copy of ECIR in every case to the person concerned is not mandatory, it is enough if ED at the time of arrest, discloses the grounds of such arrest. Moreover, non-supply of ECIR before recording the applicant’s statement under Section 50 of PMLA cannot vitiate the subsequent order rejecting the application for discharge and the order framing charges.

25. The statutory provisions regarding discharge of an accused person and framing charges against him, are contained in Sections 227 and 228 of the Criminal Procedure Code, which are being reproduced below: –

“227. Discharge.— If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for Page 9 of 17 proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

228. Framing of charge.— (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which — (a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report; (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused. (2) Where the Judge frames any charge under clause (b) of sub Section (1), the charge shall be read and explained to the accused, and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

26. The difference between the approach with which the Court should examine the matter in the aforesaid Sections has been explained by the Hon’ble Supreme Court in **Amit Kapoor v. Ramesh Chander**, (2012) 9 SCC 460, in the following words: -

“17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the “record of the case” and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion

there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

* * *

30. We have already noticed that the legislature in its wisdom has used the expression “there is ground for presuming that the accused has committed an offence”. This has an inbuilt element of presumption once the ingredients of an offence with reference to the allegations made are satisfied, the Court would not doubt the case of the prosecution unduly and extend its jurisdiction to quash the charge in haste. A Bench of this Court in *State of Maharashtra v. Som Nath Thapa* (1996) 4 SCC 659 referred to the meaning of the word “presume” while relying upon *Black’s Law Dictionary*. It was defined to mean “to believe or accept upon probable evidence”; “to take as proved until evidence to the contrary is forthcoming”.

In other words, the truth of the matter has to come out when the prosecution evidence is led, the witnesses are cross-examined by the defence, the incriminating material and evidence is put to the accused in terms of Section 313 of the Code and then the accused is provided an opportunity to lead defence, if any. It is only upon completion of such steps that the trial concludes with the court forming its final opinion and delivering its judgment. Merely because there was a civil transaction between the parties would not by itself alter the status of the allegations constituting the criminal offence.

27. Thus the law regarding the approach to be adopted by the court while considering an application for discharge of the accused persons under Section 227 and approach while framing charges under Section 228 of the Code, is that while considering an application for discharge of the accused under Section 227 of the Code, the Court has to form a definite opinion, upon consideration of the record of the case and the documents submitted therewith, that there is not sufficient ground for proceeding against the accused. However, while framing charges, the Court is not required to form a definite opinion that the accused is guilty of committing an offence. The truth of the matter will come out when evidence is led during the trial. Once the facts and ingredients of the Section exist, the court would presume that there is ground to proceed against the accused and frame the charge accordingly and the Court would not doubt the case of the prosecution.

28. When the record of the case is examined in light of the aforesaid legal position, what appears at this stage is that the vigilance establishment has filed F.I.R.

No. 003/2020 under Sections 13 (2) and 13 (1) (b) of the Prevention of Corruption Act 1988, Police Station Lucknow Sector, Vigilance Establishment against the applicant stating that in furtherance of a Government Order dated 08.06.2018, U. P. Vigilance Establishment had conducted an enquiry against the applicant, who was the then Minister for Mining in U. P. Government. After conducting the open enquiry, the enquiry report was submitted to the Government in which it was found that while working as a public servant, the applicant spent ₹ 2,98,28,511/- in excess of his known income, which is disproportionate to his income from the known and valid sources. The applicant could not give any satisfactory reply regarding the disproportionate expenditure and acquisition of properties. Besides this, there was prima facie evidence that the applicant had acquired benami properties also. The F.I.R. states that the aforesaid acts of the applicant amount to commission of offence under Section 13 (1) (b) of the Prevention of Corruption Act, 1988. The E.D. has conducted investigation, during which it has recorded statements of several persons, including the applicant, and has filed a complaint, which states that the applicant became a member of the legislative assembly in the year 2012 and in the year 2013, he was appointed as Minister of State for Irrigation and later he was appointed as the Minister of State for Mining. The applicant remained a Minister till 2017 and on 15.03.2017, he was arrested in connection with a different F.I.R. registered by U. P. Police. During the period the applicant was a Minister, he misused his official position and unlawfully gained several Crores of rupees in cash, which was deposited in the bank accounts of his family members, his employees and companies, in which his sons were

directors. Investigation revealed that the applicant rose exponentially in wealth ever since he became a minister. The total income of the applicant during the period he was a Minister, was ₹ 72.38 lakhs whereas the assets standing in the name of the applicant, his family members and benami holders and of some companies in which the applicant's sons are directors, is ₹ 35 crores approximately. The applicant has committed the offence of money laundering by amassing unexplained and unaccounted properties in the name of his family members and related companies.

29. The aforesaid allegations clearly make out a case for trial of the applicant for commission of offence under Section 3 of the PMLA as upon consideration of the record of the case and the documents submitted therewith, it does not appear that there is not sufficient ground for proceeding against the applicant. There appears to be no illegality in the order passed by the Trial Court rejecting the application for discharge filed by the applicant and in the order framing charges against him.

30. The plea regarding closure or withdrawal of some earlier complaints filed before the Hon'ble Lokayukta and the F.I.R. having been lodged in furtherance of an order passed by the Hon'ble Lokayukta on a subsequent complaint allegedly filed on the basis of similar set of facts would also not affect the legality of the orders passed by the trial Court for more than one reason. Firstly, there is no averment that the earlier complaints had been closed after a full-fledged enquiry and summary closure of complaint or withdrawal thereof without any finding of innocence would be of no consequence. Secondly, the principle of res judicata does not apply to the proceedings before the Hon'ble Lokayukta. Thirdly, it

would also not amount to double jeopardy, which principle is contained in Section 300 of Cr.P.C. For attracting the principle of double jeopardy, the person must have been tried by a 'Court of competent jurisdiction' for an offence and convicted or acquitted of such offence, whereas the Hon'ble Lokayukta is not a 'Court' within the meaning of the expression used in Section 300 of Cr.P.C.

31. The E.D. has filed the complaint after conducting investigation, when the evidence collected prima facie established commission of offence under PMLA and there appears to be no illegality in the order passed by the trial Court rejecting the application for discharge of the applicant and the order framing charges against the applicant.

32. The application lacks merit and the same is, accordingly, rejected. However, there will be no order as to costs.

(2023) 7 ILRA 571
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2023

BEFORE

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

Application U/S 482. No. 4319 of 2023

Sushil **...Applicant**
State of U.P. & Anr. **Versus**
...Opposite Parties

Counsel for the Applicant:
 Sri Abhishek Pandey

Counsel for the Opposite Parties:
 G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 216, 227 & 482 - Indian Penal Code, 1860 - Sections 307, 452,

504 & 506 - Application – for assailing the order by which the trial court altered the charge u/s 307 IPC against the applicant – offence of attempt to murder – criminal intimidation - FIR - investigation – charge sheet – NBW – arrest – released on bail – application u/s 2016 Cr.P.C - court finds that, no fault in case such an application has been entertained in the present facts of the case wherein from the St.ment of witnesses having rifle and country made pistol was proved at place of incident was ample material to entertain the application to alter charge - held, - court feels that the learned Magistrate could have done it suo moto but the application was only a way to bring to the notice of the court concern about the defect in framing of the charge – court does not find any error in the impugned order – accordingly, the Application is dismissed.(Para – 33, 34)

Application u/s 482 dismissed. (E-11)

List of Cases cited:

1. Asian Resurfacing of Road Agency Pvt. Ltd. & anr.Vs Central Bureau of Investigation (2018) 16 SCC 299),
2. Jasvinder Saini & ors..Vs St. (Govt. of NCT of Delhi) (2013 0 Supreme (SC) 571),
3. Hasanbhai Valibhai Qureshi Vs St. of Guj. (2004) 5 SCC 347),
4. St. Vs K.P. Shankar & ors..(2015 0 Supreme (Mad) 2658)
5. Nanhey Bhaiya @ Nanhan Singh & ors.Vs St. of U.P. (2023 LawSuit (All) 451)
6. P. Kartikalakshmi Vs Sri Ganesh & anr.(2017 vol. 3 SCC 347)
7. Anant Prakash Sinha @ Anant Sinha Vs St. of Har. & anr.((2016) 6 SCC 105)
8. Central Bureau of Investigation Vs Karimullah Osan Khan ((2014) 11 SCC 538)
9. Harihar Chakravarty Vs St. of W. B. (AIR 1954 SC 266).

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

1. Heard Mr. Abhishek Pandey, learned counsel for the applicant and Mr. Amit Singh Chauhan, learned A.G.A. for the State.

2. The present case has been filed assailing the order dated 13.01.2023 passed by Additional District and Sessions Judge, Deoband, Saharanpur in Session Trial No.56 of 2021 (State Vs. Sunil and others), arising out of Case Crime No.210 of 2018, under Sections 307, 452, 504, 506 I.P.C., Police Station-Deoband, District Saharanpur, by which the Court concerned altered the charge u/s 307 I.P.C. against the applicant, pending before Additional District and Sessions Judge, Deoband, Saharanpur.

3. Brief facts of the case are; an FIR was lodged by opposite party no.2 against three accused persons including the applicant on 04.03.2018 at 23:46 hours, under Sections 307, 504, 506 I.P.C., which came to be registered as Case Crime No.0210 of 2018.

4. As per allegations in the FIR, the informant along with his cousin namely Amit purchased a land from Sudhir Tiwari. A civil suit with respect to the same land is pending in the Court of Civil Judge, Deoband. The family members of Sudhir Tiwari were annoyed by purchase of land by the informant and his cousin, therefore, they were inimical to the informant and his family members. It has further been alleged that on 03.03.2018 at about 11 PM when the informant was returning from Rohana Sugar Mill to his residence on his tractor, a black motorcycle, in which three persons were sitting, having rifle and countrymade

pistol in their hands, overtook the informant's tractor near the railway crossing and fired upon him with intention to kill him. The informant saved his life by jumping from the tractor. The aforesaid incident was witnessed by Amit and Mahipal, who were coming from behind. Seeing them, the accused persons ran away towards the village after opening fire. The informant managed to reach home and narrated the entire story to his family members. At about 12 O'clock, Sushil, Sunil and Shubham again reached at the residence of the informant and with intention to kill, opened fire with the countrymade pistol and rifle, warning him and threatening to kill him. The second incident was witnessed by Brijesh, Munesh and few others. During investigation, statement of opposite party no.2 has been recorded, who has supported the version of the FIR. Statements of witnesses Brijesh and Munesh have also been recorded in which Munesh has stated about presence of Sushil and Shubham, having rifle and countrymade pistol in their hands at the place of incident.

5. The statements of other witnesses namely, Satish, Sat Kumar, Manoj Kumar, Subhash, Mahipal and Kapil were also recorded. The aforesaid persons have stated that due to some land dispute between the parties, they are inimical to each other and, therefore, for the purpose of pressurising the applicant, the aforesaid F.I.R. has been lodged.

6. During investigation, the Investigating Officer found the implication of Shubham incorrect, therefore, he was exonerated by the Investigating Officer.

7. On the basis of statements of interested witnesses, on 26.07.2018, the

Investigating Officer filed charge sheet against the applicant-Sushil, under Sections 307, 452, 504, 506 I.P.C. whereas under Sections 452, 504, 506 IPC against the other accused Sunil.

8. The Additional Chief Judicial Magistrate, Deoband, Saharanpur took cognizance of the aforesaid charge sheet by order dated 23.08.2018. The charge sheet was challenged by the applicant and co-accused Sunil by way of filing application u/s 482 No.11872 of 2019 and the Hon'ble Court vide order dated 30.03.2019 has passed the following order:

"1. Heard learned counsel for the applicants and learned A.G.A. for the State.

2. The present 482 Cr.P.C. application has been filed to quash the charge-sheet no. 544 of 2018 dated 26.07.2018 as well as cognizance order dated 23.08.2018 and entire proceedings of Case No. 2570 of 2018 (State Vs. Sunil and another), under Sections- 307, 504, 506 and 452 I.P.C., Police Station- Deoband, District- Saharanpur, arising out of Case Crime No. 0210 of 2018, under Sections- 307, 504 and 506 I.P.C., Police Station- Deoband, District- Saharanpur, pending before the court of learned Additional Chief Judicial Magistrate, Deoband, District Saharanpur.

3. Learned counsel for the applicants submits that wholly concocted and false story is set up against the applicants on account of pending civil dispute between the parties. The allegation in the FIR describes the incident of 11:00 AM on public road whereas in the statement recorded during investigation, there is gross inconsistency as to the time and place and occurrence. At present, it

also does not appear that any empties were recovered to support the allegation of the use of firearm in the incident.

4. Matter requires consideration.

5. Notice on behalf of opposite party no. 1 has been accepted by learned A.G.A.

6. Issue notice to opposite party no.2 returnable at an early date.

7. Opposite parties may file their counter affidavits within six weeks. Rejoinder affidavit may be filed within two weeks thereafter.

8. List thereafter.

9. Till the next date of listing, further proceedings of the aforesaid case shall remain stayed against the applicants.”

9. During pendency of the aforesaid petition, in view of the direction of Hon’ble Apex Court passed in case of **Asian Resurfacing of Road Agency Private Limited and Anr. vs. Central Bureau of Investigation¹**, the trial Court has proceeded against the applicants and co-accused persons and nonailable warrants have been issued. The applicant was arrested and has been released on bail on 25.01.2021.

10. In the meantime, the complainant moved an application before the trial Court under Section 216 Cr.P.C. requesting to alter the charge of Section 307 IPC against the applicant. Relying upon the statements of few witnesses, the trial Court vide order dated 13.01.2023 has allowed the application framing charge under Section 307 IPC against the applicant and co-

accused, hence, the present application has been filed.

11. Learned counsel for the applicant submits that the earlier petition has become infructuous in view of the order passed by Court below dated 13.01.2023, therefore, by order of High Court dated 09.05.2023, the same was dismissed as not pressed.

12. Learned counsel for the applicant has challenged the order dated 13.01.2023 on following grounds:

(i) that neither the prosecution nor the de-facto complainant or anyone interested in the criminal case is entitled to file application under Section 216 Cr.P.C.

(ii) that the trial Court cannot alter the charge only on the basis of evidence adduced at the time of trial and not on the basis of material that was already on record as collected by the Investigating Officer.

13. Learned counsel for the applicant relying upon the judgement of Hon’ble Apex Court passed in case of *Jasvinder Saini & Others Vs. State (Govt. of NCT of Delhi)*², states that the additional evidence at the time of trial was essential for framing of additional charge or place charge already framed. Relevant paragraphs of the aforesaid judgement are being reproduced herein below:

“11. A plain reading of the above would show that the Court’s power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. Sub-sections (2) to (5) of Section 216 deal with the procedure to be followed once the Court decides to alter or add any charge.

Section 217 of the Code deals with the recall of witnesses when the charge is altered or added by the Court after commencement of the trial. There can, in the light of the above, be no doubt about the competence of the Court to add or alter a charge at any time before the judgment. The circumstances in which such addition or alteration may be made are not, however, stipulated in Section 216. It is all the same trite that the question of any such addition or alternation would generally arise either because the Court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the Court.”

14. Placing reliance upon judgement of Hon’ble Apex Court passed in **Hasanbhai Valibhai Qureshi Vs. State of Gujarat**³, he submits that while dealing with the scope of Section 216 Cr.P.C. the Hon’ble Apex Court has held that there is scope of alteration of charge during trial on the basis of materials brought on record. Section 216 of the Code appearing in Chapter XVII clearly stipulates that any Court may alter or add to any charge at any time before judgement is pronounced. Whenever such alteration or addition is made, the same is to be read out and informed to the accused. He has pressed upon paragraph 10 of the aforesaid judgement, which is extracted below:-

“10. Therefore, if during trial the trial Court on a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar

to appropriately act as the exigencies of the case warrant or necessitate.”

15. Placing reliance upon judgement of High Court of Judicature at Madras passed in **State Vs. K.P. Shankar and Ors.**⁴, he submits that on the basis of statement recorded under Section 161 Cr.P.C. when no evidence has been adduced for the offence in question at the time of trial, addition or alteration of charge is not justified. He has also emphasised that Section 216 Cr.P.C. does not contemplate that any application has to be filed by the prosecution or by any witness including the de-facto complainant.

16. In support of his submission he has pressed upon following paragraphs:

“7.....Merely on the basis of the statement of witnesses, the offence under Section 302 of IPC need not be included. In the absence of proof of corpus delicti, it is not proper on the part of the prosecution to file the petition under Section 216 of Cr.P.C. The trial Court is therefore right in dismissing such petition filed by the prosecution. There is no evidence available to include the charge under Section 302 of IPC.

The word "evidence" can mean and include the statement of the witnesses adduced before the Magistrate concerned during the course of trial and the evidence collected by the Police Officer under Section 161 of Cr.P.C. will not be construed as "evidence" for the purpose of filing the petition under Section 216 of Cr.P.C. The petition under Section 216 of Cr.P.C. filed by the prosecution is therefore pre mature. Even if it is shown that the respondents/accused are guilty of the offence of murder, it is only for the Trial

Court to decide the same on the basis of the evidence made available against them during the course of trial. The application filed under Section 216 of Cr.P.C. by the prosecution is therefore not maintainable and it was rightly rejected by the trial Court. In this context, the learned counsel for the respondents relied on the decision of this Court in the case of (H.A. Hurul Firdhouse, represented by her power agent H.A. Abdul Jabbar vs. State, represented by Inspector of Police, W-22, All Women Police Station, Mylapore, Chennai - 2 and others) 2010 (3) Madras Weekly Notes (Crl.) 368 for the proposition that neither the prosecution nor the petitioner/accused has any right to seek for inclusion or deletion of a charge and it is for the trial Court, in its discretion, consider such inclusion of a charge. It was also held in the above said decision that as against an order passed by the trial Court, dismissing an application under Section 216 of Cr.P.C. a Criminal Revision Case is not maintainable.”

“8. The learned counsel for the respondents/accused also relied on the decision rendered by this Court in the case of (Chellapandi vs. Dy. Superintendent of Police, C.B.C.I.D., Madurai District and others) (2012) 1 MLJ Criminal 246 wherein this Court has held that the power under Section 216 of Cr.P.C. to alter or amend the charges is vested with the Court on the Court being satisfied, based on the documents produced, that the charges framed has to be amended or altered. In the present case, the prosecution has filed the petition under Section 216 of Cr.P.C. to include the charge under Section 302 of IPC merely on the basis of the evidence given by the witnesses before the police officer to the effect that the victim was taken towards the sea with a view to

commit the murder. In fact, in the present case, there is a long delay in giving the complaint itself for about five years and therefore also, the petition filed by the prosecution is not maintainable. In such circumstances, the learned counsel for the respondents prayed this Court to dismiss the Criminal Revision Case.”

“12. The only question arise for consideration in this Criminal Revision Case is whether the prosecution has a right to file an application under Section 216 of Cr.P.C. to include the charge under Section 302 of IPC or whether such an application is maintainable.”

“17. It is evident from Section 216 Cr.P.C. that alteration or amendment or addition of a charge can be done only by the Court and the trial Court alone got such power. This position is reiterated in the decision rendered by this Court in the case of (Krishnammal Vs. The Revenue Divisional Officer and others) reported in 2008 Criminal Law Journal 2845 wherein in Para Nos.9 to 11, it was held as follows:-

9. From the conjoint reading of the provisions of the said Sections, it is pellucid that only the Court is having power to frame charge or alter it or add new charges at any time before judgment is pronounced. Neither the prosecution nor the person interested has right to file petition by invoking either of the said Sections so as to delete the existing charges or add new charges. In short, either the prosecution or the person interested has no right to ask the Court either to alter the existing charges or to add new charges.”

“18(8). Section 216, Cr.P.C. does not contemplate any application being filed either by the prosecution or by any witness

including the de facto complainant. It simply states the power of the Court to alter the charge or add any charge to the charge already framed. The stage at which such alteration or addition to charge can be made is also indicated thereon. Such an alteration or addition can be made at any time before judgment is pronounced. The Section also provides for the follow up action to be taken in the case the alteration or addition to the charges is made after considerable progress in the trial of the case.

18(9). In the light of the said provision we have to consider the order passed by the learned Trial Magistrate. A reading of the order of the learned Trial Magistrate will show that, on a proper understanding of the context of the said provision, the learned Trial Magistrate has passed the impugned order. The learned Trial Magistrate has expressed a clear opinion that the petition itself was premature one as none of the witnesses for prosecution was cross examined and five more witnesses were to be examined and that the question of framing an additional charge could be considered at a later stage in the light of the evidence to be adduced during the course of the trial. The said opinion is in tune with the intention of the legislature in enacting the said provision. Therefore, as rightly contended by the learned Senior counsel for the Respondent, there is no defect infirmity in the order passed by the Trial Court warranting interference by this Court.”

17. Learned counsel for the applicant has placed reliance upon the judgement of High Court of Judicature at Allahabad (Lucknow Bench) passed in **Nanhey Bhaiya @ Nanhan Singh And 2 Others Vs. State of U.P.5**, wherein it has been stated that the power vested in the Court is exclusive to the Court

and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right.

18. Lastly, he has relied upon judgement of Hon’ble Apex Court passed in **P. Kartikalakshmi vs. Sri Ganesh and another6**, while submitting that the application moved by the informant or prosecution is not maintainable and has emphasised on Paragraphs 6, 7 and 8, which are as under:

“6. Having heard the learned counsel for the respective parties, we find force in the submission of the learned Senior Counsel for Respondent 1. Section 216 CrPC empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 CrPC to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law.

7. We were taken through Section 221 and 222 CrPC in this context. In the

light of the facts involved in this case, we are only concerned with Section 216 CrPC. We, therefore, do not propose to examine the implications of the other provisions to the case on hand. We wish to confine ourselves to the invocation of Section 216 and rest with that. In the light of our conclusion that the power of invocation of Section 216 CrPC is exclusively confined with the Court as an enabling provision for the purpose of alteration or addition of any charge at any time before pronouncement of the judgment, we make it clear that no party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge, because it is not provided under Section 216 CrPC. If such a course to be adopted by the parties is allowed, then it will be well-nigh impossible for the criminal court to conclude its proceedings and the concept of speedy trial will get jeopardised.

8. In such circumstances, when the application preferred by the appellant itself before the trial court was not maintainable, it was not incumbent upon the trial court to pass an order under Section 216 CrPC. Therefore, there was no question of the said order being revisable under Section 397 CrPC. The whole proceeding, initiated at the instance of the appellant, was not maintainable. Inasmuch as the legal issue had to be necessarily set right, we are obliged to clarify the law as is available under Section 216 CrPC. To that extent, having clarified the legal position, we make it clear that the whole proceedings initiated at the instance of the appellant was thoroughly misconceived and vitiated in law and ought not to have been entertained by the trial court. As rightly pointed out by the learned Senior Counsel for Respondent 1, such a course adopted by the appellant

and entertained by the court below has unnecessarily provided scope for protraction of the proceedings which ought not to have been allowed by the court below.”

19. As the power to alter or add any charge is exclusive to the Court, therefore, the application moved by informant is not maintainable, as such course is adopted for protraction of proceeding which ought not to have been allowed by the Court below, thus, the order dated 13.01.2023 is liable to be quashed.

20. Learned A.G.A. on the other hand submits that there is no prohibition under Section 216 Cr.P.C. to alter or add a charge prior to recording of evidence. If the Court is moved for the said purpose and it is satisfied, the charge framed by it deserves to be altered and additional charge is required to be added. He further contends that when the Magistrate has jurisdiction to rectify the mistake by adding or altering charge, he can hear the counsel for the parties and do it suo moto and any application either by the public prosecutor or by the informant is only to bring the said facts to his notice and in any case that would not invalidate the order.

21. He submits that the duty of the Court while adding or altering charge has been summarised in the judgement of **Anant Prakash Sinha Alias Anant Sinha Vs. State of Haryana And Another**⁷, wherein the materials which have to be considered, the adequacy of material on record, and stages up to which such addition or alteration of charge can be done as also with the powers of the Court to entertain an application moved by the informant, complainant or any witness, has been elaborated. In view of above, there is

no illegality or infirmity in the order, therefore, relief as prayed, cannot be granted.

22. Before coming to the merits of the case, it would be appropriate to extract Section 216 Cr.P.C., which is as follows:-

“216. Court may alter charge.—

(1) Any court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the court, to prejudice the accused or the prosecutor as aforesaid, the court may either direct a new trial or adjourn the trial for such period as may be necessary. (5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.”

23. All that the Court meant to say was that in a case where a charge alleging

dowry death is framed, a charge under Section 302 IPC can also be framed if the evidence otherwise permits.

24. Thus, in the case of Jasvinder Saini (Supra), the Court opined that the appearances on evidence at the trial Court was not essential for framing of additional charge or altering the charge already framed, though it may be one of the grounds to do so.

25. It would be appropriate to extract paragraph 11 of the aforesaid judgement:

“11. A plain reading of the above would show that the Court’s power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. Sub-sections (2) to (5) of Section 216 deal with the procedure to be followed once the Court decides to alter or add any charge. Section 217 of the Code deals with the recall of witnesses when the charge is altered or added by the Court after commencement of the trial. There can, in the light of the above, be no doubt about the competence of the Court to add or alter a charge at any time before the judgment. The circumstances in which such addition or alteration may be made are not, however, stipulated in Section 216. It is all the same trite that the question of any such addition or alternation would generally arise either because the Court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the Court.”

26. While interpreting powers of Court under Section 216 Cr.P.C. to alter or

add any charge, the Hon'ble Apex Court in case of **Central Bureau of Investigation Vs. Karimullah Osan Khan**⁸, has tried to explain the expression.

“at any time”, “before judgement is pronounced”, and has also dealt with the material/basis on which charge(s) may be added, altered after conclusion of the trial.

27. Relevant paragraphs of the aforesaid judgement are reproduced herein below:-

“17. Section 216 CrPC gives considerable powers to the Trial Court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add any charge, subject to the conditions mentioned therein. The expressions “at any time” and before the “judgment is pronounced” would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time, the Courts should also see that its orders would not cause any prejudice to the accused.

18. Section 216 CrPC confers jurisdiction on all Courts, including the designated Courts, to alter or add to any charge framed earlier, at any time before the judgment is pronounced and Sub-Sections (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Needless to say, the Courts can exercise the power of addition or modification of charges under Section 216 CrPC, only when there exists some material before the Court, which has some connection or link with the charges sought to be amended, added or modified. In other words, alteration or addition of a charge must be for an offence made out by the

evidence recorded during the course of trial before the Court. (See Harihar Chakravarty v. State of West Bengal AIR 1954 SC 266. Merely because the charges are altered after conclusion of the trial, that itself will not lead to the conclusion that it has resulted in prejudice to the accused because sufficient safeguards have been built in in Section 216 CrPC and other related provisions.”

28. The Apex Court in a full bench decision in the case of **Harihar Chakravarty Vs. State of West Bengal**⁹, has gone to the extent to hold that the direction to alter the charge so as to include an offence for which the appellant was not originally charged, could only be done if the trial Court itself had taken action under Section 227 Cr.P.C. before it pronounced judgement. It could only have done so if there were materials before it either in the complaint or in the evidence to justify such action.

29. Thus, it can be interpreted in such a manner that the concerned Court has the power to alter or modify any charge prior to pronouncement of the judgement, in case, there is material before it. Irrespective of the fact as to whether it is the material as collected by the Investigating Officer, which has been placed before the trial Court after submission of the charge sheet or when the Court concerned is proceeded with the trial, thus collecting evidence at the time of trial.

30. Thus the Court in the aforesaid case opined that the trial Court could issue a direction for alteration of the charge if there were materials before it in the complaint or any evidence to justify such action. The sum and substance as understood is that if there are allegations in

the complaint, petition or for that matter in FIR or accompanying material, the Court can alter the charge.

31. This Court is of the opinion that the powers under Section 216 Cr.P.C. regarding alteration or addition of charge is for an offence made out by the evidence recorded during course of trial before the Court, which does not necessary mean that the alteration can be done only in case where evidence is adduced. Section 216 Cr.P.C., as is evincible does not lay down that the Court cannot alter the charge solely because it has framed the charge. The Court finds that the question of any such addition or alteration generally arises either because the charge already framed is defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the Court. In other words, the Court can change or alter the charge if there is defect or something is left out. The test is, it must be founded on the material available on record. It can be on the basis of complaint or the FIR or accompanying documents or material brought on record, during the course of trial and can also be done at any time before pronouncement of the judgement. Thus, as held in case of **Anant Prakash Sinha @ Anant Sinha (Supra)**, charge can be framed on the basis of evidence on record and it is not necessary to adduce new evidence for altering or modifying the charge.

32. It would be appropriate to quote paragraph 18, which is as follows:

“18.From the aforesaid, it is graphic that the court can change or alter the charge if there is defect or something is left out. The test is, it must be founded on

the material available on record. It can be on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial. It can also be done at any time before pronouncement of judgment. It is not necessary to advert to each and every circumstance. Suffice it to say, if the court has not framed a charge despite the material on record, it has the jurisdiction to add a charge. Similarly, it has the authority to alter the charge. The principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before him or if subsequent evidence comes on record. It is not to be understood that unless evidence has been let in, charges already framed cannot be altered, for that is not the purport of Section 216 CrPC.”

33. As regards the submission that the learned Magistrate could not have entertained the application preferred by the informant as the same is not maintainable in the view of the provisions of Section 216 Cr.P.C. This Court feels that the learned Magistrate could have done it suo moto but the application was only a way to bring to the notice of the Court concerned about the defect in framing of the charge, therefore, the Court finds no fault in case such an application has been entertained in the present facts of the case wherein from statements of witnesses, presence of Sushil and Shubham having rifle and country made pistol in their hands, was proved at the place of incident, thus, there was ample material to entertain the application as moved by the informant/complainant to alter the charge of Section 307 IPC against the applicant Sushil.

34. In view of the aforesaid discussion, this Court does not find any

482 Cr.P.C. even at the stage of recording of evidence in trial is not dispute at all but the decision of the same would be in the facts and circumstances of each and every case independently - therefore, proceeding on the said ground itself cannot be quashed - accordingly, Application is dismissed.
(Para – 24, 25, 26)

Application u/s 482 dismissed. (E-11)

List of Cases cited:

1. Dayle De Souza Vs Government of India through Deputy Chief Labour Commissioner & anr.: AIR 2021 SC 5626.

2. Shueb Mahmood Kidwai @ Bobby Vs St. of U.P.: (2021) (0) Supreme (All) 122,

3. Surinder Kumar Khanna Vs Intelligence Officer Directorate of Revenue Intelligence: (2018) 8 SCC 271.

4. Ratilal Bhanji Mithani Vs St. of Mah. & ors.:
(1979) 2 SCC 179,

5. R.P. Kapur Vs St. of Pun.: AIR 1960 SC 866;

6. St. of Har. & ors..Vs Bhajan Lal & ors.: 1992 Supp (1) SCC 335;

7. St. of Bihar Vs P. P. Sharma: 1992 Supp (1) SCC 222;

8. Trisuns Chemical Industry Vs Rajesh Agarwal & ors.: (1999) 8 SCC 686;

9. M. Krishnan Vs Vijay Singh & anr. : (2001) 8 SCC 645;

10. Zandu Pharmaceuticals Works Ltd. Vs
Mohammd Shariful Haque: (2005) 1 SCC 122;

11. M. N. Ojha Vs Alok Kumar Srivastava:
(2009) 9 SCC 682;

12. Joseph Salvaraj A. Vs St. of Guj. & ors.:
(2011) 7 SCC 59;

13. Arun Bhandari Vs St. of U. P. & ors.: (2013)
2 SCC 801;

14. Md. Allauddin Khan Vs St. of Bihar: (2019) 6 SCC 107;

15. Anand Kumar Mohatta & anr.Vs St. (NCT of Delhi), Department of Home & anr.(2019) 11 SCC 706;

16. Rajeev Kourav Vs Balasaheb & ors.: (2020) 3 SCC 317;

17. Nallapareddy Sridhar Reddy Vs The St. of Andhra Pradesh: (2020) 12 SCC 467,

18. Priti Saraf & anr. Vs St. of NCT of Delhi & anr.: 2021 SCC Online SC 206,

19. Ramveer Upadhyay Vs St. of U.P. : 2022 SCC Online SC 484,

20. Daxaben Vs St. of Guj. : 2022 SCC Online SC 936,

21. St. of Maharashtra Vs Sayyed Hassan Sayyed Subhan : (2019) 18 SCC 145,

22. Kunwar Pal Singh Vs St. of U. P. : (2020) 14 SCC 331,

23. Shueb Mahmood Kidwai @ Bobby Vs St. of U.P. : Criminal Misc. 482/378/407 No. 3044 of 2017, decided on 23.02.2021 : [(2021) 0 Supreme (All) 122].

(Delivered by Hon'ble Samit Gopal, J.)

1. List revised.

2. Heard Sri Gopal S. Chaturvedi, learned Senior Advocate assisted by Sri Dileep Kumar Pandey, learned counsel for the applicant and Sri Shashi Kant Pandey, learned brief holder for the State of U.P. and perused the records.

3. The present Criminal Misc. Application U/S 482 Cr.P.C. has been filed by the applicant Kunal Chawala with the following prayers:

"It is, therefore Most respectfully prayed that this Hon'ble Court may

graciously be pleased to allow this application and quash the Charge Sheet dated 26.02.2022 and cognizance/ summoning order dated 28.02.2022 as well as entire proceeding in Case No. 11020 of 2022 (State Vs. Raman Jaiswal and others), under Sections 420, 120-B IPC and Section 60, 63, 72 of U.P. Excise Act, arising out of Case Crime No. 666 of 2021, Police Station- Madhuban Bapudham, District Ghaziabad, pending before the Court of learned Chief Judicial Magistrate, Ghaziabad.

It is further prayed that this Hon'ble Court may graciously be pleased to stay the further proceeding of Case No. 11020 of 2022 (State Vs. Raman Jaiswal and others), under Sections 420, 120-B IPC and Section 60, 63, 72 of U.P. Excise Act, arising out of Case Crime No. 666 of 2021, Police Station- Madhuban Bapudham, District Ghaziabad, pending before the Court of learned Chief Judicial Magistrate, Ghaziabad, during the pendency of the present case, otherwise the applicant shall suffer irreparable loss and injury, and/or may pass such other and further order which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case."

4. The prosecution case as per the First Information Report lodged on 30.12.2021 by Smt. Sheelabh Mishra the Excise Inspector, Sector-3, Ghaziabad, the opposite party no.2 under Sections 420, 120-B IPC and Section 60, 63, 72 of U.P. Excise Act, 1910, Police Station- Madhuban Bapudham, District Ghaziabad against the applicant Kunal Chawala, Raman Jaiswal, Ramveer Singh, Sunil Kumar, Lalji Yadav and Vipin Yadav on the basis of a recovery memo of recovery of 4809 cartons and 266 loose bottles of

Indian Made Foreign Liquor, arrest of four accused persons and recovery of four vehicles being Truck No. HR 55 X 0004, Truck No. HR 68 C 5032, Ford Ecosport DL 5 CR 468 and Hyundai i-20 UP 16 Z 0006 alleging therein that FIR No. 385 of 2021 was lodged in District Moradabad in which Nagendra Yadav resident of Meerut was apprehended transporting 40 bottles of Indian Made Foreign Liquor. He disclosed that the liquor was brought from the custom godown of Kunal Chawla from Ghaziabad and he supplies it illegally in various Districts in Uttar Pradesh. For the supply, Vipin Yadav who is the person of Kunal Chawla and having mobile No. 8800482499 helps him and by calling on the said number liquor can be called anywhere. On the said information, the District Excise Officer, Ghaziabad under supervision of the first informant along with Excise Inspectors and Enforcement Officers of Excise Department of Meerut formed a team. On the basis of information received from Moradabad on 29.12.2021, the said Officers reached the godown of Kunal Chawla in P.S. Madhuban. The main gate of the godown was open and two trucks were standing inside from which cartons of liquor was being kept inside. Two persons met inside. On asking, they disclosed their names as Raman Jaiswal and Ramveer Singh. On further asking, they disclosed that they were in the said godown for Kunal Chawla and their work is to get the cartons of liquor unloaded and supplied to various places. On asking about Vipin Yadav they refused to tell anything but on checking their mobiles, the number of Vipin Yadav was found in it and their were regular calls on the mobile. On being suspicious, the godown was searched thoroughly. The papers with regards to the material which was being unloaded from the trucks was demanded which could not

be shown. The drivers of the truck disclosed their names as Sunil Kumar and Lalji. They also could not show the papers of the material on demand. On asking for license with regards to the liquor kept in the godown, the persons could not show any license and neither could produce any documents with regards to the stock and the details of it. From Truck No. HR 55 X 0048 Ballentine brand liquor was being unloaded and on other truck No. HR 68 C 5032, 500 cartons of Red Label brand liquor was present which was being unloaded. The godown was then inspected where liquor of various brands were found. A list was then drawn by the said team of 75 Indian Made Foreign Liquor which in total was in 4809 cartons and there were 266 loose bottles. The cartons were inspected and in some cartons there was no tag of FSSAI and mother company which would go to show that the material did not come through the legal channel. The Government of India and the State Government were incurring loss of customs and excise duty. Apart from this, there was different batch numbers of mother company. Even the batch numbers and date of manufacture were missing. On thorough inspection, 50 plastic bags of white colour, one blue colour plastic bag, one packet of rubber band, 7 bundles of tape, one packet of black polythene, one packet of blue polythene, 180 empty boxes of Glenfiddich and five seals which were used in boxes were found. On further probe from the said persons, they stated that they work for Kunal Chawla and the liquor is transported in black ploythenes to various places. In the Ford Ecosport and Hyundai i-20 also liquor was recovered. On probing Raman Jaiswal and Ramveer Singh they disclosed that on the instruction from godown of Kunal Chawla delivery of liquor in various places in the State and in various districts and also

in Ghaziabad is done without payment of customs duty and excise duty. It is stated that as such Kunal Chawla and other persons are running a gang due to which Government is being defrauded of its customs duty and State Government is also being defrauded of excise duty. Samples of the material recovered was drawn and recovery memo was prepared which was given for lodging of the First Information Report and the First Information Report was thus lodged.

5. The investigation in the matter concluded and a charge sheet was submitted against Raman Jaiswal, Ramveer Singh, Sunil Kumar, Lalji Yadav and Kunal Chawla (the present applicant) under Sections 420, 120-B IPC and Section 60, 63, 63 of the Uttar Pradesh Excise Act, 1910.

6. The trial court vide its order dated 28.02.2022 took cognizance upon the said charge sheet and summoned the applicant Kunal Chawla and other accused persons to face trial.

7. The applicant was granted anticipatory bail vide order dated 08.02.2022 passed by the Sessions Judge, Ghaziabad in Crl. Misc. Anticipatory Bail Application No. 21 of 2022 (Kunal Chawla Vs. State of U.P.).

8. The trial court vide its order dated 30.03.2023 framed charges against the applicant under Sections 420, 120-B IPC and Section 60, 63 of the Uttar Pradesh Excise Act, 1910. The said charge was read to the applicant-accused who pleaded not guilty and claimed to be tried.

9. The trial then started as Criminal Case No. 753 of 2022 (State of U.P. Vs.

Raman Jaiswal and others) in which the statement of PW-1 the first informant Sheelabh Mishra started to be recorded on 22.03.2023 which concluded on 04.05.2023 and then the statement of Akhilesh Verma the Excise Inspector, Ghaziabad was recorded as PW-2 which started on 11.04.2023 and is yet to be concluded.

10. During the pendency of investigation, the applicant filed a writ petition before this Court numbered as Criminal Misc. Writ Petition No. 13402 of 2022 (Kunal Chawla Vs. State of U.P and 2 others) for quashing of the First Information Report with a further prayer to not to arrest him in the case in which a Division Bench of this Court vide order dated 19.09.2022 directed that till the next date of listing or till the submission of police report under Section 173(2) Cr.P.C. whichever is earlier, the respondents are restrained to arrest the petitioner pursuant to the impugned FIR subject to cooperation in the on going investigation.

The present application under Section 482 Cr.P.C. has thus been filed with the prayers as aforesaid.

11. Learned counsel for the applicant argued as follows:-

(i) Cognizance could not have been taken by the trial court for offences under Section 60, 63 of the Excise Act as the same cannot be done on a police report. As per Section 70 of the Excise Act, cognizance can be taken on a complaint or report of an Excise Officer only. The trial against the applicant is void ab-initio as the same cannot proceed.

(ii) No offence whatsoever under Sections 420, 120-B IPC is made out. There is no fraudulent act, no false

representation and there is nothing dishonest which has come in evidence which would make out a case against the applicant.

(iii) The applicant Kunal Chawla and his wife Ruchi Chawla are the Directors of M/s Mehar Global Spirit Private Ltd. The company has been incorporated on 05.11.2018 under the Companies Act, 2013 but the company has not been made as an accused and as such the Director of the company cannot be prosecuted. Reliance has been placed upon the judgment of the Apex Court in the case of **Dayle De Souza Vs. Government of India through Deputy Chief Labour Commissioner and another : AIR 2021 SC 5626**.

(iv) If the case is of evasion of customs and excise duty then the concerned relevant authorities should have proceeded as per law and should have taken action for it but the charge as framed does not in any manner show that the applicant is being tried for it.

(v) A petition under Section 482 Cr.P.C. for quashing of the proceedings is maintainable even if the trial has started and some of the witnesses have been examined as has been held by a Division Bench of this Court in the case of **Shueb Mahmood Kidwai @ Bobby Vs. State of U.P. : (2021) (0) Supreme (All) 122**.

(vi) Reliance has been placed upon the judgment of the Apex Court in the case of **Surinder Kumar Khanna Vs. Intelligence Officer Directorate of Revenue Intelligence : (2018) 8 SCC 271** and while relying upon paragraph nos. 7, 8 and 14 it is argued that in so far as the evidence against the applicant is concerned,

the same is only a confession of co-accused. The court may take the confession into consideration but the same is not a proof, there must be other evidence also to corroborate it.

12. Per contra, learned counsel for the State opposed the prayer for quashing and argued as follows:

(i) The applicant is named in the First Information Report. There is an allegation that the applicant is the owner of godown in question from where illicit liquor has been recovered.

(ii) In so far as the ownership of godown is concerned, the same has not been disputed and even the material as has been recovered has not been disputed.

(iii) The allegations in the First Information Report prima facie make out a case against the applicant.

(iv) In so far as the allegations of the offences under the Indian Penal Code are concerned, it is clear from the perusal of the First Information Report that there is an allegation that illegal/illicit liquor was found for which the documents could not be shown and even the liquor was not having any tagging of FSSAI and mother company which would go to show that the same was not coming through genuine channels. There is further an allegation that the batch number and the date of manufacture were also not mentioned. It is submitted that even many empty boxes of liquor were found. No satisfactory reply was given by the persons there. It is submitted that the proceedings are under an Special Act and general law. The proceedings are not barred to continue together.

(v) In so far as the argument of the company not being made as an accused is concerned and the proceedings be quashed on the said ground is concerned, prima facie it was found that godown was under the ownership of the applicant and whether the same was for the use of the company or not, is a matter of trial.

(vi) The trial in the present matter has started in which one witness has been examined and the statement of the second witness is being recorded. The quashing of the proceedings at this stage, may not be in the fitness of things as scuttling the trial at this stage will not be proper.

13. After having heard learned counsels for the parties and perusing the records, it is evident that the applicant is named in the First Information Report. There are allegations against him that illegal liquor was being unloaded from the truck and being stocked in his godown. The material as found in the godown was deficient for certain necessary formalities due to which a conclusion was drawn that the same has not come through legal channel. Even there was no explanation and presentation of relevant documents by the concerned persons with regards to the same. In the present petition also the ownership of godown and the recovery of the material is not challenged. After recovery of the material and arrest of some of the accused, the First Information Report was lodged after which the investigation concluded and charge sheet was submitted on which the trial court took cognizance and summoned the applicant and other accused persons. On appearance of the applicant, the trial court framed charges against him. The said charges were read to the applicant to which he pleaded not guilty and claimed to be tried. There was no

challenge of the order taking cognizance on the charge sheet, summoning of the applicant by the trial court and also to the framing of charge against him but the only things stated by him after framing of charge was that he denies the charges and claims to be tried. The trial started in which the statement of PW-1 who is the first informant has been recorded. The statement of the other witness as PW-2 is being recorded. Now at this stage, the present petition has been filed for quashing of the proceedings.

14. The Apex Court in the case of **Ratilal Bhanji Mithani Vs. State of Maharashtra and others : (1979) 2 SCC 179** has held that after framing of charge there cannot be a discharge but only an acquittal can be done on a finding of not guilty turning on the merits of the case. It has been held as follows :-

“24. At the outset, let us have a look at the relevant provisions of the Code of Criminal Procedure, 1898, which admittedly governed the pending proceedings in this case. The procedure for trial of warrant cases by Magistrates is given in Chapter XXI of that Code. The present case was instituted on a criminal complaint. Section 252 provides that in such a case, the Magistrate shall proceed to hear the complainant (if any) and take all such evidence, as may be produced, in support of the prosecution. Sub-section (2) of that Section casts a duty on the Magistrate to ascertain the names of persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and to summon all such persons for evidence. Section 253 indicates when and in what circumstances an accused may be discharged: It says:

“253. (1) If, upon taking all the evidence referred to in Section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.”

Section 254 indicates when and in what circumstances a charge should be framed. It reads:

“254. If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused.”

Section 255 enjoins that the charge shall then be read over and explained to the accused, and he shall be asked whether he is guilty or has any defence to make. If the accused pleads guilty, the Magistrate shall record that plea, and may convict him thereon.

25. Section 256 provides that if the accused refuses to plead or does not plead, or claims to be tried, he shall be required to state at the next hearing whether he wishes to cross-examine any of the

witnesses for the prosecution whose evidence has been taken, and if he says he so wants to cross-examine, the witnesses named by him shall be recalled and he will be allowed to further cross-examine them. “The evidence of any remaining witnesses for the prosecution shall next be taken” and thereafter the accused shall be called upon to enter upon and produce his defence.

26. Section 257 is not material. Section 258(1) provides that if in any case in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal. Sub-section (2) requires, where in any case under this chapter the Magistrate does not proceed in accordance with the provisions of Section 349 or Section 562, he shall, if he finds the accused guilty, pass sentence on him in accordance with law.

27. From the scheme of the provisions noticed above it is clear that in a warrant case instituted otherwise than on a police report, “discharge” or “acquittal” of accused are distinct concepts applicable to different stages of the proceedings in Court. The legal effect and incidents of “discharge” and “acquittal” are also different. An order of discharge in a warrant case instituted on complaint, can be made only after the process has been issued and before the charge is framed. Section 253(1) shows that as a general rule there can be no order of discharge unless the evidence of all the prosecution witnesses has been taken and the Magistrate considers for reasons to be recorded, in the light of the evidence, that no case has been made out. Sub-section (2) which authorises the Magistrate to discharge the accused at any previous stage of the case if he considers the charge to be groundless, is an exception to that rule. A discharge without

considering the evidence taken is illegal. If a prima facie case is made out the Magistrate must proceed under Section 254 and frame charge against the accused. Section 254 shows that a charge can be framed if after taking evidence or at any previous stage, the Magistrate, thinks that there is ground for presuming that the accused has committed an offence triable as a warrant case.

28. Once a charge is framed, the Magistrate has no power under Section 227 or any other provision of the Code to cancel the charge, and reverse the proceedings to the stage of Section 253 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it, the proceedings are only an inquiry. After the framing of the charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial in the manner provided in Sections 254 to 258 to a logical end. Once a charge is framed in a warrant case, instituted either on complaint or a police report, the Magistrate has no power under the Code to discharge the accused, and thereafter, he can either acquit or convict the accused unless he decides to proceed under Section 349 and 562 of the Code of 1898 (which correspond to Sections 325 and 360 of the Code of 1973).

29. Excepting where the prosecution must fail for want of a fundamental defect, such as want of sanction, an order of acquittal must be based upon a “finding of not guilty” turning on the merits of the case and the appreciation of evidence at the conclusion of the trial.

30. If after framing charges the Magistrate whimsically, without appraising

the evidence and without permitting the prosecution to produce all its evidence, “discharges” the accused, such an acquittal, without trial, even if clothed as “discharge”, will be illegal. This is precisely what has happened in the instant case. Here, the Magistrate, by his order dated December 12, 1962, framed charges against Mithani and two others. Subsequently, when on the disposal of the revision applications by Gokhale, J., the records were received back he arbitrarily deleted those charges and discharged the accused, without examining the “remaining witnesses” of the prosecution which he had in the order of framing charges, said, “will be examined after the charge”.”

(emphasis supplied)

15. The situation is the same in the present matter. After taking cognizance on the chargesheet, framing of charges, accused not pleading guilty and claiming to be tried, the trial starting and one witness has been examined whereas the statement of the other prosecution witnesses is being recorded, the applicant who is facing trial comes up challenging the cognizance/summoning order dated 28.02.2022 as well as entire proceedings of the trial at such a belated stage.

16. 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. Mohammad 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 scrutinise the complaint/FIR/charge-sheet in deciding whether the rarest of the rare case is made out to scuttle the prosecution.

17. Further in the case of **Priti Saraf & anr. Vs. State of NCT of Delhi & anr. : 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 mala fide

and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

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 analysed 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 scrutinise the complaint/FIR/charge-sheet in deciding whether the case is the rarest of rare case, to scuttle the prosecution at its inception."

18. In the case of **Ramveer Upadhyay Vs. State of U.P. : 2022 SCC Online SC 484** the Apex Court has held in paragraph nos. 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. 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."

19. 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."

20. In so far as argument with regards to the offences under the Excise Act, taking cognizance and trying the applicant for it is concerned, although it is strenuously argued that the trial is bad in the eyes of eye and is void ab-initio but in the case of **State of Maharashtra Vs. Sayyed Hassan Sayyed Subhan : (2019) 18 SCC 145** it has been held by the Apex Court that there is no bar to a trial or conviction of an accused under two different enactments. The only bar is to the punishment of him twice for the offence. It has been held as under :

"7. There is no bar to a trial or conviction of an offender under two different enactments, but the bar is only to the punishment of the offender twice for the offence. Where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence.

[T.S. Baliah v. T.S. Rangachari, (1969) 3 SCR 65 : AIR 1969 SC 701] The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under IPC and at the same time, an offence under any other law. [State of Bihar v. Murad Ali Khan, (1988) 4 SCC 655 : 1989 SCC (Cri) 27] The High Court ought to have taken note of Section 26 of the General Clauses Act, 1897 which reads as follows:

“26. Provision as to offences punishable under two or more enactments.—Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.”

8. In Hat Singh case [State of Rajasthan v. Hat Singh, (2003) 2 SCC 152 : 2003 SCC (Cri) 451] this Court discussed the doctrine of double jeopardy and Section 26 of the General Clauses Act to observe that prosecution under two different Acts is permissible if the ingredients of the provisions are satisfied on the same facts. While considering a dispute about the prosecution of the respondent therein for offences under the Mines and Minerals (Development and Regulation) Act, 1957 and the Penal Code, this Court in State (NCT of Delhi) v. Sanjay [State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772 : (2014) 5 SCC (Cri) 437] held that there is no bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offences. A perusal of the provisions of the FSS Act would make it clear that there is no bar for prosecution under IPC merely

because the provisions in the FSS Act prescribe penalties. We, therefore, set aside the finding of the High Court on the first point.”

21. Further in the case of **Kunwar Pal Singh Vs. State of Uttar Pradesh : (2020) 14 SCC 331** it has been held by the Apex Court that since the ingredients constituting offence(s) in both the enactments are different, prosecution under both the enactments is permissible. It has been held that all offences under any other law shall be investigated, inquired into, tried under Cr.P.C., subject to any enactment regulating the manner or place of investigation, trial, etc. of such offences. It is held as follows :-

“4. In the written submissions filed by the appellant, a relatively new plea and contention has been raised by relying upon the judgments of this Court in *Belsund Sugar Co. Ltd. v. State of Bihar* [Belsund Sugar Co. Ltd. v. State of Bihar, (1999) 9 SCC 620], *Sharat Babu Digumarti v. State (NCT of Delhi)* [Sharat Babu Digumarti v. State (NCT of Delhi), (2017) 2 SCC 18 : (2017) 1 SCC (Cri) 628] and *Suresh Nanda v. CBI* [Suresh Nanda v. CBI, (2008) 3 SCC 674 : (2008) 2 SCC (Cri) 121] to urge that the MMDR Act, 1957 being a special statute, prosecution for an offence under Section 379 IPC would not be maintainable. The judgment of this Court in *State (NCT of Delhi) v. Sanjay* [State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772 : (2014) 5 SCC (Cri) 437], it is submitted, is distinguishable as FIR for the offence against illegal sand mining in Sanjay [State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772 : (2014) 5 SCC (Cri) 437] was registered suo motu due to non-production of any document to establish mining rights and, therefore, the

ratio in that case would apply only to cases of illegal mining where the mining lease had already been revoked or there was no subsisting mining lease.

5. We find the submission of the appellant to be untenable. In *Sanjay [State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772 : (2014) 5 SCC (Cri) 437]*, a Division Bench of this Court had decided the appeals preferred against the conflicting judgments of the *Delhi High Court [Sanjay v. State, 2009 SCC OnLine Del 525 : (2009) 109 DRJ 594]*, *Gujarat High Court [Vishalbhai Rameshbhai Khurana v. State of Gujarat, 2010 SCC OnLine Guj 13915 : (2010) 3 GCD 2160]*, *Kerala High Court [Moosakoya v. State of Kerala, 2007 SCC OnLine Ker 584 : (2008) 1 KLT 538]*, *Calcutta High Court [Seema Sarkar v. State, 1994 SCC OnLine Cal 277 : (1995) 1 Cal LT 95]*, *Madras High Court [M. Palanisamy v. State of T.N., 2012 SCC OnLine Mad 2125 : (2012) 4 CTC 1]*, *[Sengol v. State, 2012 SCC OnLine Mad 82 : (2012) 2 CTC 369]* and *Jharkhand High Court* on the question whether a person can be prosecuted for the offences under Sections 379/114 and other provisions of IPC on the allegations of illegal mining in view of Section 22 of the MMDR Act, 1957, which reads as under:

“22. Cognizance of offences.—

No court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Central Government or the State Government.”

6. After advertng to the provisions of CrPC, namely, Sections 2(c), 2(d) and 2(h) which define “cognizable offence”, “complaint” and “investigation”

respectively, this Court in *Sanjay [State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772 : (2014) 5 SCC (Cri) 437]* had referred to Section 4 CrPC, 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.”

As per sub-section (2) of Section 4, all offences under any law, other than IPC, can be investigated, inquired into and tried under CrPC, subject to any enactment regulating the manner or place of investigation, trial, etc. of such offences.

8. Accordingly, in *Sanjay [State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772 : (2014) 5 SCC (Cri) 437]* it was held that the investigation of the offences is within the domain of the police and the power of a police officer to investigate into cognizable offences is not ordinarily impinged by any fetters albeit the power must be exercised as per the statutory provisions and for legitimate purposes. The courts would interfere only when while examining the case they find that the police officer in exercise of the investigatory

powers has breached the statutory provisions and put the personal liberty and/or the property of a citizen in jeopardy by an illegal and improper use of the powers or when the investigation by the police is not found to be bona fide or when the investigation is tainted with animosity. While examining the issue, this Court in *Sanjay [State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772 : (2014) 5 SCC (Cri) 437]* took notice of the decision in *H.N. Rishbud v. State of Delhi [H.N. Rishbud v. State of Delhi, AIR 1955 SC 196 : 1955 Cri LJ 526]* wherein this Court has held that a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to the taking of the cognizance or trial. The cardinal principle of law as noted by this Court in *Directorate of Enforcement v. Deepak Mahajan [Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440 : 1994 SCC (Cri) 785]* is that every law is designed to further the ends of justice and should not be frustrated on mere technicalities. The public trust doctrine was cited and applied to underscore the principle that certain resources like air, sea, water, forests and minerals are of great importance to the people as a whole and that the Government is enjoined to hold such resources in trust for the benefit of the general public and to use them for their benefit than to serve private interests.”

22. Regarding the second limb of argument that there is no evidence with regards to the offences under the IPC, it is apparent from the records that the trial court after prima facie finding a case to be made out against the applicant took cognizance upon the charge sheet, summoned him and then charges were also framed against him under sections 420, 120-B IPC and Section 60, 63, 72 of U.P.

Excise Act. There are allegations against him that illegal liquor was being unloaded from the truck and being stocked in his godown. The trial has started in which one prosecution witness has been examined and the second witness is under examination. The applicant who is a named accused, charged accused is being tried but he has not tried to claim discharge before the trial court at the appropriate stage. Even the order framing charge has not been challenged by him yet.

23. Learned counsel for the applicant has while arguing the matter submitted that in view of the judgement of a Division Bench of this Court (Lucknow Bench) in the case of **Shueb Mahmood Kidwai @ Bobby Vs. State of U.P. : Criminal Misc. 482/378/407 No. 3044 of 2017, decided on 23.02.2021 : [(2021) 0 Supreme (All) 122]** has answered a reference made by a Single Judge Bench whether after taking cognizance on a charge sheet, framing of charge and 18 out of 19 witnesses being examined in the trial at this stage accused/applicant is entitled to move an application under Section 482 Cr.P.C. Learned counsel has placed the following paragraphs of the said judgement (though unnumbered in the original text) to support his argument, which read as under:

“This case has been placed before this Division Bench in view of a reference made by a learned Single Judge of this Court vide his order dated 12.12.2017 which reads as under:-

"Supplementary affidavit filed on behalf of the applicant is taken on record.

Heard counsel for the parties.

In continuation of Court's order dated 09.05.2017, it is hereby observed that

applicant was required to show whether final report submitted by the police against the accused has been accepted by the Court or not. Vide annexure SA-2 there is prima-facie evidence that the final report submitted by the police has been accepted by the Court. Five cases shown to be registered against the present applicant. In four of them he has been acquitted and in one, final report submitted by the police, has been accepted.

Perusal of the order dated 14.06.2000 indicates that cognizance was taken in the year 2000, charge was framed on 27.08.2008 vide annexure 5 out of 19 witnesses 18 have been cross examined. The question is whether at this stage accused/applicant is entitled to move application under Section 482 Cr.P.C. During arguments, learned counsel for the applicant has referred annexure 7 to annexure 12 to show that similar applications under Section 482 Cr.P.C. moved on behalf of co-accused have been allowed by this Court. From annexure 7 to 10, the order have been passed on concession by learned AGA. However, orders annexure 11 and 12 have been passed even though on behalf of the State quashing of charge sheets was vehemently opposed. In both these cases, learned Single Judge has opined that when in all the 4 cases shown in the Gang Chart, the applicant has been acquitted, prosecution of the applicant under Gangster Act should not be continued. Thereafter he has quashed proceedings of Sessions Trial No.199 of 2000, under Section 2/3 UP Gangster Act going on against co-accused Ram Kumar Singh and Akhtar Husain alias Sarju.”

24. With regards to the argument that the company has not been made as an

accused and the proceedings be quashed on the ground itself it is the prosecution case that the godown belonged to the applicant from which the illegal liquor was recovered. It is the case of the applicant that the godown is of the company, the same is to be taken up in the trial at the appropriate stage to show as to who is the owner of the godown and whose material is being stocked therein. The proceedings on the said ground itself cannot be quashed.

25. The proposition of law with regards to maintainability of a petition under section 482 Cr.P.C. even at the stage of recording of evidence in trial is not in dispute at all but the decision of the same would be in the facts and circumstances of each and every case independently.

26. In view of the discussion as above, the law on the issue, the prima facie material available against the applicant and also the stage of the case, this Court does not find it to be a fit case for interference, the present application under Section 482 Cr.P.C. is thus **dismissed**.

(2023) 7 ILRA 596

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 23.05.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Misc. Writ Petition No. 22529 of 2008

Shyam Bahadur Singh	...Petitioner
Versus	
State of U.P. & Anr.	...Respondents

Counsel for the Petitioner:
Sri Satish Kumar Mishra

Counsel for the Respondents:

G.A., Sri Shyam Sunder Mishra, Sri O.P. Mishra

Shyam Sunder Mishra, learned counsel for respondent no. 2 and Sri O.P. Mishra, learned AGA for the State.

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 125 - Order for maintenance of wives , children and parents - Non-mentioning or wrong mentioning of provisions of law should not be treated as obstacle in proceeding with a case - order of civil court could be challenged under Article 227 of the Constitution of India and not under original writ jurisdiction under Article 226 of the Constitution of India - any matter which has been decided in a summary manner shall not have an effect of res-judicata. (Para -6,7)

Proceeding initiated by wife under Section 125 Cr.P.C. - Dismissed - revision - dismissed - Second application for grant of maintenance filed by respondent no. 2(wife) under Section 125 Cr.P.C. - ground - change in circumstances i.e. remarriage by the husband – objected by petitioner - disputed questions of fact. **(Para - 8,10)**

HELD:-Section 125 Cr.P.C. applies to individuals who have been neglected or refused maintenance, or who lose resources due to changed circumstances. Liability to maintain under section 125 Cr.P.C. is continuing one. Change in circumstances allows a person to apply for maintenance. Foreclosure would frustrate the purpose of section 125 Cr.P.C.. No interference required in the order of trial court or of the revisional court in exercise of writ jurisdiction. **(Para -11)**

Petition dismissed. (E-7)

List of Cases cited:

Radhey Shyam & anr. Vs Chhabi Nath & ors., (2015) 5 SCC 423

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

1. Heard Sri Satish Kumar Mishra, learned counsel for the petitioner, Sri

2. This writ petition has been filed by the petitioner to issue a writ, order or direction in the nature of certiorari quashing the order dated 31.01.2006 and 22.01.2004 passed by Additional District Judge/Special Judge (SC/ST Act), Banda and Additional Chief Judicial Magistrate, North-East Railway, District Banda respectively.

3. The facts relevant for the purpose of this writ petition are as below:-

The respondent no. 2 filed an application under Section 125 Cr.P.C. claiming maintenance from her husband, which was dismissed on 31.01.1995 on certain grounds; the criminal revision filed by the respondent/wife was also dismissed; the respondent no. 2 again moved a second application under Section 125 Cr.P.C. on a premise that there have been change in circumstances, therefore, she is entitled to claim maintenance from her husband and that second application case no. 1490/2003 came to be allowed directing her husband to pay Rs. 1,500/- per month; the opposite party aggrieved by the above order dated 22.01.2004, preferred a criminal revision no. 30/2004 which was dismissed on 31.01.2006, now the petitioner husband is before this court challenging the order passed by the trial court as well as the order passed by the revisional court.

4. The main crux of the argument of the petitioner is that the respondent's wife never challenged the order of the revisional court by which the earlier order passed by the trial court rejecting the first application under Section 125 Cr.P.C. was affirmed,

therefore, the order passed against the wife became final and therefore, the matter cannot be agitated again by filing another application under Section 125 Cr.P.C.; it is argued that the entire proceeding subsequently initiated by respondent no. 2 is barred by principle of constructive res-judicata and hit by the provisions of Constitution of India, therefore, it is liable to be quashed; it is further argued that the subsequent orders granting maintenance is passed ignoring the factual and legal positions; the learned trial court as well as the revisional court passed an illegal order, therefore the orders cannot be sustained.

5. The contentions of the petitioner is opposed by respondent no. 2 on the ground that in a judicial order this Court is not allowed to interfere while exercising writ jurisdiction under Article 226 of the Constitution of India. Hence, the petition should be dismissed at the very threshold. To stress above point. Judgement of Hon^{ble} Supreme Court in the case of **Radhey Shyam and another vs. Chhabi Nath and others, (2015) 5 SCC 423** has been referred to.

The apex court in the aforesaid judgment held that writ of certiorari lies to bring decisions of an 'Inferior court?', tribunal, public authority or any other body of persons for review so that the court may determine whether they should be quashed or not. However, expression 'interference' the court is not referable to the judicial courts. Writ of certiorari lies against patently erroneous or without jurisdiction orders of tribunals or authorities or courts other than judicial courts. The Apex Court in para 25 further observed as below:-

“25. All courts in the jurisdiction of a High Court are subordinate to it and

subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of Tribunals or authorities or courts other than judicial courts. There are no precedents in India for High Courts to issue writs to subordinate courts. Control of working of subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to judicial courts”

6. Thus it has been clearly laid down that order of civil court could be challenged under Article 227 of the Constitution of India and not under original writ jurisdiction under Article 226 of the Constitution of India.

7. Certain facts catch attention of this court. The second application for grant of maintenance was filed by the respondent no. 2 in the year 2003 and the same was decided by an order dated 22.01.2004. The revision filed against that order was dismissed in January 2006. This petition under Article 226 of the Constitution of India came to be filed by the husband with a prayer to quash those orders in 2008 and since then matter is pending. Almost 14 years have gone since then and all this

while, this legal issue was neither raised nor realised that the writ petition seeks to invoke powers under Article 226 instead of Article 227 of the Constitution of India. This is settled law that non-mentioning or wrong mentioning of provisions of law should not be treated as obstacle in proceeding with a case. In my view, an ordinary litigant cannot be expected of having too minute knowledge of provisions of law and that the court shall be failing in its duty if the case is thrown in the waste paper basket on a technical point or on the basis of mentioning of a wrong provision of law. In such matter, a Judge ought to play its expected role. In this view of the matter, I find it fit to treat this petition as one moved under Article 227 of the Constitution of India.

8. This is not disputed that the earlier proceeding initiated by the wife under Section 125 Cr.P.C. came to be dismissed and the revision filed by her also came to be dismissed. This is not disputed that subsequent case under Section 125 Cr.P.C. was filed by the wife on a premise that there has been a change in circumstances.

9. I find it pertinent to reproduce relevant portion of Section 125 Cr.P.C. which is as below:-

"(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who

has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means."

10. It may be noted that the solemn aim of the proceedings under Section 125 Cr.P.C. is to prevent vagrancy and destitution. Section 125 Cr.P.C. is a piece of social legislation introduced in Cr.P.C. to grant a quick relief to the members of the society. At the same time, it may be noted that procedure which shall be adopted in such cases is a summary one. This is settled legal position that any matter which has been decided in a summary manner shall not have an effect of res-judicata, hence in my view this argument is misconceived. More so because this application has been moved on the ground that there has been change in circumstances i.e. remarriage by the husband. Though the petitioner has objected to the fact of remarriage, however, this court in exercise of writ jurisdiction is not permitted to go into the disputed questions of fact.

11. There may be instances where the person who falls within the purview of section 125 Cr.P.C. as being one who has been neglected or refused maintenance during certain period of time. There may be some instances where a person, is for the time being able to maintain himself or herself loses her/his resources because of changed circumstances. In such cases a fresh right to claim maintenance may accrue. Legally the liability to maintain under section 125 Cr.P.C. is continuing one. In my view, when there is a change in circumstances entitling a person to be a claimant as per provisions of section- 125 Cr.P.C., he or she can very well apply for maintenance. If such an option is foreclosed, it shall frustrate the very purpose of section- 125 Cr.P.C. I do not find any good ground to interfere in the order of the trial court or of the revisional court in exercise of writ jurisdiction of this court.

12. Hence, this writ petition is dismissed.

(2023) 7 ILRA 600
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
 THAKER, J.**
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 6481 of 2016
 And
 Criminal Appeal No. 6230 of 2016

Ankit **...Appellant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Appellant:

Sri Ajay Kumar Mishra, Sri Rajiv Lochan Shukla, Sri Gautam, Sri Jitendra Rana

Counsel for the Opposite Party:
 G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 299, 302 r/w 34 - Punishment for murder - Life imprisonment - Indian Evidence Act, 1872 - Section 106 - Code of Criminal Procedure, 1973 - Sections 154, 161 - Appeal against conviction - Chain of circumstantial evidence missing - Benefit of doubt - Allegations against appellants that they were causing mental torture to deceased and she had quarrel with her husband on date of incident, committed suicide - After investigation charge-sheet submitted against appellants - Charges framed - Pleaded not guilty - Appellants submitted that learned Judge has come to wrong conclusion that death was by strangulation and not suicide, even medical evidence does not support the same. (Para 4, 8, 9, 15)

Held, the appellants cannot be held guilty for offence u/s 302 IPC, as father-in-law was not at place of offence and husband does private job and had gone for job, mentioned in St.ment recorded u/s 313 Cr.P.C., disbelieved by trial Judge - All witnesses turned hostile - Incident occurred in home but presence of accused not proved - Death was not premeditated, accused had no intention to cause death of deceased, injuries were sufficient in ordinary course of nature to have caused death, it was suicidal death, accused had not committed murder of deceased. (Para 24, 25)

Appeals allowed. (E-13)

List of Cases cited:

1. Subrahmanyam Vs St. of Tamil Nadu & ors., 2010 (1) UPCCR page 21
2. G. Parshwanath Vs St. of Karn.; AIR 2010 SC 2914

3. Jagdish Vs St. of M.P., 2009 (67) ACC 295 (SC)

4. Ujjagar Singh Vs St. of Pun., AIR 2008 SC (SUPP) 190

5. Tomaso Bruno & anr. Vs St. of U.P., 2015 (1) JT 389

6. Riyazuddin @ Raju & anr. Vs St. of U.P., Criminal Appeal No.911 of 2012, decided on 2.8.2022

7. Anil Vs St. of U.P., Criminal Appeal No.703 of 2017, decided on 8.12.2022

8. Santosh Vs St. of U.P., Criminal Appeal No.5657 of 2011, decided on 22.2.2021

9. Tukaram and Ors Vs St. of Mah., reported in (2011) 4 SCC 250

10. B.N. Kavatakar & anr. Vs St. of Karn., reported in 1994 SUPP (1) SCC 304

11. Sabitri Samantaray Vs St. of Odisha, AIR 2022 SC 2591, (Para 18, 19)

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

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

(Delivered by Hon'ble Dr. Kaushal
Jayendra Thaker, J.
&
Hon'ble Shiv Shanker Prasad, J.)

1. Heard Sri Ajay Kumar Mishra, learned counsel for the appellants and Sri Vikas Goswami, learned A.G.A. for the state.

2. Both these appeals challenge the judgment and order dated 17.11.2016 passed by Additional Sessions Judge/Fast Track Court No.1, Meerut, in Sessions Trial No.836 of 2015 (State vs. Ankit and another) arising out of Case Crime No.145

of 2015, Police Station – Parikshitgarh, District – Meerut.

3. Both the accused, who are father and son, have been convicted under Section 302 read with 34 of I.P. Code pursuant to registration of Case Crime No.145 of 2015. The learned trial Judge committed the case to the court of Sessions, being numbered as 836 of 2015. Both the accused Ankit and Harnam Singh were held guilty of commission of offence under Section 302 IPC read with section 34 and have been sentenced to the life imprisonment and Rs. 15,000/- fine and in default 6 months of imprisonment.

4. The genesis of the case started with an incident which happened on 23.4.2015 wherein the sister of the first informant, who was married on 19.2.2012 to Ankit Kumar S/o Harnam Singh and as her husband and father-in-law were harassing causing mental torture to the deceased, she committed suicide at about 3:30 p.m. on 23.4.2015. This was the first information given to the police authority.

5. It is mentioned in the F.I.R. that one Dhanraj S/o Amichand, who also resides in the vicinity of the accused, had conveyed that on the date of incident, the deceased had quarrelled with the appellant herein. On this information, a case under Section 306 of I.P. Code was registered. The investigation was put into motion by one Chandvir, who was the police officer. The investigating authority went to the site, made the site plan and recorded the statement under Section 161 Cr.P.C. but at the end of the investigation lodged an F.I.R. under Section 302 of I.P. Code.

6. The accused were summoned by the Magistrate and after completing the

formality for committing the case to the court of Session, the matter was committed to the court of Session.

7. The accused Ankit was in custody on being summoned by the court of Session, were presented before learned Sessions Court. Both the accused pleaded not guilty and they wanted to be tried.

8. The police after recording the statements of several witnesses filed charge-sheet against both the accused persons. Being summoned the accused were committed to the court of Sessions as the offences for which the accused were charged were exclusively triable by the court of Sessions. It is not the case of prosecution that death is a murder.

9. The charges were framed for commission of the offence under Section 302 I.P.C. read with Section 34 against both the accused persons, which was denied by them. They pleaded not guilty and claimed to be tried.

10. The trial started and the prosecution examined a total of 10 witnesses, who are as follows:

1	Pramod Kumar	PW1
2	Parvita	PW2
3	Om	PW3
4	Dhan Raj Singh	PW4
5	Shyam Veer Singh	PW5
6	Rakesh Kumar Tyagi	PW6
7	Naresh Kumar	PW7
8	Dr. Pankaj Sharma	PW8
9	Netra Pal Singh	PW9

10	Girish Verma	PW10

11. In support of the oral evidence following documents were filed:

1	Written Report and Recovery Memo of Dupatta.	Ex.Ka.1
2	Charge-sheet	Ex.Ka.2
3	Panchayatnama	Ex.Ka.3
4	P.M. Report	Ex.Ka.10
5	F.I.R.	Ex.Ka.13

12. The prosecution examined several witnesses in support of the prosecution case so as to bring home the charge with which both the accused were charged. The evidence of PW1-Pramod Kumar in his oral testimony accepted the fact that his sister – deceased was married on 19.2.2012 with the accused Ankit and his elder sister was married with Mohit (elder brother) and Harnam and Mohit is son of Harnam but as far as the question of quarrelling and causing torture to his sister are concerned, he did not support the prosecution. Thereafter, in his oral testimony, he has deposed that his elder sister Parmita has stated that Arvita had committed suicide by hanging herself. He feigned ignorance whether in-laws of the sister were harassing her and that was the cause of her committing suicide. He has accepted that the F.I.R. was lodged by him. However, even in the cross-examination, he has not deposed anything except that his sister committed suicide. Similar version is given by elder sister Parmita, who again opined that Harnam was her father-in-law and Ankit was her brother-in-law. Arvita – deceased, according to this witness, was school teacher. She thereafter has not

supported the prosecution witness. She has denied the circumstances about quarrel and the factum that deceased was beaten by her father-in-law. Even in the cross-examination by the learned Counsel for State, she has denied the fact that Harnam and Ankit had done her to death. Onkar – PW3 has also deposed in similar line and was declared hostile. Dheeraj Singh – PW4 has not supported the prosecution case and has also been declared hostile. The Police Officer-PW5-Shyam Veer Singh has accepted that it was he who had filed the charge-sheet.

13. The conviction is solely based on the evidence of Dr. Pankaj Sharma – PW8, who had performed the post-mortem of the dead-body has opined:-

“इस साक्षी ने अपनी जिरह में यह भी कथन किया है कि जब कोई व्यक्ति गले में कपड़ा डालकर आत्म हत्या करता है तो उस दशा में भी उस व्यक्ति का साँस घुटता है मृतिका के कपड़े सही सलामत थे फटे नहीं थे। इस बारे में चोट अपने आप आयी है या किसी के द्वारा चोट कारित की गयी है कोई राय नहीं दी जा सकती है।”

14. The moot question now arises can the Court rely on the statement made under Section 161 Cr.P.C. of witnesses even if that is done, the F.I.R. nor any statement under Section 161 CPC state that the death was caused by the accused by strangulation:

" चिकित्सीय साक्ष्य शव विच्छेदन रिपोर्ट प्रदर्श क-१० में चिकित्सक द्वारा मृतिका अरविता के शरीर में आयी एंटी मॉर्टेम इंजरी में, "Ligature mark 40 c.m. long & 2 c.m. चौड़ाई all round neck 3 c.m. below Rt. ear, 6 c.m. below Lt. ear 1 c.m. below hair line back, 6 c.m. below chin & 7 c.m. above sternal notch mark situated above the thyroid cartilage between Larynx & chin & directed obliquely upwards base of the

mark is groove, raddish margin becomes dry, hard & parchment live skin.”

शव विच्छेदन आख्या में मृत्यु का कारण death due to asphyxia as a result of strangulation (anti mortem) दर्शाया गया है। ”

15. It is submitted by the Counsel for the appellant that the learned Judge has come to a wrong conclusion that death was by strangulation even if that was so there are several missing links in the chain leading to the said conclusion. The medical evidence also does not state about the same rather the learned Judge has based his finding on surmises that it was strangulation by causing death and not suicide. Learned Judge has relied on Subrahmanyam Vs. State of Tamilnadu and others, 2010 (1) UPCCR page 21, to come to this conclusion but the said conclusion is bad on facts.

16. It is further submitted by learned Counsel for appellant that the judgment relied by the learned Judge could not have been applied to the facts of this case where the medical evidence shows that the doctor performing postmortem did not opine that it was not suicide but murder. The finding that it was not a case of suicide or murder, the learned Judge opined as follows:-

“It is true that in a case of circumstantial evidence motive does have extreme significance but to say that in the absence of motive, the conviction based on circumstantial evidence cannot, in principle, be made is not correct. Motive provides foundational material – Absence of motive – Not of much consequence when chain of proved circumstances is complete. [G. Parshwanath v. State of Karnataka; AIR 2010 SC 2914, Jagdish vs. State of M.P., 2009 (67) ACC 295 (SC),

Ujjagar Singh v. State of Punjab, AIR 2008 SC (SUPP) 190] ”

This finding according to learned Counsel for appellants is perverse finding and the circumstances narrated to hold chain is complete are not proved.

17. The learned Counsel for the appellant has relied on the following decisions:-

(i) Tomaso Bruno and another Vs. State of U.P., 2015 (1) JT 389;

(ii) Riyazuddin @ Raju and another Vs. State of U.P., Criminal Appeal No.911 of 2012, decided on 2.8.2022;

(iii) Anil Vs. State of U.P., Criminal Appeal No.703 of 2017, decided on 8.12.2022;

(iv) Santosh Vs. State of U.P., Criminal Appeal No.5657 of 2011, decided on 22.2.2021;

18. It is submitted that the chain of circumstantial evidence as held to be completed by the learned Judge is not complete. The judgment cannot stand the scrutiny of this Court in view of the judgment in Riyazuddin @ Raju and another Vs. State of U.P., Criminal Appeal No.911 of 2012, decided on 2.8.2022 and Anil Vs. State of U.P., Criminal Appeal No.703 of 2017, decided on 8.12.2022, can be made applicable and the onus to prove that the accused were guilty has to be proved by prosecution which has not been discharged by prosecution.

19. Learned A.G.A. for the state has vehemently submitted that facts of this case will not permit the Court to take a different

view in this matter and has submitted that none of the judgments relied by the accused-appellant will apply to the facts of this case.

20. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind that it was homicidal death.

21. 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 or any other view is possible. The reason for considering the case from this angle is as in F.I.R. it is stated that the deceased had a quarrel with the accused and then news of her death came. Though F.I.R. under Section 154 Cr.P. Code is not proved, we consider the matter from that angle from the lens of the learned trial Judge, who has held the chain to be complete. 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.”

22. 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.

23. 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 not be one punishable under Section 304 part-I of the IPC.

24. If the case does not fall under Section 304 (I) IPC whether conviction of both accused with aid of section 302 IPC is made out or not requires to be sifted from judgment of trial court and evidence before both the courts. The accused cannot be held guilty for offence under Section 302 IPC, the reasons that father-in-law Harnam Singh was not at the place of offence. The accused appellant – Ankit does a private job and had gone for job which is a factor mentioned in the statement recorded under Section 313 Cr.P.C., disbelieved by trial Judge. Only on the basis of ligature mark can it be said that the accused, who have caused her death? The learned Judge has come to the conclusion that death was by strangulation. All the witnesses have turned hostile. Just because the incident occurred in the house, can it be said that circumstantial chain is complete. It is nobody’s case that the appellant – accused were in the house. Just because no witness has been examined, cant it be held that Ankit was not at Meerut rather no witness has opined that Ankit was at home. This is a missing link in the chain. The

circumstantial chain is not complete and it cannot be said that both the accused were having a common intention to do away with the deceased. Just because the incident occurred in the home but presence of accused has not been proved and, therefore, invoking section 106 of Evidence Act, 1872 and applying the judgment of the Apex Court in **Subrahmanyam Vs. State of Tamilnadu and others, 2010 (1) UPCR page 21**, it cannot be held to be proved that the accused were authors of death of deceased.

25. From the upshot of the aforesaid discussions, it appears that the death was not caused by the accused. The death 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 but it was suicidal death, accused is not proved to have committed the murder of deceased.

26. The Apex Court in **Sabitri Samantaray vs. State of Odisha, AIR 2022 SC 2591** has also observed as under:

“18. Section 106 of the Evidence Act postulates that the burden of proving things which are within the special knowledge of an individual is on that individual. Although the Section in no way exonerates the prosecution from discharging its burden of proof beyond reasonable doubt, it merely prescribes that when an individual has done an act, with an intention other than that which the circumstances indicate, the onus of proving that specific intention falls onto the individual and not on the prosecution. If the accused had a different intention than the facts are specially within his knowledge which he must prove.

19. Thus, although Section 106 is in no way aimed at relieving the prosecution from its burden to establish the guilt of an accused, it applies to cases where chain of events has been successfully established by the prosecution, from which a reasonable inference is made out against the accused. Moreover, in a case based on circumstantial evidence, whenever an incriminating question is posed to the accused and he or she either evades response, or offers a response which is not true, then such a response in itself becomes an additional link in the chain of events. [See Trimukh Maroti Kirkan Vs. State of Maharashtra, (2006) 10 SCC 681]”

27. It is more than settled principle of law that if two views are possible, the benefit shall always go to the accused. It will be apposite to refer to the following observations of Hon'ble the Apex Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116:-**

“163. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. In Kali Ram v. State of Himachal Pradesh (1973) 2 SCC 808, this Court made the following observations : [SCC para 25, p. 820 : SCC (Cri) p. 1060]

Another golden thread which runs through the web of the 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. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence."

The accused Ankit is in jail. Since more than 9 years, the case under Section 306 IPC is also not proved.

28. In ***Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]***, explaining rehabilitary & reformatory 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 reculturation. 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."

29. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in

our country which is reformatory 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.

30. Having considered the submission of medical evidence orally as well as the post-mortem report has been wrongly interpreted by the court below in coming to the conclusion that it was the accused Ankit and his father, who had done the deceased to death.

31. Accordingly, both the appeals are allowed. Both the accused are acquitted of all the charges. The accused Ankit be set free forthwith by giving benefit of doubt if not wanted in any other case. Harnam Singh being enlarged on bail, need not to surrender. Fine if paid, be refunded to appellants. Record and proceedings be sent back to the Court below forthwith.

32. The Court had requested the High Court Legal Service Committee/had requested Shri Ajay kumar Mishra to act as Amicus Curiae in the matter of Harnam Singh which he had accepted. This Court is thankful for that.

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

34 . We are thankful to Sri Ajay Kumar Mishra, learned counsel for the appellants in both the appeals and learned A.G.A., for ably assisting the Court.

Complainant/first informant filed an application under Section 156(3) Cr.P.C. - rejected - allegation - minor daughters intercepted by 3 persons with mala fide intention and were molested - applicant tried to lodge an FIR - police did not take any action - sent an application to S.S.P. - no action taken till now - Special Judge arbitrarily passed order without considering facts - particularly in para no. 2 - which appears incomplete. **(Para - 3)**

HELD:- Court applied judicial discretion correctly. Incomplete sentence in para no. 2 of order appears a typing mistake, which does not impact the matter's merits. No sufficient ground for intervention in order. **(Para -9,10)**

The complainant/the first informant Rameshwari filed an application under Section 156(3) Cr.P.C. naming 5 persons therein with the allegation that her minor daughters were intercepted by 3 persons with malafide intention and were molested; when they protested, all the 3 persons namely, Rabul, Dinesh and Kuldeep ran away; the same evening the applicant i.e. the mother of the victims complained to mother of Dinesh but they began abusing them; Kalicharan exhorted

his sons to teach them a lesson and they assaulted the applicant and her daughters and also tore away the clothes of one of them; it is further alleged in the application that the applicant tried to lodge an FIR but the police did not take any action, therefore she sent an application to the S.S.P. but no action has been taken till now.

4. It is contended on behalf of the revisionist that from the allegations in the application under Section 156(3) Cr.P.C., a cognizable case is disclosed; the learned Special Judge, (POCSO Act) has passed the order in arbitrary manner without considering the facts as alleged; my attention has been drawn to para no. 2 of the order where a line written appears to be rather incomplete; on the basis of this fact the order is being assailed as having passed in a casual and cavalier manner.

5. The revision is opposed by the other side submitting that incomplete sentence occurring in a portion of the impugned order on which the attention of the court has been attracted, prima facie appears to be a typing mistake; it is further submitted on behalf of the respondents that the order is speaking; the material facts have been discussed in last para of the 2nd page of the order; the real facts are that this application has been filed just to create a defence; actually a day after the alleged incident the respondents were challaned under Sections 151, 107 and 116 Cr.P.C. on the application of the present revisionist and proceeding under Section 107/116 Cr.P.C. was drawn against the rest of the two respondents; nothing happened beyond the facts calling for an action by the police under Sections 151, 107 and 116 Cr.P.C.; this application has been given with false and distorted facts to wreck vengeance by making false assertions. This application is nothing but a clear attempt to misuse the law.

6. Learned AGA has contended that the correct position of law is that police officials ought to register the F.I.R. whenever facts brought to its notice show that cognizable offence has been made out. In case the police fails to do so, the modalities to be adopted, are as set out in Section- 190 read with Section-200 of the Code of Criminal Procedure as held in *Aleque Padamsee vs. Union of India, 2007 (3) ILR 469*.

7. I went through all the material on record. The Magistrate/court concerned cannot be expected to act upon an application in a mechanical manner. He shall be failing in his duty in case he fails to apply his mind. Settled position of law is that the Magistrate shall order for registration of a case if application 'discloses' commission of cognizable offence. In my view, the disclosure of cognizable offence cannot be construed to mean replication of words or the facts in such a manner as may fit within four corners of an offence defined in statutes. This is a common knowledge that applications under Section 156(3) Cr.P.C. may be drafted cleverly and may be dotted with sham assertions or half truths with legal advice, so as to persuade the courts to spring into action. If such a narrow and short sighted interpretation is done, it will be like playing in the hands of unscrupulous litigant. While passing an order on application under Section 156(3) Cr.P.C. the court is expected to apply its judicial mind. He is expected to be judicious, discreet and cautious and not to be swayed by mere use of certain words and legal terminology. He can certainly look for substance in the allegations and existence of life in the assertions.

8. It may usefully be noted that that despite dismissal of the application under Section 156(3) Cr.P.C. the revisionist/complainant still has certain remedies open in law.

9. It is not so that once application under section- 156(3) Cr.P.C. has been filed, the Magistrate has no option but to order for registration of F.I.R. just because it discloses a cognizable offence on paper irrespective of the broad probabilities of the case. In my view the concerned court has applied judicial discretion correctly; As far as incomplete sentence in para no. 2 of the order is concerned, prima facie it appears that it is just a typing mistake which does not effect the merits of the matter.

10. There does not appear sufficient ground calling for intervention in the order by this court in exercise of revisional powers, therefore this criminal revision is dismissed.

(2023) 7 ILRA 610

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 04.07.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 534 of 2023
And other Cases

**Rajeev Ranjan Srivastava ...Revisionist
Versus**

**Asstt. Director Directorate of
Enforcement, Zonal Office, Lucknow**

...Respondent

Counsel for the Revisionist:

Sri Santosh Kumar Bhatt

Counsel for the Respondent:

Sri Kuldeep Srivastava

(A) Criminal Law - Indian Penal Code, 1860 - Sections 120 B/420/467/468/471 -The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Section 227 - Discharge ,The Prevention of Money

Laundering Act, 2002 - Section 3/4,44,45, Section 2 (y) - Scheduled Offence, The Prevention of Corruption Act, 1988 - Section 13 (2) r.w. 13 (1) (c) & (d), The Customs Act, 1962 - Section 132, The Air (Prevention and Control of Pollution) Act, 1981 - Section 37 - Offence of money laundering is an offence separate and distinct from the Scheduled offence.(Para - 25)

(B) Prevention of Money-laundering (Maintenance of Records) Rules, 2005 - Rule 3 - Maintenance of records of transactions (nature and value) - Every reporting entity shall maintain the record of all transactions including, the record of all cash transactions of the value of more than ten lakh rupees or its equivalent in foreign currency. (Para -26)

Case involved a conspiracy between several individuals - to misappropriate and divert food grains for persons below the poverty line, mid-day meal, and Antyodaya - case initially investigated by S.I.T. - later transferred to C.B.I. under court directions - C.B.I. submitted charge-sheet after investigation - revisionist (Supply Inspector) was godown-in-charge - misappropriated food-grains entrusted to him - caused loss of subsidy to government Exchequer - Petitioners filed separate discharge applications - under Section 227 of Cr.P.C. - wrongly rejected by trial Court - without considering provisions of Section 2 (y) (ii) of PMLA - non-scheduled predicate offense - lack of suspicious transactions - memo of Revisions claims that Rule 3 requires a minimum threshold of ₹ 10 lakhs for all cash transactions - instant revision.(Para - 3,4,12)

HELD:-Rule 3 has no relevance for deciding as to whether a person needs to be tried for commission of an offence under section 3 of PMLA .Trial court rightly rejected petitioners' application for discharges. No illegality in the orders. **(Para -27,28)**

Revision dismissed. (E-7)

List of Cases cited:

1. Mohammad Iqbal Vs Respondent: St. of U.P.
& Ors., Criminal Revision No. 1004 of 2019

2. Vijay Madanlal Choudhary Vs U.O.I., 2022
SCC OnLine SC 929

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

1. The petitioners in the abovementioned 6 revisions are co-accused in a single case, bearing Case No. 357 of 2022 in the Court of Special Judge (Prevention of Corruption Act) / C.B.I. Court No. 3, Lucknow, arising out of ECIR/05/LKZO/2017 (New Case No.) and ECIR/PMLA/VSZO/2011 (Old case No.) under Section 3/4 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'PMLA') and all the revisions have been filed against separate similar orders dated 25.04.2023 passed by the trial Court rejecting separate applications for discharge under Section 227 of the Criminal Procedure Code (Cr.P.C.) filed by the petitioners. All the revisions involve common questions and, therefore, the same are being decided by a common judgment.

2. Heard Sri Santosh Kumar Bhatt, the learned for the revisionist and Sri Kuldeep Srivastava, learned counsel for the respondent - Directorate of Enforcement.

3. It has been stated in the revisions that the same arise out of a case registered under an order passed by this Court in Writ Petition Number 10503 (M/B) of 2009. Initially the case was investigated by S.I.T. of U. P. Police, but later it was transferred to C.B.I. under directions of this Court. The F.I.R. number RC0062010A0026/2010 lodged in Police Station CBI, ACB, Lucknow under Sections 120 B/420/467/468/471 I.P.C. and Section 13 (2) read with 13 (1) (c) and (d) of the Prevention of Corruption Act states that during the period 2004 to 2006, several

persons, in conspiracy with each other, misappropriated and diverted the food grains meant for persons below poverty line, mid-day meal and Antyodaya scheme in Varanasi district. After investigation, the C.B.I. submitted a charge-sheet.

4. The charge-sheet states that Satendra Kumar Rai - the revisionist in Revision No. 543 of 2023, was the then Supply Inspector and he was the godown-in-charge of Harahua block during the period 01.04.2005 to 31.03.2006. He misappropriated food-grains entrusted to him and thereby caused loss of subsidy to the government Exchequer to the tune of ₹ 8,27,711/-.

5. On the basis of the aforesaid F.I.R. and the charge-sheet, the Directorate of Enforcement (hereinafter referred to as 'E.D.') registered ECIR/06/PMLA/VSZO/2011, which was later renumbered as ECIR/05/LKZO/2017 and after carrying out investigation, it filed a complaint under Sections 44 and 45 of the Prevention of Money-Laundering Act (PMLA) against six persons, who are the petitioners in the six revisions.

6. The complaint states that Sri. Prakash Mishra, the petitioner in Revision No. 546 of 2023 was the godown in-charge of Harahua Block for the period 01.04.2004 to 16.07.2004. Jai Hind Maurya, the petitioner in Revision No. 536 of 2023 was the godown in-charge of Harahua Block for the period 17.07.2004 to 31.03.2005. Satendra Kumar Rai - the petitioner in Revision No. 543 of 2023, was working as Supply Inspector and he was the godown in-charge of Harahua block for the period 01.04.2005 to 31.03.2006.

7. The aforesaid Sri. Prakash Mishra, Jai Hind Maurya and Satendra Kumar Rai

had made certain entries in the issue register, which were denied by the Kotedars (fair-price shop license holders).

8. The complaint states that subsidy loss caused by the accused persons by misappropriating huge quantities of food-grains by forging the signatures of Kotedars in the issue register during the tenure of Sri Prakash Mishra is ₹19,10,448/-, the subsidy loss caused by the accused persons during the tenure of Jai Hind Maurya is ₹3,33,464/- and the subsidy loss caused by the accused persons during the tenure of Satendra Kumar Rai is ₹ 9,71,108/- and the aforesaid accused persons made corresponding financial gains.

9. The other co-accused persons, namely Rajeev Ranjan Srivastava - the petitioner in Revision No. 534 of 2023, Prem Shankar Singh - the petitioner in revision No. 538 of 2023 and Santosh Kumar Rastogi - the petitioner in Revision No. 545 of 2023 were the financiers, who had conspired with the aforesaid accused persons, who were in-charge of the godown and they had financed the pay orders for lifting the food-grains which were illegally diverted.

10. During investigation, three fixed deposit accounts of the accused Satendra Kumar Rai came to light and the cumulative amount of ₹ 8,27,711/- deposited in those three accounts was attached by the E.D.

11. All the petitioners had filed separate applications for discharge before the trial court, which have been rejected by means of similarly worded separate orders dated 25.04.2023.

12. The orders rejecting the discharge applications have been assailed by filing separate revisions inter alia on the grounds

that the petitioners are innocent; that the complaint has been filed belatedly, the predicate offence alleged against the petitioners was not a scheduled offence at the time of its alleged commission and that the E.D. could not find any money trail or any suspicious transactions. Ground XII taken in the memo of Revisions claims that as per Rule 3, the minimum threshold for all cash transactions is ₹ 10 lakhs whereas the subsidy loss allegedly caused by the petitioners is less than the aforesaid threshold amount, but the Ground does not disclose as to Rule 3 of which set of Rules has been referred to by the petitioners.

13. The learned Counsel for the petitioner has submitted that the loss allegedly caused by the individual petitioners is less than ₹30,00,000/- and, therefore, it would not fall within the purview of the term 'Scheduled Offence'.

14. The term Scheduled Offence is defined in Section 2 (y) of the PMLA. Section 2 (y), as it was enacted originally, read as follows: -

“(y) “scheduled offence” means—

(i) the offences specified under Part A of the Schedule; or

(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more;”

15. Initially the offence under Section 467 I.P.C. found place in Part B of the Schedule. Section 2 of PMLA was amended by Act 21 of 2009, so as to make it read as follows: -

“(y) “scheduled offence”
means—

(i) the offences specified under
Part A of the Schedule; or

(ii) the offences specified under
Part B of the Schedule if the total value
involved in such offences is thirty lakh
rupees or more; or

(iii) the offences specified under
Part C of the Schedule.”

16. The Schedule was also amended by Act 21 of 2009, whereby offences under Sections 120 B, 467 and 471 I.P.C. and the offence under Section 13 of the Prevention of Corruption Act were placed in Part B of the Schedule.

17. Part B of the Schedule was omitted by Act 2 of 2013 and offences under Sections 120 B, 420, 467, 471 I.P.C. and Section 13 of the Prevention of Corruption Act were mentioned in Part A of the Schedule.

18. Section 2 (y) was again amended by Section 145 (ii) of Act No. 20 of 2015 with effect from 14.05.2015 by replacing the words “thirty lakh rupees” occurring in sub-section (ii) with the words “one crore rupees” and presently Section 2 (y) of PMLA reads as follows: -

“Section 2. Definitions

“(y) “scheduled offence” means—

(i) the offences specified under
Part A of the Schedule; or

(ii) the offences specified under
Part B of the Schedule if the total value
involved in such offences is one crore
rupees or more; or

(iii) the offences specified under
Part C of the Schedule.”

19. The Schedule was also amended by Section 145 (ii) of Act No. 20 of 2015 with effect from 14.05.2015 whereby all the aforesaid offences remained in Part A. Part B was inserted in the Schedule and it mentions the offence under Section 132 of the Customs Act, 1962. It is clarified that Part A of the Schedule mentions several other offences also but only those offences have been mentioned in this judgment, which have been allegedly committed by the petitioner and which are relevant for the present case.

20. From a bare reading of Section 2 (y) of PMLA as it exists today, it is clear that the condition of the total value involved in the offence applied to the offences specified under Part B of the Schedule alone, and not to any other Scheduled offence. Part B of the Schedule mentions offence under Section 132 of the Customs Act only and the petitioner has not been charged with commission of the aforesaid offence.

21. The learned Counsel for the petitioner placed reliance on a judgment rendered by a co-ordinate Bench of this Court in the case of **Mohammad Iqbal Vs. Respondent: State of U.P. and Ors.**, Criminal Revision No. 1004 of 2019 decided On: 28.02.2020. In that case, a complaint case under Section 37 of the Air (Prevention and Control of Pollution) Act, 1981 was filed by U.P. Pollution Control Board, Lucknow with the allegation that there was no proper arrangement for controlling air pollution and the factory was operational from 12.09.1984 to 17.07.2007 without obtaining consent of the Board, in contravention of Section 21

of the Act. The Board had made a complaint to the E.D. upon which E.D. registered an ECIR for investigation of offence of money laundering to make inquiries regarding suspected 'Proceed of Crime' amounting to ₹52,42,525/- generated by the revisionist and his firm out of the commission of Scheduled Offence. After investigation, E.D. filed a Complaint under Section 45 of the Act with the allegation that the pollution control equipment worth ₹2,00,000/- was not installed, thus, the revisionist had generated 'Proceed of Crime' to the tune of ₹2,00,000/- and had retained the same. An application for discharge was rejected by the trial court. In Revision filed against the aforesaid order, it was submitted that the application for discharge moved before the court below was wrongly rejected without considering the provisions of Section 2 (y) (ii) of the PMLA. Allowing the revision, the Co-ordinate Bench held that: -

“15. As by way of Act No. 23 of 2019, Explanation clause has been added in Section 2(u) of the PML Act, which clearly provides that the 'Proceed of Crime' include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence. Indisputably, in the present case, the cost of the unit, viz. ₹2 lac, which was not installed at the factory, is treated as 'Proceed of Crime'. Learned counsel for the respondent failed to dispute the fact that initially the allegation levelled was that total value involved in the offence was more than ₹30 lac, which is categorically mentioned in the ECIR, but later on, in the complaint case, only the cost of equipment which was not installed, is treated as a 'Proceed of Crime'.

Admittedly, the court below failed to consider this aspect of the matter.”

22. It is significant to note that the offence under Section 37 of the Air (Prevention and Control of Pollution) Act, 1981 was not mentioned in the Schedule of Offences appended to PMLA originally. It was inserted in paragraph 24 of Part B of the schedule by Act 21 of 2009. Thus the offence under Section 37 of the Air (Prevention and Control of Pollution) Act, 1981 was not a Scheduled Offence under PMLA during the period 12.09.1984 to 17.07.2007, which it was committed, yet the accused was charged with commission of offence under Section 3 of the PMLA. The co-ordinate Bench rightly did not interfere with the proceedings on the Ground that on the date of commission of the predicate offence, it was not a Scheduled Offence.

23. Before proceeding any further, it would be appropriate to have a look at Section 3 of PMLA, which reads as follows: -

“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 including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering.*

Explanation.—For the removal of doubts, it is hereby clarified that,—

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly

attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely—

- (a) concealment; or*
 - (b) possession; or*
 - (c) acquisition; or*
 - (d) use; or*
 - (e) projecting as untainted property; or*
 - (f) claiming as untainted property,*
- in any manner whatsoever;*

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.”

24. Sri. Kuldeep Srivastava, the learned Counsel for the E.D. has placed reliance upon the judgment of the Hon’ble Supreme court in the case of **Vijay Madanlal Choudhary versus Union of India**, 2022 SCC OnLine SC 929, wherein the Hon’ble Supreme Court held that: -

“269. From the bare language of Section 3 of the 2002 Act, it is amply clear that the offence of money-laundering is an independent offence regarding the process or activity connected with the

proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence. The process or activity can be in any form — be it one of concealment, possession, acquisition, use of proceeds of crime as much as projecting it as untainted property or claiming it to be so. Thus, involvement in any one of such process or activity connected with the proceeds of crime would constitute offence of money-laundering. This offence otherwise has nothing to do with the criminal activity relating to a scheduled offence — except the proceeds of crime derived or obtained as a result of that crime.

270. Needless to mention that such process or activity can be indulged in only after the property is derived or obtained as a result of criminal activity (a scheduled offence). It would be an offence of money-laundering to indulge in or to assist or being party to the process or activity connected with the proceeds of crime; and such process or activity in a given fact situation may be a continuing offence, irrespective of the date and time of commission of the scheduled offence. In other words, ***the criminal activity may have been committed before the same had been notified as scheduled offence for the purpose of the 2002 Act, but if a person has indulged in or continues to indulge directly or indirectly in dealing with proceeds of crime, derived or obtained from such criminal activity even after it has been notified as scheduled offence, may be liable to be prosecuted for offence of money-laundering under the 2002 Act — for continuing to possess or conceal the proceeds of crime (fully or in part) or retaining possession thereof or uses it in trenches until fully exhausted. The offence of money-laundering is not dependent on or***

linked to the date on which the scheduled offence or if we may say so the predicate offence has been committed. The relevant date is the date on which the person indulges in the process or activity connected with such proceeds of crime. These ingredients are intrinsic in the original provision (Section 3, as amended until 2013 and were in force till 31.7.2019); and the same has been merely explained and clarified by way of Explanation vide Finance (No. 2) Act, 2019. Thus understood, inclusion of Clause (ii) in Explanation inserted in 2019 is of no consequence as it does not alter or enlarge the scope of Section 3 at all."

25. In view of the aforesaid discussion, it is clear that the offence of money laundering is an offence separate and distinct from the Scheduled offence. The complaint alleges that the petitioners have derived proceeds of crime and they have siphoned off the same. The petitioners have been involved in possession, acquisition and use of the proceeds of crime and they have enjoyed the proceeds of crime by its possession, acquisition and use.

26. So far as the ground XII in the Memo of revision, that the trial Court has ignored that the minimum threshold for all cash transaction or any transaction is given as per Rule 3 is ₹10 Lakh is concerned, although the ground does not specify as to which set of Rules is being referred by the petitioners, it appears that the petitioner is referring to Rule 3 of Prevention of Money-laundering (Maintenance of Records) Rules, 2005, which have been framed for regulating "maintenance of records of the nature and value of transactions, the procedure and manner of maintaining and time for furnishing of information and verification of records of the identity of the clients of the

banking companies, financial institutions and intermediaries". The relevant part of Rule 3 of the aforesaid Rules is being reproduced follows: -

3. Maintenance of records of transactions (nature and value). - Every reporting entity shall maintain the record of all transactions including, the record of—

(A) all cash transactions of the value of more than ten lakh rupees or its equivalent in foreign currency;

* * *

27. The aforesaid Rule 3 has no relevance for deciding as to whether a person needs to be tried for commission of an offence under section 3 of PMLA.

28. In view of the aforesaid discussion, I am of the considered view that the trial Court has rightly rejected the application for discharges of the petitioners and there appears to be no illegality in the orders. In any case, the orders do not suffer from any such illegality as calls for interference of this Court in exercise of its revisional jurisdiction.

29. The revisions lack merit and the same are dismissed.

(2023) 7 ILRA 616

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 24.05.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 2047 of 2023

Smt. Rani Gaur

...Revisionist

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Revisionist:

Sri Abhitab Tiwari

Counsel for the Respondents:

G.A., Mrs. Archana Tyagi, Sri Pankaj Kumar Tyagi

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision, The Negotiable instruments Act, 1981- Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the account - Offence under Section 138 of the Act is primarily a civil wrong- case has to be normally tried in a summery manner as prescribed in Cr.P.C. - consent of the complainant for compounding the offence under Section 138 of the Negotiable Instruments Act is must - case can be disposed of without obtaining direct consent of the complainant under certain circumstances - circumstances included offering an amount fair and acceptable which in the opinion of the court is appropriate for duly compensating the complainant - under certain circumstances the court can proceed in absence of direct consent - court is empowered to apply its discretion in terms of provisions of Section 258 Cr.P.C. .(Para -8)

Complaint under Section 138 NI Act - pending before trial court - accused filed a demand draft of Rs. 11 lakhs - requested to compound the case - revisionist objected - not ready to settle matter for Rs. 11 lakhs after lapse of 13 years - Magistrate rejected application - accused challenged order - revisional court decided to set aside impugned order - directed trial court to pass an appropriate order - *as per the law laid down by Apex Court in M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta* - Instant Revision. **(Para -3)**

HELD:-Where an appropriate amount has been offered/deposited, the trial court may consider to drop the proceeding (*M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta*).Provisions of section 138 NI Act regarding fine may act as the best guide coupled with all the peculiar

facts and circumstances of each case to determine the amount of compensation being just, fair and acceptable. Court must record its satisfaction before it proceeds to finally decide and drop the proceedings under section 258 Cr.P.C. No cause for interference. **(Para -8,9)**

Revision dismissed. (E-7)

List of Cases cited:

1. M/s Meters & Instruments Pvt. Ltd. & anr. Vs Kanchan Mehta, AIR 2017 SC 4594
2. Damodar S Prabhu Vs Sayed Babalal, (2010) 5 SCC 663
3. Nidhi Knitwears Pvt. Ltd. & Anr. Vs Honey Hosiery Mills, 2022 0 Supreme (P & H) 549
4. Anant Tools (Unit No.II) Pvt. Ltd. & ors. Vs M/s Anant Tools Pvt. Ltd., Jalandhar, 2019(1) RCR (Criminal) 137
5. JIK Industries Ltd. & ors. Vs Amarlal VsJumnai & anr., 2012(1) RCR (Criminal) 822

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

1. Heard Sri Abhitab Kumar Tiwari, learned counsel for the revisionist, Sri O.P. Mishra, learned AGA for the State and Smt. Archana Tyagi, learned counsel for respondents.

2. By means of this criminal revision, the revisionist has challenged an order dated 23.03.2023 passed by Session Judge, Meerut in criminal revision no. 206 of 2023 (Vishwakarma Builders and Others vs. State of U.P. and Another) whereby the learned revisional court set aside the order dated 24.02.2023 passed by Additional Special Court no. 2, Meerut in criminal complaint case no. 1575 of 2009 (Rani Gaur vs. Vishwakarma Builders and Others) under Section 138 of the

Negotiable Instrument Act, Police Station Partapur, District Meerut.

3. Relevant facts are as below:-

*The instant revisionist filed a complaint on 11.08.2009 under Section 138 of the Negotiable Instrument Act, which is pending before the trial court; during the course of proceedings the accused filed a demand draft of Rs. 11 lakhs and made a prayer before the trial court to direct the revisionist/complainant to compound the case; the revisionist objected to compounding saying that she is not ready to settle the matter for Rs. 11 lakhs after lapse of 13 years; the learned Magistrate rejected the application of the accused on the ground that the complainant cannot be compelled to compound the matter; the accused challenged the aforesaid order by filing a revision; the revision came to be decided by the learned revisional court whereby the impugned order was set aside and the trial court was directed to pass an appropriate order as per the law laid down by the Apex Court in **M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta: AIR 2017 Supreme Court 4594**.*

4. It is contended on behalf of the revisionist that the finding recorded by the revisional court is illegal and arbitrary and against the provisions of law; the accused, after lapse of about 14 years wants to get the matter compounded by giving the amount of the cheque with additional about 10% only; she has been suffering since 2019 and has been in dire need of money for domestic purposes; the accused is not entitled to any benefit in the light of the judgment of the Apex Court in **Damodar S Prabhu vs. Sayed Babalal: (2010) 5 SCC 663** and in the light of the judgment of **M/s**

Meters and Instruments Private Limited and Another vs. Kanchan Mehta (supra). Citing certain circumstances relating to the present controversy, story, the background facts and civil suit between the two, it is argued on behalf of the revisionist that apprehending his imminent failure in both the cases, he sought to save himself by giving Rs. 11 lakhs for the cheque amount of Rs. 10 lakhs, after 13 years of suffering.

5. I went through the judgment of the Supreme Court in **M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta (supra)**. The Supreme Court highlighted the fact that the matters under Section 138 of the Negotiable Instruments Act are essentially civil wrongs and the case has to be normally tried in a summary manner as prescribed in Cr.P.C. The Apex Court observed in Para-18 of the judgment as below:-

“i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is “preponderance of probabilities”. The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element,

compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

iii) *Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused."*

6. On the other hand, the respondent has drawn my attention to a judgment of Punjab and Haryana High Court in ***Nidhi Knitwears Pvt. Ltd. And Another vs. Honey Hosiery Mills: 2022 0 Supreme (P & H) 549***. The Punjab and Haryana High Court has referred to the judgment of Supreme Court in ***M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta (supra)***, wherein it is observed as below:-

"12. This Court in M/s Anant Tools's case (supra), has comprehensively dealt with the judgments in JIK Industries' case (supra) and M/s Meters and Instruments' case (supra). In Para 12 of the judgment (reproduced hereinabove), a co-ordinate Bench of this Court came to the conclusion that if a subsequent Bench of the Hon'ble Supreme Court differs with the view taken by an earlier Bench of equal strength, then the only course open for the subsequent Bench is to refer the matter to a larger Bench. In case, the above option has not been exercised by the subsequent Bench, then it is the view taken by an earlier Bench of the equal strength, which is to prevail. In Hem Lata's case (supra), the decision in JIK Industries Limited and others (supra) is referred but there is no

discussion as to why the Court has chosen to follow the law laid down in M/s Meters and Instruments (supra) and not JIK Industries Limited and others (supra). In the cases of Suba Singh (supra) and Vikas Jishtu (supra), the reliance has been placed on M/s Meters and Instruments (supra) alone and JIK Industries Limited and others (supra) has not been referred to at all.

13. In the case of "M/s Indo Swiss Time Limited versus Umrao and others, 1981 AIR (Punjab and Haryana) 213", this Court has held that when judgments of the superior Court of co-equal Benches and therefore, of matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is, thus, clear that when two directly conflicting judgments of the superior Court and of equal authority are extant then both of them cannot be binding on the Courts below. In such a situation, it is the plain duty of the High Court in the interest of justice to respectfully follow that which appears to it to state the law accurately or, in any case, more accurately than the other conflicting judgments. Applying the said principle to the present case, apparently, the judgment in Anant Tools (Unit II) Pvt. Ltd. and others (supra) lays down the law more accurately than the judgments in the cases of Hem Lata (supra), Suba Singh (supra) and Vikas Jishtu (supra)."

7. It may be noted that the Punjab and Haryana High Court followed the observation as given in ***Anant Tools (Unit No.II) Pvt. Ltd. And others versus M/s Anant Tools Pvt. Ltd., Jalandhar, 2019(1) RCR (Criminal) 137***, in which the court referred to the judgment of Supreme Court

in case of *JIK Industries Limited and others versus Amarlal vs. Jumnai and another, 2012(1) RCR (Criminal) 822*, which mandated that the consent of the complainant for compounding the offence under Section 138 of the Negotiable Instruments Act is must.

8. I studied both the judgments. The Supreme Court did not say that the requirement of consent for compounding may just be done away with. Instead widening the compensatory aspect of cases filed under Section 138 of the Negotiable Instrument Act, the Apex Court has carved out a window in the existing scheme of things saying that the case can be disposed of without obtaining direct consent of the complainant under certain circumstances. The circumstances included offering an amount fair and acceptable which in the opinion of the court is appropriate for duly compensating the complainant. That is under certain circumstances the court can proceed in absence of direct consent. The court is empowered to apply its discretion in terms of provisions of Section 258 Cr.P.C. It may be made clear that this aspect of the matter is distinct and separate from compounding of the case where both the parties agree. The revisional court has remanded the matter to decide it afresh as per law laid down in *M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta (supra)*. By the aforesaid judgment the Apex Court has emphasized that where an appropriate amount has been offered/deposited, the trial court may consider to drop the proceeding. Definitely the objections, if any, in this regard shall be taken into consideration. The court has not lost its power of discretion in such matters. In view of the

above I do not find any cause for interference.

9. Accordingly, this criminal revision is **dismissed**.

(2023) 7 ILRA 620

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 26.05.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 2230 of 2023

Smt. Rani Gaur

...Revisionist

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Revisionist:

Sri Abhitab Tiwari

Counsel for the Respondents:

G.A., Mrs. Archana Tyagi, Sri Pankaj Kumar Tyagi

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - The Negotiable instruments Act, 1981- Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the account - Offence under Section 138 of the Act is primarily a civil wrong- case has to be normally tried in a summary manner as prescribed in Cr.P.C. - consent of the complainant for compounding the offence under Section 138 of the Negotiable Instruments Act is must - case can be disposed of without obtaining direct consent of the complainant under certain circumstances - circumstances included offering an amount fair and acceptable which in the opinion of the court is appropriate for duly compensating the complainant - under certain circumstances the court can proceed in absence of direct consent - court is empowered to apply its

discretion in terms of provisions of Section 258 Cr.P.C. (Para -8)

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

Complaint under Section 138 NI Act - pending before trial court - accused filed a demand draft of Rs. 11 lakhs - requested to compound the case - revisionist objected - not ready to settle matter for Rs. 11 lakhs after lapse of 13 years - Magistrate rejected application - accused challenged order - revisional court decided to set aside impugned order - directed trial court to pass an appropriate order - *as per the law laid down by Apex Court in **M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta*** - Instant Revision. (Para -3)

HELD:-Where an appropriate amount has been offered/deposited, the trial court may consider to drop the proceeding (***M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta***). Provisions of section 138 NI Act regarding fine may act as the best guide coupled with all the peculiar facts and circumstances of each case to determine the amount of compensation being just, fair and acceptable. Court must record its satisfaction before it proceeds to finally decide and drop the proceedings under section 258 Cr.P.C. No cause for interference. (Para -8,9)

Revision dismissed. (E-7)

List of Cases cited:

1. M/s Meters & Instruments Pvt. Ltd. & anr. Vs Kanchan Mehta, AIR 2017 SC 4594
2. Damodar S Prabhu Vs Sayed Babalal, (2010) 5 SCC 663
3. Nidhi Knitwears Pvt. Ltd. & anr. Vs Honey Hosiery Mills, 2022 0 Supreme (P & H) 549
4. Anant Tools (Unit No.II) Pvt. Ltd. & ors. Vs M/s Anant Tools Pvt. Ltd., Jalandhar, 2019(1) RCR (Criminal) 137
5. JIK Industries Ltd. & ors. Vs Amarlal VsJumnai & anr., 2012(1) RCR (Criminal) 822

1. Heard Sri Abhitab Kumar Tiwari, learned counsel for the revisionist, Sri O.P. Mishra, learned AGA for the State and Smt. Archana Tyagi, learned counsel for respondents.

2. By means of this criminal revision, the revisionist has challenged an order dated 23.03.2023 passed by Session Judge, Meerut in criminal revision no. 206 of 2023 (Vishwakarma Builders and Others vs. State of U.P. and Another) whereby the learned revisional court set aside the order dated 24.02.2023 passed by Additional Special Court no. 2, Meerut in criminal complaint case no. 1575 of 2009 (Rani Gaur vs. Vishwakarma Builders and Others) under Section 138 of the Negotiable Instrument Act, Police Station Partapur, District Meerut.

3. Relevant facts are as below:-

The instant revisionist filed a complaint on 11.08.2009 under Section 138 of the Negotiable Instrument Act, which is pending before the trial court; during the course of proceedings the accused filed a demand draft of Rs. 11 lakhs and made a prayer before the trial court to direct the revisionist/complainant to compound the case; the revisionist objected to compounding saying that she is not ready to settle the matter for Rs. 11 lakhs after lapse of 13 years; the learned Magistrate rejected the application of the accused on the ground that the complainant cannot be compelled to compound the matter; the accused challenged the aforesaid order by filing a revision; the revision came to be decided by the learned revisional court whereby the impugned order was set aside

*and the trial court was directed to pass an appropriate order as per the law laid down by the Apex Court in **M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta: AIR 2017 Supreme Court 4594.***

4. It is contended on behalf of the revisionist that the finding recorded by the revisional court is illegal and arbitrary and against the provisions of law; the accused, after lapse of about 14 years wants to get the matter compounded by giving the amount of the cheque with additional about 10% only; she has been suffering since 2019 and has been in dire need of money for domestic purposes; the accused is not entitled to any benefit in the light of the judgment of the Apex Court in **Damodar S Prabhu vs. Sayed Babalal: (2010) 5 SCC 663** and in the light of the judgment of **M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta (supra)**. Citing certain circumstances relating to the present controversy, story, the background facts and civil suit between the two, it is argued on behalf of the revisionist that apprehending his imminent failure in both the cases, he sought to save himself by giving Rs. 11 lakhs for the cheque amount of Rs. 10 lakhs, after 13 years of suffering.

5. I went through the judgment of the Supreme Court in **M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta (supra)**. The Supreme Court highlighted the fact that the matters under Section 138 of the Negotiable Instruments Act are essentially civil wrongs and the case has to be normally tried in a summary manner as prescribed in Cr.P.C. The Apex Court observed in Para-18 of the judgment as below:-

“i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption

under Section 139 but the standard of such proof is “preponderance of probabilities”. The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

iii) Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.”

6. On the other hand, the respondent has drawn my attention to a judgment of Punjab and Haryana High Court in **Nidhi Knitwears Pvt. Ltd. And Another vs. Honey Hosiery Mills: 2022 0 Supreme (P & H) 549**. The Punjab and Haryana High Court has referred to the judgment of Supreme Court in **M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta (supra)**, wherein it is observed as below:-

“12. This Court in *M/s Anant Tools's case (supra)*, has comprehensively dealt with the judgments in *JK Industries' case (supra)* and *M/s Meters and Instruments' case (supra)*. In Para 12 of the judgment (reproduced hereinabove), a co-ordinate Bench of this Court came to the conclusion that if a subsequent Bench of the Hon'ble Supreme Court differs with the view taken by an earlier Bench of equal strength, then the only course open for the subsequent Bench is to refer the matter to a larger Bench. In case, the above option has not been exercised by the subsequent Bench, then it is the view taken by an earlier Bench of the equal strength, which is to prevail. In *Hem Lata's case (supra)*, the decision in *JK Industries Limited and others (supra)* is referred but there is no discussion as to why the Court has chosen to follow the law laid down in *M/s Meters and Instruments (supra)* and not *JK Industries Limited and others (supra)*. In the cases of *Suba Singh (supra)* and *Vikas Jishtu (supra)*, the reliance has been placed on *M/s Meters and Instruments (supra)* alone and *JK Industries Limited and others (supra)* has not been referred to at all.

13. In the case of "*M/s Indo Swiss Time Limited versus Umrao and others, 1981 AIR (Punjab and Haryana) 213*", this Court has held that when judgments of the superior Court of co-equal Benches and therefore, of matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is, thus, clear that when two directly conflicting judgments of the superior Court and of equal authority are extant then both of them cannot be binding on the Courts below. In such a situation, it is the plain

duty of the High Court in the interest of justice to respectfully follow that which appears to it to state the law accurately or, in any case, more accurately than the other conflicting judgments. Applying the said principle to the present case, apparently, the judgment in *Anant Tools (Unit II) Pvt. Ltd. and others (supra)* lays down the law more accurately than the judgments in the cases of *Hem Lata (supra)*, *Suba Singh (supra)* and *Vikas Jishtu (supra)*.”

7. It may be noted that the Punjab and Haryana High Court followed the observation as given in *Anant Tools (Unit No.II) Pvt. Ltd. And others versus M/s Anant Tools Pvt. Ltd., Jalandhar, 2019(1) RCR (Criminal) 137*, in which the court referred to the judgment of Supreme Court in case of *JK Industries Limited and others versus Amarlal vs. Jumnai and another, 2012(1) RCR (Criminal) 822*, which mandated that the consent of the complainant for compounding the offence under Section 138 of the Negotiable Instruments Act is must.

8. I studied both the judgments. The Supreme Court did not say that the requirement of consent for compounding may just be done away with. Instead widening the compensatory aspect of cases filed under Section 138 of the Negotiable Instrument Act, the Apex Court has carved out a window in the existing scheme of things saying that the case can be disposed of without obtaining direct consent of the complainant under certain circumstances. The circumstances included offering an amount fair and acceptable which in the opinion of the court is appropriate for duly compensating the complainant. That is under certain circumstances the court can proceed in absence of direct consent. The court is empowered to apply its discretion

in terms of provisions of Section 258 Cr.P.C. It may be made clear that this aspect of the matter is distinct and separate from compounding of the case where both the parties agree. The revisional court has remanded the matter to decide it afresh as per law laid down in *M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta (supra)*. By the aforesaid judgment the Apex Court has emphasized that where an appropriate amount has been offered/deposited, the trial court may consider to drop the proceeding. Definitely the objections, if any, in this regard shall be taken into consideration. The court has not lost its power of discretion in such matters. In view of the above I do not find any cause for interference.

9. Accordingly, this criminal revision is dismissed.

(2023) 7 ILRA 624

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 24.05.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No.3839 of 2022

**Smt. Deep Sharma & Anr. ...Revisionists
Versus**

Smt. Binu Sharma & Ors. ...Respondents

Counsel for the Revisionists:

Sri Ishir Sripat, Sri Pramod Kumar, Sri Rahul Sripat (Sr. Adv.)

Counsel for the Respondents:

G.A., Sri Kumwar Rajan, Sri Randhir Singh

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision, The Protection of Women from Domestic Violence Act, 2005 - Sections 12,

18, 19, 20, 21, 22, 23 & 29 - shared household/rented accommodation.

(B) Criminal Law - The Protection of Women from Domestic Violence Act, 2005 - Section 2(a),3 - aggrieved person - respondent must not only stand in domestic relationship with the aggrieved person but he should be one who has subjected the aggrieved person to domestic violence. (Para -14)

(C) Criminal Law - The Protection of Women from Domestic Violence Act, 2005 - Chapter IV - kinds of orders which can be passed against the 'respondent' - Sections 18 to 22 - relief can only be granted against the respondent/respondents - any person who is not a respondent or who is not found involved in domestic violence, cannot be brought within the purview of this Act - courts cannot pass order against any other person on the basis of perceived threats or interference - If such a course of action is allowed this shall set a very dangerous trend, the consequences whereof cannot be foreseen.(Para-14)

Opposite party filed a complaint - against her husband, father-in-law, mother-in-law, jeths, and jethanis - under Section 12 of Protection of Women from Domestic Violence Act - Trial court found her guilty - appellant appealed - appellate court partially allowed appeal - modified relief under Section 19 and 20 - dismissed rest - trial court affirmed the rest, excluding mentioned portions - trial court found - husband was responsible for domestic violence against his wife - failed to prove allegations against rest of family members - court granted wife's right to stay in the shared household - made a provision for alternative relief - providing rent for separate accommodation - Court seeks reasons for appellate court's modification of shared household/rented accommodation order - appellate court ruled - house/residence in question falls under definition of a shared household - husband and wife once lived together on ground floor - rest of family members lived on upper floors - court affirmed that no domestic violence was

committed by rest of family members, including revisionists. **(Para -2 ,4,9,10)**

HELD:- Trial court did not interfere with order assuming revisionist interference. Appellate's order set aside due to illegality and impropriety. **(Para -15)**

Revision allowed. (E-7)

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

1. Sri Rahul Sripat, learned Senior Advocate assisted by Sri Ishir Sripat, learned counsel for the revisionist, Sri Randhir Singh, learned counsel for respondent no. 1 and Sri O.P. Mishra, learned AGA for the State, are present. None responds on behalf of respondent nos. 2 to 6.

2. By means of this criminal revision the revisionist Smt. Deep Sharma and Yagyawal Sharma have challenged an order dated 27.08.2022 passed by Special Judge (Gangster Act) Additional District and Session Judge, Court No. 6, Ghaziabad in a criminal appeal no. 204 of 2019, under Section 29 of the Protection of Women from Domestic Violence Act, 2005, Police Station Sahibabad, District Ghaziabad arising out of Case No. 585 of 2019 (Smt. Binu Sharma vs. Dharendra Kaushik and Others), under Sections 12, 18, 19, 20, 21, 22, 23 of the Protection of Women from Domestic Violence Act, 2005, by which the appeal was partly allowed and the order passed by the trial court was modified.

3. Heard Sri Rahul Sripat, learned Senior Advocate assisted by Sri Ishir Sripat, learned counsel for the revisionist, Sri Randhir Singh, learned counsel for respondent no. 1 and Sri O.P. Mishra, learned AGA for the State and perused the

material on record. None responds on behalf of respondent nos. 2 to 6.

4. The relevant facts are as below:-

The respondent no. 1-Smt Binu Sharma filed against final order passed in a complaint case no. 585 of 2019 against her husband, father in-law, mother in-law, jeths and jethanis under Section 12 of the Protection of Women from Domestic Violence Act (herein after referred to "the Act") with certain allegations; the trial court gave a finding that her husband committed domestic violence and not rest of the opposite parties; the learned trial court allowed the relief to the revisionist/applicant Smt. Binu Sharma by order dated 11.09.2019 under Sections 18, 19, 20 and 22 of the Act against her husband only; the appellant Binu Sharma filed an appeal no. 204 of 2019 against the respondents challenging the trial court's order with a prayer that she is entitled for relief against all the respondents who included her mother in-law, father in-law, jeths and jethanis; her husband-Dhirendra Kaushik filed another (cross) appeal no. 209 of 2019 against his wife praying for setting aside the order of the trial court dated 11.09.2019; the learned appellate court heard both the appeals together and modified the order to certain extent; the learned appellate court, partly allowing the appeal no. 204 of 2019 modified the relief granted under Section 19 of the Act to the extent that all the respondents/opposite parties were directed to not to interfere in her right to entry and residence in a shared household and dismissed the rest of the prayer of the appellant Smt. Binu Sharma; At the same time the learned appellate court partly allowed the appeal of husband appeal no. 209 of 2019 and modified the relief granted under section 20 of the Act to

the extent that the wife shall be entitled for Rs. 6,000/- per month instead of earlier Rs. 8,000/- per month and their daughter shall be entitled for Rs. 5,000/- per month instead of earlier Rs. 6,000/- per month; the learned appellate court dismissed the appeal for the rest of the reliefs claimed by the husband; the learned trial court affirmed rest of the order passed by the trial court excluding the portions as above.

5. The grounds taken in this revision are as below:-

(i) The order passed by the appellate court is devoid of reasoning, is illegal and passed against the evidence available on record;

(ii) The son of the revisionist i.e. husband of Smt. Binu Sharma has not been residing with their parents and instead he resided in a rented accommodation in District Gautam Buddh Nagar and this fact is admitted therefore the appellate court cannot legally direct the revisionist to let their daughter in-law reside in their house where the revisionist are residing;

(iii) The house in question was purchased by the revisionist no. 1 out of her own personal resources and that she broke all relations with her son and daughter in-law and therefore, the revisionist cannot be compelled to accommodate the respondent no. 1; their accommodation cannot be treated as shared household; moreover there is a finding given by the appellate court that no domestic violence was committed by the revisionists, therefore no relief can be given against them;

(iv) The husband, has stated in a reply filed in misc. case no. 26 of 2020 filed

under Section 31 of the Act that he is ready to keep his wife with him or in any other rented accommodation of his choice, hence it is not at all justified for the court to direct the revisionists to let her reside in their own house;

(v) The trial court failed to appreciate the fact that they produced enough of evidence by filing CCTV footage and other material to show that it was their daughter in-law who has been harassing them and assaulted them on several occasions and that the revisionist are senior citizens, hence granting relief against them is not only illegal but is nothing but abuse of process of law; the proceeding initiated by the daughter in-law is malafide and malicious;

(vi) The directions given by the appellate court are against the pleading of the parties and against the evidence given by the both the sides, hence is liable to be set aside.

6. For clarity it is repeated that the contentions of the respondent no. 1-Smt. Binu Sharma are that she, used to reside in the residence at Ghaizabad, with her in-laws, therefore, the Ghaziabad residence is her shared household and she has right to reside there; In this view of the matter the directions given by the court cannot be faulted and are correct factually and legally both.

7. It may be noted at the very outset that the trial court while allowing the application filed by Smt. Binu Sharma (against her husband and rest of her family members as well) granted relief against her husband only and no direction was passed against the present revisionist (or any other members of husband's family). For clarity,

it may be repeated that her husband (respondent no. 2 herein) was directed not to commit any domestic violence, provide for her safe entry and residence in the shared household or to provide rent for separate accommodation in alternative and certain other monetary reliefs under Sections 20 and 22 of the Act; the revisionists have challenged the appellate court's order insofar as they were directed to provide safe entry and residence in the shared household at Ghaziabad; rest of the order passed by the trial court is unchallenged.

8. From the perusal of the material on record and from the arguments of both the sides, there is no serious challenge to the facts that the husband has been living separately in Gautam Buddh Nagar since the disputes arose and that the wife is claiming her right to reside in a house, in which undisputedly her father in-law and mother in-law and rest of the family members are presently residing. This evidence has come before the court below that initially the husband and the wife have been residing in ground floor and other member of husband's family were residing on first and second floor of the same house. The main crux of the arguments of the revisionists is that they produced evidence before the court below to show that it was their daughter in-law who has been harassing and assaulting them, therefore the order is not at all proper and justified and that, as that house is a separate house owned exclusively by Smt. Deep Sharma (the mother in-law) purchased from her own resources, therefore, it cannot be treated as shared household. In addition, this fact is vehemently stressed by the revisionist that no finding has been given by the courts below that they ever committed any domestic violence, therefore

legally such an order cannot be passed against them.

9. In this case the learned trial court evaluated and appreciated evidence given by both the sides and gave a finding that the husband and wife have been living together in a house at Ghaziabad on ground floor only and that rest of the family members were staying at upper floors. On the basis of the aforesaid facts as well as certain other facts and circumstances, the trial court took a view that it was husband alone who indulged in domestic violence against his wife and that she failed to prove the allegations against rest of them. The learned trial court on the basis of appreciation of evidence found no real challenge to the fact that the house at Ghaziabad was a shared household, therefore, wife was entitled to stay there. However, most probably in the light of certain facts coming in evidence, the learned trial court found it proper to make a provision for alternative relief of providing certain amount as rent for separate accommodation, that too subject to certain conditions. Now the court has to look for the reasons which prompted the learned appellate court to modify the trial court's order regarding shared household/rented accommodation.

10. In this view of the matter, I perused the judgment of appellate court. The learned appellate court formally framed some points of determination. The learned appellate court went on to discuss the definition of shared household given in relevant law. It found that the house/residence in question came within the definition of shared household. What is important to be noticed that the appellate court, thereafter considered the question of commission of domestic violence and

affirmed the finding given by the learned trial court that no domestic violence was committed by the rest of the family members, (who included the present revisionists). The learned appellate court observed and affirmed the aforesaid finding in view of facts that the husband and the wife once lived together on the ground floor and rest of the family members on upper floors; and that not only they were residing separately but they have been separate in the matters of fooding as well; they were having separate arrangements in other aspects of living.

11. In para 7 of the judgment, while on one hand the learned appellate court agreed with the view taken by the learned trial court that no domestic violence was committed by rest of the family members (except husband), went on to consider the arguments given by the appellants that in case the relief under Section 19 of the Act is not given against rest of the family members then it will not be possible for her to reside and stay in the ground floor of the same house without interference. The learned appellate court held as below:-

"उक्त के अवलोकन से स्पष्ट है कि धारा 19 घरेलू हिंसा अधिनियम का अनुतोष अन्य विपक्षीगण के विरुद्ध नहीं दिया गया है जबकि यह तथ्य स्थापित है कि उस भवन में सभी विपक्षीगण किसी प्रक्रम्य पर एक साथ निवास करते थे। यह तथ्य भी उल्लिखनीय है कि परिवादिनी द्वारा प्रस्तुत प्रार्थना पत्र के बाद परिवादिनी के सासुर के द्वारा अपने लडके धीरेन्द्र के साथ अथवा परिवादिनी के पति को अपने सम्पत्ति से बेदखल कर दिया गया है। ऐसी स्थिति में तो अन्य विपक्षीगण के विरुद्ध धारा 19 का अनुतोष नहीं दिया जाये तो विचारण न्यायालय के द्वारा दिया गया आदेश निष्प्रभावी हो जायेगा क्योंकि अन्य विपक्षीगण का हस्तक्षेप स्वभाविक है। ऐसी स्थिति में धारा 19 की बावत दिया गया निर्णय परिवर्तित किये जाने योग्य है तथा अपीलार्थी के इस तर्क के आधार पर आलोच्य निर्णय में परिवर्तन किया जाना उचित है।"

12. The Protection Women from Domestic Violence Act, 2005 has certain

social purpose to achieve. The object of this Act is to protect the women who have been subject to domestic violence. The reliefs which may be granted under this Act are quite wide in extent. There is an attempt to take care of all the probable reliefs leaving scope for moulding them which, in the peculiarity of circumstances of each case may be required. The moot point which arises in this case is whether any kind of directions can be issued to any person in domestic relationship when the complainant failed to prove the allegations of domestic violence against him?

13. I find it pertinent to reproduce Section 19 of the Act which is as below:-

"(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order--

(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;

(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;

(e) restraining the respondent from renouncing his rights in the shared

household except with the leave of the Magistrate; or

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman.

(2) The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person.

(3) The Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence.

(4) An order under sub-section (3) shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 (2 of 1974) and shall be dealt with accordingly.

(5) While passing an order under sub-section (1), sub-section (2) or sub-section (3), the court may also pass an order directing the officer in charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

(6) While making an order under sub-section (1), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments,

having regard to the financial needs and resources of the parties.

(7) The Magistrate may direct the officer in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order.

(8) The Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to."

Bare perusal of Section 19 of the Act demonstrates that order can only be passed against a respondent. Now a question arises who is a respondent?

14. I went through the provisions of law given in the Act. The scheme of things, in my view appears that the women should be protected from any person, who is guilty of committing domestic violence as defined in section 3 of the Act. All kinds of probable violence have been included in the definition, but by no stretch of imagination, it can be construed that a person against whom allegations of domestic violence could not be proved can be directed under the provisions of section 18 and 19 etc under Chapter IV of the Act. The courts are not empowered to direct any person whose act does not fall in the purview of the Act.

Section 2(a) which defines an aggrieved person under the Protection of Women from Domestic Violence Act, 2005 is as below:-

"aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who

alleges to have been subjected to any act of domestic violence by the respondent.”

Meaning thereby the respondent must not only stand in domestic relationship with the aggrieved person but he should be one who has subjected the aggrieved person to domestic violence. Chapter IV of the Protection of Women from Domestic Violence Act, 2005 enumerates the kinds of orders which can be passed against the ‘respondent’. The perusal of the provisions of Sections 18 to 22 clearly show that the relief can only be granted against the respondent/respondents. In case the above provisions are read together the only reasonable and sensible conclusion which can be drawn is that any person who is not a respondent or who is not found involved in domestic violence, cannot be brought within the purview of this Act. The courts cannot pass order against any other person on the basis of perceived threats or interference. If such a course of action is allowed this shall set a very dangerous trend, the consequences whereof cannot be foreseen. It may happen that any person whether or not standing in any domestic relationship and whether or not, has committed domestic violence may become subject of mischief which may see no end. The reasoning given by the learned appellate court is improper and illegal. For the sake of arguments if it is presumed that there may be certain other members of the family who are likely to interfere in her right to reside in the shared household then such an act may amount to an offence and action can be taken as per law.

15. In my opinion, there was no ground to actually interfere in the order passed by the learned trial court on the assumption that there is likelihood of interference by the revisionists. The order

of the appellate court suffers from illegality and impropriety and is therefore set aside. Accordingly this revision is **allowed**.

(2023) 7 ILRA 630

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 01.05.2023

BEFORE

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

First Appeal From Order No. 225 of 1998

Kalyan Singh

...Appellant

Versus

The New India Insurance Co. Ltd. & Anr.

...Respondents

Counsel for the Appellant:

Sri R.K. Porwal

Counsel for the Respondents:

Sri Arun Kumar Shukla

A. Civil Law - Motor Vehicles Act, 1988- Sections 173- enhancement of compensation- claimant sustained injuries on account of the accident -He was admitted in the hospital and only after he was discharged that he had lodged the First Information Report-The claimant has also brought on record the copy of the First Information Report-He has also brought on record the documents relating to the offending driver being charge-sheeted and being prosecuted in the same accident-A number of documents, relating his initial treatment at Navjeevan Hospital at Lakhimpur Kheri and the documents relating to his treatment at K.G.M.U. has been brought on record, however, none of the aforesaid documents have been considered by the Tribunal in its order- The claimant has also filed a disability certificate indicating that he had suffered 45% disability certificate which has also not been noticed by the Tribunal rather there is no mention, consideration of the said documents in the judgment

and why they have been discarded-the bed head ticket from the District Hospital shows that it was PW-1, who had brought PW-2, the claimant to the hospital-The bed head ticket is an official document from the District Hospital and cannot be trifled. This witness if not present, would not have been the one to carry her father to the hospital. At least the mention of her name on the bed head ticket lends a strong buttress to the claimant's case that PW-1 was present at the scene of accident and witnessed it. Read together with the medical evidence, all of which has been omitted from consideration, the inescapable conclusion is that the Tribunal has gone completely wrong in finding against the claimant on Issue No.1- The finding of the Tribunal on Issue No.1 is, accordingly, set aside and the issue is answered in favour of the claimant; against the owner and the Insurers-The findings on Issues Nos.2 and 3 have been recorded in favour of the claimant by the Tribunal-Those findings are affirmed-Tribunal will hear the parties afresh with full opportunity to lead evidence limited to Issue No.4 alone. (Para 1 to 31)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Sunita & ors. Vs RSRTC & ors. (2020) 13 SCC 486
2. Mangla Ram Vs Oriental Ins. Co. Ltd & ors. (2018) 5 SCC 656
3. Anita Sharma & ors. Vs New India Assur. Co. Ltd & anr.. (2021) 1 SCC 171
4. Smt. Richa Khare & ors. Vs Ankit Gupta & ors. FAFO No. - 120 of 2017
5. Chhotey Lal Vs The Oriental Ins. Co. Ltd. & ors. FAFO No. - 1468 of 2021

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

This appeal by the claimant is directed against a judgment and award passed by the

Motor Accident Claims Tribunal/ 8th Additional District Judge, Etawah dated the 29th November, 1997, rejecting Motor Accident Claims Petition No.107 of 1995.

2. According to the claimant-appellant, Kalyan Singh (for short, 'the claimant') on 27.11.1994 at about half past six in the evening hours, rode out on his scooter from an alley on to the Municipal Bypass, connecting the Highway. A mini truck, bearing registration No. UHK-300, driven negligently and at a high speed, without sounding horn, approached from Auraiya end of the road and hit the claimant's motor scooter. The collision led the claimant to lose the little finger of his left hand, that was crushed, broken and severed. The mini truck sped away towards Agra. The claimant was conveyed to the District Hospital. The claimant went to Police Station Kotwali to lodge a report on 11.01.1995, but the Police refused to register the case citing the delay. Thereupon, on 12.01.1995, the claimant sent a written information by registered post to the Senior Superintendent of Police, Etawah, which was a typed written document. It is the claimant's case that if the truck driver had not been negligent and observed rules of the road, the accident would not have happened and the claimant spared the deprivation of a digit of his hand. The deprivation has led the claimant to suffer from a feeling of inferiority complex and his capacity to work has diminished. Accordingly, the claimant instituted the present claim petition, asking for a compensation in the sum of Rs.2,29,000/-. He also sought interim relief in the sum of Rs.20,000/-.

3. A written statement was filed by one Shamim Begum, the owner of mini truck, bearing registration No. UHK-300,

resisting the claim. Shamim Begum was impleaded as opposite party No.1 to the claim petition and is arrayed as respondent No.2 to this appeal. She will hereinafter be called 'the owner'. It was asserted in the owner's written statement that the offending truck was insured with The New India Assurance Company Ltd. vide Cover Note No. 169379, comprehensively. The insurance was valid from 21.01.1994 to 20.01.1995. The obligation to make good the compensation, therefore, rests with the aforesaid Insurance Company. It has been pleaded that on 27.11.1994, no crime was reported at Police Station Kotwali. The claimant has not fractured his finger in the so called motor accident. It was denied that the claimant earns a sum of Rs.5000/- per month. He has suffered no loss of income. The mini truck was being operated carefully and according to the rules. Even if the compensation be held payable, the burden would go to the Insurance Company, considering that the offending truck was insured on the date of the accident. According to the owner, the claim petition deserved to be rejected.

4. A separate written statement was filed on behalf of The New India Assurance Company Ltd. (for short, 'the Insurers') urging in defence that no cause of action arose to the claimant to institute this claim petition. The claim petition was bad for non-joinder of necessary parties, inasmuch as the driver of the truck was not impleaded. Also, it was bad for non-joinder, because the insurer of the motor scooter was not impleaded. On the date of the accident, the offending truck was not insured with the Insurers. The truck owner has committed breach of the conditions of insurance and did not inform the Insurers about the accident. It is the claimant, who has to prove that on the date of the

accident, the driver of the offending truck held a valid licence and that the offending truck had a route permit, besides a registration certificate. It was pleaded that unless the owner proves that premium for the insurance policy had been credited in the Insurers' account, the Insurers are not liable to indemnify. In the alternative, it was pleaded that the premium had not been credited and there is a violation of Section 64-VB of the Insurance Act, 1938. The Police have not complied with sub-Sections (1) to (6) of Section 158 of the Motor Vehicles Act, 1988 (for short, 'the Act'). The offending truck was being driven on the date of the accident without the driver holding a valid driving licence or the truck being covered by a permit. The offending truck did not have a registration certificate. The claimant has wrongly asserted his age and the medical expenses to be incurred in the future, all in order to secure a higher award. The compensation claimed under different heads is wrong and bogus. The claim petition deserved to be rejected.

5. On the pleadings of parties, the following issues were framed (translated into English from Hindi):

“1. Whether the driver of Truck No. UHK-300 on 27.11.1994, driving it negligently, caused injury to the claimant, resulting in permanent disablement?

2. Whether on the date of the accident, Truck No. UHK-300 was insured with the Insurance Company, opposite party No.2?

3. Whether on the date of the accident, the driver held a valid driving licence and the vehicle a permit and registration (certificate)?

4. To what compensation is the claimant entitled and from which opposite party?"

6. In support of the claim petition, the claimant filed documents through list bearing paper No.24-Ga and examined Km. Radha Singh as PW-1 and himself as PW-2.

7. The owner filed documents through a list, paper No.17-Ga, numbering four. All the documents are noticed to be photostat copies by the Tribunal. No oral evidence was led on behalf of the owner.

8. The Insurers filed documents through a list, bearing paper No.31-Ga. It includes a certified copy of the insurance policy. No oral evidence was led on behalf of the Insurers as well. Before the Tribunal, the claim petition proceeded ex parte against the owner and heard as such.

9. The Tribunal while answering Issue No.1 held that no accident was caused by the offending truck nor any injury sustained by the claimant. Issue No.2 was answered in the manner that on the date of accident, the offending truck was validly insured with the Insurers. Issue No.3 was answered holding that on the date of the accident, the driver of the offending truck had a valid driving licence and that the offending truck was moving on a valid permit and registration certificate. Issue No.4 was answered in the negative and against the claimant in view of the findings returned on Issue No.1.

10. Heard Mr. R.K. Porwal, learned Counsel for the claimant and Mr. Arun Kumar Shukla, learned Counsel for the Insurers. No one has appeared on behalf of the owner.

11. Mr. R.K. Porwal, learned Counsel for the claimant has submitted that the Tribunal has erred in disbelieving the factum of accident and the injury sustained, because there was no oral or other evidence produced on behalf of the owner or the Insurers. There was no reason to disbelieve the claimant's testimony and the documentary evidence. It is urged that the documents filed clearly indicate the injury sustained by the claimant in the accident. Amongst these, of particular importance is the disability certificate issued by the Medical Board, where the injured is shown to have sustained a disability to the extent of 10% with the little finger of the left hand being amputated.

12. Mr. Porwal has referred to the testimony of PW-1, Km. Radha Singh, an eye witness and that of PW-2, the victim, to say that there is no reason to disbelieve their evidence by holding them to be interested witnesses. Mr. Porwal has pointed out the documentary evidence with regard to the injuries and the treatment papers that are on record. Mr. Porwal has gone to the extent of arguing that the Tribunal has virtually accepted all that the Insurers have said in their written statement without producing any evidence. He has also criticized the Tribunal's approach in disbelieving the victim's daughter by dubbing her as an interested witness. It is argued that non-registration of an FIR by the Police does not make the factum of the accident improbable or the injury sustained doubtful. The Tribunal is not to look upto the proceedings in the crime before the Police in order to arrive at a correct conclusion whether the accident happened in the manner pleaded and the consequent injuries sustained. The approach of the Claims Tribunal in appraising the evidence has been criticized by the learned Counsel as hyper-technical and hairsplitting.

13. Mr. Arun Kumar Shukla, learned Counsel for the Insurers, on the other hand, has supported the impugned judgment and submitted that there was a denial of the involvement of the offending truck in the accident. It is urged that no documentary evidence was produced by the claimant to prove the accident as one caused by the offending truck. It is submitted that there was no independent eye witness account of the accident. Both the witnesses were interested, that is to say, they were father and daughter. The presence of PW-1, Radha Singh has been urged to be doubtful, because there is no mention about the fact in the claim petition. It is submitted that the claimant's case is based on a cock and bull story with not the slightest of convincing evidence about it. Mr. Shukla has placed reliance upon the decision of a learned Single Judge of this Court in **Chhotey Lal v. The Oriental Insurance Co. Ltd. and others, FAFO No. - 1468 of 2021, decided on 12.10.2022**, where in similar circumstances relating to an injury case, it was held:

“The record reveals that the accident had taken place on 03.06.1983 and the claim petition was filed for a compensation of Rs.1,57,500/-. As per claim petition, the claimant had got treatment for the injuries suffered in the accident for three months in Beli Hospital, Allahabad but he did not file any prescription or other documents to demonstrate that he met with an accident and for the injuries suffered by him in the accident, he was treated in Beli Hospital for three months. The claimant has also not produced any independent evidence to prove the accident. Further the claimant did not file any FIR in respect to the alleged accident.

It is true that the FIR is not relevant to prove the accident but in the

instant case, there was no evidence on record except the testimony of claimant and, therefore, this Court finds that the tribunal has rightly held that in absence of any independent evidence or documentary evidence on record, the claimant has failed to prove the accident and, thus, this Court does not find any illegality in the findings returned by the tribunal.”

14. Mr. Shukla has next placed reliance on a decision of this Court in **Smt. Richa Khare and others v. Ankit Gupta and others, FAFO No. - 120 of 2017, decided on 08.03.2022**, where it has been held:

8. As per above case law, it is held by the Apex Court that delay in lodging the first information report should not be treated to be fatal in genuine cases. In this judgment, Hon'ble Apex Court has laid emphasis on the words "in genuine cases". These words are of utmost importance. In the facts and circumstances of the case in hand, this case-law is not applicable as the facts of this case are entirely different. We had opined in on-going discussion that it is evident from the evidence on record that offending truck was not involved in the accident. Merely filing the charge-sheet cannot be the sole basis to reach to the conclusion that offending vehicle was involved in the accident. In this case, firstly, the closure-report was filed by the Investigating Officer, which mentions that the accident took place due to slipping the wheel of the motorcycle. Although, the charge-sheet was filed by the Investigating Officer against the driver of the truck after making further investigation, but it is to be seen in the light of the inquest report also wherein there are five witnesses, who were close-relative of the deceased. The opinion of all

the witnesses of inquest report was that accident occurred due to slipping of front-wheel of the motorcycle. At the cost of repetition, we again lay the emphasis on the fact that inquest report was prepared after six days of the accident and even then it is not mentioned in it that accident took place due to involvement of any vehicle. Hence, we have no reason to differ with the view taken by the learned Tribunal while dismissing the claim petition.

15. Upon hearing learned Counsel for the parties and perusing the record, what this Courts finds is that the Tribunal indeed has adopted a hyper-technical approach to evaluate the parties' case. It has almost imposed upon the claimant the standard of proving his case beyond reasonable doubt. That is not to be done at all in a claim petition before the Tribunal. The Tribunal has noted that PW-1, Radha Singh has said that the offending truck had swerved to the wrong side and hit her father's scooter, causing the injury. It has been remarked that according to the claimant, the offending truck was moving from east to west, whereas the claimant was entering the main road from the north turning to the west. This would show that both the claimant's scooter and the offending truck were moving in the same direction. Therefore, it is incorrect to say that the offending truck moved to the wrong side and hit the scooter. The offending truck too was moving on the same side of the road as the scooter, according to rule of the road. The Tribunal has remarked that if the offending truck was moving west to east and hit the scooter moving east to west, on the left hand side of the road, going by the claimant's orientation, that would have been a case of the truck hitting the scooter on the wrong side. We do not agree.

16. While it is true that a person entering a main road from a side lane or alley, ought to take care about the moving traffic on the main road, it is the duty of a bigger vehicle to bear caution about the smaller vehicle, like cars, two wheelers, bicycles or even pedestrians, moving on the same side of the road, that they do not get hit from the rear or by a lateral contact with the middle section or the back end of a wide bodied vehicle. Here, this precisely appears to be the case. In the examination-in-chief of PW-1, Km. Radha, it has been stated:

"4. मेरे पिताजी अपने बाएं हाथ पर सड़क पर स्कूटर ला चुके थे। घटनास्थल पर सड़क काफी चौड़ी है और सड़क पर किसी प्रकार के गड़ढे आदि नहीं हैं।

5. ट्रक चालक द्वारा यदि नियमित गति से वाहन चलाया जा रहा होता तो दुर्घटना नहीं होती. ट्रक चालक के द्वारा मेरे पिता के स्कूटर को गलत side में आकर पास किया था. टक्कर मारकर ट्रक आगरा की ओर भाग गया. घायल पिता को उठाकर हम अस्पताल ले गए. वहां उनको भर्ती कर लिया गया तथा उपचार किया गया. उपचार के दौरान मेरे पिताजी की अंगुली को डॉक्टरों द्वारा काट दिया गया. घर पर मेरे पिताजी का 3-6 माह इलाज चलता रहा।"

17. In the cross-examination, no question has been put to the witness regarding the manner of the impact described by her. This Court is, therefore, of opinion, as already held, that the Tribunal went astray in holding that the offending truck did not move to the wrong side of the road while hitting the motor scooter. The Tribunal has much emphasized the fact that the claimant has said in his testimony that he was admitted to the hospital for two days, whereas the discharge slip, paper No. 24-Ga/3 from the District Hospital, Etawah shows that he was discharged the same day i.e.

27.11.1994 by writing the word 'relieved' in the relevant column. The Tribunal has gone on a tangent reckoning the hours left in the day on 27.11.1994 to conclude that the date of admission and discharge, both being 27.11.1994, could never account for two days. The Tribunal has also taken note of the document under reference to opine that the endorsement on the reverse of it indicates the dates from 30.11.1994 to 17.12.1994, when different medicines were prescribed. It has been remarked that mention on this document about relieving the patient on 27.11.1994, would not lead to the inference that the consistent prescription of medicines on different dates show a longer duration of internment in the Hospital for the claimant.

18. This Court again is not in agreement with the Tribunal on this part of the finding. It may be true that the discharge slip may not prove the two days of indoor treatment for the claimant, but that is not decisive of the claim that he makes. The claimant says that in the accident, he lost one of his fingers that was amputated. The Tribunal has clearly ignored from consideration documentary evidence that shows the claimant's case to be well-founded. It has ignored from consideration an injury report dated 27.11.1994 issued by Dr. Pulakraj, Medical Officer, District Hospital, Etawah. It is countersigned by the Medical Officer. The injuries, mentioned in this report bearing paper No. 24-Ga/2, read:

“Injuries – (1) Crushed Injury ☉ little finger which is about completely separated from ☉ hand.

Opinion –

Injury is caused by hard and blunt object. Nature – Grievous.

Duration – fresh.”

19. Also not considered is another document dated 27.11.1994 issued by the District Hospital, Etawah. The document is a bed head ticket, which does show that the claimant was admitted to the District Hospital on 27.11.1994 at 8.04 p.m. It is true that the bed head ticket also shows that he was relieved on 27.11.1994. But, that is of no consequence, as already said. What is relevant is that in the column of disease, it is mentioned 'Crushed injury ☉ little finger'. In the column of 'B/B', the name of Km. Radha Singh daughter of Kalyan Singh is written. The next column mentions the injury as 'accidental injury ☉ little finger due to collision of Metador and scooter at about 7.15 p.m. today.' There is also a note, which says 'injury noted in accidental register'. There is a further note which says, 'police informed'. This document bears paper No.24-Ga/6, that has been completely ignored from consideration by the Tribunal while writing its finding on Issue No.1.

20. There is yet another document not at all taken into consideration by the Tribunal and that is the disability certificate 18.07.1995. It has been issued by a Board of Doctors in the office of the Chief Medical Officer, Etawah. It mentions the injury as 10% and indicates it to be amputation of the little finger. The aforesaid certificate bears paper No.24-Ga/4. This disability certificate also bears the claimant's photograph attested by the Doctor. The disability certificate is signed by three doctors comprising the Board. With so much of overwhelming evidence on record, the finding returned by the Tribunal says: "इसके अलावा याची द्वारा किसी भी इन्जरी रिपोर्ट की प्रति भी दाखिल नहीं की गई है कि जिससे तहरीरी रिपोर्ट का सिद्ध होना तथा याची को आयी चोट का उक्त दुर्घटना से संबंधित होना सिद्ध नहीं होता है।"

21. The aforesaid finding and conclusion of the Tribunal cannot be accepted. Rather, the bed head ticket clearly indicates that the injured was brought to the hospital by his daughter, Km. Radha Singh, PW-1, which lends inherent credibility to the claim when seen in conjunction with the injury. This Court is constrained to say that with the claimant suffering an amputated digit of the hand, the approach of the Tribunal is most insensitive.

22. In our opinion, by the medical evidence alone and the clear testimony of PW-1 and PW-2, the factum of accident involving the offending truck and the resultant injury are overwhelmingly proven. The remarks of the Tribunal about the delay in lodging the FIR or non-registration of the criminal case are of trivial consequence, if none.

23. The Tribunal has then gone on to remark that a report of the incident is said to have been sent to the SSP, Etawah on 12.01.1995, but a copy of the said information has not been brought on record. A copy of the information that had been brought on record is one dated 12.01.1995, but that has not been proved. It has been held that the written information bearing paper No. 24-Ga/5 is not proved, and, therefore, not admissible in evidence. The said finding of the Tribunal is again utterly wrong. What is on record is a copy of the information sent to the SSP dated 11.01.1995 and also on record are copies of the registered postal receipts and AD Card. The information bears paper No. 24-Ga/5 and the registered postal receipts and AD Card bears paper No. 24-Ga/8. Regarding these documents, PW-2, Kalyan Singh, the claimant has stated in his examination-in-chief thus:

"घटना की रिपोर्ट पुलिस ने नहीं लिखी मैंने SP को डाक द्वारा दरखास्त दी थी।"

24. The registered postal receipt is evident to be one of the day following, when the information to the SP was written. It is to be noted that with so much said about the document paper No. 25-Ga/5, no question was put to contradict the witness in the cross-examination. To a proceeding before the Tribunal, where provisions of the Evidence Act do not apply, we are of opinion that the document has been sufficiently proved. The duties of the Tribunal in judging a motor accident claim are more inquisitorial than adversarial. Here, the Tribunal has gone after the claimant's evidence as if it were judging a prosecution case in a criminal trial. There is then a facet of the finding on this issue by the Tribunal, where the testimony of PW-1 has been criticized to say that the witness has not disclosed in his evidence the names of persons, who had witnessed the accident. It has done a hairsplitting comparison of the testimony of the claimant, comparing what was said in the examination-in-chief and that in the cross-examination about the events that followed the accident. It has been remarked that whereas in the examination-in-chief, he has stated that after the accident, people carried him to the District Hospital, Etawah, at the tail end of his cross-examination, he has said that Ramveer, Manohar and his daughter carried him to the hospital. The Tribunal has not rest content with this much of criticism of the claimant's testimony. The learned Judge has gone on to say that PW-2 is PW-1's daughter (when in fact, PW-1 is PW-2's daughter) and, therefore, an interested witness.

25. It has been remarked further that if she was present on the spot, the claimant

would have certainly mentioned the fact in his claim petition as well as his testimony. It is also said by the Tribunal that PW-2 could mention the name of witnesses in his testimony, but has merely said that some people took him to the hospital. It has been deduced from this part of PW-2's testimony that if his daughter was present, he would not have employed the words 'some people'. This kind of an appraisal of testimony by the Tribunal in a claim petition is completely incompatible with the jurisdiction that the Tribunal exercises.

26. To emphasize again, the bed head ticket from the District Hospital shows that it was PW-1, Km. Radha Singh, who had brought PW-2, the claimant Kalyan Singh to the hospital. Her names figures in the column 'brought by'. The bed head ticket is an official document from the District Hospital and cannot be trifled. This witness if not present, would not have been the one to carry her father to the hospital. At least the mention of her name on the bed head ticket lends a strong buttress to the claimant's case that PW-1 was present at the scene of accident and witnessed it. Read together with the medical evidence, all of which has been omitted from consideration, the inescapable conclusion is that the Tribunal has gone completely wrong in finding against the claimant on Issue No.1.

27. Before concluding on the issue, I am much supported in my view by the opinion of my esteemed brother Jaspreet Singh in *Raj Kumar Hans and others v. Saroj and others*, FAFO No.737 of 2013, decided on 14.07.2021, where in very similar circumstances His Lordship taking note of the decisions of the Supreme Court in **Sunita and others v. Rajasthan State Road Transport Corporation and others**,

(2020) 13 SCC 486; Mangla Ram v. Oriental Insurance Company Limited and others, (2018) 5 SCC 656; and Anita Sharma and others v. New India Assurance Company Limited and another, (2021) 1 SCC 171, has held:

“Considering the material available on record, this Court finds that the Tribunal has erred in its approach in evaluating the evidence available on record. It has been a clear case of the claimant that the claimant sustained injuries on account of the accident which occurred on 26.10.2011. He was admitted in the hospital and only after he was discharged that he had lodged the First Information Report. The claimant has also brought on record the copy of the First Information Report. He has also brought on record the documents relating to the offending driver being charge-sheeted and being prosecuted in the same accident. A number of documents, relating his initial treatment at Navjeevan Hospital at Lakhimpur Kheri and the documents relating to his treatment at K.G.M.U. has been brought on record, however, none of the aforesaid documents have been considered by the Tribunal in its order. The claimant has also filed a disability certificate indicating that he had suffered 45% disability certificate which has also not been noticed by the Tribunal rather there is no mention, consideration of the said documents in the judgment and why they have been discarded.

As noticed by the Apex Court in the cases relating to motor accidents it is the claimant who has to prove the case on the basis of pre-ponderance of probability. The foundational facts regarding the accident, the treatment, the First Information Report as well as the charge sheet which had been brought on record

have not been considered in the correct perspective by the Tribunal. Once the aforesaid foundational facts have been connected with the evidence and considering the fact that neither the owner nor the driver led any evidence to contradict the statement of the claimant and his witnesses and nothing adverse having been elicited in their testimony, thus, the Tribunal has erred in appreciating the evidence on record. It ignored material evidence and has recorded findings which are based on surmises and against the weight of the material on record.”

28. The finding of the Tribunal on Issue No.1 is, accordingly, set aside and the issue is answered in favour of the claimant; against the owner and the Insurers.

29. The findings on Issues Nos.2 and 3 have been recorded in favour of the claimant by the Tribunal. Those findings are affirmed.

30. Since Issue No.4 has not at all been decided by the Tribunal, I am of opinion that this matter ought to go back to the Tribunal for the purpose of the said issue being decided afresh on merits, after hearing parties.

31. Accordingly, this appeal succeeds and is allowed in part. The impugned judgment and award dated 29.11.1997 passed by the Motor Accident Claims Tribunal/ 8th Additional District Judge, Etawah is **set aside** with a remit of the matter to the Tribunal, that would now hold jurisdiction in the matter. The Presiding Officer of the Motor Accident Claims Tribunal will hear the parties afresh with full opportunity to lead evidence limited to Issue No.4 alone. The findings on Issues Nos.1, 2 and 3 shall not be re-opened and

abide by this judgment. The Tribunal shall pass an award in accordance with its finding on Issue No.4, after hearing parties, within a period of three months from the date of receipt of a copy of this order, bearing in mind the directions in this judgment and in accordance with law. Costs easy.

(2023) 7 ILRA 639
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2023

BEFORE

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

First Appeal From Order No. 350 of 2006

Branch Manager, United India Insurance Co., Ltd., Alld. ...Appellant

Versus

Sri Nagendra Tiwari & Anr. ...Respondents

Counsel for the Appellant:
Sri Saurabh Srivastava

Counsel for the Respondents:
C.S.C., Ms. S.R. Gupta

A. Civil Law - Workmen's Compensation Act, 1923-Section 30- Commissioner has awarded compensation of 2,87,209/ with interest-Challenge against- the certificate shows that the disability is only 17% and there is amputation of three flanges of the upper limb but the Tribunal has considered the injury to be causing 100% disability, which could not have been done.-disability due to the accidental fall is proved beyond reasonable doubt and under the provisions of Section 4(1)(C) of the Workmen's Compensation Act, 1923 - 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 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*- 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.(Para 1 to 9)

The appeal is dismissed. (E-6)

List of Cases cited:

1. North East Karnataka Road Trans. Corp.Vs Smt. Sujatha Civil Appeal No.7470 of 2009
2. Golla Rajanna Etc. . Vs Div. Manager & anr. (2017) 1 TAC 259 SC
3. Mayan Vs Mustafa & anr. (2022) ACJ 524
4. Pratap Narain Singh Deo Vs Srinivas Sabata (1976) 0 ACJ 141

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

1. Heard Shri Saurabh Srivastava, learned counsel for the appellant-Insurance Company and Ms.S.R. Gupta, learned counsel for the respondent. None appears for the employer.

2. By way of this appeal, United India Insurance Company Ltd. has challenged the judgment and award dated 8.9.2005 passed by Workmen's Compensation Commissioner, and Assistant Labour Commissioner, Saharanpur in WCA No.10 of 2004 awarding compensation of Rs.2,87,209/- (with interest) to the claimants.

3. Learned counsel for the appellant submits that the certificate shows that the disability is only 17% and there is amputation of three flanges of the upper limb but the Tribunal has considered the injury to be

causing 100% disability, which could not have been done.

4. Learned counsel for the respondents submits that this a pure question of fact, which cannot be gone into by this Court in the light of the judgment of Supreme Court in the cases of *Mayan vs. Mustafa and another, 2022 ACJ 524* and *Pratap Narain Singh Deo vs. Srinivas Sabata, 1976 0 ACJ 141*.

5. On perusal memo of appeal, this Court finds that following substantial questions of law has been framed:

"(a) Whether the learned Commissioner was justified in over-looking the fact that on fateful day the claimant injured was absent from the duty, even though awarded compensation for his injuries?"

(b) Whether the learned Commissioner was justified in awarding more compensation, than it was claimed by the claimant itself?"

(c) Whether the learned Commissioner was justified in awarding interest against the appellant-Insurance Co. against the principle laid down by the Apex Court?"

(d) Whether the learned Commissioner was justified in fixing the liability upon the appellant-Insurance Co. without the owner having been declared as insolvent as required under Section 14 of the Act?"

(e) Whether the learned Commissioner was justified in awarding 100% compensation as against the disability certificate of only 17%?"

6. 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."

7. 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."

8. 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 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.

9. 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.

10. Interim relief, if any, shall stand vacated forthwith. The amount be disbursed to the claimant forthwith.

(2023) 7 ILRA 642

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.05.2023

BEFORE

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

First Appeal From Order No. 2599 of 2011

Arvind Agrawal & Anr. ...Appellants
Versus
Tanveer Ahmad & Ors. ...Respondents

Counsel for the Appellants:

Sri Vivek Kumar Singh

Counsel for the Respondents:

Sri Baleshwar Chaturvedi, Sri S.K. Mehrotra

A. Civil Law - Motor Vehicles Act, 1988- Sections 173- enhancement of compensation-deceased was a son of the claimants/parents- He was the sole breadwinner and he was aged 23 years and earned a B.Tech (Communications) degree- **Annual income of the deceased is considered to be Rs. 72,000/- 50% added towards future prospects as per Rules 220-A(3) of 1998-Hence , total**

compensation granted Rs. 14,06,000/- @ 7%.(Para 1 to 35)

B. 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.(Para 33)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Gyan Chand Jain & ors. Vs Permanand & ors. (2003) 1 TAC 490
2. Sarla Verma(Smt.) & ors. Vs DTC (2009) 6 SCC 121
3. Magma General Ins. Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors. (2018) 18 SCC 130
4. National Ins. Co. Vs Pranay Sethi & ors. (2017) 16 SCC 680
5. New India Assur. Co. Ltd Vs Urmila Shukla & ors. (2021) SCC OnLine SC 822
6. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd & ors. (2017) 35 LCD 1311
7. P.O. Meera & anr. Vs Ananda P. Naik & ors. (2022) SCC OnLine Ker 546
8. Branch Manager, Future General India Ins. Co. Ltd. Bengaluru Vs Varsha S.L. (2019) SCC OnLine Kar 3498
9. Shashikala & ors. Vs Ganga-lakshamma & anr.. (2015) 9 SCC 150

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

This is a claimant's appeal under Section 173 of the Motor Vehicles Act,

1988 seeking enhancement of compensation awarded by the Tribunal.

2. The two claimant-appellants, Arvind Agrawal and Smt. Renu Agrawal, are the parents of the late Anshul Agrawal, the victim of a fatal motor accident, that happened on 31.05.2008. According to the facts set out in the claim petition, the deceased, Anshul Agrawal, was proceeding on board a Maruti car bearing Registration No. UP 14 T 0150 on 31.05.2008 at about 10 o'clock in the evening hours, along with his workmen, one Dhananjay and another Sonu. He was proceeding from Rampur bound homewards. He lived at Premises No. 6/165, Rajnagar, Police Station Kavinagar, District Ghaziabad, and this was his destination on the fateful journey. When Anshul reached a place in front of the gate at Village Shahbazpur, a truck bearing Registration No. UP 25 T5201, driven at a high speed and negligently, approached from the opposite direction. The truck collided with Anshul's car head-on. The impact led Anshul, Dhananjay and Sonu to sustain injuries. During medical aid at the Government Hospital, Gajraula, Anshul and Dhananjay lost their battle for life.

3. Arvind Agrawal lodged a first information report¹ at Police Station Gajraula regarding the incident. Arvind Agrawal is arrayed as claimant no. 1 in the claim petition and appellant no. 1 in this appeal. Both the claimant-appellants shall hereinafter be collectively referred to as 'the claimants' except where the context requires an individual or a different reference. It is the claimants' case that on account of the sudden demise of their lone and adult son, Arvind Agrawal was much troubled psychologically. Therefore, on account of an inadvertent error, he

mentioned the number of the offending truck as UP 25T 2501 instead of UP 25 T 5201 in the FIR. However, during investigation, Arvind Agrawal took care to amend his mistake by informing the Investigating Officer². The IO, after verifying facts and collecting material, charge-sheeted the driver of the offending truck in the crime arising from the accident. It is the claimants' case that the deceased would provide for the claimants, earning his livelihood from business that he did. The deceased was the claimants' lone son. He was the sole breadwinner and provided resources for their sustenance. It was the deceased's income that would enable the family to make ends meet. The deceased was aged 23 years and a healthy man. He had pursued higher technical education and earned a B.Tech (Communications) degree. He was an engineer by training. He was into the business of aluminium fabrication and glass fitting, wherein he was trading with profit. He would earn a sum of ₹10,281/- per month and had a shop at 68, Punjab Expeller Compound, Meerut Road, Ghaziabad. The claimants, on account of their son's demise, have been left without support. They have suffered irreparable loss and mental pain. The family, after Anshul's demise, have plunged into financial crisis. The deceased committed no fault or negligence that contributed to the accident. If the driver of the offending vehicle had not driven it at a high speed and negligently, the claimants' son would not have suffered an untimely demise. Therefore, opposite parties nos. 1, 2 and 3 to the claim petition, who are the owner, the driver and the insurers of the offending truck, respectively, are entirely liable for the untimely death of the claimants' son. It is also pleaded on behalf of the claimants that the deceased's ancestors have lived up to the age of 70-75 years. He would have at

least lived to see his 75th birthday. He would have been gainfully employed for a minimum of 40 years and supported the family. The deceased was unmarried.

4. Opposite party no. 2 to the claim petition, Saleem Hussain, is respondent no. 2 to the appeal. He is the driver of the offending truck. He shall hereinafter be called 'the driver'. Tanveer Ahmad is the owner of the offending truck. He is opposite party no. 1 to the claim petition and respondent no. 1 to this appeal. He shall hereinafter be called 'the owner'. The Bajaj Alliance General Insurance Company Limited are the insurers of the offending truck. They are arrayed as opposite party no. 3 to the claim petition and respondent no. 3 to this appeal. The said insurance company shall, for the sake of convenience, be called as 'the insurers'.

5. The claimants say that the driver was driving the offending truck on the owner's instructions. The owner is, therefore, liable. The offending truck was insured with the insurers vide Cover Note No. BZ0800234677. Therefore, the owner, the driver and the insurers are jointly and severally liable to make good the compensation demanded by the claimants. A total sum of ₹30,20,000/- was asked to be paid in compensation by the claimants, who petitioned the Tribunal.

6. The owner and the driver filed a joint written statement and generally denied the claimants' case. It was averred that it was not the driver's fault that led to the accident. The driver of the offending vehicle was operating it with due care and caution, and in accordance with the rules. He held a valid and effective driving license. On the date and time of the accident, the offending truck was insured with the insurers. It was also pleaded

that the claimants have demanded compensation arbitrarily. If at all the offending truck be held responsible for the accident, the liability has to be borne by the insurers.

7. The insurers filed a separate written statement, generally denying, like the driver and the owner, the claimants' case. It was pleaded that the deceased was driving his car negligently and wantonly, on account of which, the accident happened. There was no fault on the driver's part. The claimants are not entitled to compensation. They have demanded an exaggerated figure in compensation, to which they are not entitled. It was also averred that at the time of the accident, the driver did not hold a valid driving license. The insurers have pleaded that the claim petition ought to be rejected.

8. On the pleadings of parties, the Tribunal, on 15.02.2010, struck the following issues (translated into English from Hindi) :

(i) Whether on 31.05.2008 at 10 o'clock in the night, when the deceased Anshul Agrawal was proceeding to Ghaziabad from Rampur, along with Dhananjay and Sonu in Maruti Car No. UP 14 T 0150, in front of Shahbazpur Door, on the Gajraula Brajghat Road, within the local limits of Police Station Gajraula, District J.P. Nagar, Truck No. UP 25 T 5201, driven at a high speed and negligently by its driver, collided with Car No. UP 14 T 0150, on account of which, the claimants' son, Anshul Agrawal sustained grievous injuries and died during treatment at the Government Hospital, Gajraula ?

(ii) Whether the accident in question happened on account of the negligence of the deceased/driver of Vehicle No. UP 14 T 0150 ?

(iii) Whether at the time of the accident, the deceased did not hold a valid and effective driving license ?

(iv) Whether the claim petition is bad for non-joinder of the owner and the insurers of Maruti Car No. UP 14 T 0150 ?

(v) Whether at the time of the accident, the driver of Truck No. UP 25 T 5201 did not hold an effective and valid driving license ?

(vi) Whether the claimants are entitled to compensation on account of Anshul Agrawal's death? If yes, how much and from whom ?

9. On behalf of the claimants, Arvind Agrawal, examined himself as P.W.1 and Sonu Sharma, as P.W.2. The claimants, in their documentary evidence through a list bearing Paper No. 6π produced photostat copies of five documents, and through a list bearing Paper No. 30π, certified copies of 12 documents. On the other side, the truck driver, Saleem Hussain, was examined as D.W.1 and the owner and the driver filed, along with their joint written statement, photostat copies of three documents. The documents as well as the parol evidence shall be discussed, so far relevant, during the course of this judgment.

10. Issues Nos. 1 and 2 were dealt with by the Tribunal together. The Tribunal held in favour of claimants on Issue No. 1, but opined that the drivers of both vehicles had a contributory negligence to the extent of 50%. Issue No. 3 was decided, holding that on the date of the accident, the deceased held a valid driving license. Issue No. 4 was decided again in favour of the claimants, holding that compensation, as determined, is payable by the owner and

the insurers of the offending truck. The car driver is dead. One of the claimants is the car driver's father and his legal representative as well. It was held that there was no defect in the petition on account of the car driver and the insurers of the car not being made parties. Issue No. 5 was decided, again, in favour of the claimants, so to speak, holding that the driver of the truck held a valid and effective driving license on the date of the accident. In determining Issue No. 6, the Tribunal looked into the deceased's income tax returns and balance-sheet for the Financial Year 2005-06 and Assessment Year 2006-07, and likewise, for the Financial Year 2006-07 and Assessment Year 2007-08. The Tribunal was not much convinced about the monthly income of the deceased and all that was left with him, after taking into account the outgoings and expenditure. The Tribunal also took into consideration the deceased's high technical qualifications. The circumstances of his business and life were also considered to reach a conclusion that the deceased had a monthly income of ₹8,000/-, corresponding to an annual income of ₹96,000/-. The deceased, being a bachelor, 50% was deducted towards personal and living expenses by the Tribunal. In order to choose the multiplier applicable, the Tribunal has considered the age of claimant no. 1, Arvind Agrawal and adopted a multiplier of '11'. Therefore, a total dependency of ₹5,28,000/- was determined by the Tribunal. A sum of ₹2,000/- was awarded towards funeral expenses.

11. Looking to the special circumstances that the claimants had lost their only son, relying on a decision of Uttarakhand High Court in **Jamuna Prasad and another v. Baljeet Singh and others**³, the Tribunal awarded separately a

sum of ₹25,000/-, but under what head, is not clear. In addition, on account of pain and suffering for the loss of their only son, the claimants were awarded a sum of ₹10,000/- and further, a sum of ₹10,000/- for the loss of consortium and services. In the aforesaid manner, a total compensation of ₹5,75,000/- was worked out by the Tribunal. Since 50% contributory negligence was adjudged, the total compensation was halved to determine the compensation payable, leading to a sum of ₹2,87,500/-. This compensation was ordered to be paid by the owner, the driver and the insurers jointly and severally to the claimants along with interest at the rate of 6% per annum from the date of the claim petition until realisation. The insurers were ordered to deposit the sum awarded within a month of the award with the Tribunal. The Tribunal further directed that out of the sum of compensation payable to the claimants, both would be entitled to receive a one half each.

12. Heard Mr. Vivek Kumar Singh, learned Counsel for the claimants and Mr. S.K. Mehrotra, learned Counsel appearing for the Insurers.

13. It is argued by Mr. Vivek Kumar Singh that there is no case of contributory negligence, as the evidence shows that the offending truck was entirely responsible for the accident. It is also argued that the truck being the heavier vehicle, the inference of the Tribunal to apportion contributory negligence equally on ground that it is a head-on collision, is erroneous. It is next submitted that the Tribunal erred in not awarding anything towards future prospects and incorrectly applying the multiplier. It is also argued that the Tribunal has committed error in not awarding adequately under the conventional heads on account of the loss of

consortium, funeral expenses and the loss of estate.

14. On the other hand, it is argued by Mr. S.K. Mehrotra, learned Counsel for the insurers that the Tribunal has passed a just award. He submits that the Tribunal's award should neither be a pittance nor a bonanza. Mr. Mehrotra has further argued that the finding regarding contributory negligence is unassailable and has referred to the site-plan, besides the other evidence, to say that the Tribunal has rightly determined the issue.

15. Upon hearing learned Counsel for parties, this Court finds that so far as this appeal is concerned, there are only two points that arise for consideration, to wit, whether the Tribunal was right in finding contributory negligence and apportioning it at 50% between the deceased and the offending driver; and the other is, if the compensation awarded is adequate. So far as the evidence of P.W.2, who is the surviving passenger on board the ill-fated car is concerned, all that he has said in his affidavit filed in lieu of his examination-in-chief in Paragraphs Nos. 4 and 5 is this:

“4. मैं शपथपूर्वक कथन करता हूँ कि जब हमारी गाड़ी गजरौला से बृजघाट की तरफ शाहबाजपुर गेट के सामने पहुँची तो सामने से ट्रक संख्या - यू.पी.-25टी-5201 के चालक ने बड़ी तेजी व लापरवाही से ट्रक को चलाते हुए, गलत साईड में आकर हमारी मारुति कार में सामने से टक्कर मार दी।

5. मैं शपथपूर्वक कथन करता हूँ कि हमारी गाड़ी को मेरा मालिक अंशुल अग्रवाल बड़ी सावधानी व यातायात के नियमों का पालन करते हुए चला रहा था किन्तु ट्रक चालक ने तेजी व लापरवाही से ट्रक चला कर हमारी गाड़ी में टक्कर मारी जिससे इस दुर्घटना में आयी चोटों के कारण अंशुल अग्रवाल व धनजय की मृत्यु हो गयी तथा मैं भी घायल हो गया था।”

16. This witness, in his cross-examination about the accident, has said :

"हम लोग उस दिन रामपुर से शाम साढ़े सात आठ बजे चले थे। मैं घटना स्थल से रामपुर की दूरी नहीं बता सकता। घटना स्थल पर डावर की सड़क लगभग 20 फिट चौड़ी है उसके बीच ड्रिवाइडर नहीं है। सड़क पर ट्रैफिक लाईट नहीं है। सड़क के किनारे गांव है जिसकी रोशनी सड़क पर लगी हुई थी। घटना ट्रक से हुई है जिसका नम्बर मैं बता सकता हूँ। घटना वाला ट्रक सामने से आ रहा था। घटना के समय सड़क पर काफी वाहन आ रहे थे। कार व ट्रक की आमने सामने मुंह से टक्कर हुई है। कार में घटना के समय चालक के अलावा एक आदमी आगे बैठा था। मैं पीछे बैठा था। कार घटना के समय खाली थी थोड़े से औजार थे जो डिग्गी में रखे थे। ट्रक लगभग 10-20 गज की दूरी से दिखाई दे रहा था जिसकी रोशनी दिखाई दे रही थी। मुझे मामूली चोटे आई थी। अंशुल अग्रवाल को चोटे आई थी। जिनकी इस घटना में मृत्यु हो गयी है। ...

...यह कहना गलत है कि अंशुल अग्रवाल तेजी से गाड़ी चला रहे थे इस कारण घटना घटी हो। ..."

17. This witness, who has testified as P.W.2, is a very reliable witness of the accident. His presence cannot be doubted because he was on board the ill-fated car and received minor injuries too in the accident. The said version of his has remained unchallenged by the insurers in the cross-examination. The witness is, in no way, partisan or related to the claimants. He was an employee of the deceased, and after him, took up employment with his uncle. He is, thus, no longer in contact with the deceased's family. There is no reason for him to say the slightest of falsehood about the negligence of the two drivers involved in the accident. A perusal of the testimony of witness and his cross-examination clearly shows that the witness has said that the truck driver was driving it at a high speed and negligently. He has, particularly, said that the truck driver moved to the wrong side of the road and hit the ill-fated car head-on. It is further said in the examination-in-chief that the deceased was carefully driving the car following the traffic rules, but the truck driver driving

negligently and at a high speed, caused the accident. In the cross-examination of this witness at the instance of the insurers, there is nothing elicited, which may cast doubt about the witnesses' judgment of the negligence involved in the accident. It is said by the witness in his cross-examination that he was sitting on the backseat of the car when the accident happened. He could see the truck at a distance of 10-20 yards. He has specifically refuted the suggestion by the learned Counsel for the insurers that the accident happened on account of the deceased driving the ill-fated car at a high speed.

18. In substance, therefore, whatever the witness has said in his examination-in-chief remained the unshaken version of the eye-witness, who saw it all happen at close quarters. The version there is clear that the truck was driven negligently and moved to the wrong side of the road to collide head-on with the ill-fated car.

19. On behalf of the insurers, the driver of the offending truck, Saleem Hussain, has been examined as D.W.1. In his examination-in-chief in the dock, he has stated :

"... मैं उस समय यू०पी० 25 टी० 5201 का ड्राइवर था दिनांक 31.5.08 को मैं ट्रक UP 25 T 5201 को लेकर गाजियाबाद से बाजपुर जा रहा था। जैसे ही मैं शाहबादपुर गेट के पास पहुंचा तो सामने की ओर से एक कार को उसका ड्राइवर बहुत तेजी व लापरवाही से चलाता हुआ लाया और मेरे ट्रक में टक्कर मार दी। इस दुर्घटना में मेरी कोई गलती नहीं थी। समस्त गलती कार चालक की थी। ...

... इस घटना के संबंध में लिखवाये गये अपराध संख्या 923/08 थाना गजरौला में मेरी जमानत हुई थी। इस मुकदमें में गाड़ी की भी जमानत हुई थी। यह कहना सही है कि इस मुकदमें में पुलिस द्वारा मुझे दोषी मानते हुए आरोप पत्र न्यायालय में दाखिल कर दिया हो। ...

... यह कहना गलत है कि रात में नींद के कारण गलत दिशा में आकर तेजी व लापरवाही से चलाते हुए कार में टक्कर मार दी हो। यह कहना गलत है कि उक्त एक्सीडेंट में मेरी गलती हो। ... "

20. This witness was examined on behalf of the owner as D.W.1. A perusal of the testimony of this witness shows that he has refuted his negligence or even his contribution to the causing of the accident. The witness has acknowledged the fact that the Police have charge-sheeted him in the crime. The charge-sheeting by the Police is not decisive on the issue of negligence, but is certainly a piece of evidence to be considered. It does show that the Police doing their investigation also thought that it was the driver's negligence that led to the accident.

21. There is another important feature about the testimony of P.W.2. It is not just that, that as the driver of the offending truck, any stand of his which revealed or was a pointer to his negligence, would bring his conduct or ability as a driver into question, but also place him disadvantageously in the criminal trial he is facing on the charge of causing death by negligence. Assuming that the testimony in the motor accident claim would not be read in evidence in the criminal trial, the driver, who is a layman, can reasonably be expected to think that it would. He could think that it would lead to his conviction in the criminal case. This witness is, therefore, by no means, an independent witness of the kind that P.W.2 Sonu is, as the surviving victim of the accident. The fear of blameworthy conduct or conviction in the criminal case, would keep the witness D.W.1, inhibited from speaking the truth.

22. To the understanding of this Court, the testimony of this witness about the question of negligence or the

deceased's contribution to it is not dependable, particularly, when compared to that of P.W.2, who is absolutely independent and unconcerned. The Tribunal, while noticing the testimony of both these witnesses in order to evaluate it, has not at all assessed it either by the credit of the witnesses or the worth of their testimonies, judged on a comparative basis. The Tribunal has simplistically set forth the salient features of the testimony of both the witnesses and contented itself with doing that. This Court thinks that the testimony of P.W.2 and D.W.1, when taken into consideration decisively, shows that P.W.2 is more reliable about an accurate and first-hand account. This Court is also of opinion that the account of the accident given out by P.W.2 clearly establishes the driver's negligence. It excludes any contribution by the deceased. To add to it, by way of support is the fact that the Police have also thought that the truck driver was guilty of offences punishable under Sections 279, 338, 427 and 304A of the Penal Code, all of which would point to the driver's negligence. This Court makes it clear that we do not rely on the conclusions drawn by the Police, but merely look to it for the slight support of whatever worth it is in aid of our conclusions based on the evidence before us. The Court has also looked into the site-plan, which the Tribunal has relied on to found its conclusions about contributory negligence. Contrary to the Tribunal's understanding of the site-plan, what this Court finds is that the truck did move to the right and hit the car, that was not moving in the centre of the road. The car was moving according to the rule of the road, may not be on the last inch of the left-hand side. In fact, a perusal of the Tribunal's finding on the issue makes it pellucid that the learned Judge also thought about the site-plan the same way as this

Court. The only error that seems to have arisen is on account of the Tribunal straining the standards of care for the driver of the ill-fated vehicle to find a case of contributory negligence. This would be evident from the Tribunal's finding on the issue, the relevant part of which reads :

"नक्शा नजरी की प्रमाणित प्रतिलिपि कागज सं0 32 ग / 2 के अवलोकन से पाया जाता है कि कथित दुर्घटना सड़क पर आमने सामने से हुई है। ट्रक सड़क पर लगभग बीच में चल रहा था तथा कार सामने से सड़क के बीच से थोड़ा बांये थी। यदि कार चालक सावधानी बरतता और यदि ट्रक चालक लापरवाही से ट्रक ला रहा था, तो कार बांये लाकर दुर्घटना से बचा जा सकता था। अतः कथित दुर्घटना में कार चालक की भी गलती स्पष्ट होती है।"

(emphasis by Court)

23. It will be noticed that in the finding recorded by the Tribunal, it has been said that the site-plan showed that the truck was moving almost in the centre of the road, whereas the car was moving slightly to the left-hand side. About this finding, the Tribunal is absolutely right in our opinion, but then it has remarked that if the driver of the ill-fated vehicle had observed caution, seeing the truck driver driving negligently, he could have moved the car farther to the left and averted the accident. That advice may have been good for the deceased to enable him see another day, and, of course, a long life, but it cannot set the standards for negligence and its apportionment between the two drivers.

24. In the opinion of this Court, therefore, the finding of the Tribunal, that the deceased was guilty of contributory negligence, is absolutely misplaced. It is, accordingly, held that it is the driver alone, who was responsible for the accident, with no contribution on the deceased's part.

25. This takes this Court to the next issue and that is the assessment of compensation, which the claimants are entitled to. This Court has already noticed the way the Tribunal has taken into consideration the deceased's income tax returns, his revenue expenditure, the kind of business that he was into, his establishment and above all, his qualifications to find that the deceased's monthly income was ₹8,000/- per month. There is no reason for this Court to disagree with that assessment of the Tribunal about the deceased's monthly income.

26. Based on the deceased's monthly income, his annual income would be a sum of ₹96,000/-. Since the deceased was bachelor, going by the law laid down in Paragraph No. 30 of the report in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121**, a deduction of 50% towards the deceased's personal and living expenditure has been made, which this Court thinks is correct. The Tribunal has applied the multiplier of '11', reckoning it by the father's age. That is a patently fallacious standard to assess the applicable multiplier. According to the table in Paragraph No. 40 of the report in **Sarla Verma** (supra) the deceased being in the age group of 21-25, the applicable multiplier would be 18; not 11. It is accordingly held.

27. This Court further notices that the Tribunal has not awarded anything towards future prospects. It is no longer in the realm of doubt that future prospects are as much available in the case of the self-employed or those working on a fixed salary as those employed in government establishment or other establishments on salaries hitherto

regarded as the sole index of a dependable income. Now that perspective of the law has completely changed, in view of the holding of the Constitution Bench of the Supreme Court in **National Insurance Company v. Pranay Sethi and others, (2017) 16 SCC 680**. In **Pranay Sethi (supra)** 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.

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 in Reshma 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.

28. The other issue that still requires consideration is whether future prospects, to which the claimants are entitled, would be governed by the principle in **Pranay Sethi** or Rule 220-A(3) of the Uttar Pradesh Motor Vehicle Rules, 19984. The issue was settled by the Supreme Court in **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822**, where it has been 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 Sethi** cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in **Pranay Sethi** cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs.

29. There is, therefore, no doubt that in the State of Uttar Pradesh, future prospects have to be calculated in accordance with Rule 220-A (3) of the Rules, 1998 and not the principles in **Pranay Sethi**.

30. It was, at some time, a matter of doubt whether Rule 220-A (3) of the Rules, 1998 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. The issue is no longer res integra in view of the Bench decision 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 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. Niranjana 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.

31. According to the law laid down by the Division Bench in **Sushil Kumar** 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 was much less than 40 years, 50% is to be added to his income towards future prospects.

32. The claimants' entitlement under the conventional heads is again governed by the principles in **Pranay Sethi** 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	Rs 15,000

	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)

33. So far as the award of compensation for the loss of consortium is concerned, the issue 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)

34. In view of what this Court held the compensation payable to the claimants in this appeal would have to be revised in the following manner : -

<u>S.No.</u>	<u>Particulars</u>	<u>Amount (in ₹)</u>
(i)	Monthly Income of the deceased	8,000/-
(ii)	Monthly Income+Future Prospects (Monthly Income x 50%) = 8000+4000	12,000/-
(iii)	Annual Income (of the deceased) = 12,000 x 12	1,44,000/-
(iv)	Annual Dependency = Annual Income – 1/2 deduction towards personal expenses of the deceased = 1,44,000 – 72,000	72,000/-
(v)	Total Dependency = Annual Dependency x Applied Multiplier = 72,000 x 18	12,96,000/-
(vi)	Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents'	1,10,000/-

	Consortium = 15000 + 15000 + 40,000 x 2	
TOTAL COMPENSATION (₹12,96,000 + ₹1,10,000)	₹14,06,000/-	

Total Compensation Payable (in words)
= Rupees Fourteen Lacs Six
Thousand only

35. In the result, this appeal stands **allowed in part**. The impugned award passed by the Tribunal is modified and the compensation awarded is enhanced to **₹14,06,000/-**. 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 realization. Any sum of money already deposited with the Tribunal by the Insurer, pursuant to the impugned award, shall be adjusted against the award. The other directions of the Tribunal in the award shall remain intact.

36. Costs easy.

(2023) 7 ILRA 656
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.04.2023

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.

Writ-C No. 2055 of 2023

Raj Kumar Bind **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Arvind Kumar Singh

Counsel for the Respondents:
 C.S.C., Sri Pradeep Singh

A. Revenue Law – Amrit Sarovar Scheme – Fishery lease – Auction – Highest bidder deposited one-fourth of bid amount – Vested right, how far being acquired – Held, a successful bidder in a public auction does not acquire any vested rights to have the auction concluded in his favour – It is open to the authority, if there exist good sufficient reasons, not to conclude the auction proceedings in favour of the successful bidder. (Para 28)

B. Constitution of India, 1950 – Article 38 – Object – Concept of welfare St. – St.'s liability to achieve it – Held, the concept of welfare St. is a facet of Article 38 of the Constitution and it is the objective of the St. to see that the welfare of the people is appositely promoted – The greatest good of the greatest number and the benefit and happiness of all is to be avowed is object of a democratic polity and the authorities of the St. are to act in furtherance of the same. (Para 30)

C. Maxim – *Salus populi est suprema lex* – Meaning – The welfare of the public shall be the supreme law. (Para 30)

Writ petition disposed of. (E-1)

List of Cases cited:

1. Babloo Vs St. of U.P. & ors.; 2020 (10) ADJ 550
2. Rajasthan Housing Board & anr. Vs G.S. Investments and another; (2007) 1 SCC 477
3. Laxmikant Vs Satyawar; (1996) 4 SCC 208
4. Trilochan Mishra Vs St. of Orissa; AIR 1971 SC 733
5. St. of Orissa Vs Harinarayan Jaiswal; (1972) 3 SCR 784
6. Union of India Vs Mis. Bhim Sen Walaiti Ram; (1970) 2 SCR 594
7. St. of Uttar Pradesh and Ors. Vs Vijay Bahadur Singh; AIR 1982 SC 1234

8. Meerut Development Authority Vs Association of Management Studies; (2009) 6 SCC 171

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

1. Heard Sri Arvind Kumar Singh, learned counsel for the petitioner, Sri M.C. Chaturvedi, learned Additional Advocate General along with Sri Abhishek Shukla, learned Additional Chief Standing Counsel, for the State respondents and Sri Pradeep Singh, learned counsel representing the respondent Gram Sabha.

2. Learned Additional Advocate General points out that pursuant to the previous order the respondent 2 is present in Court in order to explain the factual inconsistencies noticed in the affidavits filed earlier.

3. Indulgence is sought to file a fresh affidavit along with an application in order to explain the stand of the State respondents with regard to the settlement of the fishery lease in favour of the petitioner.

4. Affidavit, along with application, filed in court, is taken on record.

5. The present petition has been filed seeking a direction to the respondent no.3/ Sub-Divisional Magistrate, Tehsil- Sadar, District- Mirzapur, to complete the formalities for grant of fishery lease to the petitioner and to allow the petitioner to exercise fishing rights in respect of pond bearing Gata No. 970 area 0.2400 hectare, situate in Village- Gonaura, Tehsil- Sadar, District- Mirzapur.

6. Counsel for the petitioner has primarily sought to contend that the petitioner being the sole bidder in the

auction held by the State respondents and having deposited one-fourth of the bid amount, would acquire a right for settlement of fishery lease in his favour.

7. Learned counsel has also contended that the stand taken by the respondent authorities in the affidavit filed earlier that the pond in question was proposed for the 'Amrit Sarovar Yojana' could not be accepted for the reason that for the purposes of the said scheme the area of the pond was required to be at least of one acre and the pond in question is having a much lesser area.

8. Learned Additional Advocate General has drawn attention to the Government Order dated 27.04.2022, a copy of which has been appended along with the affidavit filed today, to point out that the 'Amrit Sarovar Scheme' was launched as part of celebration of 'Azadi Ka Amrit Mahotsav' to commemorate 75 years of independence of the country. It is pointed out that as per directions issued by the Government, 'Amrit Sarovars' are to be developed in each district and the responsibility of maintaining them, would be of the concerned Gram Panchayats.

9. It is pointed out that in furtherance of the aforesaid Government Order, a D.O. letter dated 12.05.2022, was issued by the Commissioner, Rural Development, Uttar Pradesh containing the guidelines in regard to the 'Amrit Sarovar Scheme' which provide that for the purpose of the scheme, ponds having in a minimum area of one acre (0.4 hectares), would be considered; however, in case a pond of the required area is not available then ponds of lesser area may also be utilised for the purpose after undertaking their rejuvenation and desilting.

10. As regards the factual aspects of the case, it is submitted that the auction proceedings were initiated in terms of a public notice dated 02.07.2022. Soon thereafter, the Gram Sabha of the concerned village passed a resolution on 25.07.2022, in terms of which the pond in question along with two other ponds, were proposed for 'Amrit Sarovar Yojana'. The officials of the Revenue Department being unaware of the aforesaid proposal held the auction on 25.07.2022 and one-fourth of the bid amount was deposited.

11. It is pointed out that the Gram Pradhan of the concerned Gram Panchayat submitted an application dated 25.07.2022 annexing a copy of the proposal dated 27.07.2022 passed by the Gram Panchayat which was with regard to the proposal for allocating the pond for the purposes of the 'Amrit Sarovar Scheme'.

12. Attention of the Court has also been drawn to the fact that a physical inspection was carried out by the Area Lekhpal and a report dated 26.08.2022 was submitted with the approval of the Revenue Inspector before the Tehsildar- Mirzapur. On 23.09.2022, it was forwarded to the Sub-Divisional Magistrate, and an order was passed to the effect that since the pond in question was being proposed for the 'Amrit Sarovar Scheme', the auction proceedings were not being approved.

13 . It is submitted that the respondent authorities in all fairness have sent notices dated 14.10.2022 and 29.10.2022, directing the petitioner to seek refund of the amount deposited for the auction.

14 . Learned Additional Advocate General points out that the 'Amrit Sarovar Scheme' has been launched on the occasion

of 'Azadi Ka Amrit Mahotsav' and in terms thereof the pond in question has been chosen in larger public interest and the work that is proposed to be carried out would be in the interest of the members of the entire village community.

15. As regards the contention of the petitioner with regard to infringement of any rights merely because the petitioner has participated in the auction and deposited the one-fourth of the bid amount, it has been submitted that mere participation in the auction and being the sole or highest bidder, does not create any indefeasible right in favour of the petitioner. In this regard, reliance has been placed on a decision of this Court in ***Babloo vs. State of U.P. and others***¹.

16. Rival submissions now fall for consideration.

17. The factual aspects of the case with regard to the pond in question having been notified for auction for the purposes of grant of fishery lease and the petitioner having participated and being the sole bidder and having also deposited one-fourth of the bid amount, are not disputed.

18. The only grievance which is sought to be raised is with regard to the fact that once the petitioner was successful in the auction being the sole bidder and had deposited one-fourth of the bid amount, his rights stood crystallized, and it was not open to the respondent-authorities to have declined to grant approval to the auction proceedings.

19. The affidavit filed in court today by the respondent no. 2 contains reference to the 'Mission Amrit Sarovar' launched by the Government of India at the national

level, aimed at developing and rejuvenating 75 water bodies in each district of the country as part of the celebration of 'Azadi Ka Amrit Mahotsav' to commemorate 75 years of independence of the country.

20. Attention of the court has been drawn to the fact that development of 'Amrit Sarovars' would be an apt symbol of constructive action adopted by the country on the occasion of 'Azadi Ka Amrit Mahotsav' and would create sustainable and long term productive assets beneficial to both the sentient beings and the environment. It is also pointed out that 'Amrit Sarovars' would play an important role in increasing the availability of water both on surface and underground.

21. The Government Order which has been placed on record contains reference to the guidelines issued by the Government of India wherein as per the implementation strategy of the scheme, an 'Amrit Sarovar' is to be constructed on at least one acre of land with water holding capacity of about 10,000 cubic metres. However, it has been provided that if any district is unable to create as many new 'Amrit Sarovars', then the district may take up rejuvenation of the existing structures for restoring their ecological and productive utility. Under the scheme, at least 75 'Amrit Sarovars' in every district are proposed to be taken up for construction or rejuvenation.

22. The objective of the scheme, as reflected from the Government Order and the guidelines which have been placed on record, are indicative of the importance of the scheme and in particular, the fact that the development of 'Amrit Sarovars' are envisaged with the aim of increasing the availability of water to create sustainable and long term productive assets.

23. The right of the highest bidder at public auctions has been subject matter of consideration in a number of cases and it has been consistently held that the authority concerned is not bound to accept the highest tender or bid, which is subject to the conditions in terms of which the public auction has been held.

24. The right of the highest bidder to have the auction concluded in his favour came up for consideration in **Rajasthan Housing Board and another Vs. G.S. Investments and another**² and it was held that the highest bidder did not acquire any vested right to have the auction concluded in his favour as the same was subject to the conditions in terms of which the auction proceedings had been held. The observations made in the judgment are being extracted below :-

"8. The auction notice dated 3.2.2002 contained a condition to the effect that the Chairman of the Housing Board shall have the final authority regarding acceptance of the bid. The second auction notice issued on 19.2.2002 mentioned that the conditions of the auction will be same as mentioned in the earlier auction notice. In view of this condition in auction notice it is obvious that a person who had made the highest bid in the auction did not acquire any right to have the auction concluded in his favour until the Chairman of the Housing Board had passed an order to that effect. Of course the Chairman of the Housing Board could not exercise his power in an arbitrary manner but so long as an order regarding final acceptance of the bid had not been passed by the Chairman, the highest bidder acquired no vested right to have the auction concluded in his favour and the auction proceedings could always be cancelled..."

25. In taking the aforesaid view, the decision in **Laxmikant v. Satyawani**³ was taken note of, wherein, referring to earlier decisions in

*Trilochan Mishra v. State of Orissa*⁴, *State of Orissa v. Harinarayan Jaiswal*⁵, *Union of India v. Mis. Bhim Sen Walaiti Ram*⁶ and *State of Uttar Pradesh and Ors. v. Vijay Bahadur Singh*⁷; it had been stated as follows :-

"4...From a bare reference to the aforesaid conditions, it is apparent and explicit that even if the public auction had been completed and the respondent was the highest bidder, no right had accrued to him till the confirmation letter had been issued to him. The conditions of the auction clearly conceived and contemplated that the acceptance of the highest bid by the Board of Trustees was a must and the Trust reserved the right to itself to reject the highest or any bid. This Court has examined the right of the highest bidder at public auctions in the cases of *Trilochan Mishra, etc. v. State of Orissa* AIR 1971 SC 733, *State of Orissa v. Harinarayan Jaiswal* (1972) 3 SCR 784, *Union of India v. Mis. Bhim Sen Walaiti Ram* (1970) 2 SCR 594 and *State of Uttar Pradesh and Ors. v. Vijay Bahadur Singh* AIR 1982 SC 1234. It has been repeatedly pointed out that State or the authority which can be held to be State within the meaning of Article 12 of the Constitution is not bound to accept the highest tender or bid. The acceptance of the highest bid is subject to the conditions of holding the public auction and the right of the highest bidder has to be examined in context with the different conditions under which such auction has been held. In the present case no right had accrued to the respondent either on the basis of the statutory provision under Rule 4(3) or under the conditions of the sale which had been notified before the public auction was held."

26. A similar view was taken in the judgment in *Meerut Development Authority Vs. Association of Management Studies*⁸ and it was laid down as a legal principle that the bidder who has participated in the tender process has no other right except the right to equality and fair treatment

in the matter of evaluation of competitive bids. The relevant portion of the judgment is being extracted below :-

"27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

28. It is so well-settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favoritism."

27. The aforesaid legal position with regard to the right of a successful bidder at a public auction has been considered in a recent decision of this Court in *Babloo (supra)*.

28. The legal position that a successful bidder in a public auction does not acquire any vested rights to have the auction concluded in his

favour and the authority concerned is not under all circumstances bound to accept the highest tender or bid, is fairly well-settled. It is open to the authority, if there exist good sufficient reasons, not to conclude the auction proceedings in favour of the successful bidder.

29. In the instant case, the reasons which have been put forward by the respondent-authorities, not to conclude the auction proceedings being in larger public interest with a view to create sustainable and long term productive assets by increasing the availability of water which is one of the most valuable natural resources, cannot be held to be an insufficient reason which had persuaded the respondent-authorities not to conclude the auction proceedings in favour of the petitioner.

30. The concept of a welfare State is a facet of Article 38 of the Constitution of India and it is the objective of the State to see that the welfare of the people is appositely promoted. *Salus populi est suprema lex* is a maxim found in *Cicero's De Legibus*⁹, and it means the welfare of the public shall be the supreme law and in case of any conflict, an individual interest must yield to the community interest. The State and its instrumentalities must serve the society as a whole keeping the public interest as primary and any other interest as secondary. The greatest good of the greatest number and the benefit and happiness of all is to be avowed is object of a democratic polity and the authorities of the State are to act in furtherance of the same.

31. Counsel for the petitioner has not been able to dispute the aforestated factual and legal position.

32. Learned counsel for the petitioner has also not been able to dispute that the development of the pond in question which is proposed as part of a scheme of national interest would be in the larger public good.

33. Accordingly, learned counsel states that the petitioner does not wish to pursue the matter any further.

34. It would be open to the petitioner to seek refund of the bid amount by responding to the notices issued earlier in regard to the same.

35. The petition stands **disposed of** accordingly.

(2023) 7 ILRA 661

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 25.05.2023

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

THE HON'BLE ARUN KUMAR SINGH

DESHWAL, J.

Writ-C No. 5284 of 2009

With

Writ-C No. 44108 of 2010

With

Writ-C No. 56439 of 2010

With

Writ-C No. 7015 of 2011

With

Writ-C No. 41284 of 2011

With

Writ-C No. 42531 of 2011

With

Writ-C No. 42669 of 2011

With

Writ-C No. 44245 of 2011

With

Writ-C No. 51960 of 2011

With

Writ-C No. 913 of 2012

With

Writ-C No. 48816 of 2012

With

Writ-C No. 34847 of 2013

Manjeet Singh & Ors.

...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Sri Rameshwar Nath, Sri Ashish Jaiswal, Sri Randhir Jain

Counsel for the Respondents:

C.S.C., Sri Manu Saxena, Sri S.K. Srivastava

A. Recovery Law – UP Municipalities Act, 1916 – Sections 167, 168, 173-A, 291 & 292 – Shop was allotted by the Municipality – Arrear of rent sought to be recovered as arrear of land – Permissibility – Power of Municipality explained – Held, rent is not a tax and, therefore, it cannot be recovered as arrears of land revenue u/s 173-A of the Act, 1916 – There is no provision in the Act, 1916 which empowers the Municipality to recover arrears of rent for a shop as arrears of land revenue through a recovery citation issued by the Collector – High Court quashed the impugned recovery certificates and citations holding it without jurisdiction. (Para 6, 8, 9 and 10)

Writ petition allowed. (E-1)

(Delivered by Hon'ble Salil Kumar Rai, J.
&
Hon'ble Arun Kumar Singh Deshwal, J.)

1. The bunch of petitions challenge the recovery certificates sent by the Executive Officer of Nagar Palika Parishad, Baheri, District Bareilly to the Collector/Additional District Magistrate (Finance and Revenue), District Bareilly to recover the arrears of rent, allegedly due on the petitioners. In Writ-C Nos. 48816 of 2012, 51960 of 2011, 913 of 2012, 42531 of 2011, 42669 of 2011 and 44245 of 2011 consequential recovery citations have also been issued by the Collector u/s 173-A of the U.P. Municipalities Act, 1916 (hereinafter referred to as "Act, 1916").

2. It has been argued by learned counsel for the petitioners that the arrears

of rent, allegedly due on any shopkeeper in possession of a shop allotted to him by the Municipality can be recovered only u/s 292 of the Act, 1916 in the manner prescribed in Chapter-VI of Act, 1916. It was argued that as the rent is not due on the land and the rent allegedly payable by the petitioners, is not a tax, therefore, any alleged arrears cannot be recovered as arrears of land revenue under Section 173-A or Section 291 of the Act, 1916. It was argued that under Chapter-VI of the Act, 1916, it was incumbent on the municipality to first raise a bill fulfilling the requirement of Section 167 of the Act, 1916 and on failure of the petitioners to satisfy the said bill, a demand notice was to be issued u/s 168 of the Act, 1916. In case the petitioners failed to pay as specified in the demand notice, the arrears can be recovered only by a warrant issued u/s 169 of the Act, 1916 and signed either by the President of the Municipality or any officer authorized for the said purpose or by the Executive Officer. The warrant can be executed only in the manner prescribed u/s 170, 171 and 172 of the Act, 1916 by sale of the movable property of the alleged defaulter. In their petitions, the petitioners have pleaded that no bills or any notice of demand as required u/s 167 and 168 of the Act, 1916 was served on the petitioners. No counter affidavit has been filed, rebutting the aforesaid averments. It was argued that in view of the aforesaid recovery certificates issued by the Executive Officer to the Collector/Additional District Magistrate (Finance and Revenue), District Bareilly and the consequential recovery citations challenged in the Writ-C Nos. 48816 of 2012, 51960 of 2011, 913 of 2012, 42531 of 2011, 42669 of 2011 and 44245 of 2011 are without jurisdiction and liable to be quashed.

3. Rebutting the argument of the counsel for the petitioners, the counsel for

the Nagar Palika Parishad has argued that the recovery certificates and also the consequential recovery citations are according to law and the petitions are liable to be dismissed.

4. We have considered the submission of the counsel for the parties.

5. Sections 291 and 292 of the Act, 1916 read as under:-

"291. Recovery of rent on land. - (1)

Where any sum is due on account of rent from a person to a [Municipality] in respect of land vested in, or entrusted to the management of the [Municipality], the [Municipality] may apply to the Collector to recover any arrear of such rent as if it were an arrear of land revenue.

(2) The Collector on being satisfied that the sum is due shall proceed to recover it as an arrear of land revenue.

292. Recovery of rent of other immovable property. - Any arrears due on account of rent from a person to the [Municipality] in respect of immovable property other than land vested in or entrusted to the management of the [Municipality], shall be recovered in the manner prescribed by Chapter VI."

6. Reading of Section 292 of the Act, 1916 indicates that any arrears of rent for a shop from a person in possession of the shop after the same having been allotted to him by the Municipality, can be recovered only in the manner prescribed in Chapter-VI. Rent is not a tax and, therefore, it cannot be recovered as arrears of land revenue u/s 173-A of the Act, 1916.

7. Sections 167 and 168 of the Act, 1916 provide that for any arrears due on a

person, Municipality shall raise a bill specifying the period for which and property in respect of which the same is claimed, the liability or penalty enforceable in default of payment and time within which an appeal may be preferred as provided u/s 161. In case the alleged defaulter fails to satisfy the bill raised by the Municipality within 15 days from its presentation, the Municipality shall serve a demand notice on the defaulter in the form set forth in Schedule-IV of the Act, 1916.

8. A perusal of Schedule-IV indicates that 15 days is to be provided to the defaulter for payment of the alleged dues. In case the defaulter fails to satisfy the demand notice a warrant, signed by the President/Executive Officer or any other person on whom such power has been delegated by the Municipality is to be issued by the Municipality in Form as prescribed in Schedule-V for recovery of the dues by distress and sale of the movable properties of the defaulter. The manner of executing warrant is provided u/s 170, 171, 172 of the Act, 1916. There is no provision in the Act, 1916 which empowers the Municipality to recover arrears of rent for a shop as arrears of land revenue through a recovery citation issued by the Collector.

9. Apparently the recovery certificates and the citations challenged in the present petitions are without jurisdiction.

10. For the aforesaid reasons, the petitions are **allowed**. The recovery certificates issued by the Executive Officer to the Collector/Additional District Magistrate (Finance and Revenue) and the consequential recovery citations, if any, issued by the Collector are hereby quashed.

11. However, the Nagar Palika Parishad, Baheri, District Bareilly shall be

at liberty to recover any rent due against the petitioners in accordance with law as observed above.

(2023) 7 ILRA 664

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 29.05.2023

BEFORE

**THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.**

Writ-C No. 67047 of 2006

**Pawan Kumar & Ors. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents**

Counsel for the Petitioners:

Sri A.D. Saunders, Sri Akhilesh Tripathi, Sri Anoop Trivedi

Counsel for the Respondents:

C.S.C., Sri Akhileshwar Singh, Sri Anuj Srivastava, Sri Varad Nath, Sri Amit Saxena (Sr. Adv.), Sri H.N. Singh (Sr. Adv.)

A. Land Acquisition Law – Land Acquisition Act, 1894 – Sections 4(1), 17(1) & 48 – In pursuance of the notification u/s 4, possession of the land was taken by the St. on 08.07.1976 and on the same date, the same was handed over to U.P.S.I.D.C. to develop the industrial plot – Possession certificate also produced – Effect – Prayer for denotifying the land u/s 48 was sought – Permissibility – Scope of S. 48 explained – Held, once the award has been passed on taking possession u/s 16 of Act, 1894 the land vests in the St. and there is no divesting the same – S. 48 of Act, 1894 itself does not give any right to original tenure holder to compel the St. to withdraw from acquisition. This Section only enabling provision which enable the St. to withdraw from acquisition when the acquired land was not taking into

possession but in the present case, the St. as well as respondent no. 3 clearly St.d that possession of the land was taken. (Para 12, 14, 19 and 20)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Sawaran Lata & ors. Vs St. of Har. & ors.; 2010(4) SCC 532
2. Swaika Properties Pvt. Ltd. & ors. Vs St. of Raj. & ors.; MANU/SC/0795/2008
3. Kamal Singh & ors. Vs St. of U.P. & ors.; MANU /UP/1457/2020
4. Dinesh Kumar & ors. Vs St. of U.P. & ors.; 2018 (5) ADJ 297
5. A.P. Industrial Infrastructure Corp. Ltd. Vs Chinthamaneni Narasimha Rao & ors; AIR 2011 SC 3558
6. Aflatoon & ors. Vs Lt. Governor of Delhi & ors.; AIR 1974 SC 2077
7. Mahaveer Vs St. of U.P. & ors.; 2018(6) ADJ 529
8. Land and Building Department through Secretary & ors. Vs Attro Devi & ors.; Manu/SC/0621/2023
9. Indore Development Authority Vs Manohar Lal & ors.; 2020(8) SCC 129
10. Banda Development Authority, Banda Vs Moti Lal Agarwal; 2011 AIR SCW 2835
11. Balwant Narayan Bhagde Vs M.D., Bhagwat; 1976(1) SCC 700

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

1. Heard Sri Akhilesh Tripathi, learned counsel for the petitioners, learned Standing Counsel representing the State-respondent, Sri H.N. Singh, learned Senior

Advocate assisted by Sri Anuj Srivastava, learned counsel representing the Uttar Pradesh State Industrial Development Corporation Ltd. (*hereinafter referred to as the U.P.S.I.D.C.*) and Sri Amit Saxena, learned Senior Counsel assisted by Sri Varad Nath, learned counsel for the respondent no.5.

2. Present writ petition has been filed by the petitioners for quashing the order dated 14.09.2006 passed by the respondent no.1 by which application of petitioner to de-notify his acquired land in Gata No. 37, 39 and 41 total area 4.45 acre situated at Village Alipur Bhood Shamli, Gajraula, District J.P. Nagar was rejected on the ground that the possession of the land has already been taken in the year 1976 as well as the petitioners further seeking direction to respondent to denotify the aforesaid Gata No. 37, 39 and 41.

The factual matrix of the case is as follows:-

3 (a). The petitioners were the tenure holder of Plot No.37, 39 and 41 of area 4.45 acre situated in Village Alipur Bhood Shamli, Gajraula, District- J.P. Nagar.

3(b). State Government issued a notification dated 14.10.1976 under Section 4(1) of Land Acquisition Act, 1894 (*hereinafter referred to as the 'Act, 1894'*) and also invoked urgency clause Section 17(1) of the 'Act, 1894'. By this notification, apart from the other land, portion of the land in Gata No.37, 39 and 41 area 4.45 acre was also proposed to be acquired. This notification was followed by another notification dated 15.10.1976 under Section 6 of 'Act, 1894'. The award in the aforesaid notification was also declared on

07.05.1989. The present petitioners also received the compensation as declared by award dated 07.05.1985. Thereafter UPSIDC, who was the beneficiary of the aforesaid notification has also challenged the award dated 07.05.1985 before this Court through Writ Petition No.18453 of 1986 on the ground that before passing the award dated 07.05.1985, UPSIDC was not heard. The aforesaid writ petition was allowed vide dated 06.11.2009 and the award dated 07.05.1985 was quashed and a direction was made to pass the fresh award. Thereafter in pursuance of the order dated 06.11.2009 passed in Writ Petition No. 18453 of 1986 a fresh award was passed on 07.10.2010 by which the amount of compensation was reduced. It is also pertinent to mention here that the order dated 06.11.2009 passed in Writ Petition No.18456 of 1986 as well as fresh award dated 07.10.2010 were passed during the pendency of present writ petition.

3(c). The acquired land, in pursuance of the notification dated 15.10.1976 including the acquired land of the petitioners, was allotted to M/s Sivallik Cellulose Ltd. Company through lease deed dated 20.11.1976 and 02.03.1977. Thereafter impleadment application dated 02.04.2019 was filed by the M/s Sivallik Cellulose Ltd. to implead it as respondent no.5 which was allowed by this Court vide order dated 01.05.2019 and was permitted to be impleaded as respondent no.5. Thereafter counter affidavit was also filed on behalf of the respondent no.5.

4. Contention of learned counsel for the petitioners is that possession of their acquired land was not taken by the respondents and they are still in possession over that land. State has not produced any evidence despite order dated 12.09.2017 of

this Court, showing that possession was taken from him. The contention regarding the possession of the petitioners over his acquired land in Plot No.37, 39, 41 is based on the report dated 21.01.2006 of District Magistrate, Jyotiba Phule Nagar. Report dated 21.01.2006 of District Magistrate, Jyotiba Phule Nagar shows that Gata No.37, 39, 41 are situated in boundary wall and major part of this land is laying vacant except Gata No.39 in which 12 rooms were found. It appears that above report dated 21.01.2006 was submitted by the District Magistrate, Jyotiba Phule Nagar to Government of U.P. in pursuance of order dated 16.09.2005 of this Court passed in Writ Petition No. 61564 of 2015 on receiving the representation dated 31.05.2003 of petitioner to denotify his land on the ground that possession was not taken from him.

5. After receiving the report dated 21.01.2006 of District Magistrate, J.P. Nagar representation of the petitioner dated 31.05.2003 was rejected by the impugned order dated 14.09.2006 on the ground that possession has already been taken by the petitioners in the year 1976.

6. In the counter affidavit filed on behalf of the respondent nos.1 and 2, it was stated that possession of the entire acquired land including the land of the petitioners in pursuance of the notification dated 15.10.1976 was taken over under Section 9 of the 'Act, 1894' on 08.07.1976 and compensation has already been paid in pursuance of the award, therefore the land has been vested in the State and no question of de-notification under Section 48 of the 'Act, 1894' arises and after taking the aforesaid possession of the land same was handed over to M/S Sivallika Cellulose Ltd. (respondent no.4) because the same

was allotted to that company by UPSIDC. M/s Shiwalika Cellulose Ltd. (respondent no.4) had established paper mill on the aforesaid acquired land allotted by the U.P.S.I.D.C.

7. Respondent no.5 had also filed counter affidavit and in its counter affidavit, it was contended that the acquired land was leased out to respondent no.4 for 90 years through two different lease deeds dated 20.10.1976 and 02.03.1977 and possession of the entire industrial plot (acquired land) of an area 34.76 acres was handed over by U.P.S.I.D.C. to respondent no.5 on 08.07.1976 and after taking the possession of the allotted land, it has constructed boundary wall and made several other constructions inside therein and established factory in June, 1979. It was further stated that report dated 21.06.2006 of the District Magistrate itself contrary to possession certificate and lease deeds executed in favour of respondent no.5 by the U.P.S.I.D.C. and it was lastly contended by respondent no.5 that acquisition proceeding has become final and it cannot be challenged after the substantial delay.

8. In support of his case, counsel for the respondent no.5 has relied upon the following judgements.

(i) 2010(4) SCC 532 (Sawaran Lata and others vs State of Haryana and others);

(ii) MANU/SC/0795/2008 (Swaika Properties Pvt. Ltd. and others vs State of Rajasthan and ors.)

(iii) MANU /UP/1457/2020 (Kamal Singh and ors vs State of U.P. and ors);

(iv) 2018 (5) ADJ 297 (Dinesh Kumar and others vs. State of U.P. and others)

(v) AIR 2011 SC 3558 (A.P. Industrial Infrastructure Corporation Ltd. Vs Chinthamaneni Narasimha Rao and Ors).

(vi) AIR 1974 SC 2077 (Aflatoon and others vs. Lt. Governor of Delhi and other)

9. It is further submitted that once the acquired land is vested in State by taking the possession of the same, then same cannot be divested. Therefore, the same cannot be de-notified under Section 48 of the Act, 1894. In support of his contention, he relied upon the judgement of **Mahaveer vs. State of U.P. and others reported in 2018(6) ADJ 529.**

10. Learned counsel for the respondents also contended that large chunk of land is acquired then the State agency is not required to keep police force to protect possession of the land taken after process of acquisition is completed and in support of his submission, learned counsel for the respondents relied upon the judgment of **Land and Building Department through Secretary and others vs Attro Devi and others** reported in **Manu/SC/0621/2023.**

11. After considering the rival arguments as well as on perusal of record, the sole question that arises here for consideration is whether the possession of the acquired land of the petitioner was taken by the State or not.

12. From the record, it is clearly established that notification under Sections

4 and 6 of the 'Act, 1894' issued on 14.10.1976 and 15.10.1976 respectively and in pursuance of the above notification, possession of the land was taken by the State on 08.07.1976 and on the same date, the same was handed over to U.P.S.I.D.C. for developing industrial plot. From possession letter dated 08.07.1976 produced by the State, it is established that the possession of the land was taken on 08.07.1976 and the possession letter dated 08.07.1976 is sufficient proof of possession as per Section 114(3) of Evidence Act because same was duly executed in the discharge of official duty and after taking possession of the same, the entire acquired land including the land of the present petitioner having total area 34.76 acres was leased out/ allotted to respondent no.5 through lease deeds dated 20.10.1976 and 02.03.1977. It is also undisputed that after taking possession of the acquired land of an area 34.76 acres, respondent no.4 constructed boundary wall and established a factory over the allotted land. It is admitted case of the petitioners that they have also obtained compensation in pursuance of the award dated 07.05.1985. Though subsequently the award dated 07.05.1985 was quashed by this Court on 06.11.2009 in the Writ Petition No. 18453 of 1986 filed by the U.P.S.I.D.C. on technical ground during the pendency of the present writ petition and thereafter fresh award was also made but this fact will not give any benefit to the present petitioners as question herein is possession of land in dispute.

13. Although on the one hand, State has established by producing the possession certificate dated 08.07.1976 that possession of the land was taken but on the other hand petitioner could not dispute the above certificate by producing any evidence that

possession was not taken from them on 08.07.1976. In the report dated 21.01.2006, it is mentioned that acquired land of petitioners is situated inside the boundary wall of respondent no.5.

14. Hon'ble Supreme Court in the case of **Indore Development Authority vs Manohar Lal and others** reported in **2020(8) SCC 129**, wherein it clearly observed in paragraph 366.7 that mode of taking possession under 'Act, 1894' is by drawing inquest report/ memorandum. Once the award has been passed on taking possession under Section 16 of Act, 1894 the land vests in the State and there is no divesting the same. Once the land is vested in the State after taking possession of the same, then subsequent possession on the part of original tenure holder is illegal and same cannot be taken into account. The relevant paragraph nos. 247 and 258 are quoted herein below;

"247. The question which arises whether there is any difference between taking possession under the Act of 1894 and the expression "physical possession" used in Section 24(2). As a matter of fact, what was contemplated under the Act of 1894, by taking the possession meant only physical possession of the land. Taking over the possession under the Act of 2013 always amounted to taking over physical possession of the land. When the State Government acquires land and draws up a memorandum of taking possession, that amounts to taking the physical possession of the land. On the large chunk of property or otherwise which is acquired, the Government is not supposed to put some other person or the police force in possession to retain it and start cultivating it till the land is used by it for the purpose for which it has been acquired. The

Government is not supposed to start residing or to physically occupy it once possession has been taken by drawing the inquest proceedings for obtaining possession thereof. Thereafter, if any further retaining of land or any re-entry is made on the land or someone starts cultivation on the open land or starts residing in the outhouse, etc., is deemed to be the trespasser on land which in possession of the State. The possession of trespasser always insures for the benefit of the real owner that is the State Government in the case.

258. Thus, it is apparent that vesting is with possession and the statute has provided under Sections 16 and 17 of the Act of 1894 that once possession is taken, absolute vesting occurred. It is an indefeasible right and vesting is with possession thereafter. The vesting specified under section 16, takes place after various steps, such as, notification under section 4, declaration under section 6, notice under section 9, award under section 11 and then possession. The statutory provision of vesting of property absolutely free from all encumbrances has to be accorded full effect. Not only the possession vests in the State but all other encumbrances are also removed forthwith. The title of the landholder ceases and the state becomes the absolute owner and in possession of the property. Thereafter there is no control of the land- owner over the property. He cannot have any animus to take the property and to control it. Even if he has retained the possession or otherwise trespassed upon it after possession has been taken by the State, he is a trespasser and such possession of trespasser ensures for his benefit and on behalf of the owner of contemplate divesting of the property from the State as mentioned above."

15. Similarly, in the case of **Banda Development Authority, Banda vs Moti Lal Agarwal** reported in **2011 AIR SCW 2835**, it was observed in paragraphs 34 and 35 that no hard and fast rule can be laid down as to what act would constitute taking possession of the acquired land and if the acquired land is vacant, the concerned State authorities to go to the spot and prepare a Panchnama showing delivery of possession was sufficient for recording of finding that actual possession of the entire land had been taken. Utilisation of major portion of the acquired land for the public purpose for which it was acquired, is clearly indicative of fact that actual possession of the acquired land had been taken.

16. Paragraphs 34 and 35 of the **Banda Development Authority (supra)** case are being quoted hereinbelow;

“34. The principles which can be culled out from the above noted judgments are:

i) No hard and fast rule can be laid down as to what act would constitute taking of possession of the acquired land.

ii) If the acquired land is vacant, the act of the concerned State authority to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.

iii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the concerned authority will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the concerned authority will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in

the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.

v) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken.

35. In the light of the above discussion, we hold that the action of the concerned State authorities to go to the spot and prepare panchnama showing delivery of possession was sufficient for recording a finding that actual possession of the entire acquired land had been taken and handed over to the BDA. The utilization of the major portion of the acquired land for the public purpose for which it was acquired is clearly indicative of the fact that actual possession of the acquired land had been taken by the BDA.”

17. Similarly, in **Balwant Narayan Bhagde vs M.D., Bhagwat** reported in **1976(1) SCC 700**; wherein Court observed in para 28 that the act of Tehsildar in going

on the spot and inspecting the land was sufficient to constitute taking of possession. Thereafter it would be open to the government or commissioner to withdraw from acquisition under Section 48-A of the 'Act 1894'. The para 28 of the aforesaid judgement is quoted hereinbelow;

"28 HAGWATI, J. (concurring) (for himself and Gupta, J.)- We agree with the conclusion reached by our brother Untwalia, J., as also with the reasoning on which the conclusion is based. But we are writing a separate judgment as we feel that the discussion in the judgment of our learned brother Untwalia, J., in regard to delivery of 'symbolical' and 'actual' possession under rules 35, 36, 95 and 96 of Order XXI of the Code of Civil Procedure, is not necessary for the disposal of the present appeals and we do not wish to subscribe to what has been said by our learned brother Untwalia, J., in that connection, nor do we wish to express our assent with the discussion' of the various authorities made by him in his judgment. We think it is enough to state that when the Government proceeds to take possession of the land acquired by it under the Land Acquisition Act, 1894, it must take actual possession of the land, since all interests in the land are sought to be acquired by it. There can be no question of taking 'symbolical' possession in the sense understood by judicial decisions under the Code of Civil Procedure. Nor would possession merely on paper be enough. What the Act contemplates as a necessary condition of vesting of the land in the Government is the taking of actual possession of the land. How such possession may be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard and

fast rule laying down what act would be sufficient to constitute taking of possession of land. We should not, therefore, be taken as laying down an absolute and inviolable rule that merely going on the spot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case. But here, in our opinion, since the land was laying fallow and there was no crop on it at the material time, the act of the Tehsildar in going on the spot and inspecting the land for the purpose of determining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. It appears that the appellant was not present when this was done by the Tehsildar, but the presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession. It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where possible, to give such notice before possession is taken by the authorities, as that would eliminate the possibility of any fraudulent or collusive transaction of taking of mere paper possession, without the occupant or the owner ever coming to know of it."

18. In the present case, possession of the acquired land was taken in 1976 as per existing procedure which was also approved by Hon'ble Supreme Court. Therefore, in view of above legal position, the possession of the acquired land of the petitioner was taken on 08.07.1976 supported by possession certificate and thereafter boundary wall was constructed by respondent no.5 and established the factory on the major part of the acquired

land, clearly proof that possession of the acquired land was taken and the same was also utilised by the beneficiary. Even report of D.M., J.P. Nagar dated 21.01.2006 as well as report dated 24.10.2017 of S.L.A.O. annexed as Annexure-I of compliance affidavit dated 14.12.2017 shows that acquired land of petitioner is inside the boundary wall of respondent no.5

19. In the present case, notification dated 15.10.1976 was not challenged while filing the present case and only prayer was made that application of the petitioners for denotifying his land under Section 48 of the Act, 1894 may be considered.

20. Section 48 of Act, 1894 itself does not give any right to original tenure holder to compel the State to withdraw from acquisition. This Section only enabling provision which enable the State to withdraw from acquisition when the acquired land was not taking into possession but in the present case, the State as well as respondent no.3 clearly stated that possession of the land was taken and the same was transferred to respondent no.5 for establishing a factory. Section 48 of the Land Acquisition Act, 1894 is quoted herein below;

“Section 48 Completion of acquisition not compulsory, but compensation to be awarded when not completed.-

(1) Except in the case provided for in section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.

(2) Whenever the government withdraws from any such acquisition, the

Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings thereunder, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land.

(3) The provisions of Part III of this Act shall apply, so far as may be, to the determination of the compensation payable under this section.”

21. The present petition is itself barred by serious laches because the petitioners have agitated the ground of possession in the year 2006 though the land was acquired in 1976 and possession was also taken in the year 1976 and subsequently leased out to respondent no.5 in the year 1976 and 1977.

22. In view of the fact, petitioner could not make out any case for the indulgence of this Court, therefore petition fails and is **dismissed**.

(2023) 7 ILRA 671
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.07.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482. No. 6853 of 2023

Parmanand Sirumal Tahalramami
...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Gantavya

Counsel for the Opposite Parties:

G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 2(wa), 2(y), 326 & 482 - Indian Penal Code, 1860 - Sections 34, 302, 304-B, 201 & 498-A - Dowry Prohibition Act, 1961 -- Sections 3 & 4 - Arms Act, 1878 - Section - 30: - Application U/s 482 – for quashing the impugned order whereby trial court refused to afford an opportunity of hearing to the applicants/victims in session trial on the premises that the applicant are strangers and have no right of being heard - Offence of Murder – Dowry death - Whether applicant number no.1, who is uncle of deceased, has a right to participate in trial proceedings, and if it is looked into in purview of the definition of victim and be examined in four corners of definition, it emerges that the deceased is niece of the applicant no. 1 and she was living with applicant no.1 at Delhi for considerable period of time – Held, law is well settled that such an order or judgment cannot be revised by same court unless otherwise provided in any law time being in force or any direction or order passed by the superior courts and in present matter in absence of any such provisions or directions, the learned Sessions Court had no power to revisit/revise the order passed by the predecessor judge, while accepting application of applicant for allowing him to participate in the trial proceedings - Application allowed – directions issued accordingly. (Para – 29, 30, 31, 32)

Application u/s 482 allowed. (E-11)

List of Cases cited:

1. Ram Phal Vs St. & ors., 2015 SCC On-Line Del 9802,
2. Jagjeet Singh & ors. Vs Ashish Mishra @ Monu & anr., (2022) 9 SCC 321
3. Manoj Kumar Singh Vs St. of U.P. & ors., (2016) 97 ACC 861 (FB)

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

1. At the very outset, the learned counsel appearing for the applicant submits that she may be permitted to withdraw the prayer clause 'c' and the same may be permitted to be deleted.

2. The learned counsel appearing for the State has no objection to the contention aforesaid.

3. In view of the aforesaid submissions, the applicant's counsel is permitted to withdraw the prayer clause 'c' with further permission of deleting the same during the course of the day.

4. Heard, Ms. Neha Rashmi and Gantavya, learned counsels for the applicants, Sri Aniruddh Kumar Singh, learned AGA-I for the State and perused the material placed on record.

5. By means of the present application, prayer has been made to set-aside the order dated 26.05.2023 passed by respondent no. 2 in S.T. No. 375 of 2007 (State Vs. Sunit Tehlyan and Others) arising out of Case Crime No. 25 of 2005, under Section 302, 304 B, 201, 498 A r/w Section 34 of IPC and Section 3/4 of Dowry Prohibition Act and Section 30 of Arms Act, P.S. Manak Nagar, District Lucknow and further prayer is made that the applicant nos. 1 to 3 may be treated as the legal heirs of the victim, as applicant no. 1 is real uncle of the deceased and the applicant nos. 2 and 3 are the parents.

6. Brief factual matrix of the case is that on 25.04.2001, the niece of applicant no. 1, namely, Vanshika performed marriage with the respondent no. 3, namely, Sumit Tehilyani and on the demand of the accused persons, the applicants had given lucrative gifts and

articles to them at the time of marriage including TV, Jewellery, Motorcycle and the deceased Vanshika was residing in her matrimonial home at Lucknow with the accused persons, i.e., respondent nos. 3 to 9.

7. Shortly, after the marriage, the respondent no. 3 and his family members started committing cruelty with the deceased, whereby, making demands of dowry and the deceased was threatened for dire consequences, if she and the applicant and the family members are failed to satisfy the demand of the accused persons. This was kept on intimating to the applicants but the family members of the deceased always tried to make understand the accused persons that whatsoever was available to them, they have given at the time of the marriage and they are not in a position to provide them whatever is being demanded as dowry and in the meantime, on 11.10.2002, the deceased, Vanshika gave birth to a female child, namely, Monish Tehliani and even after birth of the child there was no change in the behavior of the accused persons and even the deceased Vanshika was deprived from food and water and was kept isolated from her family members. The deceased, Vanshika and her daughter, Monish Tehliani were last seen alive on 06.05.2005, in the matrimonial home at Lucknow as there was the birthday of Vanshika and thus the accused persons permitted the parents to talk for a short while at 12:12 P.M. on landline phone and during the conversation, it was felt that she was feeling terrified and during the course of the conversation, the phone was snatched from her and that was disconnected and thereafter numerous attempts were made to contact the deceased Vanshika and accused persons but that was in vain and ultimately, at 8:45 P.M.,

respondent no. 3 casually informed that he had killed Vanshika and fatally shot Monish Tehliani and as a result Vanshika died and the daughter of Vanshika, Monish Tehliani succumbed injuries. As the accused are very influential persons of the city and thus under their pressure, the Police was avoiding to lodge the First Information Report of the incident. The investigation was transferred multiple times and thereafter the charge-sheet was filed and the trial proceeded any how.

8. Further, on 02.09.2022, the applicants showing them as victim filed an application to represent themselves through their counsel before the trial Court which was allowed on 14.12.2022 and thereafter on several dates, the counsel of the victims/informants/applicants made submissions on 06.01.2023, 18.01.2023 and 21.01.2023 to 25.01.2023 and on 08.02.2023, and liberty was also given by the Trial Court to the counsel for the applicants/victims to file written submissions and the written submissions were also filed thereof and that was taken on record. On 13.02.2023, once the accused persons have failed to make hindrance regarding the submissions, permitted to be advanced, they filed a frivolous transfer application before the learned District Judge which was rejected after hearing the counsel for the applicants/victims, thereafter on 21.02.2023, the accused persons filed Transfer Petition (Criminal) No. 10 of 2023 before the Hon'ble High Court which was also rejected after hearing the counsel for the victims/applicants and the matter was remanded back to the learned District Judge unequivocally directing that the transfer petition shall be decided after hearing the counsel for the victims/informants and on 28.02.2023, after hearing the parties, the District Judge

rejected the transfer petition of the accused-respondents and in between the predecessor Judge was transferred and the matter was required to be re-heard and when on 08.05.2023, the counsel for the victims/informants/applicants appeared and requested for advancement of his arguments, he was orally denied, though learned ADGC (Criminal) verbally expressed that he has no objection if the counsel for the victims/applicants is heard and thus, on the same day an application was also moved by the applicants praying therein that they may be granted opportunity of hearing through their counsels to appear in the final hearing and address the Court, whereafter on 15.05.2023 no objections were filed by the prosecution and the victims/applicants filed written submissions in support of his application dated 08.05.2023 and the objections were again invited and on 23.05.2023, the learned ADGC (Criminal) endorsed no objection for victims/applicants being granted an opportunity of hearing on the application dated 8.05.2023 and thereafter on 26.05.2023, the learned Trial Court passed the order impugned and refused to afford an opportunity of hearing to the applicants/victims in Session Trial No. 375 of 2007 on the premises that the applicants are strangers and have no right of being heard.

9. Contention of the learned counsel for the applicants is that the applicant no.1 is a real uncle and applicant nos. 2 and 3 are the father and mother of the victim, i.e., deceased Vanshika and her female child and they come under the purview of the victim as has been defined under section 2(wa) of Cr.P.C. The applicant no. 1 is also the informant in the matter and he got registered the F.I.R. No.

25 of 2005, after the murder of his niece and daughter of niece. She submits that it has been a settled law that there is ample right to the victim to be heard as the victim is the de facto sufferer of a crime, and as such, the victim cannot be declined to participate in the adjudicatory process, as of now, the jurisprudence with respect to the right of the victim is positively involved in criminal proceeding and it has become a settled law that the victim cannot be denied to be heard. In support of her contention, she has placed reliance on a judgement rendered in 2015 SCC OnLine Del 9802 of High Court of Delhi, in case of **Ram Phal Vs. State & Ors** and has referred paragraph 52, 53, 54 of the aforesaid judgement, which reads as under:-

"52. As has been discussed above, Section 2(wa), in its definition of "victim", uses the phrase "means x and includes y". While Chattar Singh reasoned that "includes y" extends the ordinary meaning of the "[means] X", to cover things that would not otherwise be covered by an everyday meaning of "X", it interpreted the two parts of CRL.A.1415/2012 Page 34 the definition to include non-overlapping and mutually exclusive categories: "injury" being limited to the most direct and proximate sufferer of physical harm, and "legal heirs" covering the heirs entitled to succeed in personal law. A broader meaning of the word "victim", encompassing sufferers of emotional harm, would have necessitated an overlap between the two categories, since it is possible that a legal heir would also be a "victim", in the sense of having suffered a proximate mental injury as a result of the crime. This Court, therefore, does not agree with the decision in Chattar Singh that a Class II heir can be excluded by a Class I heir, as a Class II heir may

well have suffered "injury" that is emotional/mental, thus bringing him/her within the definition of "victim" itself. To permit such a victim to be excluded by a Class I heir would amount to letting those "included" within the definition, exclude those falling within the ordinary and natural meaning of the word defined. The Court therefore cannot agree with the analysis in *Chattar Singh* that treats the hierarchy of "legal heirs" in personal law as solely determinative of who may qualify as a "victim" simpliciter, in the absence of which, a victim by inclusion. Subject to this, we are in agreement with the submissions of the learned Amicus, and with the judgment of the Punjab & Haryana High Court, that the meaning of "legal heirs" refers to all heirs designated as such by the relevant personal law, irrespective of whether or not they are excluded by the lines of succession at any given time.

53. To summarize, the conclusions from the above discussion are:

(i) "victim" in Section 2(wa), by virtue of being defined as "a person who has suffered any loss or injury" must include a person who has suffered „harm caused to the mind“, given that Section 2(y) of the Code of Criminal Procedure incorporates the definition of "injury" in Section 44 of the IPC into the Code.

(ii) The "means X and includes Y" clause in Section 2 (wa) cannot be interpreted so as to result in the included meaning Y excluding the actual meaning X of the term being defined; thus "legal heirs" who are included within the definition of the term „victim“ cannot exclude those who CRL.A.1415/2012 Page 35 actually fall within the definition of „victim“ by

virtue of emotional harm suffered, such as the father or siblings of a deceased victim or other categories of persons (based on proximity) noted previously .

(iii) The laws of inheritance, which decide one's "legal heirs", are not intended to be solely determinative of the entitlement to exercise the rights of the victim, in the criminal trial/appeal, on his/her death, application of Heydon's mischief rule, given that the object of the 2008 Amendment Act was to ensure the involvement of the victim, who has a presumably personal interest in the fair and efficient prosecution of the trial/appeal. Resultantly, it is impermissible for an appellate court to shut out an appeal by a "legal heir" based only on her/his not being an immediate heir, or being lower down in hierarchy vis-à-vis entitlement to the crime victim's estate.

54. As a concluding remark on the specter of uncertainty (of defending multiple appeals) which would possibly hover over, and weigh down those acquitted of offences goes, this Court is in agreement with the view of the Punjab and Haryana High Court that all such „victims“ or „legal heirs“ appeals would be heard together, and the issue can be resolved by proper docket management. The court is reminded of the view in *Pakala Narayana Swamy v. Emperor* AIR 1939 PC 47 that "... in truth when the meaning of words is plain, it is not the duty of the Courts to busy themselves with supposed intentions" - and one may add in the context, imagined difficulties. "

10. Placing reliance on the above said judgement, she submits that it has been very minutely interpreted that who is the victim and whether the legal heirs termed

as Class I and Class II heirs, have any difference in the meaning in context to Section 2(wa) of Cr.P.C. It has very categorically been held that there cannot be any difference so far as the victim defined under section 2(wa) of Cr.P.C, with respect to Class I and Class II heirs as there might be more emotional attachment of a Class II heir to the deceased/victim and he or she can suffer injury than a heir of Class I category. If a person who has suffered harm to his mind, that covers definition of 'injury' which has been defined under section 44 of IPC.

11. She has further placed reliance on the judgement reported in **(2022) 9 SCC 321, Jagjeet Singh and Others Vs. Ashish Mishra @ Monu and Another** and has referred to paragraph 22 and 25 which are read as under :-

“22. It cannot be gainsaid that the right of a victim under the amended Cr.P.C. are substantive, enforceable, and are another facet of human rights. The victim's right, therefore, cannot be termed or construed restrictively like a brutum fulmen. We reiterate that these rights are totally independent, incomparable, and are not accessory or auxiliary to those of the State under the Cr.P.C. The presence of 'State' in the proceedings, therefore, does not tantamount to according a hearing to a 'victim' of the crime.

25. Adverting to the case at hand, we are constrained to express our disappointment with the manner in which the High Court has failed to acknowledge the right of the victims. It is worth mentioning that, the complainant in FIR No. 219 of 2021, as well as the present Appellants, are close relatives of the farmers who have lost their lives in the incident dated 03.10.2021. The

specific stance taken by learned Senior Counsel for the Appellants that the Counsel for the 'victims' had got disconnected from the online proceedings and could not make effective submissions before the High Court has not been controverted by the Respondents. Thereafter, an application seeking a rehearing on the ground that the 'victims' could not participate in the proceedings was also moved but it appears that the same was not considered by the High Court while granting bail to the Respondent-Accused.”

12. Referring the aforesaid, she submits that the Apex Court has settled the law so far as the right of the legal heirs of the victim is concerned and it has spoken in so many words that the victim including the legal heirs has a legal vested right to be heard at every step, post the occurrence of the offence, and that is the unbridled participatory right from the step of investigation to the culmination of the proceeding in an appeal or revision. It has also been held that even a stranger to the act of a crime can be an informant and similarly the victim need not be the complainant or informant of a felony.

13. Adding her argument, she submits that statutory mandate of section 326 of Cr.P.C clearly provides that the trial Court is under statutory obligation to continue the trial from where it was stopped by his predecessor Judge and therefore once the predecessor Judge allowed the applicants/victims to participate in the proceedings, they cannot be stopped to further participate in the proceedings as the same would be amount to revise/review the orders already passed.

14. Further contending that the findings with respect to the fact that the

learned ADGC (Criminal) opposed the application of the applicants, is perverse as it is apparent from the record that learned ADGC (Criminal) has already endorsed 'no objection' to the applicant's counsel for being heard in the matter, which clearly shows the maliciousness and biasness of the Presiding Officer. She submits that refusing the applicants to appear in the trial proceeding is against the law of the land as the Hon'ble Apex Court in a very recent judgement has held that the victim has ample right to be heard in the criminal proceeding started from investigation to the stage of culmination. She further added that the impugned order by which the opportunity of hearing to the applicants have been denied, is not only erroneous but also against the settled proposition of law and is also a judicial indiscipline.

15. She further argued that it is in fact the influence of the private respondents, being an old family of Lucknow, exercises a lot of clout in the city have not only influenced the investigation, but thereafter they are making every endeavor to suppress the free and fair adjudication of the matter at every step. This fortifies that while lodging the First Information Report, the applicants faced a lot and after a week, the First Information Report was registered after several efforts made by the applicants.

16. Concluding her arguments, she submits that the impugned order is pedantic, perverse and shocks the conscience of justice and further it is a denial of right of hearing to the applicants which is against the law settled by the Apex Court and therefore the submission is that the impugned order dated 26th May, 2023 passed on the application of the applicant, in Sessions

trial number 375 of 2007, may be set-aside.

17. Per contra, learned AGA appearing for the state has vehemently opposed the contentions aforesaid and submits that admittedly, the First Information Report was lodged by the applicant no.1, who is the uncle of the deceased Vanshika. He submits that the victim has a right to participate in the criminal proceedings, which has been defined under section 2(wa) of Cr.P.C and from bare reading of the aforesaid it is apparent that victim includes his or her 'guardian' or 'legal heirs' and as the father and mother, i.e., the applicant no. 2 and 3 of the deceased Vanshika, are still alive but the First Information Report was lodged by the uncle of the deceased and therefore, he did not come under the purview of the definition given under section 2(wa) of Cr.P.C.

18. Adding his argument, he has placed reliance on full bench judgement reported in **(2016) 97 ACC 861 (FB), Manoj Kumar Singh Vs. State of U.P. and others** and has referred paragraphs 68 and 69 of the judgement, which are quoted hereinunder:-

“68. From the discussions that have been made above, it is clear that the proviso of Section 372 is an exception to the general law and same confers on a victim a right to appeal against acquittal, which is subject to the grant of leave by the Court. The first part of the definition of 'victim' as given under Section 2 (wa) (i.e. "Victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged), is required to be construed in its literal sense and no liberal

interpretation is required, Accordingly, only such person would be treated as 'victim', who is the subject-matter of trial being direct sufferer of crime in terms of loss or injury caused to his own body, mind, reputation and property and such loss or injury is one of the ingredient of the offence for which the accused person has been charged and, therefore, any other person cannot be accepted as victim within the first part of Section 2 (wa) for the purposes of maintaining appeal. The second part that is "includes his or her guardian and Legal Heir" would come into play when the actual sufferer is absent or suffers disability.

69. In other words, victim means the actual sufferer of offence (receiver of harm caused by the alleged offence) and no person other than actual receiver of harm can be treated as victim of offence, so as to provide him /her right to prefer appeal under the proviso of section 372, though, in his or her absence or disability, his "legal heir" or "guardian" would qualify as victim and have a right to appeal. A person who claims himself to be 'guardian' or 'legal heir' of actual victim (direct sufferer), would be able to maintain appeal provided he establishes his claim as such before the court in his application by disclosing his particulars; relationship with the direct sufferer; and the grounds on which such claim of being "legal heir" or "guardian" is based. In the light of the discussion made above, the ratio of Division Bench of this Court in the case of Edal Singh (supra) is in tune with the definition of 'victim' as provided under Section 2 (wa) of the Code of Criminal Procedure. The reference is answered accordingly."

19. Referring to aforesaid, he submits that a full Bench of this Court has

very categorically held that no liberal interpretation of the word 'victim' requires as only such person would be treated as victim who is the subject matter of trial being 'direct sufferer of crime' in terms of 'injury' caused to his own body, mind, reputation and property and such loss or injury is one of the ingredients of the offence for which the accused persons have been charged and thus it has been summarized that the victim himself is the actual sufferer of the offence and the guardian or legal heir would come into play when actual sufferer is absent or suffers disability.

20. He further added that since the applicant no.1 is the uncle of the deceased, and the parents are still alive and no cogent reason has been given that why they are not approaching this Court and therefore the uncle has no right to say that he is the legal heir/guardian of the victim.

21. Further argued that once the matter came up before the present Presiding Officer, he considered the application and has rejected the same as he found that this is being done for delay dallying tactics. Whereas the trial is on its final stage and allowing any person without being his or her the guardian or legal heir, can not be justifiable and therefore the learned Trial Court has rightly passed the order dated 26.05.2023 and there is no erroneousness or any perversity and as such the present applicants are not entitled for any relief.

22. Having heard the counsel for the parties and after perusal of the material placed on record, it emerges that the marriage of the deceased Vanshika was solemnized on 25 April 2001 at Lucknow with respondent no.3, namely Sumit

Tehliani, and after the marriage, the private respondent started demanding dowry and they tortured the deceased. Thereafter, in case of non-payment of dowry, the torture reached its climax and the deceased Vanshika and her one and half year female child were shot dead, and hardly it was intimated to the family member. It also reveals that the First Information Report was lodged after 8-9 days as the respondents/accused persons were said to be very influential persons, being an old family at Lucknow and after running pillar to post they could succeed to get the First Information Report registered.

23. Further, the fact remains that the predecessor judge allowed the applicants/victims to participate in the trial proceeding and for a long period of time the applicants participated through their counsels and thereafter when another Presiding Officer started trial, the applicants were stopped orally to participate and then an application was moved wherein the ADGC (Criminal) has accorded his no objection and even no objection has also been given on the written submission moved by the applicants, but on 26.05.2023, the applicants were refused to afford opportunity of hearing on the ground that they are the stranger to the crime, and has no right to being heard in the matter.

24. Now culminating the submissions of the parties and going through the facts, three questions are cropped up; Firstly, whether the applicants are the legal heirs as per the definition of victim given under section 2(wa) of CrPC? Secondly, whether the legal heirs/guardians of the victim have right to participate in the trial proceedings? Thirdly, whether the subsequent Presiding Officer had a right

to review/revise/revisit the order passed by the Predecessor Judge?

25. So far as the first question is concerned, it would be relevant to go through the definition of 'victim' as envisaged under section 2(wa) of CrPC. Section 2(wa) of CrPC read as under:-

“‘victim’ means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression “victim” includes his or her guardian or legal heir.”

26. The definition says that victim means a person who has suffered any loss or injury caused by accused person and that includes his or her guardian or legal heirs. So far as the injury is concerned that is defined under section 44 of IPC and the reference of the same can be taken as per the provision of section 2(y) of CrPC. Injury as has been defined in section 44 IPC is read as under:-

“the word "Injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.”

27. From perusal of the definition of injury, it's clear that injury denotes any harm, illegally caused to any person, in mind, body, reputation or property. The case in hand is that the death of niece was caused by respondent no.3 and the other co-accused persons by shooting her dead. Niece, Vanshika lived with her uncle for a long period of time at Delhi as the family of the applicants are a joint family. Not only the niece was shot dead but her one and half year female child Monisha was

succumbed to injuries after three days of the incident. Naturally, this incident would have caused harm in the mind of the uncle of the deceased and thus this can be termed that the applicant no. 1 is also a victim in terms of the definition given in section 2(wa) of CrPC as it has been said that a person who has suffered loss or injury by accused person, would be a victim and victim includes his or her guardian or legal heirs. In this view, it can be said at first hand that the uncle who is the applicant no. 1, suffered injuries, which harmed his mind and thus being a guardian he is a victim of the incident.

28. It is a trite law that victim has a legal vested right to be heard at every step, post the occurrence of an offence and the victim has participation right from the stage of investigation till the culmination of proceeding in an appeal or revision. As such, it is a binding law on all Courts of this country, and therefore the question no.1 is answered affirmatively, that the victim has every right to participate in a criminal proceeding starting from the stage of investigation till appeal or revision reaches to its finality.

29. The next question is also related to the first question to some extent that whether the applicant number no.1, who is the uncle of the deceased, has a right to participate in the trial proceedings, and if it is looked into in purview of the definition of victim and be examined in the four corners of the definition, it emerges that the deceased is the niece of the applicant no. 1 and she was living with the applicant no.1 at Delhi for considerable period of time. Therefore, there must be some emotional relation in between the applicant no.1 and the deceased namely Vanshika, and it is a natural consequence

that if a human is affectionate with some other and something happens with other side, there must be injury in the mind of such person and therefore this cannot be refuted in the present scenario, also as the applicant no. 1 is uncle and the deceased was living with him and once she was shot dead, there would have been mental agony and harm in the mind of the applicant no. 1 and therefore, undoubtedly he must come under the purview of definition of victim as has been envisaged under section 2(wa) of CrPC and thus, the second question is also answered positively.

30. So far as the third question with respect to jurisdiction of a Criminal Court in a criminal proceeding for revising or reviewing the judgement or order is concerned, the law is well settled that such an order or judgement cannot be revised by the same court unless otherwise provided in any law time being in force or any direction or order passed by the superior courts and in the present matter in absence of any such provisions or directions, the learned Sessions Court had no power to revisit/revise the order passed by the predecessor judge, while accepting the application of the applicant for allowing him to participate in the trial proceedings.

31. In view of the above said submissions and discussions as well as the law laid down by the Apex Court, there is merit in the instant application. Resultantly, the impugned order dated 26.05.2023 passed by Additional Sessions Judge – IV, Lucknow in S.T. No. 375 of 2007 arising out of Case Crime No. 25 of 2005 is hereby set-aside.

32. The learned Trial court is directed to act upon as per the earlier order of the predecessor Judge by which the

present applicants were allowed to appear through their counsels in the trial proceedings

33. This court expects that the learned trial Court shall positively allow the applicants through their counsel in the trial proceeding and would try to conclude the trial.

34. Further, the applicants are also directed, not to seek any adjournment and shall cooperate with the trial proceedings, by concluding their arguments at the earliest.

35. With the aforesaid observation and directions, the instant application is here by allowed.

(2023) 7 ILRA 681
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.07.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Criminal Misc. Bail Application No. 9143 of 2023

Salman Hashmi **...Applicant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Applicant:

Ayodhya Prasad Mishra A.P. Mishra,
Jaylaxmi Upadhyay, Rituraj Mishra

Counsel for the Opposite Party:
G.A.

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 12 & 23-no allegation except for the confessional St.ment –alleged recovery of Tramadol-offence u/s 12 cannot be said to be made out merely by recovery at the instance

and pointing out the applicant –as alleged in the FIR-requirements of Section 23 prima-facie not fulfilled – once the allegations of Section 12 are not made out-prima-facie the offence u/s 24 not sustainable in the trial no criminal antecedent - entitled to be enlarged on bail. (E-9)

List of Cases cited:

1. U.O.I. Vs Balmukund & ors.2009 (12) SCC 161
2. Mohd Muslim @ Hussain vs St. (Nct Of Delhi) 2023 Live Law (SC) 260
3. Ranjitsingh Brahmajeetsing Sharma Vs St. of Mah. & anr.(2005) 5 SCC 294.

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

1. Heard learned counsel for the applicant and learned AGA for the State as well as perused the record.

2. The FIR in question was lodged as Case Crime No.0178 of 2023 under Sections 419, 420 IPC read with Section 66 of Information Technology Act and under Section 12, 23, 24 of NDPS Act at P.S.-Wazirganj, District-Lucknow. The version as contained in the FIR on record reveals the recovery of 370 strips of allegedly prohibited drug Tramadol besides the cash, mobile, laptop, vehicle Mahindra Scorpio as well as one scooty was seized by the department. The allegation in FIR reveals that information was received that around Lucknow, the prohibited intoxicated medicines were being sold online and were being purchased online and huge money was being made out of said business. Based on the said information, a team was constituted and on the basis of information received from the Mukhbir that the said business was being carried out online through a call centre. A team was constituted comprising of as many as 6 to 7 persons. It further records that on

13.6.2023, an information was received that a king pin of the gang i.e. Salman Hashmi the applicant along with his accomplice was available at the Kesarbag flat where the said Salman Hashmi runs a call centre. Receiving the said information, a team was constituted which went on a Government Vehicle. Mukhbir further informed, as per the FIR in question, that the applicant has assembled in the flat in question for selling the medicine. Subsequently, it is recorded that the drug inspector was informed and he came and was informed that they were going to carry out the search in flat in question. On reaching the place, two persons including the applicant were present and on asking their names, they disclosed their names as Salman Hashmi and accepted that they sell the prohibited medicines through International gang.

3. It was allegedly admitted by the applicant, that they used to sell the prohibited drugs on the daily basis through their online platform like- Buy soma online, overnight delivery, buy soma meds, Online meds guru- buy soma xanax online, buy Tramadol online and online meds care. It also records that the applicant admitted that he used to make available the said prohibited drugs. It was also admitted by him that he used to get the money of the said prohibited drug in his account. It was allegedly admitted that the applicant used to sell the drugs in India and across the globe and used to earn lot of profits. It is also recorded that the applicant took the name of one 'Al-zaid', as his accomplice. In the said recovery, an identity card of the bar counsel of U.P. was recovered besides an ATM card and mobile, wrist watch and laptop and a service tag. It also records that the applicant informed that he has purchased vehicle out of the profit of the

said business. From the other co-accomplice Al-zaid, certain recoveries including Aadhar card, ATM card, mobile phone were recovered.

4. Based upon the said submissions, as recorded herein above, the FIR further records that a view is formed that the applicant is involved in the import and export of medicine called Tramadol. It further records that from the mobiles recovered, several chats were shown as well as list of buyers was also revealed. It also records that substantial quantity of the said medicine Tramadol were kept in the vehicle which was recovered at the flat, it further records that the drug inspector who had gone along with the team, on inspection was of view that the Tramadol medicine cannot be kept by any person in excess of the quantity prescribed. It is also recorded that on the said drug Tramadol, batch number, date of manufacturing and expiry were not mentioned. The total quantity of Tramadol allegedly recovered was 370 strips of tablet-Tramef, 40 strips of tablet- Tramacet and 10 strips of Ultra King, 260 tablets of Nexdol-P which according to the FIR were above the commercial quantity. It is also recorded that in terms of the Government Order dated 26.4.2018, the small quantity of Tramadol is 5 grams and commercial quantity is 250 grams. It also records that no sample was drawn from the tablets Tramef-AP, Tramacet, Nexdol-P and Ultra King and 10-10 strips out of the total sample were taken for analysis and they were seen as such the applicant was charged under Section 419, 420 IPC and 66 of the I.T. Act read with Section 12, 23, 24 of NDPS Act.

5. Learned counsel for the applicant argues that the applicant is a lawyer and has been falsely implicated on account of a dispute with the police. He argues that

without going into the said history, prima-facie the offence as narrated in the FIR is not made out. In support of the said arguments, he draws my attention firstly to Section 66 of the I.T. Act which prescribes for punishment for commission of offence under Section 43 with dishonest and fraudulent intention. He then draws attention to Section 43 of the I.T. Act, which provides for penalty for damage of computer, computer system etc. without the permission of the owner or the other person who is in-charge of the computer, computer system or computer network. Section 43 and 66 of the I.T. Act are quoted herein below:

“Section 43. Penalty and compensation for damage to computer, computer system, etc. -*If any person without permission of the owner or any other person who is incharge of a computer, computer system or computer network,-*

(a) accesses or secures access to such computer, computer system or computer network 46 [or computer resource];

(b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;

(c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;

(d) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;

(e) disrupts or causes disruption of any computer, computer system or computer network;

(f) denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;

(g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;

(h) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network,

(i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;]

*(j) steal, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage;] 48 [he shall be liable to pay damages by way of compensation to the person so affected]. **Explanation.-** For the purposes of this section,-*

(i) "computer contaminant" means any set of computer instructions that are designed-

(a) to modify, destroy, record, transmit data or programme residing within a computer, computer system or computer network; or

(b) by any means to usurp the normal operation of the computer, computer system, or computer network;

(ii) "computer database" means a representation of information, knowledge,

facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalised manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network;

(iii) *"computer virus" means any computer instruction, information, data or programme that destroys, damages, degrades or adversely affects the performance of a computer resource or attaches itself to another computer resource and operates when a programme, data or instruction is executed or some other event takes place in that computer resource;*

(iv) *"damage" means to destroy, alter, delete, add, modify or rearrange any computer resource by any means;*

[(v) *"computer source code" means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form.*

Section 66. Computer related offences.- *If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.*

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

(a) *the word "dishonestly" shall have the meaning assigned to it in section 24 of the Indian Penal Code (45 of 1860);"*

6. Counsel for applicant also submits that for the sake of arguments, if all the allegations are treated to be gospel truth, no

offence can be said to be made out under Section 66 of I.T. Act. Even otherwise he argues that the punishment prescribed under Section 66 of I.T. Act is three years, thus, the applicant is entitled to be enlarged on bail.

7. As regards Section 419 and 420 IPC, the submissions of the counsel for applicant is that to hold charge under Section 419 and 420 IPC, it is essential that ingredients of Section 415 should be necessarily be made. He takes me to the Section 415 of the IPC which defines cheating and provides that who ever by receiving dishonesty in person so deceived to deliver any property to any person and, thus, the Act as prescribed, is liable for punishment under Section 419 and 420 IPC. He further argues that from the plain reading of the FIR, even if all the allegations are treated to be gospel truth, no offence as defined under Section 415 can said to be made out and, thus, the applicant cannot be prosecuted under Section 419 and 420 IPC.

8. Learned counsel for applicant then takes me to the mandate of Section 12, 23 and 24 of the NDPS Act. Section 12 of the NDPS Act reads as under:

"12. Restrictions over external dealings in narcotic drugs and psychotropic substances.-*No person shall engage in or control any trade whereby a narcotic drug or psychotropic substance is obtained outside India and supplied to any person outside India save with the previous authorisation of the Central Government and subject to such conditions as may be imposed by that Government in this behalf."*

9. Thus, Section 12 of the NDPS Act, prohibits any person from engaging in or control any trade whereby a narcotic drug

or psychotropic substance is obtained outside India and supplied to any person outside India without sanction of the Central Government. In the light of the said, counsel for applicant argues that there is no allegation, even if for the sake of arguments, the allegations leveled are treated to be correct that any Tramadol tablet was procured from outside India and was sold to any person outside India and, thus, prima-facie, Section 12 cannot be said to be invoked against the applicant.

10. He further draws my attention to Section 23 and 24 of the NDPS Act. Section 23 of the NDPS Act which is read as under:

“23. Punishment for illegal import in to India, export from India or transshipment of narcotic drugs and psychotropic substances.-Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence or permit granted or certificate or authorisation issued thereunder, imports into India or exports from India or transships any narcotic drug or psychotropic substance shall be punishable,-

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine, which may extend to ten thousand rupees or with both;

(b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine; which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be

less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh.

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.”

11. The said Section bars and provides punishment for illegal import into India and export from India or transshipment of narcotic drug or psychotropic substances. He argues that phrase import and export under Section 23 have not been defined under the Act and, thus, the meaning assigned under the Customs Act would have to be taken into consideration. He argues that there is no allegation against the applicant importing anything into India or exporting anything out of India in the FIR and, thus, no offence can be said to be made, which is punishable under Section 23.

12. He next takes me to the mandate of Section 24 of NDPS Act, which prescribes for punishment to any person who is involved for external dealing in narcotic and psychotropic substance in contravention of Section 12. Section 24 of NDPS Act reads as:

“Punishment for external dealings in narcotic drugs and psychotropic substances in contravention of section 12.- Whoever engages in or controls any trade whereby a narcotic drug or a psychotropic substance is obtained outside India and supplied to any person outside India without the previous authorisation of the Central Government or otherwise than in accordance with the conditions (if any) of such authorisation granted under section 12, shall be

punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.”

13. He argues that Section 24 of NDPS Act can never be read in isolation has to be read in conjunction with Section 12 and once the condition of Section 12 are prima-facie not invokable, Section 24 would have no relevance. He next argues that even if for the sake of arguments, all the allegations are treated to be true, the manner in which a belief has been formed with regard to quantity ceased is solely wrong as the chemical Tramadol is always quantified in milligrams whereas, in the present case, no such exercise of quantifying the chemical Tramadol was done and quantification was solely based upon the weight of the Tramadol which is contrary to law laid down in case of **Union of India Vs. Balmukund and Ors. 2009 (12) SCC 161**. He lastly argues that the applicant has no previous criminal antecedents and should be enlarged on bail.

14. Learned AGA vehemently opposes the bail application by arguing that it is well settled that the mandate of Section 37 of the NDPS Act has to be satisfied before grant of bail and condition as prescribed under Section 37(1)(b)(ii) have necessarily to be taken into consideration while considering the bail application, Section 37 of the NDPS Act reads 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 2[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.?

15. The conditions prescribed under Section 37(1)(b)(ii) are essentially to be seen in respect of the offences under Sections 24 and also for the offence involving commercial quantity. The phrase **“reasonable ground for believing that he is not guilty”** for consideration before the Supreme Court in case of **Mohd Muslim @ Hussain vs State (Nct Of Delhi) 2023 Live Law (SC) 260**, wherein the Supreme Court had occasion to consider the scope of the phrase ‘Reasonable ground’ the Supreme Court held as under :-

“18. The conditions which courts have to be cognizant of are that there are

reasonable grounds for believing that the accused is ?not guilty of such offence? and that he is not likely to commit any offence while on bail. What is meant by ?not guilty? when all the evidence is not before the court? It can only be prima facie determination. That places the court?s discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws ? be balanced against the public interest.

19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be

satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused?s guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in *Union of India v. Rattan Malik* 19). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. *Satender Kumar Antil supra*). Having 19 (2009) 2 SCC 624 regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.”

16. As regards the second part of the twin conditions, he argues that once the applicant has no criminal antecedents, the finding has to be recorded based upon the criminal antecedents as held by the Supreme Court in **(Ranjitsingh**

Brahmajeetsing Sharma vs. State of Maharashtra and Another) (2005) 5 SCC 294.

17. Considering the said twin conditions, as regards, the reasonable ground for believing that the applicant is not guilty, on the analysis of the Section 12, 23 and 24 of the NDPS Act, as submitted by learned counsel for applicant and recorded above, prima-facie there is no allegation that the applicant used to import from outside and sell outside except for the confessional statement under Section 67 Cr.P.C. The alleged recovery of Tramadol, itself demonstrates that the offence under Section 12 cannot be said to be made out merely by recovery of Tramadol at the instance and pointing out the applicant as alleged in the FIR. The requirements of Section 23 are also prima-facie not fulfilled in terms of the allegations leveled in the FIR as there is no material to allege that any legal import was made into India or export from India by the applicant. Once the allegations of Section 12 are not made out, prima-facie the offence punishable under Section 24 of the NDPS Act may not also be sustained in the trial, thus, I have reasons to believe that prima-facie the applicant is not guilty of the offence and the prosecution may not be able to establish the guilt at the time of trial as held by the Supreme Court in case of **Mohd Muslim @ Hussain (supra)**.

18. The argument of the learned AGA is that certain chats were discovered from the mobile phone and list of buyers were discovered from the mobile phone. Recovery of said chat and list, however, alone cannot be sufficient to allege the import and export from India or purchase/sale outside India solely based upon the recovery of the Tramadol, thus, I have no hesitation in holding that the

prosecution, with the evidence may not be able to sustain the trial.

19. It is clarified that these observations made are tentative and the Trial Court should not be influenced by these observations recorded which are being recorded only for considering the bail at this stage.

20. The second condition of the twin conditions prescribed under Section 37, can also be recorded in favour of the applicant as he has no previous criminal antecedents, thus, on both the grounds coupled with the fact that the applicant does not have any criminal antecedent is entitled to be enlarged on bail. Apart from the conditions of bail specified there under, the applicant shall also surrender his passport and shall not leave India without the permission of the Court concerned.

21. Let the applicant **Salman Hashmi** be released on bail in Case Crime No.0178 of 2023 under Section 419, 420 IPC read with section 66 of the I.T. Act and under Section 12, 23 and 24 of NDPS Act, P.S.-Wazirganj, District-Lucknow subject to his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court below concerned with the following conditions:

(a) The applicant shall execute a bond to undertake to attend the hearings;

(b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and

(c) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade

him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

(2023) 7 ILRA 689
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.07.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. Bail Application No. 12441 of
2022

Ram Prem & Ors. ...Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:
Ranjeet Kumar, Desh Mitra Anand

Counsel for the Opposite Party:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 437 -Application under Section 439 Cr.P.C. cannot be entertained for the reason that the applicants are not in custody-applicants were granted liberty to appear before the Magistrate and file a fresh application under Section 437 Cr.P.C.-rejected-applicants filed an application under Section 437 Cr.P.C. seeking their release on bail in the aforesaid case-rejected after recording that the applicants were not present before the Court. The non-bailable warrants issued against the applicants - returned by the police with a report that the same could not be served upon the applicants- evading service. mere appearance or being brought before the Court is necessary for his request for being released on bail and the Section does not lay down any further mandatory condition- granted liberty to file a fresh application under Section 437 Cr.P.C.

Application disposed. (E-9)

List of Cases cited:

1. Satendra Kumar Antil Vs Central Bureau of Investigation, (2021) 10 SCC 773
2. St. of Mah. Vs Ramdas Shrinivas Nayak, (1982) 2 SCC 463
3. Bhavnagar University Vs Palitana Sugar Mills Pvt. Ltd. Vs & anr, (2003) 2 SCC 111
4. Niranjana Singh Vs Prabhakar Rajaram Kharote, (1980) 2 SCC 559
5. Sundeep Kumar Bafna Vs St. of Mah., (2014) 16 SCC 623
6. Gurcharan Singh Vs St. (Delhi Admn.), (1978) 1 SCC 118 : 1978 SCC (Cri) 41
7. St. of Haryana Vs Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426
8. Satender Kumar Antil Vs CBI, (2021) 10 SCC 773
9. Siddharth Vs St. of U.P., (2022) 1 SCC 676 : (2022) 1 SCC (Cri) 423
10. Satender Kumar Antil Vs Central Bureau of Investigation Vs& anr, 2023 SCC OnLine SC 452/SC 758

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

1. Heard Sri. Desh Mitra Anand Advocate, assisted by Sri. Utkarsh Anand Advocate, the learned Counsel for the applicants, Sri. Kuldeep Pati Tripathi, the learned Additional Advocate General, who is assisted by Sri. Rao Narendra Singh, the learned A.G.A.-I and Sri. Chinmay Shukla for the State.

2. By means of the present application, the applicants have prayed for grant of bail to them in Case Crime No. 105/2021 under Sections 147, 148, 149, 308, 323, 325, 427, 452, 504 and 506 I.P.C., Police Station Nagam, District Lucknow.

3. The F.I.R. was lodged by the informant Rajaram at 14:04 on 05.05.2021

against four persons – (1) Ram Pal, (2) Sandeep, (3) Shyamlal and (4) Shyamdeo alleging that at about 7 a.m. on the aforesaid date, the aforesaid four named persons had abused and beaten up the informant with sticks and when his wife ran to save him, she was also beaten with a stick causing an injury on her head. The accused persons thrown away the goods of the informant shop and they had beaten up some other persons also.

4. In the statement of the informant recorded under Section 161 Cr.P.C., he reiterated the F.I.R. version that the incident was caused by the four persons named in the F.I.R. All the four named accused persons were arrested at 3:20 on 06.05.2021.

5. The Investigating Officer recorded in the case diary on 09.05.2021 that eight persons, including the informant, had received injuries in the incident. The investigating officer recorded statements of all the injured persons and all of them stated that the four persons named in the F.I.R. had beaten them. After recording their statements, the investigating officer added Section 308 IPC.

6. On 10.05.2021, the investigating officer recorded statements of two persons, who claimed to be eyewitnesses of the incident and they stated that besides the four named persons, all the applicants and one Satguru, were also involved in causing the incident and they stated that police force from the police station and 112 had reached the spot of the incident.

7. Thereafter the investigating officer recorded additional statement of the informant wherein he also implicated the applicants and Satguru, besides the named accused persons.

8. In the affidavit filed in support of the bail application it has been stated that the applicants were not served with any notice under Section 41 A Cr.P.C. and they were not arrested during trial.

9. The applicants had filed application under Section 482 Cr.P.C. No. 1735 of 2022 for quashing of the proceedings. While dismissing the aforesaid application, this Court observed that in case the applicants move an application for discharge within a period of 15 days, the same shall be considered and disposed of expeditiously in accordance with the law. Liberty was granted to the applicants to file an application under Section 205 Cr.P.C. for exemption from appearance.

10. The Application under Section 205 Cr.P.C. filed by the applicants was rejected by the Magistrate on the ground that the offences alleged are triable by the Sessions Court and the Magistrate is not empowered to decide the plea of discharge and to frame charges. The Magistrate rejected another application filed by the applicants for accepting their undertaking in terms of the direction of the Hon'ble Supreme Court in the case of **Satendra Kumar Antil Versus Central Bureau of Investigation**, (2021) 10 SCC 773, on the ground that the Hon'ble Supreme Court has conferred a discretion to be exercised in respect of the persons who are intending to participate in the trial of the case whereas the applicants are not appearing before the trial Court and they are not co-operating with the trial.

11. The applicant challenged the aforesaid order passed by the Magistrate by filing another Application under Section 482 No. 3564 of 2022, which was disposed off by means of an order dated 08.06.2022 by issuing a direction to the Magistrate that

if any regular bail application is moved by the applicants within 15 days, the Magistrate shall be under an obligation to dispose off the same after providing an opportunity of hearing to the parties, strictly in accordance with the law laid down by the Hon'ble Supreme Court in *Satender Kumar Antil* (supra), specially the procedure provided in the above case for offences described under Category 'A' without fail. This Court further noted that: -

"It is recalled that when the applicants were litigating bonafidely by filing an application under Section 482 Cr.P.C. before this Court and has also moved certain applications before the Magistrate concerned under the orders of this Court, the Magistrate concerned should not be in a hurry to issue coercive process against them. Thus this Court hope and trust that the Magistrate concerned or the trial Court as the case may be shall act strictly in accordance with the law laid down by Hon'ble Supreme Court in Satender Kumar Antil (supra)"

12. The applicants filed an application under Section 437 Cr.P.C. seeking their release on bail in the aforesaid case. The application bears the thumb impressions of the applicants. The application was rejected by the Additional Chief Judicial Magistrate IV, Court No. 28, Lucknow, by means of an order dated 16.06.2022 after recording that the applicants were not present before the Court. The non-bailable warrants issued against the applicants have been returned by the police with a report that the same could not be served upon the applicants are evading service. The applicants are charged with commission of cognizable, non-bailable, non-compoundable offence which is triable by the Session Court.

13. On 21.06.2022 the applicants filed an application under Section 439 Cr.P.C.

before the Session Court for their release on bail. This application also bears the thumb impressions of the applicants. This application too has been rejected by means of an order dated 12.07.2022 passed by the Additional District and Session Judge, Court No. 3, Lucknow. Thereafter the applicants have filed the instant Application for grant of bail under Section 439 Cr.P.C.

14. Sri. Kuldeep Pati Tripathi, the learned Additional Advocate General, has raised a primary objection against the application stating that the instant application has been filed under Section 439 Cr.P.C., which empowers the Court to direct release of a person on bail who is accused of an offence and in custody. The applicants are not in custody and, therefore, their application under Section 439 Cr.P.C. is not maintainable. Shri Tripathi has submitted that although the word custody has been interpreted in a broad sense, still, at least physical presence of the accused in the Court is necessary for consideration of an application under Section 439 Cr.P.C. Sri. Tripathi has further submitted that in case an accused person has the liberty to seek bail under Section 439 Cr.P.C. without even his physical presence in the Court, there will be no distinction between a bail application under Section 439 Cr.P.C. and application for anticipatory bail under Section 438 Cr.P.C. and the purpose of regular bail under Section 439 Cr.P.C. would be frustrated.

15. Per contra, the learned counsel for the applicant has submitted that the applicants were present in the Court of the Magistrate at the time of submission of the bail application, which fact is evident from the fact that the applicants have put their thumb impressions on the application. He has submitted that the applicants were present at the time of the hearing on the

application. Relying upon the law laid down by the Hon'ble Supreme Court in *Satender Kumar Antil supra*, the learned Counsel for the Applicants has submitted that there is no need for the applicants been taken into custody and their physical presence in the Court was sufficient for consideration of their bail application.

16. Section 437 of the Cr.P.C., which provides for grant of bail in non-bailable offences, provides that *"When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail"*

17. Thus mere appearance or being brought before the Court is necessary for his request for being released on bail being considered and the Section does not lay down any further mandatory condition.

18. The applicants claim that they were present in the Court of the Magistrate at the time of submission of the bail application but what is relevant is that the applicants must appear before the Magistrate at the time when the application under Section is being considered. The mere fact that the applicants have put their thumb impressions on the application does not prove that the applicants were present before the Magistrate at the time of consideration of their bail application.

19. The Magistrate has specifically recorded in this order that the applicants were not present before the Court at the time of consideration of the bail application. The learned Counsel for the applicant has disputed the correctness of this fact recorded by the Magistrate in his order.

20. In *State of Maharashtra v. Ramdas Shrinivas Nayak*, (1982) 2 SCC 463, the High Court had recorded that the Counsel had made a concession before the Court, which fact was disputed by the Counsel before the Hon'ble Supreme Court. The Hon'ble Supreme Court held that: -

"4....We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation." [Per Lord Atkinson in Somasundaram Chetty v. Subramanian Chetty, AIR 1926 PC 136 : 99 IC 742] We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in Court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. [Per Lord Buckmaster in Madhu Sudan

Chowdhri v. Chandrabati Chowdhrair, AIR 1917 PC 30 : 42 IC 527] That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment."

21. The aforesaid decision has been followed in **Bhavnagar University versus Palitana Sugar Mills Pvt. Ltd. and another**, (2003) 2 SCC 111.

22. Therefore, the fact recorded by the Magistrate in his Order that the applicants were not present before the Court at the time of consideration of the bail application, cannot be disputed and it has to be accepted that the applicants had not appeared before the Magistrate at the time of consideration of their application under Section 437.

23. However, when the Magistrate found that the applicants were not present before him and their application could not be considered for this reason, the Magistrate ought not have discussed the merits of the applications and he ought to have rejected the application in limine on this ground alone. While recording the reasons for rejection of the application, the Magistrate has stated that the application was being rejected for the reason that the applicants did not fulfill the conditions laid down by the Hon'ble Supreme Court in *Satender Kumar Antil*, the offences are cognizable, non-bailable, non-compoundable and triable by a Session Judge and the applicants were not present

at the time of submission of the application. Therefore, the Magistrate has considered the merits of the bail application also and the application has not been rejected for the sole reason of non-appearance of the applicants. It was not proper for the Magistrate to have discussed the merits of the application after he found that the application could not be entertained due to non-appearance of the accused persons.

24. The offence being non-bailable, is no ground to reject an application for grant of bail, as Section 437 has been enacted for the purpose of granting bail in non-bailable offences only. The offence is triable by a Session Court is also not a valid ground to reject an application under Section 437 Cr.P.C., which provides that: -

"437. When bail may be taken in case of non-bailable offence.—(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but—

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-Section without giving an opportunity of hearing to the Public Prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of Section 446-A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may

extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Penal Code, 1860 or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-Section (1), the Court shall impose the conditions—

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter;

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

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

b. and may also impose, in the interests of justice, such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under sub-Section (1) or sub-Section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under sub-Section (1) or sub-Section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on

bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.”

25. The Magistrate cannot grant bail under Section 437 of the Cr.P.C. only if there are reasonable grounds for believing that the applicant has been guilty of an offence punishable with death or imprisonment for life. In the present case there is not even an allegation that the applicants have committed offences punishable with death or imprisonment for life, and there is no occasion for a reasonable ground for believing that the applicants have committed such an offence. The Section does not provide that a Magistrate cannot grant bail in case of an offence triable by a Session Court. Thus a Magistrate has the jurisdiction to decide applications for grant of bail in cases involving allegation of commission of offences which are triable by Session Court.

26. Now I proceed to consider the objection that the application Section 439 of the Cr.P.C. is liable to be rejected as the applicants are not in custody. Section 439 (1) (a) Cr.P.C. provides as follows: -

“439. Special powers of High Court or Court of Session regarding bail.—(1) *A High Court or Court of Session may direct—*

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-Section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-Section;”

27. The term ‘custody’ has been explained by the Hon’ble Supreme Court in **Niranjan Singh v. Prabhakar Rajaram Kharote, (1980) 2 SCC 559**, the Hon’ble Supreme Court explained the phrase “in custody” in the following words:—

“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 Cr.P.C. unless he is in custody.

7. When is a person in custody, within the meaning of Section 439 Cr.P.C.? 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.

9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions.”

(Emphasis supplied)

28. In **Sundeep Kumar Bafna v. State of Maharashtra**, (2014) 16 SCC 623, the applicant, who was not in custody, had moved an application under Section 439 Cr.P.C. in the High Court for grant of bail and it was requested that the applicant be allowed to surrender before the High Court itself. The High Court rejected the application on the preliminary objection that the accused has to surrender before the

Magistrate. Reversing the order of the High Court in Appeal, the Hon'ble Supreme Court held that: -

“3. While accepting the preliminary objection, the dialectic articulated in the impugned order [*Sundeep Kumar Bafna v. State of Maharashtra*, Criminal Bail Application No. 206 of 2014, order dated 6-2-2014 (Bom)] is that the law postulates that a person seeking regular bail must perforce languish in the custody of the Magistrate concerned under Section 167 Cr.P.C.. The petitioner had not responded to the notices/summons issued by the Magistrate concerned leading to the issuance of non-bailable warrants against him, and when even these steps proved ineffectual in bringing him before the Court, measures were set in motion for declaring him as a proclaimed offender under Section 82 Cr.P.C.. Since this was not the position obtaining in the case i.e. it was assumed by the High Court that the petitioner was not in custody, the application for bail under Section 439 Cr.P.C. was held to be not maintainable. This conclusion was reached even though the petitioner was present in the Court and had pleaded in writing that he be permitted to surrender to the jurisdiction of the High Court.

* * *

8. Some poignant particulars of Section 437 Cr.P.C. may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being “brought before a Court”, the present provision postulates the accused being “brought before a Court other than the High Court or a Court of Session” in respect of the commission of any non-bailable offence. As observed in *Gurcharan Singh v. State (Delhi Admn.)* [*Gurcharan Singh v. State*

(Delhi Admn.), (1978) 1 SCC 118 : 1978 SCC (Cri) 41] , there is no provision in the Cr.P.C. dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Court of Session and High Court are bereft of this jurisdiction or if they were so empowered under the old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh [Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118 : 1978 SCC (Cri) 41] , as perforce it must. The scheme of the Cr.P.C. plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. Cr.P.C. severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 Cr.P.C.. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of

Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that Cr.P.C. has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in Cr.P.C. or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim viz. "where there is a right there is a remedy". The universal right of personal liberty emblazoned by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well-established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person

has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Sessions Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word “custody” the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of “committal of cases to the Court of Session” because of a possible hiatus created by Cr.P.C.

* * *

*24. In this analysis, the opinion in the impugned judgment [Sundeep Kumar Bafna v. State of Maharashtra, Criminal Bail Application No. 206 of 2014, order dated 6-2-2014 (Bom)] incorrectly concludes that the High Court is bereft or devoid of power to jurisdiction upon a petition which firstly pleads surrender and, thereafter, prays for bail. **The High Court could have perfunctorily taken the appellant into its custody and then proceeded with the perusal of the prayer for bail; in the event of its coming to the***

conclusion that sufficient grounds had not been disclosed for enlargement on bail, necessary orders for judicial or police custody could have been ordained. A Judge is expected to perform his onerous calling impervious of any public pressure that may be brought to bear on him.

(Emphasis supplied)

29. Therefore, the application under Section 439 Cr.P.C. cannot be entertained for the reason that the applicants are not in custody.

30. The application under Section 439 of Cr.P.C. could have been entertained in case the applicants had surrendered before this Court, but it has not been done by them. Therefore, the applicants may appear before the Magistrate concerned and file a fresh bail application.

31. However, the Court cannot lose sight of the facts that while deciding the earlier bail application under Section 437 Cr.P.C., although the Magistrate has taken into consideration the merits of the application, he has not adverted to certain material facts and circumstances of the case. The F.I.R. of the incident that took place at 07:00 a.m. on 05.05.2021 was lodged by one of the victims himself, after 7 hours since the incident, categorically stating that 4 persons named in the F.I.R., viz. (1) Ram Pal, (2) Sandeep, (3) Shyamlal and (4) Shyamdeo, had caused the incident. In their statements recorded under Section 161 Cr.P.C., all the 8 injured persons, including the informant himself, have reiterated the F.I.R. version stating that the aforesaid 4 named persons had beaten them. The F.I.R. or the statements of any of the injured persons recorded under Section 161 Cr.P.C. do not mention the presence of any eye-witness at the time of the incident. All the 4 named persons were arrested on

06.05.2021 and the arrest memo mentions that upon seeing the police team, they tried to escape. Upon being asked about the reason for making the attempt to escape, they told that they had entered into a quarrel with the family members of the informant Raja Ram. The Investigating Officer has recorded that on 10.05.2021, two persons, namely, Parashuram son of Bhogai and Smt. Ponam wife of Umesh told that they had witnessed the incident and besides the 4 persons named in the F.I.R., (1) Ram Prem son of Ramaasrey, (2) Shatrohan son of Gurudeen, (3) Ram Kumar son of Gurudeen, (4) Ajay Kumar son of Nanhey Ram, (5) Ayodhya Prasad son of Sripal and (6) Sant Ram son of Bhogai (the applicants) and one Satguru son of Ram Shankar, were also involved in committing the offence. Thereafter the Investigating Officer recorded the additional statement of the informant, in which he added the names of 6 persons, but even in his additional statement, the informant did not mention the name of Sant Ram son of Bhogai (the applicant no. 6).

32. In **Satender Kumar Antil v. CBI**, (2021) 10 SCC 773, the Hon'ble Supreme Court laid down the following guidelines for grant of bail to persons accused of various category of cases, and the present case falls within Category A, regarding which the following guidelines have been made: -

“Categories/Types of Offences

(A) *Offences punishable with imprisonment of 7 years or less not falling in Categories B & D.*

(B) *Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.*

(C) *Offences punishable under Special Acts containing stringent provisions for bail like NDPS (Section 37), PMLA (Section 45), UAPA [Section 43-D(5)], Companies Act, [Section 212(6)], etc.*

(D) *Economic offences not covered by Special Acts.*

REQUISITE

CONDITIONS

(1) *Not arrested during investigation.*

(2) *Cooperated throughout in the investigation including appearing before investigating officer whenever called.*

(No need to forward such an accused along with the charge-sheet (Siddharth v. State of U.P. [Siddharth v. State of U.P., (2022) 1 SCC 676 : (2022) 1 SCC (Cri) 423])

CATEGORY A

After filing of charge-sheet/complaint taking of cognizance

(a) *Ordinary summons at the 1st instance/including permitting appearance through lawyer.*

(b) *If such an accused does not appear despite service of summons, then bailable warrant for physical appearance may be issued.*

(c) *NBW on failure to appear despite issuance of bailable warrant.*

(d) *NBW may be cancelled or converted into a bailable warrant/summons without insisting physical appearance of the accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of*

the accused to appear physically on the next date/s of hearing.

(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.”

33. Thus the Hon’ble Supreme Court has merely reiterated the law which was already settled, that the bail application may be decided without the accused being taken in physical custody.

34. However, it came to light that several of the Courts, including to a large extent the Courts in Uttar Pradesh, are not following the law laid down in *Satender Kumar Antil* (Supra). Therefore, the Hon’ble Supreme Court issued the some further directions in **Satender Kumar Antil Versus Central Bureau of Investigation and Another**, 2023 SCC OnLine SC 452, which are as follows: -

*“4. Counsels have produced before us a bunch of orders passed in breach of the judgment in the case of *Satender Kumar Antil v. CBI* only as samples to show how at the ground level despite almost 10 months passing, there are a number of aberrations. It is not as if these judgments have not been brought to the notice of the trial Courts and in fact have even been noted, yet orders are being passed which have a dual ramification i.e., sending people to custody where they are not required to be so sent and creating further litigation by requiring the aggrieved parties to move further. This is something which cannot be countenanced and in our view, it is the duty of the High Courts to ensure that the subordinate judiciary under their supervision follows the law of the land. If such orders are being passed by some Magistrates, it may*

even require judicial work to be withdrawn and those Magistrates to be sent to the judicial academies for upgradation of their skills for some time.

5. Amongst the illustrative orders, very large number of them happens to be from Uttar Pradesh and we are informed that orders passed specially in Hathras, Ghaziabad and Lucknow Courts seem to be in ignorance of this law. We call upon the counsel for the High Court of Allahabad to bring this to the notice of the Hon’ble the Acting Chief Justice so that necessary directions are issued to ensure that such episodes don’t occur, including some of the suggestions made by us above.”

35. Yet again, in **Satender Kumar Antil Versus Central Bureau of Investigation and Another**, 2023 SCC OnLine SC 758, the Hon’ble Supreme Court had to reiterate that: -

*“5. The judgment of this Court including the one in *Satender Kumar Antil’s* case (supra) is the law of the land. There is no question of anyone violating the principles laid down. Suffice for us to say that wherever this judgment is applicable, it’s principles must be followed.*

6. We may note that apparently there are large number of cases arising especially in Uttar Pradesh and other States where the grievance made is that the judgment is not being followed. We consider appropriate that this order should be placed before the Chief Justice of the Allahabad High Court to ensure there is sufficient dissemination of information about this judgment.”

36. Therefore, the applicants are granted liberty to appear before the Magistrate and file a fresh application under Section 437 Cr.P.C. within a period of 7 days from today. In case such an application is filed within the aforesaid period, the same shall be decided on its merit in accordance with the law, without being influenced by the any observation made in the order dated 16.06.2022 passed by the Additional Chief Judicial Magistrate IV, Court No. 28, Lucknow, or in the order dated 12.07.2022 passed by the Additional Session Judge, Court No. 3, Lucknow and the Magistrate shall decide the application keeping in view the observations made in this order, more specifically, the observations made in paragraphs 24, 25 and 31. The Magistrate shall take into consideration the mandate of the Hon'ble Supreme Court in referred to in paras 32, 34 and 35 above.

37. The application stands **disposed off** with the aforesaid observations,

(2023) 7 ILRA 701
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.07.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Criminal Misc. Bail Application No. 13590 of
2021

Wahid Ali **...Applicant**
Versus
Narcotics Control Bureau Lucknow
...Opposite Party

Counsel for the Applicant:
Mukesh Kumar Tewari, Anil Kumar Pandey

Counsel for the Opposite Party:

Akhilesh Kumar Awasthi

Criminal Law - Code of Criminal Procedure, 1973- Section 100 - Narcotic Drugs and Psychotropic Substances Act, 1985- Section 50-substantial illegalities in the manner of search and seizure-admittedly as per the recovery memo, the search was carried out on persons and the vehicle -allegedly in the presence of a Gazetted Officer- Gazetted Officer has not signed the recovery memo-recovery against mandate of sec 50- it is an essential that independent person or a Gazetted Officer or a Magistrate before whom the search is carried out necessarily affixes his signature-Applicant entitled for bail.

Bail Application allowed. (E-9)

List of Cases cited:

1. U.O.I.Vs Shiv Shanker Kesari reported in (2207) 3 SCC (Cri) 505
2. Sk. Raju @ Abdul Haque @ Jagga Vs St. of W.B. reported in 2019 (106) ACC 303
3. St. of Rajasthan Vs Parmanand reported in 2014 2 SCC (Cri) 563
4. Sanjeev & anr.Vs St. of Himachal Pradesh reported in 2022 2 SCC (Cri) 522
5. U.O.I.Vs Bal Mukund & ors.reported in 2010 1 SCC (Cri) 54
6. Avtar Singh & ors.Vs St. of Pun. reported in 2003 (1) JIC 134 (SC)
7. Criminal Appeal No.523 of 2005 decided in the case of Ranjitsingh
8. Brahmajeetsing Sharma Vs St. of Mah. & anr.
9. Criminal Misc. Bail Application No.42918 of 2021 decided in the case of
10. Aditya Kumar Vs U.O.I.Through Narcotic Control Bureau, Lucknow
11. U.O.I.Vs Mohd Nawaz Khan reported in AIR 2021 SUPREME COURT 4476

12. St. of Kerala Etc. Vs Rajesh Etc. reported in AIR 2020 SUPREME COURT 721

13. Union of Indian Vs Ratan Malik @ Habul reported in 2009 AIR SCW 3648

14. Mohd Muslim @ Hussain Vs St. (NCT of Delhi) reported in 2023 LiveLaw (SC) 260

15. St. of Punj. Vs Baldev Singh 1999 Vol.VI SCC page 172

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

1. Heard learned counsel for the applicant and Shri Akhilesh Kumar Awasthi, learned counsel for the and perused the record.

2. The accused-applicant, who alleges that he was the driver of the vehicle in question, seeks bail in Case Crime No.29 of 2021 under section 8/21/25/29 N.D.P.S. Act, P.S. - N.C.B. Lucknow, District-Lucknow.

3. From the documents on record, it appears that on 12.07.2021, a search was carried out based upon the information received from the informers that huge quantity of drug is being transported. From the search memo, which is on record indicates that on receiving the said information, the team of the Narotics Control Bureau, Lucknow reached Chauka Ghat Railway Crossing and on their call the police team of the Police Station-Ram Nagar also arrived. The memo also records in terms of the information received, at about 10:15 P.M., one Honda WRV Car was passing which was stopped and in the said car, two persons were sitting who are Mohammad Imran and Wahid Ali (applicant). It is further recorded that the said two persons confessed before the team of N.C.B. Lucknow the aforesaid fact of carrying drugs. The memo also records that

the N.C.B. team duly informed the accused of their rights under Section 50 of the Act, the said applicant wanted the search to be carried out in the presence of Gazetted Officer and for complying with the provisions of Section 50, the Circle Officer Ram Nagar-Shri Dinesh Kumar Dubey was contacted and was requested to come over the spot. It further alleges that in presence of the said Gazetted Officer both the persons were searched in person and nothing was found with them in person. However, when the car was put on search, Morphine was recovered which was kept in a White Bag weighed at 2.250 Kg along with currency notes of an amount of Rs. 2,00,000/-. The search memo on record contains the signature of the two accused as well as the officer of N.C.B. Lucknow. Howsoever, it does not include the signature of the Gazetted Officer- Shri D.K. Dubey, in whose presence the search was said to be carried out. In pursuance to the search carried out and the recovery memo, the samples were sent by the N.C.B. for chemical analysis and the accused were apprehended for being tried under the N.D.P.S. Act. It is informed that subsequently a criminal complaint has been filed against the said two accused in the competent court of law and the trial is going on. The present bail application has been filed as the first bail application filed by the applicant was rejected on 12.08.2021 by the learned Special Judge, N.D.P.S. Court at Barabanki.

4. The Counsel for the applicant argues that there are substantial illegalities in the manner in which the search and seizure has been carried out. He argues that admittedly as per the recovery memo, the search was carried out on persons as well as in the vehicle and allegedly in the presence of a Gazetted Officer. He argues

that the Gazetted Officer has not signed the recovery memo, which is also accepted by the learned counsel for the respondent. In the light of the said deficiency, he argues that the entire recovery becomes suspect. He also draws my attention to the mandate of Section 50.

5. He specifically places reliance on Section 50 sub-section 5 to argue that the search has to be carried out in terms of the mandate of Section 100 of the Code of Criminal Procedure. He draws my attention to Section 100 of the Cr.P.C. which is as under:

"100. Persons in charge of closed place to allow search.

(1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner provided by sub- section (2) of section 47.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable

inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search. and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.

(7) When any person is searched under sub- section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code (45 of 1860)."

6. On the strength of Section 100 sub-section 5 of the Cr.P.C., as quoted hereinabove, he argues that it is incumbent that the search memo has to be signed by the Gazetted officer as is authorized to do

so. On the strength of these two provisions i.e. Section 50 sub-section 5 and Section 100 sub-section 5, the counsel for the applicant argues that the search without a signature does not satisfy the test of a valid search provided under Section 50 of the N.D.P.S. Act.

7. Learned counsel for the applicant further argues that in the present case, even the mandatory requirement of Section 42 has not been followed with inasmuch as the requirement of Section 42 sub-section 2 have not been complied with. He next argues that the applicant was a driver and thus no material exists to conclude that the applicant had conscious possession over the alleged drugs.

8. In support of the said arguments, he draws my attention to the statement of the co-accused who has stated that the drugs in question were kept at his residence and were transported through the vehicle and the driver had driven the vehicle. He thus argues that the applicant did not have any conscious possession of the alleged drugs and thus he cannot be tried for an offence under the N.D.P.S. Act. He next argues that the samples allegedly drawn from the offending seized drugs were not forwarded within a time span of 72 hours, which is a mandatory requirement in terms of the circular No.1/88. He further argues that even the point No.1.5 of the said circular requires that the sample should be drawn in the presence of the witness was not done. He further argues that the applicant has no criminal antecedent and thus, he satisfies the mandate of Section 37(b)(ii) of the N.D.P.S. Act. He lastly argues that the applicant has no criminal antecedents and is in custody since 13.07.2021 and the examination of the first witness out of seven witnesses proposed to be examined is going on and there is no likelihood of the

trial being concluded in the near future and thus, he argues that pre-trial detention violates the rights of the applicant under Article 21 of the constitution of India. In support of his argument as recorded above, the counsel for the applicant has placed reliance on the judgments of Hon'ble Apex Court passed in **Union of India vs. Shiv Shanker Kesari reported in (2207) 3 SCC (Cri) 505; Sk. Raju @ Abdul Haque @ Jagga vs. State of West Bengal reported in 2019 (106) ACC 303; State of Rajasthan vs. Parmanand reported in 2014 2 SCC (Cri) 563; Sanjeev and another vs. State of Himachal Pradesh reported in 2022 2 SCC (Cri) 522; Union of India vs. Bal Mukund and others reported in 2010 1 SCC (Cri) 54; Avtar Singh and others vs. State of Punjab reported in 2003 (1) JIC 134 (SC); Criminal Appeal No.523 of 2005** decided in the case of **Ranjitsingh Brahmajeetsing Sharma vs. State of Maharashtra and Another** and also the judgment of this Court in **Criminal Misc. Bail Application No.42918 of 2021** decided in the case of **Aditya Kumar vs. Union of India Through Narcotic Control Bureau, Lucknow.**

9. Shri Akhilesh Kumar Awasthi appearing on behalf of the respondent on the other hand strongly raised objections to the application for bail. He argues that the argument raised by the counsel for the applicant deserved to be rejected. He also argues that insofar as the argument that the Gazetted Officer has not signed the recovery memo, he argues that the Gazetted Officer was called and his signature were taken on the notice sent to him however, he argues that as the entire recovery procedure takes time, by then the Gazetted Officer had left. However, there is no reasons to believe that the Gazetted Officer was not

present during the search operation as such the recovery memo even if it does not bear the signature of the Gazetted Officer would satisfy the test of Section 50 read with Section 100 of the Cr.P.C. He further argues that the offending goods were recovered from the vehicle in which both the accused were occupants. He argues that there is presumption of conscious possession as there is nothing on record to say that the applicant is not knowing about the possession of the drug which burden has to be discharged by the applicant. He places strong reliance on the judgments of the Hon'ble Supreme Court passed in the case of **Union of India vs. Mohd Nawaz Khan** reported in **AIR 2021 SUPREME COURT 4476** wherein the **Hon'ble Apex Court** had considered the scope of the conscious possession along with the other issues that were raised before the Hon'ble Apex Court. He further argues that the conscious possession against the applicant should be accepted by virtue of law as clarified in the case of **Mohd. Nawaz Khan** (supra) and he also places strong reliance on the judgment of the **Hon'ble Apex Court** in the case of **State of Kerala Etc. vs. Rajesh Etc.** reported in **AIR 2020 SUPREME COURT 721** which interpreted the word 'reasonable ground' used in the Section 37 of the N.D.P.S. Act. He also placed heavy reliance on the judgment of the Hon'ble Apex Court in the case of **Union of Indian vs. Ratan Malik @ Habul** reported in **2009 AIR SCW 3648** wherein the **Hon'ble Apex Court** had held that while granting bail in appeal, the relevant criteria such as not finding anything from the possession, the detention of the accused for a period of three years and no chances of the appeal being heard would not be a relevant criteria.

10. In the light of the said submission, he argued that the bail application deserves to be rejected. However, he does not dispute the

fact that the first witness is being examined for establishing the offence in terms of the complaint filed by the N.C.B. Lucknow. He also does not dispute the fact that as many as seven witness are proposed to be examined in support of the allegations leveled in the complaint. As regards the submission of the counsel for the applicant that the samples were not sent within a period of 72 days, he argues that the samples were actually sent however they were returned with remarks 'refused' probably because of the wrong address. Thus, the said benefit cannot be given in favour of the applicant as there was no fault by the N.C.B. in sending the samples. He further argues that there was compliance of the mandate of Section 42 and to that extent, the argument of the counsel for the applicant merits rejection.

11. In terms of the arguments raised by the counsels across the bar, as noted above, this Court is to decide whether a case for grant of bail is made out or not. Before going into the merits of the contention, it is essential to note that across the line of precedents settled by the Hon'ble Supreme Court, it is well settled that for grant of bail in respect of commercial quantity, the conditions as prescribed under Section 37 of the Act have to be taken into consideration before granting of the bail. Section 37 of the Act is 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 2[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.]”

12. In terms of the mandate of Section 37(1)(b)(ii), it is essential that the public prosecutor be heard and it is also essential that the Court should record its satisfaction 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. The word ‘reasonable ground’ for believing that the accused is not guilty came up for interpretation and the consistency in so far as the phrase ‘reasonable ground’ is concerned was summarized by the Hon’ble Apex Court in the case of **Union of India through Narcotics Control Bureau vs. Mohd. Nawaj Khan (supra)**. The relevant paras are as under:

“19 The standard prescribed for the grant of bail is ‘reasonable ground to believe’ that the person is not guilty of the offence. Interpreting the standard of ‘reasonable grounds to believe’, a two-judge Bench of this Court in *Shiv Shanker Kesari (supra)*, held that:

“7. The expression used in Section 37(1)(b)(ii) is “reasonable grounds”. The expression means something more than *prima facie* grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

8. The word “reasonable” has in law the *prima facie* meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word “reasonable”.

“7. ... In *Stroud's Judicial Dictionary*, 4th Edn., p. 2258 states that it would be unreasonable to expect an exact definition of the word ‘reasonable’. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy.”

(See *Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar* [(1987) 4 SCC 497] (SCC p. 504, para 7) and *Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd.* [(1989) 1 SCC 532]

[...]

10. The word “reasonable” signifies “in accordance with reason”. In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a

given situation. (See *Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd.* [(2003) 6 SCC 315])

11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty."

(emphasis supplied)

20 Based on the above precedent, the test which the High Court and this Court are required to apply while granting bail is whether there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the NDPS Act and in order to curb the menace of drug-trafficking in the country, stringent parameters for the grant of bail under the NDPS Act have been prescribed."

13. The said phrase was also explained by the Hon'ble Supreme Court in the case of **State of Kerala vs. Rajesh and others (supra)** wherein the Hon'ble Supreme Court held as under:

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed

by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates."

14. On a plain reading of Section 37 (1) (b) (ii), to form an opinion that reasonable grounds exists for believing that he is not guilty, beside the test as laid down by the Hon'ble Supreme Court and as recorded above, the grounds for forming opinion or view is that reasonable ground exists that he may not be held guilty in the trial.

15. Hon'ble Supreme Court had the occasion to deal with the aspect of Section 37 and the conditions prescribed therein in the case of **Mohd Muslim @ Hussain vs. State (NCT of Delhi)** reported in **2023 LiveLaw (SC) 260**. While dealing with the scope of Section 37, Hon'ble Apex Court observed as under:-

"18. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is "not guilty of such offence" and that he is not likely to commit any offence while on bail. What is meant by "not guilty" when all the evidence is not before the court? It can only be prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on

bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws - be balanced against the public interest.

19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted

under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a *prima facie* look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. **The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved.** The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only *prima facie*, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in *Union of India vs. Ratan Malik*¹⁹). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. *Satender Kumar Antil supra*). Having 19 (2009) 2 SCC 624 regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail."

16. In the present case, the applicant is charged of committing an offence under Section 8/21/25/29 N.D.P.S. Act. Section 8 of the Act prohibits any person from possessing any narcotic drug or psychotropic substances as well as to produce, manufacture, sale, purchase etc. Section 8 of the Act is quoted hereinbelow:-

"8. Prohibition of certain operations. —No person shall—

(a) cultivate any coca plant or gather any portion of coca plant; or

(b) cultivate the opium poppy or any cannabis plant; or

(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation: Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf:

1[Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes.]"

17. In the present case, the applicant is charged with illegal 'possession' of the drug and the prosecution, has to take steps for punishing the applicant for 'possession' and imposition of punishment prescribed under Section 21, 25 and 29 of the Act.

18. The Act provides the manner in which the power for determining the

causation of offence under Section 8 of the Act is prescribed in chapter V of the said Act. Section 42 of the said Act confers the power on the Officers defined therein to enter and search any building conveyance or place and to seize the drug or substances in the manner prescribed. Section 42(2) of the Act further places an embargo on the Officer concerned to record grounds for his belief and send a copy thereof within a time span of 72 hours to the immediate official superior. Section 50 of N.D.P.S. Act with which we are primarily concerned in the present case provides as under:-

"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."

19. On a plain reading of Section 50 mandates that at the time of search, if the accused so desires should be taken without any unnecessary delay to the nearest Gazetted Officer as mentioned in Section 42 of the Act or to the nearest magistrate. It is further empowers the Officer defined under Section 42 to detain the person till the time, the accused can be brought before the Gazetted Officer or the Magistrate. After the accused is brought before Gazetted Officer or the Magistrate, the powers are conferred to such Gazetted Officer or Magistrate to further discharge the person, if there is no reasonable ground for search or direct the search under Section 50. Sub Section 5 of Section 50 is crucial for the present case which records that if the Officer authorized under Section 42 has reasons to believe that it is not possible to take the person to be search to the nearest Gazetted Officer or Magistrate and there is possibility that the person to be search may part with the possession of any drug or substances, an option is given to the said Officer that instead of taking such person to the nearest Gazetted Officer or

Magistrate, he can proceed to search as provided under Section 100 of the Code of Criminal Procedure. Section 50 sub section 6 of the Act further provides that the recording of the reasons to believe under sub section (5) have to be informed to the immediate Official superior within 72 hours.

20. As the case against the accused is based upon the allegation of possession of drugs and substances, it is sine qua non that the prosecution has to establish that the possession was found after conducting the search as prescribed under the Act. In the present case as can be discerned from the fact is that the accused-applicant was given an option of being searched in the presence of Gazetted Officer or Magistrate, the said option was exercised by the applicant and intended that he be searched in the presence of a Gazetted Officer. In the pursuance of the said option exercised by the accused, the Gazetted Officer was summoned. Even as per the counsel for the respondent, as the search was likely to take time, the Gazetted Officer left as the search continued for a sufficient period of time. It is also admitted that the Gazetted Officer, who was summoned did not sign the search memo. In the light of the said admission, coupled with the fact that the charge against the applicant is of illegal possession, it is essential that in the trial court, the foundation of a valid search and consequent discovery of possession is established by the prosecution to carry home the charge. The procedure adopted by the respondents by calling the Gazetted Officer was followed, however, the Gazetted Officer not waiting till the completion of the search and not signing search memo is a clear violation of Section 50 of the Act. Although, Section 50 of the Act in clear terms does not prescribe the

signature to be affixed by the Gazetted Officer. On a plain reading of Section 50 read with Section 51 and Section 100 of CrPC, it is an essential that any person, be it any independent person or a Gazetted Officer or a Magistrate before whom the search is carried out necessarily affixes his signature.

21. The foundational fact of 'possession' to be established by the prosecution at the time of trial through a valid search, *prima facie* is not in consonance with the mandate of Section 50. The allegation of possession *prima facie* cannot be established without any valid search which is in accordance with the mandate of Section 50.

22. It is essential to note that in the light of judgment of the Hon'ble Supreme Court it is settled that if the search is carried out in person and also goods carried by the accused, the ingredients of Section 50 have to be complied with as is held by the Hon'ble Supreme Court in para 10 in the case of **State of Rajasthan vs. Parmanand (supra)** where the court also noted the dictum of the constitutional bench in the case of **State of Punjab vs. Baldev Singh 1999 Vol.VI SCC page 172** as under:-

"10. The conclusions drawn by the Constitution Bench, which are relevant for this case could be quoted.

"(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."

23. As this Court is *prima facie* to see that there is a reasonable ground for holding the person to be not guilty, at this stage, in terms of the observation made by the Hon'ble Supreme Court in the case of **Baldev Singh (Supra)** laid clearly that the recovery of the illicit items becomes suspect as such reasonable grounds exists to form a view that the applicant after trial may not be judged guilty. All the said observations made above are, *prima facie*, observations to form an opinion which is required to be found at the time of hearing of the bail application and it is clarified that the said observations would in no way affect the trial which shall proceed in accordance with law and after evaluation of evidence.

24. As regards the second condition prescribed under Section 37(1)(b)(ii) that

the accused if enlarged on bail, he is not likely to commit any offence while on bail, it is essential to note that the Hon'ble Supreme Court in the case of **Ranjitsingh Brahmajeetsing Sharma (supra)** had clearly held that while forming a view with regard to future conduct of the accused, the court should consider keeping in view the antecedents of the accused, his propensity and the nature and the manner in which he is alleged to have committed the offence. In the present case, the accused has no criminal antecedents and thus, I have reasons to record satisfaction as is required in the second part of Section 37(1)(b)(ii) of the Act. Although, delayed trial in itself is a ground for grant of bail in the cases under N.D.P.S. Act, the court cannot ignore the fact that after about two years of detention, only one witness has been examined. This view has been recently taken by the Hon'ble Supreme Court in the case of **Mohd Muslim @ Hussain (supra)** and the order passed by the Hon'be Apex Court in the Case of **Rabi Prakash vs. The State of Odisha decided in the Special Leave to Appeal (Crl.) No(s).4169/2023**. I am not going to the other arguments raised at the bar with regard to the violation of Circular No.1/88, the factum regarding the conscious possession which is to be analyzed after the evidence. Any finding at this stage may have affect on the outcome of the trial and the same are also not required in view of my findings recorded above pertaining to the violation of condition under Section 50 N.D.P.S. Act. In view of the findings recorded above, the accused- applicant is entitled to be enlarged on bail. Thus, the bail application is **allowed**.

25. Let the applicant **Wahid Ali** be released on bail in aforesaid first information report number subject to his

furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court below concerned with the following conditions:

(a) The applicant shall execute a bond to undertake to attend the hearings;

(b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and

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

(2023) 7 ILRA 712

REVISIONAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 31.05.2023

BEFORE

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

Civil Revision No. 101 of 2022

C/M Anjuman Intezamia Masajid Varanasi
...Revisionist

Versus

Smt. Rakhi Singh & Ors.

...Opposite Parties

Counsel for the Revisionist:

Sri Syed Ahmed Faizan, Sri S.F.A. Naqvi (Sr. Advocate), Sri Zaheer Asghar, Ms. Fatma Anjum, Sri Mahmood Alam.

Counsel for the Opposite Parties:

Sri Prabhash Pandey, Sri Arya Suman Pandey, Sri Saurabh Tiwari, Si Vishnu Shankar Jain, Sri Vineet Sankalp, Sri Hari Shanker Jain, Ms. Mani Munjal, Sri Parth

Yadav, Sri Pradeep Sharma, Sri M.C. Chaturvedi (Addl. A.G.), Sri Bipin Bihari Pandey (C.S.C.-V), Sri Rananjay Singh (Addl. C.S.C.), Sri Shrawan Kumar Dubey, Sri Girijesh Kumar Tripathi & Sri Hare Ram Tripathi, S.C.

The Places of Worship (Special Provisions) Act, 1991-Sections 3 & 4 - The Waqf Act, 1995- Section 85-Plaintiff

Respondent instituted suit against the St. of U.P. & ors.including Petitioner/defendant representing Gyanvapi mosque-claiming their right to do pooja of the Deities on Settlement Plot No.9130 be declared -and the defendants be restrained from interfering in the exercise of their right by the plaintiffs to do pooja, aarti, bhog of the Deities-nor demolish or destroy any part of images of those Deities-Application under Order VII Rule 11 CPC filed claiming the suit is barred by the Act, 1991- -rejected-Revision- mere asking to enforce a subsisting right that inheres with hindu devotees since long to worship Hindu Deities located in the suit property -at their specified place- it is not an act that changes the character of the Gyanvapi Mosque into a temple-does not attract the bar under Sections 3 and 4 of the Act of 1991- no relief claimed by the plaintiffs which is required to be decided by a Tribunal under the Act of 1995 within the meaning of Section 85 - absolutely no relief claimed regarding title or possession with regard to the suit property, claimed to be waqf, so as to bring in the ouster of jurisdiction under Section 85.

Revision dismissed. (E-9)

List of Cases cited:

1. Sopan Sukhdeo Sable & ors. Vs Assistant Charity Commissioner & ors., (2004) 3 SCC 137
2. Mohd. Aslam @ Bhure Vs U.O.I.& ors., (1994) 2 SCC 48
3. Abdul Gafur & anr.Vs St. of Uttarakhand & ors., (2008) 10 SCC 97
4. Bhargavi Constructions & anr.Vs Kothakapu Muthyam Reddy & ors., (2018) 13 SCC 480

5. Sree Surya Developers & Promoters Vs N. Sailesh Prasad & ors., (2022) 5 SCC 736

6. T. Arivandandam Vs T.VS Satyapal & anr., (1977) 4 SCC 467

7. Madanuri Sri Rama Chandra Murthy Vs Syed Jalal, (2017) 13 SCC 174

8. Most ReVs P.M.A. Metropolitan & ors.Vs Moran Mar Marthom Vs & anr., 1995 Supp (4) SCC 286

9. Ram Jankijee Deities & ors.Vs St. of Bihar & ors., (1999) 5 SCC 50

10. M. Siddiq (dead) through Legal Representatives (Ram Janmabhumi Temple Case) Vs Mahant Suresh Das & ors., (2020) 1 SCC 1

11. Ganesh Vs Sri Ram Lalaji Maharaj Birajman Mandir & ors., 1972 SCC OnLine All 244 : AIR 1973 All 116 (FB)

12. Nari Shringar Big Bazar, Nagpur & anr.Vs Pantaloon Retailing (India) Ltd., Mumbai Vs& anr., (2008) 3 Mah.L.J. 698

13. St. of Bihar Vs Radha Krishna Singh & ors., (1983) 3 SCC 118

14. Sital Das Vs Sant Ram & ors., AIR 1954 SC 606

15. Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi & ors.Vs St. of U.P. & ors., (1997) 4 SCC 606

16. Board of Muslim Wakfs, Rajasthan Vs Radha Kishan & ors., (1979) 2 SCC 468

17. Ramesh Gobindram (Dead) Through LRs Vs Sugra Humayun Mirza Wakf, (2010) 8 SCC 726

18. Din Mohammad & ors.Vs Secretary of St., AIR 1942 All 353

19. U.O.I.& ors. Vs Vasavi Cooperative Housing Society Limited & ors., (2014) 2 SCC 269

20. Prabhagiya Van Adhikari Awadh Van Prabhag Vs Arun

21. Kumar Bhardwaj (Dead) through LRs. & ors., 2021 SCC OnLine SC 868

22. P.VS Guru Raj Reddy represented by GPA Laxmi Narayan Reddy & anr. Vs P. Neeradha Reddy & ors., (2015) 8 SCC 331

23. H.S. Deekshit & anr. Vs M/s. Metropoli Overseas Ltd. & ors., 2022(4) ICC 944

24. T. Arivandandam Vs T.VS Satyapal Vs& anr., (1977) 4 SCC 467

25. Jawahra & ors.Vs Akbar Husain, ILR, (1885) 7 All 178 (FB)

26. Baiju Lal Parbatia & ors.Vs Bulak Lal Pathuk, ILR (1897) 24 Cal 385

27. Ram Chandra & ors.Vs Ali Muhammad & ors., ILR (1913) 35 All 197

28. Balakrishna Savalram Pujari Waghmare & ors.Vs Shree Dhyaneswar Maharaj Sansthan & ors., AIR 1959 SC 798

29. Hukum Chand Vs Maharaj Bahadur Singh, AIR 1933 PC 193

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

This is a defendant's Civil Revision under Section 115 of the Code of Civil Procedure, 1908, arising out of an order of Dr. Ajaya Krishna Vishvesha, the District Judge of Varanasi, rejecting an application by the defendant-revisionist under Order VII Rule 11 CPC in Original Suit No.18 of 2022.

The reliefs claimed in the Suit

2. The five plaintiff-respondents to this revision have instituted Original Suit No.18 of 2022 against the State of Uttar Pradesh, represented by the Chief Secretary, the District Magistrate, Varanasi, the Commissioner of Police, Varanasi, the Committee of Management, Anjuman

Intezamia Masajid, Varanasi through its Secretary, representing the Gyanvapi Mosque and the Board of Trustees, Sri Kashi Vishwanath Temple through the Chief Executive Officer/Secretary of the Board, seeking reliefs of declaration, permanent prohibitory injunction and mandatory injunction, which can best be understood by a reproduction of these verbatim:

"a) Decree the suit for declaration declaring that Plaintiffs are entitled to have *Darshan, Pooja* and perform all the rituals of Maa Srinigar Gauri, Lord Ganesha, Lord Hanuman and other visible and invisible deities within old temple complex situated at settlement Plot No.9130 (Nine Thousand One Hundred Thirty) in the area of Ward and P.S. Dashwamedh District Varanasi;

b) Decree the suit for permanent injunction restraining the Defendants from imposing any restriction, creating any obstacle, hindrance or interference in performance of daily *Darshan, Pooja, Aarti, Bhog* and observance of rituals by devotees of Goddess Maa Sringar Gauri at *Asthan* of Lord Adi Visheshwar along with Lord Ganesha, Lord Ganesha, Lord Hanuman, Nandiji and other visible and invisible deities within old temple complex situated at settlement Plot No 9130 (Nine Thousand One Hundred Thirty) in the area of Ward and P.S. Dashwamedh District Varanasi;

c) Decree the suit for permanent injunction restraining the Defendants from demolishing, damaging, destroying or causing any damage to the images of deities Goddess Maa Sringar Gauri at *Asthan* of Lord Adi Visheshwar along with Lord Ganesha, Lord Ganesha, Lord Hanuman, Nandiji and other visible and invisible deities within old temple complex situated at settlement Plot No.9130 (Nine

Thousand One Hundred Thirty) in the area of Ward and P.S. Dashwamedh District Varanasi;

d) Decree the suit for mandatory injunction, directing the Government of Uttar Pradesh and District Administration to make every security arrangement and facilitate daily *Darshan, Pooja, Aarti, Bhog* by devotees of Maa Sringar Gauri along with Lord Ganesha, Lord Hanuman, Nandji and other images and deities within the precincts of temple complex known as 'Ancient temple' existing at settlement Plot No.9130 (Nine Thousand One Hundred Thirty) within the area of Ward and P.S. Dashwamedh the heart of the city of Varanasi;"

e) Grant such other relief for which the Plaintiffs may be found entitled to or which may be deem fit and necessary in the interest of justice; and

f) Decree the suit with costs in favour of Plaintiffs and against the Defendants;"

The Application under Order VII Rule 11 CPC

3. An application has been made in this suit on behalf of the revisionist-defendant No.41, to wit, the Committee of Management, Anjuman Intezamia Masajid, Varanasi, saying that the plaint ought to be rejected without a trial of the suit, because the suit is barred by The Places of Worship (Special Provisions) Act, 1991. The basis to say this, according to the revisionist, is that the plaintiffs have claimed a relief to the effect that their right to do *pooja* of the Deities on Settlement Plot No.9130 be declared and further that the defendants be restrained from interfering in the exercise of their right by the plaintiffs to do *pooja, aarti, bhog* of the Deities, nor demolish or destroy any part of images of those Deities.

The objection pleading the bar claimed under the Act of 1991 proceeds on the basis that in Plot No.9130, there is in existence the Gyanvapi Mosque for the past 600 years and is still in existence, where Muslims from the city of Varanasi and its neighbourhood offer *namaz* five times a day as also on the two Eid and Fridays etc., without any let or hindrance.

4. It is the revisionist's case that under the Act of 1991, the religious character of a place of worship, as existing on 15th August, 1947, shall continue as it was, with no change to it. The statutory bar, therefore, pleaded is that by the relief claimed in the suit, the plaintiffs want to alter the character of the Gyanvapi Mosque. This objection is further supported on the foot of the contents of Paragraph No.5 of the said application, where it is said that the contents of Paragraph No.12, sub-Paragraphs Nos. (i) to (xiv) of the plaint make it manifest that whatever facts have been pleaded there, relate to the Gyanvapi Mosque, that is in existence for the past 600 years and that the plaintiffs seek relief of doing *pooja, archana* in the said Mosque. This would violate the Act of 1991, attracting the bar. This objection is also supplemented by asserting that in Paragraph No.29 of the plaint, it is said that the building complex is in the control of the Committee of Management, Anjuman Intezamia Masajid, Varanasi which shows that the relief claimed in the suit is with regard to the Gyanvapi Mosque and that all of it is clever drafting.

5. The other objection is that the suit is barred by The Uttar Pradesh Sri Kashi Vishwanath Temple Act, 1983. The objection based on the Act of 1983 is to be found in Paragraph No.4 of the application, which asserts that the Government of U.P.

enacted the Act of 1983, by which, the control of the entire Kashi Vishwanath premises and its upkeep was entrusted to the Board of Trustees. It is the Board of Trustees of Sri Kashi Vishwanath Temple that has to take care of all the Gods and Goddesses and management of their affairs.

6. The next statute, under which the suit is said to be barred, is The Waqf Act, 1995. The basis of the last mentioned objection is to be found in Paragraph Nos.6 and 7 of the application, where it is said that the Gyanvapi Mosque, which has been described in Paragraph No.12, sub-Paragraph Nos.(i) to (xiv) of the plaint, is waqf property, which is recorded as Waqf No.100, Banaras with the U.P. Sunni Central Board of Waqf, Lucknow. The objection is that since the plaintiffs claim a right in property that is waqf, the Civil Court's jurisdiction to try the suit is barred under Section 85 of the Act of 1995. It is on the basis of all these three statutes that the revisionist has urged that the suit is barred under Order VII Rule 11(d) of the Code of Civil Procedure, 1908.

7. In their reply filed to the application under Order VII Rule 11 of the Code, the plaintiffs say that the application is not based on the averments made in the plaint and the plea regarding bar to the suit under the Act of 1991 has been raised to prolong litigation and avoid a hearing on merits. It has been asserted that there is no mosque within Settlement Plot No.9130, situate in the area of ward and Police Station Dashashwamedh, Varanasi, which has been described as the suit property in the plaint, and also, in the reply to the application under Order VII Rule 11.

8. The crux of the reply to the application under Order VII Rule 11 of the

Code carried in Paragraph Nos.4 to 8, including sub-Paragraphs of Paragraph No.8, is that there have been Deities in the suit property from time immemorial. The forcible offering of *namaz* within the property in question, at a particular point of time or a particular place, would not alter its character into a mosque. The principle of first existence has also been invoked. The scope of the suit has been spelt out as one to restrain the defendants from interfering in the performance of *darshan*, *pooja* of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji, visible and invisible Deities, *mandaps* and shrines, existing within the old temple complex i.e. the suit property. It has been emphasized that these Deities are continuously in existence within the property in question since before 15th of August, 1947 and the worshippers have a right to *darshan* and *pooja* of the Deities. They have every right to file a suit to protect and preserve the right to practice their religion flowing from Article 25 of the Constitution. The main events relating to the establishment of the Temple, its destruction across a number of events and restoration have been set out in historical detail. There is also a reference to an earlier suit on the issue, being Civil Suit No.62 of 1936, where the testimony of witnesses recorded during trial establishes that the Deities were in existence within the suit property before 15th August, 1947.

9. It is further on mentioned, in the reply to the application under Order VII Rule 11 of the Code that the report of the Advocate Commissioner, who was appointed to carry out the inspection, would throw light on the averments in the plaint and the plaintiffs would point out, based on evidence, the specified places within the suit property, where the Deities exist for worship by the plaintiffs. It has

been emphasized that the scope of the Court's jurisdiction under Order VII Rule 11 is confined to averments in the plaint and the revisionist's case cannot be considered at this stage. The averments in the plaint and the material on record make it clear that the Deities are existing within the suit property since before 15th August, 1947, and, therefore, the provisions of the Act of 1991 would not bar the suit at all. It is emphasized that under the Hindu Law, a property once vested in the Deity, shall continue to be the Deity's property and destruction (of the temple or the property), if any, cannot change the nature of the property.

10. There is also an averment in the reply to the application under Order VII Rule 11 of the Code based on the principle that the destruction of the idol does not lead to the termination of its pious purpose, and consequently, by an act of destruction of the idol, neither the endowment, its purpose nor existence can be effaced. The dedication of the property to the idol once vested in it would also continue, as would the idol's legal personality. The crux of the reply is that the Deities of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and the other visible and invisible Deities within the old temple complex i.e. the suit property, having once been established, intermittent acts of destruction would not efface their existence or the suit property, once vested in the Deities.

11. The thrust of this part of the plaintiffs' reply to the application under Order VII Rule 11 of the Code is that given the existence of the idols since time immemorial in the precincts of the suit property, the provisions of the Act of 1991 would not bar the suit. Dwelling further upon the reply to the application under

Order VII Rule 11 based on the provisions of Section 4(1) of the Act of 1991, it is said that under the statute, the religious character of a place of worship existing on the 15th of August, 1947, has to be preserved. It is, therefore, imperative for the parties to the suit to prove before the Court by evidence led at the trial as to what was the religious character of the property prevalent on the 15th August, 1947. Therefore, the plaint cannot be summarily rejected, invoking Rule 11 of Order VII of the Code.

12. It has further on been said in the reply that the plaintiffs have laid foundation by facts pleaded in the plaint that the religious character of the suit property was that of a Hindu Temple and the Deities were being worshipped there within the suit property. It is also said in the reply that under Section 2(c) of the Act of 1991, the term 'Mosque' means a religious Islamic construction raised according to Islamic tenets. It is not permissible under the Hindu law or the Muslim law to raise any construction over the religious property of the other religious community, which is precisely the case here. It is also emphasized in the reply that in Paragraph No.4 of the plaint, it has been clearly averred that Raja Todarmal had reconstructed a magnificent Temple of Lord Shiva at the same place, where the original Temple existed i.e. in Plot No.9130 on a grand scale, consisting a central Sanctum (*Garbhgrih*) surrounded by eight *mandaps*. In Paragraph No.6 of the plaint, it has been pleaded that Muslims, without creating any waqf or acquiring ownership of land lawfully, have forcibly raised constructions, which has been termed as the Gyanvapi Mosque. In other paragraphs of the plaint, it has been pleaded that the worshippers have been worshipping the old and existing

idols in the suit property. There is evidence to that effect reflected in the testimony of witnesses in Civil Suit No.62 of 1936. In their reply, the plaintiffs, therefore, say that all issues arising between parties in the suit ought to be tried and not summarily determined under Order VII Rule 11 of the Code. It is then pointed out in the reply that in Paragraph Nos.22, 23, 24 and 25 of the plaint, the suit property is included within the scope of the term 'Temple' as defined in Section 4(9) of the Act of 1983. The religious character of the property in dispute has already been declared by the U.P. State Legislature and, therefore, there is no question of applicability of the provisions of the Act of 1991. It is also emphasized that the competent Legislature has also recognized the existence of the Jyotirlinga within the definition of 'Temple', which is in existence beneath the structure claimed by the revisionist as the Gyanvapi Mosque.

The Order of the District Judge

13. The District Judge of Varanasi, who has heard and decided the application under Order VII Rule 11 of the Code moved by the revisionist, has rejected it by the order impugned and directed the suit to be tried. A perusal of the impugned order passed by the learned District Judge shows that, like this Court, he too was oppressed by parties pleading facts, law and evidence, running into tomes, well beyond the settled parameters of judging a plea under Order VII Rule 11 of the Code. The parties seem to have endeavoured almost to cajole the learned District Judge into holding a trial ahead of schedule in the garb of the application under Order VII Rule 11 of the Code.

14. This Court is gratified to note that the learned District Judge, though took note of all that was argued beyond the brief by parties, stuck course and decided within the permissible parameters of the motion under Order VII Rule 11 of the Code. The learned District Judge has fundamentally considered the bar to the suit pleaded by the revisionist under the Act of 1991, the Act of 1983 and the Act of 1995. From a perusal of the application under Order VII Rule 11 of the Code, no other plea, apart from the bar to the suit under the three statutes aforementioned, has apparently been raised. The learned District Judge, before embarking upon an examination of the parties' case, set for himself the parameters, after review of authority on the point, by which he ought to judge the plea under Order VII Rule 11 of the Code. He then enumerated the specific pleas that were raised to say that the suit is barred. How the learned District Judge went about his task, can be best expressed in his words, carried in the impugned order, which read:

“Therefore, in view of the law laid down in the above mentioned rulings, it is clear that while deciding an application under Order 7 Rule 11 of CPC, only the averments of the plaint must be seen and the defence made in the suit must not be considered. However, if the suit does not disclose a right to sue, the plaint can be rejected under Order 7 Rule 11 C.P.C.

From the perusal of the application paper no.35C, the main contentions of defendant no.4 are as follows:-

(a) The suit of the plaintiffs is barred by Section 4 of the Places of Worship (Special Provisions) Act, 1991 (Act no.42 of 1991);

(b) The suit of the plaintiffs is barred by Section 85 of the Waqf Act, 1995 (Act no.43 of 1995);

(c) The suit of the plaintiffs is barred by the Uttar Pradesh Sri Kashi Vishwanath Temple Act, 1983 (Act no.29 of 1983)”

15. The learned District Judge repelled the contention regarding the bar to the suit under the Act of 1991, holding that the plaintiffs are not seeking a declaration about their ownership of the suit property or a declaration that the suit property is a temple. They are seeking a right to worship Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and the other visible and invisible Deities, that they had, according to the plaint case, worshipped throughout the year, until 1993, located on a part of the suit property, that is to say, the backside of the Gyanvapi Mosque, on the north-east corner. It was also held that according to the plaint case, the right has been restricted under an administrative instruction of the Government of Uttar Pradesh to once a year after the year 1993 and is still being exercised within that limitation.

16. The learned District Judge opined that at the disputed place, even after 15th August, 1947, to wit, the relevant date under the Act of 1991, the Hindus have worshipped Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and the other Deities, visible and invisible, restricted or unrestricted till date. The learned Judge held that the right to worship is not only a fundamental right, but also a civil right, that can be enforced by suit. The plaintiffs do not, in substance, seek to alter the character of the suit property, which the defendants say is prohibited by the Act of 1991. They only seek to enforce their right to worship, which they have done all along.

The learned District Judge, while turning down the plea of a bar to the suit under the Act of 1991, held in his concluding remarks:

“Therefore, in the light of the law laid down by Hon'ble Supreme Court of India and Hon'ble Allahabad High Court, it is clear that right to worship is a civil right and any interference in it will raise a dispute of civil nature and under Section 9 of C.P.C., Civil Court has jurisdiction to decide such case involving such a dispute. In the present case, the plaintiffs are demanding right to worship Maa Sringar Gauri, Lord Ganesha, Lord Hanuman at the disputed property, therefore, Civil Court has jurisdiction to decide this case.

Further, according to the pleadings of the plaintiffs, they were worshipping Maa Sringar Gauri, Lord Hanuman, Lord Ganesh at the disputed place incessantly since a long time till 1993. After 1993, they were allowed to worship the above mentioned Gods only once in a year under the regulatory of State of Uttar Pradesh. Thus, according to plaintiffs, they worshipped Maa Sringar Gauri, Lord Hanuman at the disputed place regularly even after 15th August, 1947. Therefore, The Places of Worship (Special Provisions) Act, 1991 does not operate as bar on the suit of the plaintiffs and the suit of plaintiffs is not barred by Section 9 of the Act.”

17. The next statute, on the basis of which bar of the suit was claimed by the revisionist, is Section 85 of the Act of 1995. This plea is based on the exclusion of the Civil Court's jurisdiction relating to matters of a waqf property. The learned Judge has taken note of the provisions of Section 85, which bar the jurisdiction of a civil court, revenue court of other authority

to determine any question, dispute or other matter relating to any waqf, waqf property or other matter, which is required by or under the Act of 1995 to be determined by a Tribunal constituted under the said Act.

18. The learned Judge has looked into the provisions of the said Act to discern what a waqf means, as defined there, including a waqf by user. He has also considered what is meant by a person interested in a waqf as defined under Section 3(k) of the Act of 1995. A wealth of authority has been surveyed on the issue about what suits would be barred under the Act of 1995 and what kind of actions can still be tried by Civil Court, the jurisdiction of Civil Court being plenary. The learned District Judge opined that it is only those matters that are required by or under the Act of 1995 to be determined by the Tribunal, where the Civil Court's jurisdiction would be ousted.

19. In substance, the learned Judge held that the relief seeking the right to worship the Deities of Maa Sringar Gauri, Gods and other Goddesses, located in the disputed property is not a relief covered by Sections 33, 35, 47, 48, 51, 54, 61, 64, 67, 72 and 73 of the Act of 1995. These are not matters required by or under the Act of 1995 to be decided by the Tribunal. Therefore, the jurisdiction of the Civil Court to try the suit was held unfettered by the bar under Section 85 of the Act of 1995.

20. The last of the statutes, by dint of which the suit was urged to be barred by law, on behalf of the revisionist, is the Act of 1983. Sections 4(5), 4(9), 5 and 6 of the Act of 1983 were taken into consideration by the learned Judge to hold that the suit in no way can be said to be barred by the Act of 1983. It was, therefore, held by the learned District Judge

that none of the three statutes bar the trial of the suit, rendering the plaint liable to be rejected under Order VII Rule 11 of the Code.

A remark by the Court and a mention of learned Counsel who appeared at the hearing

21. It must be mentioned as a prelude to the disposition of the contentions of parties before this Court that a reading of the order passed by the learned District Judge shows that no other plea apart from the bar under the three statutes, above mentioned, was urged in aid of the application under Order VII Rule 11 of the Code seeking to reject the plaint.

22. Heard Mr. S.F.A. Naqvi, learned Senior Advocate assisted by Mr. Syed Ahmad Faizan, Ms. Fatma Anjum, Mr. Zaheer Asghar and Mr. Mahmood Alam, learned Counsel appearing for the revisionist, Mr. Hari Shankar Jain, Mr. Vishnu Shankar Jain, Ms. Mani Munjal, Mr. Parth Yadav (via video conferencing) along with Mr. Prabhash Pandey and Mr. Pradeep Sharma, learned Counsel appearing on behalf of the plaintiff-respondents nos. 2 to 5, Mr. Saurabh Tiwari along with Mr. Arya Suman Pandey, learned Counsel appearing for plaintiff-respondent No.1, Mr. M.C. Chaturvedi, learned Additional Advocate General assisted by Mr. Bipin Bihari Pandey, learned Chief Standing Counsel-V along with Mr. Rananjay Singh, Additional Chief Standing Counsel, Mr. Shrawan Kumar Dubey, Mr. Girijesh Kumar Tripathi and Mr. Hare Ram Tripathi, learned Standing Counsel appearing on behalf of defendant-respondents Nos. 6, 7 and 8 and Mr. Vineet Sankalp, learned Counsel appearing on behalf of respondent No.9, the Board of Trustees.

Submissions on behalf of the revisionist

23. It is submitted by Mr. S.F.A. Naqvi, learned Senior Advocate that the suit is barred by Section 9 of the Code, as the provisions of the Act of 1991 carry an express bar to the maintainability of a suit, that can effect altering the character of religious places of worship as existing on 15th August, 1947. He submits that the present suit precisely attempts to do that. It seems to seek altering the character of an existing mosque on the date of the suit into a Hindu temple. It is urged that the learned Trial Judge was duty bound to examine if the suit was maintainable, in view of the provisions of Sections 3, 4 and 7 of the Act of 1991. It is submitted by Mr. Naqvi that under Section 9 of the Code, the jurisdiction of Civil Court with regard to a particular kind of suit can be excluded, if there is an express provision barring the Court's jurisdiction or the bar is inferable by necessary implication. It is urged that all suits of civil nature are triable by the Civil Court, except those of which cognizance is barred expressly or impliedly. Here, the suit is expressly barred by the Act of 1991, according to Mr. Naqvi. He has referred to the provision of Rule 11(d) of Order VII of the Code to say that the provision affords the defendant a remedy to assail the maintainability of the suit at the threshold. It is emphasized that the law does not ostensibly contemplate any kind of a stage at which the bar may be pleaded. It can be raised at any stage. Rule 11 of Order VII casts a duty upon the Court to examine if the suit is worth trial and to reject the plaint, if it finds that the suit is barred under any of the clauses of Rule 11 of Order VII of the Code. In aid of his submissions on this point, Mr. Naqvi has placed reliance upon the decision of the Supreme Court in **Sopan Sukhdeo Sable and others v. Assistant Charity Commissioner and others**⁶. It is argued

that the Mosque and portions underneath were always there and never disturbed. It has been in existence since time immemorial. It is pointed out that on 15th August, 1947, the Gyanvapi Mosque and all that was underneath it along with appurtenant land was in existence. Hence, the suit is barred by Sections 3, 4 and 7 of the Act of 1991. It is next submitted that if a suit is barred under any provision of the law, Order VII Rule 11(d) of the Code makes it imperative for the Courts to exercise jurisdiction and reject the plaint. This the Trial Court has failed to do, according to Mr. Naqvi. He has drawn the Court's attention to the objects and reasons of the Act of 1991 and submitted that the statute was enacted with the purpose of thwarting all attempts at converting the character of religious places as existing on August the 15th, 1947.

24. Learned Senior Advocate appearing for the revisionist particularly emphasizes that, in judging an application under Order VII Rule 11 of the Code, evidence, howsoever overwhelming on either side, cannot be looked into. The issues that may arise if the suit were to proceed to trial would be beyond the scope of proceedings at this stage. He submits that the provision under Order VII Rule 11 is a power available to the Court and a remedy to the defendant, where the Court can summarily terminate action at the threshold, without holding a trial, if satisfied that the action should be terminated on any of the grounds carried in Rule 11 of Order VII. It is argued that Order VII Rule 11(d) forbids the trial of a suit that is barred by law. The law includes statutory and customary law, including Judge-made law. A reference in this connection has been made to the decision of the Supreme Court in **Mohd. Aslam**

alias Bhure v. Union of India and others⁷, where the writ petition was disposed of, bearing in mind the assurance extended on 24 points, both by the Central and the State Government, to take all necessary steps for the safeguarding all religious places, including the Gyanvapi Mosque in Varanasi. Referring to the provisions of the Act of 1983, its subject and the definition of Temple there on one hand and the meaning of a Waqf enumerated in Section 3(r) of the Act of 1995 on the other, Mr. Naqvi submits that Waqf property of the Gyanvapi Mosque is separate from the property of Sri Kashi Vishwanath Temple Trust. He emphasized that this fact is clearly established by the deed of exchange, Paper No. 224C, that was executed between the U.P. Sunni Central Board of Waqf and the State of U.P. represented by the Collector. The Board of Trustees of Sri Kashi Vishwanath Temple and the State of U.P. desired that a Police Control Room should be established for the security of the “disputed property” as Mr. Naqvi describes. The Board of Trustees of the Temple and the Government of U.P. discussed the matter with the U.P. Sunni Central Board of Waqf and requested them to give some land on lease or a license for the purpose in the year 1993-94. The U.P. Sunni Central Board of Waqf gave some land to the Government of U.P. on license for the purpose of establishment of a Police Control Room. Later on, the State of U.P. represented by the Chief Executive Officer of the Board of Trustees of Sri Kashi Vishwanath Temple and the Committee of Management, Anjuman Intezamia Masajid, Varanasi (the revisionist) in the year 2021, amicably exchanged land, earlier licenced. These facts are evident from Paper Nos. 227C and 230C. It is pointed out that the aforesaid dealing in the land and its disposition by the Government of U.P. as

well as the Board of Trustees of Sri Kashi Vishwanath Temple show that both of them consider the suit property as waqf property. It is for the said reason that in the first instance, the land was taken on a license by the Government from the Waqf Board in the year 1993-94, and, later on, dealt with through a deed of exchange in the year 2021.

25. It has also been urged by the learned Senior Advocate appearing for the revisionist that the present suit and its ancillary proceedings are pending in three different Courts, to wit, the learned District Judge, who has *seisin* of the suit, this Court, that has, before it, Matters under Article 227 Nos. 3341 of 2017, 1521 of 2020, 3562 of 2021 and 3844 of 2021, including this revision, and the Supreme Court. The matter which is engaging the attention of the Supreme Court is Petition for Special Leave to Appeal (C) No. 9388 of 2022 arising out of an earlier order passed in the suit and approved by this Court in a Matter under Article 227 of the Constitution. Learned Senior Advocate submits that doing all this is nothing but wastage of precious judicial time at different levels, which ought not to be permitted. Mr. Naqvi, during the course of his submissions, has reverted to the point, time and again, that the suit cannot proceed, bearing in mind the provisions of the Act of 1991, its objects and whatever it prohibits. He submits that office of the suit is ultimately to alter the religious character of Gyanvapi Mosque into a temple, which is within the prohibitive clause carried in the Act of 1991. He has also, during the course his submissions, said that the suit does not disclose a cause of action and it is a product of “clever drafting”, an expression that has resounded during the long hearing of this revision. The learned

Senior Advocate says that in the garb of asserting their right to worship, the dominant purpose of the suit is to convert the character of the existing Gyanvapi Mosque into a temple, which the Act of 1991 forbids. The dispute in the form raised through the device of clever drafting is to create the illusion of a cause of action, which is forbidden by law and does not exist.

26. Learned Senior Advocate for the revisionist has, for the proposition that a suit that is barred by law should be nipped in the bud, relied upon a decision of the Supreme Court in **Abdul Gafur and another v. State of Uttarakhand and others**⁸. He has also emphasized that the expression “law” in Clause (d) of Rule 11 of Order VII of the Code includes not only statutes, but also judicial precedents. For the said proposition, the learned Senior Advocate has placed reliance on a decision of the Supreme Court in **Bhargavi Constructions and another v. Kothakapu Muthyam Reddy and others**⁹. The learned Senior Advocate has further placed reliance upon the decision of the Supreme Court in **Sree Surya Developers and Promoters v. N. Sailesh Prasad and others**¹⁰. To buttress his contention that the present suit is a product of clever drafting, whereby a non-existent cause of action has been portrayed as a real one, an illusion for which this Court must not fall and terminate the action, the revisionist has further referred to **T. Arivandandam v. T.V. Satyapal & another**¹¹ and **Madanuri Sri Rama Chandra Murthy v. Syed Jalal**¹².

Submissions on behalf of plaintiff-respondents Nos. 2 to 5

27. Mr. Hari Shankar Jain, Mr. Vishnu Shankar Jain, Ms. Mani Munjal and Mr. Parth Yadav along with Mr. Prabhash

Pandey and Mr. Pradeep Sharma, learned Counsel appearing on behalf of plaintiffs nos. 2 to 5 to the suit and respondents to this revision have submitted that the suit is not at all barred by the provisions of the Act of 1991. It is submitted that the basis to plead the bar under the Act of 1991 is the fact that the so-called mosque in Plot No. 9130 is in existence since the last 600 years, where the Muslims offer *namaz*. It is urged that there is no mosque in the Settlement Plot No.9130 Dashashwamedh, Varanasi, which has been described as the 'property in question' in the suit. This Court has referred to it as the suit property and it shall be called that, as earlier also in this judgment, while noticing the revisionist's submissions. According to Mr. Vishnu Shankar Jain, the suit property vests in the Deity from time immemorial. If any person or persons forcibly and without authority of law offer *namaz* within that property or at a particular place, the same cannot be called a mosque. Nobody has the right to encroach upon land/ property already vested in the Deity. Mr. Jain has invoked the principle of 'first in existence' or 'prior in existence' as the paramount consideration in determining the right of worship at a place, where the Muslims and the Hindus both claim that right. Learned Counsel for plaintiff-respondents Nos. 2 to 5 emphasizes that the suit has been filed for restraining the defendants from interfering with the plaintiffs' right to *darshan* and *pooja* of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji, *mandaps* and shrines existing within the old temple complex, that is to say, the suit property. It is the plaintiffs' case that the Deities above mentioned are continuously in existence within the suit property, since before 15th August, 1947. The worshippers have the right to *darshan* and *pooja* of the Deities within the suit property and they

have every right to institute this suit to protect and preserve their right to religion flowing from Article 25 of the Constitution.

28. The way Mr. Jain has made his submissions on behalf of plaintiff-respondents Nos. 2 to 5, may be summarised under different heads as follows:

I. The plaintiffs' right to practice their religion -

29. The present suit has been instituted by the plaintiffs to secure their right to *darshan* and *pooja* of Deities *Virajman* within the premises of the old temple of Lord Adi Vishweshwar. Learned Counsel has invited the Court's attention to the following facts and the pleadings in the plaint in this regard :

(i) The plaintiffs are devotees of Lord Shiva. They have the right to worship Goddess Maa Sringer Gauri at the *asthan* of Lord Adi Vishweshwar along with Lord Ganesha, Lord Hanuman, Nandiji and other visible and invisible Deities within the old temple complex, situate in Settlement Plot No. 9130 in the city of Varanasi.

(ii) In Paragraph No. 1 of the plaint, it has been averred "that Plaintiffs are filing this suit to protect their right to religion guaranteed by Article 25 (Twenty Five) of the Constitution of India.....". The suit, therefore, has evidently been instituted by the plaintiffs in a personal capacity, seeking to protect their right to worship.

(iii) In Paragraph No. 2 of the plaint, it has been averred that the Plaintiffs are idol worshippers. They are devotees of Lord of Universe, Lord Shiva and they visit the place of Lord Adi Vishweshwar Jyotirlinga at Kashi

(iv) In Paragraph No. 35 of the plaint, it has been stated "that the Plaintiffs are filing the present suit as State Government cannot reduce the daily *pooja* to one day in a year by passing an oral order and there is no reason for making such restriction..."

(v) In Paragraph No. 36 of the plaint, it has been averred that the plaintiffs, along with a number of devotees, performed *pooja* of Maa Goddess Sringer Gauri on 16.04.2021, but thereafter, the devotees are not being allowed to perform the daily *pooja*.

(vi) In Paragraph No. 42 of the plaint, it has been averred that the plaintiffs occasionally worship Lord Shiva, Maa Sringer Gauri, Lord Hanuman *Virajman* within the old temple. They perform *pooja*, worship and *darshan* from outside, undertaking the rituals there all through the year. They also worship within the old temple, whenever they are allowed to enter inside.

(vii) In Paragraph No. 46 of the plaint, it is stated "that the Plaintiffs and devotees of Lord Shiva have fundamental right to uninterrupted daily *Darshan*, *Pooja*, *Aarti*, *Bhog*..."

(viii) In Paragraph No. 50 of the plaint, it has been further asserted that "The cause of action for filing the suit lastly arose on 17.04.2021 (Seventeenth April Two Thousand Twenty-One) as the District Administration is not allowing the Plaintiffs and other devotees to perform *pooja*...."

(ix) It is submitted that the right to worship, apart from being a fundamental right, is a civil right within the meaning of Section 9 of the Code. A violation of that right guaranteed under Article 25 entitles the person aggrieved to maintain a suit before the Civil Court for its enforcement. In support of the aforesaid contention,

reliance has been placed by Mr. Jain upon the decision of the Supreme Court in **Most Rev. P.M.A. Metropolitan and others v. Moran Mar Marthoma and another**¹³. The attention of the Court has been drawn particularly to Paragraphs Nos. 28, 29, 36, 37 and 89 of the report. In **Most Rev. P.M.A. Metropolitan** (*supra*), it has been held :

“36. In *Ugamsingh v. Kesrimal* [(1970) 3 SCC 831 : (1971) 2 SCR 836] it was held that right to worship is a civil right which can be subject-matter of a civil suit. The Court observed:

“It is clear therefore that a right to worship is a civil right, interference with which raises a dispute of a civil nature....”

89. The conclusions thus reached are:

(a) The civil courts have jurisdiction to entertain the suits for violation of fundamental rights guaranteed under Articles 25 and 26 of the Constitution of India and suits.

(b) The expression ‘civil nature’ used in Section 9 of the Civil Procedure Code is wider than even civil proceedings, and thus extends to such religious matters which have civil consequence.

(c) Section 9 is very wide. In absence of any ecclesiastical courts any religious dispute is cognizable, except in very rare cases where the declaration sought may be what constitutes religious rite.”

II. Violation of Article 25 of the Constitution

30. Mr. Jain has pointed out that it has been pleaded in the plaint that the plaintiffs’ right to worship enshrined under Article 25 of the Constitution is being infringed, and therefore, the present suit has been instituted. In this regard, he has drawn the

Court’s attention to the averments in Paragraphs Nos. 1, 45, 46 and 47 of the plaint.

III. Deities under the Hindu Law - Swayambhu Deity, images, *asthan* and invisible Deity

31. Mr. Jain submits that the Hindu law relating to *asthan* and invisible Deities has been extensively dealt with by Justice B.K. Mukherjea in ‘**The Hindu Law of Religious and Charitable Trusts**’, Dr. Pandurang Vaman Kane in ‘**History of Dharmaśāstra**’ and by Sri Gopalchandra Sarkar Sastri in his treatise ‘**A Treatise on Hindu Law**’. In ‘The Hindu Law of Religious and Charitable Trusts’, which is a compilation of Tagore Law Lectures delivered by Justice B.K. Mukherjea, ex Chief Justice of India, in Paragraph 4.8 at Pages Nos. 156-157, relating to ‘Reconstruction or purification of idols in case of defilement or destruction’ it has been stated :

“... The destruction of an image, as you will see presently, does not cause an extinction of the religious trust that is created in its favour: The rules of construction or replacement of an idol as set out above are most liberally construed ...”

32. Learned Counsel further cites Dr. Pandurang Vaman Kane in ‘**History of Dharmaśāstra**’, Volume II, Part II, Chapter XIX at Page 707, where it is stated :

“...it is clear that the ancient sages hardly ever thought of the worship of idols, but of deities in the abstract to whom they ascribed different functions and poetically represented them as being endowed like

human beings with hands and feet and other limbs...”

33. Further, in Chapter XXVI at Page No. 896 of the above mentioned treatise, Dr. Pandurang Vaman Kane says:

“But even image worshippers are quite conscious that god is pure consciousness (cit), is one without a second, is without parts and without a physical body, and that the various images in which he is thought as in-dwelling are so imagined for the benefit of worshippers.”

34. Learned Counsel for the plaintiff-respondents Nos. 2 to 5 has then drawn the Court’s attention to Chapter XIV, Page No. 492-493 of the book called ‘**A Treatise on Hindu Law**’ by Gopalchandra Sarkar Sastri, wherein the importance of worship of images under the Hindu law has been explained in the following words:

“**Images.** — The images worshipped by the Hindus are visible symbols representing some form of the attribute of God contemplated as having one only of His threefold attributes, upon which is based the Hindu idea of Trinity, namely, God the Creator, God the Preserver, and God the Destroyer, the same perhaps, as God the Father, God the Son, and God the Holy Ghost.

The images may be made of any of the substances mentioned in the Texts Nos. 4-6.

The object of worship is not the image, but the God believed to be manifest in the image for the benefit of the worshippers who cannot conceive, or think of, the Deity, without the aid of a perceptible form on which he may fix his mind and concentrate attention, for the purpose of meditation. The lump of metal,

stone, wood or **clay forming the image is not the God, but the invisible** personified Deity manifesting itself to the devotees by means of the image, is the God to a Hindu.”

35. Mr. Jain has gone on to refer to the decision of the Supreme Court in **Ram Jankijee Deities and others v. State of Bihar and others**¹⁴. He has particularly referred to Paragraphs Nos. 11, 12, 13, 15, 18 and 19 of the report in **Ram Jankijee Deities (supra)** which, in his submission, lay down the law on this subject. He submits that the decision in **Ram Jankijee Deities** has been relied upon by the Constitution Bench in **M. Siddiq (dead) through Legal Representatives (Ram Janmabhumi Temple Case) v. Mahant Suresh Das and others**¹⁵.

IV. The history of Lord Adi Vishweshwar and the Temple

36. It is submitted by Mr. Jain that Sri Adi Vishweshwar Temple is in existence from ancient times. The facts relating to the said Temple have been pleaded in the following paragraphs of the plaint:

(i) In Paragraph No. 3 of the plaint, it has been stated that there existed a glorious lofty temple at Adi Vishweshwar Jyotirlinga, near Dashashwamedh Ghat.

(ii) In Paragraph No. 4 of the plaint, it has been stated that in the year 1585, Raja Todar Mal, the then Governor of Jaunpur, at the instance of his *Guru* Narayan Bhatt, reconstructed a magnificent temple of Lord Shiva at the very place where the temple originally existed i.e. Settlement Plot No. 9130 on a large scale, consisting of a Central Sanctum (*Garbagrih*) surrounded by eight *mandaps*.

(iii) In Paragraph No. 5 of the plaint, it has been stated that Aurangzeb

had issued a *farman* (order) to demolish existing temples at Kashi and Mathura, which were carried out by his army and the fact of demolition of temple was communicated to him.

(iv) In Paragraph No. 6 of the plaint, it has been mentioned that Settlement Plot No. 9130 along with 5 *krosh* land had already stood vested in the Deity Adi Vishweshwar lacs of years ago.

V. Frame of the Suit

37. Learned Counsel for plaintiff-respondents Nos. 2 to 5 has submitted about the frame of the suit that the necessary averments have been made in the plaint in regard to the matters in issue, as required by Order VI Rule 2 and Order VII Rule 3 of the Code. He has taken the Court through the provisions of Order VI Rule 2 and Order VII Rule 3 and submitted that the learned Senior Advocate for the revisionist has argued that the plaint is liable to be rejected as the boundaries of the suit property have not been given, and also that the property in dispute does come within Police Station and Ward Chowk. Mr. Jain has submitted that the aforesaid contention is not tenable, inasmuch as Gata No. 1 of Sri Kashi Vishwanath Temple falls within the local limits of Police Station Dashashwamedh Ghat, and further, that the survey number of the suit property is 9130, as given in the plaint. He submits that this is sufficient to identify the suit property as required by the provisions of the Code.

38. In support of his submissions, learned Counsel for plaintiff-respondents Nos. 2 to 5 has placed reliance upon the decisions of the Full Bench of this Court in **Ganesh v. Sri Ram Lalaji Maharaj Birajman Mandir and others**¹⁶ and further, on a decision of the Bombay High

Court in **Nari Shringar Big Bazar, Nagpur and another v. Pantaloon Retailing (India) Ltd., Mumbai and another**¹⁷. It is urged that in the above mentioned authorities, it has been held that all that the law requires is that the description of the suit property should be sufficient to identify it. Any other misdescription in the boundaries cannot affect either the suit or the decree passed in the suit. It has also been urged that within the scope of Order VII Rule 11 of the Code, the question of boundaries of the suit property cannot be gone into.

VI. The worship of *asthan*, images, idols, Deities etc.

39. Learned Counsel for the plaintiff-respondents Nos. 2 to 5 have drawn the attention of the Court to the pleadings regarding worshipping the *asthan*, images and Deities pleaded in the plaint. The following paragraphs of the plaint have been referred to :

(i) In Paragraph No. 8, it has been mentioned that the devotees have been worshipping images of Maa Sringar Gauri, Lord Hanuman, Lord Ganesha etc. that are present in Settlement Plot No. 9130 since time immemorial despite the fact that Muslims, without any authority of law, raised some constructions over the temple, partly demolished by Aurangzeb.

(ii) In Paragraph No. 9, it has been averred that the Hindus continue to worship the Deities.

(iii) In Paragraph No. 10, it has been averred that the Hindus continued to be in possession of cellar (*tahkhana*) towards South and other parts of demolished temples. Lord Adi Vishweshwar is still in existence in His original shape.

(iv) Paragraph No. 11 refers to introduction of words “old temple” and “new temple”. Sometime in the years 1780-90, Rani Ahilyabai Holkar of Indore got constructed a Temple of Lord Shiva and established a Shiv Lingam adjacent to the old temple of Lord Shiva, which, for the sake of convenience, was termed as “new temple” and Sri Adi Vishweshwar Temple was termed as the “old temple”.

(v) In Paragraph No. 12, the book of Dr. A.S. Altekar has been relied upon.

(vi) In Paragraph No. 37, the description of Deities existing within the suit property has been given.

VII. Civil Suit No. 62 of 1936

40. This is a suit of the old, which has figured in the submissions of learned Counsel for both parties in one way or the other. The suit was numbered as Civil Suit No. 62 of 1936 on the file of the subordinate Judge of Benaras (Varanasi). It is submitted by Mr. Vishnu Shankar Jain that in the above suit, the Hindus were not made parties and their application for impleadment was rejected. Any order or decree passed in the suit is not binding on any member of the Hindu community and the decree passed in the suit cannot be used against any Hindu, including the plaintiffs. The right of Hindu devotees to worship within the temple complex in the suit property cannot be defeated on the strength of the judgment, decree or findings rendered in the said suit. The plaintiffs here have pleaded about the old suit under reference in Paragraphs Nos. 18, 19, 20 and 21 of the plaint.

41. It is submitted that it is a well-settled proposition of law that a decree or order passed in any suit or proceedings cannot bind parties who were not arrayed, either directly or through persons, through

or under whom they claim. In support of the contention of his, Mr. Jain has placed reliance upon the decision of the Supreme Court in **State of Bihar v. Radha Krishna Singh and others**¹⁸. He has drawn the Court's attention to Paragraphs No. 124 and 125 of the report in **Radha Krishna Singh (supra)**. It is submitted by Mr. Jain that though the decree passed in the old suit would not bind the plaintiffs, as they were not parties, oral testimony in the said suit can be relied upon under Section 13 of the Indian Evidence Act, 1872, as held in the case of **Sital Das v. Sant Ram and others**¹⁹. It is next submitted that whatever decree has been passed in Suit No. 62 of 1936 does not derogate from the submission that it does not bind the plaintiffs, who were not parties, directly or through the predecessors-in-title by virtue of Section 2 of the Act of 1983.

42. So far as judgment in Civil Suit No. 62 of 1936, brought on record as Paper No. 229C is concerned, it is submitted that no Hindu or body of Hindus were arrayed as parties to the suit. Therefore, the findings, whatever recorded in the judgment, are not binding and cannot affect the plaintiffs. It is pointed out by Mr. Jain that in the judgment of the learned Civil Judge, nevertheless, it is mentioned that the Mosque in question was erected after demolishing the existing temple illegally. Mr. Jain has drawn the Court's attention to the following remarks and the judgment of the learned Civil Judge, who decided Civil Suit No. 62 of 1936:

“The next question then is as to whether the construction of the mosque was lawful. Certainly according to strict Muslim law it was not lawful. The demolition of temples according to law might have been lawful in order to abolish

idolatry, but the law nowhere provides so far as it has been referred to me that the lands occupied by such temples should also be appropriated. On the other hand the law provides that it is not lawful to offer prayers on the land of another without his consent, and it is not the plaintiffs' case that over the consent of the Hindus was taken, so strictly speaking, I think, on the materials laid before me, that it was not lawful to construct his mosque and to offer prayers in it, but as already observed the King is above the law and so everything done by him was lawful."

43. It is submitted by the learned Counsel for the plaintiff-respondents Nos. 2 to 5 that the learned Civil Judge, in his judgment, has not used the word "Waqf" in its true sense, and the said word has been employed in reference to possession over the property either by a Hindu or a Muslim for the purpose of temple or mosque. In this regard, attention of the Court has been invited to the following remarks in the judgment of the learned Civil Judge deciding the old suit:

"His second contention is that the court treated the whole thing as 'waqf', and therefore it is Muslim 'waqf'. The defendant's reply is that the 'word waqf' was used for both, that is Muslim and Hindu dedications. I agree with this contention. The court said Masjid Gyanbafi and well Bishnath and whatever appertain to it or them is all "waqf"."

VIII. U.P. Sri Kashi Vishwanath Temple Act, 1983

44. It is argued by Mr. Jain that it is relevant to mention that the U.P. State Legislature passed the Act of 1983 recognizing right of the devotees to

worship within Sri Adi Vishweshwar Temple and also in the new Temple constructed by Rani Ahilyabai Holkar. Section 5 of the Act of 1983 declares that the Temple and the endowment vests in the Deity of Sri Kashi Vishwanath.

45. It is submitted by the learned Counsel for plaintiff-respondents Nos. 2 to 5, in Paragraphs Nos. 22 to 25 of the plaint, that there are averments made in regard to the Act of 1983. The word "Temple" has been defined in Section 4(9) of the Act, last mentioned. Section 5 of the Act of 1983 discloses the ownership of the Temple and its endowment shall vest in the Deity of Sri Kashi Vishwanath. The term "Endowment" has been defined under Section 4(5) of the Act of 1983. The Supreme Court has upheld the validity of the Act last mentioned, giving a complete history of the Temple in Paragraph No. 1 of the report in **Sri Adi Vishweshwara of Kashi Vishwanath Temple, Varanasi and others v. State of U.P. and others**²⁰. Much reliance has been placed on this judgment by Mr. Vishnu Shankar Jain.

IX. Action of the State Government

46. It is argued that there is a specific pleading on behalf of the plaintiffs that the State Government, without any authority of law and without passing any written order, had directed the District Administration of Varanasi to restrict entry of the devotees of Lord Shiva within the old temple complex. In this regard, the averments made in Paragraphs Nos. 42, 43, 44, 45, 48 and 49 of the plaint have been referred to.

X. No waqf ever created

47. It is the plaintiffs' case that there has never been a dedication of the suit

property by the lawful owner thereof to God so as to constitute it into a waqf. The suit property, once vested in the Deity Sri Adi Vishweshwar, since time immemorial, no waqf could ever be created by anyone out of it. It did not belong to any member of the Muslim community, including the reigning monarch of the day at any point of time, entitling its dedication to a waqf, where a mosque could be erected. It is pleaded that the Muslims have no right to use of the suit property for religious purposes in the absence of creation of a waqf. In this regard, averments in Paragraph No.7 of the plaint have referred to. It is pointed out by Mr. Vishnu Shankar Jain that the principle that property of which a waqf is made must belong to the settlor is carried in the famous Treatise '**Principles of Mahomedan Law**' by Sir D.F. Mulla. Section 176 has been referred to, which speaks about the competence of the person creating a waqf:

“176. Subject of Waqf must belong to *waqif*—The Property dedicated by way of waqf must belong to the *waqif* (dedicator) at the time of dedication. A person who is in fact the owner of the property but is under the belief that he is only a mutawalli thereof is competent to make a valid waqf of the property. What is to be seen in such cases is whether or not that person had a power of disposition over the property.”

48. In view of the above proposition of law, it is submitted that property was vesting in the Deity when, under the orders of Aurangzeb, it was partly demolished/damaged, and, therefore, there could be no *waqif* competent to dedicate the property to 'Allah'.

XI. Notification dated 25.02.1944 under U.P. Muslim Waqfs Act, 1936

49. It is submitted by Mr. Jain that the existence of the waqf has never been traced to a waqf by user and its recognition is by virtue of a notification dated 25.02.1944 issued under the U.P. Muslim Waqfs Act, 1936. The notification dated 25.02.1944 (Paper Nos. 103-Ga and 104-Ga) relates to a certain Alamgiri Mosque, which was erected after demolition of Sri Bindu Madhav Temple in the year 1673, also during the regime of Aurangzeb. It is pertinent to say that in the notification, Settlement Plot No.9130 does not find mention, whereas in relation to other properties, the settlement numbers have been given. The submission is that aforesaid notification does not relate to the suit property, or so to speak, the Gyanvapi Mosque. It is submitted that the revisionist, during hearing before the learned District Judge, filed a copy of the notification dated 25.02.1944 issued under the U.P. Muslim Waqfs Act, 1936. He has emphasized that the notification does not relate to the suit property, called the Gyanvapi Mosque. The reference there to the Alamgiri Mosque is not to be confounded with the suit property, the Gyanvapi Mosque structure.

50. The revisionist before the learned District Judge, during the course of hearing, filed an extract of *Khasra* of 1291 *Fasli* (Calendar Year 1883-1884) relating to Plot No. 9130. It is numbered as Paper No. 221-C. It is argued that the correctness of the entries made in any revenue record can be proved by leading evidence. The revenue record is not proof of ownership or title.

51. It is next submitted that the notification issued under the U.P Muslim Waqfs Act, 1936 is not binding on non-Muslims. The expression 'person interested', occurring in Section 5(2) of the

U.P Muslim Waqfs Act, 1936 was later employed in Section 6 (1) of Waqf Act, 1954. The expression fell for consideration before the Supreme Court about its import, where it was held that it does not apply to persons, who are non-Muslims. In support of the contention, reliance has been placed by Mr. Jain upon the following decisions of the Supreme Court:

(a). **Board of Muslim Wakfs, Rajasthan v. Radha Kishan and others**²¹; and,

(b). **Ramesh Gobindram (Dead) Through LRs v. Sugra Humayun Mirza Wakf**²².

52. The submission is that in view of the law laid down in the context of what a 'person interested' under the statutes relating to waqf would mean, it is evident that it has no application to non-Muslims.

53. Towards the tail-end of his submissions under this limb of their case, it is pointed out by Mr. Vishnu Shankar Jain that on the official website²³ of Waqf Assets Management System of India, the particulars of a mosque have been published showing its location in Manduadih, bearing registration No.100. It carries a description of all the cases pending against Waqf No.100. Those cases are in relation to the suit property. A copy of the document is available on the official website. This document, after supplying a copy to the learned Counsel for the revisionist, was filed before the learned District Judge during the course of arguments. A copy of the document was also placed before this Court, downloaded from official website as aforesaid.

54. It is pointed out by the learned Counsel for plaintiff-respondents Nos.2 to 5

that the publication on the official website does not carry details of the Gazette Notification, date of creation of the waqf, *Khasra* Number and other relevant details. It is also submitted that the documents filed by the revisionist cannot be looked into in deciding this application under Order VII Rule 11 of the Code.

XII. Regarding documents filed along with paper no. 219-C

55. It is submitted by the learned Counsel for plaintiff Nos.2 to 5 that the revisionist has filed papers Nos. 221-C, 222-C, a copy of *Khasra* of 1291 *Fasli* (corresponding to the Calendar Year 1883-84) to demonstrate that a mosque was recorded there. Learned Counsel for the plaintiff-respondents Nos.2 to 5 says that they seriously dispute the correctness of the entries made in the *Khasra* by the officials of Revenue Department. It is emphasized that in **Din Mohammad and others v. Secretary of State**²⁴, relied upon by the revisionist, the aforesaid revenue record was discarded by this Court in appeal. It is further urged that the correctness of entries made in any revenue record can be proved by leading evidence. The revenue record is not proof of ownership or title.

56. It is submitted that for a proposition of the law, it is well settled that entries made in the revenue records do not create or extinguish title to land, nor do these have any presumptive value about title. Mr. Jain, in this connection, has placed reliance upon the following authorities:

(a). **Union of India and others v. Vasavi Cooperative Housing Society Limited and others**²⁵; and,

(b). **Prabhagiya Van Adhikari Awadh Van Prabhag v. Arun Kumar**

Bhardwaj (Dead) through LR. and others²⁶.

57. It is next submitted that the authenticity and contents of paper No. 223-C is seriously disputed by plaintiff-respondents Nos.2 to 5. This document, it is said, is not a public document. Its genuineness and correctness are subject to proof by evidence. The entries made in this document are totally incorrect. There is no material to support the facts stated therein. The document has been prepared designedly, bearing in mind the ongoing litigation, that commenced with the filing O.S. No. 610 of 1991. The right of devotees, who are Hindus and devotees of Maa Sringer Gauri, Lord Ganesha, Lord Hanuman, Nandiji etc., cannot be defeated due to the licence granted in the year 1993 in favour of the State by the U.P. Sunni Central Board of Waqf, carried in paper No.224-C. The correctness of this document is seriously disputed on behalf of the plaintiffs.

58. The map, paper No. 224-C/04 is not admissible in evidence and the correctness thereof can be proved only by leading evidence. The plaintiffs say that they deny the correctness of this map. Again, paper No. 226-Ga is not admissible in evidence and cannot be utilized to defeat the plaintiffs' right, who are Hindus and devotees of Maa Sringer Gauri, Lord Ganesha, Lord Hanuman, Nandiji etc., all of whom exist within the suit property. It is further submitted that the State Government cannot take away the plaintiffs' rights of worshipping the Deities within the suit property. The exchange deed executed between the revisionist and the State Government through the Chief Executive Officer, Board of Trustees, Sri Kashi Vishwanath Temple, Varanasi also

cannot defeat or prejudice the plaintiffs' right to worship, which is the subject matter of the present suit.

XIII. Non-applicability of the Act of 1991

59. According to the learned Counsel for the plaintiff-respondents Nos.2 to 5 the suit property as well as the nature of the relief claimed in the suit, has been specified in the plaint. The suit has been filed *inter alia* for the purpose of restraining the defendants from interfering in the performance of *darshan*, *pooja* of Goddess Maa Sringer Gauri, Lord Ganesha, Lord Hanuman, Nandiji, visible and invisible Deities, *mandaps* and shrines existing within the old temple complex, i.e. the suit property.

60. It is the plaintiff-respondents' case that the Deities are continuously in existence within the suit property since before 15th August, 1947. The worshippers have a right to *darshan* and *pooja* of the Deities in the suit property. They have every right to file the present suit to protect and preserve their right to practice their religion, flowing from Article 25 of the Constitution.

61. Mr. Jain has referred to various paragraphs of the plaint, including Paragraph Nos.3, 4, 5, 6 and 7, referring to the history of destruction of the old temple and what the plaintiff-respondents say is an encroachment of the old temple by the Muslims, terming it as the Gyanvapi Mosque. But, he is quick to add that what is important is the existence of Sri Adi Vishweshwar Jyotirlingam along with the images of Maa Sringer Gauri, Lord Hanuman, Lord Ganesh and other visible and invisible Deities within the temple

complex at Settlement Plot No.9130, properly known as the Sri Adi Vishweshwar Temple. These Deities are being worshipped by devotees of Lord Shiva from time immemorial, despite destruction of a portion of the temple during the time of Aurangzeb, when without any of authority of law, some constructions over the land of the Deities were raised. The Deity, nevertheless, continues to be the *de jure* owner of the suit property.

62. The image of Maa Sringer Gauri exists within the suit property at the backside of Gyanvapi in the *Ishan Kon* (north-east corner). The Hindu devotees continuously perform *pooja* of Maa Sringer Gauri, Lord Hanuman, Lord Ganesh and other visible and invisible Deities with rituals and are doing circumambulation (*parikrama*) of the temple of Lord Sri Adi Vishweshwar. In this connection, he has drawn the Court's attention to Paragraph No.9 of the plaint.

63. Mr. Jain has also emphasized that the Temple is in possession of a cellar (*Tehkhana*) towards the south and other parts of the demolished temple with its ruins. Lord Adi Vishweshwar is still in existence in the original shape in the western part of the old temple. Learned Counsel for plaintiff-respondents has drawn the Court's attention to Paragraph No.10 of the plaint.

64. It is next submitted that in Suit No.62 of 1936, the witnesses testified to the existence of images of Goddess Maa Sringer Gauri, Lord Ganesh, Lord Hanuman and visible and invisible Deities, besides the performance of daily *pooja* at that place. Paragraph No.18 of the plaint, where those pleadings are

there, has been brought to this Court's notice.

65. In Paragraph No.19 of the plaint, a reference is made to the gist of the testimony of witnesses, who deposed in Suit No.62 of 1936, it is pleaded that the Deities were in existence within the suit property much before the 15th August, 1947 and those Deities are still there.

66. Mr. Jain has emphasized that the averments in the plaint make it clear that it is the plaintiffs' case that the Deities mentioned in the suit are in existence within the suit property since much before the 15th August, 1947, and, therefore, the Act of 1991 would not bar the plaintiff-respondents' right to relief. If the Deities are there, as alleged by the plaintiffs, is a matter to be tried and proved by evidence. It cannot be summarily determined.

67. Mr. Jain submits that the plaintiff-respondents have instituted the present suit to enforce their right to *darshan* and *pooja* of the existing Deities. He has referred to the provisions of Section 4(1) of the Act of 1991 and says that what the Act prohibits is change of the religious character of the place of worship, as existing on 15th August, 1947. The submission is that there is no change to the character of the suit property as existing on 15th August, 1947. The religious character of the suit property, as prevalent on 15th August, 1947, pleaded by parties differently, is a subject matter of evidence to be led on both sides. Therefore, the Act of 1991 does not bar the suit in any manner.

68. Mr. Vishnu Shankar Jain has referred to Paragraph Nos.22, 23, 24 and 25

of the plaintiff to submit that the word 'Temple' defined in Section 4(9) of the Act of 1983, includes the suit property within the definition. The religious character of the suit property has already been declared by U.P. State Legislature while enacting the Act of 1983. There is no question of the suit being barred by the provisions of the Act of 1983. It is emphasized that under the Act of 1983, the 'Jyotirlinga' is included within the definition of 'Temple', and that it is in existence beneath the structure called 'Gyanvapi Mosque' has been recognized. What is important is that Section 4(2) of the Act of 1983 protects the right of the worshippers to worship the Deities existing within the old temple complex, part of the suit property.

69. The right to worship is an indefeasible right. The suit has been brought to enforce the right of the plaintiff-respondents to worship within the suit property as they were doing before and after 15th August, 1947. What was the precise nature and character of the building complex, part of the suit property where *darshan* and *pooja* were done before 15th August, 1947 and thereafter by Hindus, like the plaintiffs, is necessary to be determined in order to decide the question of the bar that the revisionist pleads under the Act of 1991. That is a matter of evidence, which would require the suit to be tried.

70. It is next submitted that documents filed on behalf of the revisionist along with their application dated 22.08.2022, that are photocopies of some documents, cannot be looked into. The scope of proceedings under Order VII Rule 11 of the Code does not permit the examination of any kind of documents. It is emphasized more in reiteration by Mr. Vishnu Shankar Jain that the Hindus have

been worshipping at different points of the disputed structure, part of the suit property, images of God and Goddesses. The office of the suit is limited to enforcing the plaintiffs' right to worship and *pooja* of the Deities *virajman* in visible and invisible form, who were being worshipped continuously prior to 1990 or 1993 by the Hindus in general, and, thereafter, with certain restrictions till date. The suit really is one brought to remove the restrictions imposed by the State Government upon the right to worship those Deities for the plaintiff-respondents. It is urged that the suit raises triable issues and is not barred by the Act of 1991, the Act of 1995 or the Act of 1983, so as to call for a rejection of the plaintiff under Order VII Rule 11 of the Code.

71. Mr. Saurabh Tiwari, learned Counsel has addressed the Court at length on behalf of plaintiff-respondent No.1, supporting the order impugned. He has pointed out material pleadings carrying facts, that show an ancient as well as a continuing right, entitling the plaintiffs to do *pooja-archana* of Maa Sringar Gauri and other Deities on the western wall of the old Sri Adi Vishweshwar Temple.

72. Mr. Vineet Sankalp, learned Counsel appearing for defendant No.5 and respondent No.9 here, the Board of Trustees of Kashi Vishwanath Temple, has taken a stand that the Board have no objection to a trial of the suit.

The Court's determination

73. This Court must say at the outset that one would not expect the record of submissions so elaborate in a revision arising out of an order deciding a motion under Order VII Rule 11 of the Code.

However, this Court has no option but to record a summary of what learned Counsel for the parties appearing on both sides said in the unexpectedly long schedule of hearing, that spread across a total period of 17 days, albeit not full day hearings.

74. Mr. S.F.A. Naqvi, learned Senior Advocate for the revisionist has, in substance, urged that the order of the learned District Judge ought to be reversed and the application under Order VII Rule 11 of the Code allowed, rejecting the plaint because the suit is barred under Section 9 of the Code read with the three different statutes, to wit, Act of 1991, the Act of 1983 and the Act of 1995. What the revisionist, therefore, says is that the plaint ought to be rejected under Order VII Rule 11(d) of the Code. The submission of Mr. Naqvi that the Civil Court has jurisdiction to try all suits of civil nature by virtue of Section 9, except those where the jurisdiction of the Civil Court is expressly, or by necessary implication, barred, is a proposition too well settled to brook doubt. The more pertinent question here is, if at all, one or the other statute relied upon by Mr. Naqvi to say that the suit is expressly or by necessary implication, barred, does really bar the suit?

75. Urging that the suit is barred the Act of 1991, Mr. Naqvi has drawn the attention of the Court to Sections 3, 4 and 7 of that Act and also its Statement of Objects and Reasons. It would be apposite to notice the statement of objects and reasons, the enacting clause, besides Sections 3, 4 and 7 of the Act of 1991. These read:

“STATEMENT OF OBJECTS AND REASONS

In view of the controversies arising from time to time **with regard to**

conversions of places of worship, it is felt that such conversions should be prohibited.

2. In order to foreclose any controversy in respect of any place of worship that existed on 15th day of August, 1947 it is considered necessary to provide for the maintenance of the religious character of such place of worship as it existed on the 15th day of August, 1947. As a consequence thereof, all the suits or other proceedings pending as on 11th day of July, 1991 with respect to any **of such places of worship, may abate and also further** suits or other proceedings may be barred.

3. However, since the case relating to the place commonly called Ram Janma Bhumi-Babri Masjid forms a class by itself, it has become necessary to exempt it entirely from the operation of this Act.

4. Moreover, in order to maintain communal harmony and peace, matters decided by courts, tribunals or other authorities, or those settled by parties amongst themselves or through acquiescence, between 15th day of August, 1947 and the 11th day of July, 1991 are also exempted from the operation of this Act.

5. The 11th day of July, 1991 is proposed as the commencement date of the Act as on that day the President addressed the Parliament making such a declaration.

6. The Bill seeks to achieve the above objectives.

An Act to prohibit conversion of any place of worship and to provide for the maintenance of the religious character of any place of worship as it existed on the 15th day of August, 1947, and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Forty-second Year of the Republic of India as follows:—

3. Bar of conversion of places of worship.—No person shall convert any place of worship of any religious denomination or any section thereof into a place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof.

4. Declaration as to the religious character of certain places of worship and bar of jurisdiction of courts, etc.—(1) It is hereby declared that the religious character of a place of worship existing on the 15th day of August, 1947 shall continue to be the same as it existed on that day.

(2) If, on the commencement of this Act, any suit, appeal or other proceeding with respect to the conversion of the religious character of any place of worship, existing on the 15th day of August, 1947, is pending before any court, tribunal or other authority, the same shall abate, and no suit, appeal or other proceeding with respect to any such matter shall lie on or after such commencement in any court, tribunal or other authority:

Provided that if any suit, appeal or other proceeding, instituted or filed on the ground that conversion has taken place in the religious character of any such place after the 15th day of August, 1947, is pending on the commencement of this Act, such suit, appeal or other proceeding shall not so abate and every such suit, appeal or other proceeding shall be disposed of in accordance with the provisions of sub-section (1).

(3) Nothing contained in sub-section (1) and sub-section (2) shall apply to,—

(a) any place of worship referred to in the sub-sections which is an ancient and historical monument or an archaeological site or remains covered by

the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958) or any other law for the time being in force;

(b) any suit, appeal or other proceeding, with respect to any matter referred to in sub-section (2), finally decided, settled or disposed of by a court, tribunal or other authority before the commencement of this Act;

(c) any dispute with respect to any such matter settled by the parties amongst themselves before such commencement;

(d) any conversion of any such place effected before such commencement by acquiescence;

(e) any conversion of any such place effected before such commencement which is not liable to be challenged in any court, tribunal or other authority being barred by limitation under any law for the time being in force.

7. Act to override other enactments.—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 instrument having effect by virtue of any law other than this Act.”

76. A perusal of the Statement of Objects and Reasons and Sections 3, 4 and 7 of the Act of 1991, to which elaborate reference has been made by Mr. Naqvi, shows that the statute seeks to preserve the identity of places of worship of any religious denomination or any section thereof, forbidding its conversion into a place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof. A cutoff date has been introduced, with reference to which, the existence of religious character of the place

of worship is to be preserved. That date is 15th of August, 1947. The fact in issue, therefore, that would attract the bar under the Act of 1991 is the act of conversion of an existing place of worship belonging to any religious denomination, to that of another religious denomination or any other section of the same religious denomination; and, the character that has to be preserved for any place of worship is with reference to 15th August, 1947. The first and perhaps the terminal question to be answered, while judging the plea of a statutory bar to the present suit under the Act of 1991, is to find out if the office of the suit, or so to speak, the reliefs that the plaintiffs claim, are ones directed to convert what the revisionist claims to be the Gyanvapi Mosque into a Hindu temple.

77. A perusal of the plaint, particularly the relief clause and the material averments, does not show that the existing character of the place of worship as the Gyanvapi Mosque, asserted by the revisionist, is sought to be altered. There are averments in the plaint based on historical origin of the entire structure and the subsisting remnants of all that has happened in history to show that the image of Maa Sringar Gauri exists within the suit property at the backside of the Gyanvapi Mosque in the *Ishan Kon* (north-east corner). This averment finds place in Paragraph No.9 of the plaint. There is then an averment that Lord Adi Vishweshwar is still in existence in His original shape in the western part of the old temple within the suit property. This averment finds place in Paragraph No.10 of the plaint.

78. There is an averment in Paragraph No.12(ii) of the plaint that a portion of the *mandap* of the old temple exists in the courtyard of the Gyanvapi Mosque, still in

possession of the Hindus. There is a further averment in Paragraph No.12(iv) that at the back of the western wall of Gyanvapi Mosque, there is the image of Goddess Maa Sringar Gauri, existing since time immemorial and worshipped continuously. In Paragraph No.12(v) of the plaint, it is pleaded that Hindus have continued to worship, on the western side of the Mosque, 'the Gupt', i.e. the invisible Deity. The Hindus continue to worship the shape in the dilapidated wall of the ruins to the west of the Mosque as the abode of Maa Sringar Gauri and her son, Lord Ganesha. They also pay homage to the *Panch Mandaps*.

79. In Paragraph No.25 of the plaint, it has been averred that it is undisputed that *pooja* and worship of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji, visible and invisible Deities, *mandaps* and shrines, is being performed by the devotees. There is an averment there that the Act of 1983 recognizes the right of devotees to worship the Deities within the old temple complex.

80. In Paragraph No.26 of the plaint, it is asserted that the worshippers of Lord Shiva and other subsidiary Deities have the right to perform *pooja* and *darshan* of the shrines, sub-shrines, *asthan*, images of Deities, *mandaps*, including the image/shrine of Goddess Sringar Gauri.

81. In Paragraph No.36 of the plaint, there is a clear averment that on the 4th day of *Chaitra Navratra*, Samvat 2078 of the Hindu calendar year or the Gregorian calendar date 16th April, 2021, the devotees were allowed *darshan* and *pooja* of Maa Sringar Gauri. The plaintiffs along with other devotees performed *pooja* on 16.04.2021, but thereafter the plaintiffs are

not being allowed to perform the daily *pooja*.

82. It is pleaded rather insequentially in Paragraph Nos.42 and 43 of the plaint that the devotees of Lord Shiva were performing daily *pooja* and worship of Maa Sringer Gauri and the other Deities within the old temple continuously till 1990, when during Ayodhya movement, the Government of Uttar Pradesh placed restrictions on the daily *pooja*, and since 1993, the State Administration, working under the oral orders of the State Government, are allowing the devotees to perform *pooja* only on the 4th day of the *Vasantik Navratra* in *Chaitra*. The plaintiffs perform *pooja* (worship), do *darshan* from outside and perform rituals there. They also worship within the old temple, whenever they are allowed to enter there.

83. In Paragraph Nos.27 and 44 of the plaint, it is averred that the State Government have no right, power or jurisdiction to restrict the right of devotees to worship by passing a restraint order without any authority of law and without giving reasons to impose such restrictions. Doing so completely negates the plaintiffs' right to practice of their religion guaranteed under Article 25 of the Constitution.

84. In Paragraph No.45 of the plaint, it is averred that the State Government have no right to infringe fundamental rights of citizens guaranteed under Article 25, by restricting the *pooja* and *darshan* to a single day. The officers of the Government, in putting those restrictions, are infringing the rights of citizens, which is arbitrary and void.

85. In Paragraph No.46, it is averred that the plaintiffs and devotees of Lord

Shiva have the fundamental right to uninterrupted daily *darshan*, *pooja*, *aarti*, *bhog* and the performance of rituals of Goddess Maa Sringer Gauri at the *asthan* of Lord Adi Sri Vishweshwar along with Lord Ganesha, Nandiji and other Deities within the old temple complex, existing at Settlement Plot No.9130, Ward and P.S. Dashashwamedh. All these averments have apparently been made in aid of the reliefs claimed in Clauses (a) and (b) of the relief clause.

86. The averments above referred have been made to support the plaintiffs' right to worship Maa Sringer Gauri at the *asthan* of Lord Adi Vishweshwar and the other Deities, visible and invisible.

87. In Paragraph No.47 of the plaint, there are averments to support the relief sought in Clause (c) of the plaint directed to ensure that the defendants do not demolish, damage, destroy or cause any damage to the images of Deities of Goddess Maa Sringer Gauri, Lord Ganesha, Lord Hanuman and the other Deities, visible and invisible.

88. In Paragraph No.47 of the plaint, it is averred that the plaintiffs, on 10.08.2021, have learnt that some members of the Muslim community, with the active support of the revisionist, are intending to damage/ destroy the images of Deities Maa Sringer Gauri, Lord Ganesha, Lord Hanuman *Virajman*, within the old temple with the intention to deprive the members of the Hindu community from *darshan* and *pooja* etc.

89. In Paragraph No.48 of the plaint, it is pleaded that under the undue influence exerted by the State Government and the District Administration, the Board of

Trustees of Sri Kashi Vishwanath Temple had to give 1000 square feet of land belonging to the Trust by entering into a deed of exchange with the Uttar Pradesh Sunni Central Board of Waqf.

90. Dovetailed with this averment in the plaint, it is said in Paragraph No.49 that the plaintiffs have reasons to believe that the State Government and the District Administration of Varanasi would be silent spectators and will not take any action if the revisionist, their members and followers cause damage to the images of the Deities within the precincts of the old temple.

91. It appears that on 16th of April, 2021, the plaintiffs had *darshan* and did *pooja* of Maa Sringar Gauri, but on the following day i.e. the 17th April, 2021, they were prevented from doing so by defendant-respondents Nos.6, 7 and 8 to the suit, as pleaded to in the plaint, and particularly, Paragraph No.50 thereof.

The Nature and Scope of the plaintiffs' right, the nature of the suit and the restrictions placed on the plaintiffs' right by the State, impugned in the Suit

92. Upon a reading of the plaint, it is evident that the plaintiffs have not brought the suit as a class action, seeking to represent as relators, the right of Hindus in general, or a particular class, who are the devotees of Lord Shiva, Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, to do *pooja* or *darshan* of the Deities in the suit property. The plaintiffs have asserted that there has been such a right since time immemorial, amongst the devotees of Lord Shiva, Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, which has been exercised

in one form or the other. What the plaintiffs seek to exercise is their individual right to worship Lord Shiva, Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji, visible and invisible Deities, tracing their right to their religious beliefs and supporting it by averments regarding the tradition amongst Hindus to worship these Deities. The plaintiffs have elaborately averred about the basis of their religious belief founded on Hindu scriptures, but that is to show that their belief is well-grounded in religious text. Beyond that, the right pleaded by the plaintiffs is their personal right to worship the named Deities *in situ*, i.e. the suit property. There is no pleading, apart from narration of historical events concerning the suit property, which may show *in presenti* any cause of action or relief to convert the existing Gyanvapi Mosque into a temple or any other place of worship of the Hindus, within the mischief of Sections 3, 4 and 7 of the Act of 1991.

93. A reading of the plaint shows that according to the plaintiffs, there is a right with them as Hindus to perform *pooja* of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, Nandiji and other visible and invisible Deities, though on account of events that have taken place over time, the exercise of that right now has come to be restricted. In the present time, one right that the plaintiffs are free to exercise on a daily basis is the performance of *pooja* of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, with rituals and doing circumambulation (*parikrama*) of Lord Adi Vishweshwar. This right is exercised in relation to the image of the Deities that exists at the backside of the Gyanvapi Mosque in the *Ishan Kon* (north-east corner). This right the plaintiffs say they can exercise any time and is being continuously exercised by other devotees

without restriction. Apparently, this right to do *pooja* through rituals and circumambulation (*parikrama*) is from outside the suit property and not by entering it. The other right, that is averred to be exercised *in presenti* by the plaintiffs, is to do *pooja* of Goddess Maa Sringer Gauri, Lord Ganesha, Lord Hanuman, Nandiji, and other visible and invisible Deities by entering the suit property, which is now restricted to the 4th day of *Vasantik Navratra* in *Chaitra*, that fell in the year 2021 on the 16th of April. This right, prior to 1993, was being exercised on a daily basis by other Hindus, besides the plaintiffs. It came to be restricted on a temporal basis to a single day, instead of a everyday right, to wit, the 4th day of the *Vasantik Navratra* in *Chaitra* in the year 1993 for the devotees in general under oral instructions of the State Government, by the District Administration, represented by defendant-respondents Nos.6, 7 and 8.

94. The plaintiffs question the right of the State Government to restrict this right to a single day, as it violates their rights guaranteed under Article 25 of the Constitution. These averments are eloquent in Paragraph Nos.42, 43, 44, 45 and 46. It appears from the averments in the plaint, particularly those in Paragraph No.43, that the right to worship these Deities by the devotees was exercised on a daily basis by entering the suit property up to the year 1990 and came to be restricted by the Government under some kind of an administrative instruction since the year 1993. There was much ado during the hearing made on behalf of the revisionist about the mention of the two years when this right is said to have been restricted, i.e. 1990 and 1993.

95. Mr. Naqvi emphasized that the pleadings are not clear when the right was

actually restricted from a daily exercise to a single day. A wholesome and meaningful reading of the paragraph, together with other averments in the plaint, shows that the restriction placed on the right of devotees to do *pooja* of the Deities was an administrative or a law and order measure, taken in the aftermath of the Ayodhya movement. Apparently, such decisions do not come about in the form of a legislative edict or a judicial order enforced from a particular day. These come about as measures, more of arrangement, to order about a particular situation and to preserve law and order. These come with their own hiccups. *Prima facie*, therefore, there is nothing to condemn the plaintiffs' pleadings as vague on this account. If they say that the right was exercised continuously till 1990 and then restricted to a single day in the year 1993, in between, there would be exploration of measures by the Government and the Administration to preserve law and order.

96. The plaintiffs, therefore, assert the existence of a right on a daily basis to do *pooja* and *darshan* of the Deities, that was exercised by Hindus in general, without hitch until the year 1990. It came to be restricted for the sake of administrative exigency to a single day in the year 1993. The right the plaintiffs plead has never been effaced as devotees of the Deities of Maa Sringer Gauri, Lord Ganesha, Lord Hanuman. The plaintiffs say that they are entitled not to be restricted in their right to do *pooja* and *darshan* of the Deities at any time during the year. It is apparent from the case of parties that the right of the plaintiffs to do *pooja* and *darshan* of the Deities after entering the suit property and proceeding to the situs of the Deities was never questioned by the revisionist. That is not the plaintiffs' case either. The right was

restricted to a single day in the year 1993 from a daily event by the State Government and the District Administration, bearing in mind the exigencies of law and order prevalent at the time. When the restriction came, the plaintiffs say it was over a stretch of time between 1990 and 1993 during the Ayodhya movement. The substance of the right that the plaintiffs assert is that their right to worship is intact and not impugned by the revisionist at any point of time. Now, the plaintiffs, who are also devotees of Goddess Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, are entitled to prove their right to worship, unfettered by the temporal restriction to a single day, because the exigencies that brought about the restriction have since long disappeared.

97. The State Government and defendant-respondents Nos.6, 7 and 8, who represent the District Administration of Varanasi, took no stand in the matter before this Court. But, that hardly matters. After all, this revision is about the suit being triable or not on the basis of averments in the plaint and nothing more. All that the defendants can show is that the suit is not triable according to the averments in the plaint. The law in this regard is well settled, as held by the Supreme Court in **P.V. Guru Raj Reddy represented by GPA Laxmi Narayan Reddy and another v. P. Neeradha Reddy and others**²⁷. In **P.V. Guru Raj Reddy (supra)**, it has been observed:

“5. Rejection of the plaint under Order 7 Rule 11 of CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order 7 Rule 11, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint

that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order 7 Rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint *ex facie* do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial.”

98. A similar view has been expressed by their Lordships in **H.S. Deekshit and another v. M/s. Metropoli Overseas Limited and others**²⁸.

The Act of 1991

99. The question that the revisionist raised to say that the suit is barred and now under consideration, is founded on the Act of 1991. No doubt, that statute places an express bar on the right to convert a place of worship of one religious denomination to that of another, which is to be preserved for every place of worship as existing on the 15th day of August, 1947. Here, apparently, according to the averments in the plaint, there is no case or relief seeking to convert the Gyanvapi Mosque, which the revisionist represent, as already said, into a Hindu temple or other place of worship. The suit is confined in its office to enforcement of the plaintiffs' right to worship, according to the established tradition. How far that right can be established, is relevant for the purpose of present suit and that must await trial.

100. It has to be clearly borne in mind that the right to worship the Deities of

Goddess Maa Sringer Gauri, Lord Ganesha, Lord Hanuman, that the plaintiffs seek to enforce, upon the allegations in the plaint and the material placed before the Court by parties, short of evidence or defence, is neither a new right that the plaintiffs seek to establish nor is it a right that was never exercised after 15th August, 1947 by devotees like the plaintiffs. It is nobody's case that the devotees of Maa Sringer Gauri, Lord Ganesha, Lord Hanuman and the other Deities in the suit property exercised this right at some point of time, which became extinct on or before 15th August, 1947. The right continued to be exercised by the devotees, as claimed, all through the year up to the year 1990 without hitch. It is this right that the plaintiffs seek to enforce.

101. As earlier remarked, the exercise of that right appears to have run a troubled course between the years 1990 and 1993, till it was restricted to a single day, that is to say, 4th day of the *Vasantik Navratra* in *Chaitra*. Further, as already said, this temporal restriction came in as a matter of administrative exigency then emergent for the Government and the District Administration. The right was not restricted to a single day upon an objection or resistance by the revisionist. The right of the devotees of Maa Sringer Gauri, Lord Ganesha, Lord Hanuman and the other Deities in the suit property, according to the pleadings in the plaint, is an existing right, which the plaintiffs, as such devotees, seek to enforce throughout the year for themselves. It is quite another matter whether the plaintiffs establish this right at the trial or fail, which is beyond the scope of the present proceedings.

102. The fact that they have a right to do *darshan* and *pooja* of Goddess Maa

Sringer Gauri, Lord Ganesha, Lord Hanuman and the other Deities in the suit property throughout the year is what devotees like the plaintiffs were doing, as already remarked, up to the year 1990 and are now doing on a single day of the year. This Court fails to see that if the plaintiffs or devotees like them can do *pooja* and *darshan* of the Deities on a single day in the year with no threat to the mosque's character, how the making of it a daily or a weekly affair, would lead to a conversion or change of the mosque's character. It may require some arrangements to be made by the local administration, and may be, also by the Government by way of some regulation, but that is not the concern of the law.

103. The other facet of the matter, of course, is, and one already noticed, that the right being exercised all through the year beyond 15th August, 1947 and as late as in the year 1993, the enforcement of the right that the plaintiffs seek throughout the year does not attract the mischief of Sections 3 and 4 of the Act of 1991. Likewise, the mere asking to enforce a right to worship Maa Sringer Gauri, Lord Ganesha, Lord Hanuman and the other Deities, located in the suit property at their specified place, is not an act that changes the character of the Gyanvapi Mosque into a temple. It is no more than the seeking of a full enforcement of a subsisting right that inheres in the plaintiffs and since long exercised by other devotees like them until a time much after 15th August, 1947. This, at least, is the plaint case which does not, in the least measure, attract the bar under Sections 3 and 4 of the Act of 1991.

104. The declaration that has been sought about the plaintiffs' right appears to be a relief sought *ex abundanti cautela*. As already noticed, the plaintiffs say that

devotees like them have exercised the right much after 15th August, 1947 on a daily basis uninterrupted, until the year 1990, then with some trouble between the years 1990 and 1993, and thereafter as an annual feature. This Court would think that the declaration may not at all be necessary. After all, the relief is only about the frequency of the exercise of the right, rather than the exercise of the right itself.

105. The other relief that the plaintiffs seek is to prevent an apprehended demolition of the Deities existing in the north-east corner of the Gyanvapi. After all, it is the images of the Deities of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, that are the object of the devotees' worship, including the plaintiffs. The relief that the plaintiffs seek is based on the apprehension of a serious injury. The injunction, that has been claimed in this part of the relief, is a *quia timet* injunction, which has to be proved according to its own standards. The existence of the images of the Deities that the injunction under this part of the relief seeks to preserve and prevent desecration of, is to preserve a position about the existence of the Deities, on the plaintiff allegations that are there on and after 15th August, 1947 until date. It is not by altering the existing position of the Deities that the plaintiffs seek to enforce their right to worship. Therefore, this part of the relief would also not fall in the teeth of the bar envisaged under Sections 3 and 4 of the Act of 1991.

106. So far as Relief (d) is concerned, that is a relief ancillary to the other reliefs and relates to issue of directions to the Government and the Administration to make security arrangements to enable the plaintiffs to exercise their right to worship the Deities daily within the suit property. If

the other reliefs, as already said, are not *ex facie* barred by the provisions of Sections 3 and 4 of the Act of 1991, the provision in clause (d) of Rule 11 of Order VII of the Code would hardly be attracted to make out a case of non-triability.

107. It must be noticed here that a very important limb of the submissions of Mr. Naqvi, that was canvassed before this Court very emphatically, is that the plaint is a piece of clever drafting. What Mr. Naqvi has urged is that couched in the garb of the enforcement of their right to worship the Deities, the plaintiffs, in substance, seek an alteration of the character of the Mosque into a temple. The idea, about pleadings being a piece of 'clever drafting' to escape an express or implied bar to the maintainability of an action before the Court, gained currency in this country with the employment of that expression by V.R. Krishna Iyer, J. in **T. Arivandandam v. T.V. Satyapal and another**²⁹, a cause celebre relating to discouraging trials of frivolous actions. In **T. Arivandandam** (*supra*), His Lordship observed:

“5. We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentently resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful — not formal — reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And,

if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Cr. XI) and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi:

“It is dangerous to be too good.”
(emphasis by Court)

108. Not surprisingly, Mr. Naqvi relied on the said decision in aid of his submission that the plaint here was a piece of clever drafting. This Court is afraid that the plaint giving rise to the suit here is far from a piece of clever drafting. The point has been elucidated much in detail already and need not be repeated. For all that is said in this regard, it only need be mentioned that there is no clever drafting, because what the plaintiffs seek to enforce is a subsisting right of worship which they have been exercising after 15th August, 1947. It is not that that the plaintiffs, in any manner, wish to bring about any change to the suit property or alter its character, in whatever manner existing.

109. The learned District Judge has, more or less for the same reasons, held that the suit is not barred by the Act of 1991 and this Court, for all that has been said, does not find any ground to interfere with that conclusion.

Limitation: a plea by surprise

110. Although the point of the suit being ex facie barred by limitation, was not a plea that was urged before the District Judge or decided by him, it was sprung up by Mr. Naqvi in the rejoinder of his submissions before this Court. A plea of limitation does not find place in the application under Order VII Rule 11 of the Code, nor a ground to that effect is raised before this Court in the memorandum of revision. In the opening of his case also, Mr. Naqvi did not argue that point. But, at the fag end in the rejoinder, he said that the right of the plaintiffs is barred by limitation, because they are seeking a declaration, 28 years after the cause of action first accrued. He referred to the provisions of Article 58 occurring in Part III of the Schedule to the Limitation Act, 1963 to submit that the right ought to have been enforced within three years by the Hindus after the year 1990 or 1993. Now, it was a most exceptionable way to raise a plea of limitation in a motion under Order VII Rule 11 of the Code, where it was never raised earlier. Nevertheless, this Court heard Mr. Naqvi in support of the contention and Mr. Jain in answer.

111. Mr. Jain submits that the suit would not be barred by limitation, because the right to worship, which the plaintiffs assert, gives rise to a continuous or a recurring cause of action, to which Mr. Naqvi has responded by saying that Article 58 of the Schedule to the Act of 1963 mentions in the third column the time period from which the limitation would run as the point when the right to sue first accrues. He, therefore, submits that the right first accrued to the Hindus in the year 1990 or 1993. According to him, this position being evident on a bare reading of the plaint, the suit, which is one for

declaration, must be held barred by limitation.

112. To the understanding of this Court, the objection raised on the ground of limitation cannot be accepted. The reasons are more than one. For a first, it is flawed premise to assume that what the plaintiffs seek to enforce is a religious community right of the Hindus. It has been remarked earlier that the suit is no class action. What the plaintiffs seek to enforce is their individual right to worship the Deities. It is not the case of the revisionist that any class action for the same right was earlier brought under Order I Rule 8 of the Code on behalf of the Hindus and reached some kind of an unsuccessful terminus, so as to bind these plaintiffs in any way. The right to worship for a member of a particular religious community or denomination is his/ her individual right. It is both a civil right and a fundamental right. If not covered by an earlier class action on behalf of the community, there is no principle by which a class or community's inaction would cause the running of limitation under Section 9 of the Act of 1963 continuously against an individual member of that class or community, if he/ she possesses that right in his/ her individual capacity, albeit as a member of that class or community.

113. To the understanding of this Court, inaction on the part of one or more members of a class or community, all possessing the same but individual right to enforce it would not bar by limitation, an action brought by an individual member of that class on an emergent cause of action. Therefore, in the opinion of this Court, if in the year 1990 or 1993, other members of the Hindu community, who possess a like right to worship the Deities, have not brought an action to restore the right to

worship all through the year and have been content with a day of worship in the entire year, that is to say, on the 4th day of the *Vasantik Navratra* in *Chaitra*, this Court fails to see how the plaintiffs, who seek to enforce a daily right to worship, because they were prevented on the day following the 4th day of the *Vasantik Navratra* in *Chaitra* of the calendar year 2021, would face the bar of limitation. No principle or authority has been brought to the notice of this Court on the point, which may dispel or affirm the view that this Court takes.

114. The principle, that the right to worship is an individual right possessed by the members of a class or group by virtue of being such members that can be enforced through individual action and without the necessity of bringing a class action, has long come to be settled. One of the earliest authorities on the point is a Full Bench decision of our Court in **Jawahra and others v. Akbar Husain**, ILR31. The point which fell for consideration before their Lordships of the Full Bench of this Court in **Jawahra** (*supra*) was whether a Muslim had an individual right to worship in a mosque as distinguished from one enjoyed in common with all or other members of the community and also an individual *locus standi* to maintain an action concerning the right to worship in the mosque for the purpose of obtaining appropriate relief to realize that right. The question, as aforesaid, had arisen in the context of the Code of Civil Procedure, 1877, that was in force at the time. In the Code of 1877, there was Section 30, which was about class action. It granted one party the right to sue or defend on behalf of a number of others, if all of them had the same interest to prosecute or defend. This provision is *pari materia* to Order I Rule 8 of the Code. Likewise, the question also

arose in the legal foreshadow of Section 539 of the Code of 1877, that is *pari materia* to the contemporary provisions of Section 92 of the Code. Therefore, what fell for consideration before their Lordships was whether the right to worship, after all, was an individual right, individually enforceable or one that could be enforced through class action alone; and, a joint right. In **Jawahra**, Petheram, C.J. held:

“Now, the Muhammadans are only a part of the population of this country, so that the right is not vested in the general public, and therefore it resembles a right in a private way. Everyone who has such a right is entitled to exercise it without hindrance, and has a right of action against any one who interferes with its exercise. It is not a joint right; it is a right which belongs to many people. S. 30 was meant, to apply to a case in which many persons are jointly interested in obtaining relief; and where, under the old law, it would have been necessary for all of such persons to be joined, s. 30 prevents the record from being unnecessarily encumbered by many names, and allows one or more, with the permission of the Court, to sue or defend on behalf of all. The rule was introduced in order to prevent rich persons from joining together and putting forward a pauper to conduct the suit, and thus escaping all costs. In the present case it is clear that an individual right has been violated, and that an action will therefore lie.”

(emphasis by Court)

115. In **Jawahra**, in his concurring opinion, Mahmood, J. held:

“The right of a Muhammadan to use a mosque is, as the learned Chief Justice has said, like the right to use a private road; any one who has the right

may maintain a suit in respect of it. This settles the question as to s. 30 of the Civil Procedure Code. That section applies only to cases where no individual right is interfered with; but here we have the case of a mosque in a small village, and one of the worshippers in that mosque is obstructed in his use of it for purposes of devotion. He had a private right, and it was violated.”

(emphasis by Court)

116. The principle, that is laid down in **Jawahra**, would apply to an individual worshipper of any religion, where the right to worship and the enforcement of that right both have to be regarded as individual to the devotee or the worshipper. It is not like a joint right, which exists in common with others alone, survives jointly and can have no individual existence.

117. The consequences that would follow from a right being an individual right, though enjoyed in common with others as distinguished from a joint right, was acknowledged on the authority of **Jawahra** by a Division Bench of the Calcutta High Court in **Baiju Lal Parbatia and others v. Bulak Lal Pathuk**³³. The authority is not about the right of worship as such being an individual right, but one that acknowledges the distinction between an individual right shared with others and a joint right not individually held. Later on, a Division Bench of this Court in **Ram Chandra and others v. Ali Muhammad and others**³⁴ followed **Jawahra** to hold:

“But it seems to us that on the authorities we are bound to hold that the plaintiffs are entitled to maintain the suit. In the case of *Jawahra v. Akbar Husain*, it was held by a Full Bench of five Judges that every Muhammadan who has a right to use

a mosque for purposes of devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against anyone who interferes with its exercise, irrespective of the provisions of sections 30 and 539 of the Code of Civil Procedure, 1882. In the present case the defendants interfered with the rights of the plaintiffs and attempted to turn them out of the mosque. We are bound to follow the decision of the Full Bench, which has been followed in other cases and we must, therefore, hold that the plaintiffs are entitled to maintain this suit.”

118. Most of the decisions were rendered in regard to the right of Muslim worshippers to pray in mosques and for matters connected therewith as individual rights, in the context of the issue whether the said right was a joint right that could not be enforced on the individual's suit, but by a class action. It was consistently held to be not a joint right, but a right in common, individually held, enforceable through individual action. Now in contemporary times, where the right to worship is not only a civil right, but also a fundamental right, its character as an individual right can hardly be doubted; nor has it been doubted. It is for the said reason perhaps that there is not much modern authority to offer guidance on the point if the right to worship is an individual right. It certainly is. And, it is an individual right for the plaintiffs here as well, who are Hindus and devotees of the Deities pleaded to be there in the suit property.

119. If the right that the plaintiffs enjoy individually, say was denied to them on the day following the 4th day of the *Vasantik Navratra* in *Chaitra* of the calendar year 2021, it is difficult to see how by imputing to their right the character of

one enjoyed in common with other Hindu devotees, the plaintiffs' cause can be held barred by the inaction of others in the past. The cause of action for the plaintiffs indeed arose on the day following the 4th day of the *Vasantik Navratra* in *Chaitra* of the year 2021 i.e. 17.04.2021.

120. The other facet of the matter, which leads this Court to think that the bar of limitation would not at all apply, is that it is common ground between parties that prior to the year 1990 or the year 1993, the *pooja*, *darshan* of Maa Sringar Gauri, Lord Ganesha, Lord Hanuman and the other Deities in the suit property was a daily affair. The restriction of that right to a single day, in the opinion of this Court, is a continuing wrong within the meaning of Section 22 of the Act of 1963. The right to worship the Deities is not comparable to a right to office or property, wherefrom a person, once ousted, suffers a completed wrong at that point of time, and later on, the continuing effects of the injury. The denial of the right to worship the object of it, that is the Deity, is a continuing wrong, that happens everyday and every minute it is denied. Here, what is important is that the State Government and the District Administration have restricted the right to worship to a single day in the year 1990 or 1993 for Hindu worshippers in general, owing to the administrative exigencies then prevalent, but have not denied the existence of the object of worship in the suit property. To emphasize, as already remarked, the revisionist also do not deny that earlier Hindu devotees worshipped on a daily basis and have now been restricted to a single day after the year 1993 under an administrative arrangement of some kind. There is, therefore, without doubt the basis to say for any devotee, including the plaintiffs that denial of the right to worship

the Deities is a continuing wrong that accrues everyday. Any person from amongst the Hindu devotees, who is, therefore, denied the right on any day, would be within his right to commence action the day he/ she is prevented from worshipping the Deities.

121. The distinction between what would constitute a continuing wrong within the meaning of Section 22 of the Act of 1963 and what would be a concluded and completed wrong with a lingering effect of the injury, fell for consideration of the Constitution Bench in **M. Siddiq** (*supra*). In **M. Siddiq** what constitutes a continuing wrong and what does not, was elucidated thus:

“342. A continuing wrong, as this Court held in Balakrishna Savalram [*Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan*, 1959 Supp (2) SCR 476 : AIR 1959 SC 798] is an act which creates a continuing source of injury. This makes the doer of the act liable for the continuance of the injury. However, where a wrongful act amounts to an ouster, as in the present case, the resulting injury is complete on the date of the ouster itself. A wrong or default as a result of which the injury is complete is not a continuing wrong or default even though its effect continues to be felt despite its completion.

343. The submission of Nirmohi Akhara is based on the principle of continuing wrong as a defence to a plea of limitation. In assessing the submission, a distinction must be made between the source of a legal injury and the effect of the injury. The source of a legal injury is founded in a breach of an obligation. A continuing wrong arises where there is an obligation imposed by law, agreement or

otherwise to continue to act or to desist from acting in a particular manner. The breach of such an obligation extends beyond a single completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a continuing wrong. For a continuing wrong to arise, there must in the first place be a wrong which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise. Without a wrong there cannot be a continuing wrong. A wrong postulates a breach of an obligation imposed on an individual, where positive or negative, to act or desist from acting in a particular manner. The obligation on one individual finds a corresponding reflection of a right which inheres in another. A continuing wrong postulates a breach of a continuing duty or a breach of an obligation which is of a continuing nature. This indeed was the basis on which the three-Judge Bench in *Maya Rani Punj* [*Maya Rani Punj v. CIT*, (1986) 1 SCC 445 : 1986 SCC (Tax) 220] approved the statement in a decision [*G.D. Bhattar v. State*, 1957 SCC OnLine Cal 200 : AIR 1957 Cal 483 : (1956-57) 61 CWN 660 : 1957 Cri LJ 834] of the Calcutta High Court in the following terms : (*Maya Rani Punj case* [*Maya Rani Punj v. CIT*, (1986) 1 SCC 445 : 1986 SCC (Tax) 220], SCC p. 458, para 20)

“20. ... In *G.D. Bhattar v. State* [*G.D. Bhattar v. State*, 1957 SCC OnLine Cal 200 : AIR 1957 Cal 483 : (1956-57) 61 CWN 660 : 1957 Cri LJ 834] it was pointed out that a continuing offence or a continuing wrong is after all a continuing breach of the duty which itself is continuing. If a duty continues from day to day, the non-performance of that duty from day to day is a continuing wrong.”

Hence, in evaluating whether there is a continuing wrong within the meaning of Section 23, the mere fact that the effect of the injury caused has continued, is not sufficient to constitute it as a continuing wrong. For instance, when the wrong is complete as a result of the act or omission which is complained of, no continuing wrong arises even though the effect or damage that is sustained may enure in the future. What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation.”

122. How the above principle would apply may be best understood by the holding of their Lordships in **M. Siddiq** while rejecting the Nirmohi Akhara's defence to the plea of limitation, invoking the principle of continuing wrong in the following words:

“344. In the present case, there are several difficulties in accepting the submission of Nirmohi Akhara that there was a continuing wrong. First and foremost, the purpose and object of the order of the Magistrate under Section 145 CrPC is to prevent a breach of peace by securing possession, as the Magistrate finds, on the date of the order. The Magistrate does not adjudicate upon rights nor does the proceeding culminate into a decision on a question of title. The order of the Magistrate is subordinate to the decree or order of a civil court. Hence, to postulate that the order of the Magistrate would give rise to a wrong and consequently to a continuing wrong is inherently fallacious. Secondly, would the surreptitious installation of the idols on the night between 22-12-1949 and 23-12-1949 create

a right in favour of Nirmohi Akhara? Nirmohi Akhara denies the incident completely. The right which Nirmohi Akhara has to assert cannot be founded on such basis and if there is no right, there can be no corresponding wrong which can furnish the foundation of a continuing wrong. There was no right inhering in Nirmohi Akhara which was disturbed by the order of the Magistrate. The claim of Nirmohi Akhara was in the capacity of a shebait to secure management and charge of the inner courtyard. Nirmohi Akhara has itself pleaded that the cause of action for the suit arose on 5-1-1950. Proceeding on the basis of this assertion, it is evident that the ouster which the Akhara asserts from its role as a shebait had taken place and hence, there was no question of the principle of continuing wrong being attracted.”

123. It would be noticed that in **M. Siddiq**, the right that was claimed by the Nirmohi Akhara, was that of a shebait, which is a right to the management of a temple or a right to office. There was admittedly an ouster from that office for the Nirmohi Akhara, which was a concluded wrong when the ouster took place. The plea of continuing wrong was, therefore, discarded by their Lordships.

124. The decision in **Balakrishna Savalram Pujari Waghmare and others v. Shree Dhyaneshwar Maharaj Sansthan and others**³⁵ was approved by the Constitution Bench in **M. Siddiq**. In **Balakrishna Savalram Pujari Waghmare** (*supra*), the following observations, expositing the principle in **Hukum Chand v. Maharaj Bahadur Singh**³⁶, a Privy Council decision about what constitutes a continuing wrong in the context of the right to worship, are of particular relevance:

“33. Similarly, in *Hukum Chand v. Maharaj Bahadur Singh*, 60 Ind App 313: (AIR 1933 PC 193), the Privy Council was dealing with a case where the defendants' act clearly amounted to a continuing wrong and helped the plaintiff in getting the benefit of S. 23. The relevant dispute in that case arose because alterations had been made by the Swetambaris in the character of the charans in certain shrines and the Digambaris complained that the said alterations amounted to an interference with their rights. It had been found by the courts in India that the charans in the old shrines were the impressions of the footprints of the saints each bearing a lotus mark. "The Swetambaris who preferred to worship the feet themselves have evolved another form of charan not very easy to describe accurately in the absence of models or photographs which shows toe nails and must be taken to be a representation of part of the foot. This the Digambaris refused to worship as being a representation of a detached part of the human body". The courts had also held that the action of the Swetambaris in placing the charans of the said description in three of the shrines was a wrong which the Digambaris were entitled to complain. The question which the Privy Council, had to consider was whether the action of the Swetambaris in placing the said charans in three of the shrines was a continuing wrong or not; and in answering this question in favour of the plaintiffs the Privy Council referred to its earlier decision in the case of Maharani Rajroop Koer (*supra*) and held that the action in question was a continuing wrong. There is no doubt that the impugned action did not amount to ouster or complete dispossession of the plaintiffs. It was action which was of the character of a continuing wrong and as such it gave rise to a cause of action de die in diem. In our opinion,

neither of these two decisions can be of any assistance to the appellants.”
(emphasis by Court)

125. In view of the aforesaid position of the law propounded on very high authority about what constitutes a continuing wrong, and particularly, in the context of the right to worship, poses no difficulty in this case to infer that the Hindu worshippers of the Deities Maa Sringar Gauri, Lord Ganesha, Lord Hanuman, which includes the plaintiffs, are sufferers of a continuing wrong in their individual right to worship the Deities. Therefore, there is no substance in the plea that the suit on the cause of action disclosed in the plaint is *ex facie* barred by limitation, by virtue of Article 58 of the Schedule to the Act of 1963.

The Act of 1983

126. So far as the case of the revisionist that Section 4(9) of the Act of 1983 bars the suit, this Court does not see how the said provision or the statute read as a whole would bar the present suit, that is one for the enforcement of the plaintiffs' right to worship. Section 4(9) of the Act of 1983 read:

“4. **Definitions.**— In this Act, unless the context otherwise requires,—

(9) “Temple” means the Temple of Adi Vishweshwar, popularly known as Sri Kashi Vishwanath Temple, situated in the City of Varanasi which is used as a place of public religious worship, and dedicated to or for the benefit of or used as of right by the Hindus, as a place of public religious worship of the Jyotirlinga and includes all subordinate temples, shrines, subshrines and the ashthan of all other images and deities, *mandaps*, wells, tanks

and other necessary structures and land appurtenant thereto and addition which may be made thereto after the appointed date;”

127. It is urged on behalf of the revisionist that the purpose of enactment of the Act of 1983 is to provide for the proper and better administration of the Sri Kashi Vishwanath Temple, Varanasi and nothing beyond it. It is also contended that the statute aforesaid has not been enacted to misappropriate any property, which does not belong to Sri Kashi Vishwanath Temple. The contention that the Board of Trustees of Sri Kashi Vishwanath were privy to a decision, that led the U.P. Sunni Central Board of Waqf to exchange some land with the State for the establishment of a Police Control Room, would show that the Temple Trustees acknowledge the suit property as waqf property, is absolutely irrelevant here. Neither Section 4(9) of the Act of 1983 nor the transaction relating to exchange of land between the Waqf Board and the State of U.P. have any relevance to the present suit, which is about the plaintiffs' right to worship the Deities situate in the suit property. The plaintiffs neither claim title to the suit property nor possession of it. They are not the Board of Trustees of Sri Kashi Vishwanath Temple engaged in some kind of a boundary dispute with the revisionist or a title dispute with the Waqf Board. In fact, this Court utterly fails to see how the Act of 1983 would have any bearing on the plaintiffs' right to worship the Deities located in the suit property.

The Act of 1995

128. The substance of the revisionist's case to urge a bar to the trial of the suit resting on the Act of 1995 is one with

reference to Section 85 of the said statute. Section 85 of the Act of 1995 envisages a bar to the jurisdiction of the Civil Court, that is cast in the following terms:

“85. Bar of jurisdiction of civil courts.—No suit or other legal proceeding shall lie in any civil court, revenue court and any other authority in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under this Act to be determined by a Tribunal.”

129. The crux of the matter is that whereas there can be little doubt to a bar of the Civil Court's jurisdiction, or for that matter, of the Revenue Court and any other authority in respect of any dispute, question or other matter relating to any waqf or waqf property, to borrow the phraseology of the statute, the clause that controls the entire section is the phrase, 'which is required by or under this Act to be determined by a Tribunal'. Whereas in the earlier part of the section, almost anything and everything related to a waqf property has been brought within the ambit of the rule of ouster, yet the determinative factor is that it should be a matter required by or under the Act of 1995 to be decided by a Tribunal. The sequitur is that for the bar under Section 85 of the Act of 1995 to operate and oust the Civil Court's jurisdiction, there should be one or the other provision in the Act of 1995 that requires the matter by its terms to be decided by the Tribunal. The reference to the Tribunal in Section 85 is, of course, to the Waqf Tribunal, as defined under Section 3(q) of the Act, which in turn would bear reference to Section 83(1).

130. The plaintiffs seek a right to worship the Deities that Hindu devotees like the plaintiffs have since long been

132. It goes without saying that all that has been said here is limited to the purpose of a decision of the revisionist's

(2023) 7 ILRA 752
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.07.2023

BEFORE

Yash Kumar Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Ashish Kumar Rastogi, Anurag Shukla

Criminal Writ maintainability-sanction for prosecution challenged- charge-sheet not filed before the trial court nor cognizance taken.-No summons issued-prosecution to be given a chance to first lead evidence -that all relevant material including material which may favour the accused was laid before the sanctioning authority-to Appreciate such evidence- the trial court is competent-Writ not maintainable.

W.P. dismissed. (E-9)

List of Cases cited:

1. Dinesh Kumar Vs Chairman, Airport Authority of India & anr. reported in (2012) 1 SCC 532

2. C.B.I. Vs Ashok Kumar Agarwal reported in (2014) 14 SCC 295

3. C.B.I. & ors. Vs Pramila Virendra Kumar Agarwal & anr. reported in (2020) 17 SCC 664;

4. Sukh Lal Yadav Vs St. of U.P. & ors. reported in 2021 Law Suit (All.) 287

5. St. of Pun. Vs Central Bureau of Investigation reported in (2011) 9 SCC 182

6. Mumbai International Airport Pvt. Ltd. Vs Regency Convention Centre & Hotels Pvt. Ltd. & ors. reported in (2013) 3 CPR (SC) 647

7. St. of West Bengal Vs Committee of Protection of Democratic Rights reported in (2010) 3 SCC 571

8. C.B.I. Vs Ashok Kumar Agarwal, 2014 (14) SCC 295

9. C.B.I. & ors. Vs Promila Virender Kumar Agarwal Vs & anr., 2020 (17) SCC 664

10. Sukhlal Yadav Vs St. of U.P. & ors. reported in 2021 Lawsuit (Allid) 287

11. Gokul Chand Dwarkadas Murarka Vs the King 1948 AIR (PC) 82

12. Madan Mohan Vs St. of UP, AIR 1954 Supreme Court 637

13. Somnath Vs U.O.I. 1971 (2) SCC 387

14. Mumbai International Airport Pvt. Ltd. Vs Regency Convention Centre and Hotels Pvt. Ltd. 2013 3 CPR (SC) 647.

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.

&

Hon'ble Narendra Kumar Johari, J.)

(1) Heard the learned counsel for the petitioner and the learned A.G.A. Shri Shiv Nath Tilhari, who appears on behalf of the State-respondents.

(2) This petition challenges the order dated 15.02.2023 passed by the Special Secretary, Government of Uttar Pradesh, Backward Class Welfare Anubhag-1 and also prayed for a mandamus to be issued commanding the respondents not to take any coercive action against the petitioner in pursuance of impugned order.

(3) It has been submitted by the learned counsel for the petitioner that the Sanction order has been issued without application of mind as relevant material was not placed before the Sanctioning Authority.

(4) Learned A.G.A. has raised a preliminary objection regarding maintainability of the writ petition challenging the sanction of prosecution under Article 227 of the Constitution of India. He has placed reliance upon a judgment rendered by the Hon'ble Supreme Court in the case of **Dinesh Kumar Vs. Chairman, Airport Authority of India and Another reported in (2012) 1 SCC 532**; judgment rendered by the Supreme Court in the case of **C.B.I. Vs. Ashok Kumar Agarwal reported in (2014) 14 SCC 295**; judgment rendered in the case of **C.B.I. and Others Vs. Pramila Virendra Kumar Agarwal and Another reported in (2020) 17 SCC 664**; and a judgment of this Court in the case of **Sukh Lal Yadav Vs. State of U.P. and Others reported in 2021 Law Suit (All.) 287**, to say that there is a difference between absence of sanction which can be challenged at the initial stage even before cognizance is taken and invalidity of sanction on various grounds as argued by the learned counsel for the petitioner which can be seen only during the course of Trial by the learned Trial Court after cognizance is taken by it.

(5) Learned counsel for the petitioner, on the other hand, has placed reliance upon a judgment rendered by the Hon'ble Supreme Court in the case of *State of Punjab Vs. Central Bureau of Investigation reported in (2011) 9 SCC 182* and Paragraph-32 thereof, to argue that no Act of Parliament can exclude or curtail the powers of the High Court under Article 226 of the Constitution, has cautioned that the extra-ordinary powers of the High Court under Article 226 of the Constitution must be exercised by the Court for the furtherance of justice.

(6) It has also been argued that the judgment relied upon by the counsel for the State respondents are distinguishable on facts and in those judgments cognizance had been taken by the Trial Court after sanctioning Authority granted its sanction and therefore, the observations made in those cases would not be applicable in the case of the petitioner where only sanction order has been issued without cognizance being taken by the Trial Court as yet. Since the cognizance has not been taken by the learned Trial Court, there are no proceedings within the ambit of the Criminal Procedure Code and therefore, there is a vacuum which can be filled up only by this Court by exercising its power and extra ordinary power under Article 226 of the Constitution of India. It has been argued that since there is no proceedings in any Court constituted under the Cr.P.C. or even under the Special Act i.e. the Prevention of Corruption Act, the petitioner has been rendered remediless.

(7) Learned counsel for the petitioner has placed reliance upon a judgment rendered by the Hon'ble Supreme Court in *Mumbai International Airport Private Limited Vs. Regency Convention Centre &*

Hotels Private Limited & Others reported in (2013) 3 CPR (SC) 647, and Paragraph-11 thereof, where the Supreme Court has observed that every judgment must be governed and qualified by the particular facts of the case in which such expressions are to be found; that a little difference in fact or additional facts may make a lot of difference in the precedential value of a decision and that even a single significant detail may alter the entire perspective; that there is always peril in treating the words of a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.

(8) It has been argued that in the case of the petitioner one distinguish factor is that till date cognizance has not been taken as yet by any Court and, therefore, the judgment cited by the learned counsel for the State-respondents shall not be applicable.

(9) Counsel for the petitioner has placed reliance upon a judgment rendered by the Hon'ble Supreme Court in the case of *State of West Bengal Vs. Committee of Protection of Democratic Rights reported in (2010) 3 SCC 571* and Paragraph-68 thereof, which has been referred to in the judgment of C.B.I. Vs. State of Punjab.

(10) This Court has considered the judgments submitted by Sri Shiv Nath Tilhari, learned A.G.A.

(11) In *Dinesh Kumar versus Chairman Airport Authority of India and another* 2012 (1) SCC page 532; the Supreme Court was considering a case where challenge was made to the sanction order by the appellant before the High

Court and during the pendency of the such challenge cognizance was taken by the Trial Court and summons came to be issued by the Special Judge under the Prevention of Corruption Act. The Writ Court had dismissed the writ petition and the Division Bench had also dismissed the intra-court Appeal observing that it was open for the appellant to question the validity of the sanction order during trial on all possible grounds and the CBI could also justify the order of granting sanction before the Trial Judge. The counsel for the appellant had argued before the Supreme Court that the appellant had challenged the legal validity of the sanction order at the first available opportunity, even before the charge-sheet was filed, and therefore, the High Court was not justified in relegating the appellant to agitate the question of validity of sanction ordered in the course of trial. He relied upon decisions of the Supreme Court in *Mansukhlal Vithal Das Chauhan Versus State of Gujarat* 1997 (7) SCC 622; *Pepsi Foods Ltd Vs Judicial Magistrate* 1998 (5) SCC 749; *Abdul Wahab Ansari versus State of Bihar* 2000 (8) SCC 500 and *State of Karnataka versus Ameerjan* 2007 (11) SCC 273.

(12) On the other hand, learned counsel for the CBI had argued that in case the validity of the sanction order is sought to be challenged on the ground of non-application of mind, such challenge can only be made in the course of trial. He relied upon judgements rendered by the Supreme Court in *Parkash Singh Badal versus State of Punjab*, 2007 (1) SCC 1, and on *Ashok Tshering Bhutia Versus State of Sikkim*, 2011 (4) SCC 402.

(13) The Supreme Court considered the judgement rendered in *Mansukhlal Vitthaldas Chauhan* (supra) where it had

observed that the act of granting sanction is a solemn and sacrosanct act which affords protection to the Government servants against frivolous prosecutions and it is a weapon to ensure discouragement of frivolous and vexatious prosecution and is a safeguard for the innocent but at the same time it cannot be a shield for the guilty. The Court reiterated the law as laid down in *Parkash Singh Badal* (supra), wherein it was observed that law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind or not would depend on the facts and circumstances of each case and there cannot be any generalised guidelines in that regard. There is a distinction between the absence of sanction and the alleged invalidation account of non-application of mind. The former question can be agitated at the threshold but the latter is a question which has to be raised during trial.

(14) While drawing a distinction between the absence of sanction and invalidity of sanction, the Supreme Court in *Parkash Singh Badal* had held that the question of absence of sanction could be raised at the inception and threshold by the aggrieved person. However, where sanction order exists but its legality and validity is put in question, such issue has to be raised in the course of trial. Such invalidity of sanction can be raised on diverse grounds, like non-availability of material before the sanctioning authority, or bias of the sanctioning authority, or the order of sanction having been passed by an authority not authorized or competent to grant such action. All such grounds of invalidity or illegality of sanction would fall in the same category like the ground of invalidity of sanction on account of non-

application of mind , where it is incumbent upon the aggrieved person to challenge the same during the course of trial.

(15) In *C.B.I. versus Ashok Kumar Agarwal*, 2014 (14) SCC 295; The Supreme Court was considering the judgement of the High Court which had set aside the order passed by the court of Special Judge C.B.I., wherein he had rejected the application of the respondent questioning the sanction granted by the Competent Authority under Section 19 of the Prevention of Corruption Act, 1988 in respect to possession of disproportionate assets. A report was submitted by the Superintendent of Police to the Ministry of Finance which was forwarded to the Central Vigilance Commission. The Central Vigilance Commission after examining the said case advised the Ministry of Finance to grant the sanction for prosecution. A charge sheet was filed by the C.B.I. before the court of Special Judge. The Court also took cognizance. The respondent challenged the validity of the sanction by filing an application before the Trial Court. Such application was rejected on the ground that it was not the appropriate stage to decide as to whether sanction granted by the competent authority was invalid. The respondent filed a Revision in the High Court which set aside the order of the Special Judge and remanded the case to record a finding on the question of any '*failure of justice*' in according sanction, and also to examine the sanctioning authority as a witness even at pre-charge framing stage, if it deemed fit.

(16) The learned counsel for the C.B.I. had argued that an application challenging the validity of the sanction at a stage anterior even to the framing of the charge was unheard of, as the issue that had

to be decided was whether relevant material had been disclosed/placed before the sanctioning authority and the sanctioning authority had considered the same. Such an issue can only be agitated during the course of trial. On the other hand the counsel appearing for the respondent argued that the Special Judge was not competent to take cognizance in the absence of a valid sanction granted by the sanctioning authority in accordance with law. The relevant material including statement of witnesses etc had not been placed before the Hon'ble Minister when the sanction was granted. In earlier litigation the High Court had directed the Revenue Secretary to examine and consider the record of the investigation fairly and objectively. In such a situation the issue of sanction had to be considered at the pre-charge stage and such a void Sanction cannot be a foundation for a valid trial.

(17) The Supreme Court placed reliance upon judgement rendered by it in *State of Madhya Pradesh versus Krishna Chandra Saxena* 1996 (11) SCC 439 to observe that the question whether all the relevant evidence which would have tilted the balance in favour of the accused, if it was considered by the sanctioning authority before granting sanction, and which was actually left out of consideration, could be examined only at the stage of trial when the sanctioning authority comes forward as a prosecution witness to support the sanction order if challenged during trial is no longer *res integra*. It is at that stage the prosecution has to satisfy the Court that adequate material for grant of such sanction was made available to the said authority. In every such case the Court had to find out whether there has been an application of mind on the part of the sanctioning authority concerned on the material placed

before it. Consideration of the material implies application of mind. To establish that sanction was validly granted, the prosecution has to establish and satisfy the Court by leading evidence that all the facts were placed before the sanctioning authority and the authority had applied its mind on the same. If the sanction order on its face indicates that all relevant material, i.e. F.I.R., disclosure statements, recovery memos, draft charge-sheet and other materials on record were placed before the sanctioning authority, and if it is further discernible from the recital of the sanction order that the sanctioning authority perused all the material, an inference may be drawn that the sanction has been granted in accordance with law. In every individual case the prosecution has to satisfy the Court by leading evidence that the entire relevant facts had been placed before the authority concerned. This could only be done during the course of trial.

(18) The Supreme Court in the case of *Ashok Tshering Bhutia versus State of Sikkim* (supra), while dealing with the issue whether invalid sanction goes to the root of jurisdiction of the Court which would vitiate the trial and conviction held that in the absence of anything to show that any defect or irregularity therein caused the failure of justice, the contention was without any substance. The failure of justice would be relatable to error, omission or irregularity in the grant of sanction, however a mere error or omission or irregularity in sanction is not considered to be fatal unless it has resulted in the failure of justice, or has been occasioned thereby. It has to be shown by the accused that he has suffered some disability or detriment or prejudice in relation to the investigation or trial; it is only once the accused is able to show that there has been a serious prejudice

caused to him with respect to either investigation or trial and that the same has defeated the rights available to him, the accused can seek relief from the Court. If the Court is satisfied that although the report submitted by the Investigating Agency to the sanctioning authority is a detailed one, such report could not be held to be the complete record required to be considered for sanction on application of mind to the relevant material on record, such sanction can be quashed.

(19) In the case of *Ashok Kumar Agarwal*, the respondent had shown that all the relevant documents had not been sent to the sanctioning authority. It was held by the Supreme Court that the prosecution agency had to be given an opportunity to show during the course of trial that such relevant record was indeed placed before the authority concerned. The contention of the respondent could only be considered if evidence was led before the trial court to invalidate the order of sanction. The respondent was able to show to the Court that evidence collected was voluminous and the report submitted to the sanctioning authority could not possibly have included all evidence. It was in these circumstances that the Supreme Court upheld the order of the High Court.

(20) In paragraph 56 of the judgement in *Ashok Kumar Agarwal*, the Supreme Court observed that Section 19(3) of the Act itself puts a complete embargo on the Court to grant stay of trial/proceedings.

In paragraph 58 and 59, it observed thus: –

“58. The most relevant issue involved here is as at what stage the validity of sanction order can be raised.

The issue is no more res Integra. In Dinesh Kumar versus Airports Authority of India, this Court dealt with the issue and placing reliance upon the judgement in Parkash Singh Badal versus State of Punjab, came to the conclusion as under: –

“13. In our view, having regard to the facts of the present case, now since cognizance has already been taken against the appellant by the trial judge, the High Court cannot be said to have erred in leaving the question of validity of sanction open for consideration by the trial court and giving liberty to the appellants to raise the issue concerning validity of the sanction order in the course of trial. Such course is in accord with the decision of this Court in Parkash Singh Badal – –“

“59. Undoubtedly , The stage of examining the validity of sanction is during the trial and we do not propose to say that the validity should be examined during the stage of enquiry or at pre-trial stage.”

(21) In ***C.B.I and others versus Promila Virender Kumar Agarwal and another***, 2020 (17) SCC 664, the Supreme Court was considering the decision of the High Court allowing the Criminal Revision of the respondent. The accused nos.1 & 2 were husband and wife and were charged under Section 13 (1) read with section 13 (2) of the Prevention of Corruption Act 1988 and Section 109 I.P.C. They filed separate applications seeking the discharge. The trial court allowed application of accused no.1 and discharged him from offences charged against him in the F.I.R. but rejected the application of the accused no.2. In separate Revision applications filed against it by the appellant CBI and the accused no.2, the High Court clubbed both and considered the same and by a single order allowed the Revision application of accuse no.2 while the Revision application

of the appellant against the discharge of accused no.1 was dismissed. The High Court had based its decision mainly on the question of validity of sanction for prosecution. The Supreme Court held that the issue relating to validity of sanction for prosecution could have been considered only during trial since essentially the conclusion reached by the High Court was with regard to defective sanction. According to the High Court the procedure of providing opportunity for explanation was not followed which resulted in sanction being defective.

(22) The Supreme Court observed that there is a distinction between absence of sanction and alleged invalidity on account of non-application of mind. Absence of sanction no doubt can be agitated at the threshold, but invalidity of sanction is to be raised during trial. In the case of the respondent admittedly there was sanction for prosecution, though the accused sought to pick holes in the manner the sanction was granted and claimed that the same was defective. The Supreme Court observed that it is a matter to be considered in trial for then the prosecution will have the opportunity to place evidence before the trial court regarding procedure having been followed and all the facts and circumstances being taken into account by the sanctioning authority.

(23) The Supreme Court in paragraph 11 observed as under: –

“11. Further, the issue relating to validity of sanction for prosecution would have been considered only during trial as essentially the conclusion reached by the High Court is with regard to the defective sanction since according to the High Court, the procedure of providing opportunity for

explanation was not followed, which will result in sanction being defective. In that regard, the decision in Dinesh Kumar versus Airports Authority of India, relied upon by the Learned Additional Solicitor General would be relevant since it is held therein that there is a distinction between absence of sanction and the alleged invalidity on account of non-application of mind. The absence of sanction no doubt can be agitated at the threshold but invalidity of sanctions is to be seen in the trial. In the instant facts, admittedly there is a sanction though the accused seek to pick holes in the manner the sanction has been granted and to claim that the same is defective which is a matter to be considered in the trial.”

(24) The learned A.G.A. has placed reliance upon judgement of a Coordinate Bench of this Court in ***Sukhlal Yadav versus State of U.P. and others*** Criminal W.P. No.9727/2020, reported in 2021 Lawsuit (All) 287. The writ petitioner was challenging the correctness and validity of the sanction order passed by the Managing Director of U.P. Rajkiya Nirman Nigam Limited Lucknow, and had sought a further writ in the nature of mandamus restraining the respondents not to further proceed with the matter on the basis of the impugned ex parte report of the Lokayukta U.P. The counsel for the petitioner had cited two Coordinate Bench decisions of similarly accused persons wherein the Court had granted an order directing the writ petitioners to approach the sanctioning authority with the representation and until such a decision is taken by the competent authority, no action should be taken against them.

(25) The learned A.G.A. had informed the Court that the impugned order in the

writ petition was only a communication to the State Government by the Managing Director of the Rajkiya Nirman Nigam Limited. The sanction order dated 16.12.2019 had not been challenged in the writ petition. It had been submitted that the Competent Authority while passing the order dated 16.12.2019 had applied his mind and after receipt of report from the Lokayukta in relation to corruption and financial embezzlement in the construction of memorials and parks in Lucknow and Noida, a proper investigation was done and such investigation report was considered including the material and evidences collected by the Investigating Officer by the competent authority.

(26) The Court considered the question as to on what grounds and order of granting sanction can be challenged at the very initial stage, before the parties had any opportunity to lead evidence in support of the case. It considered the observations made by the Privy Council in *Gokul Chand Dwarkadas Murarka versus the King* 1948 AIR (PC) 82, and of the Supreme Court in *Madan Mohan versus state of UP*, AIR 1954 Supreme Court 637, and *Somnath versus Union of India* 1971 (2) SCC 387.

(27) While considering the relevant clauses of the Statute, the Privy Council in *Gokul Chand Dwarkadas Murarka* had observed as under: –

“it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the fact should be referred to on the face of the sanction, but this is not essential – – the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority.” – – – the burden of

proving that the requisite sanction has been obtained lies on the prosecution and such burden includes proof that the sanctioning authority had given the sanction in reference to the facts on which the proposed prosecution was to be based, and these facts may appear on the face of the sanction or may be proved by extraneous evidence. Where the facts constituting the offence do not appear on the face of the letter sanctioning prosecution, it is incumbent upon the prosecution to prove by other evidence that the material facts constituting the offence were placed before the sanctioning authority. Where this is not done, the sanction must be held to be defective and an invalid sanction cannot confer jurisdiction upon the court to try the case.“

(28) Referring to later judgements of the Supreme Court, the Coordinate Bench in the case of Sukh Lal Yadav observed as under: –

“38. It is, therefore well settled that in order to constitute a valid sanction it must be established that it was given in respect of facts, constituting the offence with which the accused is proposed to be charged. The facts may be stated in the order granting the sanction or maybe approved by extraneous evidence. If the facts do not appear on the face of the sanction, the prosecution must prove it by other evidence that the material facts constituting the offence were placed before the sanctioning authority and he had granted the same after consideration on the said facts. It follows as a corollary that where the facts constituting the offence do not appear on the face of the sanction, it will be open for the prosecution to lead evidence that the material facts were placed before the sanctioning authority

before the grant of sanction, and the occasion for leading the evidence can arise only during the course of trial.

“39. The aforesaid discussion shows that an order of sanction can be challenged only on two grounds viz (1) it has been granted by an authority who was not competent to do so; (2) it has not been given in respect of the facts constituting the offence charged. However, if the challenge to sanction is based upon the ground that the facts constituting the offence do not appear on the face of the sanction then, such a plea cannot be entertained at the initial stage before the trial has commenced, as the prosecution can have no opportunity to lead evidence in order to show that the sanction had been granted after consideration of relevant material. Therefore, such a plea cannot be entertained and examined in any proceedings including a writ petition under Article 226 of the Constitution of India before the commencement of trial. It is only after the trial has concluded and prosecution has been given the opportunity to lead evidence that the validity of sanction can be examined on this ground.”

(29) This Court has also considered judgement cited by the learned counsel for the petitioner, *Mumbai International Airport Private Limited versus Regency Convention Centre and Hotels Private Limited* 2013 3 CPR (SC) 647. The case related to impleadment of a party in a suit under Order 1 Rule X of the C.P.C. The Supreme Court observed that the plaintiff in the Suit being the *Dominus litus*, may choose persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. A person who is not a party has no right to be impleaded against the wishes of the plaintiff. The Court can however direct

impleadment of necessary and proper party. But the Court has to consider whether the Plaintiff has sought any relief against such a person and whether such a person is necessary for passing an effective decree in the Suit for Specific Performance or that its presence is necessary for the complete and effective adjudication of matters in issue in a suit for specific performance. The fact that a person is likely to secure the rights/interest in the suit property, after the suit is decided against the plaintiff, will not make such a person a necessary or proper party to a suit for specific performance. The Supreme Court dismissed the Appeal filed by the appellant as it found that it was not a necessary or proper party and its application for impleadment had been rightly rejected by the trial court and by the High Court.

(30) The counsel for the petitioner has placed reliance upon paragraph 11 of the said judgement where the Supreme Court while considering judgements cited by the appellant, observed that - *“.....every judgement must be governed and qualified by the particular facts of the case in which such expressions are to be found; that a little difference in facts or additional facts will make a lot of difference in the precedential value of a decision and that even a single significant detail may alter the entire aspect; that there is always a peril in treating the words of a judgement as though they were words in a legislative enactment, and it is to be remembered that Judicial pronouncements are made in the setting of the facts of a particular case...”* (emphasis supplied)

(31) It has been argued on the basis of observations made by the Supreme Court in the aforesaid two judgements that in the case of the petitioner herein sanction

for prosecution has not resulted in the charge-sheet being filed before the trial court or cognizance being taken. No summons having been issued. It is therefore argued that there is no case pending before any Court where the petitioner can be relegated to seek his remedy. No petitioner can be rendered remedyless.

(32) This Court is of the considered opinion that in view of the law settled by the Supreme Court in the aforesaid cases of *Dinesh Kumar versus Chairman, Airports Authority of India and another, C.B.I. versus Ashok Kumar Agarwal, C.B.I. versus Pramila Virendra Kumar Agarwal, and Sukh lal Yadav versus State of U.P. and others*, till evidence is led by the prosecution before the Trial Court, the facts and circumstances leading to the competent authority granting sanction for prosecution cannot be appreciated to the fullest. Even if for the sake of argument, it is to be believed that necessary material was not kept before the sanctioning authority for it to apply its mind, then also the prosecution would have to be given a chance to first lead evidence to the effect that all relevant material including material which may favour the accused, was laid before the sanctioning authority. To Appreciate such evidence, the trial court is competent.

(33) Also, if the learned counsel for the petitioners argument is to be believed that no cognizance has yet been taken, then it cannot be said that he is an aggrieved person, as the trial court may or may not take cognizance of the charge sheet filed by the prosecution agency.

(34) Consequently, the writ petition is **dismissed as not maintainable.**

(2023) 7 ILRA 762
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters U/A 227 No. 4795 of 2023 (Civil)

Praveen Kumar Mishra ...Petitioner
Versus
Dr. Gaurav Mishra & Anr. ...Respondents

Counsel for the Petitioner:

Sri Pankaj Agarwal, Sri Gaurav Tripathi

Counsel for the Respondents:

Sri Ramesh Chandra Agrahari, Sri Anoop Trivedi (Sr. Adv)

Execution proceeding - Release Application filed by plaintiffs-allowed-Appeal and Writ rejected-order attained finality-execution application pending-possession of shop handed over to plaintiff No. 2-Execution Court proceeded to pass order directing respondent/plaintiff No. 2 to hand over the possession of shop to respondent/plaintiff No. 3-once bonafide need is set up in favour of co-plaintiff-Execution Court has full right to proceed and pass order for possession of property -in favour of co-landlord for whom bonafide need was set up.

W.P. dismissed. (E-9)

List of Cases cited:

1. Tamil Nadu Buildings (Lease and Rent Control) Act K.VS Muthu Vs Anga Muthu Ammal: AIR1997 SC 628
2. Sri Ram Gupta Vs Prescribed Authority/Civil Judge (S.D.), Kanpur Dehat & ors.
3. Syed Asadullah Kazmi Vs A.D.J.: 1981 ARC 542

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Pankaj Agarwal, learned counsel for petitioner and Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Ramesh Chandra Agrahari, learned counsel for respondents.

2. Present petition has been filed seeking following relief:-

“It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to call for the records of the court below and set aside the impugned order dated 10.04.2023 passed by Additional Judge Small Causes Court No. 2, Kanpur Nagar in Execution Case No. 02/23/2022 and allow the Execution Case No. 206/23/2022 and also allow the instant petition striking of the said execution in its full satisfaction in view of the fact that the tenant-respondent IInd Set had delivered possession to the petitioner in the capacity of the owner and landlord of the shop in question; and/or such other and further order be passed as is expedient in the interest of justice.”

3. Since, only legal question is involved in the present petition, therefore, with the consent of parties, without inviting for affidavits, petition is being decided at the admission stage itself.

4. Brief facts of this case are that Release Application dated 22.07.2008 has been filed by three plaintiffs, which was registered as P.A. Case No. 5 of 2008. During the pendency of the said Release Application, plaintiff No. 1, mother of plaintiff No. 2 and grandmother of plaintiff No. 3 died. The Release Application was ultimately allowed vide order dated 13.01.2020, against which, Rent Appeal No. 16 of 2020 has been filed by tenant-respondent, which was dismissed by the

District Judge vide order dated 24.01.2022. The tenant-respondent preferred Writ Petition under Article 227 before this Court, being Civil Misc. Writ Petition No. 1343 of 2022, which was also dismissed by this Court vide order dated 08.03.2022. The order dated 13.01.2020 passed in P.A. Case No. 5 of 2008 has attained finality.

5. Sri Pankaj Agarwal, learned counsel for petitioner submitted that for execution of order dated 13.01.2020, two execution applications have been filed; one by petitioner-plaintiff No. 2 dated 15.10.2022 and another by plaintiff No. 3 dated 02.03.2022. Both the execution applications are still pending for final disposal. It is next submitted that during the pendency of execution proceeding, possession of shop was handed over to plaintiff No. 2, therefore, it is required on the part of Execution Court to close the proceedings, but instead of that, Execution Court has proceeded to pass order dated 21.03.2023 directing respondent/plaintiff No. 2 to hand over the possession of shop to respondent/plaintiff No. 3. He firmly submitted that once the possession is given to any of the landlord, Execution Court has no authority to proceed with the execution proceedings in absence of collusion between tenant or landlord.

6. It is further submitted that said order was challenged before this Court by filing Matters Under Article 227 No. 3373 of 2023, which was disposed of vide order dated 28.03.2023 with direction to the Execution Court/Prescribed Authority to decide both the applications within 10 days from production of certified copy of order. Order dated 28.03.2023 was served upon the Execution Court on 31.03.2023, but at that time, Advocates at Kanpur District Court were on strike, therefore, parties

were appeared in person. In the present case, due to strike of Advocates, petitioner-plaintiff No. 2 has sought adjournment vide application dated 06.04.2023, but without hearing counsel for parties, judgment was reserved on 07.04.2023 and ultimately pronounced on 10.04.2023.

7. Learned counsel for petitioner has assailed the impugned order on two grounds; first ground which is taken in Matters Under Article 227 No. 3373 of 2023 that once the possession is handed over to one of the landlord, it is required on the part of Execution Court to close the proceedings. Secondly, impugned order has been passed without hearing petitioner-plaintiff No. 2. In fact his presence was recorded in the court room as the Judge was sitting in his Chamber and without hearing his counsel, order has been passed, which is in gross violation of principle of natural justice.

8. Per contra, Sri Anoop Trivedi, learned Senior Counsel vehemently opposed the submissions of counsel for petitioner and submitted that so far as present controversy is concerned, same issue was subject matter of Writ Petition No. 20599 of 2007 (Sri Ram Gupta vs. Prescribed Authority/Civil Judge (S.D.), Kanpur Dehat and Ors., in which, this Court after framing the questions, has replied the same and the questions so framed by the Court are exactly same which is in dispute before this Court. He next submitted that Court has considered this fact that bona fide need was set up in favour of co-landlord whereas tenant has given possession to another co-landlord and Court after framing questions, has replied that Prescribed Authority committed patent error of law in rejecting the application for delivery of possession filed under Section

23 of the Act by the petitioner-landlord, simply on the ground that the possession has been delivered to a co-landlord. He further submitted that as the facts are same, therefore, ratio of law laid down is very well applicable in this case also.

9. So far as issue of hearing of parties is concerned, he firmly submitted that the presence of parties is very well recorded by the Prescribed Authority, therefore, oral averments contrary to the findings of Court cannot be accepted, if not supported by the conclusive evidence.

10. In his rejoinder argument, **Sri Pankaj Agarwal** submitted that in the matter of Sri Ram Gupta (Supra), there was issue of collusion between co-landlord and tenant whereas in the present case, there is no allegation of collusion between the parties and possession has admittedly handed over to the petitioner by the tenant, therefore, this judgment would not be applicable in the present case.

11. I have considered rivals submissions made by counsel for parties and perused the records as well as judgments cited above.

12. Brief facts of the case is that earlier a suit was filed by plaintiff Nos. 1, 2 & 3 against the defendants setting the bonafide need of plaintiff No. 3. During the pendency of proceeding, plaintiff No. 1 died and ultimately suit was allowed. Upon that, two execution applications were filed; one by plaintiff No. 2 and another by plaintiff No. 3. It is undisputed that suit was filed on the ground of bonafide need of plaintiff No. 3 and during the pendency of execution proceeding, defendant has given possession to plaintiff No. 2. Issue before the Court is as to whether after possession, proceeding shall

continue before the Execution Court or not and further Execution Court can pass order directing plaintiff No. 2 to hand over possession to plaintiff No. 3, for whom bonafide need was set up.

13. Similar issue was subject matter of this Court in the matter of Sri Ram Gupta (Supra) and while deciding the same, Court has framed two issues, which is quoted below:-

“8. The following two issues on these facts fall for consideration in the present petition:-

(1) Whether an application for delivery of possession of the released property is liable to be rejected, where the tenant alleges that he has delivered the possession to a co-landlord, whose need was not set up and/or the possession has not been handed over to a co-landlord whose need was subject-matter of release proceedings?

(2) Whether there is collusion in between the respondent Nos. 2 and 3? Taking the first point first let us have a look to the provisions of section 23 of the Act.

Section 23 of the Act reads as follows:-

Enforcement of Eviction Order.--

(1) The prescribed authority may use or caused to be used such force as may be necessary for evicting any tenant against whom an order is made under section 21 or on appeal under section 22, as the case may be, or against any person found in actual possession, and for putting the landlords into possession.

(2) Every order of the prescribed authority in proceedings under this section shall be final.”

14. First issue is relevant for the present controversy and the same was replied in foregoing paragraphs i.e.

Paragraph Nos. 9 to 14, which are quoted below:-

“9. The section 23 casts statutory obligation; (1) to evict any tenant against, whom an order has been made; or (2) against any other person found in actual possession; and (3) put the landlord into possession. The word 'landlord' in this provision (section 23) should have a restricted meaning. 'Landlord' has been defined in section 3(j) of the Act. The relevant portion is quoted below:-

In this Act unless the context other wise requires:-

a.....

b

c.....

d

j. "landlord" in relation to building, means a person to whom its rent is or if the building, were let would be, payable and includes, except in Clause(g), his agent or attorney, of such person.

10. The definition of 'landlord' as given in the definition clause is subject to "unless the context otherwise requires". Admittedly the release was sought for and was granted for the need of Shri Ram Gupta, the petitioner, landlord. Sri Ram Chandra Gupta's need was not set up in the release application. He was the co-landlord. The word 'landlord' in section 23 shall draw its colour from the word 'landlord' used in section 21 of the Act. As a matter of plain grammatical construction it is obvious that the word 'landlord' under section 23 of the Act should be interpreted with reference to section 21(1)(a).

11. The Supreme Court in a case under Tamil Nadu Buildings (Lease and Rent Control) Act K.V. Muthu v. Anga Muthu Ammal: AIR1997 SC 628, has held that the effect of words 'unless context otherwise requires' in the definition clause

has to be read in the light of the context and scheme of the Act as also the object for which the Act was made by the Legislature. While interpreting the definition, it has to be borne in mind that interpretation placed on it should not be repugnant to the context. It should be such as it would aid the object which is sought to be served by the Act. A construction which would defeat or is likely to defeat the purpose of the Act has to be ignored and not accepted. If a wider meaning is given to landlord to include the whole body of the landlords under section 23 of the Act, it would defeat the very purpose and object of section 21 of the Act. Section 24 of the Act gives option of re-entry to the tenant evicted in the proceedings under section 21 of the Act. The object of the Act will be achieved only when the possession of the release accommodation is delivered to that landlord for whom it was released.

12. The Supreme Court in the case of Syed Asadullah Kazmi v. A.D.J.: 1981 ARC 542 had an occasion to interpret section 23 of the Act. It has been interpreted by the Supreme Court that once the release order having become final it cannot be reopened by the prescribed authority on the ground of subsequent events. The Supreme Court has observed as follows:

Plainly, the order dated 25th March, 1997 of the appellate authority releasing a portion of the premises in favour of the third respondent and leaving the remaining portion in the tenancy of the appellant acquired finality when the proceedings taken against it by the appellant failed. The order having become final was found to give effect to it. In doing so, the prescribed authority was not acting outside its jurisdiction or contrary to law.....the order for release of a portion of the accommodation acquired

finality before the death of Raj Kumar Sinha and the controversy concluded by it could not be reopened.

13. In view of the above discussion, the word 'landlord' used in section 23 of the Act should be understood, in case there are more than one landlords, the landlord for whose need the release application was allowed. In other words, the word 'need' of landlord has a nexus with the particular landlord in case of co-landlords. Reverting to the facts of the present case it is axiomatic that the shop in dispute was released for the need of the present petitioner-landlord namely Shri Ram Gupta to whom, admittedly, the tenant has not delivered the possession of the shop in question. This being the position, the prescribed authority committed patent error of law in rejecting the application for delivery of possession filed under section 23 of the Act by the petitioner-landlord, simply on the ground that the possession has been delivered to a co-landlord.

14. The above view finds support from section 24 of the Act which provides an option of re-entry by the tenant. It provides that where a building is released in favour of the landlord and the tenant is evicted under section 21 or on appeal under section 22, and the landlord puts any person different from the person for whose occupation according to the landlord's representation, the building was required, or the landlord omits to occupy it within one month or such extended time as the prescribed authority for sufficient cause allow from the date of his obtaining possession, the tenant will have an option of re-entry”

15. In the case of **Sri Ram Gupta (Supra)**, shop in dispute was released for the need of petitioner-landlord and admittedly, tenant has not delivered the

possession of the shop in question, upon which, application was filed under Section 23 of the Act which was rejected on the ground that possession has been delivered to co-landlord. Court has depreciated the same and has taken view that it is patent error of law in rejecting the application and allowed the petition with cost of Rs. 10,000/-. Court has also held that it is also getting support from Section 24 of the Act which provides option of re-entry by the tenant in such matters. Meaning thereby, the property in question must have been given to the person in whose favour, bonafide need has been set up.

16. From the perusal of issue No. 1 and its reply, it is apparently clear that facts of the present case are exactly same and Court has taken a firm view that once bonafide need is set up in favour of co-plaintiff, Execution Court has full right to proceed with and pass order for possession of property in question in favour of co-landlord for whom bonafide need was set up.

17. Further, from the perusal of order sheet, it is apparently clear that though there was strike in Kanpur District Court, but both the parties were present and after hearing them, Court has passed order complying the direction of this Court dated 28.03.2023 passed in Matters Under Article 227 No. 3373 of 2023, therefore, such allegation not supported with conclusive evidence cannot be accepted.

18. Learned counsel for petitioner has also argued about the collusion and submitted that this judgment would be applicable in case of collusion between the co-landlord and tenant which cannot be accepted. Court was conscious enough with the facts, therefore, while framing the

issues, has framed first issue with regard to legal question involved in the matter. Issue No. 1 was based only on the facts of that case and squarely covers the dispute before this Court. Second issue is dealt with collusion and that too is not coming in the rescue of petitioner-plaintiff No. 2 as that does not laid down any ratio of law. Therefore, this argument of petitioner is also having no force.

19. Therefore, under such facts and circumstances of the case as well as law laid down by this Court, petition lacks merit and is, accordingly **dismissed**.

20. No order as to costs.

(2023) 7 ILRA 767

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 31.05.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters U/A 227 No. 5480 of 2023

Raj Kumar @ Rajendra Srivas & Ors.

...Petitioners

Versus

Mohd. Kaukab Azim Rizvi & Anr.

...Respondents

Counsel for the Petitioners:

Sri Chandra Prakash Kushwaha, Sri Ramendra Asthana

Counsel for the Respondents:

Surety so placed is photocopy of the sale deed - for compliance of Section 17 of Act, 1887-surety can be accepted in accordance with the provisions of Section 145 of CPC- which provides enforcement of liability of surety - Section 145(II) of CPC provides furnishing of security of property by sale, which may be sold

out to the extent of security-surety should have been of the nature which may be sold out as and when required-such surety cannot be accepted-photocopy can be accepted as secondary evidence-it is not a case of evidence-but a case of surety-photocopy of the sale deed cannot be accepted as surety u/s 17 of Act, 1887 read with Section 145 of CPC. (E-9)

List of Cases cited:

1. S. Kaladevi Vs VSR. Somasundaram & ors.; 2010(3) JT 610

2. Ishtiaq Hussain Vs Ashfaq Hussain (Civil Revision No. 132 of 1984)

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Ramendra Asthana, learned counsel for petitioners.

2. Present petition has been filed seeking following reliefs:-

“(a) set aside the judgments and orders dated 21.02.2023 passed by learned Additional District and Sessions Judge H.J.S. Banda, dismissing the S.C.C. Revision No. 19/2019, (Raj Kumar @ Rajendra Srivas, now dead through L.Rs., Mohd. Kaukab Azim Rizvi and another) and 12.12.2019 passed by learned Civil Judge (Junior Division) Banda rejecting Application 8(Ga) in Misc. Case No. 49/70/2018 Raj Kumar @ Rajendra Srivas vs. Mohd. Kaukab Azim and another) and 05.09.2013 passed by learned Civil Judge, Junior Division, Banda decreeing ex parte S.C.C. Suit No. 04/2011 Mohd. Kaukab Azim Rizvi and another vs. Raj Kumar Srivas.”

3. Learned counsel for petitioners submitted that in case an unregistered sale deed is produced before the Court as surety, same should have been accepted and

application 8-C filed to deposit the security in compliance of Section 17 of Provincial Small Causes Court Act, 1887 (hereinafter referred to as 'Act, 1887') along with application 4-C under Order 9 Rule 13 of Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") may not be rejected on this ground. Secondly, the photocopy of any document is secondary evidence as per Indian Evidence Act, 1872 (hereinafter referred to as 'Act, 1872') therefore, same cannot be rejected as surety. He next submitted that finding of the court below is that photocopy of the sale deed is not legible is also not correct as in fact the sale deed is very much legible, therefore, finding of Court below is bad. He assailed this finding before the Revisional Court, but the Court has also not returned any finding upon this ground. There is no compliance of Order 5 Rule 20 of CPC, therefore, Court may not proceed ex parte without compliance of the provisions of CPC. In support of his contention, he has placed reliance upon the judgment of Apex Court as well as this Court in the matters of *S. Kaladevi vs. V.R. Somasundaram & Ors.*; 2010(3) JT 610 and *Ishtiaq Hussain vs. Ashfaq Hussain (Civil Revision No. 132 of 1984)*, decided on 30.01.1985.

4. I have considered the submissions made by learned counsel for petitioners and perused the records as well as judgments relied upon.

5. Brief facts of the case is that earlier Suit No. 04 of 2011 was filed which was decided ex parte vide judgment and decree dated 05.09.2013. Upon that, petitioner has preferred application 4-C dated 31.07.2018 under Order 9 Rule 13 of CPC along with same dated application 8-C to deposit the security in compliance of Section 17 of Act, 1887. Court has rejected the said

application on the ground that photocopy of the sale deed has been placed, which is not legible and registered. Against the said order, Revision No. 19/2019 was filed, which was also rejected vide order dated 21.02.2023 with specific finding that photocopy of the unregistered sale deed cannot be accepted as surety.

6. Order of Revisional Court has been challenged basically on the following grounds; first ground is that an unregistered sale deed cannot be rejected, secondly, photocopy of the sale deed is legible and it may also be accepted as surety as it is treated secondary evidence as per Act, 1872.

7. Now, issue before this Court is to decide as to whether photocopy of registered sale deed can be accepted as surety for the purpose of Section 17 of Act, 1887 read with Section 145 of CPC or not. For ready reference, Section 17 of Act, 1887 is quoted below:-

"17. Application of the Code of Civil Procedure-

(1) [The procedure prescribed in the Code of Civil Procedure, 1908 (5 of 1908), shall save in so far as is otherwise provided by that Code or by this Act,] be the procedure followed in a Court of Small Causes, in all suits cognizable by it and in all proceedings arising out of such suits:

Provided that an application for an order to set aside a decree passed ex parte or for a review of judgment shall, at any time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give [such security for the performance of the decree or compliance with the judgment as the Court

may, on a previous application made by him in this behalf, have directed.

(2) Where a person has become liable as surety under the proviso to sub-section (1), the security may be realised in manner provided by Section 145 of the Code of Civil Procedure, 1908 (5 of 1908)."

8. Section 17 of the Act, 1887 provides that security may be realised in manner provided in Section 145 of CPC, therefore, Section 145 of CPC is also quoted below:-

"145. Enforcement of liability of surety- Where any person [has furnished security or given a guarantee]-

(a) for the performance of any decree or any part thereof; or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an Order of the Court in any suit or in any proceeding consequent thereon,

[the decree or Order may be executed in the manner therein provided for the execution of decrees, namely :-

(i) if he has rendered himself personally liable, against him to that extent;

(ii) if he has furnished any property as security, by sale of such property to the extent of the security;

(iii) if the case falls both under clauses (i) and (ii) then to the extent specified in those clauses, and such person shall, be deemed to be a party within the meaning of section 47 :]

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

STATE AMENDMENT

Uttar Pradesh- In its application to the State of Uttar Pradesh, for the existing Section 145, the following shall be substituted:

"145. Where any person has become liable as surety or given any property as security,-

(a) for the performance of any decree or any part thereof; or

(b) for the restitution of any property taken in execution of any decree; or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an Order of the Court in any suit or in any proceeding consequent there on, the decree or Order may be executed in the manner herein provided for the execution of decree:-

(i) if he has rendered himself personally liable, against him to that extent; and

(ii) if he has given any property as security, by sale of such property to the extent of the security;

and such person shall, for the purposes of appeal, be deemed to be a party within the meaning of section 47:

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

Explanation:-For the purposes of this section a person entrusted by a Court with custody of any property attached in execution of any decree or Order shall be deemed to have become liable as surety for the restitution of such property within the meaning of clause (b)." [Vide U.P. Act No. 24 of 1954, sec. 2 and Schedule Item 5, Entry 8 (w.e.f. 30-11-1954)]."

9. From the perusal of both the provisions, it is apparently clear that for compliance of Section 17 of Act, 1887, surety can be accepted in accordance with

the provisions of Section 145 of CPC, which provides enforcement of liability of surety and Section 145(II) of CPC provides furnishing of security of property by sale, which may be sold out to the extent of security, therefore, it is apparently clear that surety should have been of the nature, which may be sold out as and when required.

10. So far as present controversy is concerned, surety so placed before the Court is photocopy of the sale deed on the basis of that, no sale of property can be made, therefore, such surety cannot be accepted.

11. So far as second argument about photocopy of the document can be accepted as secondary evidence is concerned, it is not a case of evidence, but a case of surety and it should have been of such nature that may be sold out at any point of time either under the orders of Court or as per circumstances. Certainly, on the basis of photocopy of the sale deed, no sale proceeding can be executed, therefore, photocopy of sale deed cannot be accepted as surety. Further, judgments so relied by counsel for petitioners only deals with the acceptances of secondary evidence, therefore, the same are having no relevance in the present controversy.

12. Considering the facts so mentioned here-in-above, this Court is of the firm view that photocopy of the sale deed cannot be accepted as surety for the purpose of Section 17 of Act, 1887 read with Section 145 of CPC.

13. Third issue was about legibility of document. Once Court is of the opinion that photocopy of sale deed cannot be accepted as surety, therefore, there is no

occasions for the Court to give its finding about the legibility of documents.

14. So far as last argument about Order 5 Rule 20 of CPC is concerned, law is very well settled that in case of deficiency of notice, it has to be raised by the petitioners on the very first instance of the rebuttal and in the present case, even in application under Order 9 Rule 13 of CPC, no such averment has been made, therefore, at this stage, same can not be accepted.

15. Under such facts of the case, petition lacks merit and is accordingly **dismissed.**

16. No order as to costs.

(2023) 7 ILRA 770

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 10.07.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR

UPADHYAYA, J.

THE HON'BLE SUBHASH VIDYARTHI, J.

Civil Misc. Review Application No. 24 of 2023

Mata Prasad Tiwari

...Applicant

Versus

State of U.P. & Ors.

...Opposite Parties

Counsel for the Applicant:

Rama Kant Dixit, Asok Pande

Counsel for the Opposite Parties:

A. Civil Law - Review - Allahabad High Court Rules, 1952 - Chapter VII, Rule 1 - Pronouncement of judgment - Review on the ground that as the complete judgment was not pronounced in open Court, it becomes legally unsustainable - Held: The aforesaid Rule provides that after a case

has been heard, the judgment *may* be pronounced either at once or on some future date. This Rule is a rule of procedure and does not confer any substantive right on any party. The Rule does not prescribe any adverse consequence for the judgment not being entirely pronounced in open Court immediately. Aforesaid procedural Rule is merely directory in nature. At times the Courts pronounce the gist of the judgment and the outcome of the case in open Court, while the detailed judgment is dictated in the Chamber to utilize the time for hearing and deciding other cases in the interest of judicial work. Court rejected the submission of the Review-Applicant. (Para 3, 4)

B. Civil Law - Review - Constitution of India, 1950 - Articles 217 & 224 - Article 217, Appointment and conditions of the office of a Judge of a High Court - Article 224, Appointment of Additional and Acting Judges - Review on the ground that the Special Appeal was heard by a Division Bench consisting of two Judges, one of whom was appointed under Article 217 of the Constitution of India, whereas the other Judge was appointed under Article 224 of the Constitution of India, thus the formation of the Bench was against the spirit of the Constitution of India - *Held*: All Judges are duty-bound to perform the judicial work allotted to them and exercise their jurisdiction accordingly, irrespective of the constitutional provision under which they have been appointed. So far as judicial powers and duties of Judges are concerned, there is no difference between Judges appointed under Article 217 of the Constitution of India and Judges appointed under Article 224. Court found no substance in the second submission of the Review-Applicant, and rejected the same. (Para 10, 13, 17)

C. Civil Law - Precedents - Only the ratio decidendi of a judgment is binding as a precedent, not the order passed in a case - Review - Review on the ground that the judgment and order passed in

Writ Petition No. 4963 (S/S) of 2015, wherein persons who had not worked for a single day were treated as regular employees and were paid post-retiral dues and pension, was not considered by the Division Bench while deciding the Special Appeal - *Held*: Judgments passed in that case will not be binding precedents unless the question of eligibility of the persons for being paid salary for the period they had not worked was decided in those judgments, because it is a well-settled principle of law of precedents that only the ratio decidendi of a judgment is binding as a precedent, not the order passed in a case. (Para 28)

Dismissed. (E-5)

List of Cases cited:

State of Rajasthan Vs Prakash Chand, (1998) 1 SCC 1.

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

1. This is an application seeking review of the judgment and order passed by a co-ordinate Bench of this court dismissing Special Appeal No. 349 of 2022.

2. The first ground pressed by the learned counsel for the review-applicant is that the judgment was not pronounced as per the procedure prescribed by Chapter VII, Rule 1 of the Allahabad High Court Rules, 1952. The aforesaid Rule provides as follows: -

"1. Pronouncing of judgment:-

*(1) After a case has been heard judgment **may** be pronounced either at once or on some future date 60 of which notice shall be given to the Advocates of the*

parties : Provided that notification in the Cause List shall be deemed to be sufficient notice.

*(2) Where a case is heard by two or more Judges and judgments is reserved, their judgment or judgments, **may** be pronounced by any one of them. If no such Judge be present such judgment or judgments **may** be pronounced by any other Judge. 61*

*(3) Where a case is heard by a Judge sitting alone and judgment is reserved, his judgment **may**, in his absence, be pronounced by any other Judge.”*

The purpose of the aforesaid Rule is that the judgment delivered by the Court should be known to the parties.

3. The aforesaid Rule provides that after a case has been heard, the judgment **may** be pronounced either at once, or on some future date, of which notice shall be given to the Advocates of the parties. It further provides that notification in the cause-list shall be deemed to be ‘sufficient notice’. After a case has been heard, the judgment **may** be pronounced either at once, or on some future date. This Rule is a Rule of Procedure and it does not confer any substantive right on any party. The Rule does not provide any adverse consequence of the entire judgment not being pronounced in open Court immediately. In our considered view, the aforesaid Procedural Rule is merely directory in nature.

4. The judgments are normally pronounced in open court. In some cases, where the dictation of judgment is expected to consume a very long time, the judgments are reserved. It is also a common practice that at times the Courts pronounce the jist of the judgment and the outcome of the case in the open

Court, and the detailed judgments are dictated in the Chamber so as to utilise the time of working on the dias, which would have been consumed in dictation of the complete judgment, in the interest of judicial work by hearing and deciding some other cases. In the present case also, jist of the judgment and the outcome of the Appeal was pronounced in open court and the detailed judgment was dictated subsequently in the Chamber.

5. Therefore, we do not find force in the submission of the learned Counsel for the Review-Applicant that as the complete judgment was not pronounced in open Court, it becomes unsustainable in law. Thus, we reject the first submission of the learned Counsel for the Review-Applicant.

6. The next ground taken by the learned Counsel for the Review-Applicant is that the Special Appeal was heard by a Division Bench, consisting of two Judges, one of whom was appointed under Article 217 of the Constitution of India, whereas the other Judge was appointed under Article 224 of the Constitution of India and the formation of the Bench was against the spirit of the Constitution of India.

7. The Constitution of the Bench was known to the learned Counsel for the review-applicant at the time of making his submissions in support of the Special Appeal and still he preferred to advance his submissions in support of the Special Appeal and he took a chance of getting a judgment which would be favourable to the Appellant. This ground has been taken by him for the first time in review application, after the Special Appeal was dismissed. It is settled law that a new ground cannot be

raised for the first time in review application.

8. However, the learned Counsel for the Review-Applicant has submitted that he has taken this Ground in several other cases and in none of the cases it has been decided, so we proceed to consider the merits of this submission.

9. The relevant provisions of Article 217 and 224 of the Constitution of India provide as follows: -

“217. Appointment and conditions of the office of a Judge of a High Court.—*(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years:*

Provided that—

** * **

224. Appointment of additional and acting Judges.—*(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President **may** appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he **may** specify.*

*(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President **may** appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.*

(3) No person appointed as an additional or acting Judge of a High Court shall hold office after attaining the age of sixty-two years.”

10. A bare perusal of the aforesaid Articles makes it manifest that Article 217 makes a mention of the Judges appointed under Article 224 of the Constitution of India and it differentiates them only in the matter of their tenure of working by providing that an additional or acting Judge shall hold office as per the provision contained in Article 224 and the other Judges shall hold office until they attain the age of 62 years.

11. Article 219 of the Constitution of India contains the following provision for Oath or affirmation by the Judges of High Courts: -

“219. Oath or affirmation by Judges of High Courts.—*Every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.”*

12. The form of oath to be made and subscribed by all the Judges of the High Courts, including the Chief Justices, is as follows: -

“I, A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of) ___ do swear in the name of God / solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to

the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws."

13. There is no separate provision for making and subscribing oath by the Judges appointed under Article 224 of the Constitution of India and no separate Form of Oath is prescribed for them. The Judges appointed under Article 224 of the Constitution of India are also under oath to duly and faithfully and to the best of their ability, knowledge and judgment, perform the duties of their office without fear of favour, affection or ill-will like a Judge appointed under Article 217. The primary duty of the office of a Judge is to render justice to the litigants by deciding the cases that are assigned to him and a Judge appointed under Article 224 of the Constitution of India is as much under Oath to perform this duty, as a Judge appointed under Article 217.

14. Rule 1 of Chapter V of the Allahabad High Court Rules, 1952 provides that "*Judges shall sit alone or in such Division Courts as **may** be constituted from time to time and do such work as **may** be allotted to them by order of the Chief Justice or in accordance with his directions."*

15. In **State of Rajasthan v. Prakash Chand**, (1998) 1 SCC 1, the Hon'ble Supreme Court emphasized that: -

"the administrative control of the High Court vests in the Chief Justice of the High Court alone and that it is his prerogative to distribute business of the High Court both judicial and administrative. He alone, has the right and

power to decide how the Benches of the High Court are to be constituted: which Judge is to sit alone and which cases he can and is required to hear as also as to which Judges shall constitute a Division Bench and what work those Benches shall do."

16. The Hon'ble Chief Justice is the master of the roster and he alone has the authority to assign different cases or category of cases to different Judges. All the Judges are duty bound to perform the judicial work allotted to them and to exercise their jurisdiction accordingly, irrespective of the Constitutional provision under which they have been appointed.

17. So far as the judicial powers and duties of the judges are concerned, there is no difference between the Judges appointed under Article 217 of the Constitution of India and the Judges appointed under Article 224. In case a Judge appointed under Article 224 of the Constitution of India does not decide any case for the reason that he has been appointed under that Article, he would be failing in the performance of his Constitutional duties and he will be dis-respecting his oath.

18. Therefore, we find no substance in the second submission of the learned Counsel for the Review-Applicant and we reject the same.

19. Now we proceed to consider the merits of the case in order to ascertain whether the judgment under challenge suffers from any error apparent on the face of the record, which is the basic requirement for reviewing a judgment. The Review-Applicant was appointed as a Collection Amin in the year 1986. Although all persons appointed with him were

appointed on regular posts, they were treated as Seasonal Collection Amins. One of the selected candidates filed Writ Petition No. 4031 (S/S) of 2001, which was allowed by means of an order dated 19.08.2006 and a Writ of Mandamus was issued for allowing the petitioner of that Writ Petition to work as a Regular Collection Amin.

20. The Review-Applicant filed Writ Petition No. 738 (S/S) of 2012, which was disposed-off by means of an order dated 07.02.2012, directing the respondents to give him benefit of the order dated 19.08.2006 passed in Writ Petition No. 4031 (S/S) of 2001, to pay him salary for the period 07.02.2002 to 13.11.2012 and to pay him pension.

21. In furtherance of the aforesaid order dated 07.02.2012, the Sub-Divisional Magistrate, Gauriganj passed an order dated 18.08.2012 permitting the Review-Applicant to join his service as a Regular Collection Amin. The Review-Applicant has retired on 30.11.2012.

22. The Review Applicant filed a Contempt Petition alleging non-compliance of the order dated 07.02.2012 and the Contempt Petition was dismissed after recording that the order of the Writ Court has been complied with. It appears that the review Applicant did not challenge the order dismissing the Contempt Petition filed by him.

23. The Review Applicant thereafter filed Writ Petition No. 6155 (S/S) of 2015 for issuance of a Writ of Mandamus for fixation of his salary as directed in the order dated 07.02.2012 passed in Writ Petition No. 738 (S/S) of 2012. The Hon'ble Single Judge dismissed the Writ Petition holding that the

petitioner's claim had been rejected on the ground that he had not worked as a Regular Collection Amin from 27.08.2012 to 30.11.2012 and from 07.02.2012 to 26.08.2012 and, therefore, he was not entitled for payment of salary for the aforesaid period on the principle of "No Work No Pay". The petitioner's services were regularized vide order dated 27.08.2012 and he had worked on a regular basis for a period of merely 3 months and 5 days and he did not complete the qualifying service of 10 years necessary for making him entitled to receive pension.

24. The Special Appeal challenging the aforesaid order had been dismissed as the Division Bench was also of the view that the petitioner was not entitled to receive salary for the period he had not worked, applying the principle of "No Work No Pay" and he had not completed the qualifying service as a Regular Collection Amin.

25. The learned counsel for the Review-Applicant has submitted that in the judgment and order dated 03.08.2017 passed in Writ Petition No. 4963 (S/S) of 2015, Rajendra Prasad Tiwari v. State of U.P. and in the judgment and order dated 27.11.2018 passed in Writ Petition No. 619 (S/S) of 2014, Md. Usman Ansari v. State of U.P., the persons who had not worked for a single day, were extended benefit of judgment and order dated 19.08.2006 passed in Writ Petition No. 4031 (S/S) of 2001, whereby the petitioner's services were treated as regular since 05.06.1986 and they were paid post-retiral dues and pension, and this was not considered by the Division Bench while deciding the Special Appeal.

26. Although it is mentioned in Ground-D taken in the memo of review-application that the aforesaid judgments were already on record, it has rightly not

been stated that the learned counsel for the appellant had referred to those judgments during his submissions.

27. Copies of Case-laws are not required to be annexed with the Writ Petition or the Memo of Appeal. In any case, while deciding a case, the Court is required to consider the submission made by the learned Counsel for the parties and the case-laws placed by them before the Court in support of their submissions. The Court is not expected to go through the entire record to find out whether the petitioner or the appellant has brought on record a copy of any case-law, although the same has not been relied upon by the learned counsel during his submissions.

28. Even if Rajendra Prasad Tiwari and Md. Usman Ansari had been granted the benefit of the judgment and order dated 19.08.2006 passed in Writ Petition No. 4031 (S/S) of 2001 although they had not worked for a single day, the judgments passed in their cases will not be binding precedents unless the question of eligibility of the persons for being paid the salary for the period they had not worked was decided in those judgments, because it is well settled law of precedents that only the ratio of a judgment is binding as a precedent, not the order which is passed in a case.

29. For the aforesaid reasons, we are of the considered view that the judgment and order dated 17.01.2023 dismissing the Special Appeal does not suffer from any error, much less an error which is apparent on the face of the record.

30. The review application lacks merits and the same is accordingly **dismissed**. However, there will be no order as to costs.

(2023) 7 ILRA 776
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2023

BEFORE

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

Writ-C No. 1562 of 2020

Ram Vilas **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Anoop Kumar Mishra

Counsel for the Respondents:
 C.S.C.

A. Criminal Law -Arms Act, 1959- Sections 17(3) & 17(7) - Suspension and revocation of licences - If the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void - Cancellation of the arms license - Mere pendency of the criminal case or the apprehension that the petitioner may be involved in future in any other criminal case cannot be a ground for cancellation of the arms license under the Arms Act, 1959, unless and until a clear-cut finding is recorded by the Competent Authorities that the possession of the firearm caused a threat to public peace and is a danger to the safety of human beings. (Para 10)

B. Arms Act, 1959, Ss 17(3), 17(7) - Cancellation of the arms license - The petitioner was involved in only one criminal case and was finally acquitted by order dated 23.07.2021. Perusal of the order of acquittal does not show the use of a firearm. As provided u/s 17(7), if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void. Court held that after acquittal, the very basis of the order of cancellation vanished; the petitioner is

entitled to the restoration of his firearm license. (Para 9, 15)

Allowed. (E-5)

List of Cases cited:

1. *Indra Pratap @ Ram Pratap Vs St. of U.P. through Principal Secretary Home Lucknow & ors.*, Misc. Single No. 28781 of 2017, decided on 15.02.2019

2. *Ram Prasad Vs Commissioner & ors.*, Writ-C No. 56378 of 2006, decided on 07.02.2020

3. *Ajay Jayawant Bhosale Vs. The Commissioner of Police & ors.*, Criminal Writ Petition No. 594 of 2013, decided on 15.07.2016

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

1. Heard Mr. Anoop Kumar Mishra, learned counsel for the petitioner and learned Standing Counsel for the respondents-State.

2. This writ petition has been filed by the petitioner with a prayer to quash the order dated 02.08.2019 passed by the respondent no.2 in case No.377/2019 (computerized case No.C201918000000377) as well as the order dated 03.12.2018 passed by the respondent no.3 in appeal no.225/2017 (Computerized Case No.D201718210225).

3. The crux of the matter is that the petitioner, who had firearms license bearing no.5010 was served with show cause notice dated 12.07.2012 on the ground that there was a first information report registered against the petitioner bearing Case Crime No.217 of 2012, under Section 302 IPC, Police Station-Nidhauri Kala, District-Etah. There was another first

information report registered against the petitioner in Case Crime No.105/2011, under Sections 147, 148, 149, 323, 504, 506,324 IPC, Police Station-Nidhauri Kala, District-Etah, wherein after investigation, final report has been submitted by the Investigating Officer. On 02.05.2017, the petitioner submitted reply to the aforesaid show cause notice dated 12.07.2012 that he had been falsely implicated in the said case by the police party and, therefore, proceedings initiated for cancellation of firearms license should be dropped. After considering the reply of the petitioner, the respondent no.3 directed the respondent no.5 to submit afresh report. The report has been submitted on 01.08.2017 by respondent no.5, on the basis of which, without considering the reply of the petitioner, firearms license of the petitioner was cancelled vide order dated 03.08.2018 on the ground that criminal case is pending against him. Appeal against the aforesaid order has also been rejected by the respondent no.2 vide order dated 02.08.2019. Hence the present petition has been filed.

4. Learned counsel for the petitioner submits that except the present criminal case crime no. 217 of 2012, there is no other case registered against the petitioner nor, he has ever been found to be guilty in criminal case at that point of time. He further submits that without considering the fact that during course of trial, son of the deceased has given statement before the trial court that his father has not been shot by the petitioner and the ballistic report also does not prove that the fire arms were used by the petitioner, the fire arms license has been cancelled. He further submits that the petitioner has already been acquitted in the criminal case, on the basis of which, fire arms license has been cancelled.

5. Learned counsel for the petitioner further submits that merely because a criminal case is pending, the provisions of Section 17 of the Arms Act would not be attracted and in the present case, as the petitioner has already been acquitted in criminal case lodged against him, therefore, the impugned orders may be set aside. In support of his contention, he has relied upon the judgment of Bombay High Court in the case of *Ajay Jayawant Bhosale vs. The Commissioner of Police and Ors.*

6. Per contra, the argument of learned Standing Counsel is that once the petitioner has been found to be implicated in criminal case, it was sufficient enough for the District Magistrate to record his satisfaction. However, learned Standing Counsel could not dispute the factual position that the petitioner has been acquitted in the said criminal case.

7. Having heard learned counsel for the parties and their arguments advanced across the bar and having perused the record, I find that the appellate authority had failed to consider the order and judgment of acquittal passed in favour of the petitioner in the said criminal case and even otherwise I find that except the criminal case in question in which petitioner stood acquitted, there is no such case registered against him and, therefore, no inference can be drawn that the petitioner was having criminal antecedents.

8. From perusal of Section 17(3) and Section 17(7) of the Arms Act, 1959, it is crystal clear that not a single ground of Section 17(3) of the Arms Act, 1959 is applicable in the case of the petitioner, undisputedly petitioner was involved only in one criminal case and the respondents could not bring on record any material to

show that the petitioner was involved in any other criminal case except the present one. It is also relevant to mention here that in sole criminal case, petitioner has already been acquitted by the concerned court below. As per proviso of Section 17(7) of the Arms Act, 1959 which providing that if the conviction is set aside in appeal or otherwise, the suspension or revocation shall become void. It would be relevant to quote Section 17(3) and 17(7) of "The Act, 1959", which reads as follows:-

"Section 17(3)- The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence-

(a) if the licensing authority is satisfied that the holder of the licence is 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 is of unsound mind, or is for any reason unfit for a licence under this Act; or

(b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or

(c) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) if any of the conditions of the licence has been contravened; or

(e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence."

"Section 17(7)- A court convicting the holder of a licence of any offence under this Act or the rules made

thereunder may also suspend or revoke the licence:

Provided that if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void."

9. In the facts of the present case, this Court comes to the conclusion that none of the ground mentioned in section 17(3) of "The Act, 1959", is applicable in the petitioner case. The petitioner was involved in only one criminal case and was finally acquitted by order dated 23.07.2021, further as provided under section 17(7) of "The Act, 1959", if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void, therefore in that case too, the petitioner is entitled for restoration of his fire arm license by the Authority concerned, in view of the above, the impugned orders are not sustainable in the eyes of law.

10. It is undoubtedly to say that merely pendency of the criminal case or with the apprehension that the petitioner may be involved in future in any other criminal case cannot be a ground for cancellation of the arms license under the Arms Act, 1959, unless and until a clear cut finding is recorded by the Competent Authorities that the possession of the fire arms caused threatening of the public peace and is danger for the safety of human being. The Competent Authorities fail to record any such finding in the impugned orders.

11. In the counter affidavit filed by learned Standing Counsel, there is no denial about the fact that the petitioner has already been acquitted in the criminal case on the basis of which, fire arms license has

been cancelled. There is also nothing on record to dispute the submission made by the learned counsel for the petitioner that there is no criminal antecedents and in case, the petitioner is allowed to have fire arms license, the same would not be dangerous to public peace, safety and security.

12. This Court finds that for cancellation of a fire arm license, there had to be a definite finding that the possession of fire arm with the licensee was endangering public peace and public safety. The aforesaid has been dealt with by the Co-ordinate Bench of this Court in the case of ***Ram Prasad vs. Commissioner and others.***

13. This Court also noticed that the State Government had issued guidelines which were circulated to all the District Magistrates to follow the same in the matters of cancellation/revocation of fire arm licence. The guidelines were reproduced as under:-

"स्पीड पोस्ट/फैक्स/ई-मेल

**संख्या: 1/2018/जन-102-छ पु0-5-
2018-408/17**

प्रेषक-

भगवान स्वरूप

सचिव

उत्तर प्रदेश शासन।

सेवा में,

समस्त जिला मजिस्ट्रेट

उत्तर प्रदेश।

गृह (पुलिस) लखनऊ दिनांक:

अनुभाग-5 07 फरवरी 2018

विशय:- व्यक्तिगत शस्त्र लाइसेंसों के अनुज्ञप्तियों में परिवर्तन-परिवर्धन, उनके निलम्बन एवं प्रतिसंहरण के संबंध में, दिशा निर्देश।

महोदय,

आयुध अधिनियम, 1959 की धारा - 17 में अनुज्ञप्तियों में परिवर्तन-परिवर्धन, उनके निलम्बन एवं प्रतिसंहरण के संबंध में व्यवस्था दी गयी है। उपरोक्त के अतिरिक्त मा० सर्वोच्च न्यायालय एवं मा० उच्च न्यायालय द्वारा भी समयकश पर तत्सम्बन्ध में विस्तृत आदेश पारित किये गये हैं। गृह (पुलिस) अनुभाग-5 के शासनादेश संख्या-271 आर/छ:-पु०-5-91-573/01, दिनांक 25.02.1991 द्वारा आग्नेयास्त्र लाइसेंसों का निलम्बन/निरस्तीकरण व शासनादेश संख्या-3017 आर/छ:-पु०-5-99, दिनांक 15.05.1999 द्वारा व्यक्तिगत शस्त्र लाइसेंस(R) का दुरुप्रयोग रोकने के संबंध में निर्देश दिये गये हैं।

2. उक्त के दृष्टिगत मुझे यह कहने का निर्देश हुआ है कि व्यक्तिगत शस्त्र लाइसेंसों के अनुज्ञप्तियों में परिवर्तन-परिवर्धन, उनके निलम्बन एवं प्रतिसंहरण के संबंध में निम्नानुसार कार्यवाही सुनिश्चित किया जाय-

(1) जिला मजिस्ट्रेट/लाइसेंसिंग प्राधिकारी लिखित आदेश द्वारा अग्नेयास्त्र अनुज्ञप्ति का सुनिश्चित कालावधि के लिए निलम्बित कर सकता है या अनुज्ञप्ति को प्रतिसंहरित कर सकता है।

(2) उपरोक्त निलम्बन/प्रतिसंहरण तभी किया जाएगा जब जिला मजिस्ट्रेट/लाइसेंसिंग प्राधिकारी को यह समाधान हो जाए कि-

(क) अनुज्ञप्तिधारी किसी विधि के अंतर्गत आयुध रखने हेतु प्रतिशिद्ध है या

विकशतचित है या किन्हीं अन्य कारणों से आयुध अधिनियम में अनुज्ञप्ति के अयोग्य है, अथवा

(ख) जब जिला मजिस्ट्रेट/लाइसेंसिंग प्राधिकारी लोकशांति की सुरक्षा या "लोकक्षेत्र" के लिए अनुज्ञप्ति को निलम्बित या प्रतिसंहरित करने के युक्तियुक्त आधार पाता है, आवश्यक समझता है अथवा

(ग) जबकि यह प्रमाण हो कि अनुज्ञप्ति गलत जानकारी के आधार पर प्राप्त की गई है, अथवा

(घ) जबकि अनुज्ञप्ति की किसी शर्त का उल्लंघन किया गया है, अथवा

(ङ) जबकि अनुज्ञप्ति धारक को अपना शस्त्र परिदत्त करने का निर्देश दिया गया हो और उसके द्वारा शस्त्र का परिदान न किया गया हो।

(3) अनुज्ञप्ति प्राधिकारी को अनंत समय के लिए शस्त्र अनुज्ञप्ति निलंबित अथवा प्रतिसंहरित (निरस्त) नहीं करनी चाहिए। अनुज्ञप्ति के निलम्बन अथवा प्रतिसंहरण की अवधि सुनिश्चित होनी चाहिए।

(4) अनुज्ञप्ति प्राधिकारी को लाइसेंस निलंबित अथवा निरस्त करने का अधिकार आयुध अधिनियम की धा मजिस्ट्रेट रा 17 (3) के अंतर्गत प्रदत्त है और उक्त कार्यवाही करने से पूर्व अनुज्ञप्तिधारी को सुने जाने का अवसर प्रदान किया जाना आवश्यक है।

(5) अनुज्ञप्ति प्राधिकारी मामले के तथ्यों और परिस्थितियों पर विचार करते हुए यदि यह उचित पाते हैं कि प्रकरण में तात्कालिक प्रभाव से आयुध अनुज्ञप्ति का अनुज्ञप्ति प्राधिकारी द्वारा परिदान किया जाना

आवश्यक है तो ऐसा करने का आदेश अभिलिखित किया जाये।

(6) मात्र किसी आपराधिक मामले का लम्बित रहना शस्त्र अनुज्ञप्ति निरस्त/निलम्बित करने का पर्याप्त आधार नहीं है। यहाँ यह भी स्पष्ट करना समीचीन है कि मात्र एक आपराधिक प्रकरण के लम्बित होने के आधार पर भी विशिष्ट मामलों में आयुध अनुज्ञप्ति को निलंबित/निरस्त किया जा सकता है, परंतु अनुज्ञप्ति प्राधिकारी को ऐसा करने के पर्याप्त आधार अपने आदेश में अभिलिखित किये जाय। यह भी आवश्यक है कि ऐसे आधार अभिलिखित करते समय यह स्पष्ट उल्लिखित किया जाय कि अनुज्ञप्ति प्राधिकारी को समाधान हो गया कि प्रश्नगत आपराधिक प्रकरण की प्रकृति ऐसी है कि वह आमजन और समाज की लोकशांति एवं लोकक्षेम के प्रतिकूल है और यदि अनुज्ञप्तिधारी को अनुज्ञप्ति रखने दी गई तो लोकशांति व लोकक्षेम पर प्रतिकूल प्रभाव पड़ेगा।

(7) यदि किसी शस्त्र अनुज्ञप्ति के निलंबन या प्रतिसंहरण की कार्यवाही आपराधिक वाद के आधार पर की गई हैं तो यदि उक्त आपराधिक अभियोग, दोषमुक्ति में परिवर्तित हो जाता है तो शस्त्र निलम्बन/निरस्त्रीकरण के आदेश का औचित्य भी समाप्त हो जाता है, परंतु यदि उक्त अभियोग राज्य द्वारा अपील योग्य पाया जाए एवं उक्त प्रकरण की अपील की जाए तो राज्य को उक्त दोषमुक्ति के आदेश की अपील के निर्णय तक अनुज्ञप्तिधारी की शस्त्र अनुज्ञप्ति निलंबित/प्रतिसंहरित रह सकती है। अतः ऐसे प्रकरण जहाँ जिला मजिस्ट्रेट के समक्ष दोषमुक्ति के अभिकथन द्वारा अपने शस्त्र अनुज्ञप्ति

निलंबन/निरस्त्रीकरण की कार्यवाही को अपास्त करने की प्रार्थना की जाए, वहाँ जिला मजिस्ट्रेट यह जानकारी करना सुनिश्चित करेंगे कि प्रकरण में कोई राज्य अपील योजित/प्रस्तावित तो नहीं की गई है? तथा उसके उपरान्त ही किसी निर्णय पर पहुंचेंगे।

(8) जहाँ पर अनुज्ञप्ति प्राधिकारी द्वारा यह समाधान किया जा रहा है कि अनुज्ञप्तिधारी का कृत्य लोकशांति और लोकक्षेम के प्रतिकूल है तो इसका तात्पर्य कानून व्यवस्था बिगड़ने की सामान्य परिस्थितियाँ से नहीं समझा जाएगा, अपितु लोकशांति और लोकक्षेम प्रभावित होना तथा समाज पर व्यापक असर से तात्पर्यित है।

(9) शस्त्र निरस्त्रीकरण की कार्यवाही लम्बित रहने अथवा कोई आपराधिक विचारण लम्बित रहने के दौरान अनुज्ञप्तिधारी शस्त्र रखने के लिए अधिकार स्वरूप माँग नहीं कर सकता है क्योंकि शस्त्र अनुज्ञप्ति एक अधिकार नहीं मात्र एक सुविधा है।

(10) अनुज्ञप्ति प्राधिकारी/जिला मजिस्ट्रेट अपने तात्त्विक समाधान के लिए पुलिस, अभियोजन एवं अन्य एजेंसियों से आख्या आहूत कर सकता है। इसके साथ ही जिला मजिस्ट्रेट द्वारा प्रकरण से संबंधित सभी सुसंगत अभिलेख पर विचार करने तथा मजिस्ट्रेट अनुज्ञप्तिधारी की पारिवारिक पश्शुभूमि, उसके पूर्व आपराधिक कृत्य और उसका आपराधिक इतिहास को विचार में लेने के उपरांत ही समुचित आदेश पारित किया जाय।

(11) अनुज्ञप्ति प्राधिकारी/जिला मजिस्ट्रेट आयुध अधिनियम की धारा 17 के उपबंधों के अंतर्गत यह समाधान होने पर कि

कोई अनुज्ञप्तिधारी किसी गंभीर अपराध में सम्मिलित होने, दोषसिद्ध होने या किसी अन्य आनुशांगिक कारण, जिसे वो तात्त्विक रूप से उचित पाता हो, के आधार पर अनुज्ञप्तिकारी को अनुज्ञप्ति धारण करने के लिए अयोग्य व्यक्ति की श्रेणी में पाता है तो वह शस्त्र अनुज्ञप्ति को निलंबित/प्रतिसंहरित कर सकता है।

(12) अग्नेयास्त्रों के लाइसेंस सुरक्षा की दृष्टि से स्वीकृत किये जाते हैं। इनका प्रयोग शादी-विवाह अथवा सार्वजनिक स्थानों पर प्रदर्शन नहीं किया जाना चाहिए। ऐसा किये जाने से जनता में भय का वातावरण व्याप्त होता है। जो व्यक्ति शस्त्रों का प्रयोग प्रदर्शन हेतु अथवा जनता में भय व्याप्त करते हुए पाए जाएँ, उनके शस्त्र लाइसेंस की शर्त संख्या 5 का उल्लंघन करने के आरोप में एवं शस्त्र अधिनियम की धारा 17 (3) (ख), (घ), (ङ) के अधीन तत्काल निरस्त करते हुए विधिक कार्यवाही की जा सकती है।

(13) यदि लाइसेंसिंग अधिकारी के समक्ष सामग्री है और उन्हें यह स्पष्ट हो जाता है कि लाइसेंसी के पास शस्त्र रहने से शांति एवं जनसुरक्षा खतरे में पड़ सकती है, तो वह (लाइसेंसिंग अधिकारी) उक्त तथ्यों को अभिलिखित करने के उपरांत सीधे अथवा किसी जाँच अथवा लाइसेंसी की सुनवाई का अवसर दिये बिना लाइसेंस निलम्बित/निरस्त कर सकते हैं, परंतु उन मामलों में जिनमें लाइसेंसिंग अधिकारी को यह स्पष्ट है कि लाइसेंसी के पास शस्त्र रहने से जनशान्ति या जनसुरक्षा खतरे में पड़ सकती है और सही स्थिति की जानकारी हेतु जाँच लंबित हो तो ऐसी जाँच के दौरान लाइसेंस निरस्त नहीं किया जा सकता है।

(14) आयुध अधिनियम की धारा 17 के अंतर्गत किसी कार्यवाही को प्रचलित करने से पहले जिला मजिस्ट्रेट/अनुज्ञप्ति प्राधिकारी के लिए यह आवश्यक है कि वह अपने समक्ष प्रस्तुत पत्रावली पर अनुज्ञप्तिधारी की शस्त्र अनुभाग से मूल पत्रावली में संलग्न शस्त्र आवेदन, शपथपत्र, आख्या एवं सुसंगत दस्तावेजों का सूक्ष्म अध्ययन कर लें, ताकि यह सुनिश्चित किया जा सके कि अनुज्ञप्तिधारी द्वारा गलत तथ्यों के आधार पर शस्त्र आवेदन तो नहीं किया गया है या किसी शर्त का उल्लंघन तो नहीं किया गया है?

(15) उपरोक्त निर्देशों के अतिरिक्त आयुध अधिनियम-1959, आयुध नियमावली-2016 समय समय पर माननीय सर्वोच्च न्यायालय एवं माननीय उच्च न्यायालय इलाहाबाद द्वारा पारित आदेशों, भारत सरकार एवं राज्य सरकार द्वारा समयकम्प पर निर्गत निर्देशों का भी सम्यक अनुपालन किया जाए एवं यदि उक्त का अनुज्ञप्तिधारी द्वारा उल्लंघन पाया जाता है तो उसके शस्त्र अनुज्ञप्ति के निलंबन/निरस्तीकरण की विधि सम्मत कार्यवाही सुनिश्चित की जाय।

3. इस संबंध में मा० न्यायालय द्वारा निम्नलिखित वादों (1) सी०पी० साहू बनाम उत्तर प्रदेश राज्य 1984 ए०डब्लू०सी० 145, (2) कैलाश नाथ बनाम उत्तर प्रदेश राज्य 1985 ए०डब्लू०सी० 493, (3) हरप्रसाद बनाम उत्तर प्रदेश राज्य 2005 ए०डब्लू०सी० 4939 तथा (4) नेशनल कैपिटल टेरिटररी ऑफ़ डेलही बनाम उमेश कुमार 2008 (3) एस०सी०सी० क्रिमिनल 490 में पारित निर्णयों का सम्यक् अवलोकन करने के उपरान्त उमें दिये गये निर्देशों का पालन करते हुए ही कोई निर्णय लिया जाए।

4. कृपया उक्त निर्देशों का कड़ाई से अनुपालन सुनिश्चित किया जाए।"

14. In the case of **Indra Pratap @ Ram Pratap v. State of U.P. through Principal Secretary Home Lucknow and Others** in Misc. Single No. 28781 of 2017 decided on 15.2.2019, this Court vide paragraphs 8,9,10 and 11 has held thus: -

"8. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Section 17 of the Arms Act has been considered by a Division Bench of this Court in *Sheo Prasad Misra Vs. District Magistrate Basti and others*, 1979 (16)ACC 6 (sum), wherein the Division Bench relied upon an earlier decision in *Mast Uddin Vs. Commissioner, Allahabad*, 1972 ALJ 573. In both the aforesaid cases it has been held that mere involvement in a criminal case cannot in any way effect the public security or public interest. In view of this proposition of law the order cancelling or revoking the licence of the petitioner on the aforesaid ground of involvement and pendency of a criminal case is not tenable.

9. In Full Bench Decision of this Court rendered in *Chhanga Prasad Sahu Vs. State of Uttar Pradesh*, 1984(10) ALR 223 and *Kailash Nath and others Vs. State of U.P. and others*, 1985 (22) ACC 353 and in the case of *Rana Pratap Singh Vs. State of U.P.* 1994 JIC 72 (All); 1995 (Supp) ACC 235, it has been held that mere pendency of a criminal case (s) is no ground for cancellation of arms licence. The effect of the aforesaid Full Bench decisions was also considered in *Sadri Ram Vs. District Magistrate, Azamgarh and others*, 1998 (3) AWC 2102: 1998 (37) ACC 830.

10. This court in the case of *Harprasad (supra)* held as hereunder:

" involvement and pendency of a case crime is no ground for cancellation of fire-arm licence. It is settled law that after acquittal the very basis for cancellation of the arm licence stands vitiated. In this regard reference of the decision rendered in *Lalji Vs. Commissioner, Kanpur* and another, 1999 (4) AWC 2952, has been made."

11. Thus in view of the admitted facts and the settled legal position that a fire arm licence can not be cancelled on the ground of mere involvement of licensee in a criminal case, the impugned orders cannot be sustained. Even otherwise the petitioner has been acquitted in the criminal case in which he was involved and hence there is no justification for the continuance of the cancellation of the petitioner's fire arm licence."

Likewise, the relevant observations in the case of *Mukesh Kumar Yadav (supra)* are reproduced as under:-

"10. The said section has come up for judicial scrutiny in the case of *C.P. Sahu Vs. State*, 1984 AWC 145; *Kailashnath Vs. State of U.P. and another*, 1985 AWC 493; *Balram Singh Vs. State of U.P. and others*, 1988 AWC 14814; *Rana Pratap Singh Vs. State of U.P.*, 1995 ACJ 200 and as per the judicial provocation given, there on the following points:-

(a) the licensing authority has no power to suspend the arms licence pending enquiry into its cancellation/suspension nor has it the power to suspend the licence for indefinite period;

(b) licensing authority has the power to suspend for specified period a fire-arm licence on being satisfied as to existence of all or any of the conditions visualised by clauses (a) to (e) of sub-section (3) of Section 17 of the Act sans any

prior opportunity of hearing being given to the licence holder but such order of suspension shall not attain finality until the aggrieved party has been heard and his objections, if any, adjudicated. In other words, suspension of arms licence for specified period or its revocation under Section 17(3) of the Act, if ordered without affording opportunity of hearing, would endure in suspended animation until the aggrieved party has been heard by the licensing authority and his objections, if any, are adjudicated:

(c) the licensing authority can also for the furtherance of the immediate remedial actions, exercise in facts and circumstances of a given case, an incidental power of directing the licence holder to surrender his licence until objections have been decided ; and

(d) suspension under Section 17(3) of the Act must be for definite period to be specified in the order by the licensing authority.

11. Further, this Court in the case of Sahab Singh Vs. Commissioner Agra Region, Agra and others 2006 (24) LCD 374, in paragraph No. 3 held as under:-

"The submission of the petitioner is that merely because of pendency of a criminal case, the arms licence of the petitioner cannot be cancelled. in support of the said submission, learned counsel for the petitioner has placed reliance on two decisions of this Court in the case of Hausla Prasad Tiwari v. State of U.P. and Ishwar @ Bhuri v. State of U.P. . It has further been submitted that in view of the Full Bench decision of this Court in the cases of Balaram Singh v. State of U.P. and Ors. Kailash Nath v. State of U.P. 1985 A.W.C. 493 as well as the Division Bench decision of this Court in the case of Sadri Ram v. District Magistrate, Azamgarh and Ors., the arms licence of the petitioner

cannot be placed under suspension pending enquiry."

15. In view of the well-settled legal proposition and the relevant case laws referred above and the provisions contained in the said Act, this Court finds that in the present case, the petitioner's licence was cancelled by the concerned District Magistrate on the ground of pendency of criminal case against him. The petitioner was later on acquitted of the criminal case by order dated 23.07.2021. A perusal of the order of acquittal does not show the use of fire arm. After acquittal, the very basis of the order of cancellation vanished. The finding of the concerned District Magistrate as affirmed by the Commissioner, that it was not in the interest of public peace and the public security that the licence remained with the petitioner/licencee, is not based on any evidence/material, except the police reports which in their turn, were in view of the pendency of the criminal case against the petitioner. On mere apprehension expressed in the impugned orders that the petitioner would misuse the fire arm and would extend threat to the persons of the weaker section of the society, the arm licence could not be cancelled.

16. Thus in view of above exposition of law and applying the same to the facts and circumstances of the present case, I am of the considered opinion that the order passed by the licensing authority cancelling the fire arms license of the petitioner dated 02.08.2019 deserves to be quashed. Therefore, the impugned order dated 02.08.2019 passed by the respondent no.2 in case No.377/2019 (computerized case No.C201918000000377) as well as the order dated 03.12.2018 passed by the respondent no.3 in appeal no.225/2017

(Computerized Case No.D201718210225)
are hereby **quashed**.

17. However, quashing of the impugned orders would not result in revival of the petitioner's fire arm license automatically. The petitioner may move an application before the District Magistrate, Etah alongwith relevant document as well as acquittal order and certified copy of this order within two weeks from today. If any such application is filed before the District Magistrate, Etah/licensing authority, the same shall be processed and decided expeditiously strictly in accordance with law, within a period of two months from the date of production of such application.

18. Needless to say, the licensing authority shall not refuse the arm license on the ground of the impugned orders, which has been quashed by this order.

19. With the aforesaid directions, the present writ petition is, accordingly, **allowed**.

20. No order as to costs.

(2023) 7 ILRA 785
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2023

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.

Writ-C No. 5015 of 2023

Bajranghi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mohd. Zubair, Ms. Roshni Ibrahim

Counsel for the Respondents:
C.S.C.

A. Civil Law - U.P. Revenue Code, 2006 - Section 98 - U.P. Revenue Code Rules, 2016, Rule 99 - Collector's permission for transfer of Scheduled Caste bhumidhar's land - Explanation to Rule 99 – Clause (d) of sub-rule (8) mandates that the area of the land held by the applicant after transfer must not be reduced to less than 1.26 hectares. Held: The import of the Explanation appended to Rule 99 is that even in a case where the area of land held by the applicant on the date of application reduces to less than 1.26 hectares after the transfer, permission may still be granted in the event that either of the conditions specified in Clauses (a) to (c) is fulfilled. The use of "or" between Clauses (a) to (d) of sub-rule (8) conveys a disjunctive sense, indicating alternatives, and the fulfillment of the conditions specified in any one of the clauses would be sufficient grounds for granting permission under Section 98(1). i.e., even if one of the conditions under Clauses (a) to (d) of Rule 99(8) is fulfilled, the non-fulfillment of any other condition would be of no consequence. (Para 37, 38)

B. In the instant case petitioner belonged to the Scheduled Caste and was suffering from a disease. In order to meet the expenses of medical treatment, he had taken a loan. To repay the loan and to fund his medical treatment, he was in need of financial assistance and accordingly sought permission for the transfer of his bhumidhari land. Collector rejected the application, purportedly on the ground that after the proposed transfer, the remaining area of land held by the petitioner would be 0.5930 hectares, i.e., less than 1.26 hectares. Held: Impugned order was non-speaking and does not indicate an objective consideration of the conditions under Clauses (a) to (c) of sub-rule (8) of Rule 99, which are in the nature of alternatives. Impugned orders set aside. (Para 64)

Allowed. (E-5)

List of Cases cited:

1. Sitaram Vs St. of U.P. & ors.2022 (155) RD 178

2. Smt. Omwati Vs Collector, District Pilibhit & ors.2023 (1) ADJ 280

3. Smt. Krishna Shri Gupta Vs St. of U.P. & ors.2020 (3) ADJ 358

4. Fakir Mohd. Vs Sita Ram (2002) 1 SCC 741

5. Guru Nanak Dev University Vs Sanjay Kumar Katwal & anr.(2009) 1 SCC 610

6. G.P. Ceramics (P) Ltd. Vs Commissioner, Trade Tax, Uttar Pradesh (2009) 2 SCC 90

7. Mersey Docks and Harbour Board Vs Henderson (1888) 13 AC 595 (HL)

8. S. Sundaram Pillai Vs V.R. Pattabiraman & ors.(1985) 1 SCC 591

9. Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. CTO AIR 1961 SC 315

10. Bihta Cooperative Development Cane Marketing Union Ltd. Vs Bank of Bihar AIR 1967 SC 389

11. Hiralal Rattanlal Vs St. of U.P. (1973) 1 SCC 216

12. Dattatraya Govind Mahajan Vs St. of Mah. (1977) 2 SCC 548

13. U.O.I. Vs Mohan Lal Capoor & ors.(1973) 2 SCC 836

14. Breen v. Amalgamated Engineering Union (1971) 2 QB 175, 191 : (1971) 1 All ER 1148

15. Alexander Machinery (Dudley) Ltd. Vs Crabtree 1974 ICR 120

16. Regina Vs Immigration Appeal Tribunal Ex parte Khan (Mahmud) 1983 QB 790 : (1983) 2 All ER 420

17. Travancore Rayon Ltd. Vs U.O.I. (1969) 3 SCC 868

18. Mahabir Prasad Santosh Kumar Vs St. of U.P. (1970) 1 SCC 764

19. Siemens Engineering & Manufacturing Co. of India Ltd. Vs U.O.I. (1976) 2 SCC 981

20. Kranti Associates Pvt. Ltd. & anr. Vs Masood Ahmed Khan & ors.

21. R. Vs St Pancras Vestry (1890) 24 Q.B.D. 371

22. Associated Provincial Picture Houses, Ltd. Vs Wednesbury Corp.[1947] 2 All E.R. 680

23. Padfield & ors.Vs Minister of Agriculture, Fisheries and Food & ors.[1968] 1 All E.R. 694

24. Breen Vs Amalgamated Engineering Union & ors.[1971] 2 Q.B. 175

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

1. Heard Ms. Roshni Ibrahim, learned counsel for the petitioner and Sri Ajit Kumar Singh, learned Additional Advocate General assisted by Sri Abhishek Shukla, learned Additional Chief Standing Counsel appearing for the State respondents.

2. The present petition seeks to assail an order dated 25.02.2021 passed by the respondent No. 3/Collector/District Magistrate, Fatehpur, District Fatehpur in

Case No. 00340/2021, Computerized Case No. C202102000000394 (Bajrangi Vs. State), under Section 98(1) of the U. P. Revenue Code, 2006. The order dated 05.07.2021 passed by the respondent No. 2/Commissioner, Prayagraj Region, Prayagraj in revision filed against the earlier order, being revision No. 00340/2021, Computerized Case No. C202102000000394 (Bajrangi Vs. State), under Section 210 of the U. P. Revenue Code, 2006, is also sought to be challenged.

3. As per the pleadings and the record of the writ petition, the petitioner has claimed himself to be the recorded bhumidhar with transferable rights over land bearing Gata No. 3946, area 1.0500 hectares, situate at Village Kondar, Pargana Muttaur, Tehsil and District Fatehpur.

4. It is sought to be contended that the petitioner belongs to scheduled caste and was suffering from a disease and in order to meet the expenses of medical treatment, he had taken a loan. It is submitted that in order to repay the loan and for the purposes of his medical treatment he was in need of funds and accordingly he had sought permission for transfer of his bhumidhari land by moving an application dated 20.10.2020 before the Collector in the prescribed R.C. Form -27.

5. It is pointed out that upon the aforestated application, a report dated 04.11.2020 was submitted by the Area Lekhpal indicating therein that since the transfer was being sought for repayment of loan amount and for meeting out the expenses for the treatment of the disease the petitioner had been suffering from, there was no objection to the permission

which was being sought for transfer of the land in question.

6. Counsel for the petitioner has submitted that despite the fact that the petitioner's case for seeking permission for transfer was fully covered as per the provisions contained under Section 98 of the U.P. Revenue Code, 2006 read with Rule 99 of the U.P. Revenue Code Rules, 2016, the Collector rejected the application by means of an order dated 25.02.2021. It is submitted that the aforestated order was passed despite taking into notice the facts stated in the application and also the report submitted by the Area Lekhpal indicating therein that there were no objections to the permission being sought.

7. Aggrieved against the aforestated order, the petitioner preferred a revision before the Commissioner, which was also rejected by an order dated 05.07.2021 reiterating whatever was stated in the earlier order passed by the Collector.

8. Contention of the learned counsel for the petitioner is that once the petitioner had duly fulfilled the requisite conditions for grant of permission for transfer as per the relevant statutory provisions contained under Section 98 of the Code, 2006 read with the provision under Rule 99 of the Rules, 2016 and the report submitted by the Area Lekhpal after due verification of the facts was also favourable, there was absolutely no reason for the application to have been rejected by the concerned respondent authority.

9. It is submitted that the order passed by the respondent No. 3 rejecting the application and also the revisional order

passed thereagainst by the respondent No. 2, are non-speaking and bereft of reasons. It is further submitted that the only plausible reason which may seem to emerge from the two orders, is that after the proposed transfer, the remaining area of land held by the petitioner would be 0.5930 hectares.

10. Learned counsel for the petitioner has submitted that the requisite conditions under which permission of transfer of land may be granted by the Collector are provided under Section 98 of the Code, 2006 read with Rule 99 of the Rules, 2016. It is pointed out that the conditions laid down therein are in the form of alternatives and if any one of the conditions is fulfilled, the necessary permission ought to be granted.

11. In the case at hand, the petitioner claims to be suffering from a disease and was in need of funds for his treatment; accordingly the condition prescribed under Clause (b) of sub rule of Rule 99 was fulfilled. It is further sought to be contended that the condition prescribed under Clause (d) of sub rule (8) which mandates that the area of the land held by the applicant after transfer must not reduce to less than 1.26 hectares, has been clarified by the explanation appended to the Rule which provides that in a case where the conditions enumerated in any of the Clauses (a) to (c) of the Rule, are fulfilled, the non fulfillment of the condition enumerated in Clause (d) would not constitute a bar for grant of permission.

12. Learned Additional Advocate General appearing for the State respondents has fairly submitted that the conditions specified therein that the area of land held by the applicant on the date of application, consequent to the transfer should not

reduce to less than 1.26 hectares, would not be mandatory in the event the conditions specified under Clause (a), Clause (b) or Clause (c) are fulfilled. Learned Additional Advocate General has referred to the explanation appended to sub rule (8) to point out that the position in this regard has been clarified.

13. The provisions under the Code, 2006 and the Rules, 2016, which would be relevant for the purposes of the controversy involved in the present case are being extracted below:

"98. Restrictions on transfer by bhumidhars belonging to a Scheduled Caste.--(1) Without prejudice to the provisions of this Chapter, no bhumidhar belonging to a scheduled caste shall have the right to transfer, by way of sale, gift, mortgage or lease any land to a person not belonging to a scheduled caste, except with the previous permission of the Collector in writing:

Provided that the permission by the Collector may be granted only when--

(a) the bhumidhar belonging to a scheduled caste has no surviving heir specified in clause (a) of sub-section (2) of section 108 or clause (a) of section 110, as the case may be; or

(b) the bhumidhar belonging to a scheduled caste has settled or is ordinarily residing in the district other than that in which the land proposed to be transferred is situate or in any other State for the purpose of any service or any trade, occupation, profession or business; or

(c) the Collector is, for the reasons prescribed, satisfied that it is necessary to grant the permission for transfer of land.

(2) For the purposes of granting permission under this section the Collector

may make such inquiry as may be prescribed.

Rule 99. Collector's permission for transfer of Scheduled Caste bhumidhar's land. (Section 98).-- (1) An application under section 98 (1) or under section 98 (1) read with section 107, for permission to transfer land by way of sale or gift or for permission to bequeath land by will, as the case may be, shall be made by a Bhumidhar with transferable rights belonging to Scheduled Caste to the Collector in **R.C. Form-27.**

(2) An application under section 98 (1), for permission to mortgage his interest in the land shall be made by a bhumidhar, belonging to a Scheduled Caste to the Collector in R.C. Form-28.

(3) An application under section 98 (1), for permission to let out land shall be made by a bhumidhar belonging to a Scheduled Caste to the Collector in **R.C. Form-29.**

(4) On receipt of an application under section 98 (1) the Collector shall make such inquiry as he may, in the circumstances of the case, deem necessary. He may also depute an officer not below the rank of Naib Tahsildar for:

(a) verification of the facts stated in the application; and

(b) reporting the circumstances in which permission for transfer is sought.

(5) The inquiry officer referred to in sub-rule (4) of this rule shall submit the report in duplicate within the period of fifteen days, from the date of receiving the order of such inquiry.

(6) A copy of the report shall be supplied to the applicant free of charge, from the office of the Collector where such report has been submitted.

(7) The applicant may file objection against the report submitted by the inquiry officer within the period of

seven days from the date of receipt of the copy of the report.

(8) After receiving the report submitted under sub-rule (3) and the objection, if any, if the Collector is satisfied that-

(a) the conditions of clause (a) or clause (b) of subsection (1) of section 98 are fulfilled; or

(b) the tenure holder or any member of his family is suffering from any fatal disease regarding which the certificate has been issued by any physician or surgeon specialist in the disease concerned and the permission for transfer is necessary to meet out the expenses for the treatment of such disease; or

(c) the applicant is seeking permission under section 98(1) of the Code for the proposed transfer to purchase any other land from the consideration of such proposed transfer and the facts in this regard in the application are supported with certified copy of a registered agreement to sell in favour of the applicant; or

(d) the area of land held by the applicant on the date of application does not, after such transfer, reduce to less than 1.26 hectares, and

(e) if the permission is being sought for transfer by sale the consideration for the transfer of the land is not below the amount calculated as per the circle rate fixed by the Collector;

he may grant the permission by recording the reasons.

Explanation. --For the removal of doubt it is hereby clarified that if the condition enumerated in clause (d) of this sub-rule is not fulfilled but any condition enumerated in clauses (a) to (c) of this rule is fulfilled the permission under section 98(1) of the Code may be granted by Collector.

(9) An application referred to in sub-rule (2) or sub-rule (3) of rule 99 for permission to mortgage or to let out land, as the case may be, may be granted by the Collector on his being satisfied that the mortgage or letting out, as the case may be, is not possible in favour of a person belonging to a Scheduled Caste or Scheduled Tribe.

(10) An application referred to in sub-rule (1) of rule 99 for permission to bequeath land by will, may be granted by the Collector on his being satisfied that the bequeath of the land was not possible in favour of the person belonging to a Scheduled Caste or a Scheduled Tribe.

(11) The Collector shall make an endeavor to dispose of the application under section 98(1) within the period of fifteen days from the date of receiving the report submitted by the inquiry officer and if the application is not disposed of within such period the reason for the same shall be recorded."

14. Section 98 of the Code mandates that no *bhumidhar* belonging to a scheduled caste shall have the right to transfer, by way of sale, gift, mortgage or lease any land to a person not belonging to a scheduled caste except with the previous permission of the Collector in writing. The previous permission of the Collector is therefore, a condition precedent before any *bhumidhar* of scheduled caste can seek to transfer his land to a person not belonging to a scheduled caste. In the absence of such permission having been obtained, the transfer would be rendered void as per Section 104, and would be subject to the consequences provided under Section 105.

15. The proviso to Section 98 enumerates the conditions under which

permission may be granted by the Collector, and the same are as follows:

(i) the *bhumidhar* belonging to a scheduled caste has no surviving heir specified in clause (a) of sub-section (2) of section 108 or clause (a) of section 110, as the case may be; or

(ii) the *bhumidhar* belonging to a scheduled caste has settled or is ordinarily residing in the district other than that in which the land proposed to be transferred is situate or in any other State for the purpose of any service or any trade, occupation, profession or business; or

(iii) the Collector is, for the reasons prescribed, satisfied that it is necessary to grant the permission for transfer of land.

16. The reasons prescribed, as referred to under clause (c) of the proviso to Section 98(1), upon which the Collector is to record its satisfaction that it is necessary to grant permission for transfer of the land, are specified under sub-rule (8) of Rule 99 of the Rules, 2016, and the same are as follows:

(i) the conditions of clause (a) or clause (b) of subsection (1) of section 98 are fulfilled; or

(ii) the tenure holder or any member of his family is suffering from any fatal disease regarding which the certificate has been issued by any physician or surgeon specialist in the disease concerned and the permission for transfer is necessary to meet out the expenses for the treatment of such disease; or

(iii) the applicant is seeking permission under section 98(1) of the Code for the proposed transfer to purchase any other land from the consideration of such proposed transfer and the facts in this

regard in the application are supported with certified copy of a registered agreement to sell in favour of the applicant; or

(iv) the area of land held by the applicant on the date of application does not, after such transfer, reduce to less than 1.26 hectares, and

(v) if the permission is being sought for transfer by sale the consideration for the transfer of the land is not below the amount calculated as per the circle rate fixed by the Collector;

17. The conditions under which permission may be granted for transfer to a *bhumidhar* belonging to a scheduled caste can thus be summarised as follows:-

(i) in the absence of surviving heir specified in clause (a) of sub-section (2) of section 108 or clause (a) of section 110;

(ii) the transferor has settled or is ordinarily residing in the district other than that in which the land proposed to be transferred is situate or in any other State for the purpose of any service or any trade, occupation, profession or business;

(iii) for the reasons prescribed under the Rules, i.e.

(a) the tenure holder or any member of his family is suffering from any fatal disease; or

(b) the applicant is seeking permission for the proposed transfer to purchase any other land from the consideration of such proposed transfer; or

(c) the area of land held by the applicant on the date of application does not, after such transfer, reduce to less than 1.26 hectares, and

(d) if the permission is being sought for transfer by sale the consideration is not below the amount calculated as per the circle rate fixed by the Collector.

18. The explanation to Rule 99 clarifies that in a situation where any condition enumerated in clause (a) to (c) of sub-rule (8) of Rule 99 is fulfilled, the permission may be granted even if the holding of the *bhumidhar* (transferor) after such transfer reduces to less than 1.26 hectares.

19. The procedure for obtaining permission for transfer under Section 98 is provided for under Rule 99 of the Rules, 2016 and as per sub-rule (3) thereof an application seeking permission to transfer land by way of sale or gift or for permission to bequeath land by will, as the case may be, is to be made by a *bhumidhar* with transferable rights belonging to scheduled caste to the Collector in RC-Form 27. Upon receipt of such an application, the Collector under sub-rule (4) shall make an enquiry as he may, in the circumstances of the case deem necessary. For the purpose he may depute an officer not below the rank of Naib Tehsildar for : (a) verification of the facts stated in the application; and (b) reporting the circumstances in which permission for transfer is sought. Thereafter, under sub-rule (5), the inquiry officer shall submit the report in duplicate within a period of 15 days from the date of receiving the order of such enquiry. The copy of the report is to be supplied to the applicant under sub-rule (6) whereupon the applicant may file objections against the report within a period of seven days and thereafter the Collector upon being satisfied that any of the conditions under sub-rules (8)(a) to (d), and sub-rule (8)(e) of Rule 99, are fulfilled, he may grant permission after recording reasons.

20. In a case where the application has been made as per the prescribed

procedure and upon due enquiry as provided under the Rules, 2016 either of the aforesaid conditions are held to be satisfied, the permission is required to be granted for transfer under Section 98.

21. The aforementioned legal position with regard to the interpretation of the provisions contained under Section 98 of the Code, 2006 and Rule 99 of the Rules, 2016 which relate to the restrictions on transfer by bhumidhars belonging to a Scheduled Caste and the manner in which permission may be granted for the purpose by the Collector, were subject matter of consideration in recent decisions of this Court in **Sitaram vs State of U.P. and others and Smt. Omwati Vs. Collector District Pilibhit And 2 Others** which has been relied upon by counsel for both the parties.

22. The only plausible reason that may seem to emerge from the two orders, which are subject matter of the present writ petition, is that after the proposed transfer the remaining area of land held by the petitioner would reduce to 0.5930 hectare. This would mean that the area of land remaining with the petitioner would reduce to less than 1.26 hectares and would be hit by the injunctive condition under Clause (d) of sub rule (8) of Rule 99.

23. In this regard, it may be noticed that in terms of sub rule (8) of Rule 99, the Collector is required to record his satisfaction with regard to the fulfillment of conditions contained under Clauses (a), (b), (c), (d) and (e). It may further be noticed that Clauses (a), (b), (c) and (d), are connected, by the word 'or', and Clause (e) is connected by using the word 'and'.

24. The conjunctions 'and' and 'or' are two of the elemental words in the English

Language – 'and' combines items while 'or' creates alternatives.

25. In **Maxwell on The Interpretation of Statutes**, it has been observed as follows:

“in ordinary usage, 'and' is conjunctive and 'or' disjunctive”.

26. It was held by this Court in **Smt. Krishna Shri Gupta v. State of U.P. and Others** that in the context of statutory interpretation, the word 'or' has generally been construed as being disjunctive. The relevant observations made in the judgment are as follows:

“25. In logic, mathematics and in the context of statutory interpretation, the word “or” has generally been construed as being disjunctive i.e. connective that marks alternatives. It has been used to connect words, phrases or classes representing alternatives.”

27. In **Fakir Mohd. v. Sita Ram**, it was held that the word 'or' is normally disjunctive. The use of the word 'or' in a statute manifests the legislative intent of the alternatives prescribed under law.

28. In the case of **Guru Nanak Dev University vs. Sanjay Kumar Katwal and another**, it was held that the use of 'or' between two qualifications conveyed a disjunctive sense indicating alternatives and possession of either of the qualifications would be held to be sufficient. It was reiterated that the word 'or' is normally used in the disjunctive sense unless the context warrants otherwise. The relevant extract from the judgment is as follows :-

"9. The prescription of eligibility criteria is very clear. It requires a Bachelor's degree with not less than 45% marks or a Master's degree. The University's contention that the candidate must have a Bachelor's degree and only if his marks are less than 45% in the Bachelor's degree course, was the Master's degree to be considered, would mean that the word "or" should be substituted by the words "in the event of the candidate not having 45% marks in the Bachelor's degree". Reading such words into the provision is impermissible. The word "or" is disjunctive. No doubt, in some exceptional circumstances, the word "or" has been read as conjunctive as meaning "and", where the context warranted it. But the word "or" cannot obviously be read as referring to a conditional alternative, when such condition is not specified. In view of the provision relating to eligibility being unambiguous and using the word "or", it is clear that a Master's degree without a Bachelor's degree will satisfy the eligibility requirement."

29. The interpretation of the word 'or' in the context of an exemption notification issued under the U.P. Trade Tax Act, 1948 came up for consideration in the case of **G.P. Ceramics (P) Ltd. Vs. Commissioner, Trade Tax, Uttar Pradesh**, and it was held that the three contingencies provided for under the notification which were connected by the word 'or', were disjunctive in nature. It was stated thus :-

"24. The eligibility criteria is contained in the notification. Sub-clause (ii) of Clause 2-B of the notification envisages three contingencies i.e. (i) the unit is established on land or building or both owned by the dealer; or (ii) the unit is

established on land or building or both taken on lease for a period of not less than 15 years; or (iii) the unit is established on land or building or both allotted to such unit by the State or the Central Government or any government company or any corporation owned or controlled by the Central or the State Government.

xxx

27. The eligibility criteria are laid down in the notification, which, as noticed hereinbefore, provide for three contingencies. They are disjunctive in nature and not conjunctive..."

30. In this regard, reference may also be had to the observations made by **Lord Halsbury in Mersey Docks and Harbour Board vs. Henderson**, which are as follows :-

".....I know no authority for such a proceeding unless the context makes the necessary meaning of "or" "and" as in some instances it does; but I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence unless some other part of the same statute or the clear intention of it requires that to be done...."

31. It would therefore be seen that the meaning of the word 'or' as a tool of statutory construction has been subject matter of consideration in a number of decisions, and it has been consistently held that the word 'or' is normally disjunctive and its use in a statute manifests the legislative intent of the alternatives prescribed under law.

32. In the instant case the use of the word 'or' as a connective between Clauses (a), (b), (c) and (d), is indicative of the disjunctive sense marking the four

alternative conditions. It would follow as a consequence that in the event either of the conditions under Clauses (a), (b), (c) or (d) are fulfilled, the same would have to be held sufficient for the purposes of recording of satisfaction by the Collector for grant of approval.

33. The condition under Clause (d), which is in the nature of an injunctive clause, in terms whereof it is provided that area of land held by the applicant on the date of the application, should not after transfer, reduce to less than 1.26 hectares, has been clarified by the explanation which is appended to sub rule (8).

34. The intent, purpose and effect of an Explanation appended to a statutory provision was considered in **S. Sundaram Pillai Vs. V.R. Pattabiraman and others**. It was held that the Explanation is meant to explain or clarify certain ambiguities in the provision. Referring to earlier decisions in **Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. CTO, Bihta Cooperative Development Cane Marketing Union Ltd. v. Bank of Bihar, Hiralal Rattanlal Vs. State of U.P., Dattatraya Govind Mahajan v. State of Maharashtra** and also the principles laid down in **Sarathi in Interpretation of Statutes, Swarup in Legislation and Interpretation and Bindra in Interpretation of Statutes**, the object of an Explanation to a statutory provision was elaborated, and it was observed as follows:

“53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is--

"(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

35. The effect and intendment of an explanation is to be determined by its own words. In certain cases an explanation may be introduced ex abundanti cautela i.e. by way of abundant caution in order to clear any possible ambiguities surrounding the meaning of the statutory provision and to place what the legislature considers to be the true meaning beyond controversy or doubt.

36. The Explanation appended to sub rule (8) provides that if the condition enumerated in Clause (d) of the sub rule is not fulfilled but any of the conditions enumerated in Clauses (a) to (c) of the sub rule are fulfilled, the permission under Section 98(1) may be granted.

37. The import of the Explanation would therefore be that even in a case where the area of land held by the applicant on the date of application, reduces to less than 1.26 hectares after the transfer, permission may still be granted in the event either of the conditions specified in Clauses (a) to (c) is fulfilled.

38. The use of 'or' between Clauses (a) to (d) of sub rule (8), as noticed earlier, conveys a disjunctive sense indicating alternatives and fulfillment of the conditions specified in either of the clauses would be a sufficient ground on the basis of which permission under Section 98(1) may be granted.

39. It would be relevant to underscore that while fulfillment of either of the conditions specified under Clauses (a) to (d), aforesaid, would be 'sufficient', none of these conditions can be held to be 'necessary'. To put it in other words, in a case where one of the conditions under Clauses (a) to (d) are fulfilled, non-fulfillment of any other condition would be of no consequence.

40. In logic and mathematics, '**necessity**' and '**sufficiency**' are terms used to describe a conditional or implicational relationship between two statements. In general, a 'necessary condition' is one that must be present in order for the other condition to occur, while a 'sufficient condition' is one that produces the said condition.

41. It can therefore be said that a 'necessary condition' is a condition that must be present for an event to occur whereas a 'sufficient condition' is a condition or set of conditions that will produce the event.

42. A 'sufficient condition' would on its own produce the result but its absence cannot lead to an inference that the result would not be produced. A causal fallacy occurs when one assumes that a sufficient condition is necessary for the event to occur.

43. Applying the aforesaid principles, in the context of sub rule (8), the conditions specified in each of the Clauses (a) to (d), would have to be held sufficient, though neither of them is necessary.

44. The Explanation appended to sub rule (8) seeks to clarify the position that the non-fulfillment of the condition with regard to the requirement that area of land held by the applicant consequent to the transfer does not reduce to less than 1.26 hectares, as provided under Clause (d), would not create a bar in the grant of permission under Section 98(1), in the event any of the conditions enumerated in Clauses (a) to (c) is fulfilled.

45. On the question of the effect of non-disclosure of reasons in the orders impugned, it would be necessary to state that the duty to give reasons and the necessity of passing a speaking order by an authority exercising quasi-judicial powers, is fairly well settled. It has been consistently held that an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must be a 'speaking order' and it must not be like the 'inscrutable face of a sphinx'.

46. Emphasizing on the necessity to give reasons while exercising administrative or quasi-judicial functions, it was observed in **Union of India Vs. Mohan Lal Capoor and Others** observed as follows:

“28 Reasons are the links between the materials on which certain

conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rationale nexus between the facts considered and conclusions reached. Only in this way can opinion or decisions recorded to be shown to be manifestly just and reasonable.”

47. It would be apposite to refer to the observations made by **Lord Denning M.R., in Breen v. Amalgamated Engineering Union**, which are as follows:

“the giving of reasons is one of the fundamentals of good administration.”

48. In **Alexander Machinery (Dudley) Ltd. Vs. Crabtree, Sir Donaldson** has observed that “failure to give reasons amounts to a denial of justice”.

49. In **Regina Vs. Immigration Appeal Tribunal Ex parte Khan (Mahmud)**, **Lord Lane, C.J.** has observed:

“A party appearing before a tribunal is entitled to know, either expressly stated by the tribunal or inferentially stated, what it is to which the tribunal is addressing its mind.”

50. The **Law Commission** in the **Fourteenth Report** relating to reform in Judicial Administration made the following recommendations:

“In the case of administrative decisions provision should be made that they should be accompanied by reasons. The reasons will make it possible to test the validity of these decisions by the machinery of appropriate writs.”

51. In **Travancore Rayon Ltd. v. Union of India** it has been observed:

“The court insists upon disclosure of reasons in support of the order on two grounds : one, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.”

52. Dealing with the question as to whether it was incumbent on the authority exercising quasi-judicial or administrative powers to give any reasons for its decision, it was observed in **Mahabir Prasad Santosh Kumar v. State of U.P.**, as follows:

“The practice of the executive authority dismissing statutory appeals against orders which prima facie seriously prejudice the rights of the aggrieved party without giving reasons is a negation of the rule of law.

“Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim. If the order is subject to appeal, the necessity to record reasons is greater, for without recorded reasons the appellate authority has no material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just.”

53. In **Siemens Engineering & Manufacturing Co. of India Limited v. Union of India** while dealing with the exercise of an appellate power by the Central Government under the Sea Customs Act, 1878, it was stated thus:

“It is now settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons...”

54. Summarizing the legal position with regard to the necessity to give reasons and pass a speaking order while exercising quasi-judicial functions in the case of **Kranti Associates Private Limited And Another v. Masood Ahmed Khan And Others**, it was held as follows:

“(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.

(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".

55. The aforementioned decisions indicate that an important consideration which has consistently weighed with the courts for holding that an administrative authority exercising quasi-judicial functions must record reasons for its decision, is that such a decision is often subject to appellate as well as supervisory jurisdiction, and that the reasons, if recorded would enable the higher courts to effectively exercise the appellate or the supervisory power. The other considerations for taking this view are that the requirement of recording reasons would guarantee an objective consideration by the authority, introduce clarity in the decisions and minimize chances of arbitrariness in decision-making.

56. In addition to the above, the recording of reasons by an administrative authority would serve the salutary purpose of excluding the chances of arbitrariness and ensuring a degree of fairness in the process of decision-making.

57. The extent and nature of the reasons may depend upon particular facts and circumstances but what would be necessary is that the reasons should be clear and explicit so as to indicate that the authority has given due consideration to the points in controversy.

58. Having regard to the foregoing discussion regarding the rationale to record reasons by an administrative authority exercising quasi-judicial functions, this Court finds that the orders passed by the respondent authorities both at the first stage and at the revisional stage, are not indicative of any clear reasons, leaving it to this Court to make an inferential exercise to discern as to what weighed in the minds of the authorities to arrive at their respective conclusions.

59. The only plausible reason which may seem to emerge from the two orders, is that after the proposed transfer, the remaining area of the land held by the petitioner would be 0.5930 hectare. As already noted above, the condition with regard to the area of the land, held by the applicant, consequent to the transfer of the land being reduced to less than 1.26 hectares, is not mandatory subject to the fulfillment of any of the other conditions.

60. The orders impugned do not reflect any consideration as to whether the conditions under the Clauses (a) to (c) of sub-rule (8) of the Rule 98, which are in the nature of alternatives, have been accorded consideration.

61. It would be relevant to reiterate the view taken by this Court in the case of **Sitaram** (supra) that in exercise of its discretionary power if the concerned authority ignores or does not take into

account considerations which are relevant to the purpose of the statute in question, then its action would be invalid. This would be more so where the statute conferring discretion on the authority has structured the discretion by expressly laying down the consideration which should be taken into account by the authority for exercise of the discretion. In such a case, if the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account or by disregard of the relevant considerations required to be taken into account, the decision arrived at by the authority would be invalid.

62. The authority while exercising the discretionary power in a case where the discretion of the authority has been structured while laying down specific conditions would be required to exercise the discretionary power taking into account only the relevant considerations and disregarding the consideration which are irrelevant.

63. The legal position in this regard has been summarised in the case of **Sitaram** by referring to the decisions in **R. vs. St Pancras Vestry, Associated Provincial Picture Houses, Ltd. vs. Wednesbury Corporation, Padfield And Others vs. Minister of Agriculture, Fisheries And Food And Others and Breen vs. Amalamated Engineering Union And Others**. The relevant observations made in the case of **Sitaram** are being extracted below:-

"21. The "irrelevant considerations" doctrine was stated by **Lord Esher MR in R. vs. St Pancras Vestry** by observing as follows:

"But they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion."

22. The scope of interference by Courts in matters relating to exercise of discretion conferred by a statute upon an authority was subject matter of consideration in **Associated Provincial Picture Houses, Ltd. vs. Wednesbury Corporation wherein it was stated by Lord Greene, M.R.** as follows:

"... The law recognises certain principles on which the discretion must be exercised ... They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters.

.... the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account."

23. The circumstances under which exercise of discretionary powers by a statutory authority may be held to be invalid were stated in **Padfield And Others vs. Minister of Agriculture, Fisheries And Food And Others**, wherein **Lord Upjohn** observed as follows:

"Unlawful behaviour by the Minister may be state with sufficient accuracy ... (a) by an outright refusal to consider the relevant matter, or (b) by misdirecting himself in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration."

24. The principle laid down in the decision of the **House of Lords** in **Padfield's case** (supra) was reiterated by **Lord Denning, M.R. in Breen vs. Amalamated Engineering Union And Others**, by stating as follows:

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside."

25. The proposition can thus broadly be laid down by stating that a decision by an authority exercising discretionary power under a statute must be arrived at by taking into account the relevant considerations and eschewing the irrelevant considerations, in the absence of which the action would have to be held as ultra vires and void."

64. For the aforesaid reasons, and in particular that the orders passed by the respondent authorities are non-speaking and not indicative of an objective consideration of the relevant statutory provisions required for the purposes of grant of permission for transfer under Section 98 of the U.P. Revenue Code, 2006, the impugned orders are held to be legally unsustainable and are set aside.

65. The matter is remitted to the respondent no. 3 for passing a fresh order on the basis of the provisions contained under Section 98 of the Code, 2006 read with sub-rule (8) of Rule 99 of the Rules, 2016 in the light of the discussion made hereinabove. The respondent authority would be expected to pass appropriate orders on the application of the petitioner under Section 98 seeking grant of permission for transfer, expeditiously, and preferably within a period of three months from the date of presentation of a certified copy of this order.

66. The writ petition is **allowed** to the extent indicated above.

(2023) 7 ILRA 800

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 19.05.2023

BEFORE

**THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.**

Writ-C No. 38508 of 2022

Brijesh Kumar Dubey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Radhey Krishna Pandey, Sri Manish Pandey

Counsel for the Respondents:

C.S.C., Sri Ajattshantru, Sri Awadhesh Kumar Mishra, Sri Abhishek Shukla

Civil Law - U.P. Revenue Code, 2006-Sections 4(16), 8 & 210 - Board of Revenue - Board of Revenue is the Chief controlling authority having supervisory powers over all subordinate revenue courts. Sub Divisional Magistrate while exercising adjudicatory powers of a judicial nature acts as a Revenue Court', and is a court subordinate to the Board of Revenue and subject to its revisional jurisdiction and also its control and supervision. When a superior court issues an order of remand to an inferior court with certain directions, the latter is obligated to decide in accordance with the said directions. Held: lack of propriety on the part of the Sub Divisional Magistrate in refusing to accord consideration to the recall application of the petitioner, disregarding the direction issued by the Board of Revenue while allowing the revision of the petitioner. (Para 8, 9, 10, 11)

Allowed. (E-5)

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

1. Heard Sri Radhey Krishna Pandey, learned counsel for the petitioner, Sri Abhishek Shukla, learned Additional Chief Standing Counsel appearing for the State respondents and Sri Awadhesh Kumar Mishra, learned counsel appearing for the respondent Nos. 7 and 8.

2. Counsel for the petitioner has confined his relief to a challenge to the order dated 23.08.2022 passed by the Sub Divisional Magistrate, Sadar, Mirzapur/respondent No. 3 whereby the

restoration application filed by the petitioner registered as Case No. RST/01001/2019, in proceedings under Section 144 of the U.P. Revenue Code, 2006, has been rejected.

3. As per pleadings in the writ petition, the petitioner claims to have purchased certain land parcels by means of a sale deed dated 24.06.2019 and his name was also mutated in the revenue records in terms of an order dated 09.01.2019. Thereafter, upon coming to know with regard to pendency of a declaratory suit filed by the respondent Nos. 7 and 8 in respect of the said land, an impleadment application dated 26.09.2019 was filed, which was dismissed for want of prosecution by an order dated 19.02.2020. The restoration application filed thereagainst was also rejected by an order dated 30.12.2020.

4. It is submitted that against the orders dated 19.02.2020 and 30.12.2020, in terms of which the impleadment application filed by the petitioner in proceedings under Section 144, had been rejected, the petitioner had preferred a revision being Case No. REV/158/2021 (Computerized Case No. AL2021165300158), which was allowed by the Board of Revenue in terms of the order dated 05.07.2021 remitting the matter to the court of the Sub Divisional Magistrate, after coming to a conclusion that in a judicial proceeding the affected party has a right to be heard.

5. Contention of the learned counsel for the petitioner is that, by the time the petitioner could place the aforesaid order, before the Sub Divisional Magistrate, a final order had been passed deciding the suit on 28.07.2021.

6. Thereafter, the petitioner is stated to have preferred a recall application annexing therewith the order dated 05.07.2021 and praying for recall of the order dated 28.07.2021. The said application was rejected by the respondent No. 3 by an order dated 23.08.2022 ostensibly for the reason that since a final order has been passed in the suit, the recall application could not be entertained.

7. Contention of the learned counsel for the petitioner is that once the Board of Revenue, in exercise of its revisional powers, had set aside the earlier orders dated 19.02.2020 and 30.12.2020 and had remitted the matter to the court of the respondent No. 3, the said respondent could not have ignored the order passed by the revisional court and reject the recall/restoration application.

8. In this regard, it may be noted that the Board of Revenue as per Section 8 of the Code, 2006, is the chief controlling authority in all matters relating to disposal of cases, appeals or revisions. The revisional jurisdiction of the Board is provided for by Section 210 of the Code, and in terms thereof it is empowered to call for the record of any suit or proceedings decided by any subordinate revenue court, in which no appeal lies, for the purpose of satisfying itself as to the legality or propriety of any order passed in such suit or proceedings. The language of the section is one of wide amplitude and embraces within its fold any suit or proceeding decided by the revenue courts subordinate to the Board of Revenue.

9. The Sub Divisional Magistrate while exercising adjudicatory powers of a judicial nature acts as a 'Revenue Court', as defined under Section 2(16) of the U.P.

Revenue Code, 2006, and as such would be a court subordinate to the Board of Revenue and subject to its revisional jurisdiction and also its control and supervision.

10. It would be beyond cavil that when a superior court issues an order of remand to an inferior court with certain directions, the latter is obligated to decide in accordance with the said directions.

11. Counsel for the State respondents and the counsel appearing for the respondent Nos. 7 and 8, have not been able to dispute the lack of propriety on the part of the Sub Divisional Magistrate in refusing to accord consideration to the recall application of the petitioner, disregarding the direction issued by the Board of Revenue while allowing the revision, in view of its position as the chief controlling authority having supervisory powers over all subordinate revenue courts.

12. Counsel for the parties are ad idem on the point it would serve the interest of justice if the case is remitted to the respondent No. 3 for passing of a fresh order, after taking into consideration the order dated 05.07.2021 passed by the Board of Revenue in the revision.

13. Having regard to the aforesaid, this Court deems it appropriate to set aside the order dated 23.08.2022 passed by the respondent No.3, in Case No. 01001 of 2019 (Computerized Case No. 201916530001001) (Dhiraj Kumar and Others Vs. Munni Devi).

14. The matter is remitted to respondent No. 3 to pass a fresh order keeping in view the direction issued by the Board of Revenue in its order dated

05.07.2021 passed in Case No. REV/158/2021 (Computerized Case No. AL2021165300158), in accordance with law, after giving due opportunity to the parties concerned, expeditiously and preferably within a period of **three months** from the date of presentation of a certified copy of this order.

15. The petition stands **allowed** to the extent indicated above.

(2023) 7 ILRA 803
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 40939 of 2004

State of U.P. ...Petitioner
Versus
Radha Charan Since Deceased & Anr. ...Respondents

Counsel for the Petitioner:
S.C.

Counsel for the Respondents:
S.C., Indra Pal Singh Rajpoot

Civil Law - Imposition of Ceiling on Land Holdings Act, Section 10(2) - Transfer of Property Act, 1882 - Sections 122 & 123 - U.P. Zamindari Abolition and Land Reforms Act, 1950, Section 152 - Gift - Gift to minor. In the instant case, the donor, tenure-holder Radha Charan, by a registered gift deed dated 16.04.1979 (prior to 24 January 1971), gifted an area of 20.26 acres of land to his minor sons, namely Madan Pal Singh, aged about 14 years, and Ram Pal Singh, aged about 6 years, under the guardianship of their mother, Suhag Rani. Prescribed Authority passed order after excluding the land

covered by the gift deed to the extent of 20.26 acres from the holding of Radha Charan. In the writ petition, the State's case was that the minors were not entitled to receive a gift deed in their favor and that the land held by them in their own names was liable to be clubbed together with the land of their father, who was the original tenure-holder, and the same was rightly included in the notice. *Held* : Gift deed was executed in favor of the minor sons through their mother, Smt. Suhag Rani. Though the donees were minors, they had accepted the gift through their mother, who was competent to accept the gift on behalf of her sons. There was a recital of delivery of possession. Even the property in question had been mutated in the names of the donees, and during the lifetime of the donor, the donees attained the age of majority and also accepted the gift deed, behaving with the property in question as Bhumidhars with transferable rights. All the elements of a valid gift were complete. Radha Charan was the Bhumidhar who transferred his right, title, and interest in 20.26 acres of agricultural land through a gift deed dated 21.04.1969 to his minor sons. Gift deed was in accordance with land laws. The impugned judgment and order of the learned appellate court are legal and valid and are not liable to be interfered with. (Para 21, 22, 35)

Dismissed. (E-5)

List of Cases cited:

1. Sakuntala Devi Vs Amar Devi, A.I.R. 1985 H.P. 111
2. Gauranga Sahu & ors.Vs Maguni Dev & ors., A.I.R. 1991 Orissa 151, page 155
3. Sanjukta Ray Vs Bimelendu Mohanty, A.I.R. 1997 Orissa 131
4. Kamakshi Ammal Vs Rajalakshmi, A.I.R. 1995 Madras 415

5. K. Balakrishnan Vs K. Kamalam, A.I.R. 2004 S.C. 1257

6. Ashkar Singh & Another Vs Rawal Singh & anr., A.I.R. 1952 P & H 148, p. 150

7. Balwant Singh Vs Chatin Singh, A.I.R. 1985 P & H 74

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

1. Heard Sri Naresh Chandra Pal, Advocate, holding brief of Sri Indra Pal Singh Rajpoot and learned Standing Counsel for the State and perused material available on record.

2. This writ petition has been filed under Article 226 of the Constitution of India to issue a writ, order or direction in the nature of certiorari for quashing the impugned judgment and order dated 29.04.2004 passed by Additional Commissioner, Chitrakoot Dhaam Division, Banda.

3. In brief, fact of the case are that a notice was issued to late Radha Charan (Deceased) Resident of Village Chilli Pargana and *Tehsil* Rath, District Banda, under Section 10 (2) of the Imposition of Ceiling on Land Holdings Act, for filing objection on the basis that there is Rakba 26.97 Acre surplus irrigated land, which has to be forfeited in favour of the State. As per notice maximum useful area is 24.00 Acre and after service of notice Radha Charan filed an objection that the land of the objector is un-irrigated land and it has wrongly been shown to be irrigated land. He further mentioned that from his wife Suhag Rani, out of wedlock Ram Pal Singh and Madan Pal Singh were born, who were living separately. Since the time of their mother, for their livelihood 20.00 acre of

the land was given to them as their share of which they are in possession and are cultivating the same. When the children were not satisfied they got the land transferred by way of gift-deed from the objector since before 24.01.1971, therefore, this land should not be added in the account of the objector. Both the sons are adult and the transfer in favour of the sons is legal and valid.

4. After several years from the death of Smt. Suhag Rani, the objector solemnised another marriage with Smt. Girja Rani and with whom he had two children, Km. Saroj and Jai Singh, thus the family of the objector consists of husband and wife and two minor children. Arazi Nos. 644, 645 & 1694 are in possession and holding of the objector and it has been wrongly included in the possession of Mohan Lal, Murlidhar, Swami and Channni and another. Their name has wrongly been mentioned and they are not in possession. Usar and grove land has wrongly been shown as Majrui land. It has also been mentioned that in the order dated 09th January, 1975, the Prescribed Authority has accepted the existence of adult sons and 9.02 acre un-irrigated land has been shown as surplus land and the question regarding this point cannot be raised again. Only the land in the name of the applicant can be considered.

5. Madan Pal Singh and Ram Pal Singh, have filed an objection on the similar in nature and Bhurjai, Khamodeen, Channo, Mohan Lal and Mataiyya have filed separate objection which is similar to para 9 of the objection of the tenure holder.

6. Issues were framed and the evidences were recorded and on 22.06.1976. Mool Chandra Yadav, the

Prescribed Authority, Ceiling, Rath, Hamirpur held that 17.40 Acre normal or 8.16 Acre irrigated land is surplus land. Prior to that on 09.01.1975 Sri C.L. Verma, Prescribed Authority, Rath, District Hamirpur passed judgment and order dated 09.01.1975 and held that 9.02 Acre unirrigated land of the tenure holder Radha Charan is surplus land for the purposes of Ceiling Act.

7. The order dated 22.06.1976 passed by the Prescribed Authority was challenged in the Court of District Judge, Hamirpur, which was decided on 23.12.1976 by III Additional District Judge in Appeal No. 01 of 1976, which was challenged by the Tenure Holder in Civil Misc. Writ Petition No. 925 of 1977 – Radha Charan Vs. State of U.P & Ors. Which was decided on 08th November, 1978.

8. The petition was partly allowed and the order dated 23.12.1976 passed by III Additional District Judge, Hamirpur was set aside and he was directed to rehear the appeal on the second point mentioned in the judgement of the High Court and it was directed to pass afresh order. Thereafter, the case was decided. After amendment in the Act on 24.03.1988, the Commissioner Jhansi Division, Jhansi decided the appeal against the petitioner, which was challenged in the High Court by filing Civil Misc. Writ Petition No. 9597 of 1988, which was decided on 14.09.1994 and the Additional Commissioner, Jhansi - Respondent no. 2 was directed to decide the appeal afresh in accordance with law.

9. In compliance of the above order, the appeal was decided by Sri Usha Raman, Additional Commissioer, Chitrakoot Dhaam Mandal, Banda on 29th April, 2004 and the appeal was allowed.

Being aggrieved, by the order of the appellate court dated 29th April, 2004, the State of U.P. has filed this petition for quashment of impugned order dated 29.04.2004 (annexure no. 1) passed by the Additional Commissioner, Chitrakoot Dhaam Bhana.

10. In this appeal, the State of U.P. averts that this writ petition has been filed against the judgement and order dated 29.04.2004 passed by Additional Commissioner, Chitrakoot Dhaam Mandal, Banda, Ceiling Appeal No. 803 of 1976, 04 of 1985-86 and 06 of 2003-04 Radha Charan (Deceased) Madan Pal and another Vs. State of U.P, the grievance is that the appellate authority has allowed the appeal and sent the file to the Prescribed Authority have passed orders after excluding land covered by gift deed to the extent of 20.26 Acre from the holding of Radha Charan. The judgment and order 29.04.2004 has been annexed as Annexure No. 1 to the petition.

11. A notice under Section 10 (2) of the Ceiling Act was issued against Radha Charan the original tenure holder proposing 09.02 Acre of land to be declared surplus, who filed objection claiming that his one of the son was major and his family contains of seven members and the notice was not prepared correctly. The Prescribed Authority on 09.01.1975 declared 9.02 Acre unirrigated land situated in Tehsil Rath, Hamirpur to be surplus, which is annexed as Annexure No. 2 to the petition.

12. Thereafter the U.P Imposition of Ceiling on the Land Holdings Act, 1960 was amended and explanation was added to Section 5 of the Act alongwith Section 38-A of the Act. Under the amended provisions, the Prescribed Authority issued

afresh notice to the tenure holder Radha Charan including the land of Plot Nos. 812, 813 and 816 etc. total area 20.26 acres, which was gifted to Radha Charan's son (minor) on 16.04.1969.

13. Radha Charan filed objection against the second notice mainly on the ground that both the donees Madan Pal Singh Ram Pal Singh, were living separately alongwith their mother of the deceased and the gifted land was not given to him. Hence, the same cannot be made subject matter of the proceedings initiated against him.

14. The Prescribed Authority after considering the entire evidence, declared 17.40 acers equivalent to 8.16 acres, land to be surplus land, copy of the order dated 22.06.1976 annexed as Annexure No. 03 to the petition. The said order was challenged before the District Judge, Hamirpur, which was dismissed *vide* order dated 23.12.1976, which was challenged in Writ Petition No. 925 of 1977, which was partly allowed by the Hon'ble High Court *vide* judgement and order dated 08.11.1978, which is annexed to the petition as annexure no. 4. The appeal was remanded and after the remand, the same was again dismissed *vide* order dated 24.03.1988, which is annexed as Annexure No. 5 to the petition.

15. The order dated 24.03.1988 was again challenged in writ petition no. 9597 of 1996, which was allowed by this Hon'ble High Court *vide* judgment and order dated 14.09.1994, remanding the appeal for reconsideration in light of observations made in the order, which is annexed as Annexure No. 6 to the writ petition.

16. In pursuant to the order dated 14.09.1994, the appellate authority decided the appeal committing error in accepting the gift deed dated 19.04.1969 by Radha Charan in favour of his minor sons namely Ram Pal Singh and Madan Pal Singh, copy of gift deed is annexed as Annexure No. 7 to the writ petition. On the date of execution of gift-deed, Madan Pal Singh was about 14 years of age whereas Ram Pal Singh was hardly six years old and none of them was major. Therefore they were not entitled to give gift deed made in their favour and the land held by them in there own name was liable to be club together with the land of his father, who was the original tenure holder and the same was rightly included in the notice.

17. There is also evidence that Radha Charan was in possession over the land covered by the Gift Deed on the relevant date. Therefore the exclusion of the land was not permissible.

18. In this case the main question is as to whether the registered gift-deed dated 16.04.1979 prior to the date of 24th January, 1971 in favour of sons Madan Pal Singh aged about 14 years and Ram Pal Singh @ Ram Singh aged about six years through their guardian Smt. Suhagrani wife of the donor Radha Charan is valid or not. In this regard the learned appellate court has given finding that by way of the aforesaid gift deed, the donor tenure holder Radha Charan had gifted an area of 20.26 acre of land to his sons under the guardianship of their mother Suhag Rani. There is also an averment of delivery of possession. The gift deed is registered on which basis the name of the donees had been mutated.

19. The learned appellate court has also considered the circumstances that Radha Charan had solemnised another marriage. The donees were his sons from the first wife whom he transferred the property in their mother's guardianship, hence the gift deed appears to be a natural human conduct and transaction.

20. It is noteworthy that contrary to that nothing could be proved from the side of the State. In this regard provisions of Section 122 and Section 123 of The Transfer of Property Act, 1882, are relevant, which are reproduced here-in-below :-

Section 122 and Section 123 The Transfer of Property Act, 1882.

122. "Gift" defined.—"Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made.—Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

123. Transfer how effected --- For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses."

On the basis of the above definition, essential elements of a gift are :-

- (a). the absence of consideration;
- (b). the donor;
- (c) the donee;
- (d) to be voluntary;
- (e) the subject-matter;
- (f) the transfer; and

(g) the acceptance.

21. In this case no consideration has been taken by the donor. The donor was a legally competent person. Though, the donees were minor, but they had accepted the gift through their mother, who was competent to accept the gift on behalf of her sons. It has been proved that the gift deed had been executed voluntarily without any coercion, undue influence, misrepresentation or fraud and the deed is not barred by any law. The owner of the subject matter was alive and the property-in-question was into existence, there are several modes of transfer and the property-in-question has been transferred by way of gift and the mother of both the donees had accepted the gift deed on behalf of the sons. There is recital of delivery of possession. Even the property-in-question had been mutated in the name of donees and during the life time of donor, the donees attained the age of majority and they also accepted the gift deed and are behaving with the property in question as Bhumidhar with transferable rights. Thus all the element of a gift of a valid gift is complete.

22. From the perusal of last line of Section 122, it is very much clear that a gift can be accepted by or on behalf of the donees and it is very much mentioned in the gift deed that the gift deed was executed in favour of the minor sons through their mother Smt. Suhag Rani. Thus, it cannot be said that the gift deed has not been accepted in accordance with law. The donor never claimed this property in future, he had not taken any legal action to cancel the aforesaid gift deed. He had not filed any objection regarding mutation on the names of the donees, though the donees were minor, but a gift can be made in favour of a minor.

In page 1257 (4) of 10th Edition of Mulla, the Transfer of Property Act, it is mentioned that :-

“The donee is the person who accepts the gift. A gift may be accepted by, or on behalf of a person who is not competent to contract. A minor may, therefore be a donee; but if the gift is onerous, the obligation cannot be enforced against him while he is minor. But when he attains majority he must either accept the burden, or return the gift.

The word ‘accepted by or on behalf of the donee’ show that the donee may be a person unable to express acceptance. A gift can be made to a child en ventre sa mere, and could be accepted on its behalf.”

The reference of column no. 7 at page no. 1259 of the same book, is also relevant, which is reproduced here-in-below:

“7 – Acceptance

In order to constitute a valid gift, the pivotal requirement is acceptance thereof. No particular mode of acceptance is required, and the circumstances throw light on that aspect. A transaction of gift in order to be complete must be accepted by the donee during the lifetime of the donor. Factum of acceptance can be established by different circumstances such as donee taking a property, or being in possession of deed of gift alone. If a document of gift after its execution or registration in favour of donee is handed over to him by the donor which he accepts, it amounts to a valid acceptance of gift in law. The specific recital in the deed that possession is given, raises a presumption of acceptance. However, once it is found that the gift was accepted and the truth of the contents of the gift deed was admitted, clinching evidence is required to establish

that the donor still retained possession with him, and the document was not acted upon.”

23. In *Sakuntala Devi Vs. Amar Devi A.I.R 1985 H.P. Page 111*, it has been held that the acceptance may be inferred.

24. In *Gauranga Sahu and Ors. Vs. Maguni Dev & Ors. A.I.R 1991 Orrisa 151, page 155*. It has been held that oral evidence can be looked into for finding out whether the gift had, in fact, been acted upon.

25. In this case, it has been said by the donor through objection/counter affidavit that he delivered the possession to the donees and he had gifted the property in love and affection to his sons.

26. In *Sanjukta Ray Vs. Bimelendu Mohanty A.I.R. 1997 Orrisa 131*, it has been held that where there is a specific recital in the gift-deed that possession has been handed over to the donee, a presumption arises that possession has been handed over to the donees.

27. In *Kamakshi Ammal Vs. Rajalakshmi A.I.R 1995 Madras 415*, it has been held that where a father made a gift to his daughter and on its acceptance by her, she allows her father to enjoy the income from the properties settled in view of the relationship of father and daughter between he donor and donee, it could not be said that there was no acceptance of gift by the donee even assuming that the donor continued to be in possession and enjoyment of the property gifted. Delivery of possession of the gifted property is not absolute requirement, for the completeness or the validity of the gift as found in Muslim law of gifts.

28. In **K. Balakrishnan Vs. K. Kamalam A.I.R. 2004 S.C. 1257**, it has been held that a minor may accept benefit, although he cannot incur an obligation. Where a gift is made in favour of a child of the donor, who is the guardian of the child, the acceptance of gift can be presumed to have been made by him, or on his behalf without any overt act signifying acceptance by the minor.

29. In **Ashkar Singh & Another Vs. Rawal Singh & Another, A.I.R 1952 P & H 148, P. 150**, it has been held that a minor's guardian may accept a gift deed for him. Gift would be complete where the guardian accepts the gift on behalf of the minors and in token of acceptance, appends his thumb impression on the gift deed. Similar views has been propounded by P & H High Court in **Balwant Singh Vs. Chatin Singh A.I.R 1985 P & H 74**.

30. Under Section 152 of the U.P.Z.A & L.R Act, 1950, there is provision of transfer of *Bhumidhari* interest. Radha Charan was the *Bhumidhar*, who transferred his right, title and interest of 20.26 acre of agricultural land through gift deed dated 21.04.1969, to his minor sons.

31. The relevant portion of Section 152 of U.P. Zamindari Abolition and Land Reforms Act, 1950 is as under : -

“152. Bhumidhari interest when transferable. --- (1) The interest of a bhumidhar with transferable rights shall subject to the conditions hereinafter contained, be transferable.

(2). Except otherwise expressly permitted by this Act or any other law for the time being in force, the interest of a bhumidhar with non-transferable rights shall not be transferable.

(3) A bhumidhar referred to in sub-section (2) may, in such circumstances as may be prescribed, mortgage, without possession his interest in his holding, as security for a loan taken from the State Government by way of taqavi, or from a co-operative society or from the State Bank of India, or from any other bank, which is a Scheduled bank within the meaning of clause (e) of section 2 of the Reserve Bank of India Act, 1934, or from the Uttar Pradesh State Agro-Industrial Corporation Limited, and may also transfer, by way of gift, the interest in his holding, except the part thereof which has been so mortgaged, to a recognised educational institution for any purpose connected with instructions in agriculture, horticulture and animal husbandry.”

32. Thus, from the above citation, it is again made clear that a *Bhumidhar* with transferable rights can transfer his right, title and interest of any agricultural land **‘by way of gift’** which Radha Charan had adopted. Thus the alleged gift deed is also in accordance with the land laws.

33. On the basis of above discussion, this Court is of the considered view that the impugned judgment and order of the learned appellate court is legal and valid and is not liable to be interfered with.

34. The petition lacks merit and is liable to be **dismissed**.

35. The petition is accordingly dismissed and the order of learned appellate court dated 29.04.2004 passed by the Additional Commissioner Chitrakoot Dhaam, Banda Division Banda, is hereby confirmed.

ground that shop in question has been allotted to him in the year 2002 during the pendency of the present writ petition and he has been in possession of Shop No.G-3 and running business of watch and he was not heard before passing of the order dated 03.05.2018 though he is proper party. Aforesaid recall application of the respondent no.4 was allowed and he was also impleaded as respondent no.4 by order dated 11.05.2023. As the sole-petitioner has also died, therefore, his son Raj Kumar was also impleaded as petitioner no.1/1 in the present petition by order dated 15.05.2023. The factual matrix of present case is as follows :

4. Petitioner as well as respondent no.4 and several other persons claim themselves to be allottees of different shops constructed over *nala* and lease deed were also executed in their favour by the Nagar Palika Parishad, Muzaffarnagar. Thereafter, in the beautification plan, Muzaffarnagar Development Authority proposed to demolish the shops constructed over the *nala* and in lieu of that, all the displaced shop keepers, who were having shops constructed over *nala*, were offered shops in shopping complex adjacent to Bhagat Singh Road Muzaffarnagar. In pursuance of that plan, shops were allotted in shopping complex adjacent to Bhagat Singh Road.

5. An agreement dated 26.06.1999 was executed between the petitioner, Rohit Lal and Muzaffarnagar Development Authority for the allotment of Shop No.G-1, subject to condition that he will withdraw his pending appeal before the High Court. The appeal pending in the High Court was filed under Order 23 Rule 1 CPC and related to the power of the Development Authority to demolish the shops constructed on the *nala* and to evict the shopkeepers from the *nala*.

6. From the records, it also appears that one Saidas was allotted Shop No.G-3 at ground floor and son of petitioner-Rohit Lal who is presently petitioner no.1/1 was allotted Shop No.G-2 at ground floor. Subsequently, with the permission of Muzaffarnagar Development Authority, petitioner-Rohit Lal had exchanged his shop with Saidas and finally Shop No.G-3 was allotted to petitioner-Rohit Lal and Shop No.G-1 was allotted to Saidas.

7. Subsequently, a dispute arose between different allottees for the allotment of shops on ground floor of shopping complex for the shops facing towards Bhagat Singh Road and several petitions were filed before this Court which were also disposed of by common order dated 03.05.2018 and present writ petition is one of the writ petitions in which the order dated 03.05.2018 was recalled on 11.05.2023, at the instance of respondent no.4.

8. From perusal of original record of Muzaffarnagar Development Authority produced before the Court, it appears from the note sheet that in lieu of earlier shop at *nala*, Shop No.G-3 was allotted to petitioner-Rohit Lal and in lieu of Shop No.31 situated over *nala*, Shop No.G-2 was allotted to Raj Kumar (petitioner no.1/1) and in lieu of Shop No.32 over *nala*, Saidas was allotted Shop No.G-1. There was no interim order in favour of the petitioner in the present writ petition and during the pendency of the present petition, Shop No.G-3 was allotted to respondent no.4, the recall applicant.

9. Contention of learned counsel for the petitioner is that impugned order is absolutely erroneous because allotment of Shop No.G-3 made in favour of petitioner-Rohit Lal was cancelled merely because his son Raj Kumar (petitioner no.1/1) was also

having adjacent Shop No.G-2 on ground floor facing towards Bhagat Singh Road, Muzaffarnagar because father and son were allotted shops in lieu of their different shops over *nala* at Bhagat Singh Road and both of them have been doing independent business.

10. *Per contra*, learned counsel for respondent no.4 contended that after cancellation of allotment of G-3 in favour of petitioner-Rohit Lal by the impugned order on 18.10.2000, same was allotted to him on 03.12.2002, during the pendency of the present petition, as no interim order was granted, in the present case in lieu of his Shop No.21/1 existing over *nala* at Bhagat Singh Marg. Thereafter, sale deed was also executed in favour of respondent no.4 regarding Shop No.G-3 on 22.03.2003 by Muzaffarnagar Development Authority, therefore, he became absolute owner of the Shop No.G-3. It was further submitted by learned counsel for the respondent no.4 that at the time of allotment of Shop No.G-3 in the year 2002 or at the time of execution of sale deed in 2003 regarding Shop No.G-3, he was not informed by the Muzaffarnagar Development Authority about the present litigation regarding Shop No.G-3. Therefore, respondent no.4 is bonafide purchaser for consideration without knowledge of pendency of present petition and now his business of watch in the name of Lucky Watch has been established and same has been running since 2002. Therefore, he cannot be evicted and his sale deed dated 22.03.2003 regarding Shop No.G-3 cannot be cancelled in exercise of extraordinary discretionary power of this Hon'ble Court because he has right to remain in possession. Even in equity also, considering his established business in Shop No.G-3 running since 2002, and also the fact that substituted petitioner Raj

Kumar is having four other shops on ground floor having Shop Nos.G-2, G-33, G-34 and G-35, he should not be dispossessed. Learned counsel for respondent no.4 also relied upon the GST receipt showing that business of watch in Shop Nos.G-2 and G-3 was being run by the petitioner-Rohit Lal. Though, the Shop No.G-2 was allotted to son of Rohit Lal but business of watch was run by Rohit Lal, in both the shops, till the cancellation of allotment regarding Shop No.G-3.

11. Lastly, it was submitted by learned counsel for respondent no.4 that, even though, the impugned order is confirmed by this Court then no prejudice will be caused to petitioner because he is already having four shops at ground floor facing towards Bhagat Singh Marg and if impugned order is set aside then petitioner will suffer irreparable loss because he has only one shop i.e. G-3 on ground floor facing towards Bhagat Singh Road in which his business of watch has been established.

12. It is relevant to note that in his affidavit, the Secretary of the Development Authority has admitted that no information was given to respondent no.4 about the pendency of the present petition in this Court.

13. Considering the rival contentions and on perusal of record, it is clear that all the displaced shop keepers, who were having shops at *nala* at Saheed Bhagat Singh Marg, wanted to take shop at ground floor facing towards the main road i.e. Bhagat Singh Road. Though, there were limited shops, therefore, only 20 persons including the petitioner-Rohit Lal and petitioner no.1/1 Raj Kumar could initially get shop at ground floor of the complex

(Tehsil Vyavasaye Ki Yojana Part II) facing towards Bhagat Singh Road. As the petitioner-Rohit Lal and his son Raj Kumar both of them were having two adjacent shops (G2 and G3) at ground floor facing towards Bhagat Singh Road and both of them were running the same business, therefore, Muzaffarnagar Development Authority by the impugned order dated 18.11.2000 cancelled the allotment of Shop No.G-3 in favour of petitioner and retained the shop of petitioner no.1/1 so as to adjust other displaced shop keepers at ground floor. From perusal of impugned order, it appears that it was passed on the ground that there is unavailability of shops facing towards Bhagat Singh Marg and petitioner as well as his son were having two adjacent shops at ground floor facing towards Bhagat Singh Marg and both of them were running watch selling business. Though, there is no allotment order regarding Shop No.G-3 in favour of petitioner-Rohit Lal on record but from the perusal of note sheet produced before the court by Muzaffarnagar Development Authority as well as from the impugned order, it appears that the Shop No.G-3 was allotted to petitioner-Rohit Lal. Mere allotment of shop does not give unfettered right to execute the sale deed of the shop in question in favour of petitioner. Allotment in favour of petitioner-Rohit Lal at the most can be equated to agreement to sell. It does not give absolute right to petitioner to compel the municipal authority to sell that shop to him. On the other hand after allotment of shop in 2002, sale deed regarding Shop No.G-3 was also executed in favour of respondent no.4 on 22.03.2003 which absolutely transferred the ownership in favour of respondent no.4 and who after obtaining the possession, established his business of watch selling. Considering the equity and bonafide conduct of respondent

no.4 in purchasing the shop without knowledge of the present litigation, quashing the order dated 18.11.2000 will disturb the established shop of the respondent no.4. Even otherwise, after the death of petitioner-Rohit Lal, the right of the Rohit Lal has been succeeded by his son Raj Kumar (Petitioner No.1/1), therefore now, Raj Kumar (Petitioner No.1/1) who has been running G-2 shop and other purchased shops during the pendency of present petition on the ground floor, will not suffer irreparable loss or prejudice.

14. In view of the above fact, we do not find it fit to interfere in the impugned order dated 18.11.2000.

15. Accordingly, the writ petition is **dismissed**.

(2023) 7 ILRA 813
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2023

BEFORE

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

Matter Under Article 227 No. 5364 of 2018

Rakesh Kumar & Anr. ...Petitioners
Versus
Chhotey Lal & Ors. ...Respondents

Counsel for the Petitioners:

Ms. Tanya Pandey, Sri Anil Tiwari (Sr. Advocate)

Counsel for the Respondents:

Sri Anant Ram Dubey, Sri Anil Kumar, Sri Mohit Gautam, Sri Sudhir Kumar Kulshrestha, Sri Shobhit Dube

Civil Law - Limitation Act, 1963-Article 136- Suit for specific performance-suit decreed-appeal and second Appeal dismissed-decree for specific relief attained finality- application for

execution of the decree was moved on 21.07.2011 -decree to be executed was the original decree dated 02.06.1975- and the execution application was instituted on 21.07.2011-the judgment debtor moved objection of it being time barred since more than 12 years passed since the decree is passed- limitation has to be reckoned from the date of the decree of the Appellate Court- even if the date of the order of this Court dismissing the second appeal in limine is ignored- The appellate decree was passed on 31.03.2011 and the execution application was made on 21.07.2011, which was well within the limitation of 12 years under Article 136 of the Act of 1963- the execution is competent and must proceed.

W.P. dismissed. (E-9)

List of Cases cited:

1. Ratansingh & ors.Vijaysingh & ors., (2001) 1 SCC 469
2. Shyam Sundar Sarma Vs Pannalal Jaiswal & ors., (2005) 1 SCC 436
3. Ram Bachan Rai & ors.Vs Ram Udar Rai & ors., (2006) 9 SCC 446
4. Bimal Kumar & anr.Vs Shakuntala Debi & ors., (2012) 3 SCC 548
5. Surinder Pal Soni Vs Sohan Lal (Dead) through Legal Representatives, (2020) 15 SCC 771
6. Sajja Chimpiraiah Vs Gaddam Venkata Subbaiah (died) & ors., AIR 2004 AP 528
7. Chandi Prasad & ors.Vs Addl. Dist. and Sessions Judge, Hapur & ors., AIR 2001 All 229
8. Chandi Prasad & ors. Vs Jagdish Prasad & ors., (2004) 8 SCC 724
9. Shanthi Vs T.D. Vishwanathan Vs & anr., (2019) 11 SCC 419

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

1. This is a judgment-debtor's petition under Article 227 of the Constitution

arising out of a part rejection of his application under Section 151, Code of Civil Procedure, 1908 (for short, 'the Code') by the Executing Court vide order dated 05.05.2018, holding the execution application not barred by time, and the order of the learned District Judge, Etah dated 28.05.2018, affirming the said order in Revision.

2. Briefly stated, the facts relevant for decision of this petition are that one Chhote Lal instituted Original Suit No. 466 of 1969 for specific performance of contract against Maha Ram, saying that the latter had entered into an agreement to sell with the plaintiff on 14.08.1966, covenanting to sell Plot no. 442 admeasuring 4.86 acres, situate at village Birauchi, Paragana Pachalana, District Etah. The suit was instituted before the ex-Court of Munsif, Kasganj, saying that Maha Ram had agreed to sell the suit property to the plaintiff in terms of the suit agreement dated 14.08.1966 for a total sale consideration of Rs. 2500/-. It was covenanted between parties that Maha Ram, who was arrayed as defendant no. 1 to the suit, will execute a sale deed in favour of the plaintiff within three months after securing bhumidhari rights. The plaintiff had paid an earnest of Rs. 1000/-, and, defendant No. 1 delivered possession to the plaintiff over the suit property. Maha Ram avoided execution of the covenanted sale deed in favour of the plaintiff on various pretexts, though the plaintiff remained ready and willing throughout to perform his part of the contract. Maha Ram stealthily executed a sale deed, conveying the suit property to one Har Prasad, arrayed as defendant no. 2 to the suit on 13.06.1969. Defendant no. 2 to the suit knew about the prior agreement in favour of the plaintiff, as also the fact of possession being with the plaintiff. The suit

aforesaid was duly contested by both the defendants and decreed for the relief of specific performance by the Munsif, Kasganj vide judgment and decree dated 02.06.1975. The said decree was appealed by the second defendant to the suit, Har Prasad before the learned District Judge, Etah, arraying Maha Ram as a proforma respondent. The appeal, upon assignment, came on for hearing before the Additional District Judge, Court No. 5, Etah on 31.03.2011, when it was dismissed and the decree of the Trial Court affirmed. A second appeal from the appellate decree was carried to this Court, being second appeal No. 468 of 2011. The Second Appeal, however, was dismissed by this Court under Order XLI Rule 11 of the Code vide an order dated 24.05.2011. It is common ground that the decree for specific performance has attained finality between parties.

3. An application for execution of the decree was moved on 21.07.2011, that is to say, after the Lower Appellate Court had affirmed the Trial Court and this Court also had summarily rejected the second appeal preferred by Har Prasad, the purchaser and another. In the execution application that was filed, in Column No. 3, the date of the decree to be executed was mentioned as 02.06.1975, that is to say, the date of the original decree. In Column No. 4, it was mentioned that a first appeal from the original decree was filed, being First Appeal No. 114 of 1975, which was dismissed by the learned District Judge, Etah on 31.03.2011. It is mentioned that Second Appeal No. 468 of 2011 too was carried before the High Court, which was dismissed vide order dated 24.05.2011. Now, in the execution case registered on the basis of the execution application dated 21.07.2011, bearing Execution Case No. 2

of 2011, an application has been filed on behalf of judgment-debtors nos. 2/1 and 2/2, bearing paper no. 54-EC-2, saying that the execution application is ex facie barred by time, because it seeks execution of the decree dated 02.06.1975 passed in Original Suit No. 466 of 1969 and presented far beyond the prescribed period of limitation of 12 years, under Article 136 of the Schedule appended to the Limitation Act, 1963 ('the Act of 1963' for short). The limitation was sought to be reckoned from the date of the original decree by the judgment-debtors nos. 2/1/ and 2/2, calculating time between the original decree dated 02.06.1975 passed in the suit and the date of institution of the execution application i.e. 21.07.2011. Another objection raised through the same application, bearing paper no. 54-EC-2, is to the effect that the heirs of judgment-debtor no. 1, Maha Ram, were not properly impleaded, inasmuch as on the date of institution of the execution application, the heirs and LRs of Maha Ram were judgment-debtors nos. 1/2/1 Satya Prakash and 1/2/2 Basdev, shown to be minors in the application, but their guardian ad litem, through whom they were to be represented, was not impleaded, in compliance with the provisions of Order XXXII Rule 3 of the Code. Another facet of this objection and more fundamental in nature that was raised was that after the death of judgment-debtor no. 1 Maha Ram, who was defendant no. 1 to the suit, his heirs and LRs were not substituted in the plaint.

4. The learned 1st Additional Civil Judge (Junior Division), Kasganj, the successor of the ex-Court of Munsif, Kasganj before whom the application, paper No. 54-C-2, came up for hearing, sustained it in a very minor part of the objection about the impleadment of

judgment-debtors nos. 1/2/1 Satya Prakash and 1/2/2 Basdev. It was allowed to the extent that the decree-holder ought to carry out amendment to the execution application, indicating the age of these minor judgement-debtors on the date of presentation of the execution application and implead them through their guardian ad litem within a week. The other facet of this objection about impleadment that the said defect went much farther, as the heirs and LRs of defendant no. 1 to the suit had not been substituted in the plaint, was not accepted because his heirs and LRs were duly substituted in the second appeal, after defendant no. 1/2 Chando Devi died, who was substituted in place of original defendant no. 1 Maha Ram. The Executing Court held this to be a minor irregularity.

5. The principal objection that was canvassed through the application, paper no. 54-EC-2, was the one about limitation, briefly spoken of in the opening part of this judgment. The objection precisely was that since the decree to be executed was the original decree dated 02.06.1975 and the execution application was instituted on 21.07.2011, it was way beyond the prescribed period of limitation under Article 136 of the Schedule, appended to the Act of 1963. This, no doubt, is a substantial objection, as it goes to the root of the Executing Court's jurisdiction. The Executing Court rejected this objection, holding, by the order impugned dated 05.05.2018, that it is settled law that the decree of the original Court merges into that of the Appellate Court and the execution is of the Appellate Court's decree. It was remarked that since this Court had passed a decree on 24.05.2011 in a second appeal, what was to be executed was the decree of this Court dated 24.05.2011. It was held that limitation

would run from 24.05.2011, and not from 02.06.1975. The judgment-debtors nos. 2/1 and 2/2, who are the two petitioners here, carried a revision to the District Judge, Kasganj (Kasganj being carved out as a new District out of the former territory of the original District Etah, pending proceedings), who summarily dismissed the revision by the impugned order dated 28.05.2018, holding that the order impugned passed by the Executing Court was an interlocutory order, which did not fall within the definition of a 'case decided' within the meaning of Section 115 of the Code. It was also held that no injury was caused to the petitioners on account of the impugned order, rendering the revision fit to be summarily dismissed.

6. Aggrieved by the orders of the Revisional Court and the Executing Court, judgment-debtor nos. 2/1 and 2/2 have preferred this petition under Article 227 of the Constitution.

7. Heard Mr. Anil Tiwari, Senior Advocate assisted by Ms. Taniya Pandey, learned Counsel for the petitioners, Mr. Shobhit Dube, Advocate holding brief of Mr. Anant Ram Dube and Mr. Anil Kumar, learned Counsel appearing on behalf of respondent No. 1. No one has appeared on behalf of respondent Nos. 2 to 6.

8. Mr. Anil Tiwari, learned Senior Advocate has strenuously argued before this Court that what is being executed is the original decree dated 02.06.1975 passed by the Trial Court and it was never stayed pending the first appeal or in second appeal. It was, thus, an enforceable decree with effect from 02.06.1975. He submits that since the decree was never stayed, the prescribed period of limitation under Article 136 of the Schedule appended to the

Act of 1963 i.e. 12 years has to be reckoned with effect from 02.06.1975, the limitation running continuously and never arrested. He has invited this Court's attention to Article 136 of the Schedule, appended to the Act of 1963, which reads:

THE SCHEDULE
(PERIODS OF LIMITATION)
[See sections 2(j) and 3]

	Description of suit	Period of limitation	Time from which period begins to run
136.	For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.	Twelve years	<u>When the decree or order becomes enforceable</u> or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of

			which execution is sought, takes place:

Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

(emphasis by Court)

9. He has emphasized the words 'when the decree or order becomes enforceable' and says that the decree here is not one regarding which commencement of the period of limitation is postponed to a particular event, like a decree directing any payment of money or the delivery of any property to be made at a certain or future date. The decree here passed in the suit, according to Mr. Tiwari, became executable forthwith, that is to say, on the date of the decree. Time, according to the learned Senior Advocate, would therefore, commence on 02.06.1975, running continuously from the said date until exhaustion of the period of limitation on the expiry of 12 years. He emphasizes that an order of stay, if there were one pending appeal, would surely have arrested time from running. But, it was never there. He has urged that the decree of the lower Appellate Court is a decree of dismissal and affirmation, and not an executable decree. It is for the said reason that the execution application seeks in Column No. 3, execution of the decree dated 02.06.1975 passed by the Trial Court. The learned Senior Advocate submits that time would not run from the date of the decree of the lower Appellate Court, because that is not an operative decree at all. He further submits that so far as the order of this Court

is concerned, that too affirms the decrees passed by the Courts below, and for that reason, is not an executable decree from the date of which limitation would run. In the submission of the learned Senior Advocate, the Executing Court committed a manifest error of law in holding that limitation to execute the decree under Article 136 of the Schedule appended to the Act of 1963, would commence from this Court's order dated 24.05.2011 passed in the second appeal.

10. In support of his submission that limitation in this case would not be arrested and run continuously from the date of the original decree, because there was no stay in appeal granted by the Lower Appellate Court or this Court in second appeal, Mr. Tiwari has relied upon the decision of the Supreme Court in **Ratansingh v. Vijaysingh and others, (2001) 1 SCC 469**. He has next placed reliance upon a decision of the Supreme Court in **Shyam Sundar Sarma v. Pannalal Jaiswal and others, (2005) 1 SCC 436** and further upon the authority of **Ram Bachan Rai and others v. Ram Udar Rai and others, (2006) 9 SCC 446**. Also placed reliance upon by the Senior Advocate for the petitioners is the decision of the Supreme Court in **Bimal Kumar and another vs. Shakuntala Debi and others, (2012) 3 SCC 548**. The thrust of the submission, as already noted on the foot of all these authorities, is that in the absence of a stay of execution of the decree passed by the Trial Court in appeal, limitation would continuously run. Before the close of his submissions, Mr. Anil Tiwari has emphasized that the learned District Judge has committed a manifest illegality in rejecting the revision summarily, holding the order impugned to be an interlocutory order, and not one that is a 'case decided', within the meaning of

Section 115 of the Code. It is urged that the learned Judge has, on completely wrong and flawed premise, failed to exercise jurisdiction vested in him, because the settled position of the law is that where an order challenged in revision is one, if reversed, would result in a final decision of the suit or other proceedings, it can never be regarded as interlocutory. Here, according to Mr. Tiwari, if the order of the Executing Court were reversed and the execution application held barred by time, it would certainly result in termination of proceedings.

11. Mr. Shobhit Dube, learned Counsel for respondent no. 1, in reply, has supported the impugned orders. He submits that there cannot be any doubt that what was to be executed was the decree of the lower Appellate Court, wherein the decree of the Trial Court stood merged. The lower Appellate Court having passed its decree on 31.03.2011, the execution application instituted on 21.07.2011 is within limitation. Mr. Dube has placed strenuous reliance in this regard upon the holding of the Supreme Court in **Surinder Pal Soni vs. Sohan Lal (Dead) through Legal Representatives, (2020) 15 SCC 771**. He has also placed reliance upon a decision of the Andhra Pradesh High Court in **Sajja Chimpiraiah vs. Gaddam Venkata Subbaiah (died) and others, AIR 2004 AP 528**.

12. Upon hearing learned counsel for the parties, this Court must say that the facts here are not in dispute. As already remarked, the suit for specific performance was decreed on 02.06.1975 and an appeal carried by the predecessor-in-title of the judgment-debtor-petitioners was dismissed by the Additional District Judge on 31.03.2011. A second appeal preferred by

the petitioners' predecessor was summarily dismissed by this Court under Order XLI Rule 11 of the Code vide order dated 24.05.2011. Columns Nos. 3 and 4 of the execution application moved on 21.07.2011 would be relevant to refer to. These are extracted below:

3. डिक्री का दिनांक	2.6.1975
4. क्या डिक्री के विरुद्ध कोई अपील योजित हुई?	जी हाँ. (1) प्रथम अपील संख्या 114/75 हर प्रसाद बनाम् छोटे लाल न्यायालय जिला जज एटा में योजित हुई जो दिनांक 31.3.2011 को खारिज हुई। (2)- द्वितीय अपील संख्या 468 / 11 हर प्रसाद बनाम् छोटे लाल आदि माननीय उच्च न्यायालय में योजित हुई जो दिनांक 24.5.2011 को वाद सुनवाई निरस्त हुई।

13. Though in Column no. 3, the date of decree to be executed is mentioned as that of the original decree, but in Column No. 4, the decree with its full particulars passed in the first appeal and event in the second appeal, with all its particulars are mentioned. In the opinion of this Court, the mere mention of the original decree in Column No. 3 as the decree to be executed would not alter the substance of the execution application, which makes ample reference to the decree of the Lower Appellate Court also.

14. It is a salutary principle of law that the decree is only one. If a decree passed in a suit by the Court of the first instance is challenged in appeal and affirmed, it is the appellate decree that alone would be the 'ruling decree', as it is called. The appellate decree, even if a decree of affirmation, saying nothing more than that the (operative) decree

of the Court of the first instance is affirmed, and the appeal dismissed, would yet be the decree that alone would be executed. The decree of the Trial Court, howsoever much it may be operative in nature, will always merge in the superior Court's decree, which then would express all its directions by just a word of affirmation.

15. So far as a second appeal is concerned, it is technically an appeal from the appellate decree. It was mooted on behalf of respondent No. 1 by Mr. Dube that limitation would be reckoned from the date of this Court's order dismissing the appeal under Order XLI Rule 11 of the Code. This need not be gone into, because on the facts here, that question is not necessary to decide. The reason is that if the decree of the Lower Appellate Court were assumed to be the ruling decree that is executable, the execution application would still be within limitation. It is not a case, where the starting point of limitation, reckoned from the date of the order under Order XLI Rule 11 of the Code, dismissing the defendant's Second Appeal, is decisive about the limitation available to the decree-holder. Therefore, the ruling decree is that of the Lower Appellate Court, which is a decree dated 31.03.2011. Limitation, to bring an application for execution, therefore, would run from the date of the decree passed by the Lower Appellate Court, or the only decree, that now governs the rights of parties. The Lower Appellate Court passed its decree on 31.03.2011 and the execution application was instituted on 21.07.2011, which is clearly well within the prescribed time period of 12 years provided under Article 136 of the Schedule appended to the Act of 1963.

16. The decision in **Ratansingh** (*supra*) relied upon by Mr. Anil Tiwari, learned Senior Advocate to say that unless operation of the decree passed by the Court

of first instance stayed in appeal, limitation does not cease to run, holds:

“9. Filing of an appeal would not affect the enforceability of the decree, unless the appellate court stays its operation. But if the appeal results in a decree that would supersede the decree passed by the lower court then it is the appellate court decree which becomes enforceable. When the appellate order does not amount to a decree there would be no supersession and hence the lower court decree continues to be enforceable.

10. A decree is defined in Section 2(2) CPC as under:

“2. (2) ‘decree’ means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;”

11. In order that a decision of a court should become a decree there must be an adjudication in a suit and such adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be of a conclusive nature. If those parameters are to be applied then rejection of application for

condonation of delay will not amount to a decree. Consequently, dismissal of an appeal as time-barred is also not a decree. We are aware that some decisions of the High Courts have taken the view that even rejecting an appeal on the ground that it was presented out of time is a decree within the meaning of the said definition. We are also aware of the contrary decisions rendered by High Courts on the same point. Dealing with some of those decisions a Full Bench of the Calcutta High Court [S.P. Mitra, C.J., Sabyasachi Mukherjee, J. (as he then was) and S.K. Datta, J.] has held in *Mamuda Khateen v. Beniyan Bibi* [AIR 1976 Cal 415 : (1976) 2 Cal LJ 357 (FB)] that “if the application under Section 5 of the Limitation Act was rejected the resultant order cannot be a decree and the order rejecting the memorandum of appeal is merely an incidental order”. The reasoning of the Full Bench was that when an appeal is barred by limitation the appeal cannot be admitted at all until the application under Section 5 of the Limitation Act is allowed and until then the appeal petition, even if filed, will remain in limbo. If the application is dismissed the appeal petition becomes otiose. The order rejecting the memorandum of appeal in such circumstances is merely an incidental order. We have no doubt that the decisions rendered by the High Courts holding the contrary view do not lay down the correct principle of law.

12. In such a situation the mere fact that the second appeal was dismissed as a corollary to the dismissal of application for condonation of delay has no effect on the decree passed by the first appellate court.

13. Learned counsel cited the decision of a two-Judge Bench of the Calcutta High Court in *Shyama Pada Choudhury v. Saha Choudhury & Co.* [AIR 1976 Cal 122 : (1976) 80 CWN 29] as the Bench repelled

the contention that the time would start running from the date of the decree of the lower court when the appellate court did not interfere with the lower court decree. That position was adopted in the background where the appellate court affirmed the decree of the lower court though with a slight modification regarding the costs portion. In such a situation it was rightly held that the appellate court decree became enforceable and hence the time would start running from the date of that decree.”

17. To the understanding of this Court, it is one thing to say that mere filing of an appeal would not arrest limitation from running, and quite different to say that a decree having been passed in appeal, the period of limitation would be reckoned from the date of the decree of the Appellate Court; not the original decree. It is the latter proposition which governs the fate of this case. The authority of their Lordships of the Supreme Court in **Ratansingh** relied upon by Mr. Tiwari does not hold differently.

18. The next decision relied upon by Mr. Anil Tiwari, learned Senior Advocate is **Syam Sundar Sarma** (*supra*). It is a three Judge Bench decision, which appears to lay down the principle that the rejection of a delay condonation application, accompanying the memorandum of appeal, is nevertheless a decision in the appeal itself and has the same effect on divesting the Trial Court of its jurisdiction to entertain an application for setting aside the ex parte decree under Order IX Rule 13 of the Code though filed earlier, as the case, where an appeal from the ex parte decree is dismissed on merits. This decision does overrule the principle in **Ratansingh** that the rejection of a delay condonation application accompanying an appeal, and

the consequent dismissal of the appeal as time barred, does not amount to a decree. That is not the point that arises here. Nothing is held in **Shyam Sundar Sarma**, which may be of any assistance to the judgment-debtors-petitioners.

19. The next authority relied upon by Mr. Anil Tiwari, learned Senior Advocate appearing for the judgment-debtor-petitioners is **Ram Bachan Rai** (*supra*), which too, this Court is afraid, does not at all apply in principle to the issue involved. **Ram Bachan Rai** was a case where an ex parte decree was passed and sought to be set aside under Order IX Rule 13 of the Code. The application to set aside was dismissed in default. The application to restore the earlier application to set aside was rejected by the Trial Court, and an appeal from the said order was dismissed. A revision from the Appellate Court's order was also dismissed by the High Court. When in execution, symbolic possession of the suit property was delivered to the decree-holder, the judgment-debtors moved the Executing Court under Section 47 of the Code, saying that the execution of the decree was barred by time. The decree ex parte was passed on 03.05.1976 and the execution application was instituted on 05.04.1991, that is to say, after a period of 15 years. It was beyond the limitation of 12 years. There was no issue on facts that there was never a stay granted on execution of the decree ex parte, at any stage, so as to arrest time from running and save limitation. The Executing Court dismissed the objection under Section 47, holding that the period of limitation would have to be reckoned from the date of rejection of the civil revision, arising out of the restoration matter by the High Court and not the date of the decree. This order was affirmed in revision by the High Court. Upon an appeal

by special leave to their Lordships of the Supreme Court, reversing the Executing Court and the High Court, it was held that the execution application was barred by limitation under Article 136 of the Schedule appended to the Act of 1963, because the limitation had to be reckoned not from the date of dismissal of the civil revision arising out of the restoration matter against the ex parte decree, but the date of the decree. Apparently, there was no stay of execution pending the proceedings, seeking to restore, that ultimately failed. Therefore, the period of limitation was held to run from the date of the decree continuously and end upon expiry of a period of 12 years, whereafter execution was levied.

20. This Court must observe that **Ram Bachan Rai** was not a case about the merger of an original decree with an appellate decree at all. It was a case where the original decree was the one to be executed, albeit after failure of motions to get it set aside before the Trial Court, and also the higher fora, since the decree was ex parte. Obviously, to this nature of proceedings, no one can doubt that the period of limitation applicable would have to be reckoned from the date of the original decree, when during motions brought to set aside the ex parte decree or by invoking appellate procedures, there was no stay of execution. It has not the slightest application to a case, where the original decree stands effaced and merged in the superior decree of an Appellate Court, as the case here.

21. The limitation here, therefore, has to be counted from the date of the Lower Appellate Court's decree, if not the order in second appeal affirming it, a question not thought necessary to be gone into, as earlier said.

22. In view of what has been said above, the decision in **Ram Bachan Rai**

also does not bail out the judgment-debtor-petitioners. In a last ditch effort, Mr. Tiwari has fallen back for support upon the decision in **Bimal Kumar** (supra). He has drawn this Court's attention to the following paragraphs of the report in **Bimal Kumar**:

“41. In this context, we may usefully refer to the dictum in *Ratansingh v. Vijaysingh* [(2001) 1 SCC 469] wherein, while dwelling upon the concept of enforceability of a decree and the effect of an order of stay passed by the appellate court, the Bench stated thus: (SCC p. 473, paras 8-9)

“8. When is a decree becoming enforceable? Normally a decree or order becomes enforceable from its date. But cases are not unknown when the decree becomes enforceable on some future date or on the happening of certain specified events. The expression ‘enforceable’ has been used to cover such decrees or orders also which become enforceable subsequently.

9. Filing of an appeal would not affect the enforceability of the decree, unless the appellate court stays its operation. But if the appeal results in a decree that would supersede the decree passed by the lower court then it is the appellate court decree which becomes enforceable. When the appellate order does not amount to a decree there would be no supersession and hence the lower court decree continues to be enforceable.”

42. In *Ram Bachan Rai* [(2006) 9 SCC 446] the two-Judge Bench took note of the fact that an application under Order 9 Rule 13 for setting aside the ex parte decree was dismissed which was assailed in a miscellaneous appeal and ultimately in a civil revision. At no stage, stay was granted by any court. The decree-holders therein

filed an application for execution after 12 years. Regard being had to the same, it was held that the execution proceeding was barred by limitation.

44. In the case at hand, the compromise decree had the status of a final decree. The latter suit filed by the appellants was for partition and declaring the ex parte compromise decree as null and void. As has already been stated, there was no stay of the earlier judgment or any proceedings emanating therefrom. In the absence of any interdiction from any court, the decree-holder was entitled to execute the decree. It needs no special emphasis to state that there was no impediment or disability in the way of the respondents to execute the decree but the same was not done. Therefore, the irresistible conclusion is that the initiation of execution proceedings was indubitably barred by limitation.

45. Thus analysed, the reasons ascribed by the learned Single Judge are absolutely unsustainable. The period of limitation stipulated under Article 136 of the Act could not have been condoned as has been so presumed by the learned Single Judge. The reliance placed on Bharti Devi [AIR 2010 Jhar 10 : (2009) 3 JLJR 90] is totally misconceived inasmuch as in the said case, the execution proceeding was initiated for permanent injunction. No exception can be taken to the same and, therefore, reliance placed on the said decision is misconceived.”

23. Now, **Bimal Kumar** was a case that never involved the merger of a decree passed by a Court of first instance with an appellate decree. It was a case where a partition suit was filed between parties earlier, where, leaving aside one defendant, the plaintiff and the other defendants filed a joint petition of compromise. The defendant, who appeared

in the suit and filed a written statement to contest, later on chose not to contest. The Trial Judge accepted the compromise and passed a compromise decree, proceeding against the non compromising defendant ex parte. Later on, it appears that the heirs and legal representatives of ex-parte defendant brought a fresh suit for partition on ground that the compromise decree, passed in earlier suit, was obtained by fraud, challenging the compromise decree passed in the former suit. The later suit was dismissed. An appeal carried from this decree was dismissed for non-prosecution. At this stage, the decree-holder in the earlier suit, where the compromise decree had been passed, applied for execution. In the meantime, the ex-parte defendant in the earlier suit, who had unsuccessfully sued and appealed by a separate suit, passed away. The decree-holders in the former suit for partition levied execution against the heirs and legal representatives of the ex parte defendant-judgment-debtors of the earlier suit. The legal representatives raised an objection that the execution was barred by limitation and deserved to be dismissed on that ground.

24. The Trial Judge dismissed the execution application as time barred. A revision carried to the High Court was allowed, holding it to be within time. In appeal by special leave, their Lordships held that in the absence of a stay of the compromise decree passed in the earlier suit being granted in the subsequent suit brought by the ex parte defendant, the limitation has to be reckoned from the date of the compromise decree. In the absence of any stay, the limitation would run continuously and run itself out at the end of the prescribed period of time. It can thus be seen that in **Bimal Kumar** too, there was no case about a decree of a Court of first

instance merging with the decree of an Appellate Court from the date of which limitation would then have to be reckoned. Therefore, the holding in **Bimal Kumar** is also away from the point that the judgment-debtor-petitioners canvass here.

25. In **Surinder Pal Soni (supra)** relied upon by Mr. Shobhit Dube, the relevant facts and the point involved can best be understood in their Lordships' words, carried in paragraph no. 8 of the report:

“8. On the other hand, Mr Gopal Jha, learned counsel appearing on behalf of the respondents submitted that:

8.1. The doctrine of merger applies to a situation when the limitation for the filing of an execution application is to be computed.

8.2. The decree of the trial court was conditional since it contained a direction for the execution of the sale deed of the suit land except 2 kanals within a period of 2 months on receipt of the balance sale consideration. The decree contained three conditions, each of which had to be fulfilled.

8.3. In the present case, the decree of the trial court was not modified by the appellate court.

8.4. No application was filed by the appellant for the extension of time to effect deposit nor was any amount deposited while filing the execution application. The High Court while dismissing the appeal of the judgment-debtor did not grant an extension of time to the decree-holder for the deposit of the balance.

8.5. The decree-holder has not shown reasonable grounds for extension of time and the filing of an appeal does not constitute a valid ground particularly in the absence of a stay under Order 41 Rule 5.

8.6. The respondent deposited the balance of the sale consideration on 19-2-2015 without an application under Section 148 CPC for the extension of time.

8.7. For the above, it was submitted that the appellant having failed to comply with the conditions specified in the decree dated 20-3-2012, the High Court was justified in allowing the respondent's civil revision and holding that the decree had been rendered inexecutable.”

26. On these facts, repelling the contention that non grant of a stay order pending appeal by the Appellate Court would not, at all, affect the reckoning of limitation from the date of decree of the Appellate Court, subsequently passed, it was observed:

“9. The rival submissions fall for our consideration.

10. By its judgment dated 20-3-2012, the trial court decreed the suit for specific performance filed by the appellant save and except for the land admeasuring 2 kanals. The decree of the trial court envisaged performance of the agreement to sell dated 8-12-2003 in respect of the land which formed the subject-matter of the suit, except for 2 kanals. The judgment-debtor was directed to execute the sale deed in respect of the remaining portion of the suit land:

- (i) within a period of 2 months;
- (ii) on receipt of the balance sale consideration; and
- (iii) upon deducting the consideration for 2 kanals of land.

The decision of the trial court was carried in appeal both by the decree-holder and by the judgment-debtor. The appellate court issued notice on the appeal and the application for stay filed by the judgment-debtor, while the decree-holder moved for

execution of the decree. The judgment-debtor had filed objections to the execution of the decree. The appellate court dismissed both sets of appeals by confirming the judgment and decree of the trial court.

11. Upon the decision of the appellate court, there was a merger of the judgment of the trial court with the decision which was rendered in appeal. Consequent upon the passing of the decree of an appellate court, the decree of the trial court merges with that of the appellate court. The doctrine of merger is founded on the rationale that there cannot be more than one operative decree at a given point of time. The doctrine of merger applies irrespective of whether the appellate court has affirmed, modified or reversed the decree of the trial court. In Kunhayammed v. State of Kerala [Kunhayammed v. State of Kerala, (2000) 6 SCC 359], while explaining the doctrine of merger, this Court held thus : (SCC p. 370, para 12)

“12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The

nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.”

12. Further, while explaining the position that emerges on the grant of special leave to appeal by this Court, it was observed : (Kunhayammed case [Kunhayammed v. State of Kerala, (2000) 6 SCC 359], SCC p. 383, para 41)

“41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one.”

13. This position of law has been recently affirmed and reiterated by a three-Judge Bench decision of this Court in Khoday Distilleries Ltd. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd. [Khoday Distilleries Ltd. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd., (2019) 4 SCC 376]

14. The decision in Kunhayammed [Kunhayammed v. State of Kerala, (2000) 6 SCC 359] was followed by a three-Judge Bench decision of this Court in Chandi Prasad [Chandi Prasad v. Jagdish Prasad, (2004) 8 SCC 724], which held thus : (Chandi Prasad case [Chandi Prasad v. Jagdish Prasad, (2004) 8 SCC 724], SCC p. 731, paras 23-24)

“23. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice delivery system.

The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time.

24. It is trite that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court.”

15. More recently, the decision in Chandi Prasad [Chandi Prasad v. Jagdish Prasad, (2004) 8 SCC 724] was followed by a two-Judge Bench of this Court in Shanthi v. T.D. Vishwanathan [Shanthi v. T.D. Vishwanathan, (2019) 11 SCC 419 : (2019) 4 SCC (Civ) 787] rendered on 24-10-2018 in the following terms : (Shanthi case [Shanthi v. T.D. Vishwanathan, (2019) 11 SCC 419 : (2019) 4 SCC (Civ) 787] , SCC OnLine SC para 7)

“7. ... When an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intents and purposes, the suit continues. When a higher forum entertains an appeal and passes an order on merit, the doctrine of merger would apply. The doctrine of merger is based on the principles of the propriety in the hierarchy of the justice delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be

more than one operative decree governing the same subject-matter at a given point of time.”

16. The learned counsel appearing on behalf of the respondents submitted that under Order 41 Rule 5 CPC, an appeal does not operate as a stay of the proceedings under a decree or order appealed from except so far as the appellate court may order, nor shall execution of the decree be stayed only by reason of an appeal having been preferred from the decree. The appellate court is however vested with the authority to stay the execution of the decree for sufficient cause. The submission is that since the decree was not stayed pending the disposal of the appeal, there was no impediment in its execution and, upon the failure of the appellant to deposit the balance in the execution proceedings, the decree becomes inexecutable. The learned counsel submitted that in such a situation, application of the doctrine of merger stands obviated.

17. We are unable to accept the submission. The doctrine of merger operates as a principle upon a judgment being rendered by the appellate court. In the present case, once the appellate court confirmed the judgment and decree of the trial court, there was evidently a merger of the judgment of the trial court with the decision of the appellate court. Once the appellate court renders its judgment, it is the decree of the appellate court which becomes executable. Hence, the entitlement of the decree-holder to execute the decree of the appellate court cannot be defeated.”

(emphasis by Court)

27. The other decision relied upon by Mr. Dube, learned counsel appearing on behalf of respondent No. 1 is **Sajja Chimpiraiah** (supra). The issue that arises here, including the facts, in the background

of which the issue arose, have been considered under point No. 1. **Sajja Chimpiraiah** was a case that arose out of an execution proceedings brought to execute a decree for specific performance of contract and a point of limitation, barring the execution, was raised. It was observed in **Sajja Chimpiraiah** thus:

“11.Point No. 1 :

The decree-holder obtained the decree in O.S. No. 319 of 1972 on 12-1-1977 for specific performance of an agreement of sale dated 26-3-1972. As per the terms of the decree, the revision petitioner was directed to execute a registered sale deed in favour of the decree-holder. The revision petitioner preferred A.S. No. 11 of 1997 in the Court of the Senior Civil Judge, Chirala and it was dismissed on 31-8-1977. He also preferred S.A. No. 78 of 1989 before the High Court of Andhra Pradesh and it was dismissed by the High Court on 16-6-1997. Subsequently, the decree-holder filed E.P. No. 46 of 1999 on 20-10-1998 by depositing the balance sale consideration with interest, after obtaining an order of extension from the High Court on 9-1-1998, to direct the revision petitioner under Order 21, Rule 34, C.P.C. to execute a registered sale deed in favour of the decree-holder after receiving the balance of sale consideration and in the event of the failure of the revision petitioner, the Court to execute the sale deed on their behalf through process of the Court. If the date of the decree of the Junior Civil Judge, Parchur is taken into consideration, the execution petition is beyond the period of 12 years, since the original decree was passed on 12-1-1977. If the decree of the High Court in the Second Appeal is taken as 16-6-1997, the Execution Petition is within time.

12.The learned counsel for the decree-holder Sri M.V.S. Suresh Kumar submitted that since the revision petitioner preferred appeals before the Sub-Court and the High Court, the decree of the trial Court and the

AP530 first Appellate Court merged with the decree of the High Court in the second appeal. Therefore, the limitation starts to run from the date of the disposal of the second appeal i.e., 16-6-1997. Hence, the decree-holder has ample time to file the execution petition within 12 years from the date of the decree of the High Court and as the execution petition was filed on 20-10-1998, it is within time. Therefore, the decree is enforceable against the revision petitioner and the question of rescinding the contract of sale under Section 28 of the Specific Relief Act does not arise.

13.The learned counsel for the revision petitioner Sri T. Jagadish submitted that since the execution petition was filed beyond the period of 12 years from the date of the decree of the Junior Civil Judge, Parchur, the execution petition could not be maintained. Therefore, it is liable to be dismissed.

14.The learned counsel for both parties placed strong reliance on various judgments of the Supreme Court and High Courts and they requested to pass appropriate orders in the light of the principles laid down in those judgments.

15.The learned counsel for the revision petitioner relied on the following rulings and requested to hold that the execution petition is barred by limitation.

16.In *Ratansingh v. Vijaysingh*, AIR 2001 SC 279, the Supreme Court while considering the scope of Article 136 of the Indian Limitation Act, 1963 held as follows (Paras 8 and 9) : "Article 136 of the Schedule to the Limitation Act, 1963 provides 12 years for execution of any decree or order of any Civil Court (other

than a decree granting a mandatory injunction). The third column in the Article which indicates the time from which period begins to run, states that "when the decree or order becomes enforceable....." Normally a decree or order becomes enforceable from its date. But cases are not unknown when the decree becomes enforceable on some future date or on the happening of certain specified events. The expression "enforceable" has been used to cover such decrees or orders also which become enforceable subsequently. Filing of an appeal would not affect the enforceability of the decree, unless the appellate Court stays its operation. But if the appeal results in a decree that would supersede the decree passed by the lower Court and it is the appellate Court decree which becomes enforceable. When the appellate order does not amount to a decree there would be no supersession and hence the lower Court decree continues to be enforceable."

17. Under Article 182 of the old Limitation Act, the time from which the period would begin to run was shown as :-

- 1) Date of the decree or order or
- 2) Whether there has been appeal, the date of final decree or order by the appellate Court or withdrawal of the appeal.

18. Section 48 of the old C.P.C. prescribed a period of 12 years, before expiry of which, an application could be made for execution."Sec. 48 (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from-(a) the date of the decree sought to be executed, or,(b) where the decree or any subsequent order directs any

payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.(2) Nothing in this section shall be deemed-(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at sometime within twelve years immediately before the date of the application; or(b) to limit or otherwise affect the operation of Article 180 of the second schedule to the Indian Limitation Act, 1877.

19. The provision under Article 182 of AP531 the old Limitation Act, was quite different from its corresponding Article 136 of the present Limitation Act. Now period of execution of a decree starts running from the date when it becomes enforceable.

20. The learned counsel for the revision petitioner submitted that as per the above decision of the Supreme Court the decree becomes enforceable from the date on which the Appellate Court passed the decree which supersedes the decree of the trial Court and as there was no decree passed by the first Appellate Court or second Appellate Court altering the decree passed by the trial Court it became enforceable from the date of decree of the trial Court. Therefore, the execution petition filed beyond the period of 12 years from the date of the decree of the trial Court cannot be maintained.

21. In *Antony Sami v. Arulanandam Pillai*, 2002 (1) Andh LD 1 : AIR 2001 SC 2967, the Supreme Court while considering the scope of Article 136 of the Limitation Act, 1963 held that when a decree of specific performance was passed with a

direction that the decree-holder should deposit the balance of sale consideration before a particular date and the judgment-debtor to measure and demarcate the land before the same date and when the decree-holder deposited the amount the limitation for execution starts despite the Judgment-debtor failing to demarcate the land, the decree becomes executable when once the decree-holder deposits the amount.

22. In *West Bengal Essential Commodities Supply Corporation v. Swadesh Agro Farming and Storage Pvt. Ltd.*, AIR 1999 SC 3421, the Supreme Court held as follows (Para 21) :

"The period of limitation for execution of decree under Article 136 of the Limitation Act runs from the date of the decree and not from the date when the decree is actually drawn up and signed by the Judge."

23. In *Bhuralal v. Jiwansingh*, AIR 1956 Rajasthan 21, Modi J., held as follows :

"Article 182 is not exhaustive in the sense that it is not the only Article which applies to execution applications and that Art. 181 may also be applicable to such applications. Article 181 is a residuary Article and will only apply where the application of Article 182 is excluded. The correct Article applicable to applications for execution in conditional decrees is Article 181, Limitation Act and not Article 182, and that as there is nothing in law to preclude the decree-holder from performing the condition laid down in the decree on the very day the decree is passed, where no date for the performance of the condition is specified in the decree itself, the decree-holder has the liberty to perform the condition within three years of the date of the decree at the most but not beyond it, and he cannot be permitted to extend this period by a belated

performance of the condition which it was for him to fulfil."

24. In *L. Lahori Ram Sahgal v. L. Prabhu Dayal*, AIR 1953 Allahabad 120, a Division Bench of Allahabad High Court considered the scope of Section 148, C.P.C., 1908, regarding the extension of time in a decree for specific performance held as follows :

"The decree was to become executable only on compliance of its terms. Failure to comply with the terms would make the decree inexecutable. The decree-holder not having fulfilled the terms of the contract had no right to get the decree executed."

25. The law laid down in the above decisions, makes it clear that the period for execution of a decree starts running from the date when it becomes enforceable. The above decisions are not helpful to the revision petitioner on the question as to when the limitation for execution of a decree starts to run.

26. The learned counsel for the respondents on the other hand cited the following decisions regarding the starting point of limitation for execution of the decree.

27. In *Nalluri Veerraju v. Sri Kanchi Kamakshammavari Temple at Madhavaram, West Godavari Dist.*, (1997) 1 Andh LD 716 : 1997 AIHC 2151, S. Dasaradharama Reddy, J., of A. P. High Court while considering the scope of Article 136 of the Limitation Act held that the Limitation has to be computed from the date of the appellate decree, in the appeal preferred by one of the defendants, though the petitioner himself did not file the said appeal. The Court further held that when one of the judgment-debtors filed appeal

AP532 against the decree and judgment of the trial Court though dismissed, the Execution Petition filed

against the second Judgment-debtor is not barred by time, as the limitation has to be computed from the date of the appellate decree.

28. In *Posani Ramachandraiah v. Daggupati Seshamma*, AIR 1978 Andh Pra 342, a Division Bench of this Court held as follows :

"Where appellate decree is sought to be executed, limitation starts from the date of that decree as decree of the first Court merges with the decree of the Appellate Court."

The Court further held :

"Art. 136 says that the period of limitation begins to run when the decree or order becomes enforceable. It does not say when it becomes enforceable. The repealed S. 48, C.P.C. says, that no order for execution of a decree shall be made after the expiration of twelve years from the date of the decree sought to be executed. The meaning of the words "from the date of the decree sought to be executed", in S. 48 C.P.C. and the words "where the decree or order becomes enforceable" in Art. 136, is practically the same."

"When the Legislature enacted Art. 136 by omitting S. 48, C.P.C. and reproducing it in Art. 136, they must have been aware of the interpretation of S. 48 by the Courts and approved of it. Consequently, under Art. 136 of the present Limitation Act, the period of limitation can be reckoned from the date of the appellate decree, even though there was no stay in the appeal. If there is an appeal, the decree that can be enforced is that of the appellate Court, and the period of limitation has to be reckoned from the date of that decree."

29. In *Thodkamalla Venkata Laxmi Narayanarao v. Kishanlal*, AIR 1961 Andh Pra 326, a Division Bench of this High Court while considering the scope of

Section 48, CPC and Article 182 of the old Limitation Act held as follows :

"When execution application filed beyond 12 years of original decree but within time from the date of dismissal of appeal by appellate Court, the execution application is not barred by Section 48, C.P.C. in view of the unrestricted words "where there has been an appeal" in Article 182 of the old Limitation Act."

30. In *Nacharammal v. Veerappa Chettiar*, AIR 1946 Madras 231, a Division Bench of Madras High Court while dealing with Section 48, C.P.C. held as follows :

"Where an appellate Court passes a decree it takes the place of the decree of a trial Court, and it is the decree of the appellate Court only which becomes capable of execution, consequently the period of 12 years under S. 48 commences from the date of such appellate decree and not from the date of the decree of the trial Court."

31. In *S.T.M. Vyravan Chettiar v. R.M. Rayalu Ayyar Nagaswami Ayyar and Co.*, AIR 1951 Madras 844, a Division Bench of Madras High Court held as follows :

"The period of 12 years under S. 48 would be computed from the date of the decree and not from the date when that decree is amended."

32. The trend of the above decisions leads to a conclusion that irrespective of allowing or dismissing the appeal, the period of limitation has to be computed from the date of the appellate decree for filing the execution petition.

33. In the present case the appeals preferred by the revision petitioner were dismissed. Therefore, the contention of the revision petitioner that the limitation runs from the date of the original decree cannot be accepted. It is applicable to cases where appeals were entertained at the instance of one of the judgment-debtors also.

34. In the light of the above legal position it can be safely concluded that from the date of the decree of the High Court dated 16-6-1997, the execution petition was within time. Therefore, it is not barred by limitation.

35. Point No. 2 :

The revision petitioner filed I.A. No. 269 of 1999 under Section 28 of the Specific Relief Act requesting to rescind the contract dated 26-3-1972 and to restore the schedule property to the revision petitioner directing the respondent to pay the costs. The revision petitioner in the said application contended

AP533 that he purchased the schedule property under a registered sale deed dated 15-4-1972 from the third respondent. The Principal District Munsif Court, Chirala passed a decree on 12-1-1977 for specific performance of the contract of sale dated 26-3-1972, wherein he was directed to execute a registered sale deed in favour of the first respondent. The first respondent did not file the execution petition to execute the decree within the period of 12 years, therefore, it is barred by limitation. He also contended that since the first respondent failed to pay the balance of purchase money within the period of limitation, the decree for specific performance is barred by limitation, therefore, the contract has to be rescinded by holding that he is entitled for restoration of possession of the property. The first respondent resisted the application contending that the trial Court as well as the Appellate Court settled the issue between the parties regarding the execution of the sale deeds and he further contended that since the High Court allowed him to pay the balance of sale consideration by extending time, he is entitled to get the decree enforced through the execution petition.”

(emphasis by Court)

28. The issue was examined by this Court in **Chandi Prasad and others vs. Addl. Dist. and Sessions Judge, Hapur and others**, AIR 2001 All 229, wherein Sudhir Narain, J. held:

“9. The question is whether the decree drawn in pursuance of the judgment of the High Court passed on 18-4-1985 shall be taken as the date when the decree becomes enforceable or the date of the judgment of the lower appellate Court delivered on 4-1-1974. Similar controversy was raised in *Banshidhar Durga Dutta v. Loonkaran Sethia*, 1983 ALJ 557, where the execution application was filed after the judgment of the appellate Court, the Division Bench of this Court held that the decree becomes enforceable after the judgment of the lower appellate Court. In this case the appeal was dismissed as not pressed and the judgment-debtor raised the contention that as the appeal was not pressed and the judgment was affirmed and as there was no stay of the operation of the decree of the trial Court, the execution application become time barred. This contention was not accepted on the reasoning that once the appeal has been filed against the decision of the lower appellate Court it is open to the decree-holder to wait for the decision of the appeal and thereafter to file application for execution of the decree. It was observed (at Page 559; of All LJ):

“It follows from the law laid down by the Privy Council that if the Court's order furnishes a cause of action then similarly the lower Court's decree also furnishes a cause of action. The time from which the limitation begins to run is the point when the decree or order becomes enforceable. The expression “enforceable” means “to put into execution, to cause to take effect”.

In case of a decree of the trial Court being affirmed, the appellate decree becomes enforceable and that can be put into execution. The Judgment debtors' contention that since there was no stay order, the decree holder could not take advantage of the time spent in prosecution of the appeal, does not appeal to us to be tenable. A judgment-debtor does not lose by the decree holder's not putting his decree into execution. The decree-holder has the choice to wait for the decision of the appeal. The law does not cast any duty on him to put the decree into execution immediately after its being passed. It had not been denied that in case of a decree being modified or varied, the period of limitation would start from the date of passing of the decree in the appeal. If that so, there is no reason to take contrary view in respect of a decree which is confirmed in appeal. There is no logic in holding a decree of the latter category to have become barred by time if the execution of the same is not made immediately after its being passed by the trial Court. If the principle of merger applies, the decree of the trial Court would get merged with that of the appellate Court and it is that decree which will become enforceable."

10. The principle of doctrine of merger was applied by the Supreme Court in *Kunhayammed v. State of Kerala*, (2000) 6 SCC 359 : AIR 2000 SC 2587. It was clarified that so far as principle of merger is concerned, on principle there is no distinction between order of reversal or modification and order of confirmation passed by the appellate Court. As in all the three cases the order passed by the lower authority shall merge in the order passed by the appellate authority whatsoever be its decision - whether of reversal or modification or only confirmation. The Court relied upon the following observation

of the Supreme Court in *UJS Chopra v. State of Bombay*, AIR 1955 SC 633 : (1955 Cri LJ 1410 at page 649 : of AIR).

"A judgment pronounced by a High Court in exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties would replace the judgment of the lower Court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Court below."

11. x x x

12. In view of the above the application filed by defendant-respondents for execution of the partition decree was within time as it was filed within 12 years from the date of the judgment of the High Court in Second Appeal referred to above.

(emphasis by Court)

29. On appeal, the decision of this Court in **Chandi Prasad** was affirmed by the Supreme Court in **Chandi Prasad and others vs. Jagdish Prasad and others**, (2004) 8 SCC 724, where it was held by their Lordships:

"23. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time.

24. It is trite that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate

court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See V.M. Salgaocar and Bros. (P) Ltd. v. CIT [(2000) 5 SCC 373 : AIR 2000 SC 1623] .]

25. The concept of doctrine of merger and the right of review came up for consideration recently before this Court in Kunhayammed v. State of Kerala [(2000) 6 SCC 359] wherein this Court inter alia held that when a special leave petition is disposed of by a speaking order, the doctrine of merger shall apply stating: (SCC p. 383, paras 41-43)

“41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the

exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42. ‘To merge’ means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-68.)

43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.

26. In Kunhayammed [(2000) 6 SCC 359] it was observed: (SCC p. 370, para 12)

“12. ... Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could

have been laid shall have to be kept in view.”

27. The said decision has been followed by this Court in a large number of decisions including *Union of India v. West Coast Paper Mills Ltd.* [(2004) 2 SCC 747]”

30. The same principles were reiterated in a very recent decision of the Supreme Court in **Shanthi vs. T.D. Vishwanathan and another**, (2019) 11 SCC 419, where their Lordships followed their earlier decision in **Chandi Prasad**.

31. The indisputable position, therefore, is that limitation has to be reckoned from the date of the decree of the Appellate Court, even if the date of the order of this Court dismissing the second appeal in limine is ignored. The appellate decree was passed on 31.03.2011 by the learned Additional District Judge and the execution application was made on 21.07.2011, which was well within the limitation of 12 years under Article 136 of the Schedule appended to the Act of 1963. The mention of the date of original decree in Column No. 3 would not make any difference because there is copious reference in Column No. 4 of the execution application to the decree passed in appeal.

32. In the opinion of this Court, therefore, the execution is competent and must proceed.

33. No other point was pressed.

34. This petition fails and is **dismissed** with costs.

(2023) 7 ILRA 834

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 14.07.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.**

Government Appeal No. 1075 of 1990

**State of U.P. ...Appellant
Versus
Devendra @ Dablu & Ors. ...Respondents**

Counsel for the Appellant:

A.G.A., Sri Rajesh Kumar Pandey, Sri N.K. Srivastava

Counsel for the Respondents:

Sri Y.D. Sharma, Anjaly Pandey, Sri Pramod Kr. Rajpoot, Sri Sanjay Srivastava, Sri Sunil Kumar

**Criminal Law - Indian Penal Code, 1860-
Section 392**-Appeal against acquittal order-FIR lodged promptly-accused persons are named in the FIR-no explanation for recovery- enmity not proved-set 134 of the Evidence act-quality of evidence required-recovery of the robbed items proved case proved beyond any reasonable doubt u/s 392 IPC-for co-accused prosecution could not prove conspiracy against him. **Appeal dismissed** in respect of one accused-for the rest accused persons- appeal preferred by the State is **allowed**.

Appeal preferred by the State is allowed.
(E-9)

Cases cited:

1. Devendra @ Dablu and Mahendra are liable to be convicted and sentenced in accordance with law.

2. The judgment and order of acquittal passed by the learned trial Magistrate with regard to Durga Prasad is upheld.

3. Since accused Devendra @ Dablu and Mahendra are not present in the Court in person, hence they are ordered to be taken into

custody. They shall be heard on the quantum of sentence.

4. The accused though were directed to remain present but they are absent. Their advocate is also absent. Hence, non-bailable warrants are issued on the accused - Devendra @ Dablu and Mahendra, returnable on 04.08.2023, to be served through CJM, Bulandshahar. On the said date they shall be brought before the Court.

List of Cases cited:

1. Mukesh Vs St. of NCT of Delhi & ors., AIR 2017 SC 2161 (three Judges Bench)

2. Bhagwan Jagannath Markad Vs St. of Mah., (2016) 10 SCC 537

3. Sadhu Saran Singh Vs St. of UP, (2016) 4 SCC 357

4. Pramod Kumar Vs St. NCT of Delhi, AIR 2013 SC 3344

5. Govind Raju @ Govinda Vs St. Vs& anr, AIR 2012 SC 1292

6. Sandeep Vs St. of UP, (2012) 6 SCC 107

7. Dharnidhar Vs St. of UP, (2010) 7 SCC 759

8. Dalbir Kaur Vs St. of Pun., (1976) 4 SCC 158

9. Hukum & ors.Vs St. of Raj., 2001 CrLJ 511

10. Bable Vs St. of Chhattisgarh, AIR 2012 SC 2621

11. Jarnail Singh Vs St. of Pun., 2009 (6) Supreme 526

12. Mahaveer Singh Vs St. of Har., (2014) 6 SCC 716

13. Atluri Brahma Nandam Vs Anne Sai Bapuji and Laxmibai Bhagwant Buva, AIR 2013 SC 1204

14. Sudip Kumar Sen Vs St. of W. B., (2016) 3 SCC 26

15. St. of UP Vs Satveer, (2015) 9 SCC 44

16. Prithvipal Singh Vs St. of Pun., 2012 (76) ACC 680 (SC)

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

1. This Government Appeal has been preferred by the State to set aside the judgment and order of acquittal dated 30.01.1990 passed by the Additional Munsif Magistrate-IV, Bulandshahar in Criminal Case No.1288 of 1987 (New Criminal Case No.419 of 1989), under Sections 392/411, 120-B IPC, Police Station Kotwali Nagar, District Bulandshahar by which the accused persons (respondent nos.1, 2 and 3) had been acquitted from the charges under Section 392 IPC.

2. In brief, facts of the case are that on 03.10.1985 the informant, Bhagwat Singh from PHC Unchagaon, Bulandshahar took out Rs.29,965.40/- as salary of his departmental employees from the State Bank, Bulandshahar, kept the same in a leather bag and after parking the cycle at Mr. Dalmore's house in Village Hirapur, keeping the alleged bag in his hand walked away towards Bus Stand, Jahangirabad. At about 20-25 steps away from the said house at 02:00 p.m, accused Amarnath @ Pappu, Devendra @ Dablu riding on a Vicky Moped motorcycle without number plate, met with him and snatched the bag from his hand on the gun point in which there were Rs.29,965.40/-, a treasury register and other papers. The informant produced a written complaint Ex.Ka-1 at the Chowki, Nai Mandi, Bulandshahar on which basis chik FIR Ex.Ka-5 was prepared under Section 392 IPC. After investigation charge sheet was submitted, charge was framed under Section 392 IPC against the accused

persons who denied the charge and sought for trial.

3. Following witnesses have been examined by the prosecution:-

1	PW-1	Bhagwat Singh (informant)
2	PW-2	Jagroop (independent witness who turned hostile)
3	PW-3	Mahendra Singh Chauhan, Sub-Inspector Police Station Kotwali, Bulandshahar
4	PW-4	Rajendra Singh Chaudhary, Sub-Inspector Police Station Vannadevi, Aligarh.

4. Following documentary evidences have been examined by the prosecution:-

1	Ex.Ka-1	Written Complaint
2	Ex.Ka-2	Chik FIR, recovery memo of Goods and Moped and entries in bill register
3	Ex.Ka-3	Site Plan with Index and list of payment of staff
4	Ex.Ka-4	Site Plan with Index,
5	Ex.Ka-5	Letter to branch manager, SBI, paper regarding payment of pay money to the informant from bank
6	Ex.Ka-6	Chik FIR and charge sheet
7	Ex.Ka-7	Carbon copy GD and pass-book
8	Ex.Ka-8	Notes
9	Ex.Ka-9 and 10	Truss of the clothes

5. Material Exhibits

1	M.Ex-1	Bag
2	M.Ex-2	Treasury register
3	M.Ex-3	Salary particulars
4	M.Ex-4	Letter
5	M.Ex-5 and 18	Moped and paper
6	M.Ex-6-7	Seals
8	M.Ex-8-15	Bundle of notes
9	M.Ex-16-17	Truss made of clothes

6. In brief, oral evidences of the prosecution witnesses are as follows:-

6.1. PW-1, informant – Bhagwat Singh stated on oath that on 03.10.1985 he was posted as Accounts Clerk in Uchagaon PHC. He had gone to the State Bank of India to collect the salary of the employees. He had received salary amounting Rs.30,865.40/- out of which he had deposited Rs.900/- in his and his wife's personal account. Remaining amount Rs.29,965.40/- which was kept in the alleged bag walked through bicycle towards the bus stand and parked it at the house of Dalmor Singh of Village Hirapur and walked back on foot with the alleged bag in his hand towards the bus stand. He would have hardly walked about 20-25 steps, the accused persons namely Amarnath @ Pappu (present in the court), Devendra @ Dablu (not present in the court) and Mahendra Singh (present in the court) met and stopped him and forcibly snatched the bag on the gun point. Thereafter he made-a-noise upon which the witnesses Dalmor Singh, Jagroop Singh, Kailash and Sardar etc. reached there and tried to catch the accused persons. The accused ran away towards Syana Road riding on Vicky brandishing the pistol.

Apart from the money in the bag, there was a treasury register in which bills were noted. There were other papers and stamps also. He had himself written the complaint Ex.Ka-1 and produced it at Chowki, Nai Mandi.

6.2. The sealed bundle was opened before the witness in the court. Seeing which he deposed that this was the same bag which the accused persons had snatched from him. Seeing the register, he deposed that on 03.10.1985, he had received the bills amounts from the bank which were noted at serial nos.123 to 129 in the said register and these entries were signed by him after receiving the bill amount.

6.3. In cross-examination the witness has deposed that on the day of incident he left Village Unchagaon at 07:30 a.m. First of all, he reached the bank treasury at 10:15 a.m. Dalmor was his distant relative where he used to park his bicycle. He had neither dealing with the accused nor he had any enmity with them since before the incident. Being nervous, he could not mention that he had received Rs.30,865.40/- from the State Bank. The Inspector had recorded his statement same day in which also he could not said that fact. It is correct to say that the fact about Rs.30,865.40/- was said for the first time in the court. The fact regarding deposition of Rs.900/- was not mentioned in the FIR. He further deposed that it was wrong to say that he was not knowing the accused persons since before the incident. It is also wrong to say that he had lodged a false report in connivance with the police.

6.4. PW-2, Jagroop has deposed that it was a matter of about five months before when he was tending the potato in the field. He has no knowledge that the accused

persons had snatched the bag or not. He did not know the accused persons. He knew Dalmor Singh who was his cousin. He did not know whether Bhagwat Singh comes at Dalmor Singh's house. This witness was declared hostile. In cross-examination the witness denied to give the statement to the IO and deposed that it was wrong to say that he deposed wrongly being warned by the accused persons.

6.5. PW-3, SI Mahendra Singh Chauhan, Police Station Kotwali Nagar, District Bulandshahar deposed that on 04.10.1985 he was posted at Police Station Kotwali Nagar. On that day he alongwith Constable Surendra singh, Constable Pramod Kumar to investigate Case Crime No.595, under Section 379 IPC. When he reached at Chauraha Anoopshahar Adda, SI Rajendra Singh Choudhary Chowki Incharge New Mandi, HC Jai Prakash and Constable Babu Khan and Rishipal met with him and he was told that they have to recover the robbed articles and wished to arrest the accused persons. On this, they made physical search to each other and ensured that no one had any robbed articles. After this, they tried to take public witness but no one was ready to cooperate. When the witnesses were not found, he along with the other policemen reached near the Pyau, Utrawali at Aurangabad Road and sat hiding under its cover and waited for the accused to come. After a while, two men appeared from Aurangabad side coming on Vicky (motor cycle moped). The informer pointed out and left. They were stopped. Mahendra Jatav was riding the vicky and his brother Devendra @ Dablu was sitting behind him. The two were present in the court. Devendra was carrying a leather bag in his hand, when they opened the bag, they found a treasury register of Unchagaon Hospital. A sealed

bundle was opened before him upon which he deposed that this leather bag was recovered from the accused Devendra. A register and a file were also recovered from this bag which were before him. From the file two papers related to Unchagaon Hospital were also recovered, the second paper was written by the informant. Apart from that, two seals related to Unchagaon Hospital were also found. Apart from these things, only Rs.3,887/- was recovered from this bag. When physical search of Devendra was made, a country-made pistol and two cartridges of 303 bore were recovered from his person. Details of recovered notes were given in the recovery memo which was prepared by SI Rajendra Singh on which they had signed. Upon being asked about the vicky/moped in question, the accused could not show the papers and no registration was found, thereafter the vehicle was taken into custody. When they were bringing the recovered articles alongwith both the accused, one Durga was seen about whom the accused Devendra told that this is the owner of the moped vicky in question. The accused Durga was also taken into custody by the police and they reached Chowki, New Mandi. After handing over the accused there, the witness alongwith other persons returned to Police Station Kotwali Nagar. SI Rajendra Singh and other police personnel remained at Chowki New Mandi and kept on enquiring.

6.6. In the cross-examination this witness deposed that at about 04:00 p.m. he alongwith three other policemen went for investigation of Case Crime No.595, under Section 379 IPC which belonged to Devi Pura Mohalla. When he reached at Chauraha Anoopshahar Adda, SI Rajendra Singh alongwith other policemen met there and they sought for help regarding the

robbery in question. On being asked the witness replied that in this case they have no order of CO. At the behest of SI Rajendra Singh, they reached immediately at Anupshahar Adda by cycles which would have taken about one and half an hour from the police station to reach there. They left Anupshahar station at about 5-1/2 hour. Two Sub-Inspectors, one HC, 5 Constables and one informer were there. They all had separate cycles. No one from the public was ready to be a witness. Village Utrawali would be about 3-4 kms away from Anupshahar station. The informer was with SI Rajendra Singh. The accused were coming from Aurangabad side. The way which turns to Utrawali, they ambushed near a Pyau. In the fard, the information of the informer or the fact that the informer went with the policemen to the spot and pointed out at the accused are not mentioned. All these facts are in GD. The fard was not signed by the accused. As long as the accused were in the police custody, the copy of the fard given to them was not deposited at the police station. He further stated that on 11.10.1985 at about 09:30 p.m. near Uday Talkies his statement under Section 161 CrPC was recorded in which he stated about the other investigations. He further stated that neither Durga Prasad gave his moped nor they got the same before him. The witness denied that the accused persons were falsely implicated.

6.7. PW-4, SI Rajendra Singh Chowdhary Police Station Bannadevi, District Aligarh has deposed on oath that on 03.10.1985 he was posted as SI at OP New Mandi, Police Station Kotwali Dehat, Bulandshahr. Next day on 04.10.1985, he was appointed as IO of the case. HC Jaiprakash, Constable Babu Khan, Constable Rishipal were also with him. When they came to Anupshahar station at

05:15 p.m, they received an information from the informer that two miscreants of this robbery were returning from Aurangabad on vicky moped alongwith the robbed articles and an illegal firearm was also with them. On this information, he tried to take witnesses from the public but no one was ready. Meanwhile, SI Mr. S.S. Chauhan Police Station Kotwali Nagar alongwith Constable Surendra, Devendra and Pramod met at the same place who were assigned some investigation. The witness told them the whole story and asked for help. On this, Sri Chauhan agreed, he also tried to take public witnesses but no one was ready. Then the policemen after their personal search went to Aurangabad Road to arrest the accused persons. After reaching near Utrawali Pyau they hid there. After about 5-7 minutes, 2 persons were seen coming on a vicky from Aurangabad side. The informer went away after pointing out upon them, the policemen stopped those persons. They tried to run away but by using usual force they were arrested. During their physical search all the robbed articles as mentioned above as well as a country-made pistol alongwith two cartridges of 303 bore were recovered and the motorcycle in question was also taken into custody. After completing the proceedings, they returned. On the way, the accused Devendra told that the motorcycle in question belonged to Durga who also met on the way and was also arrested there. The accused as well as the robbed articles were presented at OP New Mandi. During the investigation, statement of the witnesses were recorded. On inquiry, the accused persons confessed the offence and the act of conspiracy done in connivance with another accused Durga. He further deposed that the site plan was prepared and signed by him. He inquired the Branch Manager who had given details of the

money. He further stated that it is wrong to say that the accused persons were falsely implicated due to old enmity with them.

7. Heard Sri N.K. Srivastava, learned counsel for the State, Sri Sanjay Srivastava, learned counsel for all the accused respondents and perused the records.

8. The learned trial court has acquitted the accused persons on the following grounds:-

8.1. That no public witness had been taken by the IO during the course of arrest and recovery from the accused persons.

8.2. That the informant Bhagwat Singh has not given any explanation regarding visit of the house of Dalmor.

8.3. That it was the duty of the informant to go to PHC, Unchagaon directly with the salary amount rather to go to the house of Dalmor. Thus, the informant has committed negligence with regard to his duty.

8.4. Dalmor was the best witness who has not been examined while as per the informant on his hue and cry Dalmor reached on the spot within 5-6 seconds.

8.5. That the prosecution has examined only Jagroop as PW-2 out of Jagroop, Sardar Singh, Kailash and others who has been declared hostile, why rest of the witnesses had not been examined, has not been explained.

8.6. That there is no averment of the informer in the recovery memo. It has also not been mentioned that the informer accompanied the police upto the place of

recovery and had also pointed out towards the accused persons.

8.7. That it is not proved that copies of the recovery memo were provided to the accused persons, as the same were not with them at the time when they were admitted to the lock-up of the police station.

8.8. That according to the witnesses there were seal of SBI upon the notes but the same has not been proved by any officer of the bank.

8.9. That PW-1, Bhagwat Singh has not stated either in the FIR or in his statement under Section 161 CrPC regarding deposit of Rs.900/- in the bank.

8.10. That generally a person would not carry the robbed goods on the next day of the incident particularly when the robbed money belonged to a bank with a seal.

8.11. That no person would carry the robbed money in the same bag which had been robbed alongwith the money.

8.12. That the informant has not given any statement against the accused Durga Prasad. He has been made accused only on the basis of use of his moped by the other accused persons. It is noteworthy that PW-4 Rajendra Chaudhary has accepted in his cross-examination that none of the witnesses had given statement that the offence was conspired by the accused Durga Prasad. Hence, no charge under Section 392 IPC is proved against him.

9. On the basis of above grounds, the trial court has acquitted the accused persons.

10. The State appellant has taken grounds in appeal that the order of acquittal is wholly erroneous and illegal, against the weight of evidence on record, the trial court has erred in law by not placing implicit reliance on the testimony of PW-1, Bhagwat Singh. From the recovery of the vehicle, the money i.e. cash amount and the pistol and cartridges, the case was fully established and proved and there was no legal justification to disbelieve the evidence of Mahendra Sing and Rajendra Chaudhary. The evidence of police witnesses has been quite illegally disbelieved. The prosecution story inspires confidence and the contrary view is wholly erroneous. Hence, the appeal be allowed and the order of acquittal of the accused be set aside and the accused be convicted and sentenced in accordance with law.

11. This appeal is decided as under discussing the grounds taken by the trial court to acquit the accused persons.

12. (i) *The learned trial court has taken ground that no public witness had been taken by the IO during the course of arrest and recovery from the accused persons.*

13. In this regard it would be proper to evaluate and peruse the evidence available on record. The incident had occurred on 03.10.1985. It was not a simple and not noticeable offence as the huge government money had been robbed. In the year of 1985 about Rs.30,000/- was a big amount. The FIR had been lodged soon after the incident and from the evidence it is proved that after the incident the police had become active as the government money had been robbed and the informers were directed to give the clue. There was no dispute regarding the identity of the

accused persons as their names had already been mentioned in the FIR, hence the police had only to search and arrest the accused persons alongwith the robbed items.

14. PW-3 and PW-4 have deposed unanimously that the whereabouts of the accused persons had been given by the informer. Since the communication made by the informer is a privileged communication, hence PW-3 and PW-4 could not be compelled to say about this in view of Section 125 of The Indian Evidence Act. PW-3 had deposed that they tried their best to take public witnesses but no witness was ready to testify. In the cross-examination a question was asked about this fact on which the witness replied that any person from the public was not ready to be a witness. In this regard no suggestion has been given from the side of the accused persons that the police did not try properly to procure any public witness. PW-4, SI Rajendra Singh Chaudhary has also deposed that in the course of search of the case property and the accused persons when reached Anoopshahar Adda at about 05:15 p.m. he got an information from the informer that two accused persons are coming on the same vicky used in commission of crime with robbed materials from the side of Aurangabad alongwith illegal weapons. On this information he tried to take witnesses from the public but no one was ready. Meanwhile, the SI of Kotwali Nagar Mr. SH Chauhan alongwith Constable Surendra, Devendra and Pramod met at the same place. He told them the whole story and asked them to come for help. Sri Chauhan agreed on this and also tried to take public witnesses but no one was ready then the police personnel became witnesses and took each others' personal search and convinced that no one

had any goods related to the case and went towards the Aurangabad road with the informer and hid under the cover of pyau.

15. In this regard, this witness has also been cross-examined on which he replied that even on the place of recovery he waited for 5-6 minutes and tried to get the witnesses but no one was ready to be a witness. At that time there was not enough time to take action against the witnesses who did not turn up to testify. No suggestion has been given to the witness that he did not try his best to procure the public witness for recovery.

16. It would be proper to discuss the law regarding non-availability of a public witness in a criminal case.

17. In **Mukesh Vs. State of NCT of Delhi and others**, AIR 2017 SC 2161 (three Judges Bench), **Bhagwan Jagannath Markad Vs. State of Maharashtra**, (2016) 10 SCC 537; **Sadhu Saran Singh Vs. State of UP**, (2016) 4 SCC 357 it has been held that 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 the statement of a sole witness even if he is a related witness. Non-examination of independent witness could not be fatal to the case of prosecution.

18. From the perusal of the evidence of both the above witnesses it is very much clear that they tried their best to take a public witness but since none was ready to cooperate with the police, they could not do so. Generally, it is seen that due to fear of enmity independent person do not come forward to be a witness in a criminal case.

It is seen that offences are committed in public places but people do not intervene to save the life and personal liberty of the victim. Even in civil cases people avoid to be witness from either side as it develops enmity for future. In such condition if only police witnesses are there who are deposing in favour of the prosecution in absence of the public witness what would be the evidentiary value of the police witness has been discussed by the Apex Court in several cases.

19. In **Pramod Kumar Vs. State NCT of Delhi**, AIR 2013 SC 3344; **Govind Raju @ Govinda Vs. State and another**, AIR 2012 SC 1292 it has been held that the testimony of police personnel should be treated in the same manner as testimony of any other witness. There is no principle of law that without corroboration by independent witnesses, the testimony of police personnel cannot be relied on. The presumption that a person acts honestly applies as much in favour of a police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good reasons. As a rule it cannot be stated that police officer can or cannot be sole eye-witness in a criminal case. Statement of police officer can be relied upon and even form basis of conviction when it is reliable, trustworthy and preferably corroborative by other evidence on record.

20. In **Sandeep Vs. State of UP**, (2012) 6 SCC 107 the conviction was upheld by the Apex Court which was solely bases upon the evidence of police personnel. In this case only police parties were examined as prosecution witnesses and the labourers/independent witnesses were not examined as witnesses.

21. In this case the accused were named in FIR, the informant was recognizing them prior to the incident, the part of money having seal of State Bank of India and other materials which the informant had at the time of incident, were recovered and proved beyond reasonable doubt in the court. Thus, the evidence of police personnel finds support from the evidence of PW-1 and the items recovered from the accused persons for which no explanation has been given from the side of the accused persons. Thus, this ground taken for acquittal by the learned trial court is not tenable and is accordingly rejected.

22. (ii) *The learned trial court had taken ground that the informant Bhagwat Singh has not given any explanation regarding visit of the house of Dalmor.*

23. According to this court probably the learned trial court has not gone through the FIR and the evidence. In the FIR it is clearly mentioned that he parked his cycle at the house of Dalmor Singh and went towards Jahangirabad Bus Stand when this incident took place. PW-1 has given similar evidence on oath and on being cross-examined he has deposed that Dalmor is his distant relative and he used to park his cycle there. Whenever he come to collect salary from Unchagaon, he used to park his cycle at Dalmor's house. In this regard no suggestion has been given to the witness that he was telling a lie and he had not parked his cycle at Dalmor's house on the day of incident. Hence, this Court comes to the conclusion that the finding recorded by the learned trial court in this regard is baseless and, therefore, rejected.

24. (iii) *The learned trial court has also concluded that it was the duty of the informant to go to PHC, Unchagaon*

directly with the salary amount rather to go to the house of Dalmor.

25. According to this Court, it has been proved from the evidence of informant PW-1 that it was his common practice to park the cycle at the house of Dalmor and to ride on bus with salary for going to PHC, Unchagaon. On the fateful day, the informant adopted the same practice. It cannot be said that it was an unusual behaviour of the informant as it was done by him since long. It cannot be said that by visiting the house of Dalmor to park the cycle, the informant has committed negligence with regard to his duty. According to this Court such act cannot be made a ground for acquittal.

26. (iv) ***The learned trial court has concluded that Dalmor was the best witness which has not been examined by the prosecution.***

27. Certainly Dalmor Singh is mentioned as witness at serial no.2 in the charge sheet but he has not been examined. Jagroop Singh witness at serial no.3 in the charge sheet has been examined but he has not supported the prosecution version. Probably in apprehension of hostility of Dalmor Singh, he would not have been examined. There might be some other reasons such as illness, absence or reluctance of Dalmor Singh on account of terror of the accused persons. This court has already discussed this point earlier.

28. In **Dharnidhar Vs. State of UP, (2010) 7 SCC 759; Dalbir Kaur Vs. State of Punjab, (1976) 4 SCC 158** it has been held that non-examination of independent eye-witnesses is inconsequential if the witness was won over or terrorised by the accused.

29. In **Sandeep (supra) and Hukam and others Vs. State of Rajasthan, 2001 CrLJ 511** it has been held that the public prosecutor is not bound to examine such witnesses which are not supportive of prosecution's case. It has also been held that public prosecutor is not bound to examine all witnesses of a particular fact.

30. In the above circumstances if Dalmor Singh had not been examined, the same is not fatal for the prosecution.

31. (v) ***The learned trial court has concluded that only Jagroop has been examined out of Jagroop, Sardar Singh, Kailash and others. The trial court has also based his judgment of acquittal on the ground that rest of the witnesses named in charge sheet were not examined.***

According to this Court this question has already been answered. Due to the same and similar ground and circumstances, rest of the witnesses would not have been examined. Hence, there is no need to explain this point any more. The reason given by this Court with regard to the non-examination of Dalmor also applies to this ground taken by the learned trial court.

32. (vi) ***The learned trial court had concluded that there is no averment of informer in the recovery memo and it has also not been mentioned that the informer accompanied the police to the place of recovery and that he had also pointed out towards the accused persons.***

33. According to this Court the fact regarding the information given by the informer is a privileged communication which is protected from disclosure in view of Section 125 of The Indian Evidence Act. According to this Court there was no need to mention the above facts in the recovery

memo. These facts were foreign and irrelevant to the recovery memo. So far as the recovery memo is concerned, it is exhaustive and comprehensive and it contains all the elements necessary with regard to the arrest and recovery. So far as the information given by the informer and reaching on the place of recovery and pointing out towards the accused are concerned, these facts are already mention in case diary and has also been deposed on oath by PW-3 and PW-4. Therefore, this Court is of the view that the learned trial court has made it a ground of acquittal without any basis and cogent reason.

34. (vii) *The trial court has also concluded that if the copies of the recovery memo would have been provided to the accused persons, the same would have been with them when they had been admitted to the lock-up of the police station.*

35. In this regard, the recovery memo Ex.Ka-2 is to be seen where it has been written by SI that copies of the recovery memo were provided to the accused persons. It is true that there are only the signatures of the police personnel as witness of the recovery memo and it has not been signed by the accused persons. According to this Court there is no rule of law that a recovery memo would necessarily be signed by the persons whom any recovery has been made. In this regard it has been deposed by PW-3 that accused persons did not sign the recovery memo. There is no rule of law that a copy of the recovery memo has to be submitted by the accused persons at the police station. It is also noteworthy that in this regard no suggestion has been given from the side of the accused persons that the copies of the recovery memo were not provided to them.

Hence, such plea could not be taken by them and it was not available to the learned trial court for making it a basis of acquittal.

36. (viii) *The learned trial court has concluded that though there was seal of the State Bank of India on the notes recovered during the course of recovery but no officer of bank had been examined to prove it.*

37. According to this Court, even a layman recognizes the seal/stamp of the bank. It was found on the notes recovered from the possession of the accused persons. For this there was no need to call for an officer from the concerned bank. The particulars of the notes are on record which show that out of Rs.30,865.40/- Rs.900/- of the informant were deposited by him in his and his wife's account and rest Rs.29,965.40/- were in the leather bag of the informant out of which only Rs.3,887/- were recovered from the accused persons and rest of the money were spent. In this regard evidence of PW-3 is material who has given description of the recovered notes that three bundle of 10-10 rupees total Rs.3,000/-, one bundle of 5 rupees total Rs.500/-, one bundle of two rupees total Rs.200/-, one note of Rs.100/-, eight notes of 10 rupees total Rs.80/- and seven notes of one rupees total Rs.7/- gross total Rs.3,887/- were recovered. The bundle of notes of Rs.10/- Rs.5/- and Rs.2/- were bearing the seal of State Bank of India Bulandshahar. There were chits of bank dated 03.10.1985 on all three bundles of Rs.10/-, chit of 30.09.1985 on the bundle of Rs.5/-, chit of 11.04.1985 on the bundle of Rs.2/- were also found. According to this Court such evidence already present on the money recovered from the accused persons clearly established that the money recovered from the possession of the

accused persons was the part of the money withdrawn from the State Bank by the informant. Therefore, this Court is of the considered view that there was no need to summon any officer of the State Bank of India, Bulandshahar Branch to prove the seal present on the alleged notes. In this regard this Court has scrutinized the evidence of PW-3 and PW-4. The learned counsel for the accused persons have not cross-examined these witnesses on this point that the money recovered so was not the money withdrawn from the said bank by the informant on the day of occurrence. Therefore, there was no occasion for the learned trial court to concoct and imagine such ground to pass an order of acquittal.

38. (ix) *The learned trial court has concluded that PW-1 Bhagwat Singh has not stated either in the FIR or in his statement under Section 161 CrPC that out of total amount he had deposited Rs.900/- in the bank.*

39. According to this court it is also an imaginary and concocted ground concocted by the learned trial court without any basis. It is very much clear from the FIR that the informant had Rs.29,965.40/- in leather bag when he left the premises of the State Bank. From the documentary evidence Ex.Ka-3 it is fully established that virtually Rs.30,865.40/- had been withdrawn. From the original pass-book of the informant and his wife available on record it is established that out of the above amount the informant had deposited Rs.900/- in his and his wife's account. Therefore, at the time of incident he had only Rs.29,965.40/- in his leather bag which was robbed. Therefore, there was no need to give the description of the whole amount which had been withdrawn by him from the bank. It is not a case of

accounting. The FIR must be concise, it is not an encyclopedia in which all the facts must be mentioned. It is an instrument only to accelerate the police machinery, therefore, non-mentioning the fact regarding deposition of Rs.900/- in the bank in the FIR or not giving statement in this regard under Section 161 CrPC is not fatal for the prosecution. (See **Bable Vs. State of Chhattisgarh**, AIR 2012 SC 2621, **Bhagwan Jagannath Markad (supra)**; **Jarnail Singh Vs. State of Punjab**, 2009 (6) Supreme 526.

40. (x-xi) *The learned trial court has concluded that generally a person would not carry the robbed goods on the next day of the incident particularly when the robbed money was bearing a seal of bank.*

41. According to this Court one cannot imagine human behaviour of another person. Different human being behave differently. In several cases it has been held that even devil does not know what is going on in the mind of an accused. It depends on the personality of the person concerned. The reaction, conduct and behaviour of the person cannot be similar and equal. Thus, it cannot be said that when such miscreants known to the informant are robbing him in a day-light, they cannot move with the robbed items in the same bag in a day hour. Hence, this ground taken by the learned trial court is not sustainable.

42. Earlier it has been made clear that several grounds taken for passing an order of acquittal by the learned trial Magistrate have no legs and basis as no proper cross-examination have been done from the side of the accused persons. In **Mahaveer Singh Vs. State of Haryana**, (2014) 6 SCC 716; **Atluri Brahma Nandam Vs. Anne Sai Bapuji and Laxmibai**

Bhagwant Buva, AIR 2013 SC 1204 it has been held that it is a settled legal proposition that in case the question is not put to the witness in cross-examination who could furnish explanation on a particular issue, the correctness or legality of the said facts/issue could not be raised.

43. According to this Court on the basis of the principles laid down in the above precedents it can be said that since no proper cross-examination have been made and no proper suggestions have been given to the witnesses, therefore, the evidence of the witnesses is not liable to be questioned.

44. (xii) *The learned trial court has taken ground that the informant has not given any statement against the accused Durga Prasad. He has been made accused only on the basis of use of his moped by the other accused persons.* PW-4, Rajendra Chaudhary has admitted in his cross-examination that none of the witnesses had given statement that the offence was conspired by him. Hence, no charge under Section 392 IPC is proved against him.

45. In this regard the evidence of witnesses of fact i.e. PW-1 and PW-2 is immaterial and it is not expected from them to know regarding any conspiracy occurred among the accused persons. In this regard only the statement of PW-3 and PW-4 are relevant. PW-3 has deposed that accused Devendra had confessed that moped belonged to accused Durga Prasad. This witness has not given any evidence regarding conspiracy occurred among the accused persons about the commission of crime. This witness has been examined from the side of accused Durga Prasad in which he had replied that before him neither the moped was provided by the

accused Durga Prasad to the rest of the accused persons nor they had taken it. According to this Court, this cross-examination was very much irrelevant as it is not the case of the prosecution that the alleged moped was provided by Durga Prasad to the rest of the accused persons before this witness. However, it is very much clear that no evidence of conspiracy between the accused Durga Prasad and rest of the accused persons could be produced by this witness.

46. Similarly, PW-4 has deposed that the moped belonged to the accused Durga Prasad was recovered on the pointing of the accused Devendra. This witness has written the confession of accused Devendra that accused Durga Prasad had informed them that the informant would come to the state bank for receiving the salary of the employees of Unchagaon Hospital. Durga Prasad is also an employee in PHC, Sayana. Hence, he was aware about this fact and he was also knowing that the informant would park his cycle in village Hirapur and thereafter would go to Unchagaon. He had also confessed that Durga Prasad had pointed out the informant at the bank and after giving his moped he had left.

47. Except this confessional statement to the police there is no iota of evidence of conspiracy among the accused Durga Prasad and rest of the accused.

48. According to **Section 25 of The Indian Evidence Act** no confession made to a police officer shall be proved as against a person accused of any offence. The accused Devendra is a co-accused who has not accepted the fact of confession made by him to the IO and the same is not proved by any independent evidence. Accused Durga

Prasad has stated in his statement under Section 313 CrPC that after parking the moped he had gone to his duty. Thus, according to this Court there is no iota of evidence or evidence to prove the charge under Section 392 read with Section 120-B IPC against the accused Durga Prasad. Hence, this Court is of the view that the findings recorded in favour of accused Durga Prasad by the learned trial court is correct and is not liable to interfered with.

49. Since none of the public witness has been examined from the side of prosecution except PW-2 Jagroop who has turned hostile, the only witness of fact remains informant PW-1. It has been proved from his evidence that he was knowing the accused persons prior to the incident. He has given all particulars of the case such as when he came to the house of the Dalmor after withdrawing the salary amount of the employees of Unchangaon PHC and how when he would have gone only 20-25 steps from the house of Dalmor, he was robbed by the named accused persons at gun point.

50. In this case the FIR was lodged promptly without any unreasonable delay. The accused persons are named in the FIR. The manner of occurrence and the amount robbed from the informant have been mentioned in the FIR and in the statement of the informant. Just after one day the accused persons had been arrested with the leather bag, seals, other relevant papers and amount of Rs.3,887/-. No explanation could be given by the accused persons as to how these materials were with them. It has not been proved that there was any enmity or reason to the informant to falsely implicate the accused persons.

51. In this regard **Section 134 of The Indian Evidence Act** is relevant according

to which no particular number of witnesses shall in any case be required for the proof of any fact. According to this Section quality of evidence of witnesses is important to prove the fact and not the number of the witnesses.

52. It has been held in several cases that testimony of solitary witness can be sufficient to convict the accused if he is wholly reliable. In **Sudip Kumar Sen Vs. State of West Benal, (2016) 3 SCC 26; State of UP Vs. Satveer, (2015) 9 SCC 44; Prithvipal Singh Vs. State of Punjab, 2012 (76) ACC 680 (SC)** it has been held that quality of evidence and not the quantity matters in a criminal trial. Plurality of witnesses in a criminal trial is not the legislative intent. If the testimony of the sole witness is found reliable on the touchstone of the credibility, accused can be convicted on the basis of such sole testimony.

53. According to this Court, the informant PW-1 had neither any ill will, malice or conspiracy with any enemy of the accused persons to falsely implicate them. The fact of the case and charge under Section 392 IPC has been fully proved from the evidence of the informant PW-1. The recovery of the robbed items has been proved in accordance with law from the evidence of PW-3 and PW-4. All the documents produced by the prosecution have been proved by PW-1, PW-3 and PW-4 and the prosecution has been successful in proving the case against the accused Devendra @ Dablu and Mahendra beyond any reasonable doubt.

54. So far as the case of Durga Prasad is concerned the prosecution could not prove the factum of conspiracy against him. Generally, in village, kasba and city people

take the vehicles of others on the pretext of any work. It appears that the moped of accused Durga Prasad would have been taken by the rest of the accused persons in the same manner. Hence, this appeal is liable to be dismissed in respect of accused Durga Prasad.

55. So far as the rest accused persons – Devendra @ Dablu and Mahendra are concerned, the appeal preferred by the State is liable to be allowed. The case is proved against them beyond reasonable doubt under Section 392 IPC and they are liable to be convicted and sentenced in accordance with law.

ORDER

56. The appeal is partly allowed in respect of the accused Devendra @ Dablu and Mahendra and is partly dismissed with regard to the accused Durga Prasad and the judgment and order of acquittal passed by the learned trial Magistrate with regard to him is upheld.

57. Since accused Devendra @ Dablu and Mahendra are not present in the Court in person, hence they are ordered to be taken into custody. They shall be heard on the quantum of sentence.

FURTHER ORDER

58. The accused though were directed to remain present but they are absent. Their advocate is also absent. Hence, we have no other option but to issue non-bailable warrants on the accused - Devendra @ Dablu and Mahendra, returnable on 04.08.2023, to be served through CJM, Bulandshahar. On the said date they shall be brought before this Court.

59. List for hearing the accused on the quantum of sentence on 04.08.2023.

(2023) 7 ILRA 848

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 08.05.2023

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Civil Misc. Review Application No. 129 of 2023
IN

Civil Misc. Writ Petition No. 23940 of 2022

RGK Industries LLP 144, New Delhi

...Petitioner

Versus

UPPCL Lko. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Veerendra Kumar Shukla, Sri Anurag Khanna,
Sri Sandeep Arora, Sri V.K. Shukla (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Baleshwar Chaturvedi, Sri Krishna
Agarwal, Sri K.M. Asthana

A. Civil Law - Recovery of Electricity Arrears - Electricity Act, 2003- Section 56 - UP Government Electrical Undertaking (Dues Recovery) Act, 1958, S. 5, Recovery of electricity dues as arrears of land revenue - U.P. Electricity Supply Code, 2005 - Clause 6.15; Recovery of Arrears - Clause 4.3 (f) (i); Both seller & purchaser will be either/or, jointly and severally liable to pay the outstanding electricity dues/ obtain No Dues Certificate. *Issue:* Whether an auction purchaser, a subsequent transferee of the auctioned property (auction conducted by the Debt Recovery Tribunal after determining the dues of the bank), can be held liable for payment of electricity dues of the erstwhile owner? Held: From a conjoint reading of Clause 4.3 (f) (i), (ii), (iii), it is clear that it is the duty of the purchaser to make an inquiry into the matter of the

dues of electricity with respect to a premises where electricity supply has been made to the erstwhile owner. Clause 4.3 (f) (i) cannot be confined to private sales. In the instant case there was an explicit statement in the schedule of the property that the Recovery Officer was not aware of any dues, claims, encumbrances, or revenue assessed on the property. Also, Clause 4 of the auction notice/sale proclamation provided: "4. The property is being sold on an 'as is where is' basis." Meaning thereby, the auction purchaser was required to make necessary inquiries about the claims, charges, or encumbrances, if any, related to the property. The auction purchaser was under an obligation to make inquiries regarding the outstanding electricity dues with respect to the property put to auction in the proceedings under the SARFAESI Act, 2002. Auction purchaser cannot be allowed to contend that he was not intimated about the electricity dues or that there was no occasion for him to make an inquiry. An auction sale being a distress sale, the auction purchaser not only purchases the property but also purchases the liabilities attached to it. (Para 32, 42, 43)

Dismissed. (E-5)

List of Cases cited:

1. *Isha Marbles Vs Bihar State Electricity Board & anr.*, 1995 (2) SCC 648
2. *Paschimanchal Vidyut Vitran Nigam Vs DVS Steels & Alloys Pvt. Ltd. & ors.*, 2009 (1) SCC 210
3. *Telangana State Southern Power Distribution Company Limited & anr. Vs Srighdhaa Beverages*, 2020 (6) SCC 404
4. *Southern Power Distribution Company of Telangana Limited & ors. Vs Gopal Agarwal & Others*, 2018 (12) SCC 644

5. *Dakshin Haryana Bijli Vitran Nigam Ltd. Vs Paramount Polymers (P) Ltd.*, 2006 (13) SCC 101

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. & Hon'ble Vipin Chandra Dixit, J.)

1. Heard Sri Anurag Khanna learned Senior Advocate assisted by Sri Sandeep Arora and Sri V.K. Shukla learned Counsels appearing for the review applicant, Sri Baleshwar Chaturvedi learned counsel for the respondent No.2, Sri K.M Asthana learned counsel for the respondent No.4.

2. The present review petition has been filed seeking for recall/review of the judgement and order dated 30.09.2022 passed by this Court after the review-applicant had approached the Apex Court in a Special Leave Petition (Civil) Diary No.462 of 2023, decided vide judgement and order dated 13.02.2023. On the submission of the learned counsel for the petitioner therein that certain error in the judgement of the High Court with reference to certain clauses had been made and a view different from the division bench decision of the very same High Court had been taken, permission was granted to the petitioner to withdraw the Special Leave Petition with liberty to file review.

3. The issue raised in the review application is about the correctness of the decision given by us dated 30.9.2022 wherein considering the provisions of Clause 4.3 of the U.P. Electricity Supply Code' 2005 (hereinafter referred as Code' 2005), the challenge to the recovery of electricity dues from the auction purchaser namely the review applicant herein, has been turned down. The main question

which arises for consideration in the review application as also the writ petition is whether the liability towards the electricity dues in relation to the property in question can be realized from the petitioner/review applicant, who was an auction purchaser.

4. We have heard the learned Senior Counsel appearing for the review applicant at length as also the counsels appearing for the Electricity Department namely Paschimanchal Vidyut Vitran Nigam Limited and the bank concerned.

5. Few facts of the case in brief are relevant to be noted to examine the merit of the dispute. The petitioner herein is an auction purchaser of a property bearing No. G-599 to G-623 situated at Mussoorie Gulawati Road Industrial Area, Ghaziabad, Uttar Pradesh. The said property was put to auction sale and E-sale proclamation dated 14.05.2019 is appended with the supplementary affidavit in the review application filed by the review applicant. After purchase of the property, when the petitioner had applied for electricity connection in the premises in question, it was intimated of the arrears of electricity dues against the previous consumer namely the owner whose property was put to auction by the Debt Recovery Tribunal, Delhi. The recovery citation initiating recovery of electricity dues had been issued in the name of the petitioner herein.

6. In the writ petition, it was argued by learned counsel for the applicant that the arrears of electricity charges in relation to the property in question cannot be realized from the petitioner, who is an auction purchaser, as electricity dues do not constitute the charge over the property and a transferee of the premises cannot be held

liable for the dues of the previous owner/occupier.

7. This argument was dealt by us in the original judgment by reading the provisions of clause 4.3 (f) (i) of the Code' 2005. It was held that in view of a specific statutory provision dealing with the dispute, general law principle that a transferee of the premises is not liable for the dues of the previous owner/occupier are not applicable. It was also noted that as per the conditions of the auction sale, the auction purchaser was under obligation to verify about the dues/encumbrances over the property and while purchasing the property in distress sale, he has also purchased the liability towards the electricity dues.

8. Terming this finding returned by us in the original judgement as erroneous, it was argued by learned Senior Counsel appearing for the review applicant that an error apparent on the face of the record has been committed by us, in as much as, the provisions of Clause 4.3(f)(i) have not been considered in the correct perspective. Much emphasis has been laid to Clause 4.3(f)(v) of the Code' 2005 to assert that the said clause is a special provision which applies for auction sale held by a financial institution, as in the present case. In view of the said provision, when a financial institution has auctioned the property without considering the charge of the licensee on assets, claim can only be lodged by the licensee with the concerned financial institution with diligent pursuance and not with the auction purchaser. It is further argued that Clause 4.3(f)(i) applies to private sale and does not contemplate any liability of an auction purchaser to find out the outstanding electricity dues upto the date of sale.

9. Moreover, the said provision is only in the form of the pre-condition for issuance of No-Objection certificate for obtaining new connection and does not in any way empower the licensee to recover the outstanding dues from the auction purchaser. It was argued that Clause 4.3(f)(i) is traceable to clause 4.1 of the Code' 2005, which deals with the licensee's obligation to supply electricity to an owner or occupier of any premises. Clause 4.1(3)(4) of the Code' 2005, the proviso to clause 4.1, has been placed before us to submit that the said provision only provides that in case of arrears of electricity dues in respect of any old consumers/premises, where ownership has changed, the new connection shall be released to the new owner only after submission of the No-dues certificate as provided in Clause 4.3(f) of the Code' 2005. It is, thus, argued that Clause 4.3, which is provided under the heading "new connection/general" cannot be invoked to assert the liability of the auction purchaser to find out the electricity dues at the time of sale. Further no liability can be fastened on the subsequent purchaser, who was auction purchaser, to pay the electricity dues of the previous owner whose property was put to auction.

10. It was further argued that in case, the licensee relies upon the provisions of clause 4.3(f)(i) to justify the recovery being made from the auction purchaser, the said provision would be repugnant to the provisions of the Electricity Act' 2003 (hereinafter referred as Act' 2003) which were duly considered by the Apex Court in the case of **Isha Marbles Vs. Bihar State Electricity Board & another, 1995 (2) SCC 648** wherein it was categorically held that the auction purchaser who is a third party and in no way connected with the previous owner/occupier, the liability of the

previous contracting party of the electricity dues cannot be fastened upon the purchaser. It was held therein that though the purchaser asked for electricity connection as a new connection but it cannot be regarded as a new connection rather, it is only a re-connection since the premises has already been supplied with the electrical energy. Such a supply having been disconnected owing to the default of the consumer, that consumer had bound himself to the Board to pay the dues as he had also agreed by the condition as stipulated in the Act and the Rules including the payments of the dues. It was held that since the auction purchaser cannot be said to be "consumer" within the meaning of Section 2 of the Act' 2003, and had never been benefited of electricity supply which was disconnected for the non-clearance of the dues, and the auction purchaser, having purchased the property after dis-connection, he cannot be "consumer or occupier" within the meaning of the provisions of the Act' 2003 till a new contract is entered into. It was held that the electricity dues are no charge over the property and when the premises came to be owned or occupied by the auction purchaser, when such purchaser seeks supply of electricity energy, he cannot be called upon to clear the past arrears as a condition precedent to supply. What matters is the contract entered into by the erstwhile consumer with the Board. The Board cannot seek the enforcement of contractual liability against the third party. It was held therein that bona-fides of the sale may not be relevant in such circumstances.

11. Reliance has further been placed on the decision of the Apex Court in **Paschimanchal Vidyut Vitran Nigam Vs DVS Steels & Alloys Private Limited &**

others 2009 (1) SCC 210 to read para 11 thereof wherein it was noted that the supply of electricity by a distributor to a consumer is 'sale of goods'. The distributor as the supplier, and the owner/ occupier of a premises with whom it enters into a contract for supply of electricity are the parties to the contract. A transferee of the premises or a subsequent occupant of a premises with whom the supplier has no privity of contract cannot obviously be asked to pay the dues of his predecessor in title or possession, as the amount payable towards supply of electricity does not constitute a 'charge' on the premises. A purchaser of a premises, cannot be foisted with the electricity dues of any previous occupant, merely because he happens to be the current owner of the premises. No recovery proceedings can be initiated against the purchaser of a premises for the outstanding electricity dues of the vendor of the premises, in absence of any contract to the contrary.

12. Lastly, it was argued that the licensee having failed to file any claim with the financial institution in accordance with the provisions of clause 4.3(f)(v) cannot make recovery from the petitioner, as the Act' 2003 does not envisage the shifting of liability upon the auction purchaser for the electricity dues of the previous owner. It was also argued that in the sale proclamation dated 14.5.2019, the recovery officer has stated that there exists no encumbrance known to him. The petitioner being bonafide auction purchaser, the outstanding dues of the Power Corporation cannot be recovered from him in absence of any statutory provision in this regard.

13. A Division bench judgement of this Court in Misc. Bench No. 971 of 2018 dated 16.01.2018 has been relied to assert

that in the similar facts and circumstances, taking note of the provisions of clause 4.3(f)(v) of the Code, 2005, it was held that the bank/financial institutions, who had auctioned the property in question, without making any enquiry from the electricity department regarding the outstanding electricity dues, was under liability to pay the said dues out of the surplus amount received from auction sale. The direction had, thus, been issued to the bank to decide the matter after receipt of the electricity bill and giving notice and hearing to the borrower as also the electricity department.

14. Sri Baleshwar Chaturvedi appearing for the respondent-department has further relied upon another Division bench judgement of this Court dated 10.11.2021 to assert that taking note of Clause 4.3 (i),(iii) & (v) of the Code' 2005, it was held therein that in view of the outstanding electricity dues with regard to the premise in question, no fault could be found in the decision of the electricity department to deny fresh connection as the above referred provisions of the Code' 2005 clearly provide that electricity connection would not be given in case there are outstanding dues with regard to the premises in question.

15. A decision of the Apex Court in **Telangana State Sourthern Power Distribution Company Limited & another Vs. Srigdhaa Beverages** 2020 (6) SCC 404, has been placed before us to demonstrate that the Apex Court has distinguished the law laid down by it in **Isha Marbles (supra)**, taking note of the contents of the auction notice, in the similar facts and circumstances, as in the instant case. The question adjudicated by the Apex Court therein was whether liability towards the previous electricity dues of the last

owner could be mulled on the auction purchaser of a unit which was put to auction under the SARFAESI Act' 2002. The decision relied upon by the counsel for the petitioners herein have been distinguished in **Telangana State Southern Power Distribution Company Limited (supra)** to hold that there may have been some differences in facts of different cases but there is a clear judicial thinking which emerges from the decisions of the Apex Court that the electricity dues, which are statutory in character under the Act' 2003 and as per the terms and conditions of supply, cannot be waived in view of section 56 of the Act, 2003 and cannot partake the character of dues of purely contractual nature. Moreover, in the said case, the E-auction notice was clear to the effect that the liability to pay electricity dues existed on the purchaser. It was held that the question of new connection or re-connection would not be relevant in such facts and circumstances of that case. The electricity department would be well within its right to demand the arrears dues of the last owner, from the respondent purchaser.

16. Dealing with the rival submissions of the learned counsels for the parties, we may first go through the auction notice, i.e. the sale proclamation. In the instant case, the specific contention in the auction notice/sale proclamation dated 14.05.2019 can be found in Clause 4 thereof, which reads that:-

“4. The property is being sold on “as is where is” basis.”

17. The Schedule of property attached to the sale proclamation gives the description of the property to be sold in the following manner:-

Description of	Revenue	Detail	Claims,

the property to be sold	assessed upon the property or any part thereof	s of any encumbrance to which property is liable	if any, which have been put forward to the property, and any other known particulars bearing on its nature and value
Property being No. G-599 to G-623, Massoorie Gulawati Road, Industrial Area, U.P.	Not Known	Not Known	Not Known

18. The property in question, in the instant case, was put to auction in a proceeding conducted by the DRT, Delhi and the sale proclamation was issued by the Recovery Officer-I, DRT-II, Delhi. A perusal of the letter dated 23.10.2015 sent by the Executive Engineer, Paschimancal Vidyut Vitran Nigam Limited, Vidyut Vitran Khand, Pilkhuwa Ghaziabad indicates that an information with regard to the outstanding electricity dues of the previous owner to the tune of Rs.1,76,00,528.00 had been duly communicated to the Recovery Officer. It was stated therein that the recovery certificates were duly sent to the office of

the District Magistrate, Hapur but payment had not been received and the premises-in-question had been sealed and the auction sale were going on.

19. It is an admitted fact that the sale consideration, received through auction sale, did not include the electricity dues to the tune of Rs.1,76,00,528.00 as was due to the previous consumer. The reliance placed on the decision of the Division bench dated 16.1.2018 in Misc. Bench No. 971 of 2018 to assert that the bank shall be directed to examine the bill and pay the electricity dues to the department/respondent No.2 is, therefore, misplaced.

20. As regards the submission of the learned Senior Counsel for the petitioner/review applicant about the applicability of the provisions of clause 4.3(f) of the Electricity Code, 2005, in light of the provisions of the Act' 2003 and the decision of the Apex Court in **Isha Marbles (supra)**, we are first required to note the relevant provisions of clause 4.1 and 4.3 of the Code' 2005, which has been framed in exercise of power under the Electricity Act' 2003.

21. The Code' 2005 is applicable to all distribution licensees in the respected license area of the state. The Code enlists the obligations of the licensee and consumers vis-a-vis each other and specifies the set of practices to provide efficient, cost-effective and consumer friendly service to the consumers. It inter-alia deals with the following:-

“(a) *Procedure for new connection and for enhancement or reduction of load.*

(b) *Recovery of electricity charges and intervals for billing of electricity charges.*

(c) *Disconnection, reconnection and restoration of supply of electricity.*

(d) *Tampering, distress or damage to electrical plant, electric lines or meter.*

(e) *Entry of distribution Licensee or any person acting on his behalf for disconnecting supply and removing the meter and / or for replacing, altering or maintaining electric lines or electrical plant or meter.*

(f) *Practices relating to payment of bills, consumer metering and assessment of energy.*

(g) *Standards of Performance for the Licensee; and*

(h) *Procedure for redressal of consumer grievances.”*

22. Clause 4.1 prescribes obligation of licensee to supply electricity on an application by the owner or a occupier of any premises, located in his area of supply. The obligation is of the licensee to supply electricity to such premises within one month after receipt of the complete application. Clause 4.1, however, provides that:-

“4.1 *Licensee's Obligation to Supply - The Licensee shall on an application by the owner or occupier of any premises, located in his area of supply, give supply of electricity to such premises within the one month after receipt of completed application and payments,*

Provided where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution Licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as specified by the Commission in clause 4.8:

Provided also in case of application for supply from a village or hamlet or area

wherein no provision for supply of electricity exists, the Commission shall extend the time period for provision of supply appropriately on a case-to-case basis:

Provided further that in case of arrears of electricity dues in respect of any of old consumers / premises where ownership has changed, the new connection shall be released to the new owners only after submission of No-Dues Certificate as provided in clause 4.3(f)

2 [And provided that if there are arrears of electricity dues on a premises, a new connection shall not be released to a new applicant / or the old consumer on the same premises. The connection shall also not be released if], -

(i) The applicant (being an individual) is an associate or relative (as defined in Section 2 and 6 respectively of the Companies Act, 1956) of the defaulting consumer;

(ii) Or where the applicant being a company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, is controlled, or having controlling interest in the defaulting consumer; provided, the Licensee shall not refuse electric connection on this ground, unless an opportunity to present his case is provided to the applicant and a reasoned order is passed by an officer as designated by the licensee.”

23. Clause 4.3, which is the General provision providing procedure for New connection for supply of electricity, in Clauses 4.3 (f)(i), (ii), (iii), (iv) & (v) reads as under:-

“(f)(i). It will be the duty of the seller and of the purchaser to find out the outstanding electricity dues up to the date

of sale, and further that both seller and purchaser will be either/or, jointly and severally liable to pay the outstanding electricity dues/ obtain No dues certificate.

(ii) Before sale of a premise is made, the outstanding dues will be cleared and, in the alternative the deed to agreement / sale will specifically mention the outstanding dues and the method of its payment. “Outstanding dues” means all dues pending on a premises including late payment surcharge.

(iii) In case the no-dues certificate is not obtained by the old owner, new owner before purchase of property may approach the licensee for no-dues certificate, by giving the reference of the connection in said premises. The licensee shall either intimate the pending dues, if any, on the premises or issue no dues certificate within 30 working days from the date of application.

(iv) The outstanding dues will be first charge on the assets of the company, and the licensee shall ensure that this is entered in an agreement with new applicant.

(v) The recovery proceedings against the defaulting consumer; and where the defaulting consumer is a company, from the Directors of the company, shall be ensured. Where a financial institution has auctioned the property without consideration to licensees charge on assets, claims may be lodged with the concerned financial institution with diligent pursuance.”

24. Clause 6.15 of the Code provides that:-

“6.15 Recovery of Arrears:-

(a) The payments due to the Licensee shall be recovered as per provision of Section 56 of the Act, and arrears of land revenue as per the provisions of the U.P. Government Electrical Undertaking (Dues

Recovery) Act, 1958, as amended from time to time.

(b) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges of electricity supplied, and the supply of the electricity shall not be disconnected by licensee for this reason.

[(Explanation: The date from which such charges becomes 'first due', needs to be correctly interpreted. If as a result of regular meter reading / inspection of installation of consumer, such charges / penalties levied as per this code or tariff schedule, shall become first due counted from the due date of payment of such a bill, and such bill shall be provided to the consumer not later than two billing cycle for that category of consumer." .

25. Section 56 of the Electricity Act' 2003 provides for recovery of electricity charges in case of default on the part of any person liable to pay the same. The UP Government Electrical Undertaking (Dues Recovery) Act' 1958 provides for recovery of electricity dues as arrears of land revenue, notwithstanding anything contained in any other law or instrument or agreement to the contrary. Section 5 of the Act' 1958 be noted hereinunder:-

"5. Recovery of dues.- *If the dues for which notice of demand has been served are not deposited with the prescribed authority within thirty days from the date of service, or such extended period as' the prescribed authority may allow, the same together with cost of recovery as may be prescribed shall be recoverable as arrears*

of land revenue, anything contained in any other law or instrument or agreement to the contrary notwithstanding"

26. A conjoint reading of Section 56 of the Act' 2003 and Section 5 of the Act' 1958 providing for recovery of electricity dues and clause 6.15 of the Code 2005 indicates that the statutory electricity charges, in case of default on the part of any person liable to pay the same, can be recovered as arrears of land revenue. The question remains as to whether the petitioner/review applicant being auction purchaser, subsequent transferee of the auctioned property can be held liable for payment of electricity dues of the erstwhile owner.

27. To answer this question, we are required to note that the petitioner/review applicant herein is a purchaser of the property in an auction sale conducted by the Debt Recovery Tribunal after determining the dues of the respondent bank in the proceeding conducted before it against the borrower/erstwhile owner. The E-auction notice provides the condition of sale in clause 4 as under:-

4. The property is being sold on "as is where is" basis."

28. The Schedule of property giving description of the property to be sold has already been extracted above. From a reading of para 4 of the E-auction notice and the description of the property in the Schedule appended to the said notice, it is evident that the property was put to sale on "as is where is basis". It was clarified in the auction notice by the Recovery Officer that claims, if any, which have been put forward to the property, and any other known particulars bearing on its nature and value

was not known to him. The details of any encumbrances to which the property is liable was also not known. The revenue assessed upon the property or any part thereof was not known to the Recovery Officer. On reading of the auction notice, terms and condition on which the property was put to auction clearly shows that the Recovery Officer carrying out the auction sale, absolved himself of the liabilities towards claims, if any, nature and value thereof, encumbrances to the property, revenue assessed upon the property. The auction sale was, thus, conducted of the property on “as is where is” basis. Meaning, thereby the auction purchaser was required to make necessary enquiries about the claims, charges or encumbrance, if any, related to the property.

29. Clause 4.3 (f) (i) which pertains to the provision relating to supply of electricity, New connections, further casts an obligation on the purchaser of the property to find out the outstanding electricity dues up to the date of sale and states that in case of transfer of property, there would be co-extensive liability of the purchaser to pay the outstanding electricity dues so as to obtain no-dues certificate. Clause 4.3 (f) (iii) further states that in case no-dues certificate is not obtained by the old owner, new owner before purchase of the property may approach the licensee for no-dues certificate, by giving the reference of the connection in the said premises. The licensee shall then intimate the pending dues, if any, on the premises or issue no-dues Certificate to the purchaser. Clause 4.3 (f) (iv) and (v) pertains to the outstanding dues of electricity against the company i.e. where defaulting consumer is a company. This provision states that outstanding dues will be first charge on the assets of the company and in case the

defaulting consumer is a company, recovery proceedings from the Directors of the company shall be ensured. It further provides that where a financial institution has auctioned the property without consideration to licensees charge on assets, claims may be lodged with the concerned financial institution with diligent pursuance. Clause 4.3 (f)(v), thus, only provides that in case of auction of the property of a Company, the licensee may put his claim with the financial institution to pay electricity charges from the assets of the company, and for that purpose, the licensee may lodge its claim with the concerned financial institution with diligent. However, as submitted by the learned Senior Counsel for the petitioner/applicant, the said provisions cannot be read to mean that the claim for discharging the liability towards electricity dues can only be laid by the licensee before the financial institution which has auctioned the property and no recovery can be made from the auction purchaser.

30. It may further be noted that clause 4.3 (f) (i) cast a duty on the purchaser of a property to find out the outstanding electricity dues up to the date of sale. The contention of the learned Senior Counsel for the writ petitioner/review applicant is that this provision applies only in case of private sale and an auction purchaser cannot be held liable to pay electricity dues of erstwhile owner and obtain no-dues certificate by invoking this provision.

31. We may note that the provisions contained in clause 4.3 are general provision relating to supply of electricity to a New consumer. In case of transfer of property, a duty is cast on the purchaser as well as seller to clear the electricity dues. The liability of the purchaser has been held

to be co-extensive to pay the outstanding electricity dues/to obtain no-dues Certificate, to obtain a new connection. Clause 4.3 (f) (iii) further cast an obligation on the purchaser of the property to obtain No Dues Certificate before purchase of the property, by giving reference of the connection in the premises, wherein there was an electricity connection. From a conjoint reading of Clause 4.3 (f) (i), (ii), (iii), it is clear that it is a duty of the purchaser to make an inquiry into the matter of the dues of electricity, with respect to a premises, wherein electricity supply has been made to the erstwhile owner.

32. In view of these statutory provisions, when we read the contents of the auction sale notice extracted above, it is evident that the auction purchaser was under obligation to make inquiries of the outstanding electricity dues with regard to the property put to auction in the proceeding under the SARFAESI Act' 2002.

33. As regards the contention of the learned Senior Counsel for the applicant based on the decision of this Court by reading clause 4.3 (f) (v) that the claim towards the electricity dues, in case of auction of the property by financial institution, can only be laid before it, and no recovery can be made from the auction purchaser, suffice it to note that Section 26-E of the SARFAESI Act 2002 gives priority to the debts due to a secured creditor, in the proceedings initiated under the said Act for recovery of debts by enforcement of security interest in accordance with Chapter-III in accordance with Section 13 to 15 of the Act 2002. It is not the case of the auction purchaser/petitioners, that the sale consideration paid by him in the

auction of the secured assets was beyond the debt due to the secured creditor/bank, and some money has been left with the bank after settlement of its own dues, to pay the outstanding electricity dues of the licensee.

34. The Apex Court in **Telangana State Sourthern Power Distribution Company Limited (supra)**, has examined the similar controversy in an auction sale conducted under the SARFAESI Act 2002, wherein the auction purchaser had pleaded that previous electricity dues of the erstwhile owner cannot be recovered from him. The writ petitions therein filed by the auction purchaser before the High Court seeking for quashing of the demands towards outstanding electricity dues were decided in his favour on the reasoning that as a subsequent purchaser, the auction purchaser was not responsible for the dues of the erstwhile owner, relying upon the decision of the Apex code in **Isha Marbles (supra) and Sourthern Power Distribution Company of Telangana Limited & others Vs. Gopal Agarwal & others** 2018 (12) SCC 644.

35. In the said case, the Apex Court having gone through the E-auction notice has taken note of clauses 5.9.6 and 8.4 of the General Terms and Conditions of Supply of Distribution & Retail Supply Licensees in AP. The aforesaid clauses extracted in the judgment of the Apex Court are *pari materia* to Clauses 4.3 (f), (i), (ii), (iii) of the U.P. Electricity Supply Code 2005 subject matter of consideration herein. Clause 8.4 of the General Terms and Conditions of Supply of Distribution & Retail Supply Licensees in AP as noted by the Apex Court therein provided that in case the seller of the property did not clear the dues, the company may refuse to supply

electricity to the premises through the already existing connection or refuse to give a new connection to the premises till all dues of the electricity are cleared.

36. It was held by the Apex Court in **Telangana State Sourthern Power Distribution Company Limited (supra)** that from the reading of the provisions of Electricity Act' 2003, read with the General Terms and Condition of Supply therein, the electricity dues partake the character of statutory dues. From the reading of language of the auction sale notice therein, wherein property was sold on "as is where is, what is there is and without any recourse basis", it was held that the said clause leaves no doubt that the liability to pay electricity dues exists on the auction purchaser.

37. The decision in the case of **Isha Marbles (supra)** was distinguished with the observation that in the said case sale was in pursuance of Section 29(1) of the State Financial Corporation Act, 1951, but the important aspect was that there was no Clause specifically dealing with the issue of electricity dues or such other dues, as in the auction notice in this case **Telangana State Sourthern Power Distribution Company Limited (supra)** before the Apex Court. The reasoning given by the Court in the case of **Isha Marbles (supra)** that the subsequent purchaser being not the 'consumer' within the meaning of Section 2(c) of the Act' 2003, and in absence of consumption of electricity by the subsequent purchaser who was merely asking re-connection without there being any statutory dues towards consumption charges, he cannot be saddled with the liability of the past owner, has been considered to note in **Telangana State Sourthern Power Distribution Company**

Limited (supra) that in the E-auction notice, there was a specific clause which absolved the Authorized Officer of various dues including electricity dues. In light of the said Clause in the E-auction notice, the subsequent purchaser/auction purchaser cannot be absolved of his liability to pay the electricity dues.

38. The Apex Court in the case of **Telangana State Sourthern Power Distribution Company Limited (supra)** has further noted the previous decision of the Apex Court in **Hyderabad Vanaspathi Ltd. v. A.P. State Electricity Board & Ors.** 1998 (4) SSC 470 to note that the Apex Court therein had held that the electricity dues under the terms and condition of supply partake the character of statutory dues. The agreements which were entered into with individual consumers only serve the purpose of bringing to the notice of the consumer the terms and condition of supply, but did not make the terms purely contractual. The Board in performance of statutory duty supplied energy on certain specific terms and conditions framed in exercise of statutory power. Undoubtedly, the terms and conditions are statutory in nature and they cannot be said to be purely contractual.

39. The Apex Court in **Telangana State Sourthern Power Distribution Company Limited (supra)** has also noted its earlier decision in **Dakshin Haryana Bijli Vitran Nigam Ltd. v. Paramount Polymers (P) Ltd** 2006 (13) SCC 101 to observe in paragraph 10, as under:-

"10. We can draw strength from the observations of this Court in Dakshin Haryana Bijli Vitran Nigam Ltd. v. Paramount Polymers (P) Ltd., where there was a similarity as in the present case, of a

specific clause dealing with electricity dues. It was observed that in such a scenario if a transferee desires to enjoy the service connection, he shall 4 (1998) 4 SCC 470 5 (2006) 13 SCC 101 (2 Judges Bench) pay the outstanding dues, if any, to the supplier of electricity and a reconnection or a new connection shall not be given to any premises where there are arrears on account of dues to the supplier unless they are so declared in advance.”

40. It was, thus, held that once an auction purchaser was bidding in a property on “as is where is, whatever there is and without recourse basis”, it was his duty to have inspected the premises and made inquiries about the dues in all respects. The auction notice being explicit in character, giving specific mention of the dues of various accounts, including electricity dues, the auction purchaser was clearly put to notice in this behalf.

41. The decision in **Paschimanchal Vidyut Vitran Nigam (supra)** was further considered therein to note that a condition for clearance of electricity dues, for sanction of a connection for supply of electricity cannot per se be termed as unreasonable or arbitrary. We may further note the observation of the Apex Court in **Paschimanchal Vidyut Vitran Nigam (supra)** in paragraph 12 as under:-

“12. But the above legal position is not of any practical help to a purchaser of a premises. When the purchaser of a premises approaches the distributor seeking a fresh electricity connection to its premises for supply of electricity, the distributor can stipulate the terms subject to which it would supply electricity. It can stipulate as one of the conditions for supply, that the arrears due in regard to the supply of

electricity made to the premises when it was in the occupation of the previous owner/occupant, should be cleared before the electricity supply is restored to the premises or a fresh connection is provided to the premises. If any statutory rules govern the conditions relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfillment of the requirements of such rules and regulations. If the rules are silent, it can stipulate such terms and conditions as it deems fit and proper, to regulate its transactions and dealings. So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, courts will not interfere with them.”

42. For the above discussions, in view of the statutory provisions as contained in Clause 4.3 of the Code' 2005 of “General conditions for grant of New connection”, the conditions of the auction notice of sale of property being on “as is where is basis” and the explicit statement in the Schedule of property put to auction that the Recovery Officer was not aware of any dues, claims, encumbrance or revenue assessed on the property, in light of the settled law noted above that the electricity dues are statutory in character and they cannot be waived in view of the provisions of Electricity Act, 2003 and cannot partake the character of dues of purely contractual nature, we find that the auction purchaser was under obligation to make enquiry about the dues before bidding in the property indicated in the auction sale notice dated 14.5.2019. The auction purchaser cannot allowed to contend that he was not intimated about the dues of electricity or there was no occasion for him to make an enquiry, as the Recovery Officer had absolved himself of any such liability.

43. Moreover, auction sale being a distress sale, the auction purchaser not only purchases the property but also purchases the liabilities attached to it. Clause 4.3 (f) casts an obligation on the purchaser of the property to make necessary enquiry from the licensee in case no-dues certificate is not obtained by the erstwhile owner and obtain no-dues Certificate by moving an application before the licensee, before purchase of the property.

44. No such application has been moved by the auction purchaser before the licensee to make any enquiry about the pending dues had been placed before us. The co-extensive liability of the purchaser to pay the outstanding electricity dues and obtain no-dues certificate in the scheme of the Code' 2005, in light of the clear language of Clause 4.3 (f) (I), cannot be confined to private sales as suggested by the learned Senior Counsel for the petitioner. The provision of Clause 4.3 (f), which deals with the grant of electricity connection on transfer of property casts an obligation on the purchaser of the property to make enquiries about the outstanding electricity dues before the sale and pay the same to obtain a no-dues certificate so as to get a new electricity connection. The statutory rules governing the conditions relating to sanction of a connection or supply of electricity empowers the licensee to insist upon the fulfillment of the requirement of such Rules and Regulations. One of the conditions for supply that the arrears due in regard to the supply of electricity made to the premises, occupied by the erstwhile owner, should be cleared before the electricity supply is restored to the premises or a fresh connection is provided. Insistence of this condition by the licensee in light of the statutory provisions, noted above, cannot be said to be arbitrary

or unreasonable. This Court in exercise of power of judicial review cannot interfere in the same. We are, therefore, of the considered opinion that the respondents licensee would be well within its power to make recovery of outstanding electricity dues of the erstwhile owner from the auction purchaser, namely the petitioner-herein by initiating the proceedings for recovery of dues as arrears of land revenue.

45. For the elaborate reasoning given above, in view of the submissions of the learned Senior Counsel for the review applicant, we do not find any good ground to recall/review the judgement and order dated 13.9.2022, dismissing the writ petition holding that no fault can be found in the decision of the department not to provide electricity connection to the petitioner without clearing its outstanding dues.

46. The review application is, accordingly, **dismissed** being devoid of merits. The reasoning given in the present order of disposal of the review application on merit be added to the reasoning for dismissal of the writ petition in the original order.

(2023) 7 ILRA 861

REVISIONAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 21.04.2023

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Sales/Trade Tax Revision No. 333 of 2019

J.M. Housing Ltd., Noida

...Applicant

Versus

**The Commissioner, Commercial Tax, U.P.
Lko.**

...Respondent

Counsel for the Applicant:

Sri Suyash Agarwal, Sri Nitin Kesharwani, Sri Rakesh Ranjan Agarwal (Sr. Advocate)

Counsel for the Respondents:

C.S.C.

Sales/trade Tax- Revision filed against appellate order granting partial reduction in the value of goods incorporated in 'works contract' executed by the assessee and thus reduced the tax assessed on 'works contract'- on the main issue, whether the constructions raised by the assessee were by way of execution of 'works contract', the finding has been returned in the affirmative i.e. against the assessee- the constructions were made by the assessee, though on its own land against Allotment Letter issued to and payments made by 403 allottees- the authorities have taxed the assessee only to the extent of payments were received by it against 403 flats.- if the assessee had desired to claim more deduction-it ought to have maintained its books in accordance with Rule 9 of the Rules-cannot claim those deductions in absence of books of accounts to justify the same- findings recorded by the Tribunal not perverse.

W.P. dismissed. (E-9)

List of Cases cited:

1. Larsen and Toubro Limited & anr. Vs St. of Karn. & anr., 2013 NTN (Vol.53) 65
2. K. Raheja Development Corp. Vs St. of Karn. 2005 NTN (Vol 27) 243
3. CIT Vs Sun Engineering Works (P) Ltd (1992) 4 SCC 363
4. U.O.I.& anr.Vs Arulmozhi Iniarasu & ors.(2011) 7 SCC 397
5. M/S Hindustan Shipyard Ltd Vs St. of Andhra Pradesh 2000 U.P.T.C.-891
6. Suraj Lamp & Industries Pvt. Ltd. Vs St. of Har. & anr., (2012) 1 SCC 656

7. Assotech Realty Pvt. Ltd., Delhi Vs St. of U.P. & anr., 2007 UPTC 797

8. Express Projects Pvt. Ltd. Vs St. of U.P., 2013 NTN (53) 144

9. Supertech Ltd. NOIDA Vs Commissioner, Commercial Tax, U.P. Lucknow, 2017 NTN (63) 136

10. The Commissioner, Commercial Tax Vs S/S Design Arch Infra Pvt. Ltd

11. C.K. Gangadharan & anr. Vs Commissioner of Income Tax, (2008) 304 ITR 61 (SC)

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Shri Rakesh Ranjan Agarwal, Senior Advocate, assisted by Shri Suyash Agarwal and Shri Nitin Kesharwani, learned counsel for assessee and Shri A.C. Tripathi, learned standing counsel for the revenue.

2. Present revision has been filed by the assessee under Section 58 of the Uttar Pradesh Value Added Tax Act 2008 (hereinafter referred to as the 'Act') against the order of the Commercial Tax Tribunal, Bench II, NOIDA, dated 29.6.2019 passed in Second Appeal No. 52 of 2019 for the A.Y. 2010-11 (U.P.). By that order, the Tribunal has partly allowed the assessee's appeal and granted partial reduction in the value of goods incorporated in 'works contract' executed by the assessee and thus reduced the tax assessed on 'works contract'. However, on the main issue, whether the constructions raised by the assessee were by way of execution of 'works contract', the finding has been returned in the affirmative i.e. against the assessee.

3. Similar position prevails in other revisions connected to the present revision. Some of those revisions have been filed by other assessees. However, learned Senior Counsel for the assessee stated, the issue involved in all cases is one and the same. Also, in certain other cases, the Tribunal has taken the opposite stand i.e. in favour of the assessee. Thus, *Sales/Trade Tax Revision Nos. 671 of 2013, 207 of 2013, 208 of 2013, 209 of 2013, 210 of 2013* have been filed by the revenue, raising the same issue (from the other perspective). Learned Standing Counsel has pointed out, those revisions (filed by the State), had arisen prior to the decision of the Supreme Court in **Larsen and Toubro Limited & Anr. vs State of Karnataka & Anr., 2013 NTN (Vol 53) 65** (hereinafter referred to as the '**L&T case**').

4. In such circumstance, all the revisions being decided today came to be tagged. Accordingly, they were heard on various dates interspersed with adjournments that became necessary owing to roster changes experienced by way of regular routine of the Court in its day-to-day functioning. The order itself took time to correct, finalize and upload on 31.5.2023, with prior oral intimation to learned counsel for the parties.

5. For the sake of convenience and as has been suggested by learned counsel for the parties, the submissions were first advanced in the present revision being Sales/Trade Tax Revision No. 333 of 2019 (J.M.Housing Ltd vs The Commissioner Commercial Tax) for the A.Y. 2010-11 (U.P.). Accordingly, it is being decided first.

6. This revision was admitted on the following questions of law:

"(i) Whether on the facts and circumstances of the case, the Tribunal has erred in not distinguishing the ratio of the decisions of the Supreme Court in the case of K. Raheja and Larsen & Toubro to the facts of the present case inasmuch as there was neither tripartite agreement nor any prior sale deed nor had the assessee otherwise executed any works contract on behalf of the eventual purchasers with respect to construction raised by the assessee on its own land?"

"(ii) Whether in the alternative the Tribunal was right in sustaining the addition of 10% in purchase of value of goods for calculating the deemed sale, ignoring the value of goods at the time of incorporation of goods consumed in the construction even though the property in goods passes later on?"

7. No other question has been pressed or stated to be arising in this batch of cases. Undisputedly, the assessee claims to be the lessee of land ad measuring 20900 sq.mtrs, at district Gautam Budh Nagar. It further claims to have decided to develop on that land, a residential housing scheme - 'J.M. Orchid', comprising of two and three bedroom flats, numbering about 684, in all. Without entering into any further agreement with any developer or any third party, the assessee then claims to have started construction of the above described 684 flats, from its own funds. The revenue authorities found those apartments being constructed during the Assessment Year in question. In that circumstance, the Special Investigation Branch of the revenue department conducted a spot inspection/survey of the assessee's business activity, on 21.07.2012. At that time, it was alleged (by the revenue authorities), 550 out of total 684 flats were being constructed for prospective buyers. Later,

the assessee was visited with assessment proceedings, on that issue.

8. The assessee submitted its reply to the notice and contested the claim of the revenue. Ultimately, the final assessment order for the A.Y. 2010-11 was passed on 31.12.2013, by the Deputy Commissioner, Commercial Tax, Sector 12, NOIDA. As recorded in that order, different number of flats were found carrying the status - 'booked' (on different dates) during that Assessment Year. Those were specified in that assessment order itself. The assessing authority took a view, only 403 out of 681 flats (being constructed by the assessee), were booked by third parties (hereinafter described as 'allottees'). Thus 59% of the flats being constructed by the assessee were treated 'booked' by the allottees/third parties. That percentage of flats has been treated by the assessing authority to be representative and descriptive of the extent of 'works contract' executed by the assessee in the project - 'J.M. Orchid', during the assessment year in question. In proportion to that, the assessing authority then considered the purchase value of goods such as iron and steel, hardware, brick, sand, plywood, concrete, timber, cement etc., to compute the value of goods, incorporated in that 'works contract'. To that value, the assessing authority added an assumed profit @ 21%. Thus, the assessing authority determined the turnover of goods incorporated in the execution of the 'works contract' at Rs. 26,32,66,106/-. On that, total tax was computed, Rs. 1,51,32,365/-. Adjusting the figure of ITC Rs. 84,64,027/-, net demand of tax Rs. 66,68,338/-, was created.

9. Against the above assessment order, the assessee preferred statutory first appeal. By the order dated 28.10.2017

passed by the Additional Commissioner Grade-II (Appeal) First, Commercial Tax, NOIDA, the assessee's appeal was allowed. The original assessment order dated 31.12.2013 was set aside and the matter remitted to the assessing authority, to pass a fresh assessment order. It may be noted, the first appeal authority had made an omnibus observation that the assessing authority had not considered the objections raised by the assessee. Thus, the first appeal authority set aside the assessment order and remitted the matter to the assessing authority. The assessee carried the matter to the Tribunal in Second Appeal No. 52 of 2019. It may be noted here, the revenue did not challenge the order of remand made by the first appeal authority.

10. Perusal of the record reveals, the Tribunal has considered the submissions advanced by the assessee on merits. Thereafter, it has chosen to deal with the appeal on merit issues. The assessee is not aggrieved by that procedural approach adopted by the Tribunal. In that, the Tribunal has reached a conclusion, the assessee was executing a 'works contract' to the extent of 59% of the total constructions being raised by it i.e. 403 out of 681 residential flats in the scheme described 'J.M. Orchid'. To that extent, the Tribunal has confirmed the finding of the assessing authority. As to the quantification of turnover i.e. value of goods incorporated in such 'works contract', the Tribunal has altered the computation made by the assessing authority. It has considered the book value of goods incorporated in the 'works contract' and reduced the enhancement made to the same (profit) to 10%. Accordingly, it has determined the assessed tax at Rs. 6,30,031/-.

11. Learned Senior Counsel for the assessee has submitted, historically, tax on

value of goods incorporation in the execution of 'works contract' fell outside the ambit of the legislatures. Thus, no tax could be imposed treating the same to be sale of goods. Only by virtue of the 46th Constitutional Amendment made and the consequential amendments to the State taxation laws as also to the Central Sales Tax Act, 1956, 'works contract' came to fall within the ambit of the laws pertaining to levy of tax on sale of goods. Referring to Section 2(au) read with Section 2(ac) of the Act, it has been submitted, for any transaction to fall within the definition of a 'works contract' - for the purpose of taxation under the Act, it must arise under an 'agreement', amongst others to raise constructions, may be of the kind the assessee raised in the present case. Unless that vital requirement of law is first seen - clearly met i.e., unless the constructions are raised pursuant to a prior written agreement, it may never be inferred that such construction had been raised by way of a 'works contract' on behalf of a person other than the land owner. In the present case, undisputedly the assessee is the owner of the land over which the constructions were being raised. As the owner and person in absolute title and possession over the land, the assessee chose to raise its own constructions namely 684 residential flats, of various specifications of its choice. For that purpose, it arranged its finances; applied for sanction of map from the NOIDA; obtained sanction of map and; started raising constructions from its own funds. All the while, the assessee never parted with the title or possession, either over the land or the residential flats being constructed by it. It did not create any interest in any third party during the progress of such constructions by it. In short, it did not enter into any prior 'agreement' to raise such constructions.

12. Second, it has been strenuously urged, the Allotment Letters (allotting 403 out of 681 flats i.e. 59% of constructions being raised) are nothing but simple Allotment Letters that may never be construed as any 'agreement'. Those are unregistered documents. Such Allotment Letters are not agreements in terms of Section 2(au) of the Act. Those 'Allotment Letters' did not create enforceable rights in the allottees and to that extent 'works contract' never arose, in the present facts.

13. Third, referring to the decision of the Supreme Court in **K. Raheja Development Corporation Vs. State of Karnataka 2005 NTN (Vol 27) 243** (hereinafter referred to as the '**K. Raheja case**') and **L&T case**, it has been forcefully submitted, the facts of those two cases and therefore, the ratio laid down by the Supreme Court is wholly distinguishable and not applicable to the present facts. Elaborating his submissions, learned Senior Counsel for the assessee has submitted, in those cases, there existed a tripartite agreement involving the owner of the land on one hand; the developer or the builder (who had agreed to raise constructions on the land of the owner), as a second party and; allottee/prospective purchaser as a third party. Arising from that fact difference, it has been urged, the owner of the land never attempted to raise constructions over his land, on his own account. In fact that land owner entered into an agreement with the second party, described as the developer. The latter planned and raised constructions - for sale to prospective purchasers. Relying on that distinction of fact, it has been then urged, since in that case, the owner chose to allow another entity to raise constructions over his land, that too under a written agreement, the element of 'works contract'

arose, by virtue of the definition of the term 'works contract', as enacted under the Karnataka Sales Tax Act and the Maharashtra VAT Act. Both enactments contain the definition of the term 'works contract' as may have been *pari materia* to the definition of that term given under Section 2(a) of the Act.

14. By way of second limb of the submission thus advanced, it has been urged, unlike Uttar Pradesh, both in the states of Maharashtra and Karnataka, there existed specific enactments regulating the activity of raising constructions of such residential apartments. Thus, in the State of Karnataka, the Karnataka Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act, 1972 (hereinafter referred to as the 'KOFA') and in Maharashtra, the Maharashtra Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act, 1963 together with the rules framed thereunder (hereinafter referred to as the 'MOFA'), were in force. Referring in extenso - to the provisions of those Acts, specifically Sections 4, 5, 6, 7, 9 of KOFA and Sections 4, 4A, 5 of MOFA read with stipulation contained in Rule 4, 5 and the Model Form of agreement prescribed thereunder, and entered into between the promoter and purchaser of an apartment as prescribed under the Rules framed under MOFA, and at the same time, referring to the relevant discussion on the same (contained in the decision of the Supreme Court in **L&T case**), it has been urged, no such provision or law exists in the State of Uttar Pradesh.

15. Since in the State of Karnataka and Maharashtra by virtue of KOFA and MOFA and the delegated law arising thereunder, the terms of agreement were

stringently prescribed by law and further, since it was clearly stipulated thereunder that the builder/developer may not make any variation or deviation contrary to that agreement and also since, in those cases, valuable rights were created in favour of the allottees in presenti, whereunder they were described as 'Prospective Purchasers', an 'agreement' was found to have been formed creating visible and enforceable 'works contract', as defined under the relevant taxation laws - then in force, in the states of Karnataka and Maharashtra.

16. Since no such 'agreement' existed and since no such rights were ever created in the present case and in any case, since no such rights can ever be seen or be inferred to be existing in favour of an allottee of any of the 681 residential flats constructed by the assessee, over his own land (under the scheme 'J.M. Orchid'), no 'works contract' existed, in view of the language of Section 2(a) of the Act. To draw a distinction from the ratio in the decision of the Supreme Court in **K. Raheja** case and the **L&T case**, learned Senior Counsel for the assessee has pressed into service another decision of the Supreme Court in **CIT Vs. Sun Engineering Works (P) Ltd (1992) 4 SCC 363**, specifically paragraph 39 of that decision. It is his submission, in view of the vast difference of the statutory law in the State of U.P. as compared to the statutory law found enforced in the State of Karnataka and Maharashtra, it is not permissible to apply the reasoning given in the decisions of the Supreme Court in **K. Raheja case** and **L&T case**, divorced from the material statutory context in which it had arisen. Plainly, since the statutory context considered by the Supreme Court in those cases is not existing in the State of U.P., the decisions of the Supreme Court are inapplicable. To that end, reliance has

also been placed on another decision of the Supreme Court in **Union of India and Another Vs. Arulmozhi Iniarasu and Others (2011) 7 SCC 397**, specifically paragraph-14.

17. To bolster his submission further, learned Senior Counsel for the assessee has pressed into service yet another decision of the Supreme Court in **M/S Hindustan Shipyard Ltd Vs. State of Andhra Pradesh 2000 U.P.T.C.-891**. Therein, the issue involved was - whether the contract requiring manufacture and delivery of ships was a contract of simple sale or a 'works contract'. Referring to paragraph-6 of the report, it has been urged, for the purpose of inferring existence of a 'work contract' there is no straight jacket formula or a quick witted test available, that may be infallible. In absence of any standard formula, facts and circumstance of each case would have to be examined. Those may make material difference to the conclusion that may be drawn, even in cases that may first seem to be identical, at the superficial level.

18. Then referring to complete absence of any tripartite agreement between the parties and the absence of any law creating visible rights in favour of the allottees/Prospective Purchasers (as had been noted by the Supreme Court in the **K. Raheja case** and **L&T case**), it has been urged, no element of 'works contract' exists or has been found proven as may allow 'works contract' tax to be levied on the assessee, with respect to any of the above noted 681 residential apartments, constructed by it.

19. Unlike the facts in **K. Raheja case** and **L&T case** under the Allotment Letters issued by the present assessee, there is no

clause to transfer any title or right in the land or any part of it in favour of any society. Heavy reliance has been placed on various clauses of the Allotment Letters, in the present case. In that light, reliance has been placed on the decision of the Supreme Court in **Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana & Anr., (2012) 1 SCC 656**. Thus, it has been urged, transfer of immovable property by way of sale can be made only through a deed of conveyance (sale deed). In its absence, no right, title or interest in an immovable property may ever arise or be created or be transferred. In that case, it was clearly ruled, no transfer would arise on the strength of a power of attorney. Similarly here, the Allotment Letter creates no conveyance in favour of the allottee. The property with respect to which any Allotment Letter may have been issued being an immovable property, rights between the parties to the Allotment Letter could be altered only through a registered sale deed. During the course of constructions being made by the assessee in the Assessment Year in question, that stage was not reached. No sale deed came to be executed in the year in question. In absence of any sale deed and further, in absence of any agreement to sell, the Court may not infer existence of the necessary prior 'agreement', for the purpose of Section 2(a) of the Act. Once there is complete lack of evidence as to existence of 'agreement' for the purpose of establishing a 'works contract', the transaction being performed by the assessee would remain anything but a 'works contract', for the purpose of levy of tax under the Act. Since the transaction performed by the assessee did not fall within the plain language of the taxation statute, the assessee would remain insulated from any tax that the revenue authority seeks to impose, on such transaction.

20. Then, in the context of the Act and the disputes arising within the State of Uttar Pradesh, it has been urged, the test (as is being invoked by learned Senior Counsel for the assessee), in the present case, has been recognised on many occasions. First, in **Assotech Realty Pvt. Ltd., Delhi Vs. State of U.P. & Anr., 2007 UPTC 797**, a division bench of this Court considered a similar Allotment Letter. It was found, despite issuance of such allotment letter, **Assotech Realty Pvt. Ltd.** remained the owner of the apartment/flats including all constructions raised thereon, till execution of the sale deed and its registration in favour of the allottees. That decision though came to be reversed by the Supreme Court in **Civil Appeal No/s. 5624-5625 of 2007** arising out of **SLP No. 2237-79 of 2007**, vide order dated 03.12.2007, the principle of law laid down by the division bench was neither disapproved nor departed from by the Supreme Court. The Civil Appeal was disposed of on consideration that the issue may be thrashed out in statutory proceedings first, with the further observation - the nature of rights conferred on the allottees had to be considered in the regular proceedings of assessment and appeal therefrom. No conclusion may have been reached prematurely by the writ Court before that exercise had been made by the statutory authorities.

21. Further, to bolster his submission, learned Senior Counsel for the assessee has also submitted, after the order of the Supreme Court, **Assotech Realty Pvt. Ltd., Delhi (supra)** was subjected to regular assessment. The matter reached the Tribunal. It allowed the appeal, vide order dated 11.06.2010. It was rectified by order 12.07.2010 on some arithmetical/clerical error. The revision filed by the revenue

against that order, **STR/TTR Defective No. 184 of 2012 (CTT Vs. M/s Assotech Realty Pvt. Ltd.)** came to be dismissed by a learned single Judge of this Court, vide order dated 20.09.2012. That order has attained finality. Therefore, no different/other view may be taken, in the present proceedings.

22. Then, another division bench decision of this Court in **Express Projects Pvt. Ltd. Vs. State of U.P., 2013 NTN (53) 144** took note of the earlier division bench decision of this Court in **Assotech Realty Pvt. Ltd., Delhi (supra)** and the order of the Supreme Court in Civil Appeal arising from that decision and, thereafter reiterated the principle laid down by the Supreme Court i.e. individual facts and evidence would have to be examined in each case, by the revenue authorities. Thus, that writ petition was dismissed as withdrawn, with liberty given to that assessee to raise appropriate challenge in statutory proceedings.

23. Similar course is stated to have been adopted by another learned single Judge of this Court in **Supertech Ltd. NOIDA Vs. Commissioner, Commercial Tax, U.P. Lucknow, 2017 NTN (63) 136**. There, the matter was remanded, applying the test laid down by the Supreme Court in **Assotech Realty Pvt. Ltd., Delhi (supra)**. Thus, no rule of thumb is available, at this stage, to infer existence of 'works contract' in face of Allotment Letters issued, by a builder. Other material and evidence would have to be examined to reach that conclusion. Since in the present case, other material or evidence exists, the conclusion reached by the assessing authority as confirmed by the Tribunal (that there existed a 'works contract'), without considering the same, is based on no

material or evidence. Rather, it is conjectural. Referring to the order of the Tribunal, it has been submitted, the Tribunal has not made any effort to record any finding on that material aspect. In light of the above, it has blindly applied the decision of the Supreme Court in **K. Raheja case and L&T case** without ascertaining the facts of the case, first.

24. While hearing of the present matter was continuing and it got disrupted for roster considerations, the assessee came to file a Supplementary Affidavit, on 22.01.2023, annexing thereto the order dated 04.01.2023 passed by the Commercial Tax Tribunal, Bench-II, NOIDA in **Second Appeal No. 124 of 2022 (M/S J. M. Housing Ltd. Vs. CTT)** for A.Y. 2017-18 (upto 30.06.2017), i.e. in the case of the same assessee. Therein, again, in the context of similar terms of the Allotment Letter, the Tribunal has reasoned that the constructions of residential apartments made by the assessee were not by way of execution of a 'works contract'. As such constructions were not being made on behalf of the allottees. The constructions were found to be raised by the assessee on its own account.

25. On the second question, it has been submitted, it arises in the alternative. In the first place, the value of the goods for the purpose of determining the turnover of 'works contract' or the value of goods appropriated to 'works contract', has to be the value of those goods on the date of such goods being physically incorporated in the 'works contract'. Since the present is a case of construction of residential apartments, the date of appropriation/incorporation would be the date when the goods were physically applied or used in construction, such that they became part of the

constructions being raised. On that date, the value of the goods may never be more than the purchase value or the market value of the goods on the date of such appropriation/incorporation.

26. Referring to the books of accounts of the assessee as have been accepted, it has been shown, the goods incorporated in the alleged 'works contract' were valued at Rs. 19,78,16,069/-. Referring to the grounds of appeal as raised before the Tribunal, it has been submitted, the assessee never accepted or admitted addition to be made to that value @ 10%. If at all, the value of goods alleged to have been incorporated in a 'works contract' should have been taken at the book value and not more. In that context, it has been submitted, the decision of the learned single-Judge of this Court in **The Commissioner, Commercial Tax Vs. S/S Design Arch Infra Pvt. Ltd.** does not decide the issue at hand. That issue though had arisen in that revision, it was not pressed by the revenue. Therefore, at present, the Tribunal has completely erred in relying amongst other on that decision, to make an addition of 10% to the value of the goods incorporated in the alleged work contract, executed by the assessee. Since final authoritative decision had never arisen on this issue, it was open to the assessee to raise the issue and the Tribunal ought to have decided the same, independent of its earlier decisions. In that regard, reliance has been placed on yet another decision of the Supreme Court in **C.K. Gangadharan & Anr. Vs. Commissioner of Income Tax, (2008) 304 ITR 61 (SC)**.

27. Relying on the ratio of **C.K. Gangadharan & Anr. (supra)**, it has been submitted (in the alternative), merely because certain orders of the Tribunal

passed in the case of different assesseees may not have been challenged, and thus remained untested before this Court, no binding precedent may have arisen for that reason. The assessee retains a perfect right to challenge the correctness of the findings of the Tribunal as to 10% addition made to the book value of the goods claimed to have been incorporated in the execution of the alleged 'works contract'.

28. On the other hand, learned Standing Counsel would submit, much water has flown since the earlier decision of the division bench of this Court in **Assotech Realty Pvt. Ltd. (supra)**. Any doubt that may have existed and any issue that may have been perceived to be open at that stage, no longer survives for consideration in view of the subsequent authoritative pronouncement of the Supreme Court in **L&T case**, that decision being a decision of a larger bench/three-judge bench of the Supreme Court. Upon answer given to the reference made (specifically as to correctness of the view expressed in the **K. Raheja case**), the controversy cannot be looked at except through the prism of clarity offered by the ratio laid down by the Supreme Court in **L&T case**.

29. Referring to that decision, learned Standing Counsel would vehemently urge, in the context of 'works contract', in construction industry, largely, there are two situations. First, transactions arise where a land owner may make constructions over his own land, from his own funds, without any allotment and without creating any right or interest in any third party. There, the land owner seeks and is granted sanction by the relevant development or other authority, to raise the constructions according to the plan submitted and

approved. The constructions are raised by such land owners from their own funds, without any intent or agreement or 'Allotment Letter' or offer to sell (any under-construction building or part thereof), before the constructions are completed and made ready for use. Second, is a type of transaction where third party rights are created and or intervene, whether by way of a bipartite agreement or tripartite agreement or any other agreement involving one or more than one other party/parties, besides the land owner. In those situations, Allotment Letter is issued as a consequence of another agreement often described as a Builder Agreement or a Development Agreement etc; wherein (i) a third party may agree to develop the land owned by the land owner or (ii) the land owner may himself enter into a bipartite agreement with the persons who may eventually come to occupy the constructions being raised. In either case, upon issuance of Allotment Letter, a 'work contract' would arise no sooner than its issuance, against consideration. In that case whether the eventual owner of the accommodation/building/part of building etc. is described as an allottee or an applicant or a prospective purchaser, would remain a matter of nomenclature only. It would not affect the nature of rights created. Once the right to occupy the constructions arises in favour of such other persons (either under a bipartite agreement entered into directly with the land owner or a tripartite agreement between the allotment on one hand, with the land owner and developer on the other, or under a similar joint-venture agreement etc.), a right to have the construction raised – of agreed specification and in agreed time schedule, against an agreed payment schedule, would itself lead to existence of a 'works contract'.

30. Referring to the Allotment Letter, he would submit, it creates rights of the nature as may not have arisen except under 'works contract'. Once that 'agreement' had arisen and the constructions were raised in accordance thereto, the 'agreement' necessary to bring to life a 'works contract', is clearly visible and identifiable. It is neither vague or uncertain nor unspecified. Its terms are well defined and written. To those terms, the assessee has no dispute. In fact it is a self admitted document. Its copy has also been annexed to the supplementary affidavit brought on record by the assessee.

31. Seen in that context and in light of the ratio in **L&T case**, ownership of land, its lack of transfer under the terms of the Allotment Letter, possibility of deviation in constructions being neither prohibited nor specially regulated in the State of U.P. (as was done in the states of Karnataka & Maharashtra under KOFA and MOFA), would remain issues, extraneous to the dispute at hand. Once the 'agreement' giving rise to the 'works contract' is identified and it does exist, the lack of regulatory law and the lack of transfer of land would make no difference. What the revenue seeks to tax is not the sale of land (which in any case it can never do), but the value of the goods incorporated in the execution of such 'works contract'. It is also not relevant whether the goods were incorporated strictly in accordance with the terms of the Allotment Letter i.e. without deviation in the constructions raised or together with certain deviations noted in the context of building laws. Insofar as the allottee would remain entitled to the constructions raised by virtue of the compliance of the terms of the Allotment Letter i.e. payments made as and when due, the same would include the transfer of

goods incorporated in the 'works contract'. Its value would expose the assessee to the levy of the tax under the Act.

32. The only situation where the 'works contract' tax liability would cease to exist would be as contemplated in the **L&T case** – i.e., where the allotment made is cancelled by either party, for whatever reason. In that event, subsequent to the cancellation, the constructions made would stand on the same footing as if raised by the owner or the builder, as the case may be, on his/their own account. However, up to the stage of cancellation, the constructions raised would remain liable to suffer the levy of 'works contract' tax.

33. Third, it has been submitted, the stipulations in the agreement between builder and the allottee owner/ and or builder and the allottee would not have the effect of negating or rebutting the evidence of existence of 'works contract' as had otherwise arisen, primarily on the strength of the Allotment Letter. Thus, the requirement for the levy of tax on execution of 'works contract' was satisfied in terms of the definition of 'works contract' under Section 2(a) of the Act. Once that test is seen satisfied, the inquiry must end the consequence of law, i.e. the levy of tax would arise by the necessary operation of law, thereupon. It would not remain subservient or dependent on the further conduct of the parties to the transaction namely, the owner and or the builder on one hand and the allottee on the other. Only exception thereto is the event of cancellation of allotment. There, as noted above, the 'works contract' would dissolve and the constructions raised thereafter acquire the status of own constructions of the owner or the builder, as the case may be, as may be raised/continued after cancellation of the allotment.

34. There is no canon of law available as may allow the private law between the parties to either violate or over reach the statutory law. Since the fiscal statute is seen to tax 'works contract', as defined, it never remained open to the assessee to incorporate artificial clauses in the Allotment Letter as may allow it to claim that exception to the statutorily unexceptional rule - to tax 'works contract'.

35. In any case the law with respect to transfer of immovable property and the mandatory requirements prescribed thereunder for registration of a deed have no bearing on the levy of tax on works contract. That exists in a different sphere of law governing the manner in which a deed evidencing transfer of immovable property may be created and registered. Section 2(au) deliberately does not employ anything as may warrant any inference to be drawn that unless there pre-exists a valid and registered agreement to sell or a registered sale deed with respect to the under-construction building, no 'works contract' may arise. In fact that contract precedes a valid agreement to sell or a sale deed, as the case may be.

36. Then referring to the provision of KOFA and MOFA and the decisions of the Supreme Court in **K. Raheja case (supra)** and **L&T case (supra)**, it has been stated, the provisions of those statutory laws do not govern the ratio laid down by the Supreme Court. Since those provisions were also cited in those cases, discussion had emerged in the decisions of the Supreme Court, noted above. However, the only purpose of those enactments was to protect the interest of a person/s who may have entered into an agreement with builders and or land owners, for allotment of portion of constructions being raised

thereon. Such protections were granted with respect to quality, specifications of constructions etc.

37. Having heard learned counsel for the parties and having perused the record, before considering the submissions thus advanced by learned counsel for the parties, it would be useful to extract certain provisions of the Act. Relevant to the issues involved in the present case, provisions of Section 2(ac) being definition of 'sale', 2(ad) being definition of 'sale price' and 2(au) being definition of 'works contract' read as below:

"2(ac) "sale" with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) by one person to another, for cash or for deferred payment or for any other valuable consideration and includes,

(i) a transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) the delivery of goods on hire purchase or any other system of payment by installments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) the supply of goods by an association or body of persons (whether incorporated or not) to a member thereof for cash, deferred payment or other valuable consideration;

(vi) *the supply, by way of or as part of any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration,*

and such delivery, transfer or supply of any goods under subclause (i) to subclause (vi) above shall be deemed to be sale of those goods by the person making the delivery, transfer or supply and a purchase of those goods by the person to whom such delivery, transfer or supply is made.

(ad) "sale price" *means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of goods at the time of or before the delivery of such goods, other than cost of outward freight or delivery or cost of installation in cases where such cost is separately charged;*

EXPLANATION --

(i) *In a case in which any amount of any duty payable by a dealer is deferred for a period or in a case in which point of payment of any duty is shifted, amount, of such duty shall be deemed part of the sale price;*

(ii) *The price of packing material in which any goods are packed shall be deemed part of sale price of goods sold;*

(iii) *Sale price of goods in relation to transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, shall be determined after deducting the aggregate of actual amount incurred towards labour and services, amount of profit relating to supply of labour and services and such other amounts as may be prescribed from the*

total amount received or receivable in respect of such works contract; [See Rule 9]

(iv) *In respect of transfer of right to use goods, any goods for any purpose (whether or not for a specified period) sale price means the valuable consideration received or receivable in respect of such transfer of right to use goods but does not include any sum payable as a penalty or as compensation or damages for breach of contract;*

(v) *Tax charged or chargeable shall not form the part of the sale price;*

(vi) *Cash or trade discount at the time of sale as evident from the invoice shall be excluded from the sale price but any ex post facto grant of discounts or incentives or rebates or rewards and the like shall not be excluded from the sale price;*

(ae)

.....

.....

(au) *"works contract" includes any agreement for carrying out, for cash, deferred*

payment or other valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property."

38. Under Section 3(vi) of the Act, the turnover of sale of goods involved in the execution of 'works contract' is to be determined in accordance with the prescribed Rules namely, Rule 9 of the Rules framed under the Act. Rule 9 of the Rules reads as under:

"9. Period for conveyance of title of promoter to organisation of flat purchasers.-

If no period for conveying the title of the promoter to the organisation of the flat purchasers is agreed upon, the promoter shall (subject to his right to dispose of the remaining flats, if any) execute the conveyance within four months from the date on which the Co-operative society or the company is registered or, as the case may be, the association of the flat takers is duly constituted.

[When a promoter has submitted his property to the provisions of the Maharashtra Apartment Ownership Act, 1970 by executing and registering a Declaration as required by section 2 of the Act, and no period for conveying the title of the promoter in respect of an apartment to each apartment taker is agreed upon, the promoter shall execute the conveyance or deed of apartment in favour of each apartment taker within four months from the date the apartment taker has entered into possession of his apartment.

[The promoter shall file with the Competent Authority a copy of the conveyance executed by him under sub-section (1) of section 11 within a period of two months from the date of its execution.]”

39. Then, it cannot be denied, the facts of the present case may be similar to those found by a division bench of this Court in **Assotech Realty Pvt. Ltd. (supra)**. There also, the assessee/petitioner before the Court was the owner of the (free-hold) land. It proposed to raise constructions over that land transferred to it by the Ghaziabad Development Authority. It advertised those constructions thereby proposing to sell apartments to be constructed. Against expression of interest shown by various individuals etc., against that representation made, it had issued Allotment Letters to them. Amongst others,

under the terms and conditions of allotment, it was made subject to a sale deed being executed between the parties. Provision for common area/facilities etc. were also made with the stipulation that the same would remain the property of the said petitioner/assessee and that allottees would not acquire any further right till the execution of individual registered sale deed in their favour. Also, it may be noted, the challenge itself had arisen in the context of U.P. Trade Tax Act, 1948. At the same time, the definition of 'works contract' under Section 2(a) of the Act is found to be *pari materia* to the definition of that term under Section 2(m) of U.P. Trade Tax Act, 1948.

40. In that context, the division bench held, the meaning of the word 'agreement' as defined under the 'works contract' implied either a written or implied contract. Then, it may be noted, Clauses 3, 5, 6, 12, 13, 14, 15 and 17 of the Allotment Letter issued by the present assessee read as under:

"3. NATURE & TITLE OF ALLOTMENT

3.1 The aforesaid group housing project is raised on the lease hold plot of 20,000 Sq. Mtrs, Allotted by the NOIDA Authority registered Lease Deed dated 30.07.2010 and the Allottee(s) shall remain bound by all the terms and conditions contained in the said Lease Deed, executed between the Noida Authority and the Company. The Lease Deed is registered with the Sub Registrar-III, Noida as Registered Document No. 3193, Book No.1, Zild No 2017, on pages 127 to 168, dated 30.07.2010.

3.2 That as per the terms and conditions of the main lease, executed by Noida Authority in favour of the Company, the allotment of the flat shall be subject to

the execution of Sub-Lease Deed between the Noida Authority, Company and the Allottee(s), in respect of the land but super structure shall be on outright sale basis. The document/title of transfer deed shall be made and registered accordingly.

3.3 The Lease Deed executed by Noida Authority in favour of the Company is for a period of 90 years from the date of its execution, accordingly the Sub-Lease Deed to be executed in favour of the Allottee(s), expiring correspondingly with the expiry date of the Lease Deed in favour of the Company by the Noida Authority.

3.4 The Sub-Lease Deed/Conveyance deed shall be executed, only after the Allottee(s) has made full & final payments, Including all other additional charges which are due and payable to the Company. Till the execution of the Sub-Lease Deed/Conveyance Deed and handing over the possession of the flat, the ownership of the fiat shall remain vested with the Company.

5. CHANGE IN SPECIFICATION

That the Company may provide additional/better specifications other than those mentioned in the specifications sheet or G brochures or may increase/decrease the area of the flat of the Allottee(s) as deemed necessary or due to any supervening circumstances or due to any technical reason/s to facilitate the larger interest of the other Allottee(s), subject to adjustment of the price proportionality at the original rate.

6. PROJECT LOAN

6.1 The Allottee agrees that until a Sub-Lease Deed is executed and registered, the company shall continue to be the owner of the flat and also the construction thereon

and this allotment shall not give to the Allottee(s) any right or title or interest therein even though all the payments have been received by the Company. It is further clarified that the Company is not constructing any flat as a contractor of the allottee(s) but on the other hand Company is constructing the complex as its own and the sale shall be deemed to have take place only, after the actual completion construction/finishing/handling over of the flat and the execution of the Sub-Lease Deed. The company shall have the first lien and charge on the flat for all its dues that may/become due and payable by the Allottee(s) to the Company.

6.2 It is hereby agreed, understood and declared by and between the parties that the Company may take construction finance demand loan for the construction of the above Complex from the Banks/Financial Institutions after mortgaging the land flat of the said complex, however the sale deed in respect of the said flat in favour of Allottees) will be executed and registered free from all encumbrances at the time of registration of the same, relating to flat qua Builder.

6.3 No request for any changes whatsoever in the flat from the Allottee(s) shall be entertained.

12. TRANSFER OF ALLOTMENT

12.1 The allotment of flat is made in the proposed group housing project 'JM ORCHID' at Plot No, GH-01/C, Sector-78, Noida, District Gautam Budh Nagar, UP and allotment is valid for this project of the company and not liable to be transferred to any other project of the company.

12.2 The transfer of allotment is not permissible, however it may be permitted at the discretion of the company in the exceptional cases only, subject to payment

of administrative charges @
_____ plus govt. taxes of super area
of flat.

13. PAYMENT PLAN

13.1 The Allottee(s) shall be required to make the payment as per the payment plan opted by him/her which is attached with Annexure (a).

13.2 That the costs relating to stamp duty and other incidental charges as applicable for registration of Sub-Lease Deed Conveyance Deed shall be paid separately by the Allottee(s) to the company before possession as and when demanded by the company.

14. CANCELLATION OF ALLOTMENT & FORFEITURE OF MONEY

That failure of the Allottee(s) to adhere to the payment plan will render this allotment cancelled and the company shall be free to re-allot the flat to any other buyer. That on termination of the allotment or cancellation of the same by the Allottee(s), the amount so far deposited by the Allottee(s) shall be refunded without any interest thereon after deducting the 10% of total cost of flat including other charges which is liable to be forfeited.

15. DELAYED PAYMENT

15.1 Allottee(s) shall ensure that all payments are made on or before the due date(s) fixed in the payment schedule, to avoid cancellation of allotment.

15.2 Where payments are delayed, the Company shall at its absolute discretion accept the delayed payments, on being shown sufficient cause by the Allottee(s) for

such delay. The Allottee(s) shall be liable to pay interest 18% per annum on delayed payment, but no late payment shall be accepted if the default continues for a consecutive period of three months in case of Down Payment Plan and for three consecutive installments in case of other payment plans.

15.3 Delayed payments Allottee(s) will first be adjusted towards the interest due and thereafter the balance will be adjusted towards the principal amount.

17. ASSURANCE

That the Company M/s J.M. Housing Ltd. hereby assures the allottee(s) that all the payments to Noida Authority will be solely paid and cleared by the Company before handing over the possession of the Flat or before the execution of Sub-lease Deed in favour of the Allottee(s)."

41. Similar clauses were found existing (by the division bench), in the case of **Assotech Realty Pvt. Ltd. (supra)**. In that context, the division bench observed as below:

"21. From the reading of the aforesaid clauses, we find that the specification, plan, price payment, schedule and lay out plan as has been proposed by the petitioner is to be agreed by the parties. Further, the petitioner has been empowered to mortgage the land and apartments of the said complex to raise construction/finance/demand loan for the construction of the complex, from the Banks/ Financial Institutions. The only stipulation is that the sale-deed would be executed and registered free from all encumbrances. The allottees are to strictly adhere to payment schedule failing which liability for payment of interest accrues. The allottees do not get any right in the

apartment until a sale-deed is executed and registered and the petitioner continues to remain the owner of the apartment as also the construction thereon. The allotment letters does not give any right, title and interest to the allottees even though full payment has been received by the petitioner. The petitioner is empowered to make variations/modifications in the plan, design and specification and possession is to be handed only upon payment of the entire amount. Taking into consideration, the terms and conditions of the letter of allotment, which have been reproduced above, we are of the considered opinion that the petitioner continues to remain the owner of the apartments/ flats including all constructions till such time the sale-deed is executed and registered in favour of the prospective allottees/purchasers. The payment of instalments by the prospective allottees/ purchasers do not transfer any right, title or interest in the construction undertaken by the petitioner. Thus, the constructions undertaken by the petitioner cannot be said to have been undertaken by it for and on behalf of the prospective allottees/ purchasers.”

42. There upon, after a detailed consideration of the decision of the Supreme Court in **K. Raheja case**, the division bench finally concluded as below :

“26. In the aforesaid case, the agreement provided that M/S

K. Raheja Development Corporation, as developer on its own behalf and as developer of such person, would construct the flats as a unit, ultimately to belong to such person. In the aforesaid case K. Raheja Development Corporation were constructing the unit for and on behalf of the person who had agreed to purchase the

flats. In the present case, we find that the petitioner is constructing the flats/ apartments not for and on behalf of the prospective allottees but otherwise. The payment schedule would not alter the transaction. The right, title and interest in the construction continue to remain with the petitioner. It cannot be said that the constructions were undertaken for and on behalf of the prospective allottees and, therefore, the constructions in question undertaken by the petitioner would not fall under Clause (m) of Section 2 read with Section 3-F of the Act and are outside the purview of the provisions of the Act. In other words, they cannot be subjected to tax under the Act and the action in imposing tax on such constructions treating them to be works contract, is wholly without jurisdiction. We are, therefore, of the considered opinion that the impugned orders dated 24th March, 2006 and 29th May, 2006, passed by the Assistant Commissioner, Trade Tax, Sector I, Noida, respondent No. 2, insofar as they relate to imposition of tax on construction of apartments/ houses/ flats and other construction in question, are wholly jurisdiction and they cannot be sustained and are hereby set aside.”

43. It is equally true, the above decision of the division bench was set aside by the Supreme Court in **Special Leave to Appeal (Civil).../2007 CC 11480-11481 (State of U.P. & Anr. Vs M/s Assotech Reality Pvt. Ltd.)**. At the same time, the Supreme Court did not overrule the reasoning of the division bench, on merits. It set aside the order of the division bench, leaving it open to the parties to contest the dispute on merits, through statutory forum of appeal. The Supreme Court only observed as below:

"What was the nature of the right conferred on the allottees of flat, what was the consideration for payment of installments, whether construction by the respondent was on its own account or for the allottees etc. These questions were not capable of being decided in a writ petition."

44. It is light of such observation, the matter reached the appeal forum where it also does appear, the appeal filed by the **Assotech Realty Pvt. Ltd. (supra)** came to be allowed by Tribunal. That order was not interfered with by this Court in exercise of revision jurisdiction, under Section 11 of the U.P. Trade Tax Act. Yet, no other or further conclusion may be reached from a plain reading of the order dated 29.2.2012 passed in Sales/Trade Tax Revision Defective No. 184 of 2012. That order reads as below:

"Cause shown is sufficient; delay in filing the revision is condoned.

This revision has been filed by the State for the assessment year 2004-05 against the order of the Tribunal dated 14.12.2010. The question of law referred to is hereunder :-

"Whether on the facts and in the circumstances of the case, the Tribunal legally justified in setting aside the tax liability created by the assessing officer on the construction and sale of flats to be prospective owners treating the transaction as works contract ?"

The Tribunal has recorded findings that the assessee had made the flats on his own behalf and has even paid stamp duty on his own and therefore, this case is not covered under Section 3F of the Act.

In view of the findings of fact recorded by the Tribunal, no question of law arises. This revision has no merit, it is dismissed.

Sri Suyash Agrawal has appeared on behalf of the assessee."

45. Neither the issue being presently raised and seriously contested (in these proceedings), was discussed in that decision nor there arose any finding as may bind this Court in the present case. The learned single Judge while dealing with that revision merely observed that the Tribunal had recorded a finding that the assessee (in that case) had constructed the flats on its own behalf and that it had paid stamp duty on its own account. That being the reasoning of the Tribunal, the Court then merely observed - no question of law arose in such facts.

46. Considering the question of law that had been raised by the revenue in that revision, the reasoning offered by the Court to dismiss it, do not co-relate. It may never be said with any conviction that the Court had chosen to answer the question raised before it. It may be noted, this Court does not have appeal jurisdiction over the orders of the Tribunal. It only exercises revision jurisdiction. Thereby, it only seeks to answer questions of law that may be raised before it arising from any adjudication on facts made by the Tribunal - the last fact finding authority, both under U.P. Trade Tax Act and the Act.

47. For a question of law to be answered decisively, it must be both, seen to exist on the surface, and its answer must be contained within the discussion and reasoning given by the Court - while answering that question, raised before it. By merely stating - no question of law arose in view of the findings recorded by the Tribunal that constructions had been raised on its own account, the Court never intended and it may never be inferred that it

attempted to answer the question raised before it. In fact, such orders are orders of refusal to answer a question of law raised before the Court. Those are passed wherever and whenever the Court finds that the question of law may have been raised before it, does not or exist or arise. Classically, that situation arises when findings recorded by the Tribunal are found to be findings of fact concluded on the strength of material and evidence placed before it.

48. Looked in that light, the order of the learned single-judge dated 20.9.2012 appears to be no different. Whether, the observation of the learned single-judge that the question of law does not arise in view of findings recorded by the Tribunal is treated to be correct or not, is an academic issue. Insofar as it can never be said that this Court chose to answer the question raised on strength of its own reasoning and insofar as it cannot be seen that this Court had ever reasoned that no 'works contract' arose on the strength of the Allotment Letter etc., no reliance may be placed on that decision. The decision is what it says and nothing more. It is a decision on facts only. It may bind the parties to that dispute only, without creating any binding precedent.

49. The other decision of the division bench in the case of **Express Projects Pvt. Ltd. (supra)** and the still other decision of the learned single Judge in **Supertech Ltd. NOIDA (supra)**, are clearer in effect. They only seek to enforce on the revenue authorities and the appeal authorities - the ratio of the decision of the Supreme Court in **K. Raheja case and L&T case**. Both in case of **Express Projects Pvt. Ltd. (supra)** and **Supertech Ltd. NOIDA (supra)**, the Court remitted the matter to the statutory authorities, leaving it open to them to

consider the individual contracts and facts of those cases, in the light of the decision of the Supreme Court in the case of **K. Raheja case** and **L&T case**. Therefore, it may never be accepted on the strength of such decisions that any binding adjudication had been made by this Court - whether similar contracts did or did not give rise to a 'works contract'. All that the Court adjudicated was, the matter required consideration by the statutory authorities as to the true intent of the parties and its consequences qua the existence or otherwise of a 'works contract'.

50. Before we may proceed to consider the decisions of the Supreme Court in **K. Raheja case** and **L&T case**, it would be relevant to take notice of the language of Section 2(a) of the Act. In defining the term 'works contract', the legislature has chosen to include therein 'any agreement' to carry out for cash etc. - 'building construction' of 'any movable or immovable property'. In the present facts, there is no dispute that 'cash' or 'valuable consideration' was passed by the allottees to the assessee - for building or construction of an 'immovable property'. Construction for the purposes of sale of residential flats would undoubtedly fulfill those conditions. What therefore is critical to the answer to the dispute brought before this Court is - whether the Allotment Letter admittedly issued by the assessee constitutes an 'agreement' for the purposes of Section 2(a) of the Act.

51. Interestingly, the word 'agreement' has not been defined under the Act. However, it having been used by the legislature in the context of a 'works contract', and in absence of any contrary intention expressed under the Act and in absence of any recognised principle, to the

contrary, it is wholly contextual and relevant to look at its definition the Indian Contract Act, 1872. Section 2 of the Indian Contract Act reads as below:

"2. Interpretation-clause.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—"

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

(c) The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee";

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;

(f) Promises which form the consideration or part of the consideration for each other, are called reciprocal promises;

(g) An agreement not enforceable by law is said to be void;

(h) An agreement enforceable by law is a contract;

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable."

52. In the backdrop of that statutory context, it is also not disputed between the parties that the assessee as owner of land, started development, involving construction of 681 residential apartments described as 'J.M. Orchid'. This enterprise is stated to have been commenced by the assessee on its own account. Yet, at the same time, it is undisputed, during the Assessment Year in question, 403 of such under construction residential apartments under construction had already been booked by and had been allotted to third parties. It is the own case of the assessee that such bookings were evidenced by individual Allotment Letters issued, to each of those 403 allottees.

53. As to the terms of the Allotment Letters thus issued, again according to the assessee, those were as per the terms specified in Allotment Letters. A proforma Allotment Letter has been appended to the Supplementary Affidavit brought on record before this Court as well. Its content have already been noted above. Plain reading of the same clearly brings out the intent of the parties being - the assessee offered for sale individual apartments specified and fully described in the Allotment Letter. Details of tower number, flat number, floor number, super area etc. were clearly specified. With respect to payments, Clause 13 is specific. It required the payments to be made as per

the plan as may have opted by the individual allottee.

54. Clause 14 of the Allotment Letter further stipulates, failure to adhere to payment plan may expose the allottee to cancellation of the allotment. Also, clause 15 provided for payment of interest in the event of default in payment of due installment under the relevant payment plan. Then, Clause 12 contemplated transfer of allotment at the instance of the allottee upon fulfillment of certain conditions. Also, under Clause 17, the assessee assured the allottees, it would make all due payments to the NOIDA before handing over the possession of the allotted flat and before execution of the sub-lease deed, in favour of the allottee. Various other clauses were also made integral part of the Allotment Letter. Though detailed reference to the same may not be made here, at the same time, it be may be briefly noted, there exist specific clauses with respect to car parking facility, recreation facilities and center, period of possession, payment of service tax, common areas, etc. Read co-jointly, they do bring out existence of mutual set of promises made, by the assessee and the allottees, creating corresponding liabilities and rights. All such promises, liabilities and rights arise against due consideration. Consequences of non-payment of consideration are also provided by way of cancellation of the Allotment Letter itself. Therefore, the allotment letter is clearly a document that may be described as an 'agreement' under the Contract Act. What therefore survives for consideration is, whether the linkage between such 'agreement' and the construction raised by the assessee exists as may further qualify the 'agreement' to be a 'works contract', within the meaning of that term of Section

2(a) of the Act. In the absence of denial, rather, in face of unexcepted admission as to execution of 'Allotment Letter' and its continuance, the fact that the same was not registered etc., would remain extraneous, to the dispute at hand.

55. Though the Court may have ventured into a de novo exercise to evaluate that issue, at the same time, in view of the pronouncements of the Supreme Court in **K. Raheja case** and **L&T case**, that exercise is neither desirable nor required. In **K. Raheja case**, a two-judge bench of the Supreme Court was confronted with the issue whether the appellants before that Court were 'dealers' within the meaning of the Sales Tax Act and were therefore liable to pay turnover tax under that Act. The facts of the case as were noted in paragraph no.2 of the decision were - the appellant K. Raheja was carrying on business of real estate development. It entered into development agreements with different owners of land. Upon sanction of the plans, residential and commercial constructions were raised on such plots of land. In that context, agreements of sale were entered into between those parties contemplating handing over to the purchasers, the duly constructed accommodations with undivided interest in land, also.

56. In such facts, it was noted in that decision, the owner of the land would transfer the ownership of land to the societies formed under KOFA. To that extent, there clearly existed a difference in the facts of that case and the present case to the extent. Here, the assessee has been found raising construction on land leased to it. Also, even on completion of the constructions, only a sub-lease is contemplated to be executed, by the assessee in favour of the allottee and not

any society. However, learned Senior Counsel appearing for the assessee may not be entirely right in his contention that the present Allotment Letter does not contain any clause for transfer of lease hold right in the land. Since the land in question has been leased out to the assessee by NOIDA for a period of 90 years, the Allotment Letter [(specifically through Clause 3(2)], speaks of execution of sub-lease deed between NOIDA authority and the assessee and the allottee, in respect of the interest in land. It is only the super structure constructed over such land i.e., the residential flats that are proposed to be sold, on outright sale basis.

57. Keeping those facts in mind and the further undisputed fact that provisions of Section 2(1)(v-i) of the Karnataka Sales Taxation Act was *pari materia* to the definition of 'works contract' under Section 2(au) of the Act, it is relevant, the Supreme Court also made the following observation :

"We have heard the parties, perused the various documents and considered the cases cited at the bar. As has been rightly submitted by Mr. Hegde the definition of the term 'works contract' in the said Act is an inclusive definition. It does not include merely a works contract as normally understood. It is a wide definition which includes "any agreement" for carrying out building or construction activity for cash, deferred payment or other valuable consideration. The definition does not make a distinction based on who carries on the construction activity. Thus even an owner of the property may also be said to be carrying on a works contract if he enters into an agreement to construct for cash, deferred payment or other valuable consideration. We, therefore, do not need to

go into the question whether the Appellants are owners as even if the Appellants are owners to the extent that they have entered into Agreements to carry out construction activity on behalf of somebody else for cash, deferred payment or other valuable consideration, they would be carrying out a works contract and would become liable to pay turnover tax on the transfer of property in the goods involved in such works contract. Further under the said Act there is no distinction between construction of residential flats or commercial units. Thus, a works contract, within the meaning of the term in the said Act, can also be for construction of commercial units. For the purposes of considering whether in agreement amounts to a works contract or not, the provisions of the Karnataka Ownership Flats (Regulation of Promotion of Construction, Sales, Management and Transfer) Act, 1974 I will have no relevance."

58. The above reasoning of the Supreme Court assumes primary importance for the purposes of adjudication in the present case, inasmuch as the Supreme Court negated the submissions arising from the ownership in the land and its transfer. It clearly reasoned - it was not required to go into the question, whether the assessee K. Raheja was the owner of the land. To the extent, K. Raheja may have entered into an agreement to carry out construction activity for others, it would be carrying out a 'works contract'. It would therefore be exposed to liability to tax thereon. Then, in unequivocal terms, the Supreme Court itself qualified - the provisions of KOFA were not relevant to the issue of construction or of 'works contract'. That observation having been made by the Supreme Court while it was directly dealing with the issue, the

submission arising on the strength of KOFA and MOFA is misconceived. It is not required to be gone into by the Court, on the interpretation that is to be made to the effect of the Allotment Letter. In view of that reasoning given by the Supreme Court, the lack of any parallel enactment such that KOFA and MOFA in the State of U.P., is plainly extraneous to the issue.

59. Then, in para 20 of that report, it was observed as under:

“Thus the Appellants are undertaking to build as developers for the prospective purchaser. Such construction/development is to be on payment of a price in various instalments set out in the Agreement. As the Appellants are not the owners they claim a "lien" on the property. Of course, under clause 7 they have right to terminate the Agreement and to dispose off the unit if a breach is committed by the purchaser.

However, merely having such a clause does not mean that the agreement ceases to be a works contract within the meaning of the term in the said Act. All that this means is that if there is a termination and that particular unit is not resold but retained by the Appellants, there would be no works contract to that extent. But so long as there is no termination the construction is for and on behalf of purchaser. Therefore, it remains a works contract within the meaning of the term as defined under the said Act. It must be clarified that if the agreement is entered into after the unit is already constructed, then there would be no works contract. But so long as the agreement is entered into before the construction is complete it would be a works contract.”

60. Having looked at the terms of the agreement that are similar to those forming the substance of dispute in the present case, it is seen - here as well, the assessee was raising the constructions of residential accommodation. Though it may have started that construction activity on its own account, at the same time, it invited offers from the public at large and accepted such offers from particular individuals, against conditions agreed in writing. As noted above, on a mutual set of promises extended by the allottees and the assessee, the terms of the Allotment Letter and the ‘agreement’ giving rise to a ‘works contract’ arose. Thus, amongst others, it included a payment plan, adherence to which a sine qua non to the continued allotment in favour of that individual allottee. The fact that the assessee had a right to cancel the allotment and the further fact that the title in the constructions being raised and the interest in land would be transferred on a future date (upon execution of proper lease deed and sale deed), would not deflect the existence of ‘works contract’ that had arisen, as a direct consequence of the Allotment Letter.

61. The definition of the term ‘works contract’ is inclusive and not exclusive. Since it includes therein both, a written and implied contracts, such contracts may also be inferred as a consequence of the admitted conduct offered by the parties, wherein assessee offered payment terms to raise constructions and deliver the same for the exclusive benefit, use/and entitlement of the allottee. The original independent act of the assessee to start raising the constructions on its own land from its own fund after obtaining sanction from the development authority would be of little consequence, and in any case fade into inconsequence, as implied ‘works contract’

was not only permissible, but also arose subsequent to the date of commencement of the constructions. From thereon, the assessee would stand exposed to 'works contract' tax liability, during the subsistence of the Allotment Letter/s. Such 'works contract' could arise subsequent to initiation of construction activity but also, as the Supreme Court observed - may also (after arising), cease upon cancellation of an individual allotment.

62. Seen in that light, it is not as if a building may be raised either exclusively on own account or under a 'works contract'. It is also not if the initiation of construction on own account or by way of 'works contract' may exclude or determine the taxability of transfer of goods involved in execution of 'works contract', in entirety. It would remain a dynamic concept. The assessing authority would have to examine the issue, year to year, on individual facts obtaining in each Assessment Year. Thus, by way of example, one part of the total development being carried out by the assessee not less than a unit/flat may either be constructed or continued to be constructed on own account of the assessee or by way of 'works contract' on behalf of the allottee, in one year and that situation may completely reverse viz-a-viz the same apartment, in the next year, depending upon existence and or continuance of the Allotment Letter. Only restriction that may arise is - once the apartment is complete and entire value of goods involved therein incorporated in such flat in an Assessment Year, that position may not change, in the next year. This is also clearly spelt out by the Supreme Court in **K. Raheja case**, itself.

63. The correctness of that decision was doubted by another two judge bench of

the Supreme Court. Thus, in **L&T case**, the matter came to be referred to the three judge bench of the Supreme Court. Again, in that case, the L&T was a developer seeking to raise constructions described as development over the land owned by an individual. There was an arrangement between the L&T and the owner of the land that after the development, 25% of the total space would belong to the owner whereas 75% would belong to the L&T yet, applications were invited from public for allotment of the proposed constructions. Upon Allotment Letters issued and also under an agreement to sell executed with intended purchasers, the constructed apartments were to be handed over to the individual purchasers with undivided interest in the land also. Sale deeds were thus executed in favour of the allottees by the L&T and the owner of the land. It is in such circumstance and that L&T was subjected to 'works contract' tax.

64. The matter was again thrashed out at great length. The entire gamut of law of 'works contract' was revisited and elaborate discussion arose. In paragraph nos. 93, 94 and 95 of the report, it has been observed as below:

"93. The question is: Whether taxing sale of goods in an agreement for sale of flat which is to be constructed by the developer/promoter is permissible under the Constitution? When the agreement between the promoter/developer and the flat purchaser is to construct a flat and eventually sell the flat with the fraction of land, it is obvious that such transaction involves the activity of construction inasmuch as it is only when the flat is constructed then it can be conveyed. We, therefore, think that there is no reason why such activity of construction is not covered

by the term "works contract. After all, the term "works contract is nothing but a contract in which one of the parties is obliged to undertake or to execute works. Such activity of construction has all the characteristics or elements of works contract. The ultimate transaction between the parties may be sale of flat but it cannot be said that the characteristics of works contract are not involved in that transaction. When the transaction involves the activity of construction, the factors such as, the flat purchaser has no control over the type and standard of the material to be used in the construction of building or he does not get any right to monitor or supervise the construction activity or he has no say in the designing or lay-out of the building, in our view, are not of much significance and in any case these factors do not detract the contract being works contract insofar as construction part is concerned.

94. For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, in our opinion, three conditions must be fulfilled: (i) there must be a works contract, (ii) the goods should have been involved in the execution of a works contract, and (iii) the property in those goods must be transferred to a third party either as goods or in some other form. In a building contract or any contract to do construction, the above three things are fully met, In a contract to build a flat there will necessarily be a sale of goods element. Works contracts also include building contracts and therefore without any fear of contradiction it can be stated that building contracts are species of the works contract.

95. Ordinarily in the case of a works contract the property in the goods used in the construction of the building passes to the owner of the land on which the building

is constructed when the goods and materials used are incorporated in the building. But there may be contract to the contrary or a statute may provide otherwise. Therefore, it cannot be said to be an absolute proposition in law that the ownership of the goods must pass by way of accretion or exertion to the owner of the immovable property to which they are affixed or upon which the building is built."

65. Examination of the above discussion and reasoning given by the Supreme Court reveals, that Supreme Court found no reason why activity of construction would not be covered under the term of 'works contract'. Also, though the ultimate transaction that may take place between the parties would be one of sale of an apartment, it was further reasoned, that may not dilute the existence of the 'works contract' in such a transaction since it involved the activity of construction which was primary to the definition of the 'works contract'. Lack of control (of the allottee), over the type and standard of material used in the construction or because the allottee may have no right to monitor or to supervise the activity, would be of no consequence.

66. Thereafter, the larger bench of the Supreme Court laid down three tests to sustain the levy of tax on goods sold in execution of 'works contract'. Those are existence of 'works contract'; involvement of goods in execution of such 'works contract'; property in such goods must be transferred to third party. In the context of contract, that was in issue, those conditions were found wholly fulfilled at that stage. The Supreme Court also did not find it material to consider - if the existence of a

third party-developer, over and above the owner, would be of material consideration.

67. In paragraph 101 of the report, the discussion made by the three judge Bench of the Supreme Court was summarized as below:

101. In light of the above discussion, we may summarise the legal position, as follows:

(i) For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled: (one) there must be a works contract, (two) the goods should have been involved in the execution of a works contract and (three) the property in those goods must be transferred to a third party either as goods or in some other form.

(ii) For the purposes of Article 366(29-A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks etc. are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.

(iii) Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. The term "works contract" in Article 366 (29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366(29-A)(b) limits the term "works contract".

(iv) Building contracts are species of the works contract.

(v) A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.

(vi) The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant intention of the contract-is-not-to-transfer the property in-goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

(vii) A transfer of property in goods under clause 29-A(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person. making the transfer and the purchase of those goods by the person to whom such transfer is made.

(viii) Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article: 366(29-A)(b), there is a deemed sale of goods which are involved in the execution of the works contract. involved in the execution of a works contract where the contract is goods divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on

the value of the material in the execution of works contract.

(ix) The expression "tax on the sale or purchase of goods" in Entry 54 in List II of Seventh Schedule when read with the definition clause 29- A of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.

(x) Article 366(29-A) (b) serve: to bring transactions where essential ingredients of 'sale' defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

(x) Taxing the sale of goods element in a works contract under Article 366(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes between the developer and the flat purchaser after incorporation of goods."

68. With respect to **K. Raheja case**, in paragraph 107 of the report, the Supreme Court summarized the conclusions of the two judge Bench decision of that Court as below:

"107. On consideration of the arguments that were put forth parties, the Court in Raheja Development held as under:

(i) The definition of the term "works contract" in the Act inclusive definition.

(ii) It is a wide definition which includes "any agreement" for carrying out building or construction activity for cash, deferred payment or other valuable consideration.

(iii) The definition of works contract does not make a distinction base on who carries on the construction activity. Even an owner of the property may be said to be carrying on a works contract if he enter into an agreement to construct for cash, deferred payment other valuable consideration.

(iv) The developers had under ken to build for the prospective purchaser.

(v) Such construction/development was to be on payment of a in various instalments set out in the agreement.

(vi) The developers were not the owners. They claimed lien on the property. They had right to terminate the agreement and dispose of the unit if a breach was committed by the purchaser. A clause like this does not mean that the agreement ceases to be works contract. So long as there is no termination, the construction is for and on behalf of the purchaser and it remains a "works contract".

(vii) If there is a termination and a particular unit is not resold but retained by the developer, there would be no works contract to that extent.

(viii) If the agreement is entered into after the flat or unit is already constructed then there would be no works contract. But, so long as the agreement is entered into before the construction is complete it would be works contract."

69. The doubts raised by the two judge Bench decision of the Supreme Court while making reference in the **L&T case**

were noted in paragraph 108 of the decision. It reads as below:

“108. The correctness of the view taken in Raheja Development has been doubted in the referral order principally for the reasons: (a) the developer had undertaken the contract to develop the property of the owner. It is not alleged by the department that there is monetary consideration involved in the development agreement. If the development agreement is not a works contract, could the department rely upon the second contract which is the tripartite agreement and interpret it to be a works contract; (b) if the ratio in Rahaja Developments is to be accepted then there would be no difference between works contract and a contract sfer d for sale of chattel as a chattel and (c) from the definition of works contract, in the the contractor must have undertaken the work of construction for and on behalf of the flat purchaser for cash, deferred or any other valuable consideration but could it be said that developer was contractor for the prospective flat purchaser.”

70. Those was answered in paragraph 110 of the report. It is self-apparent and reads as below:

“110. The argument purchaser is entitled to transfer of flat and conveyance of fraction of land only when all installments have been fully paid and that shows that the agreement between the developer and the flat purchaser is the sale of flat and not to appoint the developer as the contractor of the flat purchaser for the purposes of carrying out the construction of the flat for and on behalf of the flat purchaser has no merit. The submission overlooks the typical nature of the development agreement which is followed

by a tripartite agreement between the owner of the land, the developer and the flat purchaser. Effectively and de facto it is the developer who constructs the building for the flat purchaser. The developer does so for monetary consideration. The label of payment is not decisive but the factum of the payment is. The construction is done on payment of price as agreed upon between the developer and the flat purchaser. It is not necessary to recapitulate all clauses of the agreement under KOFA or for that matter under MOFA. Raheja Development takes note of relevant clauses of the recitals and the agreement under KCFA. We need not repeat them. Similarly, Form V of the Maharashtra Ownership Flat Rules contains recital such as, 'as a result of the Development agreement the promoters are entitled and enjoined upon to construct buildings on the said land'. One of the relevant clauses (omitting unnecessary portion) in Form V reads, "the promoter shall construct the said building/s....in accordance with the plans, designs, specifications which have been seen and approved by the flat purchaser with the owner; such variations and modifications as the promoter may consider necessary or as may be required by the concerned local authority/the government.....provided that the promoter shall have to obtain prior consent in writing to the flat purchaser in respect of variations or modifications which may adversely affect the flat of the purchaser. It is, thus, not correct to say that the work is undertaken by the developer for himself and for the owner and the construction is not carried for and on behalf of the purchaser.”

71. While dealing with the doubt expressed as to the correctness of the **K. Raheja case**, the larger bench of the Supreme Court clearly opined that the fact

that the transfer of the flat and conveyance of land would arise on a future date, upon all installments being paid and that agreement between the developer and flat purchaser was one for sale of flats, had no merit. The reason to reject the challenge was given by the Supreme Court by observing that the doubt thus expressed clearly overlooked the typical nature of developer agreement. The developer does so for monetary consideration. The liability of payment was also found not decisive, though the factum of payment was found to be so.

72. Here, as well, it is an undeniable truth in the facts found by the Tribunal that the constructions were made by the assessee, though on its own land against Allotment Letter issued to and payments made by 403 allottees. It would be appropriate to note here itself that the revenue authorities have taxed the assessee only to the extent of payments were received by it against 403 flats. Only with respect to those allotments/payments received, 'works contract' was found existing and only with respect to those flats, transfer of property involved in the execution of 'works contract' has been assessed. That has been quantified at 59% of the total flats. As noted before, that fact finding is not in dispute.

73. Then, as to the fact of KOFA and MOFA, in the further discussion made in paragraph 110 of **L&T case**, it has been specifically found, the provisions of KOFA and MOFA were additional facts pleaded in **K. Raheja case** and **L&T case**. Insofar as existence of the 'works contract' had been found in those cases, not on the strength of the provisions of KOFA and MOFA and the contracts entered into in accordance with those provisions of law but on an

independent reading of the Allotment Letter, the submission being advanced in the present case - that absence of KOFA and MOFA to the present case would make material difference, is found to be wholly misconceived and unacceptable in face of that law laid down by the Supreme Court.

74. Doubts, if any, as to existence and continuance of 'works contract' against Allotment Letters was further clarified in paragraph 115 and 117 of the report. Thus, as noted above, the 'works contract' would arise only upon issuance of Allotment Letter and would continue during its subsistence, qua the value/consideration that the assessee may receive during that period.

75. In view of the fact that the submissions advanced on the strength of KOFA and MOFA are found to be not relevant to the present controversy, the principle invoked by learned Senior Counsel for the assessee, on the strength of the decision of **Sun Engineering Works (P) Ltd (supra) and Arulmozhi Iniarasu (supra)** is wholly inapposite. That principle is not available to the present controversy.

76. As to the principle, every clause of the 'agreement'/Allotment Letter would have to be seen, there can be no quarrel. In fact, it is that true test that has been applied by the Tribunal. This leads the Court to the conclusion that upon conjoint reading of all clauses of the Allotment Letter, it may be safely inferred-the assessee was executing a 'works contract', to the extent it was raising constructions against individual Allotment Letters issued and payments received there against. However, only to the extent and up to the validity or existence of such Allotment Letters, such

‘works contract’, would exist/continue to exist.

76. Insofar as the decision of **L&T case**, is subsequent to the decision of the division bench of this Court in **Assotech Realty Pvt. Ltd. (supra)**, it is the decision of the Supreme Court that creates binding effect in law. Even though the merit discussion made by the division bench in **Assotech Realty Pvt. Ltd. (supra)** may not have been specifically or directly overruled the same is no longer good law, in light of the reasoning and ratio laid down by the Supreme Court in **L&T case**. Once the ‘agreement’ arose upon Allotment Letter issued by the assessee, it satisfied the test of a ‘works contract’, in terms of the law laid down by the Supreme Court. It would be of no avail to rely on the decision of the division bench of this Court or the fact circumstance of dismissal of revision arising from the subsequent order of the Tribunal in **Assotech Realty Pvt. Ltd. (supra)**. That final decision would remain a final adjudication, confined and limited to that case alone.

78. By way of clarification, it may be noted, the other decision of the division bench of this Court in **Express Projects Pvt. Ltd. (supra)** and the decision of the learned single Judge in **Supertech Ltd. NOIDA (supra)** did not lay down any law. By those decisions, the matters were only remitted to the statutory authorities, to decide those matters afresh.

79. Coming to the issue of addition of profit to the book value of the goods involved in the execution of the ‘works contract’, it may be noted, the assessing authority had made an addition of 21%. While challenging the same, the assessee raised specific grounds of appeal. Since

much argument has been advanced by both sides on the strength of grounds of appeal, contents of paragraph 35 of the memo of appeal filed by the assessee before the Tribunal, may be noted. It reads as below:

“35. यह कि लार्सन एण्ड टूबो लि० एण्ड अदर्स बनाम स्टेट एण्ड कर्नाटका एण्ड अनादर्स (2013) (23) VLJ 97(SC) के पृष्ठ 134, 135 के क्रमांक 101 के क्रमांक 11 में निम्न लिखित व्यवस्था दी गयी है।

“Taxing the sale of goods element in a works contract under articles 366-(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods.”

अपीलकर्ता द्वारा अपने हिसाब किताब विस्तृत विवरण सहित रखें मये है। आडिट होता है। निर्माण सामग्री खरीद होते ही उसका प्रयोग हो जाता है अतः प्रयुक्त होते समय माल की कीमत टैक्स व भाड़ा सहित होती है। यह सभी जोड़कर स्वयं अपीलकर्ता द्वारा फ्लैट में प्रयुक्त दिखायी गयी है। प्रयुक्त सामग्री को कर निर्धारण अधिकारी द्वारा स्वीकार भी किया है परन्तु कर निर्धारण अधिकारी द्वारा जो इस धनराशि पर 21% वृद्धि करके जो कर देयता निर्धारित की गयी है वह नियम व कानून के विरुद्ध है। वैसे भी यह सर्वविदित हैं कि होलसेल में व्यापार में 1.5 प्रतिशत के लाभांश तक होता है, जबकि अपीलकर्ता का तो निर्माण सामग्री का खरीद बिक्री का व्यापार भी नहीं है। अपीलकर्ता द्वारा जो फ्लैट्स निर्माण करके बिक्री का कार्य किया जाता है उसमें लाभांश का आधार फ्लैट्स के निर्माण में प्रयुक्त सामग्री की दर कभी नहीं होती है बल्कि लाभांश निर्माण के सुपरविजन, कंट्रोल, आदि के मेहनत के बदले में व जमीन की मँहगायी दिन पर दिन हो जाने के कारण ही प्राप्त होता है क्योंकि यह सर्वविदित है कि एक सामान्य जन को घर बनाने में कदम कदम पर कितनी समस्याएँ जैसे विभिन्न सरकारी विभागों से

परमिशन, भाग दौड़ करके बिल्डिंग मैट्रियल की व्यवस्था व अलग अलग मद के मजदूरों की व्यवस्था में जो पापड़ बेलने पड़ते हैं उसी मेहनत के लिये ही अपीलकर्ता को मुनाफा प्राप्त होता है न कि सामग्री के दर के आधार पर ॥ यह कि उ०प्र० के अन्दर सदस्य वाणिज्यकर अधिकरण की विभिन्न पीठों द्वारा खरीद मूल्य वृद्धि 10.9% करते हुए बिक्री निर्धारित की गयी है और विभाग द्वारा निम्नलिखित मामलों में तथा अन्य बहुत सारे मामलों में माननीय इलाहाबाद उच्च न्यायालय में रिवीजन तक भी दाखिल नहीं की गयी है।

• सर्वश्री अजनारा इण्डिया लि., गाजियाबाद बनाम कमिश्नर वाणिज्यकर जाप्र० लखनऊ द्वितीय अपील संख्या 1547:2613 वर्ष 2010-2011, 1545/2013 *af* 2007-2018, 1546/2013 *at* 2008-2009, 1661/2013 वर्ष 2009-2010 आदेश दिनांक 11-11-2016

• कमिश्नर वाणिज्यकर बनाम सुपर टैक लि एनोएडा, द्वितीय अपील संख्या 324/16 (10-11) आदेश दिनांक 27-10-2016, द्वितीय अपील संख्या 384/16 (11-12) आदेश दिनांक 27-10-2016

• सर्वश्री सनवर्ल्ड रजिडेन्सी प्रालि बनम कमिश्नर वाणिज्यकर उ०प्र० द्वितीय अपील संख्या 298/2016

• सर्वश्री ए०टी०एस० एस्ट्रेक्चर लि एनोएडा बनल कमिश्नर वाणिज्यकर उ०प्र० लखनऊ 2016 N. TN (Vol- 62) Page Tribunal 41 व द्वितीय अपील संख्या 1/11, 5/10 व 300/16

• सर्वश्री हरी बिल्डवेल् प्रालि अराम कमिश्नर वाहिका लखनऊ द्वितीय अपील संख्या 768/13 यह कि उपरोक्त सभी आदेश विभाग पर बाध्यकारी है यहाँ पर यह भी उल्लेखनीय है कि 10 की मूल्य वृद्धि भी अपील के तथ्या व तर्कों के प्रकाश में बहुत ज्यादा है।

यहाँ पर पुनः यह भी उल्लेखनीय है कि प्रथम अपील न्यायालय द्वारा निम्नलिखित मामलों में 2006 के स्थान पर 10 % निर्धारित किया गया था परन्तु विभाग द्वारा द्वितीय अपील तक भी दायर नहीं गयी।

▪ वरुणा फाइनेन्स प्रा०लि० डुण्डाहेडा गाजियाबाद बनाम कमिश्नर वाणिज्यकर उ०प्र० लखनऊ 2015 N.T.N (57) Tribunal 124

▪ सर्वश्री स्काईटेक कन्स्ट्रक्शन वैशाली गाजियाबाद, बनाम कमिश्नर वाणिज्यकर 2015 N.T.N (57) Tribunal 113

यहाँ पर पुनः उल्लेखनीय है कि स्वयं प्रथम अपीलीय अधिकारी द्वारा बहुत सारी अपीलों में खरीद मूल्य पर 10 % वृद्धि करके डीमड सेल निर्धारित की गयी है।

सदस्य वाणिज्यकर अधिकरण द्वारा खरीद मूल्य में 10% की वृद्धि करते हुए, आदेश सर्वश्री डिजाईन आर्क इन्फ्रा प्रा०लि०, के मामलों में परित किया गया था। इस आदेश के विरुद्ध विभाग द्वारा रिवीजन संख्या 293/2015 माननीय इलाहाबाद उच्च न्यायालय में दाखिल किया गया था। माननीय इलाहाबाद उच्च न्यायालय द्वारा विधिवत सुनवाई के उपरान्त विभागयी रिवीजन खारिज कर दी गयी ।"

80. In the first place, the assessee disputed the assumption of profit @ 21%. Then, of its own, it referred to and relied on the earlier orders of the Tribunal providing for 10% additions. Largely it disputed the correctness of the finding of the Tribunal (in other cases) assuming profit @ 21%. Seen in that light, while the assessee did not accept the correctness of the finding of the Tribunal to compute 10% profit over the book value of the goods of profit for execution of the 'works contract' for reasons not known to the Court, it did not rely on Rule 9 of the Rules, that provides for permissible deductions. It may not be gainsaid, to rely on Rule 9 of the Rules, the assessee would have been burdened to prove the expenses claimed.

81. Therefore, though the books of accounts of the assessee have not been rejected, in absence of proof of facts requiring applicability of Rule 9, estimation of deemed profit became necessary to be made - to determine the turnover of 'works contract'. In that, the Tribunal cannot be faulted for applying the 10% rule as a rough and ready method to estimate, considering compoundable cases, the turnover (to be subjected to tax). Insofar as the Tribunal seems to have applied the time tested measure to make estimate, I find no good ground to offer any interference with

the finding of the Tribunal, in exercise of revision jurisdiction of the Court.

82. As to the alternate submission advanced by learned Senior Counsel for the assessee, that the value of goods has to be seen on the date when the goods may have been actually incorporated in a 'works contract', it is neither practical nor it otherwise merits acceptance. Construction activity that continues on a day-to-day basis and experiences price fluctuations everyday, may never be subjected to such an impractical exercise of computation as may lead to endless complications and disputes. If accepted, it would be to compel the authorities to monitor the day-to-day price of raw materials used in construction and would also imply that the assessee would have prove – to what extent goods may have been incorporated to a 'works contract', each day. Therefore, as a method, if the value of the goods applied to a 'works contract', is taken with reference to the total price, there appears no infraction of the law. Otherwise, Rule 9 enables the assessee to seek all appropriate allowable deductions. Thus, on this issue as well, the matter does not call for any interference.

83. Suffice to state, if the assessee had desired to claim more deduction, then it ought to have maintained its books in accordance with Rule 9 of the Rules. The assessee cannot claim those deductions in absence of books of accounts, to justify the same. At present, the issue is not justiciable by this Court any further, in exercise of revisional jurisdiction. Insofar as the findings recorded by the Tribunal do not appear to be perverse or unfounded, no interference is warranted on that count, either.

84. In view of the above, the first question of law is answered in the negative

and the second question of law is answered in the affirmative i.e. both questions are answered in favour of revenue and against the assessee.

85. Present revision fails and is **dismissed**. No order as to costs.

(2023) 7 ILRA 892
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision no. 58 of 2023

Dr. Amitabh Kumar Gupta **...Revisionist**
Versus
Awadh Bihari Nigam **...Respondent**

Counsel for the Revisionist:

Sri Manish Tandon, Sri Mohd. Naushad Siddiqui,
 Sri Narendra Mohan

Counsel for the Respondent:

Sri J.P. Singh

Civil Law - The Code of Civil Procedure, 1908 - Order 6 Rule 17 - Amendment of pleadings after the trial has commenced - Due diligence - If an amendment application is filed at the stage of final hearing, then while allowing the application, it is necessary to examine whether due diligence was exercised by the applicant. Putting new facts on record due to engagement/change of new counsel, fault on the part of counsel or any other reason attributed to counsel cannot be ground for filing of amendment application after commencement of trial. In the instant case, at the time of the final argument, an amendment application was filed under Order VI Rule 17 of CPC solely on the ground of engagement of a new counsel, who discovered that certain relevant facts had not been taken on account of mistake on the part of the

earlier counsel. However, there was no explanation regarding the exercise of due diligence. SCC Court, without considering the requirement of due diligence on the part of the plaintiff-opposite party, allowed the amendment application. Impugned order quashed. (Para 11, 13, 15)

Allowed. (E-5)

List of Cases cited:

1. *Hari Shanker & ors. Vs Bhagwati Prasad Mishra* 2014 (0) Supreme (All) 3127

2. *Shri Firoz Uddin & ors. Vs Shri Anwar Uddin*, passed in Matters Under Article 227 No. 5213 of 2013.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Mr. Narendra Mohan, Advocate has filed Vakalatnama on behalf of opposite party, which is taken on record.

2. Heard Sri Manish Tandon, learned counsel for the revisionist and Sri Narendra Mohan, learned counsel for the opposite party.

3. Present revision has been filed for challenging the order dated 27.3.2023 passed by the Additional District Judge, Court No.13, Kanpur Nagar in S.C.C. Suit No. 44 of 2017.

4. Since only legal question is involved, therefore, with the consent of the parties, without inviting for affidavits, the matter is being decided at the admission stage itself.

5. Learned counsel for the revisionist submitted that earlier plaintiff-opposite party has instituted the SCC Suit No. 44 of

2017 upon which written submission has been filed. Thereafter, point of determination has also been framed. He next submitted that both the parties i.e. plaintiff and defendant have filed their witnesses through affidavit and case is fixed for final hearing. At the time of final argument, amendment application was filed under Order VI Rule 17 of CPC read with 151 IPC only on the ground of change of new counsel and after engagement of new counsel, it was found that certain relevant facts was not taken into consideration. He also submitted that since beginning, it is the case of respondent-plaintiff that provision of U.P. Act No. 13 of 1972 shall not be applicable as rent of building in question is more than 2,000/-. Now on facts, respondent-plaintiff is coming to the fact that building is newly constructed, therefore, U.P. Act No.13 of 1972 would not be applicable. He firmly submitted that it is pure question of fact and plaintiff respondent has full knowledge about the same since the date of filing of suit, therefore, at the stage of final argument without explanation of due diligence, such amendment application may not be allowed. He further submitted that ground so taken about the change of new counsel is not acceptable, therefore, order is bad and liable to be set aside. In support of his contention, he has placed reliance upon the judgment of this Court in the matter of *Hari Shanker and 5 others vs. Bhagwati Prasad Mishra reported in 2014 (0) Supreme (All) 3127 and Shri Firoz Uddin and 4 others vs. Shri Anwar Uddin passed in Matters Under Article 227 No. 5213 of 2013* decided on 8.5.2023.

6. Mr. Krishna Mohan, learned counsel for the opposite party submitted as earlier counsel has not been pointed out the relevant fact only after engagement of new

counsel, he found such relevant facts, therefore, he has filed amendment application at this stage, therefore, it cannot be dismissed on the ground of due diligence.

7. I have considered the rival submissions advanced by the learned counsel for the parties and perused the Order 6 Rule 17 of CPC as well as impugned order. In the application filed under Order 6 Rule 17 of CPC, the only ground taken is that after engagement of new counsel, he has pointed out certain relevant facts, which was not taken into consideration except this nothing has been stated in the amendment application.

8. To appreciate the controversy, Order VI Rule 17 of CPC is being quoted hereinbelow;

"17. Amendment of pleadings.-The Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

9. Order VI Rule 17 of CPC clearly provides that in case of amendment after commencement of trial, due diligence is required to be seen, but in the present case except the change of counsel, nothing has been stated. About the change of counsel or fault on the part of counsel has also been

considered by this Court in the matter of ***Hari Shanker (Supra)***. Relevant paragraph of the same is quoted hereinbelow:-

"14. Supreme Court again in J. Samuel v. Gattu Mahesh, (2012) 2 SCC 300, held that due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term "due diligence" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial. A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit. In the given facts, there is a clear lack of "due diligence" to search out the fact, which is to be amended in written statement. Therefore, the condition of due diligence could not be satisfied. Law is very clear and the mistake committed certainly does not come within the preview of a typographical error. Similar view was taken in Vidyabai Vs. Padma Latha, (2009) 2 SCC 409, Sushil Kumar Jain Vs. Manoj Kumar, (2009) 14 SCC 38 and Abdul Rehman Vs. Mohd. Ruldu, (2012) 11 SCC 341.

15. The written statement was drafted by an advocate after reading the plaint. After legal advice, it cannot be said that in exercise of "due diligence" the fact sought to be brought in the pleading by way of

amendment was not in the knowledge of the defendant. A distinction has to be drawn between 'due diligence' and 'negligence'. The case of the defendants falls in the category of 'negligence' and not 'due diligence'. Trial Court rightly rejected the amendment application, as Proviso to Order VI Rule 17 C.P.C., now casts a rider on the power of the Court in allowing amendment application."

10. Again the similar issue was considered by this Court in the matter of **Shri Firoz Uddin (supra)**. Relevant paragraph of the said judgment is quoted hereinbelow:-

"20. So far as present case is concerned, there is no dispute on the point that except the engagement of new counsel, nothing has been stated in amendment application even after sincere efforts, they could not search out the fact, which is to be amended in written statement. Therefore, the condition of due diligence could not be satisfied. Law is very much settled that change of counsel cannot be a ground for filing amendment. Therefore, no interference is required in the impugned order dated 11.04.2023."

11. This Court is of the firm view that putting new facts on record due to engagement/change of new counsel, fault on the part of counsel or any other reason attributed to counsel cannot be ground for filing of amendment application and allow the same, which was filed after commencement of trial. In fact, in light of Order VI Rule 17 of CPC, parameters of due diligence cannot be met out by making allegation on earlier counsel and giving credit to new counsel to search out the certain new facts during the preparation of the case. Therefore, any such amendment

application placed upon the efforts or mistake on the part of counsel cannot be entertained and allowed.

12. The issue of due diligence is necessary part, which is required to be considered by the Court. Same was very well considered by this Court in the matter of **Shri Firoz Uddin (Supra)**. Relevant paragraph of the said judgment is quoted hereinbelow:-

"18. From the perusal of Order VI Rule 17 CPC, it is apparently clear that there is no discrimination for filing amendment application either for plaint or written statement and proviso of due diligence is very much applicable in both the cases amendment is filed after commencement of trial. In fact, it is beneficial legislation enabling the parties to bring the some relevant facts on record, if it was not available at the time of filing of plaint or written statement even after commencement of trial. Therefore, a condition of due diligence has also been made, which has to be complied with, otherwise this provision may be misused to delay the proceeding. Therefore, it would be equally applicable for plaint and written statement."

19. So far as judgements referred herein above are concerned, those are also of the same view. There is no doubt that about the facts mentioned in amendment application, Court should have been more liberal while considering the amendment application in written statement, but at the same time Court cannot ignore the proviso of due diligence otherwise provision would have been misused. Therefore, Courts were conscious while interpreting the provision of Order VI Rule 17 CPC and no liberty is given to either of the parties to skip away with the condition of due diligence. Courts

have taken a categorical view that either it is a case of amendment in plaint or written statement, it is necessary to fulfill the requirement of due diligence as provided in Order VI Rule 17 CPC."

13. So far as due diligence as referred in Order VI Rule 17 of CPC is concerned, it is necessary requirement while allowing the amendment application after commencement of trial. In the present case, there is no dispute on the point that amendment application was filed at the stage of final hearing, therefore, while allowing the application, it is necessary requirement to see as to whether due diligence was made by the applicant for the fact, which is brought on record by filing amendment application and failure of that, amendment application cannot be allowed. In the impugned order, SCC Court has not considered this fact that only ground taken for filling amendment application is mistake on the part of earlier counsel without considering the requirement of due diligence on the part of plaintiff-opposite party. This is also mandate of this Court in the matter of *Shri Firoz Uddin (Supra)*.

14. In the present case, nothing has been stated about any due diligence made by the plaintiff-opposite party to bring the facts on record except the engagement of new counsel, who has searched out the new facts.

15. Therefore, under such facts and circumstances as well as law laid down by this Court, impugned order dated 27.3.2023 passed by learned Additional District Judge, Court No.13, Kanpur Nagar is hereby quashed and revision is **allowed**. No order as to costs.

(2023) 7 ILRA 896

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 25.05.2023

BEFORE

THE HON'BLE SURYA PRAKASH

KESARWANI, J.

THE HON'BLE ANISH KUMAR GUPTA, J.

Writ-C No. 40161 of 2022

Connected With

Writ-C No.12406 of 2023

and

Writ-C No.4834 of 2022

Uday Pratap Singh & Ors. ...Petitioners

Versus

State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Ved Prakash Shukla, Sri Shailendra Kumar Singh

Counsel for the Respondents:

C.S.C., Sri Madan Mohan, Sri Vaibhav Tripathi

A. Pharmacy Act, 1948 - AICTE Act, 1987 - Pharmacy Act, being a special legislation governing the field of pharmacy, shall prevail over any other general law for the purpose of registering candidates as pharmacists in the State Register and the Central Register. (Para 27)

B. Pharmacy Act, 1948, Section 12 - Approved Courses of Study - Any degree obtained by a student that has not been approved by the Pharmacy Council of India, in terms of Section 12 of the Pharmacy Act, would not entitle them to registration in the State Register maintained under Section 31 of the Pharmacy Act. Singhania University, though recognized u/s 2(f) of the UGC Act, 1956, is required to obtain approval/recognition for awarding diplomas in pharmacy u/s 12 of the Act, 1948, from the Pharmacy Council of India,

to make such diplomas in pharmacy an approved qualification for the purpose of registration in the State Register. Petitioners are not entitled to be registered under the Pharmacy Act, 1948, based on diploma certificates granted by Singhania University, which does not have approval or recognition from the Pharmacy Council of India u/s 12 of the Act, 1948. (Para 21, 27)

Dismissed. (E-5)

List of Cases cited:

1. *The Pharmacy Council of India Vs Dr. S.K. Toshniwal Educational Trust Vidarbha Institute of Pharmacy & ors.*, (2020) SCC Online SC 296

2. *Bharathidasan University & anr. Vs All India Council for Technical Education & ors.*, AIR 2001 SC 2861

3. *Yashraj Institute of Professional Studies Vs Indian Nursing Council, New Delhi, & ors.*, (2022) 1 ADJ 326 (LB)

4. *Ranjan Sinha & anr. Vs Ajay Kumar Vishwakarma & ors.*, (2017) 14 SCC 774

5. *Pharmacy Council of India Vs Aatmaram Dariyani & ors.*, (2018) 11 SCC 341

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

1. Since the controversy involved in the above petitions is identical, therefore, with the consent of learned counsels for the parties, all the three petitions are heard together and decided by this common order.

2. Heard Sri Ved Prakash Shukla, learned counsel for the petitioners, Sri Rajiv Gupta, learned Additional Chief Standing Counsel for respondent nos. 1 and 2 and Sri Vaibhav Tripathi, learned Central

Government Standing Counsel for respondent no. 3 and Sri Madan Mohan, learned counsel for respondent no. 4 in the the above petitions.

3. These petitions have been filed by the petitioners who have obtained the Diploma in pharmacy from Singhania University, Jhunjhunu, Rajasthan, praying for a direction to the Pharmacy Council of Uttar Pradesh to enter the name of the petitioners in the First Register maintained by them as a pharmacist to practice in the State of U.P. under Section 31 of the Pharmacy Act, 1948 and further a direction to allow the petitioners to practice as a pharmacist after completing all the formalities under the Pharmacy Act, 1948 and the Pharmacy Practice Regulations, 2015.

4. The brief facts of the case, according to the petitioners, are that after passing intermediate (Class XIIth) they took admission in "two years' Diploma course in Pharmacy" from Singhania University, which is recognized under Section 2 (f) of the University Grants Commission Act 1956 (hereinafter referred to as the Act, 1956). According to the petitioners they completed their course and diploma in Pharmacy was awarded to them by the aforesaid University. It has been stated in Paragraph 10 of the Writ Petition No. 40161 of 2022 that the petitioners undertook training of 500 hrs in reputed hospitals as per requirement of the education regulation framed under Section 10 of the Pharmacy Act, 1948 (hereinafter referred to as the Act, 1948). Thereafter, in paragraph nos. 11, 13, 14, 15 of the Writ petition No. 40161 of 2022 it has been stated by the petitioners that after completing all the formalities they approached the respondent no. 4 for their

registration in accordance with Section 31 read with Section 10 of the Act, 1948 to enter their name in the register but the respondent no. 4 declined the request of the petitioners for the reason that the aforesaid Singhanian University has not been added on the website maintained by the respondent no. 3 under Section 12 of the Act, 1948 and the Course/Diploma in Pharmacy, conducted by the Singhanian University is not recognized by the Pharmacy Council of India. Aggrieved, the petitioners filed the present writ petitions praying for the relief aforesaid.

SUBMISSIONS

5. Learned counsel for the petitioners submits as under:

i) The judgment relied by the respondent no. 4, in paragraph 29 of the counter affidavit in Writ Petition No. 40161 of 2022, has no application on facts of the present case inasmuch as the controversy in that case was between the AICTE and the respondent no. 3 and not between the respondent no. 4 and the diploma holders.

ii) Singhanian University is a University established under law and has been recognised under Section 2 (f) of the Act, 1956. Therefore, the respondent nos. 3 & 4 cannot deny registration of the petitioners under the Act, 1948 on the basis of Diploma granted by the said University.

iii) A University does not require any recognition for a particular course from the Pharmacy Council of India. Therefore, even if the Singhanian University has not obtained recognition for pharmacy course from the respondent no. 2, still registration cannot be denied inasmuch as a University does not require any recognition for the

pharmacy course under Section 12 of the Act, 1948 from the Pharmacy Council of India. Reliance is placed upon the judgment in case of **The Pharmacy Council of India v. Dr. S.K. Toshniwal Educational Trust Vidharbha Institute of Pharmacy and Ors., (2020) SCC Online SC 296** and judgment of Hon'ble Supreme Court in **Bharatidassan University and Another v. All India Council for Technical Education and Others, AIR 2001 SC 2861 Para 15 and 16**, **Yashraj Institute of Professional Studies v. Indian Nursing Council New Delhi and Others (2022) 1 ADJ 326 (LB)**.

6. Learned Counsel for the respondent no. 3 submits that

i) the course of Pharmacy is not recognized by the Pharmacy Council of India i.e., respondent no. 3, therefore, respondent no. 4 cannot register the petitioners. The Pharmacy Council of India has been constituted as a body empowered to regulate the education and profession of pharmacy in India. Therefore, in view of the provisions of the Act, 1948 covering all areas including approval of courses, laying down course contents, eligibility conditions for students as well as teachers, evaluation standards of examination, grant of registration, entry of higher qualification in the same discipline, taking action for infamous conducts etc. are well within powers of the respondent no. 3 i.e., Pharmacy Council of India. Therefore, unless the pharmacy course allegedly been conducted and the diploma being awarded by the Singhanian University is recognized by the respondent no. 3, registration of the petitioners under the Act, 1948 cannot be done. Referring to various paragraphs of the counter affidavit, it is submitted that the writ petitions are totally misconceived and

no relief can be granted in view of the law laid down by Hon'ble Supreme Court in the case of **Dr. S.K. Toshniwal Educational Trust Vidharbha Institute of Pharmacy and Ors. (supra)** and in **Ranjan Sinha and Another vs. Ajay Kumar Vishwakarna and Ors. (2017) 14 SCC 774**

7. Sri Rajiv Gupta, learned Additional Chief Standing Counsel refers to paragraphs 6, 7 & 9 of the counter affidavit filed on behalf of respondent nos. 1 and 2 and submits that the writ petition is totally misconceived and therefore, deserve to be dismissed.

8. Learned counsel for respondent no. 4 submits that since Singhania University is not approved for the pharmacy course under Section 12 of the Act, 1948, therefore, the respondent cannot register the petitioners on the strength of diploma granted by the Singhania University. Reference is made specifically to Paragraph Nos. 6, 7, 8, 9, 10 & 13 of the counter affidavit of the respondent no. 4.

9. Learned counsel for the parties has not made any other submission except those aforesaid. In view of the submission made by learned counsel for the parties and with their consent the following questions are being framed for determination in these writ petitions:-

a) Whether the petitioners are entitled to be registered under the Act, 1948 on the basis of diploma certificates granted by Singhania University, which admittedly does not have any approval or recognition from Pharmacy Council of India under Section 12 of the Act, 1948?

b) Whether the Singhania University, which is recognized under Section 2 (f) of the UGC Act, 1956, is not required to take any approval/recognition/permission for awarding diploma in pharmacy under Section 12 of the Act, 1948 from the Pharmacy Council of India?

10. To answer the aforesaid questions it is necessary to examine the Statements of Objects and Reasons and scheme of the Pharmacy Act, 1948. The Statement of Objects and Reasons of the Pharmacy Act, 1948, is reproduced below:

"Statement of Objects and Reasons- *It is desirable that, as in most other countries, only persons who have attained a minimum standard of professional education should be permitted to practise the profession of Pharmacy. It is accordingly proposed to establish a Central Council of Pharmacy, which will prescribe the minimum standards of education and approved courses of study and examinations of Pharmacists, and Provincial Pharmacy Councils, which will be responsible for the maintenance of provincial registers of qualified pharmacists. It is further proposed to empower Provincial Governments to prohibit the dispensing of medicine on the prescription of a medical practitioner otherwise than by, or under the direction and personal supervision of, a registered pharmacist."*

11. It is further relevant to note Sections 10, 11, 12, 29, 30, 31 & 32 of the Pharmacy Act which are reproduced below:

"10. Education Regulations. -
(1) *Subject to the provisions of this section, the Central Council may, subject to the*

approval of the Central Government, make regulations, to be called the Education Regulations, prescribing the minimum standard of education required for qualification as a pharmacist.

(2) In particular and without prejudice to the generality of the foregoing power, the Education Regulations may prescribe-

(a) the nature and period of study and of practical training to be undertaken before admission to an examination.

(b) the equipment and facilities to be provided for students undergoing approved courses of study;

(c) the subjects of examination and the standards therein to be attained.

(d) any other conditions of admission to examinations.

(3) Copies of the draft of Education Regulations and of all subsequent amendment thereof shall be furnished by the Central Council to all State Governments, and the Central Council shall before submitting the Education Regulations or any amendment thereof, as the case may be, to the Central Government for approval under sub-section (1) take into consideration the comments of any State Government received within three months from the date of furnishing of the copies as aforesaid.

(4) The Education Regulations shall be published in the Official Gazette and in such other manner as the Central Council may direct.

(5) The Executive Committee shall from time to time report to the

Central Council on the efficacy of the Education Regulations and may recommend to the Central Council such amendments thereof as it may think fit.

11. Application of Education Regulations to States.- At any time after the constitution of the State Council under Chapter III and after consultation with the State Council, the State Government may, by notification in the Official Gazette, declare that the Education Regulations shall take effect in the State:

Provided that where no such declaration has been made, the Education Regulations shall take effect in the State on the expiry of three years from the date of the constitution of the State Council.

12. Approved courses of study and examinations.- (1) Any authority in a State [***] which conducts a course of study for pharmacists may apply to the Central Council for approval of the course, and the Central Council, if satisfied, after such enquiry as it thinks fit to make, that the said course of study is in conformity with the Education Regulations, shall declare the said course of study to be an approved course of study for the purpose of admission to an approved examination for pharmacists.

(2) Any authority in a State [***] which holds an examination in pharmacy may apply to the Central Council for approval of the examination, and the Central Council, if satisfied, after such enquiry as it thinks fit to make, that the said examination is in conformity with the Education Regulations, shall declare the said examination to be an approved examination for the purpose of qualifying for registration as a pharmacist under this Act.

(3) Every authority in the States [***] which conducts an approved course of study or holds an approved examination shall furnish such information as the Central Council may, from time to time, require as to the courses of study and training and examination to be undergone, as to the ages at which such courses of study and examination are required to be undergone and generally as to the requisites for such courses of study and examination.

29. Preparation and maintenance of register.-(1) As soon as may be after this chapter has taken effect in any State, the State Government shall cause to be prepared in the manner hereinafter provided a register of pharmacists for the State.

(2) The State Council shall as soon as possible after it is constituted assume the duty of maintaining the register in accordance with the provisions of this Act.

(3) The register shall include the following particulars, namely:

(a) the full name and residential address of the registered person;

(b) the date of his first admission to the register;

(c) his qualifications for registration;

(d) his professional address, and if he is employed by any person, the name of such person;

(e) such further particulars as may be prescribed.

30. Preparation of first register.

For the purpose of preparing the first register, the State Government shall by notification in the Official Gazette constitute a Registration Tribunal consisting of three persons, and shall also appoint a Registrar who shall act as Secretary of the Registration Tribunal.

(2) The State Government shall, by the same or a like notification, appoint a date on or before which applications for registration, which shall be accompanied by the prescribed fee, shall be made to the Registration Tribunal.

(3) The Registration Tribunal shall examine every application received on or before the appointed date, and if it is satisfied that the applicant is qualified for registration under section 31, shall direct the entry of the name of the applicant on the register.

(4) The first register so prepared shall thereafter be published in such manner as the State Government may direct, and any person aggrieved by a decision of the Registration Tribunal expressed or implied in the register as so published may, within sixty days from the date of such publication, appeal to an authority appointed by the State Government in this behalf by notification in the Official Gazette.

(5) The Registrar shall amend the register in accordance with the decisions of the authority appointed under sub-section (4) and shall thereupon issue to every person whose name is entered in the register a certificate of registration in the prescribed form.

(6) Upon the constitution of the State Council, the register shall be given

into its custody, and the State Government may direct that all or any specified part of the application fees for registration in the first register shall be paid to the credit of the State Council.

31. Qualifications for entry on first register.—[A person who has attained the age of eighteen years shall be entitled] on payment of the prescribed fee to have his name entered in the first register if he resides. or carries on the business or profession of pharmacy, in the State and if he—

(a) holds a degree or diploma in pharmacy or pharmaceutical chemistry or a chemist and druggist diploma of an Indian University or a State Government as the case may be. or a prescribed qualification granted by an authority outside [***] India, or

(b) holds a degree of an Indian University other than a degree in pharmacy or pharmaceutical chemistry, and has been engaged in the compounding of drugs in a hospital or dispensary or other place in which drugs are regularly dispensed on prescriptions of medical practitioners for a total period of not less than three years, or

(c) has passed an. examination recognized as adequate by the State Government for commoners or dispensers, or

(d) has been engaged in the compounding of drugs in a hospital or dispensary or other place in which drugs are regularly dispensed on prescriptions of medical practitioners for a total period of not less than five years prior to the date notified under subsection (2) of section 30.

32. Qualifications for subsequent registration. —(1) After the date appointed under sub-section (2) of section 30 and before the Education Regulations have, by or under section 11, taken effect in the State, [a person who has attained the age of eighteen years shall on payment of the prescribed fee] be entitled to have his name entered in the register if he resides or carries on the business or profession of pharmacy in the State and if he—

(a) satisfies the conditions prescribed with the prior approval of the Central Council, or where no conditions have been prescribed, the conditions entitling a person to have his name entered on the first register as set out in section 31, or

(b) is a registered pharmacist in another State, or

(c) possesses a qualification approved under section 14:

Provided that no person shall be entitled '[under clause (a) or clause (c)] to have his name entered on the register unless he has passed a matriculation examination or an examination prescribed as being equivalent to a matriculation examination.

(2) After the Education Regulations have by or under section 11 taken effect in the State, a person shall on payment of the prescribed fee be entitled to have his name entered on the register if he has attained the age of [eighteen years], if he resides, or carries on the business or profession of pharmacy, in the State and if he has passed an approved examination or possesses a qualification approved under

section 14 '[or is a registered pharmacist in another State.]'"

12. The Pharmacy Act, 1948, is a welfare legislation enacted with object to make better provisions for regulation of profession and practice of pharmacy and to prescribe qualification for being registered as pharmacist. Any person who wants to come into the profession and practice of pharmacy has to comply with the provisions of the Pharmacy Act. Section 10 of the Act empowers the Central Council to make regulations to be called the Education Regulations with the approval of the Central Government prescribing the minimum standard of education required for the qualification as a pharmacist.

13. The aforesaid regulations regulate:-

(a) the nature and period of studying and practical training;

(b) equipment and facilities to be provided for students undergoing approved course of study;

(c) the subjects of examination and the standard therein to be attained, and

(d) any other conditions to be examined.

It is pertinent to mention here that in exercise of the powers under Section 10 of the Act, 1948, the Pharmacy Council of India has framed Education regulations, 1991, which are in force with regard to the course of diploma in pharmacy. Clause (9) of the Regulation provides as under:-

"9. Approval of the authority conducting the course of study:-

The course of regular academic study prescribed under regulation 7 shall be conducted in an institution, approved by the Pharmacy Council of India under sub-section (1) of Section 12 of the Pharmacy Act, 1948.

Provided that the Pharmacy Council of India shall not approve any institution under this regulation unless it provides adequate arrangements or teaching in regard to building accommodation, equipment and teaching staff as specified in Appendix-B to these regulations."

14. Section 12 of the Act provides that any authority in a State which conducts a course of study for pharmacists may apply to the Pharmacy Council of India for an approval of the course and the Pharmacy Council of India, if satisfied, after such inquiry as it thinks fit to make, that the said course of study is in conformity with the Education Regulations, shall declare the said course to be an approved course of study for the purpose of admission to an approved examination for Pharmacist.

15. Sub-section (2) of Section 12 of the Act provides that any authority in a State which holds an examination in pharmacy may apply to the Central Council for approval of the examination, and Central Council, if satisfied, after such enquiry as it thinks fit to make, that the said examination is in conformity with the Education Regulations, shall declare the said examination to be an approved examination for the purposes of qualifying for registration as a pharmacist under this Act.

16. Section 29 of the Act, 1948 mandates about preparation and maintenance of Register. Section 30

provides procedure for preparation of First Register. Section 30 (4) provides for the publication of the First Register. Section 31 provides the qualifications for entry into the First Register.

17. Section 32 of the Act, 1948 provides the procedure & qualifications for entry into the subsequent register after publication of the First Register. It provides for registration of a pharmacist in the State Register subject to the conditions that such a person:

(i) has attained the age of 18 years;

(ii) paid the prescribed fees;

(iii) resides or carries on the business or profession of pharmacy in the State: and if he-

(a) satisfies the conditions prescribed with the prior approval of the Central Council, or where no condition has been prescribed to have his name registered as set-out in Section 31; or

(b) is a registered pharmacist in another State; or

(c) possesses qualification approved under Section 14.

Provided that no person shall be entitled under Clause (a) or (c) to have his name entered on the register unless he has passed a matriculation examination or an examination prescribed as being equivalent to a matriculation examination.

Sub-section (2) of Section 32 makes it mandatory that such person must have passed an approved examination. The

expression "approved examination" means the approved examinations in terms of Sub-section (2) of the Section 12 of the Act. Sub-section (2) of Section 12 uses the expression "any authority in a State". The phrase used "any authority in a State" is wide enough and does not exclude any University recognized by the University Grants Commission.

18. Thus, unless a person has satisfied the conditions prescribed under Section 32 of the Act, he shall not be entitled for the registration in the State Register maintained by the State Council.

19. The petitioners are relying upon the provisions of Section 31 of the Act which were applicable for the preparation of the first register till the Education Regulations were not in force. After the Education Regulations prescribing qualification came into force, Section 31 has no applicability as has been held by the Hon'ble Supreme Court in the case **Ranjan Sinha (Supra)**, which has been further affirmed by the Hon'ble Supreme Court in the Case of **Pharmacy Council of India v. Aatmaram Dariyani & Ors (2018) 11 SCC 341. In Ranjan Singh (Supra)** the Supreme Court observed as under:-

"38. In view of the above, we may conclude that when the First Register of Pharmacists prepared by the Registration Tribunal was published by the Government of Bihar under sub-section (4) of Section 30, the same is conclusive and any amendments by way of inclusions can be carried out till the framing of Education Regulations by the Pharmacy Council of India. For doing this, competent authority may take into consideration the qualification as prescribed by Section 31 of the Act. However, after the coming into

force of the Education Regulations as well as at the time of subsequent registration, the Government has to necessarily adhere to the Education Regulations. Any person who does not satisfy the qualifications as per the Education Regulations shall not be entitled to seek entry in the Pharmacy register."

20. After the Education Regulations are framed by the Pharmacy Council of India under Section 10 of the Pharmacy Act, 1948, the first register is required to be published in terms of Sub-section (4) of Section 30 of the Pharmacy Act, 1948. Once the First Register is published no person is entitled for any entry in the First Register. A name can be entered in subsequent registration after the publication of the First Register only in accordance with Section 32 of the Act. For the purposes of subsequent registration, qualification possessed by an applicant must be an approved examination in terms of Section 12 of the Act read with Regulation 9 of the Education Regulations, 1991, of the Pharmacy Council of India. If a person has not passed an approved examination or does not possess qualification approved under Section 12 or Section 14, he is not entitled for registration in the State Pharmacy Register.

21. Thus, in view of the aforesaid discussions, we answer the first question in negative and hold that the petitioners are not entitled to be registered under the Act, 1948 on the basis of diploma certificates granted by Singhania University, which admittedly does not have any approval or recognition from Pharmacy Council of India under Section 12 of the Act, 1948.

22. It has been vehemently argued by learned counsel for the petitioners that once

a University is recognized under Section 2 (f) of the University Grants Commission Act, 1956, it has right to confer degrees under Section 22 of the UGC Act. Section 2 (f) and Section 22 of the the University Grants Commission Act, 1956, are reproduced below:-

"2(f) "University" means a University established or incorporated by or under a Central Act, a Provisional Act or a State, and includes any such institution as may, in consultation with the University concerned, be recognised by the Commission in accordance with the regulations made in this behalf under this Act.

22. Right to confer degrees.- (1)
The right of conferring or granting degrees shall be exercised only by a University established or incorporated by or under a Central Act, a Provisional Act or a State Act or an institution deemed to be a University under section 3 or an institution specially empowered by an Act of Parliament to confer or grant degrees.

(2) Save as provided in sub-section (1), no person or authority shall confer, or grant, or hold himself or itself out as entitled to confer or grant, any degree.

(3) For the purpose of this section, "degree" means any such degree as may, with the previous approval of the Central Government, be specified in this behalf by the Commission by notification in the Official Gazette."

23. From the aforesaid provisions of the UGC Act, it is crystal clear that a University recognized under Section 2 (f) of the UGC Act, has a right to confer and

award degrees but for the purposes of registration as pharmacist in the State Register maintained by the Pharmacy Council of a State, such degree/course must be an approved course under Section 12 of the Pharmacy Act.

24. Learned Counsel for the petitioner has heavily relied upon the judgment of Hon'ble Supreme Court in case of **Bharatidassan University (Supra)** and contended that a University is not required to seek any approval for initiating course in the field of pharmacy. We have gone through the aforesaid judgment. The aforesaid judgment is primarily on the issue of applicability of the All India Council for Technical Education Act, 1987 and Section 2 (h) of the AICTE Act specifically excludes the University from its ambit. Therefore, the said judgment has no relevance for the purpose of the instant case. Reliance placed by the learned counsel for the petitioner in the case of **Yashraj Institute of Professional Studies v. Indian Nursing Council, New Delhi [2022 (1) ADJ 326]** has no application on the facts of the case.

25. Sub-section (2) of Section 12 of the Act mandates every authority in state which conducts an examination in pharmacy, to apply for approval of the examination from the Pharmacy Council of India as per the scheme of the Act. Since University in our considered view is also covered under the phrase "any authority in a State" therefore, a University is not exempt from seeking approval from the Pharmacy Council of India to conduct an examination in pharmacy. Therefore, diploma in pharmacy awarded by the Singhanian University which admittedly does not have any approval from the Pharmacy Council of India, therefore, it is

not an approved qualification for the purposes of registration of the petitioners as pharmacists in the State Register under the Act after the Education Regulations, 1991, came into force.

26. In the case of **Dr. S.K. Toshniwal Educational Trust Vidarbha Institute of Pharmacy and Others (Supra)** while dealing with the conflict of applicability of the AICTE Act, 1987 and the Pharmacy Act, 1948, the Hon'ble Supreme Court has categorically held as under:-

11. As observed hereinabove, the issue involved in the present batch of cases is regarding the applicability of the Pharmacy Act, 1948 or the AICTE Act, 1987 in relation to subject of pharmacy including the approval of courses of study, minimum standards of education required for qualification as a pharmacist, registration as a pharmacist, regulation of future professional conduct etc. In other words, the question is as to whether the mandate of the PCI or that of the AICTE would prevail on the question of granting approval and related matters to any institution for conducting pharmacy education course, if there is any conflict/contradictions in the opinions of these two bodies. The issue is as to which body, i.e. AICTE or PCI would primarily be responsible for regulation of pharmaceutical regulation in India.

12. While answering the issues/questions involved in the present batch of petitions, first of all, what is required to be considered is whether the Pharmacy Act which is a prior Act to that of AICTE Act can be said to be a special Act with special provisions in the field of Pharmacy? The Statement of Objects and Reasons for the Pharmacy Act is as under:

“It is desirable that, as in most other countries, only persons who have attained a minimum standard of professional education should be permitted to practise the Profession of Pharmacy. It is accordingly proposed to establish a Central Council of Pharmacy, which will prescribe the minimum standards of education and approve courses of study and examinations for Pharmacists, and Provincial Pharmacy Councils, which will be responsible for the maintenance of provincial registers of qualified pharmacists. It is further proposed to empower Provincial Governments to prohibit the dispensing of medicine on the prescription of a medical practitioner otherwise than by, or under the direct and personal supervision of, a registered pharmacist.”

12.5. Thus, considering the various provisions of the Pharmacy Act and the regulations made therein, it can be said that the Pharmacy Act is a complete code in itself in the subject of pharmacy. The PCI has been constituted as a body empowered to regulate the education and profession of pharmacy in India. It cannot be disputed that the subject of pharmacy is a special and not a general subject. From the relevant provisions of the Pharmacy Act, more particularly, the provisions referred to hereinabove, the Pharmacy Act exclusively covers all areas inclusive of approval of courses, laying down course content, eligibility conditions for students as well as teachers, evaluation standards of examination, grant of registration, entry of higher qualifications in the same discipline, taking action for infamous conduct etc. It also contains a penal provision. Thus, the legislative intent in enacting the Pharmacy Act seems to be to ensure that there is seamless regulation of the profession. To

carry out the objective and purpose for enacting the Pharmacy Act, the Legislature has established under the Statute the autonomous statutory authority i.e. Pharmacy Council of India. Thus it can be said that in the field of pharmacy, the Pharmacy Act is a special law.

13. Now having held that the Pharmacy Act is a special Act dealing with the special subject of pharmacy, the next question which is posed for consideration of this Court is whether in the field of pharmacy, the Pharmacy Act would prevail or the AICTE Act? The next question is whether in the profession of pharmacy, the PCI shall have the exclusive jurisdiction or the AICTE?

14. Applying the law laid down by this Court in the aforesaid decisions and as observed hereinabove, the Pharmacy Act is a Special Act in the field of pharmacy and it is a complete code in itself in the field of pharmacy, the Pharmacy Act shall prevail over the AICTE Act which, as observed hereinabove, is a general statute dealing with technical education/institutions. Therefore, the submission on behalf of AICTE and/or concerned educational institutions that the AICTE Act is a subsequent law and in the definition of “technical education” it includes the “pharmacy” and therefore it can be said to be an “implied repeal”, cannot be accepted. At this stage, it is required to be noted that as such in the AICTE Act there is no specific repeal of the Pharmacy Act, more particularly when, as observed hereinabove, the Pharmacy Act is a Special Act and the subsequent enactment of AICTE Act is general and therefore the Pharmacy Act being a Special Act must prevail. Apart from that, with regard to several aspects, there is no provision made

in AICTE Act which are exclusively within the domain of PCI. Thus, it cannot be accepted that there is 'implied repeal' of the Pharmacy Act.

*17. We are in complete agreement with the view taken by this Court in Shri Prince Shivaji Maratha Boarding House's College of Architecture. Otherwise on merits also, as observed and held hereinabove, **the Pharmacy Act which is a Special Act in the field of pharmacy shall prevail and consequently so far as the recognition of degrees and diplomas of pharmacy education is concerned, the Pharmacy Act shall prevail.** As observed hereinabove, PCI constituted under the provisions of the Pharmacy Act which is consisting of the experts in the field of pharmacy and/or related subjects shall prevail. **Consequently, the norms and regulations set by the PCI and other specified authorities under the Pharmacy Act would have to be followed by an institution imparting education for degrees and diplomas in pharmacy.***

20. In view of the above and for the reasons stated above, it is held that in the field of Pharmacy Education and more particularly so far as the recognition of degrees and diplomas of Pharmacy Education is concerned, the Pharmacy Act, 1948 shall prevail. The norms and regulations set by the PCI and other specified authorities under the Pharmacy Act would have to be followed by the concerned institutions imparting education for degrees and diplomas in pharmacy, including the norms and regulations with respect to increase and/or decrease in intake capacity of the students and the decisions of the PCI shall only be followed by the institutions imparting degrees and diplomas in Pharmacy. The questions are answered accordingly.

27. In view of the categorical provisions of Section 10, 11, 12, 30, 31 & 32 of Act, 1948 and

*the law laid down by the Hon'ble Supreme Court in **Dr. S.K. Toshniwal (Supra)**, we are of the considered view that the Pharmacy Act, being special legislation governing the field of pharmacy shall prevail over any other general law for the purpose of registration of the candidates as Pharmacist in the State Register and consequently, in the Central Register. Therefore, any degree obtained by the petitioners which has no approval of the Pharmacy Council of India in terms of Section 12 of the Pharmacy Act would not entitle them for their registration in the State Register maintained under Section 31 of the Pharmacy Act. **Thus, the question no. 2 is also answered in negative and we hold that the Singhania University, which is recognized under Section 2 (f) of the UGC Act, 1956, is required to take approval/recognition for awarding diploma in pharmacy under Section 12 of the Act, 1948 from the Pharmacy Council of India for making such Diploma in Pharmacy to be the approved qualification for the purposes of registration of such diploma holder in the State Register.***

28. For all the reasons aforesaid, we do not find any merit in the writ petitions. Consequently, all the writ petitions are dismissed.

(2023) 7 ILRA 908
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Misc. Writ Petition No. 18229 of 2022

Dr. B.K. Yadav @ Biplav Kumar Yadav
...Petitioner

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

Counsel for the Petitioner:

Sri Satyendra Kumar Singh

Counsel for the Respondents:

G.A.

Petitioner is the Care taker of the Hospital- he diagnosed the informant's son suffering from Hernia and advised surgery-due to negligence on the part of the doctors- without seeking the written consent from the parents/natural guardian operated the child, who died during treatment-Petitioner being a care taker- was supposed to be responsible for providing medical care- -investigation is at the inceptive stage-Material has to be collected whether the offence is culpable or is a case of gross negligence- criminal prosecution cannot be thwarted as from a bare reading of the FIR- the allegations disclose commission of a cognizable offence.

W.P. dismissed. (E-9)**List of Cases cited:**

1. Dr. P. Kumar VS St. of U.P. Vs & anr. reported in 2016 Vol. 0, Supreme Court (All), 252

2. Jacob Mathew Vs St. of Punj. & anr. reported in 2005(5) Supreme 297

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard learned counsel for the petitioner, learned A.G.A. for the State and perused the record.

2. The writ petition seeks quashing of the F.I.R. dated 03.07.2020 giving rise to Case Crime No.33 of 2020, under Section 304 I.P.C., Police Station- Lalpur Pandeypur, District Varanasi.

3. The allegations against the petitioner is that the petitioner is the Care taker of the Medicity Neuro & Critical Care

Hospital, Varanasi, who diagnosed the informant's son suffering from Hernia and advised surgery. The informant deposited a sum of Rs. 48,000/- for the treatment. However, due to negligence on the part of the doctors who without seeking the written consent from the parents/natural guardian operated the child, who died during treatment.

4. The main contention raised by learned counsel for the petitioner is that the petitioner did not operate the informant's son and is merely the Care taker of the aforesaid hospital. The petitioner has been falsely implicated for ulterior purposes. The counsel for the petitioner to support his submissions has relied the judgment and order passed in **Dr. P. Kumar VS. State of U.P. And Another reported in 2016 Vol. 0, Supreme Court (All), 252** stating that the medical practitioner should not be prosecuted in every such case where due to critical condition a patient expires. Further, it has been asserted that the Supreme Court has laid down the guidelines with regard to the cases of medical negligence and has issued direction that *in such cases the matter should first be referred to a competent doctor or committee of doctors specialist in the relevant field and when such a doctor or committee reports that there is prima facie case of medical negligence, only then notice should be issued to the doctor or hospital concerned. Courts or consumer courts are not experts in medical science and therefore they should not substitute their own views over that of specialists. The Supreme Court has also warned the police officers against arresting or harassing the doctors unless the facts clearly come within the parameters laid down in Jacob Mathew's case. Observing that the law is a watchdog and not a bloodhound, the Supreme Court*

has held that the doctors doing duty with reasonable care would not incur liability even if their treatment failed. Harm resulting from mischance or misadventure or through an error of judgment would not necessarily attract such liability. Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightaway liable for medical negligence.

5. Per contra, learned A.G.A. for the State has asserted that the petitioner diagnosed and advised surgery to the informant's son suffering from Hernia. The gross negligence on the part of the petitioner is that the surgery/operation took place without seeking consent of the natural guardian/father/first informant of the deceased, who was available at the time of the incident. The consent letter annexed as Annexure No. SA-1 of the Supplementary Affidavit indicates that the said consent has been procured from the uncle Manish and the grand-mother Sita Devi. Despite the natural guardian being present at the place of incident as is evident from the FIR, the petitioner did not care to seek the consent from the father/informant.

6. From the bare reading of the First Information Report, it is apparent that the son of the first informant died during the treatment/surgery undergone for Hernia. The impugned First Information Report has been registered under Section 304 IPC and the petitioner being a care taker was supposed to be responsible for providing medical care. The contention of the learned counsel for the petitioner that he is a care taker, is merely his defence, which is not to be considered in a writ petition which seeks quashing of the FIR. The investigation is at the inceptive/nascent stage. Material has to

be collected whether the offence is culpable or is a case of gross negligence. It is too early to conclude whether the petitioner could avail and seek the protection in the light of the guidelines/parameters as laid down by the Hon'ble Supreme Court in **Jacob Mathew Vs. State of Punjab & Another** reported in **2005(5) Supreme 297**, in regard to medical negligence. The criminal prosecution cannot be thwarted as from a bare reading of the FIR, the allegations disclose commission of a cognizable offence.

7. No interference is required.

8. The writ petition is, therefore, *dismissed*.

(2023) 7 ILRA 910

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 22.05.2023

BEFORE

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

Second Appeal No. 337 of 1998

Munni Lal

...Appellant

Versus

Mohd. Rafik Kidwai & Anr.

...Respondents

Counsel for the Appellant:

Sri M.S. Pipersenia, Sri Shiv Kumar Singh

Counsel for the Respondents:

Sri A.D. Saundars, Sri S.K. Tiwari, Sri Sundama Ji Shandiyia

Civil Law-The Code of Civil Procedure, 1908-Section 100-Second Appeal---Suit for cancellation of sale deed dismissed, appeal allowed--- Trial Court from all this evidence has concluded that once it was admitted to the plaintiff that the Sub-Registrar before registering the document had read it out

to her and the Sub-Registrar had not pressurized her into thumb marking it or make her mark it forcibly, if there was an unpaid sale consideration of Rs.6000/- by the defendant, the plaintiff could have refused to thumb mark the document. The Trial Court has also noticed that PW-2 also acknowledged the fact that the Sub-Registrar read out the document before registering it and also the fact that it said that Rs.6000/- were received by the plaintiff as an advance, but the witness still appended his signatures to the document--- The finding of the Lower Appellate Court ignores the fact that DW-3 who is a witness of the transaction, was produced before the Court and testified to it. His testimony has been noticed by the Trial Court to return findings on the point of payment of Rs.6000/- by way of earnest. Those findings have been recorded based on DW-3's testimony in the defendant's favour. The Lower Appellate Court has not reversed that finding by the Trial Court in the defendant's favour. Rather, the Lower Appellate Court has ignored the testimony of DW-3 holding that this witness was never produced by the defendant---The findings recorded by the Lower Appellate Court are ones that set aside the findings recorded by the Trial Court upon the most crucial issue without consideration of the most material evidence on record---The judgment of reversal written by the Lower Appellate Court cannot be sustained.

(Para 55, 63 & 64)

Second appeal allowed. (E-15)

List of Cases cited:

1. Vidhyadhar Vs Manikrao & anr., (1999) 3 SCC 573
2. Dahiben Vs Arvindbhai Kalyanji Bhanusali (Gajra) Dead through Legal Representatives & ors., (2020) 7 SCC 366
3. Kewal Krishan Vs Rajesh Kumar, AIR 2022 SC 564
4. Baijnath Singh Vs Paltu, (1908) ILR 30, Allahbad 125
5. Chandrashankar Manishankar Vs Abhla Mathura & ors., AIR 1952 Bombay 56,

6. Sukaloo & anr.Vs Punau, AIR 1961 MP 176

7. Kaliaperumal Vs Rajagopal & anr., (2009) 4 SCC 193

8. Raj Dutt & ors. Vs Nageshwar & ors., 2019 (9) ADJ 252

9. Janak Dulari Devi & anr.Vs Kapildeo Rai & anr., (2011) 6 SCC 555

10. Ganga Saran Vs Civil Judge, Hapur, Ghaziabad and other, AIR 1991 All 114,

11. Raman Gopi & anr.Vs Kunju Raman Uthaman, 2011 SCC OnLine Ker 4028

12. D.V. Lakshmana Rao Vs St. of Karn. & ors., 2000 SCC OnLine Kar 775

13. Ramkumar Rajak Vs Smt. Geetadevi Gupta & ors., F.A. No.345 of 2019, decided on 20.03.2023

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

This is a defendant's second appeal, arising out of a suit for cancellation of sale deed.

2. Original Suit No.168 of 1983 was instituted by Smt. Jinnat against Munni Lal, seeking a decree for cancellation of a registered sale deed dated 11.10.1982. The suit aforesaid was instituted in the ex-Court of Munsif, Mauranipur, Jhansi, now re-designated as the Civil Judge (Jr. Div.).

3. Smt. Jinnat was the original plaintiff and died pending suit. She was substituted by her heirs and L.Rs. before the Trial Court, who are the plaintiff-respondents here. According to the original plaintiff, Smt. Jinnat, she was an old and illiterate woman, a poor widow, and a native of Village Ranipur, Tehsil Mauranipur, District Jhansi. She was, at the relevant time, living in Village Ladwari,

Tehsil Niwari, District Teekamgarh (Madhya Pradesh), where she was employed in the Public Works Department. She was bhumidhar in the possession of Plot Nos.1238/1/1-52, 1238/2/0-09, 1239/0-11, 1237/1/0-25, 1237/2/0-02 and 1247/1/0-14, all situate at Village Bamhaura Sohagi, Tehsil Mauranipur, District Jhansi. Smt. Jinnat, represented by her heirs and LRs, shall hereinafter be referred to as 'the plaintiff' unless the context requires individual or a different reference. According to the plaintiff, she entered into a bargain with the defendant to sell her bhumidhari land above described (for short, 'the suit property'). The bargain was made between the plaintiff and Munni Lal son of Ghanshyam, the sole defendant, for a total sale consideration of Rs.7000/-.

4. It is the plaintiff's case that parties agreed that the entire sale consideration of Rs.7000/- would be paid at the time of registration of the sale deed before the Sub-Registrar in his office, situate at Mauranipur. It is the plaintiff's case that Munni Lal, who is now represented on record of this appeal by his heirs and LRs, respondent Nos.1/1, 1/2, 1/3, 1/4 and 1/5, and referred hereinafter, for the sake of convenience, as 'the defendant', was a headstrong, vicious and deceitful man. He took the plaintiff along to Tehsil Mauranipur on 11.10.1982 in connection with the execution and registration of the covenanted sale deed. The defendant purchased the requisite stamp papers. The defendant colluded with the scribe, Laxmi Prasad, instructing him to scribe the deed of sale. However, despite demand by the plaintiff, at that time to pay the agreed sale consideration of Rs.7000/-, the defendant did not pay anything. He said that the entire sale consideration would be paid to her before the Sub-Registrar. On the said

pretext, the defendant along with scribe and the witnesses, all of whom were in collusion with the defendant, took along the plaintiff to the Sub-Registrar's office. When the plaintiff, the defendant, the scribe and witnesses entered the Sub-Registrar's office, the Sub-Registrar, the scribe and the witnesses, with whom the defendant was in collusion, put pressure on the plaintiff to thumb mark the deed. Thereupon, the plaintiff told the Sub-Registrar that she had agreed to sell her property for a sum of Rs.7000/-, which she should be paid. Upon this, the Sub-Registrar assured the plaintiff that the defendant would be shortly paying her the due sale consideration. It is pleaded that to give effect to the contemplated fraud, the defendant kept counting currency in the Sub-Registrar's presence, but paid her a sum of Rs.1000/- alone.

5. It is the plaintiff's case that she repeatedly said that until she received the entire sale consideration of Rs.7000/-, she would not thumb mark the document. But, no one paid heed to the plaintiff and deliberately ignoring it, the scribe, the witnesses, the defendant and a colluding Sub-Registrar, forcibly made her thumb mark the document. Despite the plaintiff beseeching the defendant to pay the balance sale consideration of Rs.6000/-, she was not paid anything. It is averred in the plaint that the plaintiff repeatedly requested the defendant, the witnesses and the Sub-Registrar, including the scribe to give her, her due, but all of them, who were in collusion, laughed it off saying that the registration of the document was complete and nothing was due. The plaintiff did not receive a single rupee beyond Rs.1000/-. The plaintiff did not, thus, receive the agreed sale consideration and by defrauding her, she was made to execute and get registered the impugned sale deed.

Therefore, on the same day and immediately, the plaintiff proceeded to Police Station Mauranipur and lodged a First Information Report, giving rise to Crime No.158 of 1982, under Sections 420, 218, 167 IPC, Police Station Mauranipur, District Jhansi. Soon after registration of the crime, the Police, on the basis of the FIR, held inquiry and finding substance therein, arrested the defendant. The defendant was produced before the Judicial Magistrate, Mau Garautha, where the case is pending. The sale deed was impugned as one secured by the defendant capitalizing on the plaintiff's helplessness and practicing fraud, which is not binding upon her.

6. The plaintiff asserted that she continues to be in cultivatory possession of the suit property and the defendant has no connection therewith. The plaintiff never delivered possession of the suit property pursuant to the impugned sale deed. The sale deed was sham and would not affect the plaintiff's rights in future. It was also averred that the cause of action had arisen so that in future, the bogus sale deed may not be misutilized by the defendant to adversely affect the plaintiff's rights to the suit property. It is on the foundation of the aforesaid facts that the suit was instituted, seeking cancellation of the impugned sale deed dated 11.10.1982.

7. A written statement was filed on behalf of the defendant generally denying the plaintiff's allegation. In the additional pleas, it was averred that the suit has been brought on incorrect facts to harass the defendant. According to the defendant, the plaintiff's case, that it had been compacted between parties that the entire agreed sale consideration of Rs.7000/- would be paid at the time of registration of the deed before

the Sub-Registrar, is incorrect. Instead, the parties had bargained a sale of the suit property comprising the plaintiff's share in the plots, admeasuring a total of 2.13 acres for a sum of Rs.7000/-. At the time when the parties bargained, the defendant paid the plaintiff a sum of Rs.6000/- in earnest, leaving the balance of the agreed sale consideration in the sum of Rs.1000/- to be paid before the Sub-Registrar, when the document duly executed was presented for registration.

8. It is also averred that since the sale deed was to be executed within two days of the aforesaid bargain, neither the bargain was reduced to writing in the form of a contract nor the payment of earnest made through a written document/ receipt. The scribe, Laxmi Prasad was chosen by the plaintiff herself and it was upon her instructions that he scribed the sale deed. It was denied that she demanded, at the time of execution of the sale deed, the sum of Rs.7000/-, or that the defendant said in answer to her demand that he would pay the entire sum before the Sub-Registrar. No question arose of paying the sum of Rs.7000/- before the Sub-Registrar, because the plaintiff had already received, out of the agreed sale consideration, a sum of Rs.6000/- as earnest with a balance of Rs.1000/- only to be paid before the Sub-Registrar at the time of registration of the document. It is for the said reason that before the Sub-Registrar, Mauranipur, the plaintiff accepted the sum of Rs.1000/- willingly and got the sale deed dated 11.10.1982 registered, followed by delivery of possession of the suit property to the defendant.

9. The plaintiff's case that she is still in bhumidhari possession of the suit property on the spot is based on falsehood

and concoction. Since the date of the sale deed, it is the defendant, who is in cultivatory possession of the suit property. He has given the suit property on a crop sharing basis and irrigating the fields, utilizing the Kachner Minor Canal. The defendant has irrigation slips indicating payment of the irrigation charges. Further in the defendant's written statement, the plaintiff's case of a collusion between the plaintiff's deed writer, the witnesses and the Sub-Registrar has been denied as also the case that they forced the plaintiff to thumb mark the document. It is also pleaded that the plaintiff's case that when she asked the Sub-Registrar that the defendant be required to pay the sale consideration of Rs.7000/-, the Sub-Registrar assured that the defendant is shortly paying her, is incorrect. There was no occasion for the payment of a sum of Rs.7000/- before the Sub-Registrar, because the plaintiff had already received a sum of Rs.6000/- in earnest, leaving a balance of Rs.1000/- alone to be paid. It is the balance that was paid before the Sub-Registrar, which the plaintiff accepted willingly.

10. It is also denied that the defendant got the plaintiff to thumb mark the sale deed forcibly in collusion with the Sub-Registrar. The Sub-Registrar, according to the defendant, read out the contents of the sale deed, in the presence of the witnesses, to the plaintiff and also made her understand it. After understanding the contents of the document, she put her mark to it for the purpose of registration. It is averred that the Sub-Registrar asked the plaintiff if she had received a sum of Rs.6000/- as earnest, to which the plaintiff said that she had received Rs.6000/- and now Rs.1000/- were due. The defendant paid before the Sub-Registrar a sum of Rs.1000/- to the plaintiff. After receiving

the balance of Rs.1000/-, the plaintiff put her mark to the document. It has been denied that the plaintiff ever demanded a sum of Rs.7000/- before the Sub-Registrar or that all of them laughed off the demand, the fraud being perfected through registration of the deed.

11. It is pleaded in Paragraph No.19 of the written statement that the plaintiff has reported the defendant to the Police on account of some men hostile to the defendant prompting her to do so. It is also averred that it is incorrect to say that a case on the basis of the FIR is pending before the Judicial Magistrate, Mau Garautha under Sections 420, 218, 167 of the Penal Code. No prosecution was ever launched against the defendant on the basis of the plaintiff's report, because the defendant never defrauded the plaintiff. It is also the defendant's case that the plaintiff's assertion that she is in possession of the suit property is incorrect. Rather, the defendant is in possession thereof since the date the sale deed was executed in his favour. The defendant employs labourers to carry on farming on the suit property. The plaintiff has no connection with the suit property any longer. The defendant also said that the suit is undervalued and the court-fee paid insufficient, because the suit is one for cancellation, where the suit should have been valued at the market value of the suit property and the court-fee paid ad valorem.

12. The defendant applied for mutation on the basis of the sale deed, but the plaintiff, out of ill-motive, objected to the mutation and the matter is currently pending before the Settlement Officer of Consolidation, Jhansi. There is a specific plea in Paragraph No.23 of the written statement to the effect that before the sale deed was executed, the plaintiff took

permission of the Consolidation Officer and then proceeded to execute the sale deed, accepting the settled sale consideration. It is on these pleas that the defendant said that the suit ought to be dismissed with special cost.

13. Based on the pleadings of parties, the following issues were struck (translated from Hindi to English):

“1. Whether the defendant got the sale deed, relating to the land in dispute, executed by the plaintiff on the basis of deceit, without paying her the agreed sale consideration? If yes, its effect?

2. Whether the sale deed executed in favour of the defendant is valid?

3. Whether the plaintiff is in possession over the land in dispute?

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

5. To what relief is the plaintiff entitled?”

14. Issue No.4 was decided as a preliminary in terms of the order dated 02.07.1985, which was made part of the judgment. Apparently, there is no issue about undervaluation or insufficiency of court-fee decided against the plaintiff. The Trial Court took up Issues Nos.1 and 2 together and upon an appraisal of the entire evidence on record, meticulously considering the testimony of witnesses and the documentary evidence, including the sale deed and the Registrar's endorsement thereon, held on both issues against the plaintiff and in favour of the defendant. Issue No.3 was also answered in favour of the defendant and against the plaintiff. In consequence of the findings on Issues Nos.1, 2 and 3, Issue No.5 was answered in favour of the defendant and against the

plaintiff. The result was that the suit was ordered to be dismissed with costs by the learned Trial Judge vide judgment and decree dated 02.09.1994.

15. The plaintiff appealed the decree to the District Judge of Jhansi vide Civil Appeal No.134 of 1994. The appeal upon assignment came up for hearing before the Second Additional District Judge, Jhansi on 18.12.1997. The learned Judge allowed the appeal, set aside the decree of the Trial Court, which he reversed and decreed the suit, ordering cancellation of the impugned sale deed. An intimation of the cancellation was directed to be sent to the Sub-Registrar for necessary action.

16. Aggrieved, the defendant has appealed to this Court under Section 100 of the Code of Civil Procedure, 1908.

17. The appeal was entertained by this Court vide order dated 19.03.1998. It was not admitted to hearing, but notice pending admission was issued and the lower court records summoned. An interim injunction was granted, directing parties to maintain status quo with regard to possession, condition and nature of the suit property. Much later, when the appeal came up for admission on 21.04.2022, it was admitted to hearing on the following substantial questions of law:

(1) Whether on a case that the price set forth in a registered sale deed has not been paid to the vendor by the vendee, a decree for cancellation can be passed?

(2) Whether a case for cancellation, not being made out on account of unpaid price stated to be paid in the sale deed, but proved not to be paid, entitles the Court to pass a decree for recovery of the unpaid price?

18. The appeal was heard on 27.04.2022 and judgment reserved.

19. This Court felt that there was some clarification required with regard to the testimony of DW-3 that the Lower Appellate Court had omitted to consider as non-existent. The appeal was, therefore, posted for further hearing and the following substantial question of law considered imperative was formulated vide order dated 24.11.2022:

(3) Whether the Appellate Court has set aside the findings recorded by the Trial Court upon consideration of the evidence on record, while writing a judgment of reversal?

20. The appeal was again heard on 24.11.2022 and judgment reserved.

21. Heard Mr. M.S. Pipersenia, learned Counsel for the defendant and Mr. A.D. Saundars, learned Counsel appearing for the plaintiff.

22. It would be convenient to answer Substantial Questions of Law Nos.1 and 2 together, as the proposition involved in the first, if answered one way, would lead to the other not requiring consideration at all.

23. Mr. M.S. Pipersenia, learned Counsel for the defendant submits that the effect of non-payment of consideration set out in the sale deed does not render the transaction void, but, if proven to be indeed not paid to the vendor, would at best entitle him to recovery of price – the whole if unpaid, or a part thereof, that remains unpaid. In support of his submission, Mr. Pipersenia has placed reliance upon the decisions of the Supreme Court in

Vidhyadhar v. Manikrao and another, (1999) 3 SCC 573 and Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) Dead through Legal Representatives and others, (2020) 7 SCC 366. He has invited the attention of the Court to the provisions of Sections 54, 55 and 58 of the Transfer of Property Act, 1882 (for short, 'the Act of 1882') to advance his submission that non-payment of price, even if proved, does not lead to avoidance of the conveyance. It may entitle the plaintiff to sue for price and recover it.

24. Mr. A.D. Saundars, learned Counsel for the plaintiff, on the other hand, says that the price set forth in the sale deed constitutes the consideration for the underlying contract, to which the sale deed is a super-added conveyance. He submits that if payment of price is postponed to a future date, the sale deed would be valid, but if it is shown in the deed to be paid in presenti but not actually paid, the deed would be void. In support of this submission, Mr. Saundars placed reliance upon the authority of the Supreme Court in **Kewal Krishan v. Rajesh Kumar, AIR 2022 SC 564.**

25. This Court has keenly considered the submissions advanced by learned Counsel on both sides and perused the record.

26. For the purpose of answering the first substantial question of law, this Court assumes that the finding of fact returned by the Lower Appellate Court to the effect that out of the agreed sale consideration of Rs.7000/-, Rs.1000/- alone was paid by the defendant is correct. Section 54 of the Act of 1882, which occurs in Chapter III providing for sales of immovable property, defines 'Sale' as follows:

"54. "Sale" defined.—"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.—Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.—A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

27. Section 55 of the Act of 1882 lays down the rights and liabilities of the buyers and the sellers. In that context, Section 55(4)(b) is relevant. Quoted meaningfully, Section 55(4)(b) provides:

"55. Rights and liabilities of buyer and seller.—In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

- (1) x x x
- (2) x x x
- (3) x x x
- (4) The seller is entitled—
- (a) x x x

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered.

(5) x x x

(6) x x x"

28. This question fell for consideration before the Supreme Court in **Vidhyadhar** (supra). It arose out of a suit for redemption of mortgage by conditional sale or in the alternate, a decree for specific performance of contract for repurchase. The suit was decreed by the Trial Court and the decree was upheld by the Lower Appellate Court. The High Court, however, set aside the decree. The issue in the case appeared to be between the plaintiff and defendant No.1 to the suit, the said defendant contesting the suit with a case that the document in his favour was not a mortgage by conditional sale, but a sale and since the amount of consideration had not been tendered within time stipulated, the plaintiff could not claim re-conveyance of the property. On facts, the suit property, that was land, appeared to have been mortgaged by defendant No.2 with defendant No.1 for Rs.1500/-. Defendant No.2 had transferred the property in favour of the plaintiff for a sum of Rs.5000/- by a registered sale deed, entitling the plaintiff to exercise his equity of redemption against defendant No.1. The suit for redemption was decreed in favour of the plaintiff upon payment in Court of the sum of Rs.1500/- together with all interest accrued. The decree carried all necessary directions, such

as the defendant being required to bring into Court all documents in his possession or power relating to the suit property and delivering those documents to the plaintiff. There were other directions for reconveyance of the suit property issued to defendant No.1 and delivery of possession etc. The decree aforesaid was affirmed in appeal. In second appeal, the High Court was, however, of opinion that out of the sum of Rs.5000/-, for which the sale deed was executed, a sum of Rs.500/- alone was paid by the plaintiff, apparently to defendant No.2 before the Sub-Registrar and the rest was not paid. The High Court also held that the document that was executed by defendant No.2 in favour of defendant No.1 was a 'kararkharedi'. It was executed for the sum of Rs.1500/- by defendant No.2 in favour of defendant No.1. But in fact, it was a sum of Rs.800/-, that was paid before the Sub-Registrar. The High Court, therefore, interfered with the decree directing that the land in suit shall be restored to defendant No.2, who shall pay back a sum of Rs.800/- in installments to defendant No.1 and a sum of Rs.500/- in installments to the plaintiff. On appeal by special leave carried by the plaintiff to their Lordships of the Supreme Court, it was held:

“35. Even if the findings recorded by the High Court that the plaintiff had paid only Rs 500 to Defendant 2 as sale consideration and the remaining amount of Rs 4500 which was shown to have been paid before the execution of the deed was, in fact, not paid, the sale deed would not, for that reason, become invalid on account of the provisions contained in Section 54 of the Transfer of Property Act, 1882 which provide as under:

“54. ‘Sale’ is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.”

36. The definition indicates that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. The definition further says that the transfer of ownership has to be for a “price paid or promised or part-paid and part-promised”. Price thus constitutes an essential ingredient of the transaction of sale. The words “price paid or promised or part-paid and part-promised” indicate that actual payment of the whole of the price at the time of the execution of sale deed is not a sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs 100, the sale would be complete.

37. There is a catena of decisions of various High Courts in which it has been

held that even if the whole of the price is not paid, the transaction of sale will take effect and the title would pass under that transaction. To cite only a few, in *Gayatri Prasad v. Board of Revenue* [1973 All LJ 412] it was held that non-payment of a portion of the sale price would not affect validity of sale. It was observed that part-payment of consideration by the vendee itself proved the intention to pay the remaining amount of the sale price. To the same effect is the decision of the Madhya Pradesh High Court in *Sukaloo v. Punau* [AIR 1961 MP 176 : ILR 1960 MP 614].

38. The real test is the intention of the parties. In order to constitute a “sale”, the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in praesenti or in future. The intention is to be gathered from the recital in the sale deed, the conduct of the parties and the evidence on record.

39. Applying these principles to the instant case, it will be seen that Defendant 2 executed a sale deed in favour of the plaintiff, presented it for registration, admitted its execution before the Sub-Registrar before whom the remaining part of the sale consideration was paid and, thereafter, the document was registered. The additional circumstances are that when the plaintiff instituted a suit on the basis of his title based on the aforesaid sale deed, Defendant 2, who was the vendor, admitted in his written statement, the whole case set out by the plaintiff and further admitted in the witness-box that he had executed a sale deed in favour of the plaintiff and had also received the full amount of consideration. These facts clearly establish that a complete and formidable sale deed was executed by Defendant 2 in favour of the plaintiff and the title in the property passed to the plaintiff. The findings recorded by

the High Court on this question cannot, therefore, be upheld.

40. The judgment of the High Court on this point is also erroneous for the reason that it totally ignored the provisions contained in Section 55(4)(b) of the Transfer of Property Act which are set out below:

“55. In the absence of a contract to the contrary, the buyer and seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

(1)-(3)***

(4) The seller is entitled—

(a)***

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered.

(5)-(6)***”

41. Clause (b) extracted above provides that where the ownership of the property is transferred to the buyer before payment of the whole of the sale price, the vendor is entitled to a charge on that property for the amount of the sale price as also for interest thereon from the date of delivery of possession. Originally, there was no provision with regard to the date from which interest would be payable on the amount of unpaid purchase money. The Special Committee which suggested an amendment in this section gave the following reason:

“This clause is also silent as to the date from which the interest on the unpaid

purchase money should run. It seems fair that it should run from the date when the buyer is put in possession.”

It was on the recommendation of the Special Committee that the words “from the date on which possession has been delivered” were inserted into this clause by Section 17 of the Transfer of Property (Amendment) Act, 1929 (20 of 1929).

42. This clause obviously applies to a situation where the ownership in the property has passed to the buyer before the whole of the purchase money was paid to the seller or the vendor. What is contained in this clause is based on the English doctrine of equitable lien as propounded by Baron Rolfe in *Goode v. Burton* [(1847) 74 RR 633 : 1 Ex 189]. This clause confers statutory recognition on the English doctrine of equitable lien. As pointed out by the Privy Council in *Webb v. Macpherson* [(1903) 30 IA 238] the statutory charge under this paragraph is inflexible. The charge does not entitle the seller to retain possession of the property as against the buyer but it positively gives him a right to enforce the charge by suit. (See : *Venkataperumal Naidu v. M. Rathnasabhapathi Chettiar* [AIR 1953 Mad 821] ; *Shobhalal Shyamlal Kurmi v. Sidhelal Halkelal Bania* [AIR 1939 Nag 210 : ILR 1939 Nag 636] and *Basalingaya Revanshiddappa v. Chinnava Karibasappa* [AIR 1932 Bom 247 : 34 Bom LR 427] .)

43. In view of the above, the High Court was wholly in error in coming to the conclusion that there was no sale as only a sum of Rs 500 was paid to Defendant 2 and the balance amount of Rs 4500 was not paid. Since the title in the property had already passed, even if the balance amount of sale price was not paid, the sale would not become invalid. The property sold would stand transferred to the buyer subject

to the statutory charge for the unpaid part of the sale price.”

29. The issue again fell for consideration in **Dahiben** (supra) before the Supreme Court, where their Lordships taking note of earlier decision in **Vidhyadhar** held:

“29.8. In *Vidhyadhar v. Manikrao* [*Vidhyadhar v. Manikrao*, (1999) 3 SCC 573] this Court held that the words “price paid or promised or part-paid and part-promised” indicates that actual payment of the whole of the price at the time of the execution of the sale deed is not a sine qua non for completion of the sale. Even if the whole of the price is not paid, but the document is executed, and thereafter registered, the sale would be complete, and the title would pass on to the transferee under the transaction. The non-payment of a part of the sale price would not affect the validity of the sale. Once the title in the property has already passed, even if the balance sale consideration is not paid, the sale could not be invalidated on this ground. In order to constitute a “sale”, the parties must intend to transfer the ownership of the property, on the agreement to pay the price either in praesenti, or in future. The intention is to be gathered from the recitals of the sale deed, the conduct of the parties, and the evidence on record.

29.9. In view of the law laid down by this Court, even if the averments of the plaintiffs are taken to be true, that the entire sale consideration had not in fact been paid, it could not be a ground for cancellation of the sale deed. The plaintiffs may have other remedies in law for recovery of the balance consideration, but could not be granted the relief of cancellation of the registered sale deed. We find that the suit filed by the

plaintiffs is vexatious, meritless, and does not disclose a right to sue. The plaint is liable to be rejected under Order 7 Rule 11(a).”

30. Following the line of reasoning in **Dahiben** and referring to an old decision of our Court in **Baijnath Singh v. Paltu, (1908) ILR 30, Allahbad 125**, besides the authority of the Bombay High Court in **Chandrashankar Manishankar v. Abhla Mathura and others, AIR 1952 Bombay 56**, the decision of the Madhya Pradesh High Court in **Sukaloo and another v. Punau, AIR 1961 MP 176** and the decision of the Supreme Court in **Kaliaperumal v. Rajagopal and another, (2009) 4 SCC 193**, it was held by this Court in **Raj Dutt and others v. Nageshwar and others, 2019 (9) ADJ 252**:

“38. In the case of 'Baijnath Singh v. Paltu and others', (1908) ILR 30 Allahabad 125, Division Bench of this Court observed that if the sale-deed recites that the sale consideration was paid but it is found by the Court that no sale consideration passed, the non-payment of purchase money does not prevent the passing of the ownership of purchased property from the vendor to the purchaser and the purchaser, notwithstanding such non-payment, can maintain a suit for possession of the property.

39. In another case 'Chandrashankar Manishankar v. Abhla Mathur and others', AIR (39) 1952 Bombay 56, it was held that it may be that the recital in the document stating payment of the consideration is not true. But that does not invalidate the document. To support a sale it is not necessary that the whole of the price should be paid. The price may be paid or promised wholly or in part. it was also held that if according to the tenor of the document, the

consideration was not actually paid, but the document shows that there was an intention to pay, then in that case the document is not rendered invalid on account of the non-payment of the consideration. If, on the other hand, the intention was not to pay any consideration, then the document is of no effect.

40. In another case 'Sukaloo and another v. Punau', AIR 1961 MP 176, it was held that it is the intention of the parties which has to be looked into to decide whether the sale-deed operated as a transfer of interest from the vendor to the vendee on the date of its execution. If this was the intention, then it does not matter whether the whole of the consideration or part of it remained unpaid. Further, where a registered deed of sale purporting to operate as a conveyance on the face of it exists, the burden of proving that it was not so intended is on the party who asserts this fact.

41. A similar question came up for consideration before the Hon'ble Supreme Court in the case of 'Vidhyadhar v. Manikrao and another', (1999) 3 SCC 573. The Hon'ble Supreme Court after considering of Section 54 of the Transfer of Property Act observed that actual payment of full price at the time of execution of sale-deed is not a sine-qua-non for completion of sale. The real test of sale is intention of the parties. It was held as under :

"36. The definition indicates that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. The definition further says that the

transfer of ownership has to be for a "price paid or promised or part-paid and part-promised". Price thus constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part-paid and part-promised" indicate that actual payment of the whole of the price at the time of the execution of sale-deed is not a sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs 100, the sale would be complete.

38. The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in praesenti or in future. The intention is to be gathered from the recital in the sale-deed, the conduct of the parties and the evidence on record."

42. In another case '*Kaliaperumal v. Rajagopal and another*', (2009) 4 SCC 193, it was held as follows :

"17. It is now well-settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of the Transfer of Property Act, 1882 ("The Act", for short) defines "sale" as "a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised". If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property

has passed to the buyer before payment of the entire price, under Section 55(4)(b) of the Act."

43. Thus, what can be culled out from the aforesaid decisions that the mere fact that a sale-deed recites the payment of consideration which is not true cannot render the document invalid. To support a sale, it is not necessary that the whole of the price should be paid. The price may be paid or promised wholly or in part. If according to the tenor of the document the consideration was not actually paid, but the document shows that there was an intention to pay, then in that case the document is not rendered invalid on account of the non-payment of the consideration. On the other hand, if the intention was not to pay any consideration or the document is without any consideration, the document is of no effect. There is a distinction between a sale where the consideration is intended to be paid and is not paid, and where the consideration is not intended to be paid at all by both the parties. In the former case, the title passes to the purchaser, and in the later case though the vendor is tricked into going through the form of execution and registration of the document, the sale-deed is void as a colourable transaction. It is not necessary that the whole of the price should be paid. The price may be paid or promised to be paid wholly or in part."

31. Though there is no wholesome exception to the rule adumbrated in the above line of decisions to the effect that non-payment of price set forth in the sale deed does not ipso facto invalidate it, but entitles the vendor to a charge on the transferred property in terms of Section 55(4)(b) of the Act of 1882, yet there is some exception to this thumb rule explained by their Lordships of the Supreme Court in **Kaliaperumal** (supra),

to which this Court has made a fleeting reference in **Raj Dutt** (supra). A fuller exposition of the rule in **Kaliaperumal** can be better understood upon what their Lordships held in the entirety of it. The holding in **Kaliaperumal** reads:

“17. It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of the Transfer of Property Act, 1882 (“the Act”, for short) defines “sale” as “a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised”. If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment of the entire price, under Section 55(4)(b) of the Act.

18. Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer if payment of consideration (price) is a condition precedent for passing of the property.

19. The answer to the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or

whether they intended the transfer of the property to take place, only after receipt of the entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by Section 92 of the Evidence Act.”

32. The way this subtle exception to the general rule would work in a given case and how it would be applied, has also been spelt out in **Kaliaperumal**, where it is observed:

“20. In this case, the execution of the sale deed on 26-6-1983 is not in dispute. The said instrument was presented for registration on 21-10-1983 and registered on 26-10-1983, as the first respondent vendor appeared before the Sub-Registrar and admitted that the vendors had executed the documents, but refused to make an endorsement to that effect on the deed as the vendors had not received the balance consideration of Rs 40,000.

21. Applying the abovementioned principles to the facts of this case, we find that the parties intended that ownership of the property would be transferred to the appellant only after receipt of the entire consideration by the vendors, as a condition precedent. The operative portion of the sale deed clearly states that the vendors have agreed to receive Rs 40,000 in the presence of the Sub-Registrar on the date of the registration of the sale deed and that in consideration of payment to be so made, the property was being conveyed to the purchaser. This makes it clear that the title was intended to pass only on the payment of balance consideration of Rs 40,000 in

the presence of the Sub-Registrar. This is also supported by the evidence of DW 1 to DW 4. The Sub-Registrar has also clearly recorded that no amount was tendered or paid by the purchaser to the vendors in his presence. Therefore title in fact did not pass either on execution or registration of the sale deed.

22. There is yet another circumstance to show that title was intended to pass only after payment of full price. Though the sale deed recites that the purchaser is entitled to hold, possess and enjoy the scheduled properties from the date of sale, neither the possession of the properties nor the title deeds were delivered to the purchaser either on the date of sale or thereafter. It is admitted that possession of the suit properties purported to have been sold under the sale deed was never delivered to the appellant and continued to be with the respondents. In fact, the appellant, therefore, sought a decree for possession of the suit properties from the respondents with mesne profits. If really the intention of the parties was that the title to the properties should pass to the appellant on execution of the deed and its registration, the possession of the suit properties would have been delivered to the appellant.

23. All the three courts have also concurrently found that the appellant had pleaded a false case that he had paid a part of the balance consideration, that is, Rs 25,000 on 21-7-2003 to the respondents to enable them to purchase lorry. This case of the appellant was disbelieved by the trial court as well as the first appellate court which is the final court of facts. That finding was not challenged by the appellant before the High Court.

24. From the averments made in the plaint it is evident that the appellant was ready and willing to make payment of only Rs 15,000 and not Rs 40,000. He had never

shown his readiness or willingness to make payment of Rs 40,000 which was the balance of the consideration and which had to be paid only in the presence of the Sub-Registrar, as mentioned in the deed. Therefore, the first respondent who was present before the Sub-Registrar on behalf of the respondents on 26-10-1983, was justified in not signing or affixing his thumb mark in the endorsement of registration to be made on the deed by the Sub-Registrar.

25. Therefore, on the facts and in the circumstances of the case, we are of the considered view that the parties really intended that title of ownership to the suit properties would pass to the purchaser, only after payment of full consideration by the purchaser to the vendor as a condition precedent. Parties did not intend that there should be transfer of ownership merely on execution and registration of the deed.”

33. The rule in **Kaliaperumal** appears to be that generally ownership and title to the property would stand transferred to the vendee upon the registration of a sale deed with effect from the date of execution thereof, but as remarked there, the rule is not invariable. The true test propounded there is the intention of parties as to when title in the property would pass. Registration is prima facie proof of the vendor's intention to transfer the property, but it does not perfect the transfer if payment of consideration is intended by the parties to be essential to the passage of property from the vendor to the vendee. How that intention is to be gathered, has been explained in Paragraph No.19 of the report in **Kaliaperumal**.

34. It has been laid down that the intention is to be gathered for a first from the recitals in the sale deed. In the event the

recitals are insufficient or ambiguous, the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, of course bearing in mind the restrictions, that Section 92 of the Indian Evidence Act, 1872 places upon admission of parole evidence contrary to a written document. The rule, therefore, appears to be that if the recitals in the sale deed are clear and unambiguous, indicating an immediate intention to transfer property to the vendee, though saying that it is upon receipt of the entire sale consideration, the actual non-receipt of it, would not invalidate the sale, but entitle the vendor to recover the price, the whole or part, remaining unpaid, that is admitted or proved. However, if recitals in the sale deed do not disclose an unqualified, clear and unambiguous immediate intention by the conveyance to transfer property, but subject it to some kind of a reservation or restriction, dependent upon payment of price, or otherwise the recitals do not make it a case of the parties' intention to unconditionally and immediately transfer the property to the vendee, the conduct of parties can be looked into to gather the true intention.

35. The remarks in **Kaliaperumal** about applying the principle, where the general rule of immediate passage of title to the property conveyed would follow upon registration of the deed executed and where on a different intention discernible from the recitals in the deed, passage of title can be held dependent upon payment of consideration, are illuminating. In the said decision, the facts so far relevant, as these appear from the report, are that the sale deed carried a recital in the disposition clause that the vendors have agreed to receive Rs.40,000/- in the presence of the Sub-Registrar on the date of registration of

the sale deed and in consideration of the payment to be so made, the property was being conveyed to the purchaser. Their Lordships, therefore, remarked that the recitals made it clear that "the title was intended to pass only on the payment of balance consideration of Rs.40,000/- in the presence of the Sub-Registrar". Before the Sub-Registrar, when the sale deed was presented for registration, the vendor appeared and admitted execution of the instrument, but refused to make an endorsement about receipt of the balance consideration of Rs.40,000/-, which the vendor said he had not received. The Sub-Registrar clearly recorded that no amount was tendered or paid by the purchasers to the vendor in his presence. It was, therefore, held that title did not pass either on execution or registration of the sale deed. Some other circumstances were also noticed that are mentioned in Paragraph No.22 of the report.

36. The rule about an unqualified passage of title upon execution and registration of the sale deed and when it would not apply, that is to say, if the parties have intended differently from the express recitals in the sale deed or on account of ambiguous or insufficient recitals can, therefore, be held to be well established until the decision in **Kaliaperumal**.

37. The principle was considered further shortly after **Kaliaperumal** by the Supreme Court in **Janak Dulari Devi and another v. Kapildeo Rai and another**, (2011) 6 SCC 555. In **Janak Dulari Devi** (supra), which was a case that arose from the State of Bihar, the Court answered the questions: (i) Whether title to the property passed to the vendee on execution of the sale deed? and, (ii) Whether the vendor, on facts there, was justified in cancelling/

repudiating the sale on ground that the sale consideration was not paid? Their Lordships answered the questions bearing in mind the prevalent practice in Bihar known as “ta khubzul badlain”, translated in the report to mean ‘title to the property passing to the purchaser only when there is exchange of equivalents’. It was in that context that in Paragraph No.13 of the report in Janak Dulari Devi (supra), the exception to the rule laid down in Kaliaperual appears to be stated in rather unqualified terms, which in fact it is not. That there is no departure on principle in Janak Dulari Devi from what the law is, is evident upon a conjoint reading of Paragraphs Nos.11, 12 and 13 of the report. It would suffice to quote the observations of their Lordships in Paragraph Nos.11 and 13 of the report in Janak Dulari Devi, that read:

“11. Where the intention of the parties is that passing of title would depend upon the passing of consideration, evidence is admissible for the purpose of contradicting the recital in the deed acknowledging the receipt of consideration. In *Bishundeo Narain Rai v. Anmol Devi* [(1998) 7 SCC 498] this Court had occasion to consider the question as to when the ownership and title in a property will pass to the transferee, under a deed of conveyance. This Court observed: (SCC p. 503, para 11)

“11. ... Section 8 of the Transfer of Property Act declares that on a transfer of property, all the interests which the transferor has or is having at that time, capable of passing in the property and in the legal incidence thereof, pass on such a transfer unless a different intention is expressed or necessarily implied. A combined reading of Section 8 and Section 54 of the Transfer of Property Act suggests that though on execution and registration of

a sale deed, the ownership and all interests in the property pass to the transferee, yet that would be on terms and conditions embodied in the deed indicating the intention of the parties. It follows that on execution and registration of a sale deed, the ownership title and all interests in the property pass to the purchaser unless a different intention is either expressed or necessarily implied which has to be proved by the party asserting that title has not passed on registration of the sale deed. Such intention can be gathered by intrinsic evidence, namely, from the averments in the sale deed itself or by other attending circumstances subject, of course, to the provisions of Section 92 of the Evidence Act, 1872.”

13. Where the sale deed recites that on receipt of the total consideration by the vendor, the property was conveyed and possession was delivered, the clear intention is that title would pass and possession would be delivered only on payment of the entire sale consideration. Therefore, where the sale deed recited that on receipt of the entire consideration, the vendor was conveying the property, but the purchaser admits that he has not paid the entire consideration (or if the vendor proves that the entire sale consideration was not paid to him), title in the property would not pass to the purchaser.”

38. Mr. Saundars has drawn the attention of this Court to the very recent decision in **Kewal Krishan** (supra), in particular to the remarks in Paragraph No.15 of the report, that read:

“15.

Hence, a sale of an immovable property has to be for a price. The price may be payable in future. It may be partly paid and the remaining part can be made

payable in future. The payment of price is an essential part of a sale covered by section 54 of the TP Act. If a sale deed in respect of an immovable property is executed without payment of price and if it does not provide for the payment of price at a future date, it is not a sale at all in the eyes of law. It is of no legal effect. Therefore, such a sale will be void. It will not effect the transfer of the immovable property.”

39. He submits that the Rule stated in **Kewal Krishan**, which is a much later decision, is stated in unqualified terms and does not acknowledge the general principle that unpaid price after execution and registration of the sale deed does not invalidate the transaction, but merely creates a lien or a charge on the property sold. He submits that unless the price is made payable in future, the rule in **Kewal Krishan** would show that a sale deed relating to an immovable property, executed without payment of price is not at all a sale in the eyes of law. Indeed, that is the rule laid down in **Kewal Krishan**, which appears to be the last decision on the point by the last Judge, that is to say, the Supreme Court. No decision to the contrary has been brought to this Court's notice.

40. Mr. Pipersenia, learned Counsel for the defendant has argued that the decision in **Kewal Krishan** does not take notice of the provisions of Section 55(4)(b) of the Transfer of Property Act, which creates the unpaid price a charge on the property sold, but does not invalidate the transaction. It is further argued that the decision in **Kewal Krishan** does not take note of the earlier authorities of the Supreme Court in **Vidhyadhar, Kaliaperumal, Janak Dulari Devi**, and above all, the relatively recent decision in

Dahiben, which express a contrary view, some qualified and others unqualified.

41. Mr. Pipersenia submits that if there are conflicting decisions of the Supreme Court comprising Benches of the same strength, the decision, which appears to the High Court to have elaborately and accurately laid down the law, ought to be followed. The point of time when the decision was rendered is not decisive about its binding effect.

42. The question fell for consideration before a Full Bench of this Court in **Ganga Saran v. Civil Judge, Hapur, Ghaziabad and other, AIR 1991 All 114**, where it was held:

“6. With respect to the first question the decision of Supreme Court in the case of Qamaruddin which is later decision on one hand and decisions in Vishesh Kumar v. Shanti Prasad (Supra) and Vishnu Awatar v. Shiv Awatar (Supra) which affirm the decision of this Court in Jupiter Chit Fund (Pvt) Limited v. Dwarka Diesh (Supra) would show that there is a direct conflict on the question of maintainability of revision in High Court u/ S. 115, C.P.C. Both the judgments of the Supreme Court are by a bench consisting of two Hon'ble Judges. In such a situation the questions which arise for consideration are namely: When there is a direct conflict between the two decisions of Supreme Court rendered by Judges of equal strength, which of them should be followed by the High Court and whether later decision of the Supreme Court has effect of overruling the earlier decision of the Supreme Court?

7. One line of decision is that if there is a conflict in two Supreme Court decisions, the decision which is later in point of time would be binding on the High

Courts. The second line of decisions is that in case there is a conflict between the judgments of Supreme Court consisting of equal authorities, incidence of time is not a relevant factor and the High Court must follow the judgment which appears to lay down law elaborately and accurately.

8. Similar situation arose before a Full Bench of Punjab and Haryana High Court in the case of *M/s Indo Swiss Time Limited, Dundahera v. Umrao*, AIR 1981 Punj and Har 213. What the Full Bench in the said case held is extracted below (at pp. 219-220 of AIR) :

"Now the contention that the latest judgment of a co-ordinate Bench is to be mechanically followed and must have pre-eminence irrespective of any other consideration does not commend itself to me. When judgments of the superior Court are of co-equal Benches and therefore, of matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is manifest that when two directly conflicting judgments of the superior Court and of equal authority are extant then both of them cannot be binding on the courts below. Inevitably a choice, though a difficult one, has to be made in such a situation. On principle it appears to me that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of coequal Benches of the Superior Court are earlier later is a consideration which appears to me as hardly relevant."

This decision was followed by the Bombay High Court in the case of *Special Land Acquisition Officer v. Municipal Corporation*, AIR 1988 Bombay 9. The majority of Judges in the Full Bench held

that if there was a conflict between the two decisions of equal benches which cannot possibly reconcile, the courts must follow the judgment which appear to them to state the law accurately and elaborately. We are in respectful agreement with the view expressed by the Full Bench of Punjab and Haryana High Court in the case of *M/s Indo Swiss Time Limited v. Umrao*, (AIR 1981 Punj and Har 213) (Supra) especially when the Supreme Court while deciding *Qamaruddin's case* (1990 All WC 308) (Supra) did not notice the U. P. amendment to S. 115, C.P.C. and earlier decision of the Supreme Court. In the light of the view expressed in this case it is to be examined as to which of the case decided by the Supreme Court lays down the law accurately. As noticed earlier the U.P. Amendment Act No. XXXI of 1978 amended S. 115 of Code of Civil Procedure. By virtue of this amendment, revision u/S. 115, S.P.C. did not lie to the High Court against the appellate or revisional order passed by the District Court where the valuation of the suit is less than Rs. 20,000/-. This amendment came up for consideration in *M/s Jupiter Chit Fund (Pvt) Ltd. v. Dwarka Diesh*, (AIR 1979 All 218) (FB) (Supra) and it was held that S. 115, C.P.C. as amended by U.P. Amendment Act assigns mutually exclusive jurisdiction to the High Court and district Court. This full bench decision was affirmed by Supreme Court in its two decisions namely in the cases of *Vishesh Kumar v. Shanti Prasad*, (AIR 1980 SC 892) and *Vishnu Awatar v. Shiv Awatar* (AIR 1980 SC 1575) (supra). A perusal of the judgment of the Supreme Court in the case of *Qamaruddin's case* (1990 All WC 309) (Supra) indicates that it was not brought to the notice of the bench deciding the case that it was a case from U.P. and that S. 115, C.P.C. amended by U.P.

Amendment Act No. XXXI of 1978 governed the matter. The matter was disposed of as if S. 115, C.P.C. as originally enacted applied.

9. x x x x

10. For the above reasons it must be held that the decision of Supreme Court in Qamaruddin's case (1990 All WC 308) (Supra) to the extent it holds that revision against an appellate or revisional order passed by the district court is maintainable u/ S. 115, C.P.C. (as amended by U.P. Act 31/78) to the High Court does not state the law accurately or overrule the decision of the Full Bench of this Court in Jupiter Chit Fund (Pvt) Ltd. v. Dwarka Diesh (AIR 1979 All 218) (Supra) particularly when it has specifically been approved by the two earlier decisions of the Supreme Court.”

(emphasis by Court)

43. A Full Bench of the Kerala High Court considered the question in **Raman Gopi and another v. Kunju Raman Uthaman, 2011 SCC OnLine Ker 4028**, where it was held:

“77. The legal position, which therefore emerges on a discussion and analysis of the principles stated in various decisions of the Apex Court and other High Courts including this Court, so as to act as guidance to the High Courts and Subordinate Courts, when faced with a conflicting decisions, are summarised below:—

(i) In case of conflicting views taken in the decisions of two Benches of equal strength of the Apex Court, the decision later in point of time, will prevail over the earlier one;

(ii) What is binding is the ratio decidendi. A decision is only an authority for what it actually decides. (iii) A decision which is not expressed and is not found on

reasons nor proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Art. 141 of the Constitution. Similarly, any declaration made or conclusion arrived at without application of mind or preceded without a reason, cannot be a declaration of law, or authority as a binding precedent;

(iv) It is well settled that what is the essence of a decision is the ratio and not every observation, nor what logically follows from various observations made in it.

(v) The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution.

(vi) A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. (Salmond on Jurisprudence 12th Edn. p. 153).

(vii) A Division Bench, in case of conflict between the decision of a Division Bench of two Judges and the decision of a larger Bench and in particular, a Constitution Bench, would be bound by the latter decision.

(viii) Per incuriam means a decision rendered by ignorance of a previous binding decision such as a decision of its own or of a court of coordinate or higher jurisdiction or in ignorance of the terms of

a statute or of a rule having the force of law. A ruling making a specific reference to an earlier binding precedent may or may not be correct, but cannot be said to be per incuriam.”

(emphasis by Court)

44. The issue also engaged the attention of the Karnataka High Court in **D.V. Lakshmana Rao v. State of Karnataka and others, 2000 SCC OnLine Kar 775**, where it was observed:

“14. It is now well settled that if there are two conflicting judgments of the Supreme Court, of benches with equal number of Judges, then the latter will prevail over the earlier. But where the earlier judgment is of a larger bench and the latter judgment is of a smaller bench, then the decision of the larger bench will be binding. In *State of U.P. v. Ramchandra* [AIR 1976 SC 2574.] the Supreme Court held that where the High Court finds a conflict between the views expressed by a larger bench and a smaller bench, the proper course for the High Court is to find out the ratio decidendi of the decision of the Larger Bench and follow the same in preference to the opinion expressed by the Smaller Bench. Hence I am bound to follow the decisions in *Satendra Prasad Jain and Pratap* which are of Larger Benches, instead of following the decision in *Mariyappa* which is of a smaller Bench.”

45. Here, the Court finds that all the decisions that have been rendered are by two Judge Benches of their Lordships of the Supreme Court. There is no decision by a Bench of larger strength. The other decisions keep the principle intact, as already stated, though there is some exception carved out in the decisions in **Kaliaperumal** and **Janak Dulari Devi**,

that are not there in **Vidhyadhar** and **Dahiben**. But, the holding of their Lordships in **Kewal Krishan** is absolutely unqualified and lays down the rule that except for cases where the payment of price, whole or in part, is postponed, non-payment of the sale consideration would render the sale not a sale at all in the eyes of law. It is of no legal effect and void. That being the latest holding of the Supreme Court, it is not open to this Court to go behind the reasoning in the decision and choose the earlier decisions as laying down the correct law, evaluating the relative merits of decisions of the highest Court, as if it were.

46. It must be noticed here that the issue, that has confronted this Court, has engaged the attention of a Division Bench of the Chhattisgarh High Court in a very recent decision rendered in **Ramkumar Rajak v. Smt. Geetadevi Gupta and others, F.A. No.345 of 2019, decided on 20.03.2023**. Their Lordships of the Division Bench in **Ramkumar Rajak** (supra), noticing the conflict of opinion between **Kewal Krishan** and **Dahiben**, observed:

“9. In so far as the principles laid down in the matter of **Kewal Krishan** (supra), as relied upon by the learned counsel appearing for the appellant is concerned, in order to show that if a sale deed in respect of an immovable property is executed without payment of price, then it would not be a sale at all and will not effect the transfer of the immovable property. But, the same would, however, be of no use in view of the decision rendered earlier by the equal strength of the Supreme Court in the said matter of **Dahiben's** case (supra), wherein, it was held that non-payment of sale consideration would not be a ground

for cancellation of the sale deed as in the said event, as observed herein above, the plaintiff may have other remedy to recover the same. Since, this view taken earlier was not brought to the knowledge of the equal strength of the Supreme Court in the said matter of Kewal Krishan (supra) therefore, this would not be of any use for the plaintiff.”

(emphasis by Court)

47. With utmost respect, this Court is unable to agree with the view expressed on the point by their Lordships of the Division Bench of the Chhattisgarh High Court. To the understanding of this Court, what has been held by the Division Bench in **Ramkumar Rajak** (supra) is that their Lordships of the Supreme Court in the later decision in **Kewal Krishan** having decided the point one way without noticing the earlier authority in **Dahiben**, which was rendered by a Bench of their Lordships of the same strength as **Kewal Krishan** (the subsequent decision) would not bind the High Court. Virtually, the decision in **Kewal Krishan** has been ignored as per *incuriam*. To the understanding of this Court, a decision of the Supreme Court cannot be ignored by the High Court recording it as per *incuriam*, unless it be a case which is clearly against the ratio of a Bench of higher strength of their Lordships. That is not the case here.

48. This Court, as already said, assumes that out of the agreed sale consideration of Rs.7000/-, Rs.1000/- alone that were paid before the Registrar is all that has been paid. Whether in fact that is the correct position, would be considered while answering Substantial Question of Law No.3. This is an assumption for the purpose of answering Questions Nos.1 and 2.

49. Substantial Question of Law No.1 is answered in the **affirmative** and it is held that if the price set forth in the registered sale deed has not been paid to the vendor by the vendee, a decree for cancellation may be passed on this ground. So far as Substantial Question of Law No.2 is concerned, once it is held that non-payment of the price set forth in the registered sale deed to the vendor by the vendee would entail cancellation of the conveyance, the question need not be answered.

50. Substantial Question of Law No.3 is to the effect whether the Lower Appellate Court has set aside the findings recorded by the Trial Court upon consideration of evidence on record while writing a judgment of reversal. The most crucial finding, upon which event would turn in this appeal and one where two Courts have opined divergently is the payment of the whole of the sale consideration set forth in the registered sale deed. That is the only issue to which question of an effective reversal of the Trial Court's finding by the Lower Appellate Court upon consideration of the evidence on record would attach. The Trial Court, in returning its findings on Issues Nos.1 and 2, to either of which the central fact is payment of the entire sale consideration, has proceeded to narrow down the issue by recording what is common ground between parties. It has been recorded by the Trial Court that the parties are not at issue about the following facts:

(1) That there was a negotiation* between parties regarding sale of the suit property in favour of the defendant;

(2) That on the basis of negotiation*, it was agreed that the plaintiff would sell the

suit property in favour of the defendant for a sum of Rs.7000/-;

(3) That after the contract or the conversation, the plaintiff did execute a registered sale deed relating to the suit property in favour of the defendant; and,

(4) That at the time of registration of the sale deed, the defendant paid to the plaintiff a sum of Rs.1000/- only.

(* Note: The word employed in the Trial Court's judgment is 'vartalap', which would literally translate to 'conversation' but in the context would really mean 'negotiation'.)

51. The Trial Court has, therefore, proceeded that out of the agreed sale consideration, according to the plaintiff, she was paid Rs.1000/- only, whereas according to the defendant, Rs.6000/- were paid at the time of the agreement with Rs.1000/- being payable at the time of registration of the deed, which were paid at that time. The Trial Court has considered as part of the oral testimony, the testimonies of PW-1 i.e. the plaintiff herself, PW-2 Bhagwat Singh and PW-3 Khalak Singh. The Trial Court also looked into the recitals in the sale deed, which show that Rs.6000/- had been received earlier and Rs.1000/- alone were payable at the time of registration. The Trial Court has remarked that in the circumstances when a sum of Rs.1000/-, according to the deed, was all that was left to be paid at the time of registration, there was no occasion for the balance to be paid at the time of execution of the deed or when the deed writer was scribing it. The Trial Court has also noticed the fact that a sum of Rs.1000/- was paid to the plaintiff before the Sub-Registrar.

52. The Trial Court has also observed that there does not appear to be any illegality vitiating the impugned sale deed, because the

plaintiff has not said in her examination-in-chief that after the deed was scribed, it was not read out to her by the scribe/ deed writer Laxmi Prasad or by the Sub-Registrar before he admitted it to registration. It has been remarked that if the document had not been read out to the plaintiff, either by the scribe or the Sub-Registrar, she would surely have mentioned the fact in her examination-in-chief. From non-mention of the fact, the Trial Court has drawn an inference that it is an omission, which goes against the plaintiff.

53. It has then been noticed by the Trial Court that in her cross-examination, the plaintiff has stated that before the Sub-Registrar admitted the document to registration, he read it out to her. The relevant part of the cross-examination has been quoted by the Trial Court, which ought to be reproduced:

“सबरजिस्ट्रार ने उसे बतलाया था कि 6 हजार रुपया उसने पेशगी में लिये हैं व एक हजार रुपया शेष आज मिलने हैं तो उसने कहा था कि उसे पेशगी में 6 हजार रुपये नहीं मिले”

54. The Trial Court has gone on to observe that given the fact that the Sub-Registrar had read out the sale deed to the plaintiff before registration, which mentioned that Rs.6000/- have already been paid to her (a fact she did deny in her cross-examination and said that she denied it before the Sub-Registrar too), it was open to her not to have appended her mark to the document. She could have refused to sign or append her mark, but she did not do so. The Trial Court has then put a specific question to her, which reads:

“प्रश्न. क्या सबरजिस्ट्रार ने आपसे जबरदस्ती निशानी अंगूठा लगवाया था?

उत्तर. सबरजिस्ट्रार मऊ ने स्वयं निशानी अंगूठा नहीं लगवाया”

55. The Trial Court from all this evidence has concluded that once it was admitted to the plaintiff that the Sub-Registrar before registering the document had read it out to her and the Sub-Registrar had not pressurized her into thumb marking it or make her mark it forcibly, if there was an unpaid sale consideration of Rs.6000/- by the defendant, the plaintiff could have refused to thumb mark the document. The Trial Court has also noticed that PW-2 Bhagwat Singh has also acknowledged the fact that the Sub-Registrar read out the document before registering it and also the fact that it said that Rs.6000/- were received by the plaintiff as an advance, but the witness still appended his signatures to the document.

56. The witnesses on the defendant side have been noticed to be the defendant himself, who testified as DW-1, the scribe Laxmi Prasad, DW-2 and Dashrath @ Majhle, DW-3. DW-1's testimony has been noticed by the Trial Court, where he has said that he had spoken to the plaintiff 2 or 4 days before the sale deed was executed. The transaction was settled for a total sum of Rs.7000/-, out of which a sum of Rs.6000/- was paid in earnest to the plaintiff. The sum of Rs.6000/- was paid at the house of one Sitaram Maharaj in the presence of Majhle. Admittedly, there is no written record of all this transaction, to wit, the contract that was entered into 2-4 days before the sale deed or the earnest of Rs.6000/- that was paid by the defendant to the plaintiff. There are only two witnesses to the transaction. One is Sitaram Maharaj and the other is Majhle, DW-3. Therefore, the testimony of Dashrath @ Majhle, DW-3 is crucial.

57. About the testimony of the lone man, who witnessed the payment of

Rs.6000/- by the defendant to the plaintiff, DW-3 Dashrath @ Majhle, the Trial Court has recorded the following finding:

“ डी0डब्लू-3 के रूप में दशरथ उर्फ मझले ने भी जिनत व मुन्नीलाल की जमीन बेचने के बावत हुयी तथा-कथित बातचीत को सिद्ध किया है जबकि उसने अभिकथित किया है कि जिनत व मुन्नीलाल की जमीन बेचने के बावत बातचीत मेरे सामने हुयी थी। यह बातचीत सीताराम के घर पर हुयी थी। उस समय सीताराम के घर पर मैं, मुन्नीलाल व सीताराम व जिनत बेगम मौजूद थे। जमीन 7 हजार रुपये में बेचने का बात तय हुयी थी। 6 हजार रुपये जिसमें से जिनत को वहीं पर उसी समय दे दिये गये थे। (डी0डब्लू-3 पृष्ठ एक प्रथम पैरा)

इस प्रकार प्रतिवादी मुन्नीलाल ने डी0डब्लू-1 के रूप में तथा दशरथ उर्फ मझले ने डी0डब्लू-3 के रूप में प्रश्रुत भूमि को बेचने के सम्बन्ध में हुयी बातचीत को एवं 6 हजार रुपये पेशगी में दिये जाने सम्बन्धी प्रतिवादी के कथन को सिद्ध किया है।”

58. The Trial Court has also noticed the testimony of DW-1, where he has said that the Sub-Registrar asked the plaintiff if she has received earnest of Rs.6000/- after he had read out it to her, to which the plaintiff said that she had received Rs.6000/-. The Sub-Registrar was also noticed to have asked the plaintiff whether she wanted to sell the entire chak, to which the plaintiff said that she wanted to sell the whole of it. The Trial Court has noticed that the witness has said that it was then that he paid the balance of Rs.1000/-, which was the balance sale consideration to be paid at the time of registration.

59. This Court must remark that apparently the sale deed describes the transaction in the manner accepted by the Trial Court, where Rs.6000/- was mentioned in the recitals to have been received by the plaintiff and the balance of Rs.1000/- payable before the Sub-Registrar, that was actually paid before him. A perusal of the Sub-Registrar's endorsement on the

sale deed shows that the total sale consideration was Rs.7000/-, out of which Rs.1000/- was received before the Sub-Registrar and the balance as an advance. The Sub-Registrar's endorsement is one dated 16.10.1982.

60. The Lower Appellate Court has reversed the findings of the Trial Court regarding non-payment of the earnest of Rs.6000/- relying on the testimony of the plaintiff and her two witnesses, as also the fact that she promptly lodged an FIR soon after the registration of the sale deed. The Lower Appellate Court has also invoked the principle that uneducated women from the village as also men, who have grown old, have to be admitted to the privilege of a pardanashin woman in the matter of reversal of burden. Though that question does not arise in this appeal, inasmuch as no substantial question of law to that effect was urged by parties, this Court proceeds to see if indeed the finding of the Trial Court has been effectively reversed. As already remarked, the most crucial question is about the payment of Rs.6000/-. About this fact, the Lower Appellate Court has held:

"प्रतिवादी गवाह मुन्नीलाल ने कहा है कि उसने 6000/- रु0 सीताराम महाराज व मंगले के सामने दिये थे। यह पेशगी का धन 6000/- रु0 उसने सीताराम महाराज के घर पर दिया था। जमीन बेचने की बातचीत भी सीताराम महाराज व मंगले के सामने ही हुई थी। इस प्रकार प्रस्तुत मुकदमे में सीताराम व मंगले अत्यधिक महत्वपूर्ण गवाह हैं परन्तु प्रतिवादी ने इन्हें शहादत में पेश नहीं किया है। इस प्रकार प्रतिवादी ने 6000/- रु0 अदायगी के संबंध में अपने कानूनी दायित्वों का वहन नहीं किया है ऐसी परिस्थिति में धारा 114 भारतीय साक्ष्य अधि० के अंतर्गत यह निष्कर्ष निकाला जा सकता है कि यदि सीताराम व मंगले को शहादत में पेश किया जाता तो वह प्रतिवादी पक्ष के विपरीत शहादत देते।"

(emphasis by Court)

61. Further on, the Lower Appellate Court has observed:

"गवाह मुन्नीलाल ने कहा है कि जिन गवाहों के साक्ष्य उसने पेशगी में 6000/- रु0 दिए थे उन्हें भी रजिस्ट्री के समय रजिस्ट्री कार्यालय में लिवाकर नहीं ले गया था। ऐसी परिस्थिति में जबकि पेशगी का धन दिया जाना विवादित है तो प्रतिवादी के लिए यह आवश्यक था कि वह उन गवाहों को न्यायालय में पेश करता। उन गवाहों को पेश न किए जाने से प्रतिवादीपक्ष के प्रतिकूल यह निष्कर्ष निकाला जा सकता है कि यदि वे गवाह पेश किए गए होते तो उन्होंने प्रतिवादीपक्ष के विपरीत शहादत दी होती।"

(emphasis by Court)

62. The Lower Appellate Court has, therefore, proceeded on the assumption that out of the two witnesses referred to by the defendant, in whose presence the earnest of Rs.6000/- was paid, that is to say, Sitaram Maharaj and Majhle, no one was produced before the Court. It has also been opined by the Lower Appellate Court that in case Sitaram Maharaj or Majhle were produced in Court, the presumption on account of Section 114 of the Evidence Act is that their testimony would have gone against the defendant. It has been remarked twice in the findings of the Lower Appellate Court about the issue of payment of earnest that witnesses of the transaction, before whom the sum of Rs.6000/- is said to be paid in advance or as earnest by the defendant, have not been produced before the Court. The non-production of these witnesses would lead to an adverse inference against the defendant as regards the fact of payment of earnest of Rs.6000/-.

63. The finding of the Lower Appellate Court as aforesaid ignores from consideration the fact that DW-3, Dashrath @ Majhle, who is a witness of the transaction, was produced before the Court and testified to it. His testimony has been noticed by the Trial Court to return findings on the point of payment of Rs.6000/- by way of earnest. Those findings have been

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recorded based on DW-3's testimony in the defendant's favour. The Lower Appellate Court has not reversed that finding by the Trial Court in the defendant's favour. Rather, the Lower Appellate Court has ignored from consideration the testimony of Dashrath @ Majhle, DW-3 holding that this witness was never produced by the defendant. Therefore, in the opinion of this Court, it has to be held that the findings recorded by the Lower Appellate Court are ones that set aside the findings recorded by the Trial Court upon the most crucial issue without consideration of the most material evidence on record. For the said reason alone, in the opinion of this Court, the judgment of reversal written by the Lower Appellate Court cannot be sustained.

64. Substantial Question of Law No.3 is answered in the negative holding that the Lower Appellate Court has not set aside the findings recorded by the Trial Court upon consideration of the evidence on record while reversing the Trial Court's judgment.

65. In view of the conclusions recorded above, this appeal **succeeds** and is **allowed** with costs throughout. The decree passed by the Lower Appellate Court is **set aside** and that of the Trial Court **restored**.

66. Let a decree be drawn up, accordingly.

(2023) 7 ILRA 935
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2023

BEFORE

THE HON'BLE MAHESH CHANDRA
TRIPATHI, J.
THE HON'BLE MANJIVE SHUKLA, J.

Writ-C No. 8913 of 2021

Brijesh Kumar Singh & Ors. ...Petitioners
Versus
The Central Registrar, Co-Operative
Societies, New Delhi & Ors. ...Respondents

Counsel for the Petitioners:
Sri Balwant Singh, Sri Umesh Vats

Counsel for the Respondents:
A.S.G.I., Sri Atul Kumar Shahi, Sri Kartikeya
Saran, Sri Krishna Ji Shukla, Sri Narendra Kumar
Chatterjee, Sri H.N. Singh(Sr. Advocate)

**Civil Law-The Constitution of India-1950-
Article 226 - The Multi-St. Co-operative
Societies Act, 2002-Section 44(2) & 85 -
The Multi-St. Co-operative Societies Rules,
2002-Rule 19(1)---** No member of a board
shall be eligible to be elected as the Chairperson
or President of a Multi St. Co-operative Society,
after he has held the office during two
consecutive terms, whether full or part. While
deciding the complaint of the petitioners by the
Central Registrar on 28.05.2019 it was held that
the first petitioner was not eligible for being
elected as per provisions contained under
Section 44 (2) of the Act, 2002. So far as the
said observation is concerned, till date the same
is not upset by any competent court and
therefore, the same has attained finality. It is
admitted position of the parties that the first
petitioner was elected third time as Chairman in
the year 2015. Moreover, 'no confidence motion'
was acted upon. Admittedly, the first petitioner
has not discharged any work as Chairman of the
Bank since 2017 to 2020. The Board of
Directors, who were elected on 31.07.2015, had
to complete its term of 05 years upto
31.07.2020. The Board of Directors of the
Cooperative Bank had convened the meeting on
25.10.2019 in which the Returning Officer was
appointed to conduct the election, which was
also communicated through registered post on
04.11.2019 to the Central Registrar. The fresh
election took place and the new Board was
constituted on 19.02.2020, wherein 11 Directors
including the Chairman and Vice Chairman were
elected. The new Board is discharging its duties
with effect from 19.02.2020. Considering the
fact, that the said election was never challenged

under the limitation period as provided under Section 85 of the Act, 2002 and therefore, for all practical purpose, the election, which took place on 18.02.2020 and 19.02.2020, has attained finality--- In case there is any vacuum or Cooperative Board fails to conduct the election of the members of the Board, the Central Registrar is empowered to hold the election within the period of 90 days from the date when such election became due, as per Section 45 (6) of the Act, 2002. Moreover, Rule 19 (1) of the Rules, 2002 also provides that the election of members of the board shall be conducted by the returning officer appointed by the board in its meeting. **(Para 40 & 41)**

Petition dismissed. (E-15)

List of Cases cited:

1. Ranjit Bose & ors Vs E & N F Railway Credit) decided on 25.2.2009 A.S.T. No.91 of 2008 Calcutta High Court
2. Vikas Trivedi & ors. Vs St. of U.P. & ors. 2013 (8) ADJ 523 (FB)
3. Jyoti Kumar Malviya Vs Indian Farmers Fertilizers Co-operative Ltd. & ors. 2006 (3) ADJ 383
4. Matsya Jivi Sahkari Samiti Ltd. Vs St. of U.P. & ors. 2020(12) ADJ 461 (DB)
5. Sushil Kumar Vs Central Registrar of Coop. Society & ors. Delhi High Court in W.P. (C) No.2059/2021
6. Madan Mohan Vs St. AIR 1966 Calcutta 23
7. P.B.K. Rajachidambaram Vs R.P. Rathana Sharma AIR 1967 Madras 182
8. Praga Tools Vs Imanuel (1969) 1 SCC 585

(Delivered by Hon'ble Mahesh Chandra Tripathi, J. & Hon'ble Manjive Shukla, J.)

1. Heard Mr. Umesh Vats and Mr. Balwant Singh, learned counsel for the petitioners; Mr. H.N. Singh, learned Senior

Advocate assisted by Mr. Atul Kumar Shahi, learned counsel for respondent no.2 and Mr. Krishna Ji Shukla, Advocate, holding brief of Mr. N.K. Chatterjee, learned counsel for the Union of India.

2. By means of present writ petition, the petitioners have sought following reliefs:-

“i) Issue a writ, order or direction in the nature of mandamus commanding and directing to the Central Registrar, Co-operative Societies, Department of Agriculture and Co-operative, Government of India, New Delhi to take appropriate decision on the matter of the petitioners and appoint returning officer to hold the election of the bank (North Eastern & East Central Railway Employees' Multi – State Primary Co-operative Bank Limited, Gorakhpur).

ii) Issue a writ, order or direction in the nature of mandamus directing to the Central Registrar (respondent no.1) to send report to the Reserve Bank of India regarding the expiration of the terms of the general body as well as Board of Directors of the Bank to the Reserve Bank of India (respondent no.4).

iii) Issue a writ, order or direction in the nature of mandamus commanding and directing to the Reserve Bank of India to take appropriate decision to supersede the Board of Directors i.e. North Eastern & East Central Railway Employees' Multi – State Primary Co-operative Bank Limited, Gorakhpur and administrator upon.

iv) Issue a writ, order or direction in the suitable nature which this Hon'ble Court may deem fit and proper under the circumstances of the case.

v). Award the cost of the writ petition to the petitioners.”

3. By means of an amendment application, which was allowed by this Court on 27.03.2023, further relief was added:-

“i-A) Issue a writ, order or direction in the nature of certiorari quashing the elections dated 08.01.2020, 18.02.2020 and 19.02.2020 held by the respondent nos.2 & 3.”

4. The brief facts of the case are that “North Eastern & East Central Railway Employees Multi State Primary Co-operative Bank Limited, Gorakhpur”¹ is a Co-operative Society, which was established in the year 1921 and initially registered under the Cooperative Societies Act, 1912. Subsequently, it was brought under the provisions of “Multi State Cooperative Societies Act, 1942” for extending the objects of the Society. Thereafter, “Multi State Cooperative Societies Act, 1984”³ was enacted for incorporation, regulation and winding up of Multi State Cooperative Societies. Since, the area of operation of the said Society is more than one State and therefore, it was also registered under the provisions of the Act, 1984. Later on, the Act, 1984 was amended and “Multi-State Co-operative Societies Act, 2002”⁴ was enacted. The Society was again registered under the provisions of Act, 2002. The Society has its own registered bye-laws. It does not receive any fund from the State Government or Central Government. The bank is running and functioning according to the provisions of the Act, 2002 and the provisions of Multi-State Co-operative Societies Rules, 20025.

5. It also appears from the record that the terms of delegates, members and office bearers of the Board are five years. Once

the term of the general body of the Bank was going to expire in the month of August, 2015 then the Board of Directors of the Bank had proceeded to pass a resolution on 10.04.2015 for holding a meeting of the general body of the bank as well as the board of the bank. The said resolution was duly intimated to the Central Registrar on 30.04.2015. The election programme was notified on 11.05.2015 and the election of the general body/delegates was held and the result was declared on 26.06.2015, wherein 250 delegates from 11 departments were elected. The Returning Officer notified the election of the members of the board and office bearers on 29.06.2015 and the same was duly informed to the Central Registrar on 30.06.2015. The election of the members of the board was held in the general meeting of the bank on 30.07.2015 and the election of Chairman and Vice Chairman of the bank was held on 31.07.2015, wherein, the first petitioner was elected as Chairman of the Board of Directors of the Bank.

6. Meanwhile, out of nine, six Directors of the bank prepared the alleged resolution dated 27.09.2018, wherein, the first petitioner was removed from the office of the Chairman on the 'no confidence motion' brought by Rajesh Kumar Singh, Director. The petitioners had challenged the aforesaid resolution in Writ C No.42730 of 20186 which was disposed of by a coordinate Bench of this Court with following observations:-

“We have heard Sri P.N. Saxena, learned Senior Advocate assisted by Sri Amit Saxena for the petitioners; Sri Balwant Singh for respondents 3 to 9.

After some arguments, Sri P.N. Saxena, learned Senior Counsel appearing

for the petitioners, has confined his arguments in respect of the second prayer made in the petition which is for a direction upon the Central Registrar of Cooperative Societies, Department of Agriculture and Cooperation, Government of India, New Delhi to take a decision on the reference petition of the petitioners filed under Section 84 of the Multi- State Cooperative Societies Act, 2002.

According to the petitioners a forged and fabricated Resolution No. 25 dated 27.9.2018 has been set up to disclose that the petitioner no. 1 (Brajesh Kumar Singh) had abused his position as Sabhapati of the Board and, therefore, by a resolution has been removed from office.

It has been submitted that the said resolution is in the teeth of the proviso to Section 47 of the Multi-State Cooperative Societies Act, 2002 as no opportunity was given to the petitioner no. 1 to make a representation on the allegations and otherwise also the resolution has not been passed by requisite strength as is required by law. It is also stated that there was no agenda for consideration of any such resolution.

He prays that since the reference application has already been filed under Section 84 of the Multi-State Cooperative Societies Act, 2002 a direction may be issued upon the first respondent (The Central Registrar of Cooperative Societies, Department of Agriculture and Cooperation, Government of India, New Delhi) to take a decision within a specified period.

Considering the nature of the dispute as also the prayer made, we deem appropriate to dispose off the writ petition with a direction upon the respondent no. 1 to ensure expeditious decision on the reference petition of the petitioners, preferably, within a period of two months

from the date of production of certified copy of this order.

It is made clear that this court has not expressed any opinion on the merits of the claim and, before taking decision, the first respondent shall provide opportunity of hearing to the parties concerned.”

7. In pursuance of the aforesaid order dated 20.12.2018, the Central Registrar had refused to refer the matter under Section 84 of the Act, 2002 on 28.05.2019. The said order was again assailed by the petitioners in Writ C No.29112 of 20197 in which notices were issued to the respondents on 16.9.2019 and they were directed to file counter affidavit in the matter. Again the petitioners made a complaint before the Central Registrar on 23.03.2019 stating, therein, that six Directors, whose names are mentioned in paragraph-15 of the writ petition, are not informing the petitioners about the meeting of the Board of Directors. Again the petitioners alongwith 57 delegates/members of the general body made a complaint under Section 78 of the Act, 2002 before the Central Registrar on 10.04.2019, alleging number of irregularities being committed by the present management of the bank and sought a detailed enquiry. Again the first petitioner alongwith Ashok Kumar Pandey had approached this Court by preferring Writ C No.38998 of 2019 and a Division Bench of this Court had proceeded to dispose of the writ petition on 13.1.2020, with following observations:-

“Heard Shri Amit Saxena, learned Senior Advocate, assisted by Shri Balwant Singh, learned counsel for the petitioners and Shri Vibhu Rai, learned counsel for the respondents.

The petitioners claim that they are members of the Board of the Society and

that they have moved an application before the Central Registrar under Section 78 of the Multi-State Co-operative Societies Act, 2002, for an enquiry into the affairs of the Society and that the same be directed to be considered and decided by the Central Registrar.

Shri Vibhu Rai, learned counsel for the respondents, contends that the petitioners have no locus to make any such application.

Since the petitioners have invoked the powers under Section 78 of the Act, 2002, it is incumbent upon the Central Registrar to consider the application in that regard though in considering the same, he may also Rule with regard to the maintainability of the application as well as the locus of the petitioners in filing the same.

In view of the aforesaid facts and circumstances, we dispose of the writ petition with the direction to the Central Registrar to consider the above application of the petitioner filed under Section 78 of the Act, 2002, in accordance with law and in so considering it may decide the locus of the petitioners as well as the maintainability of the writ petition after giving proper opportunity of hearing to all concerned parties most expeditiously preferably within a period of six weeks from the date of submission of copy of this order before him.

In view of the above, the writ petition stands disposed of.”

8. In pursuance of the said order dated 13.1.2020, the Central Registrar of Cooperative Societies heard both the parties and passed an order on 02.03.2020 for holding the enquiry into the matter. The order dated 02.3.2020 is reproduced hereinafter:-

“1. Complainant had approached Hon'ble High Court of Allahabad for a

direction to this authority regarding inquiry under Section 78 of the MSCS Act, 2002 in the NE & EC Railway Employees Primary Cooperative Bank Limited, Gorakhpur (hereinafter referred to as bank). The complainant had alleged number of irregularities being committed by the current management of the bank with regard to which they had sought a detailed inquiry. The Hon'ble High Court vide its order dated 13.01.2020 had directed this authority to consider the application with regard to maintainability as well as locus of the petitioner/complainants. This authority has also been directed to consider the application of petition/complaint filed under Section 78 of the Act in accordance with law.

2. All the concerned parties were issued a notice in compliance of direction of Hon'ble High Court. The complainants have submitted that the current management of the bank has committed a series of irregularities which are serious in nature and require a detailed inquiry. It has also been submitted that as per Section 78 of MSCS Act, 2002, 1/3rd of the total number of Directors may require an inquiry to be conducted by the Central Registrar or an officer nominated by him to inquire into any complaint regarding constitution, working and financial condition from Multi State Cooperative Society. There are 9 Directors of the bank which are currently part of the Board and they are three Directors, therefore, they have locus standi to request for an inquiry.

3. The respondents represented by the current Chairperson and Secretary of the Society submitted that the complainants have not attended three consecutive meetings of the Board in spite of notice thereby incurred disqualification under Section 43 (m) of the Act and therefore, they do not have the locus standi to file a complaint under Section 78 of the Act.

4. After hearing both the parties, this authority enquired about the process of notice which was issued giving intimation of the date and place of the Board meetings to all the members of the Board. After going through the papers shown by the respondents and the notices that are purported to be issued, it is evident that due process has not been followed, therefore, the question of incurring disqualification for absence from these meetings does not hold ground. Therefore, the argument of disqualification is rejected. Since, out of 9 existing members of the Board, three have made an allegation of inquiry into affairs of the bank. Therefore, this authority comes to the conclusion that inquiry under Section 78 can be ordered.

5. The allegation made in the complaint alongwith the relevant documents be sent to Divisional Commissioner, Gorakhpur Division for conducting inquiry within a period of 90 days of this order. Both the parties shall remain present before Commissioner, Gorakhpur Division on 18.3.2020.”

9. In pursuance of the order of Central Registrar dated 02.03.2020 the first petitioner and Ashok Kumar Pandey appeared before the Commissioner, Gorakhpur Division, Gorakhpur on 18.03.2020. The next election of the general body as well as Board of Directors of the bank was due in the year 2020 and the election process was to be commenced in April-May, 2020. On 08.01.2020 the delegates for forming the general body were elected and the election of Board of Directors as per the election schedule was held on 18.2.2020 and the Chairman and Vice Chairman was held on 19.02.2020, which have been subsequently challenged in the aforesaid writ petition.

10. Mr. Umesh Vats, learned counsel for the petitioners vehemently submitted

that the Bank is a registered cooperative society under the provisions of the Act, 2002. The affairs of the Bank is to be run and managed strictly in consonance with the provisions as contained under the Act, 2002 and the by-laws framed thereunder. The strength of the general body of the bank, who participate in the election for electing the delegates, is more than 50,000 and they are working in three States namely Uttarakhand, Uttar Pradesh and Bihar. The petitioner nos.1 and 2 claimed to be members of Board of Directors, which was constituted on 31.07.2015 for a period of five years. On 23.10.2018 the Acting Secretary of the Bank informed to the first petitioner that by resolution dated 27.09.2018 he had been removed from the office of Chairman of the Board of Directors on the 'no confidence motion' brought by Rajesh Kumar Singh, Director and Sri Anurag Khare, Vice President has been appointed as the acting Chairman/President. The petitioners questioned the validity of the said resolution in Writ C No.42730 of 2018, alleging therein that a forged and fabricated Resolution No.25 dated 27.9.2018 was mooted just to dislodge the first petitioner as Chairman of the Society and the said resolution was in teeth of provisions contained under Section 47 of the Act, 2002. The relief was confined to the extent that since the reference application has already been filed under Section 84 of the Act, 2002, a direction may be issued to the Central Registrar of Cooperative Societies to take a decision within stipulated time. The Division Bench without touching the merits of the case had disposed of the writ petition with direction to the respondent i.e. Central Registrar of Cooperative Societies to decide the said reference. In response to the said decision the Central Registrar had refused to refer the matter under Section 84

of the Act, 2002 vide his order dated 28.5.2019.

11. In this backdrop, Mr. Vats, learned counsel for the petitioners has vehemently submitted that the intention of six Directors and acting Secretary was to grab the property of the bank and therefore, in order to grab the property in question they prepared forged and fabricated proceeding for dislodging the first petitioner. Again the petitioners moved a representation on 23.3.2019 to the Central Registrar of Cooperative Societies for making an enquiry under Section 78 of the Act, 2002. It is also claimed that more 30% delegates of the bank had also made similar request on 10.4.2019. Again they filed Writ C No.38998 of 2019, which was disposed of by the Division Bench on 13.1.2020 with direction to the Central Registrar to consider the application of the petitioners with regard to maintainability as well as locus of the petitioners/complainants. In pursuance of the aforesaid order, the Central Registrar has decided the matter in favour of the petitioners on 02.03.2020 for holding an inquiry.

12. Mr. Vats submitted that a person is elected as a Chairman or Vice Chairman for a particular term, which cannot be curtailed by illegal resolution/no confidence motion. The Board of Director and office bearers are elected by the procedure prescribed under the Act, 2002 read with the Rules, 2002 and the Bye-laws framed thereunder, and which guaranteed a tenure of five years, which is prescribed in Section 35 (d) of the bye-laws. No procedure is prescribed in the Act, 2002, Rules, 2002 and bye-laws of the Bank for removing the President/Chairman of the Board of the Director of the Bank by way of 'no confidence motion'. The alleged

resolution/no confidence motion is in breach of proviso to Section 47 of the Act, 2002 as no opportunity was given to the first petitioner to move a representation against the alleged resolution. Neither any charge was levelled against the first petitioner nor any specific reason has been given in the 'no confidence motion', which indicated malafide intention of the six Directors namely Anurag Khare, Rajesh Kumar Singh, Afroz, Rama Shankar Singh, Arvind Chand and Manoj Kumar Vishwakarma. It was submitted that the bank has more than 50,000 shareholders and near about 250 working employees. The capital of the bank is more than Rs.200 crores.

13. It has been submitted before us that the term of the Board of Directors of the Bank has been expired and no election for constituting the general body of the Bank as well as the Directors of the bank has been held. In the aforesaid circumstances, the Central Registrar is required to appoint the Returning Officer to hold the election for constituting the general body as well as the Board of Directors. It is further required to send a report to the Reserve Bank of India for exercising its powers under Section 56 of the Banking Regulation Act, 1949 to supersede the Board of Directors of the Bank and appoint an Administrator in the Bank. The bank also holds a Banking licence issued by the Reserve Bank of India and is also governed by the Banking Regulations Act, 1949 (As applicable to Co-operative Societies). Section 36AA of the Banking Regulations Act, 1949 provides that where the Reserve Bank is satisfied that in the public interest or for preventing the affairs of a banking company being conducted in a manner detrimental to the interests of the depositors

or for securing the proper management of any banking company, it is necessary so to do, the Reserve Bank may, for reasons to be recorded in writing by order, remove the Board of Directors of such Multi State Cooperative Bank from office for a period not exceeding five years, as may be specified in the order, which may be extended from time to time, so, however, that total period shall not exceed five years.

14. Learned Advocate for the petitioners submitted that as per Schedule-I of Rules, 2002 the Board of Directors in office shall meet at least 60 clear dates in advance of the date of expiration of its term and by resolution determine the date, time and place for convening a general body meeting for conducting the election. This provision will also apply mutatis mutandis to such Multi State Cooperative Society as are under the charge of the Administrator appointed under sub-section (1) of Section 130. The Board of Directors in this meeting shall also appoint a Returning Officer but the alleged election was held on 08.01.2020, which is in gross violation of the Rules, 2002. Schedule-1 of the Rules, 2002 further states that a copy of the decision shall forthwith be sent to the Central Registrar but in the present case, no such information was sent to the Central Registrar, which is also evident from the reply given by the office of Central Registrar to Mr. A.K. Singh under the Right to Information Act, 2005. The said Schedule further states that the Society shall immediately forward such report and return of the result furnished by the Returning Officer to the Central Registrar but the said provision has not been followed. Schedule I (f) further says that the notice of the general body meeting shall be sent to the members by any of the modes i.e. by local delivery or under postal

certificate or by publication in the newspaper having wide circulation but the members of the general body of the Society were not informed by any mode. Further the Circular dated 27.12.2019 issued by the Central Registrar clearly provides that the Board of the Multi State Cooperative Societies/Banks may appoint the Returning Officer for conducting the elections of the Societies from the panel of serving officers mentioned in the said Circular but the said procedure has not been followed.

15. Learned counsel for the petitioners further submitted that the Rules, 2002 provides that every decision of the Board of Directors qua election and election result will be communicated from time to time to the Central Registrar. Schedule-I of the Rules, 2002 deals with the procedures for notification and holding of election. The election programme will be published in daily newspapers, which has wide circulation but in the present matter, the said procedure has not been followed. The petitioners have made several representations before the Central Registrar regarding appointment of the Returning Officer for holding the election of the Bank but till date, the same has not been decided. The alleged resolution/no confidence motion is in breach of proviso to Section 47 of the Act, 2002 as no opportunity was given to him to make a representation on the said allegation. Neither any charge was levelled against him nor any specific reason has been given in the no confidence motion, which indicated malafide intention of the aforesaid six Directors.

16. In support of his submission, he has placed reliance on the judgment of Calcutta High Court in **A.S.T. No.91 of 2008**⁸, wherein, the appellant Ranjit Bose (since deceased), who was respondent no.4

in the said writ, filed the appeal, which was registered as AST 91 of 2008, challenging the interim order dated 14th February, 2008 passed in W. P. No.334 (W) of 2008. In the said writ petition, the petitioners had questioned the validity of the order of the Chief Director (Co-operative) in the office of the Central Registrar of Co-operative Societies, dated December 31, 2007 directing the Chairman of the first petitioner, which is Multi-State Co-operative Society, governed by the provisions of the Act, 2002, not to appoint any employee in the co-operative society during the progress of the election process. Finally, a Division Bench of Calcutta High Court had proceeded to allow the said appeal and set aside the interim orders passed by the learned Trial Judge.

17. On the other hand, Mr. H.N. Singh, learned Senior Counsel for respondent no.2 vehemently opposed the writ petition and submitted that Sunil Kumar Singh is presently posted as Secretary of the Bank. The terms of delegates, members of Board of the Bank and office bearers of Board are five years. The first petitioner was elected as the Chairman of the Bank for the first time from 2008 to 2010 and thereafter, he was elected as Chairman for the second time from 2010 to 2015. Again the election of the members of the board was held on 30.07.2015 and the election of Chairman and Vice Chairman was held on 31.07.2015, wherein the first petitioner was elected as member of the board for the third time, which was against Section 44 (2) of the Act, 2002. Eventually, he was removed on the 'no confidence motion' on 27.09.2018.

18. It was also submitted that before the board meeting on 27.9.2018, there were

26 proposals under the agenda items, out of which 19 were approved and 07 were rejected. During the said board meeting, 24 proposals were passed by the first petitioner. However, one of the Director namely Rajesh Kumar Singh introduced the 'no confidence motion' against the first petitioner (Proposal No.25) and after placing the said proposal, the first petitioner walked out of the meeting and refused to sign the minutes of the said proposal. On the proposal no.25, out of 09 members of the Board, 06 favoured; 01 member casted vote against the said proposal and 01 member was absent. In this backdrop, it is submitted that as per the bye-laws no.33 the members of the board may elect the Chairman and Vice Chairman by majority vote. Under the democratic set up once they can elect the Chairman and Vice Chairman by majority vote then they may also have their rights to remove them by majority and accordingly, the resolution was passed. In the aforesaid meeting, it was decided to hold the fresh election of the Board of Co-operative Bank. For that purpose, a meeting of the Board was held on 25.10.2019 in which one Ravi Kumar Singh was appointed as an Election Officer for conducting the election. By the same resolution, the date of publication of tentative voter list, inviting objection, finalization of the list and other schedule of election was finalised. The Secretary of the Bank, who is working as Chief Executive Officer and a paid employee of the Bank/Society, sent the information of appointment of the election officer to the Central Registrar on 04.11.2019.

19. It was contended that the Returning Officer had sent a letter on 29.10.2019 for publishing the election schedule in daily newspaper "Gorakhpur Keshari" and the actual publication was

made on 30.10.2019 for election of delegates/representatives from respective constituencies for forming the general body for the purpose of election of member of the board. As per the schedule of general body election, tentative and final voter's list was published and the election was held on 06.1.2020 from 8 AM to 5 PM at respective voting places in respective Divisions and Headquarters. After collecting the same, the final result was declared on 08.01.2020, whereby the electoral college was constituted for the purpose of conducting the election of Board of Directors. After declaration of the result of delegates/members of general body further publication was made in daily newspaper "Gorakhpur Keshari" on 10.01.2020 publishing the election schedule for conducting the election of member of the board fixing date on 18.02.2020 for filing of nomination, inviting objection, scrutiny of nomination papers, withdrawal of nomination, publication of final nomination list and time for voting, if necessary and declaration of the result at 4 PM. The election schedule for election of the Chairman and Vice Chairman was simultaneously published fixing date of election on 19.02.2020 and its declaration after completing all formalities on same date at 12.30 PM. The election of Board of Directors and its office bearers was held on 18.2.2020 as per provisions of Clause 26 of the bye-laws of the Society. The election of Chairman and Vice Chairman was held on 19.02.2020 and its intimation was sent to the Central Registrar on 20.02.2020.

20. It was submitted that the first petitioner had concealed the fact that prior to the election of the year 2015, he had already been elected as Chairman of the Board for two consecutive terms i.e. from 2008 to 2010 and from 2010 to 2015 and he

was again elected as Chairman in the election for the third time on 31.07.2015. However, the petitioner no.1, who was illegally holding the office of the Chairperson in third consecutive term, was removed on 27.09.2018 on the 'no confidence motion' moved by Rajesh Kumar Singh and the charge of the Chairman was handed over to Anurag Khare in officiating capacity. Finally, the Central Registrar vide his order dated 28.05.2019 had decided that the first petitioner is not eligible for being elected as per provisions contained in Section 44 (2) of the Act, 2002. The order of the Central Registrar dated 28.05.2019 has not been challenged and for all practical purposes the same has attained finality. Meanwhile, the Board of Directors, who were elected on 31.07.2015, completed its term of five years on 31.07.2020. Thereafter, it was decided to hold the fresh election of the Board of Co-operative Bank and for that purpose, the meeting of the Board was held on 25.10.2019 in which Ravi Prakash Singh was appointed as Returning Officer to conduct the election. The same was also duly communicated to the Central Registrar through registered post on 04.11.2019. Fresh election had also taken place and the new Board was constituted on 19.02.2020, wherein 11 Directors including the Chairman and Vice Chairman, were elected and the new Board is discharging its duties with effect from 19.02.2020. Except the petitioners, who are only 12 in number, others have not raised any objection and as such, the claim of the petitioners is no more in existence.

21. He submitted that the Central Registrar can conduct the election, only if the existing Board has failed to conduct the election within due time as provided under Section 45 (6) of the Act, 2002. Once in the

present matter, the election process had already been commenced with the appointment of Returning Officer on 25.10.2019 and the election of the delegates had already been held on 08.01.2020 then there was no occasion for the petitioners to make any request before the Central Registrar on 08.02.2021 for appointment of the Returning Officer. The petitioner nos.1 and 2 are not members of the Board and they have not been elected as Members of the Board in the election held on 18.02.2020. Further, no objection was made against the said election and as such, after expiry of the limitation period, as provided under Section 85 of the Act, 2002, the election proceedings have attained finality and the writ petition is liable to be dismissed. He submitted that the writ petition against the cooperative society is not maintainable. Undisputedly the cooperative society cannot be termed as State within the meaning of Article 12 of Constitution of India. The Cooperative Society had been formed to espouse and protect the interests of employees of the Indian Railways and its functions were clearly private in character.

22. Mr. H.N. Singh, learned Senior Advocate had lastly opposed the writ petition on the ground of limitation and submitted that the writ petition was entertained in the year 2021 and at the initiate stage, the petitioners had not asked any relief qua the election, which took place in the month of January-February, 2020. Once the said election had not been challenged well within the limitation period, as contemplated in Section 85 of the Act, 2002 then at this stage, the election of the year 2020 cannot be upset. In support of his submission, he has placed reliance on the Full Bench judgment of this Court in **Vikas Trivedi and others vs. State of UP**

and others⁹; the Division Bench judgments in **Jyoti Kumar Malviya vs. Indian Farmers Fertilizers Co-operative Ltd. Others**¹⁰ and **Matsya Jivi Sahkari Samiti Ltd. vs. State of UP and others**¹¹. He has further placed reliance on the judgment of the Delhi High Court in W.P. (C) No.2059/2021¹², wherein, the petitioners have challenged the steps initiated by the respondents for the purposes of election of delegates of the Northern Zone Railway Employees Thrift and Credit Society Limited, which is admittedly governed by the Act, 2002 read with the Rules, 2002 and the Bye-laws framed thereunder and the Delhi High Court has proceeded to dismiss the writ petition as not maintainable, leaving it open to the petitioners to raise those issues, if so chosen and advised, before the appropriate forum.

23. Mr. Krishna Ji Shukla, Advocate, holding brief of Mr. N.K. Chatterjee, learned counsel for Union of India submitted that Section 45 of the Act, 2002 deals with the elections of the members of the board. Section 45 (1) provides that the conduct of elections to the board of a Multi-State Cooperative Society shall be the responsibility of the existing board. A Multi-State Cooperative Society is an autonomous body accountable to their members. The Multi-State Cooperative Society is required to function as per the provisions of the Act, 2002, the Rules, 2002 and its approved bye-laws. Section 45 (6) of the Act, 2006 provides that where the board fails to conduct the election of the members of board, the Central Registrar shall hold the election within a period of 90 days from the date when such election became due. Rule 19 of the Rules, 2002 deals with the procedure for conduct of elections. Rule 19 (1) provides that the election of members of the board shall be

conducted by a Returning Officer appointed by the board in its meeting. The Returning Officer so appointed shall not be a member or an employee of the society. The Society vide letter dated 20.02.2020 had submitted the election report to the office of Central Registrar. Further the provision of Section 123 of the Act, 2002 is only applicable for supersession of the board of a Multi-State Cooperative Society/Bank and the Society in question does not fall under the said category.

24. Mr. Shukla contended that in compliance of the order of the Court dated 20.12.2018 passed in Writ C No.47230 of 2018, the personal hearing was accorded on 02.05.2019 and the petitioner no.1 and other concerned parties appeared before the Central Registrar. Finally, the Central Registrar vide his order dated 28.05.2019 had found no reason to refer the matter for arbitration under Section 84 of the Act, 2002 as requested by the first petitioner. He submitted that the provisions of Section 44 (2) of the Act, 2002 are attracted in the present case, wherein the first petitioner has become ineligible for the third term to the post of Chairperson of the Bank. Again the first petitioner filed Writ C No.38998 of 2019 for issuing direction to the Central Registrar to hold an enquiry under Section 78 of the Act, 2002. The said writ petition was disposed of on 13.1.2020 with direction to the Central Registrar to consider the application of the petitioner dated 10.4.2019 filed under Section 78 of the Act, 2002 in accordance with law. Finally, the Central Registrar vide order dated 02.03.2020 directed to the Commissioner, Gorakhpur Division to make an enquiry in the matter under Section 78 of the Act, 2002. Section 84 of the Act, 2002 deals with the reference of disputes. As per Section 84 (2) (c) of the

Act, 2002 any dispute arising in connection with the election of any officer of a Multi-State Cooperative Society shall be deemed to be dispute touching the constitution, management or business of a Multi-State Cooperative Society.

25. Heard rival submissions and perused the record.

26. Before proceeding to consider the rival submissions, it would be appropriate to re-produce the relevant provisions of the the Act, 2002 read with the Rules, 2002 and the Bye-laws framed thereunder:-

“Section 28. Members not to exercise rights till due payment made.

No member of a multi-State cooperative society shall exercise the rights of a member, unless he has made the payment to the society in respect of membership, or has acquired such interest in the society, as may be specified in the bye-laws.

Section 32. Manner of exercising vote.

Every member of a multi-State co-operative society shall exercise his vote in person and no member shall be permitted to vote by proxy:

Provided that a multi-State co-operative society or a co-operative society or any other institution which is a member of any other multi-State co-operative society may, subject to the provisions of subsection (3) of section 38 and the rules, appoint its representative to vote on its behalf in the affairs of such multi-State co-operative society.

Section 38. Constitution, powers and functions of general body

(1) The general body of a multi-state cooperative society shall consist of all the members of such society:

Provided that where the bye-laws of a multi-state cooperative society provide for the constitution of a smaller body consisting of delegates of members of the society elected or selected in accordance with such bye-laws, that smaller body shall exercise such powers of the general body as may be prescribed or as may be specified in the bye-laws of the society.

(2) Subject to the provisions of this Act, the rules and the bye-laws, the ultimate authority of a multi-state cooperative society shall vest in the general body of its members:

Provided that nothing contained in this sub-section shall affect the exercise by the board or any officer of a multi-state cooperative society of any power conferred on such board or such officer by this Act or the rules of the bye-laws.

(3) Where in any meeting of the general body or the board of a Multi-State Co-operative Society, a co-operative society or another Multi-State co-operative Society is to be represented, such co-operative Society or other Multi-State Co-operative society shall be represented in such meeting only through the Chairperson or the President or the Chief Executive Officer or a member of the board of such co-operative Society or other Multi-State Co-operative Society, as the case may be, if such member is so authorized by the board and where there is no board of such co-operative Society or other Multi-State Co-operative Society for whatever reasons, through the administrator, by whatever name called, of such co-operative society or other Multi-State Co-operative Society:

Provided that where the bye-laws of a Multi State Co-operative Society provide

for representation of other institutions in any meeting of general body or the board of such Multi State Co-operative Society, such institutions shall be represented through its nominee.

Section 44. Prohibition to hold office of chairperson or president or vice-chairperson or vice-president in certain cases.

(1) No member of a board shall be eligible to be elected as the chairperson or president or vice-chairperson or vice-president of a multi-State co-operative society if such member is a Minister in the Central Government or a State Government.

(2) No member of a board shall be eligible to be elected as the chairperson or president of a multi State co-operative society, after he has held the office as such during two consecutive terms, whether full or part:

Provided that a member, who has ceased to hold the office of the chairperson or president continuously for one full term, shall again be eligible for election to the office as such.

Explanation.--where any member holding the office of the chairperson or president at the commencement of this Act is again elected to that office after such commencement, he shall for the purpose of this section, be deemed to have held office for one term before such election.

(emphasis supplied)

Section 45. Elections of members of board.

(1) The conduct of elections to the board of a multi-State cooperative society shall be the responsibility of the existing board.

(2) The election of members of board shall be held by secret ballot in the manner as may be prescribed.

(3) The election of the members of the board shall be held in the general meeting of the members of the multi-State co-operative society.

(4) The elected members of the board shall, if the bye-laws of such society permit, be eligible for re-election.

(5) The term of office of the elected members of the board shall be such, not exceeding five years from the date of elections, as may be specified in the bye-laws of a multi-State co-operative society:

Provided that elected members shall continue to hold office till their successors are elected or nominated under the provisions of this Act or the rules or bye-laws and assume charge of their office.

(6) Where the board fails to conduct election of the members of board, the Central Registrar shall hold the election within a period of ninety days from the date when such election became due.

(7) No person shall be eligible to be elected as a member of the board of a multi-State co-operative society unless he is a member of the general body of that society.

(8) The expenses for holding election by the Central Registrar shall be borne by the multi-State cooperative society.

(9) The Central Government may make rules generally to provide for or to regulate matters in respect of election of members of the board.”

Section 47 - Removal of elected members by general body

An elected member of a board, who has acted adversely to the interests of

multi-State co-operative society, may on the basis of a report of the Central Registrar or otherwise be removed from the board upon a resolution of the general body passed at its meeting by a majority of not less than two-third of the members present and voting at the meeting:

Provided that the member concerned shall not be removed unless he has been given a reasonable opportunity of making a representation in the matter.

Section 78. Inquiry by Central Registrar.

(1) The Central Registrar may, on a request from a federal cooperative to which a multi-State co-operative society is affiliated or a creditor or not less than one-third of the members of the board or not less than one-fifth of the total number of members of a multi-State cooperative society hold an inquiry or direct some person authorised by him by order in writing in this behalf to hold an inquiry into the constitution, working and financial condition of a multi-State cooperative society:

Provided that no inquiry under this sub-section shall be held unless a notice of not less than fifteen days has been given to the multi-State co-operative society.

(2) The Central Registrar or the person authorised by him under sub-section (1) shall have the following powers, namely:--

(a) he shall at all reasonable times have free access to the books, accounts, documents, securities, cash and other properties belonging to or in the custody of the multi-State co-operative society and may summon any person in possession or responsible for the custody of any such books, accounts, documents, securities, cash or other properties to produce the same, at any place specified by him;

(b) he may, notwithstanding any bye-law specifying the period of notice for a general meeting of the multi-State co-operative society, require the officers of the society to call a general meeting of the society by giving notice of not less than seven days at such time and place at the headquarters of the society to consider such matters, as may be directed by him; and where the officers of the society refuse or fail to call such a meeting, he shall have power to call it himself;

(c) he may summon any person who is reasonably believed by him to have any knowledge of the affairs of the multi-State co-operative society to appear before him at any place at the headquarters of the society or any branch thereof and may examine such person on oath.

(3) Any meeting called under clause(b) of sub-section(2) shall have all the powers of a general meeting of the society called under the byelaws of the society and its proceedings shall be regulated by such bye-laws.

(4) The Central Registrar shall, within a period of three months of the date of receipt of the report, communicate the report of inquiry to the multi-State co-operative society, the financial institutions, if any, to which the society is affiliated, and to the person or authority, if any, at whose instance the inquiry is made.

Section 84. Reference of disputes.

(1) Notwithstanding anything contained in any other law for the time being in force, if any dispute [other than a dispute regarding disciplinary action taken by a multi-State cooperative society against its paid employee or an industrial dispute as defined in clause (k) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947)] touching the constitution, management or

business of a multi-State co-operative society arises--

(a) among members, past members and persons claiming through members, past members and deceased members, or

(b) between a member, past members and persons claiming through a member, past member or deceased member and the multi-State co-operative society, its board or any officer, agent or employee of the multi-State co-operative society or liquidator, past or present, or

(c) between the multi-State co-operative society or its board and any past board, any officer, agent or employee, or any past officer, past agent or past employee, heirs or legal representatives of any deceased officer, deceased agent or deceased employee of the multi-State co-operative society, or

(d) between the multi-State co-operative society and any other multi-State co-operative society, between a multi-State co-operative society and liquidator of another multi-State co-operative society or between the liquidator of one multi-State co-operative society and the liquidator of another multi-State co-operative society, such dispute shall be referred to arbitration.

(2) For the purposes of sub-section(1), the following shall be deemed to be disputes touching the constitution, management or business of a multi-State co-operative society, namely:--

(a) a claim by the multi-State co-operative society for any debt or demand due to it from a member or the nominee, heirs or legal representatives of a deceased member, whether such debt or demand be admitted or not;

(b) a claim by a surety against the principal debtor where the multi-State co-operative society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor

as a result of the default of the principal debtor, whether such debt or demand is admitted or not;

(c) any dispute arising in connection with the election of any officer of a multi-State co-operative society.

(3) If any question arises whether a dispute referred to arbitration under this section is or is not a dispute touching the constitution, management or business of a multi-State co-operative society, the decision thereon of the arbitrator shall be final and shall not be called in question in any court.

(4) Where a dispute has been referred to arbitration under sub-section(1), the same shall be settled or decided by the arbitrator to be appointed by the Central Registrar.

(5) Save as otherwise provided under this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to all arbitration under this Act as if the proceedings for arbitration were referred for settlement or decision under the provisions of the Arbitration and Conciliation Act, 1996.

85. Limitation.—

(1) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963), but subject to the specific provisions made in this Act, the period of limitation in the case of a dispute referred to arbitration shall,—

(a) when the dispute relates to the recovery of any sum including interest thereon due to a multi-State co-operative society by a member thereof, be computed from the date on which such member dies or ceases to be a member of the society;

(b) save as otherwise provided in clause (c), when the dispute relates to any act or omission on the part of any of the

parties referred to in clause (b) or clause (c) or clause (d) of sub-section (1) of section 84, be six years from the date on which the act or omission, with reference to which the dispute arose, took place;

(c) when the dispute is in respect of an election of an officer of a multi-State co-operative society, be one month from the date of the declaration of the result of the election.

(2) The period of limitation in the case of any dispute, except those mentioned in sub-section (1), which are required to be referred to arbitration shall be regulated by the provisions of the Limitation Act, 1963 (36 of 1963), as if the dispute were a suit and the arbitrator a civil court.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the arbitrator may admit a dispute after the expiry of the period of limitation, if the applicant satisfies the arbitrator that he had sufficient cause for not referring the dispute within such period.

(emphasis supplied)

(Rules, 2002)

Rule 19 - Procedure for conduct of elections

(1) The election of members of the board shall be conducted by a returning officer appointed by the board in its meeting. The returning officer so appointed shall not be a member or an employee of the society:

Provided, that the Central Registrar shall appoint the returning officer to conduct the election of the National multi-state cooperative societies, multi-state urban cooperative banks, multi-stage agricultural processing cooperatives and Railway Employees Credit Societies. The Central Registrar may also appoint returning officer for the conduct of a

election of a society if so requested by the board of Directors of such society.

(2) The election of the members of the board referred to in sub-rule (1) shall be conducted by secret ballot in the manner as specified in the schedule attached with these rules.

Rule 26 of the bye laws – Constitution of the general body

i. The general body of the bank shall consist of all the members of the bank.

ii. Subject to the provisions of the Act, Rules and these bye-laws, the ultimate authority of the bank shall vest in the general body of its members.

iii. Since the society is having more than 1000 members, smaller representative of general body is formed on the following manner.

iv. One delegate for every one hundred members but not exceeding 20 from each constituencies and shall exercise such powers of the general body Assistant Registrar prescribed and specified in the bye-laws, the delegates shall be elected for a period of five years from the date of their election.

Provided that delegates shall hold their office till their successor are elected and assume charge of their office.

v. Each of the department or office mentioned herein shall form a constituency for the purpose of election of delegates.

1. Accounts Department.

2. Managing, Personnel, Audit Department, Statistical office, Railway Safety, Commissioner's office and the Bank.

3. Operating.

4. Commercial.

5. Civil Engineering.

6. Mechanical Engineering.

7. Stores.

8. Electrical Engineering.

9. Medical.

10. Signal and Telecommunication Engineering.

11. Security.

vi. The election of delegates to the General Body shall be conducted in the manner prescribed under Election Regulation framed by the Bank in consonance with Act & Rules as approved by the general body.

Rule 35 of the bye laws – Election of members of Board

i. The conduct of election to the Board of the Bank shall be the responsibility of the existing Board. The Board of Directors in office shall meet at least sixty clear days in advance of the date of expiration of its term and by resolution determine the date, time and place for convening a General Body meeting for the conduct of the elections of its successor Board.

ii. The election of the members of the Board shall be held in the manner specified in the election schedule annexed to the Multi-State Co-operative Societies Rules, 2022.

iii. The elected members of the Board shall be eligible for re-election.

iv. The term of office of the elected members of the Board shall be five years from the date of their election.

Provided that the elected member shall continue to hold office till their successors are elected or nominated under the provisions of the Act, Rules or bye-laws and assume charge of their office.”

(emphasis supplied)

27. In order to rule upon the rival submissions, the Court deems it apposite to notice the following facts. The Bank was established on 23.11.1912 and recently, it is governed by the Act, 2002. The bank also

holds a Banking licence issued by the Reserve Bank of India. The cooperative society had been formed to espouse and protect the interests of employees of the Indian Railways. The affairs of the Society is to be run and managed strictly in consonance with the provisions as contained under the Act, 2002 and the by-laws framed thereunder. The bank does not receive any grant from Government. The Board of Director and office bearers are elected by the procedure prescribed under the Act, 2002; the Rules framed thereunder and registered bye-laws, which has guaranteed a tenure of five years in Section 35 (d) of the bye-laws. Co-operatives are democratic institutions, where the members elect the board and the board members amongst themselves elect the Chairman and the Vice Chairman. Further Section 44 (2) of the Act, 2002 prescribes that no member of a board shall be eligible to be elected as the Chairperson or President of a Multi State Cooperative Society, after he has held the office, as such during two consecutive terms, whether full or part. The first petitioner was elected as the Chairman of the Bank for the first time from 2008 to 2010 and thereafter, he was elected as Chairman for the second time from 2010 to 2015. Again the election of the members of the board was held on 30.07.2015 and the election of Chairman and Vice Chairman was held on 31.07.2015, wherein the first petitioner was elected as Chairman for the third time. Since the first petitioner was holding the office of the Chairperson, which was against the provisions of Section 44 (2) of the Act, 2002 and as such, he was removed on 27.09.2018 on the 'no confidence motion' moved by Rajesh Kumar Singh and the charge of the Chairman was handed over to Anurag Khare in officiating capacity.

28. From the record it further transpires that the first petitioner filed the reference before the Central Registrar under Section 84 of the Act, 2002 on 28.10.2018. He had also filed Writ C No.42730 of 2018, which was disposed of by a coordinate Bench of this Court on 20.12.2018 with direction to the Central Registrar of Cooperative Societies to ensure expeditious decision on the reference petition of the petitioners, preferably within two months. Thereafter, the first petitioner and the respondents were called upon for personal hearing and during the personal hearing held on 2nd May, 2019, the board members raised the issue that the first petitioner was continuing for the third term and as such, the 'no confidence motion' was moved by one board member namely Rajesh Kumar Singh. While this point was raised by the board members of the bank during the personal hearing held on 2nd May, 2019, the first petitioner did not raise any argument against this allegation. Finally, the Central Registrar vide order dated 28.05.2019 had refused to make reference under Section 84 of the Act, 2002 on the ground that the first petitioner has been the Chairman for two consecutive terms and in view of the provisions contained in Section 44 (2) of the Act, 2002, which creates prohibition to hold the office of the Chairperson for more than two consecutive terms whether full or part, the first petitioner was ineligible for the third term on the post of the Chairperson of the Bank. The order of the Central Registrar dated 28.05.2019 and its findings were not challenged before any competent authority or court, therefore for all practical purposes, the said order has attained finality.

29. On perusal of the record, it would be further evident that the cooperative society is admittedly one, which is

governed by the provisions of the Act, 2002. As per the Bye-laws framed thereunder, its area of operations are spread across the States of Uttar Pradesh, Uttarakhand, and Bihar. As per details of members, which is appended as Annexure No.2 to the writ petition, the Bank has 52010 members as on 31.03.2016 and near-about 250 employees are working in the bank. Under the Bye-laws, elections are to be held for delegates and for constituting its Board of Directors. The primary members of the cooperative society elect delegates, who in turn choose the constituents of the Board of Directors. As per the membership details, which have been disclosed by the respondents, 215 delegates are elected by the primary members of the cooperative society and it is these delegates which then proceed to elect members of the Board of Directors. Section 45 (2) of the Act, 2002 specifies the tenure as not exceeding 5 years by using the word "shall". The two words 'shall' and 'not exceeding' are indicative of mandatory provision declaring the term of office of elected members as 5 years maximum, though the proviso speaks that the elected members shall continue to hold office till a new body assumes charge. From the said proviso it appears that continuation of the elected members after expiry of 5 years period has been subjected to holding of election of a new body and assumption of charge thereof. The legislature practically intended that election must be held by the Board itself within the tenure of the Board. Considering the situation that if a Board of Directors is negligent to complete the election, sub-section (6) was enacted, which provides power to the Central Registrar to hold the election within a period of 90 days from the date when such election became due. There is a statutory mandate directing to conduct election by the Board in terms of Schedule

of the Rule, 2002, wherein in Rule 35 (i) it is provided that the Board of Directors in office shall meet atleast 60 clear days in advance of the date of expiration of its term and by resolution determine the date, time and place for convening a general body meeting for the conduct of election of its successor Board. Under Clause (b) of the said Schedule such decision is required to be sent forthwith to the Central Registrar, who under Clause (c) of the said Schedule will appoint a Returning Officer for the purpose of holding election. The last undisputed elections were held in 2015 and thus, the term of the elected body was to come to an end in 2020. It is in that backdrop, the existing Board had passed the resolution on 25.10.2019 and appointed Ravi Prakash Singh, as an Election Officer. According to the respondents, the election was held on 06.1.2020 from 8 AM to 5 PM across the various constituencies of the cooperative society and the final result was declared on 08.01.2020, whereby electoral college was constituted for the purpose of conducting the election of Board of Directors. After declaration of the result of delegates/members of general body further publication was made in daily newspaper "Gorakhpur Keshari" on 10.01.2020 publishing the election schedule for conducting the election of members of the Board on 18.02.2020 and simultaneously, the election schedule for election of Chairman and Vice Chairman was published fixing date of election on 19.02.2019. As per the election schedule, the election of the member of Board of Directors was held on 10.02.2020 and the Chairman and Vice Chairman on 19.02.2020, wherein 11 Directors including the Chairman and Vice Chairman, were elected and the new Board is discharging its duties with effect from 19.02.2020.

30. We have also occasion to peruse the order of the Central Registrar of Cooperative Societies dated 28.5.2019, wherein it has been observed that the first petitioner namely Brijesh Kumar Singh was elected as the Chairman of the Bank for the first time for the period from 2008 to 2010 and thereafter, he was elected as Chairman for the second time from 2010 to 2015. Again he was elected for the third time on 30.07.2015. It is specifically provided in sub-section (2) of Section 44 of the Act, 2002 that no member of a board shall be eligible to be elected as the Chairperson or President of a Multi-State Co-operative Society, after he has held the office as such during two consecutive terms, whether full or part. Before the board meeting dated 27.09.2018, 26 agenda items were proposed for approval before the then Chairman Brijesh Kumar Singh (first petitioner), however, some items were not approved by him including point no.5 pertaining to consider the matter regarding the third term of the existing Chairman, Brijesh Kumar Singh in the light of Central Registrar's order dated 17.08.2017. Although the said item was not included in the agenda of the board meeting, however, the 'no confidence motion' was moved during the board meeting dated 27.09.2018 by Rajesh Kumar Singh, one of the Directors of the bank. In para 5.2 of the order it has been observed that the first petitioner had pleaded that he was not informed about the meeting and that no meeting took place. However, as per point no.4.3 of the submissions made by the respondents, the first petitioner was present in the meeting and walked out, when the 'no confidence motion' was moved.

31. From the facts noticed above, it is an admitted position that the first petitioner was elected as the Chairman of the Bank

for the first time from 2008 to 2010; thereafter he was elected as Chairman for the second time from 2010 to 2015 and he was again elected for the third time on 30.07.2015, which is against Section 44 (2) of the Act, 2002, which creates prohibition to hold the office of the Chairperson for more than two consecutive terms whether full or part. Consequently, the first petitioner was removed on 27.09.2018 on the 'no confidence motion' moved by Rajesh Kumar Singh and the charge of the Chairman was handed over to Anurag Khare in officiating capacity. The Central Registrar vide order dated 28.05.2019 had also refused to make reference under Section 84 of the Act, 2002 on the ground that the first petitioner is ineligible for the third term on the post of the Chairperson of the Bank. Moreover, in response of the order dated 13.01.2020 passed in Writ C No.38998 of 2019, while considering the complaints of the petitioner on 02.03.2020, the Central Registrar of Cooperative Societies had observed that the complainants (petitioners) have submitted that the current management of the bank has committed a series of irregularities, which are serious in nature and require a detailed inquiry. Therefore, it is misconceived argument on behalf of the petitioners that at the said stage the management of the bank was not available. The Registrar further observed in para-3 of the order that the respondents represented by the current Chairperson and Secretary of the Society have also taken further objection that the complainants have not attended three consecutive meetings of the Board in spite of notice, which incurred disqualification under Section 43 (m) of the Act, 2002. Therefore, they had no locus standi to file any complaint under Section 78 of the Act, 2002. Therefore, it is not disputed that the first petitioner, who was

holding the office of the Chairman in third consecutive term, was removed on 27.09.2018 and the charge of Chairman was handed over to Anurag Khare in official capacity. Nothing has been brought on record by the petitioners to indicate that with effect from 27.9.2018 to 31.07.2020 the first petitioner being as Chairman had ever performed any work in the Society as Chairman. The term of the elected body also came to an end in July, 2020. The election of the member of Board of Directors were held on 10.02.2020 and the Chairman and Vice Chairman on 19.02.2020, wherein 11 Directors including the Chairman and Vice Chairman, were also elected and the new Board is discharging its duties since 19.02.2020.

32. The High Court of Calcutta in **Madan Mohan v. State**¹³, was considering the question, whether a Cooperative Society, registered under the Bengal Cooperative Societies Act, 1940, or its Managing Committee was amenable to writ jurisdiction. Their Lordships held that the management of the affairs and activities of the Society, were inter alia, controlled by the Registrar of Cooperative Societies, who was a public authority. Such affairs could not be private affairs. It was not necessary that a body, in order to be a public body, ought to be constituted by a statute, though its powers and duties were created by an Act or the Rules. Even, where the Society was a person, there could not be any broad and general proposition, that no writ would lie against such a person. It depends on particular facts of each case.

33. In **P.B.K. Rajachidambaram v. R.P. Rathana Sharma**¹⁴, the Madras High

Court held that the writ could be issued against a cooperative society.

34. In **Praga Tools v. Imanuel**¹⁵, their Lordships of the Supreme Court were considering the question, whether a writ would lie against a Company, incorporated under the Companies Act. Though, the writ was disallowed, but it was held that the writ could be issued, only in case of legal right to performance of legal duty. It was further held that it was not necessary that the person or the Authority, in whom the statutory duty was imposed, need be a public official or an official body. However, at the same time, their Lordships observed that the Company, being a non-statutory body and, once incorporated under the Companies Act, there was neither a statutory nor a public duty imposed on it, by a statute, in respect of which, enforcement could be sought by means of a mandamus.

35. So far as the issue of no-confidence motion is concerned, a Full Bench of this Court in **Vikas Trivedi and others vs. State of U.P. and others** (supra) has considered this aspect and held as under:

"Our answers to the questions referred including the question No.1, which has been re-framed by us, are as follows:-

(i) The requirement of giving notice by the Collector under Section 15(3)(ii) in the prescribed form as required by Rule 2 and Form-2 is held not to be mandatory and on substantial compliance of the provisions the proceeding shall not be vitiated. Whether there has been substantial compliance of the said provisions, depends on the facts and circumstances of each case.

(ii) The observation of the Division Bench in Ram Nath Tripathi's case (supra) that notice in prescribed form along with its annexures in complete format is mandatory does not lay down the correct law. The judgment in Smt. Krishna Jaiswal's case (supra) lays down the correct law and is approved.

(iii) The notice sent by the Collector convening the meeting to consider the motion of no confidence cannot be invalidated on the ground that copy of the notice with the name of the person who had signed the written notice of intention, was not sent along with the notice. When proposed motion of no confidence is signed by the requisite members, the notice convening the meeting cannot be invalidated merely on the ground that some pages of the proposed motion containing signatures of some members only were sent along with the notice."

36. In the case of **Jyoti Kumar Malviya vs. Indian Farmers Fertilizers Co-operative Ltd. Others** (supra) the Division Bench has considered the provisions of Article 12 and 226 of Constitution of India and held that IFFCO cannot be said to be an "instrumentality" of the State as the IFFCO does not discharge any "public function" and so it cannot be said to be amenable to the writ jurisdiction.

37. In **Matsya Jivi Sahkari Samiti Ltd. vs. State of UP and others** (supra), a Division Bench of this Court has dismissed the writ petition filed seeking direction to decide the claim of the petitioner with regard to election proceedings of a Co-operative Society. The order reads as follows:-

"8. The aforequoted provisions indicate that the manner of settlement of

disputes is provided for under Chapter IX of the Act, 1965.

9. Section 70 is in respect of disputes which may be referred to arbitration and in terms thereof, the disputes specified under sub-section (1) are to be referred to the Registrar for action in accordance with the provisions of the Act and the rules and no Court shall have jurisdiction to entertain any suit or other proceedings in respect of any such dispute.

10. In terms of the proviso to sub-section (1) of Section 70, a dispute relating to an election under the provisions of the Act or the rules made thereunder, shall not be referred to the Registrar until after the declaration of the result of such election.

11. Sub-rule (1) of Rule 444-C provides that the election in a co-operative society shall not be called in question either by arbitration or otherwise except on the grounds specified under clause (a) and clause (b) under sub-rule (1).

12. In terms of sub-rule (2) a dispute relating to an election shall be referred by the aggrieved party within forty-five days of the declaration of the result.

13. In the case at hand, as per the case set up by the petitioner, the elections of the co-operative society in question, have already been held and the results thereof have also been declared. In view of the aforesaid facts and situation, any complaint, grievance or dispute which is being sought to be raised with regard to the elections, is to be referred to the Registrar on an appropriate application by the aggrieved party.

14. A conjoint reading of the provisions contained under Section 70 of the Act, 1965 and Rule 444-C of the Rules, 1968 leave no manner of doubt that a complete procedure for settlement of disputes and the manner of reference of such disputes, including a dispute relating

to an election under the provisions of the Act or the Rules made thereunder, is provided for. Any grievance, complaint or dispute relating to the election proceedings of a co-operative society can be called in question on the grounds specified under sub-rule (1) of Rule 444-C by applying for a reference by making an appropriate application under Section 70 of the Act, 1965.

15. A complete mechanism with regard to settlement of disputes relating to election in a co-operative society having been provided for in the manner as aforesaid, we are not inclined to exercise our extraordinary jurisdiction under Article 226 of the Constitution, in the facts of the present case.

16. It would be open to the petitioner to invoke the appropriate remedy, provided in terms of the statutory provisions under the Act, 1965 and the Rules made thereunder.

38. In the case of **Sushil Kumar vs. Central Registrar of Coop. Society and ors** (supra), the Delhi High Court has dismissed the writ petitions, challenging the steps initiated by the respondents for the purposes of election of delegates of the Northern Zone Railway Employees Thrift and Credit Society Limited, as not maintainable on the ground that merely because a body is obligated to comply with various statutory requirements, that cannot be conclusive to answer the question of whether it is discharging a public function.

“27. The following undisputed facts emerge from the aforesaid discussion. The cooperative society has essentially been formed to promote and safeguard the welfare of its members who are all employees of the Indian Railways. As its objects would indicate, it is enjoined to

work towards the upliftment and betterment of the condition of its members through self-help and mutual aid in accordance with "cooperative principles". It raises funds from its members by requiring compulsory deposits, issuing shares and other means permissible under the Byelaws. In NZRECTC, the learned Judge albeit dealing with the issue of whether the respondent cooperative society could be treated as a public authority for the purposes of the Right to Information Act, 2005, in unambiguous terms found that it receives no funds or financial aid from the Government. That decision significantly noted that the cooperative society was not a statutory corporation and had merely applied for registration under the Act. It was then observed that it was not found to satisfy the test of substantial finance by the Government and was funded principally on the basis of contributions made by its members. NZRECTC then found that even the Bye-laws did not vest any control in the Central Government or the Railways over its affairs. It was further observed that the mere fact that the cooperative society was governed by the provisions of the Act would have no bearing on the question of whether it was a public authority. It ultimately and in light of the conclusions noticed above found that the cooperative society would not be covered by the Right to Information Act, 2005.

28. From the aforesaid findings on facts as recorded in NZRECTC and which were not disputed by the petitioners, it is manifest that there is no deep or pervasive control exercised by the Government. It is a cooperative society formed by employees of the Indian Railways to promote and safeguard the interests of its members. From its aims and objects it is apparent that it is principally concerned with ameliorating the conditions of its members,

to extend loans, work toward their welfare, acquire land for the purposes of establishing its offices and for construction of residences for its members and to lend money to its shareholders and members. Its finances are founded on share money and contributory deposits made by its members. In order to hold that a body would be amenable to the writ jurisdiction of this Court as conferred by Article 226 of the Constitution it would have to be necessarily found that it is either State or an authority as envisaged by Article 12. The well settled tests propounded in the decisions of the Supreme Court noticed above include whether the body is substantially funded or financially controlled by the Government, whether it is functionally or administratively controlled by the Government and whether it performs a public function or discharges a public duty.

29. From the facts noticed above, it is apparent that the cooperative society is neither substantially financed nor funded by the Government. A reading of its Byelaws establishes beyond a measure of doubt that it is also not administratively controlled by the Government. There is no dominant or overriding power that the Government may be recognised to wield over the affairs of the cooperative society. The Government is not shown to control the cooperative society either in the management of its affairs or the formulation of policy. The Court also bears in mind that the cooperative society has not been conferred with any monopoly status. It clearly comes across as an autonomous body formed by employees of the Indian Railways as a part of their intent to adopt "cooperative principles" for the promotion of the welfare and well-being of its members. The Court thus comes to the firm conclusion that the cooperative society fails to satisfy the test of "deep and pervasive

control" as enunciated in the body of precedents noted above.

30. That then takes the Court to consider whether the cooperative society discharges a public function and whether its registration under the provisions of the Act would have any bearing on the question that stands posited. Dealing firstly with the issue of a public function, it becomes apposite to note that the Supreme Court in Ramakrishna Mission pertinently observed that in order to satisfy the public function test it must be found that the body is discharging functions that are akin to the sovereign functions of the State. For a body to be recognised as performing a public function, it must be found that its activities and functions are imbued with a character touching upon public interest as opposed to something which may be of a purely private character. The Court fails to discern any public function element that may flow from the Byelaws of the society. That instrument in fact and to the contrary indicates that the cooperative society is essentially concerned with protecting the private interests of its members.

31. Turning then to the registration of the cooperative society under the Act, it may at the outset be observed that the affairs of various bodies may be regulated and controlled by myriad statutes in respect of a wide range of activities and functions that may be performed by them. However, merely because the affairs of a particular body may be regulated by statute, that cannot be determinative of the question that stands raised. As was aptly observed by the Supreme Court in Ramakrishna Mission, law is a "ubiquitous phenomenon" and touches various aspects of the functioning of a body. It was observed that merely because a body is obligated to comply with various statutory requirements, that cannot be conclusive to answer the question of

whether it is discharging a public function. The fact that the cooperative society is registered under the Act or that the Byelaws or the procedure of elections owe their genesis to the Act and the Rules, would not be sufficient to hold that it would be amenable to the writ jurisdiction of the Court. This Court also bears in mind the principles enunciated by the Full Bench of the Allahabad High Court in Vijay Behari Srivastava where it was pertinently observed that merely because the affairs of a society are controlled by the Registrar that would not make that body "State" as contemplated under Article 12 of the Constitution. In S.S. Rana the Supreme Court held that the general regulation of a society by statute is merely meant to ensure its proper functioning and would not render the activities of that entity as being subject to State control. The aforesaid position in law clearly emerges from the decision of this Court in Mohinder Singh. It would be pertinent to note that both Sushila Devi Bhaskar and S.K. Gambhir, on which reliance was placed by Mr. Garg, were dealing with cases where the Court had found that the cooperative societies had become instruments and vehicles for implementation of State policy and acting as an adjunct to the Delhi Development Authority. It was in that backdrop that the writ petitions were held to be maintainable.

32. The Court further notes that the writ petition neither rests on an allegation of a statutory provision having been violated nor does it impugn a decision or action of a public authority. The decision of the Supreme Court in A. Umarani which was cited by Mr. Garg also does not come to the aid of the petitioners for the aforesaid reasons. It may be observed that Byelaws constitute a contract between the society and its members and members inter se. A mere infraction of those Byelaws would not

justify the invocation of Article 226 of the Constitution. For this reason, also it must be held that the writ petition would not be maintainable.

33. The Court may while parting note that while Mr. Garg had addressed various contentions touching upon the merits of the dispute, those have not been dealt with in light of the conclusion of the Court that the writ petition itself is not maintainable. The Court consequently leaves it open to the petitioners to raise those issues, if so chosen and advised, before the appropriate forum and in accordance with law.

34. Accordingly, and for the aforesaid reasons, since the writ petition has been found to be not maintainable under Article 226 of the Constitution, it shall stand dismissed. All interim orders shall consequently stand discharged."

39. Admittedly, in the election held on 31.07.2015, the first petitioner was elected as Chairman of the Board for the third time. The meeting of the board took place on 27.09.2018; acting Secretary had submitted 26 proposals to be under agenda items, out of which 07 proposals were rejected and 19 proposals were approved. It transpires from the record that 24 proposals were passed by the first petitioner. However, one Rajesh Kumar Singh introduced proposal no.25. At the time of discussion over the said item, the first petitioner walked out of the meeting and refused to sign the minute. Out of nine members of the Board, six members voted in favour of the 'no confidence motion' and only one member voted against the 'no confidence motion' and the first petitioner was absent. As per bye-law no.33, which provides that the members of the Board elect the Chairman and Vice Chairman by majority, therefore they can also remove them by majority. Admittedly, the resolution was under challenge in Writ

C No.42730 of 2018, wherein the coordinate Bench of this Court vide order dated 20.12.2018 had accorded reprieve to the extent that since the petitioners have already moved reference under Section 84 of the Act 2002, accordingly a direction was issued upon the first respondent (Central Registrar of Cooperative Societies, Department of Agriculture and Cooperation, Government of India, New Delhi) to take a decision. Consequently, the Central Registrar had refused to refer the matter under Section 84 of the Act, 2002 vide order dated 28.05.2019 which was again subject matter of challenge in Writ C No.29112 of 2019. Consequently, the case has also been set up by the petitioners while moving the complaint to the Central Registrar on 23.03.2019, wherein it was alleged that 06 Directors were convening the meeting of the Board of Directors without any information to the petitioners. Later on, the petitioners moved an application under Section 78 of the Act, 2002 before the Central Registrar for an enquiry into the affairs of the Society. Once the Central Registrar has not taken any cognizance on the said complaint then the first petitioner alongwith Ashok Kumar Pandey had again preferred Writ C No.38998 of 2019. In the said writ petition, the petitioners never claimed any relief qua 'no confidence motion' and while disposing of the writ petition on 13.01.2020, the Central Registrar was asked to consider the application of the petitioners filed under Section 78 of the Act, 2002. While deciding the said application the Central Registrar, Cooperative Societies had passed an order for holding an enquiry on 02.03.2020. The said order has already been reproduced hereinabove, wherein the petitioners acknowledged and accepted before the Central Registrar the status of the contesting respondents as Chairperson and

Secretary of the Society. Therefore, at this belated stage the challenge to the 'no confidence motion', which took place in the year 2018, is not tenable in law and accordingly, the same is rejected.

40. Section 44 (2) of the Act, 2002 provides that no member of a board shall be eligible to be elected as the Chairperson or President of a Multi State Co-operative Society, after he has held the office as such during two consecutive terms, whether full or part. While deciding the complaint of the petitioners by the Central Registrar on 28.05.2019 it was held that the first petitioner was not eligible for being elected as per provisions contained under Section 44 (2) of the Act, 2002. So far as the said observation is concerned, till date the same is not upset by any competent court and therefore, the same has attained finality. It is admitted position of the parties that the first petitioner was elected third time as Chairman in the year 2015. Moreover, 'no confidence motion' was acted upon. Admittedly, the first petitioner has not discharged any work as Chairman of the Bank since 2017 to 2020. The Board of Directors, who were elected on 31.07.2015, had to complete its term of 05 years upto 31.07.2020. The Board of Directors of the Cooperative Bank had convened the meeting on 25.10.2019 in which the Returning Officer was appointed to conduct the election, which was also communicated through registered post on 04.11.2019 to the Central Registrar. The fresh election took place and the new Board was constituted on 19.02.2020, wherein 11 Directors including the Chairman and Vice Chairman were elected. The new Board is discharging its duties with effect from 19.02.2020. Considering the fact, that the said election was never challenged under the limitation period as provided under

Section 85 of the Act, 2002 and therefore, for all practical purpose, the election, which took place on 18.02.2020 and 19.02.2020, has attained finality.

41. Therefore, at this stage we would like to add that in case there is any vacuum or Cooperative Board fails to conduct the election of the members of the Board, the Central Registrar is empowered to hold the election within the period of 90 days from the date when such election became due, as per Section 45 (6) of the Act, 2002. Moreover, Rule 19 (1) of the Rules, 2002 also provides that the election of members of the board shall be conducted by the returning officer appointed by the board in its meeting. It is also claimed that after the election due information was sent to the office of the Central Registrar and therefore, at no stage there was any situation of supersession of the Board of Multi State Cooperative Society/Bank to attract the provisions of Section 123 of the Act, 2002.

42. In view of the foregoing discussions, we are of the view that the contentions raised by the petitioners are not sustainable in law and accordingly, no relief can be accorded to the petitioners. As such, we are not inclined to exercise our discretionary jurisdiction under Article 226 of Constitution of India.

43. Accordingly, the writ petition is dismissed.

(2023) 7 ILRA 961
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.05.2023

BEFORE
THE HON'BLE RAHUL CHATURVEDI, J.

Application U/S 482. No. 1405 of 2023

Gagan Pal Singh Ahuja & Anr.

...Applicants

Versus

State of U.P. & Anr.

...Opposite Parties

Counsel for the Applicants:

Sri Hritudhwaj Pratap Sahi, Sri Sankalp Narain, Sri Raghav Dev Garg, Sri Anurag Khanna (Sr. Adv.)

Counsel for the Opposite Parties:

G.A., Sri Anurag Vajpeyi, Sri Padmaker Pandey, Sri Manish Tiwary (Sr. Adv.)

Criminal Law-The Code of Criminal Procedure, 1973-Section 319 & 482---

Despite the fact that the parties have come to terms and the opposite party has received the amount to his satisfaction, in a clandestine fashion, opposite party no.2 have managed to move an application through Public Prosecutor, for summoning the applicants in the exercise of power under section 319--- The courts below were unmindful of the fact that the compromise between the parties and the summoning of non-accused persons(who are the parties of the compromise) cannot go hand in hand. Both are anti-thesis to each other and with the ulterior motive, this application was moved through Public Prosecutor--- the opposite party no.2 have got some ulterior plans to extract more money from the applicants by way of interest and that is why, he has used the Public Prosecutor but fact remains that since, he has already entered into compromise and with the specific understanding that after taking the amount, he will not go to prosecute the applicants in the aforesaid offence, still, he has managed to obtain the favourable orders which is liable to be set-aside. **(Para 45)**

Application allowed. (E-15)

List of Cases cited:

1. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr., reported in (2017) 9 SCC 641

2. Lovely Salhotra and anr Vs St., NCT, Delhi (2017) SCC Online SC (636)

3. Vijay Kumar Gupta Vs St. Government of NCT Delhi in Criminal Misc no.2289 of 2013 dated 09.03.2017

4. Jayraj Singh Digvijay Singh Rana Vs St. of Guj. & anr.(2012) 12 SCC 401

5. Kapil Gupta Vs St. of NCT Delhi reported in (2022) SCC Online SC 1030

6. Narender Singh Vs St. of Pun. (2014) 6 SCC 466

7. Shiji @ Pappu & ors. VS Radhika & anr., (2011) 10 SCC 705

8. Dimpey Gujral & ors. Vs Union Territory through Administrator, U.T. Chandigarh & ors., (2013) 11 SCC 497

9. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr., (2017) 9 SCC 641

10. Yogendra Yadav & ors.. Vs St. of Jharkhand & anr.(2014) 9 SCC 653

11. B.S. Joshi & ors. Vs St. of Har. & anr.(2003) 4 SCC 675.

12. Hardeep Singh and anr Vs St. of Pun. reported in AIR 2014 SC 1400

13. Kalyan Kumar Gogoi Vs Ashutosh Agnihotri & anr., reported in AIR 2011 SC 760

14. Lal Suraj @ Suraj Singh & anr. Vs St. of Jharkhand, reported in (2009) 2 SCC 696

(Delivered by Hon'ble Rahul Chaturvedi, J.)

[1] Heard Sri Anurag Khanna, learned senior Advocate assisted by Sri Sankalp Narain, Sri Raghav Dev Garg, learned counsel for the applicant ; Sri Manish Tiwary, learned Senior Counsel assisted by Sri Anurag Vajpeyi, Sri Padmaker Pandey, learned counsel for opposite party no.2 ; Sri

Ajay Kumar Sharma and Sri S.M.A. Faraz Qazmi, learned counsel appearing for the State and perused the records.

[2] Since, the pleadings between the contesting parties have been exchanged and as such, the matter is ripe for final submissions. Invoking the plenary powers of this Court under Section 482 Cr.P.C., the prayer sought by the applicant is as follows :-

“Hon’ble court may kindly be pleased to exercise power under section 482 Cr.P.C. and in terms of the law laid down by the Supreme Court in the case of Parbatbhai Aahir(supra) pass an appropriate order quashing the criminal proceeding in so far as the applicants are concerned in case crime no.0264 of 2018 registered in Police Station-Nazirabad, District-Kanpur Nagar and also quash the revisional rejection order dated 16.12.2022 as well as the summons issued to the applicants dated 22.11.2022 so that justice be done.”

[3] During the arguments, it was urged by Sri Anurag Khanna, learned Senior Counsel appearing for the applicant to allow the present application in the terms of the law laid down by Hon’ble Apex Court in the case of **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and Others Vs. State of Gujarat and another, reported in (2017) 9 SCC 641**, decided on 4th October, 2017 and other catena of decisions decided by Hon’ble Apex Court on this issue, pass an appropriate order quashing the criminal proceedings in the light of the compromise dated 04.10.2019 and 10.10.2019 between the contesting parties named above in so far as the applicants are concerned in case crime no.0264 of 2018 under sections 420, 406,

467, 468, 471, 386, 389, 120B, 504 and 506 IPC registered in Police station-Nazirabad, District-Kanpur Nagar and quash the revisional order dated 16.12.2022 passed by learned Sessions' Court, Kanpur Nagar whereby the revision which had been preferred by the applicants against an order dated 23.08.2022 passed by learned Additional Chief Metropolitan Magistrate, Court No.3, Kanpur Nagar under section 319 Cr.P.C. has been allowed and summons have been issued against the applicants by the Additional Chief Metropolitan Magistrate, Kanpur Nagar fixing date 22.11.2022 as the next date in the aforesaid case.

[4] I have heard learned counsels for the contesting parties at length to their satisfaction. In order to appreciate the legal issue involve, it is imperative to give a bird's eye view to the factual matrix of the case which has given rise to the present controversy.

FACTUAL MATRIX:-

[5] The instant 482 Cr.P.C. application has been preferred by Gagan Pal Ahuja s/o Preet Pal Singh Ahuja and his father Preet Pal Singh Ahuja s/o Darshan Singh r/o House No.7, Silver Mension, Silver Spring, Phase-I, Bypass road, Indore, (M.P.) challenging the aforesaid orders of learned Magistrate dated 23.08.2022, as well as order of confirmation by the learned Revisional court dated 16.12.2022 passed by learned Sessions Judge, Kanpur Nagar whereby despite of the fact that the parties have come to terms and the opposite party has received the amount to his satisfaction, in a clandestine fashion, opposite party no.2 have managed to move an application through Public Prosecutor, for summoning

the applicants(who are non-accused) in the exercise of power under section 319 Cr.P.C.

[6] Way back on 01.01.2015, a partnership deed was executed comprising of (I) Ms. Meeta Dua, w/o of Sonu Dua (ii) Devendra Singh Dua(opposite party no.2) (iii) Gagan Pal Singh Ahuja-applicant no.1 and one Jaspal Singh Ahuja as partner of the partnership firm M/s A.K. Enterprises having registered office at Shop No.33, Kenal Market, Lajpat Nagar, Kanpur Nagar. Preetpal Singh, applicant no.2 have got no concern with the said partnership firm, but for the best reasons known to opposite party no.2, father of Gagan Pal Singh Ahuja, has been unnecessarily dragged in this offence.

[7] On 07.05.2015 and 10/12.06.2015, a sale deed was allegedly executed by Vikram Singh Chauhan and Mr Man Singh, in favour of M/s A.K. Enterprises in respect of certain landed property at Village Hatipura Tehsil Barod, District-Agar Malwa, Madhya Pradesh. Applicant no.1, Gagan Pal Ahuja endorsed the said sale deed on behalf of the partnership firm i.e. M/s A.K. Enterprises. The consideration for the execution of the aforesaid sale deed was Rs.67 lacs and Rs.50 lacs and the same was paid by respondent no.2 and applicant no.1 respectively. The respondent no.2 paid the amount directly to Sri Vikram Singh and Sri Man Singh.

[8] In the year 2016 after digesting the amount, the said Vikram Singh Chauhan has admitted the fact that the so-called sale deed with regard to aforesaid landed property was never registered and said transaction was not legally completed. Sensing that something sneaky and shabby may occur, Sri Devendra Singh Dua-

respondent no.2 have backed out from the said partnership firm and a fresh partnership deed came into existence on 01.04.2016, between Ms. Meeta Agrawal, w/o Sonu Dua, Gagan Pal Singh Ahuja and Jaspal Singh Ahuja.

[9] Soon after coming to know that the nefarious design of Vikram Singh Chauhan and others, on 16.10.2017, Gagan Pal Singh Ahuja, applicant no.1 himself has lodged an FIR under section 420, 467, 468, 471, 406 IPC at Police Station-Agar, District-Malwa, M.P. against Vikram Singh Chauhan for the alleged act of cheating and committing fraud against the applicant no.1 and his partnership firm. After the investigation, on 15.05.2018, a charge sheet was submitted by the Investigating Officer for the case as C.S. No.93 on 15.05.2018 and Sri Vikram Singh Chauhan was arrested by the M.P. Police.

[10] On the other hand, a first Information Report bearing no.0246 of 2018 was lodged on 27.12.2018 by opposite party no.2 at police station-Nazirabad, Kanpur Nagar under section 420, 406, 467, 468, 471, 386, 389, 120B, 504, 506 IPC roping in Gagan Pal Singh and his father Preet Pal Singh along with Man Singh and Vikram Singh Chauhan. As mentioned above, Preet Pal Singh was roped in this case just because he was the father of applicant no.1, though in fact, he has got no concern with above transaction.

[11] At this juncture, when the investigation was in progress, on 01.10.2019, in the presence of Gurdeep Singh, Surjeet Singh, Sonu Dua and one Saran Jeet Singh Gujral along with the applicants met with the informant/opposite party no.2 and persuaded him to settle down the dispute outside the Court. After

clearing off all the misunderstandings allegedly cropped upon between them and thereafter a truce and compromise was arrived with them. After being satisfied, respondent no.2 entered into a compromise and it was agreed upon the parties that the applicants would pay a sum of Rs.67 lacs to respondent no.2. After taking the amount, it was also agreed that opposite party no.2 shall not proceed against the applicants in case crime no.264 of 2018 in the light of the compromise deed dated 04.10.2019 and 10.10.2019(Annexure-11 and 12 of the petition). From Annexure-12, it is clear that the applicant has extended 19 posted dated cheques of different dates in favour of Ms. Meeta Dua and Mr. Devendra Singh Dua respectively whose details were given in the compromise letter addressed to S.S.P. Kanpur Nagar. It is interesting to point out here that prior to this, a compromise deed was signed by Meeta Dua, Devendra Singh Dua and Gagan Pal Singh Ahuja in front of the witnesses Sonu Dua and Saranjeet Singh Gujral. It has been argued by learned counsel for the applicant that as and when, those cheques were fallen due, they were duly encashed in the account of Meeta Dua and Devendra Singh Dua respectively and entire outstanding sum was credited in their respective accounts. Thus, opposite party no.2 has admitted, that he has got no objection, if the prosecution against the applicants may be dropped. Taking into account the said acknowledgement by opposite party no.2, I.O. of the case have submitted the 'CLOSURE REPORT' against the applicants only after taking those compromise/settlement between the parties as part of Case Diary and taking them on record in Parcha Tittama No.4.

[12] After submission of the charge sheet, the remaining accused persons were put to trial after framing the charges against

them. It is worthwhile to point out that no charges were framed against the present applicants as they were non-accused, and their names were dropped by the I.O. on account of aforementioned compromise and settlement between the contesting parties. On 06.04.2021 and 06.12.2021 in examination-in-chief and its cross-examination, PW-1, informant Devendra Singh Dua, in no uncertain terms has admitted (a) that initially he has been duped by 67 lacs; (b) he has signed the compromise deed with the applicant out of his own sweet will without any coercion or threat upon him and (c) he has received 19 post dated cheques mentioned from serial no.1 to 19 of the compromise deed to the tune of Rs.67 lacs and all the cheques were duly encashed in their respective account. The relevant extracts of the testimony of PW-1 Devendra Singh Dua is quoted hereinbelow :-

“ आज दिनांक 06.12.2021 को साक्षी देवेन्द्र सिंह दुआ पुत्र श्री अमीर सिंह सशपथ पत्र बयान किया—

इस पूरे मामले में मेरे व मेरी बड़ी बहू श्रीमती मीता दुआ का कुल 67 लाख रुपया निवेश हुआ था। पत्रावली में संलग्न सुलहनामा एवं क्षतिपूर्ति के कागजात के संबंध में सहमत हेतु पत्र दिनांकित 4.10.19 प 2 में प्रथम पक्ष के रूप में लगा हुआ चित्र मेरा है तथा इस पर लगा हुआ निशानी अगूँठा भी मेरा है। इस समझौता पत्र के पेज 6 के पैरा 1 में दी गयी 01 लागयत 19 तक की चेके समस्त चेकों का भुगतान हो गया है। अभियुक्त विक्रम सिंह से मेरा कोई समझौता नहीं हुआ है। उसको 62 लाख रुपये दिये थे उसने कोई भुगतान नहीं किया है।

जमीन के लेन-देन की बात वर्ष 2015 में नवम्बर के आखरी सप्ताह में हुई थी। उस जमीन का मुआयना उस समय मैंने किया था। इन जमीनों के कागजात की मैंने जाँच करायी थी। इन जमीनों के स्वामी अनेक थे जिसका मुख्तारनामा विवके के

पास था। प्रीतपाल सिंह व गगनपाल सिंह द्वारा कहा गया कि कागजात एकदम सही है मैंने जाँच की है। उनकी बात पर विश्वास करके मैंने जमीन का सौदा किया था।

समयाभाव के कारण जिरह स्थगित की गयी। जिरह जारी रहे।

[13] From the aforesaid, it is explicitly clear that opposite party no.2 in no uncertain terms have acknowledged the receipt of Rs.67 lacs as a result of compromise dated 04.10.2019 and 10.10.2019 annexed as Annexure-11 and 12 respectively.

[14] It seems that opposite party no.2 has some different design in his mind and that is why after, receiving the entire outstanding amount of Rs.67 lacs in their accounts, in order to harass the applicants, in the sham criminal case, have persuaded the Public Prosecutor to drag the applicants in this offence with whom opposite party no.2 has already have a truce. Out of blue and without any anticipation to the applicants, the Public Prosecutor Mr. Sandeep Kumar Singh on 21.02.2022 has filed an application under section 319 Cr.P.C. for adding the applicants as accused of pending trial which has been undergoing arising out of case crime no.264 of 2018. This was unexpected move on the part of the public prosecutor who seems to be in the hand in glove with opposite party no.2 as argued by learned counsel for the applicants.

[15] Responding to this application, the Additional Chief Judicial Magistrate, Kanpur Nagar on 23.08.2022 has allowed the said application moved by the Public Prosecutor and have eventually summoned Gagan Pal Singh Ahuja and his father Preet Pal Singh Ahuja as an additional accused,

fixing 26.09.2022 as next date fixed, while issuing the summons to the applicants. The learned Additional C.M.M. Court No.3, Kanpur Nagar have opined that :

अवलोकन से दर्शित है कि न्यायालय में दाखिल आरोप पत्र में यह स्पष्ट है कि अभियुक्त विक्रम सिंह चौहान तथा गगनपाल सिंह के विरुद्ध न्यायालय में आरोप पत्र दाखिल किया गया था तथा गगनपाल सिंह व प्रीतपाल सिंह की कार्यवाही को शेष बताया गया है।

विवेचक द्वारा पर्चा तितम्मा 4 में गगनपाल सिंह व प्रीतपाल सिंह का सुलहनामा छतिपूर्ति भुगतान के आधार पर विवेचना समाप्त की दी गयी थी जबकि गवाहों के बयानों से यह स्पष्ट है कि अपराध गगनपाल सिंह व प्रीतपाल के द्वारा किया जाना दर्शित है। सुलहनामा कर लेने से अभियुक्तगण का अपराध समाप्त नहीं हो जाता है। अतः प्रार्थी का प्रार्थना पत्र अंतर्गत धारा 319 दं0प्र0सं0 स्वीकार किये जाने योग्य है।

[16] Sri Khanna, learned Senior Counsel submits that this is the exclusive and rare case of dishonesty whereby at one hand, the opposite party have accepted the total sum of Rs.67 lacs to his satisfaction after entering into the said compromise, on the other hand, he has instigated or made arrangement through Public Prosecutor to move an application to make the applicants as an additional accused of pending trial in exercise of power under section 319 Cr.P.C.

[17] Aggrieved by the order dated 23.08.2022 passed by the Additional C.M.M. Court No.3, Kanpur Nagar, allowing the 319 Cr.P.C. application moved by the Public Prosecutor, the applicants have preferred Criminal Revision under section 397 Cr.P.C registered as Criminal Revision No.390 of 2022. Ultimately, that criminal revision too was rejected by the learned Revisional Court confirming the orders dated 23.08.2022.

While rejecting the said revision preferred by the applicants, learned Revisional Court pleased to observe the following :-

“अवर न्यायालय की पत्रावली के परिशीलन से यह भी विदित होता है कि देवेन्द्र सिंह दुआ, श्रीमती मीता दुआ प्रथम पक्ष व गगनपाल सिंह अहूजा व जसपाल सिंह अहूजा पुत्रगण प्रीतपाल सिंह अहूजा व प्रीतपाल सिंह के मध्य एक समझौता हुआ है, जिसमें उन्होंने माना है कि मान सिंह व विक्रम सिंह ने कूटरचित अभिलेखों के आधार पर देवेन्द्र सिंह व मीता दुआ से 67,00,000/—रुपये की बेइमानी एवं धोखाधड़ी की थी और इसके एवज में उन्होंने 67,00,000/—रुपये क्षतिपूर्ति के रूप में देना स्वीकार किया है। स्पष्ट है कि स्वयं अभियुक्तगण गगनपाल सिंह व प्रीतपाल सिंह ने भी प्रस्तुत प्रकरण में यह माना है कि उन्होंने वादी देवेन्द्र सिंह दुआ व मीता दुआ से धोखाधड़ी व बेइमानी की है। साक्षीगण पी0डब्लू0 1 व 2 के साक्ष्य से इस स्तर पर यह साबित है कि अभियुक्तगण व उनके साथियों द्वारा कूटरचित विक्रय पत्र के आधार पर वादीपक्ष को आर्थिक क्षति पहुंचायी गयी है तथा उनसे धोखाधड़ी की गयी है, उन्हें धमकाया गया है, उन्हें जान से मारने की धमकी दी गयी है, गाली गलौज की गयी है तथा उन्हें बलात्कार के झूठे मुकदमे में फंसाने की धमकी दी गयी है। तथा वादी पक्ष के 67,00,000/—रुपये हड़प लिये गये हैं। अभियुक्तगण द्वारा कारित अपराध धारा 320 दं0प्र0सं0 के अन्तर्गत शमनीय प्रकृति का नहीं है, ऐसी स्थिति में अभियुक्तगण व वादी के बीच हुये कथित समझौते का प्रस्तुत वाद के तथ्यों पर कोई प्रभाव नहीं पड़ता है तथा इस समझौते के आधार पर अभियुक्तगण को विचारण से मुक्त नहीं किया जा सकता है। उपरोक्त परिप्रेक्ष्य में अवर न्यायालय द्वारा साक्षीगण पी0डब्लू0 1 व 2 के साक्ष्य के आधार पर अभियुक्तगण को धारा 319 दं0प्र0सं0 में विचारण हेतु धारा 406, 420, 467, 468, 471, 386, 389, 504, 506 व 120 बी. भा0दं0सं0 में आहत करने में कोई विधिक त्रुटि कारित नहीं की गयी हैं। तदनुसार प्रस्तुत दण्ड निगरानी निरस्त होने योग्य है।”

[18] Hence, the present application under section 482 Cr.P.C assailing the order dated 23.08.2022 and 16.12.2022 respectively. From the records, it is clear

that proceeding against the remaining co-accused persons namely Vikram Singh Chauhan and Man Singh is still pending and proceeding smoothly.

[19] Per contra, a short counter affidavit has been filed on behalf of Devendra Singh Dua, opposite party no.2 sworn by Sonu Dua and in the said counter affidavit, in paragraph no.11, the deponent of the counter affidavit acknowledges that the compromise deed has been executed on 04.10.2019 and 10.10.2019 between the parties after receiving the total sum of Rs.67 lacs and all the 19 post dated cheques totalling to the aforesaid amount got encashed and the amount has been credited in the accounts of opposite party no.2 and Ms. Meeta Dua. But in the remaining paragraphs, the counsel for opposite party no.2 has tried to draw some parallel between the applicant no.1 and Vikram Singh Chauhan. But there is no denial to the fact that Rs.67 lacs were credited in the account of opposite party no.2 as a result of compromise between the parties arrived on 04.10.2019 and 10.10.2019.

[20] It has been submitted by learned counsel for the applicant that courts below were unmindful of the fact that there is compromise between the parties which was arrived at between them to their satisfaction and the contesting parties were satisfied by the said compromise. There was no occasion or reason to file an application under section 319 Cr.P.C. to summon the applicant which was actually done by the learned Chief Metropolitan Magistrate and confirmed by the learned Revisional court. Both are anti-thesis to each other and cannot go hand-in-hand. Therefore, it could be safely termed that the action on the part of the Public Prosecutor was motivated one to attain sinister motive.

[21] On aforesaid factual parameters, learned counsel for opposite party no.2 Sri Manish Tiwary, at the outset has raised his submissions with regard to a partial compromise between the parties and its admissibility. Secondly, Sri Tiwary has strenuously defended the orders of learned Additional Chief Metropolitan Magistrate dated 23.08.2022 and revisional order dated 16.12.2022 confirming the orders of learned Additional Chief Metropolitan Magistrate by making a mention that since those compromise deed were never produced during the trial and never exhibited as a part of the evidence thus, they would not fall within the ambit of expression 'Evidence' as contemplated in the *Hardeep Singh's Judgment* and therefore, the said compromise cannot be looked into.

[22] Let us deal with the every issue one by one :-

**(i) Permissibility of the
peaceful compromise between the
parties**

The compromise, in the modern society, is the sine qua non of a harmony and orderly behaviour. The sole of the justice and if the power under section 482 Cr.P.C. is sued to enhance such compromise which, in turn, enhances the social amity and reduces friction, then it is a "finest hour of the justice". Dispute which has their genesis in a matrimonial discord, landlord-tenant matters, commercial transactions and other such matters can safely be dealt by the Court by exercising its power under section 482 Cr.P.C. In the event of the compromise, the said power is to be used in its true sense in its totality and shall not be used in its abridged form. There can never be any

such rigid rules prescribed in exercise of such power, especially in the absence of any premonitions to forecast and predict eventualities which the cause of justice may throw up during the course of litigation.

[23] The power to do complete justice is the very essence of every judicial justice dispensation system. It cannot be diluted by the distorted perceptions and is not slave to anything, except to caution and circumspection, the standard of which the Court sets before it, in exercise of such plenary and unflattered power inherently vested in it while donning the cloak of compassion to achieve the end of justice. No embargo, be in a shape of Section 320 Cr.PC.(Cr.P.C.) or any other such curtailment, can whittle down the powers under section 482 Cr.P.C.

[24] In this regard, learned counsel for the applicants has cited the judgment of Hon'ble the Apex Court to buttress his contention that even a peacemeal compromise is permissible under the law exercising the inherent power of this Court under section 482 Cr.P.C. In the case of **Lovely Salhotra and anr Vs. State, NCT, Delhi (2017) SCC Online SC (636)**, it has been opined by Hon'ble the Apex Court that :-

“4. We have taken into account the fact of the matter in question as it appears to us that no cognizable offence is made out against the appellant-herein. The High Court was wrong in holding that the F.I.R. cannot be quashed in part and it ought to have appreciated the fact that the appellants-herein cannot be allowed to suffer on the basis of the complaint filed by Respondent No.2— herein only on the ground that the investigation against co-

accused is still pending. It is pertinent to note that the learned Magistrate has opined that no offence is made out against co-accused Nos.2, 3, 4 and 6 prima facie.

7. Accordingly, we set aside the order of the High Court and quash the FIR qua the appellants- herein.”

[25] Similarly in the case of **Vijay Kumar Gupta Vs. State Government of NCT Delhi** in Criminal Misc no.2289 of 2013 dated 09.03.2017 in paragraph no.7 has observed that :

“7. Looking into the facts and circumstances of the case and the fact that the petitioners have paid the loan/settlement amount to the Respondent No.2 and nothing remains to be adjudicated further, to remove the hurdle in the personal life of the present petitioners for leading better and peaceful life and to meet the ends of justice, I deem it appropriate to quash the FIR No.107/2003, under Section 406/420/468/471 Indian Penal Code, 1860., registered at Police Station – Parliament Street, Delhi qua against the petitioners, namely Vijay Kumar Gupta, Raj Kumar Sharma and Vinod Chaudhary only to the extent of their role in commission of the alleged offence.”

[26] In the case of **Jayraj Singh Digvijay Singh Rana vs. State of Gujrat** and another reported in **(2012) 12 SCC 401**, Hon'ble Apex Court has held that :-

“The only question for consideration before this Court at this stage is that inasmuch as all those offences are not compoundable offences under Section 320 of the Code (except Section 420 of IPC that too with the permission of the Court before which any prosecution for such

offence is pending), whether it would be possible to quash the FIR by the High Court under Section 482 of the Code or by this Court exercising jurisdiction under Article 136 of the Constitution of India?

8) The above question was recently considered by this Court in *Shiji @ Pappu & Ors. vs. Radhika & Anr.* (2011) 10 SCC 705. The question posed in that case was “Whether the criminal proceedings in question could be quashed in the facts and circumstances of the case having regard to the settlement that the parties had arrived at.” After advertng to Section 482 of the Code and various decisions, this Court concluded as under:

“17. It is manifest that simply because an offence is not compoundable under Section 320 CrPC is by itself no reason for the High Court to refuse exercise of its power under Section 482 CrPC. That power can in our opinion be exercised in cases where there is no chance of recording a conviction against the accused and the entire exercise of a trial is destined to be an exercise in futility. There is a subtle distinction between compounding of offences by the parties before the trial court or in appeal on the one hand and the exercise of power by the High Court to quash the prosecution under Section 482 CrPC on the other. While a court trying an accused or hearing an appeal against conviction, may not be competent to permit compounding of an offence based on a settlement arrived at between the parties in cases where the offences are not compoundable under Section 320, the High Court may quash the prosecution even in cases where the offences with which the accused stand charged are non-compoundable. The inherent powers of the High Court under

Section 482 CrPC are not for that purpose controlled by Section 320 CrPC. Having said so, we must hasten to add that the plenitude of the power under Section 482 CrPC by itself, makes it obligatory for the High Court to exercise the same with utmost care and caution. The width and the nature of the power itself demands that its exercise is sparing and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. It is neither necessary nor proper for us to enumerate the situations in which the exercise of power under Section 482 may be justified. All that we need to say is that the exercise of power must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law. The High Court may be justified in declining interference if it is called upon to appreciate evidence for it cannot assume the role of an appellate court while dealing with a petition under Section 482 of the Criminal Procedure Code. Subject to the above, the High Court will have to consider the facts and circumstances of each case to determine whether it is a fit case in which the inherent powers may be invoked.”

9) On going through the factual details, earlier decision, various offences under Section 320 of the Code and invocation of Section 482 of the Code, we fully concur with the said conclusion. In the case on hand, irrespective of the earlier dispute between Respondent No. 2- the complainant and the appellant being Accused No. 3 as well as Accused Nos. 1 and 2 subsequently and after getting all the materials, relevant details etc., the present appellant (Accused No. 3) sworn an affidavit with bona fide intention securing

the right, title and interest in favour of Respondent No.2 herein-the Complainant. In such bona fide circumstances, the power under Section 482 may be exercised. Further, in view of the settlement arrived at between Respondent No. 2-the complainant and the appellant (Accused No. 3), there is no chance of recording a conviction insofar as the present appellant is concerned and the entire exercise of trial is destined to be an exercise in futility. Inasmuch as the matter has not reached the stage of trial, we are of the view that the High Court, by exercising the inherent power under Section 482 of the Code even in offences which are not compoundable under Section 320, may quash the prosecution. However, as observed in Shiji (supra), the power under Section 482 has to be exercised sparingly and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. In other words, the exercise of power must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law.

[27] Recently, Hon'ble the Apex Court expanding the horizon of Section 482 Cr.P.C. have acceded that in the event, the parties agree and they have entered into a compromise even in the proceeding of Section 376 IPC could be invoked and proceeding may be quashed depending upon the stage of trial with regard to the heinous offences like rape, have expressed his opinion in the case of Kapil Gupta Vs. State of NCT Delhi reported in (2022) SCC Online SC 1030 while relying upon the judgment of Narender Singh Vs. State of Punjab reported in (2014) 6 SCC 466 have expanded the scope of Section 482

Cr.P.C. paragraph no.13 and 14 of Kapil Gupta's case is extracted hereinbelow :-

13. It can thus be seen that this Court has clearly held that though the Court should be slow in quashing the proceedings wherein heinous and serious offences are involved, the High Court is not foreclosed from examining as to whether there exists material for incorporation of such an offence or as to whether there is sufficient evidence which if proved would lead to proving the charge for the offence charged with. The Court has also to take into consideration as to whether the settlement between the parties is going to result into harmony between them which may improve their mutual relationship.

14. The Court has further held that it is also relevant to consider as to what is stage of the proceedings. It has been observed that if an application is made at a belated stage wherein the evidence has been led and the matter is at the stage of arguments or judgment, the Court should be slow to exercise the power to quash the proceedings. However, if such an application is made at an initial stage before commencement of trial, the said factor will weigh with the court in exercising its power."

Thus, deciding whether to exercise its power in the heinous offence like rape under section 482 of the Code, timings of settlement plays a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of the offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceeding/investigation. It is because of the reason that at this stage, the

investigation is still on and even the charge sheet has not been filed.

[28] Thus, comparing the aforesaid ratio by Hon'ble the Apex Court whereby the court has accorded his permission to have a peace meal compromise meaning thereby a part compromise with certain accused persons, I have got no hesitation to accept that opposite party no.2 has validly entered into compromise with the applicants on 04.10.2019 and 10.10.2019 leaving behind rest of the charge sheeted accused

[29] I have perused the order under challenge dated 23.08.2022 of the Additional C.M.M. Kanpur Nagar in which in no uncertain terms submits that mere on the ground of settlement between the parties, the gravity of the offence cannot be liquidated or the offence itself cannot be evaporated and therefore, have allowed the 319 Cr.P.C. application moved by the Public Prosecutor.

[30] As quoted above, learned A.C.M.M. Kanpur Nagar, ignoring the compromise, and the parcha tittma no.4, has wrongly averred that mere compromise would not end the rigors of the punishment or the offence itself. This finding by the learned Magistrate is dehors of the ratio laid down by Hon'ble Apex Court in the cases of (i) *Shiji @ Pappu and Others VS. Radhika and Another, (2011) 10 SCC 705* (ii) *Dimpey Gujral and others Vs. Union Territory through Administrator, U.T. Chandigarh and others, (2013) 11 SCC 497* (iii) *Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and Others Vs. State of Gujarat and another, (2017) 9 SCC 641* (iv) *Yogendra Yadav and Ors. Vs. State of Jharkhand and another (2014) 9 SCC 653* (v) *B.S. Joshi and others Vs.*

State of Haryana and another (2003) 4 SCC 675.

[31] Taking the ratio in the aforementioned judgment, the findings recorded by the A.C.M.M, Kanpur Nagar, is in the stark contrast with the aforesaid findings.

[32] Similarly, when the Revisional Court considered, it has been clearly mentioned that the offence is not compoundable offence under the provision of Section 320 Cr.P.C, and therefore, it has been mentioned that said compromise have got no bearing in the offence. This proposition of law is unswollable and cannot be accepted. As mentioned above, the scope and ambit of Section 482 Cr.P.C. is in much wider than that of Section 320 Cr.P.C. In the aforementioned judgments, this Court has already discussed elaborately which need not reiterated and thus, both the judgments and orders passed by the learned A.C.M.M. Kanpur Nagar and learned Revisional Court are the direct conflict of the aforesaid ratio of the case decided by Hon'ble the Apex Court and liable to be set-aside

(ii) Expression of word 'Evidence' in Section 319 Cr.P.C.

[33] Since, the focal issue of this 482 application is the alleged two orders dated 23.08.2022 and 16.12.2022 passed by the learned A.C.M.M-III, Kanpur Nagar and its order of confirmation by learned Sessions Judge, Kanpur Nagar respectively. In this regard, it is imperative to spell out the bare skeleton provision of Section 319 Cr.P.C. which reads thus :-

Section 319 in The Code Of Criminal Procedure, 1973

319. *Power to proceed against other persons appearing to be guilty of offence.*

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

[34] Sri Manish Tiwary, learned Senior Counsel, at the outset, without mincing any words, have accepted that there is truce and compromise between the

parties. He further submits that as per his instructions, his client has received the outstanding amount of Rs.67 lacs but he has unable to give satisfactory reply as to what is the occasion for moving application under section 319 Cr.P.C. summoning the applicants. It seems that the only motive could be attributed for moving this application is simply an arm twisting of the applicants so that they may give the interest over it. This suggestion by the Court, was not disputed by the learned Senior Counsel. In addition to this, he has not denied the statements of PW-1, Devendra Singh Dua and his cross-examination mentioned in aforesaid paragraph no.12. On this, he states that even assuming for the sake of the arguments that there is a compromise between the parties but since the said compromise is not exhibited and therefore it cannot be read or looked into as a piece of evidence, its content cannot be relied upon.

[35] Hon'ble the Supreme Court has an occasion to deal and decide the expression 'Evidence' in its celebrated judgment of *Hardeep Singh and anr Vs. State of Punjab* reported in *AIR 2014 SC 1400*. The Court has formulated the question :-

* "Whether the word 'Evidence' used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the Court can exercise the powers under the said provision even on the basis of statements made in examination-in-chief of the witness concerned ?

** "Whether the word 'Evidence' used in Section 319(1) Cr.P.C. has been used in a comprehensive sense collected during investigation or the word 'Evidence'

is limited to the evidence recorded during trial ??

[36] Before coming to the reply to the aforesaid queries, it is imperative to search out the true nature and import of Section 319 Cr.P.C. which springs out from the doctrine JUDX DAMNATUR CUM NOCENS ABSOLITUR (Judge is condemned when the guilty is acquitted) and this doctrine is an undercurrent and used as a bacon light while explaining the ambit and spirit underlying the enactment of Section 319 Cr.P.C. It is the duty of the Court to do justice by punishing the real culprit. Whether the Investigating Agency for any reason does not array one of the real culprits as an accused, the Court is not powerless in calling the said accused to face the trial. But, a million dollar question remains that what are the circumstances and what is the stage, the Court should exercise its power as contemplated under section 319 Cr.P.C. The submission were raised before the court covered a very wide canvas and the learned counsel have taken the Court to the various provision of Cr.P.C. and judgments in that regard. But fact remains that the controversy centres around the stage at which such power can be invoked by the court and the material on the basis whereof, such extra-ordinary power could be exercised by the Court.

[37] From the ages, the Court are the sole repository of the justice and the Court are ordained to do justice and a duty is caste upon it to uphold the rule of law, and therefore, will be inappropriate to deny the exercise of such power to the court in our criminal justice system where it is not uncommon that the real accused or the kingpins, at times, get away by manipulating the investigation or the prosecuting agency. The desire to avoid the

trial is so strong that an accused makes all effort at times to get away himself absolve even at the stage of investigation or inquiry even though, he is connected with commission of the offence. The legislature cannot be presumed to have all the eventualities and the circumstances and therefore, it is the duty of the Court to give full affects to the word used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to trial an offence and not to allow a person who deserve to be tried to go scot free by not being arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecution.

[38] Now focussing upon the moot question the expression 'Evidence' and its true import during trial? Answering to this query, whether the expression 'Evidence' used in section 319 Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word 'Evidence is limited to the evidence recorded during trial. In this regard, the expression 'Evidence' has been defined in Section 3 of the Indian Evidence Act which reads thus :-

“Evidence” .— “ Evidence” means and includes—

(1)all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;

(2)[all documents including electronic records produced for the inspection of the Court], such documents are called documentary evidence.

“Proved”.—A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

“Disproved”. — A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

“ Not proved”. — A fact is said not to be proved when it is neither proved nor disproved

[39] We, therefore proceed to examine the matter further on the premise that the definition of word “evidence” under the Evidence Act is exhaustive. In Kalyan Kumar Gogoi v. Ashutosh Agnihotri & Anr., reported in AIR 2011 SC 760, while dealing with the issue this Court held : The word “evidence” is used in common parlance in three different senses: (a) as equivalent to relevant, (b) as equivalent to proof, and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word “evidence” given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence,

real evidence, secondary evidence, substantive evidence, testimonial evidence, etc.

[40] In Lal Suraj @ Suraj Singh & Anr. v. State of Jharkhand, reported in (2009) 2 SCC 696, a two-Judge Bench of Hon’ble the Supreme Court held that “a court framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court exercises its jurisdiction under Section 319 Cr.P.C., the power has to be exercised on the basis of the fresh evidence brought before the court. There lies a fine but clear distinction.”

The word ‘evidence’ in Section 319 Cr.P.C. contemplates the evidence of witnesses given in the court.

[41] Ordinarily, it is only after the charges are framed that the stage of recording of evidence is reached. A bare perusal of Section 227 Cr.P.C. would show that the legislature has used the terms “record of the case” and the “documents submitted therewith”. It is in this context that the word ‘evidence’ as appearing in Section 319 Cr.P.C. has to be read and understood. The material collected at the stage of investigation can at best be used for a purpose as provided under Section 157 of the Evidence Act i.e. to corroborate or contradict the statements of the witnesses recorded before the court. Therefore, for the exercise of power under Section 319 Cr.P.C., the use of word ‘evidence’ means material that has come before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the court is of the opinion that a person not accused before it, has also committed the offence, the court

may summon such person under Section 319 Cr.P.C.

[42] The word “evidence” therefore has to be understood in its widest sense, both at the stage of trial and, even at the stage of inquiry, as used under Section 319 Cr.P.C. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial as well as the material collected during investigation or even in an inquiry.

[43] In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from ‘evidence’ recorded during trial, any material that has been received by the court at the time of taking cognizance and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C.

[44] Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add

an accused whose name has been shown in Column 2 of the chargesheet. In view of the above position the word ‘evidence’ in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

[45] Thus, marshalling the abovesaid legal discussions as to whether the expression Evidence should be construed in its widest possible canvass or should be used in limited sense ? The reply to this query is apparent, that the expression Evidence in Section 319 Cr.P.C. has to be broadly understood and not literally that is evidence brought during the trial alone. It has to be given the broadest possible way. And thus, to suggest that since the said compromise deed is not exhibited during trial, the cross examination of the PW-1 Devendra Singh Dua and his candid acknowledgement that he has received the amount of Rs.67 lacs from the opposite party no.2, after entering into compromise and the said compromise should be taken as piece of evidence while deciding the application under section 319 Cr.P.C.

[46] The courts below were unmindful of the fact that the compromise between the parties and the summoning of non-accused persons(who are the parties of the compromise) cannot go hand in hand. Both are anti-thesis to each other and with the ulterior motive, this application was moved through Public Prosecutor.

Under these circumstances and in the light of the aforesaid judgments and the expression ‘Evidence’, coupled with the fact that the parties have already entered into terms, I have no hesitation to quash both the orders of learned A.C.M.M-III, Kanpur Nagar dated 22.11.2022 allowing the application under section 319 Cr.P.C.

by the Public Prosecutor and when the same was challenged before the learned Sessions Judge, Kanpur Nagar by way of Criminal Revision No.390 of 2022, the same was rejected confirming the orders of learned A.C.M.M-III, Kanpur Nagar. Both these orders are safely be termed as dehors of the aforesaid judgment of Hon'ble the Apex Court and the anti thesis of compromise. At the cost of repetition, the Court has no hesitation to observe that the opposite party no.2 have got some ulterior plans to extract more money from the applicants by way of interest and that is why, he has used the Public Prosecutor for this purpose and succeeded to an extent but fact remains that since, he has already entered into compromise and with the specific understanding that after taking the amount, he will not go to prosecute the applicants in the aforesaid offence, still, he has managed to obtain the favourable orders which in my opinion is liable to be set-aside.

[47] Accordingly, both the orders of learned A.C.M.M-III, Kanpur Nagar dated 22.11.2022 and order of confirmation passed by learned Revisional Court dated 16.12.2022 are hereby quashed.

[48] The present application filed under section 482 Cr.P.C. hereby stands **ALLOWED.**

(2023) 7 ILRA 976

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 05.07.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

Second Appeal No. 131 of 1993

Arjun Prasad & Ors.

...Appellants

Versus

Ganesh Prasad & Ors.

...Respondents

Counsel for the Appellants:

Sri S.N. Saxena, Sri Adnan Ahmad, Sri Arvind Kr. Sinha, Sri K.P. Singh

Counsel for the Respondents:

Sri G.S. Nigam, Sri Arvind Kumar Jauhari, Sri D.P. Gupta, Sri Madan Gopal Misra, Sri O.P. Tiwari, Sri P.L. Mishra, Sri Shafat Ullah Khan, Sri T.C. Gupta

Civil Law-The Code of Civil Procedure, 1908-Section 100 - The Specific Relief Act, 1963-Sections 16 & 20 ---

Trial court refused the decree of specific performance and the lower Appellate Court set aside the decree of trial Court and has decreed the suit for specific performance--- The agreement was executed by Sarju Prasad which has been concurrently held by the two Courts, the defendants had raised a plea which was not bonafide and the defendants tried to cast a doubt over the entire transaction by resorting to different pleas including giving incorrect date of death of Sarju Prasad to shroud the execution of the agreement itself, with suspicion which could not be substantiated--The payment of sale consideration, the issuance of notice prior to institution of the suit seeking specific performance has been sufficiently proved by the plaintiffs--- Readiness and willingness has been specifically pleaded by the plaintiffs and there is no denial by the defendants--- No plea raised by the plaintiffs which is found to be false or not in good faith--- Ingredients for grant of specific performance was proved by the plaintiffs

Mere rise in the value of the property is not enough to refuse the grant of a decree of specific performance, without any other accentuating circumstances--- While exercising the discretion in terms of Section 20 of the S.R Act the conduct of the parties have to be seen and the conduct of the defendants was not such so as to tilt the discretion in favour of the defendants--- Discretion which was exercised by the trial Court was not appropriate and the judgment and decree passed by the lower Appellate Court is justified---- Court modifies the

judgment and decree passed by the lower Appellate Court to the extent that the plaintiffs-respondents shall be entitled to a decree of specific performance in pursuance of the agreement to sell dated 10.08.1983 provided that now the respondents-plaintiffs shall pay a total sum of Rs.8,00,000/- to the defendants-appellants within a period of 90 days or in the alternate deposit the same before the Executing Court after adjusting any amount already paid or deposited. **(Para 66,69,70 & 74)**

Appeal dismissed. (E-15)

List of Cases cited:

1. Chand Rani Vs Kamla Rani, (1993) 1 SCC 519
2. R.C. Chandiok Vs Chuni Lal Sabharwal (1970) 3 SCC 140
3. Narinderjit Singh Vs North Star Est. Promoters Ltd., (2012) 5 SCC 712
4. Ramzan Ali & anr.Vs Altafur Rahman, 2023:AHC-LKO30146
5. Jugraj Singh & anr.Vs Labh Singh & ors. (1995) 2 SCC 31.
6. Ram Awadh & ors. Vs Achhairbar Dubey & anr., (2000) 2 SCC 428
7. Kadupugotla Varalakshmi Vs Vudagiri Venkata Rao & ors. 2021 SCC OnLine SC 365
8. Durga Prasad Vs Deep Chand, AIR 1954 SC 75
9. Kafiladdin Vs Samiraddin, [AIR 1931 Cal 67]
10. Thomson Press (India) Ltd. Vs Nanak Builders and Investors Private Limited & ors., (2013) 5 SCC 397
11. Rathnavathi Vs Kavita Ganashamdas, (2015) 5 SCC 223
12. Smt. Rajeshwari & ors. Vs Smt. Meharunnishan & ors. in Second Appeal No.375 of 2001, decided on 24.02.2021
13. P. Ramasubbamma Vs V. Vijayalakshmi & ors., (2022) 7 SCC 384

14. Katta Sujatha Reddy & anr.Vs Siddamsetty Infra Projects Private Limited & ors., (2023) 1 SCC 355

15. K. Narendra Vs Riviera Apartments (P) Ltd., (1999) 5 SCC 77,

16. G. Jayashree & ors. Vs Bhagwandas S. Patel & ors. (2009) 3 SCC 141

17. Ramesh Chandra Vs Asruddin, (2016) 1 SCC 653

18. K. Nanjappa Vs R.A. Hameed, (2016) 1 SCC 762

19. Jayakantham & ors. Vs Abaykumar, (2017) 5 SCC 178

20. Ferrodous Est. (P) Ltd. Vs. P. Gopirathnam (Dead) & ors., 2020 SCC OnLine SC 825

21. Shenbagam & ors. Vs K.K. Rathinavel, 2022 SCC OnLine SC 71

22. Nirmala Anand Vs Advent Corporation (P) Ltd. & ors., 2002

23. K. Prakash Vs B.R. Sampath Kumar, (2015) 1 SCC 597

24. Zarina Siddiqui Vs A. Ramalingam (2015) 1 SCC 705

25. U.N. Krishnamurthy Vs A.M. Krishnamurthy; 2022 SCC Online SC 840

(Delivered by Hon'ble Jaspeet Singh, J.)

1. The instant second appeal has been preferred by the defendants-appellants emanating from a suit for specific performance of contract filed by the plaintiffs-respondents, wherein the trial Court by means of the judgment and decree dated 07.04.1992 refused the decree of specific performance which was assailed before the lower Appellate Court and the lower Appellate Court by means of its judgment and decree dated 02.12.1992 has

set aside the decree of trial Court and has decreed the suit for specific performance, prompting the defendants-appellants to knock the doors of this Court under Section 100 CPC.

2. The instant second appeal was admitted by the Court on 24.03.1993 on the substantial question of law as formulated in the memo of appeal, Clause A, which reads as under:-

A. Whether the learned court below have misread and misinterpreted documents on record which renders their findings, perverse, incorrect, illegal?

3. In order to appreciate the controversy involved in the second appeal, certain relevant facts relating to the suit are being noticed hereinafter.

4. Ganesh Prasad and Satish Kumar, both minors sons of Kanhaiya Lal, through their father and natural guardian, had instituted a suit for specific performance of contract dated 12.08.1983 in terms whereof the original vendor, namely, Sarju Prasad had agreed to sell the property in dispute bearing No.367 (New No.346), situate in Jawahar Nagar, District Unnao. In terms of the said agreement executed by Sarju Prasad, it was agreed that for a total sale consideration of Rs.12,500/-, Sarju Prasad would sell the property in dispute to the minor sons of Kanhaiya Lal for which a sum of Rs.500/- was paid by the plaintiffs to Sarju Prasad as earnest money and the remaining consideration was to be paid at the time of execution of the sale-deed. The agreement also contemplated that the sale-deed would be executed within a period of one month and the possession will be transferred to the plaintiffs at the time of execution of the sale-deed.

5. It was also pleaded that before the sale-deed could be executed, Sarju Prasad expired and he was survived by his wife and three children, who were impleaded as the defendants. It was also recorded in the plaint that the plaintiffs were ready and willing to perform their part of contract and they had requisite means of paying the remaining consideration. However, the defendants were evading to perform their obligation, as a result, the plaintiffs had sent a notice dated 12.08.1983 and despite the same, the defendants did not comply with their obligations which led the plaintiffs to institute the suit for specific performance before the Court of Civil Judge, Unnao which was registered as Regular Suit No.52/1986.

6. The said suit was contested by the defendants, who were the legal heirs of the original executant of the agreement Sarju Prasad and while denying the execution of the agreement, it was specifically stated that Sarju Prasad prior to his death was suffering from a respiratory disease due to which he had become very weak and was also not mentally alert. It was further pleaded that neither Sarju Prasad executed the agreement nor he had the authority to do so. Sarju Prasad did not even have the need to sell the property and as such it appears that the plaintiffs in order to usurp the property got the agreement executed through impersonation as Sarju Prasad had died on 23.09.1982 and as such the agreement which is dated 10.08.1983 could not have been executed by him. For the aforesaid reasons, it was pleaded that the suit for specific performance could not be decreed and was liable to be dismissed.

7. Upon exchange of the pleadings, the trial Court framed five issues. However, the important issues upon which the suit

was contested were (i) Whether the plaintiffs are entitled to seek specific performance of the agreement dated 10.08.1983? (ii) Whether late Sarju Prasad had any right to execute the said agreement to sell and if, yes, its effect? (iii) Whether the defendants were in possession of the disputed property prior to the agreement and if so, its effect? (iv) Whether Sarju Prasad expired on 23.09.1982 as stated by the defendants?

8. After the parties led their evidence, the trial Court recorded a finding that Sarju Prasad did not die on 23.09.1982 as the defendants failed to prove the aforesaid fact and it further found that Sarju Prasad had executed the agreement to sell dated 10.08.1983. It also returned a finding that the property belonged to Sarju Prasad and prior to his death, there was no occasion for grant of any rights to his wife and children as alleged and thus it cannot be said that Sarju Prasad did not have rights to execute the agreement to sell. Lastly, the trial Court noticed that apparently the value of the house, the subject matter of the agreement, was around Rs.60,000/- and the agreement indicated the sale consideration to be Rs.12,500/- against which only Rs.500/- had been paid as earnest money. Consequently, the trial Court did not find it appropriate to grant a decree of specific performance, however, by means of its judgment and decree dated 17.04.1992, it refused the decree of specific performance but directed the defendants to refund the sum of Rs.500/- along with interest @ 12% per annum from the date of the agreement till the date of its payment.

9. The defendants being aggrieved against the judgment and decree passed by the trial Court filed a regular civil appeal bearing No.37/1992 under Section 96 CPC.

The plaintiffs had also filed their cross-objection as the decree of specific performance had been refused by the trial Court and, therefore, after hearing the parties, the lower Appellate Court granted a decree of specific performance after allowing the appeal by means of the judgment and decree dated 02.12.1992. It is this judgment and decree of reversal which is under challenge before this Court in the instant second appeal.

10. Shri Adnan Ahmad, learned counsel for the appellants has advanced the following submissions:-

(i) It is submitted that in a suit for specific performance of contract, it was necessary for the plaintiffs not only to have stated in the plaint that they were ready and willing to perform their part of the contract, but this readiness and willingness is to be established by evidence to be present throughout the suit uptill the passing of the decree. It is submitted that the trial Court did not give any finding regarding the readiness and willingness and even the lower Appellate Court did not dwell into this aspect of the matter appropriately while decreeing the suit.

11. It is submitted that as per the alleged agreement, the sale-deed was to be executed within a period of one month. The agreement is dated 10.08.1983 and the time as prescribed in the agreement was uptill September, 1983. The notice given by the plaintiffs for seeking specific performance is dated 04.08.1984 and the suit came to be filed on 21.01.1986. In context of the timelines, it would be seen that the plaintiff had got the notice issued much after the prescribed time for execution of the sale-deed had expired and even thereafter, the suit came to be filed almost year and a half

which indicates and points to the fact that the plaintiffs were not serious regarding their continuous readiness and willingness to perform their part of the contract.

(ii) It is further urged that in the given facts of the case where admittedly the prices of the property had escalated since the execution of the agreement and it was brought on record during trial that the value of the house was about Rs.60,000/- and the sale consideration as indicated in the agreement was only Rs.12,500/-, this fact reflected that the agreement was inequitable and there was a clear inadequacy of the consideration. Thus, it would be seen that against the alleged agreed amount of Rs.12,500/- a paltry sum of Rs.500/- had been paid as earnest money. Hence, requiring the appellants to execute the sale-deed for a meager sum of Rs.12,000/- was unconscionable rather in the circumstances, the trial Court had properly exercised its jurisdiction by directing the return of Rs.500/- along with interest @ 12% per annum which did complete justice between the parties whereas the lower Appellate Court did not appropriately consider the findings nor gave cogent reasons as to why the discretion which was exercised by the trial Court had been reversed by the lower Appellate Court which has resulted in sheer miscarriage of justice. Moreover, the appellants would be deprived of a roof from over their heads and that too at a most inequitable price and especially with passage of time, as the prices of the immovable properties have hugely escalated, it would result in an unfair advantage to the plaintiffs-respondents. In these circumstances, it is submitted that the decree passed by the trial Court deserved to be affirmed and the instant second appeal be allowed.

12. Learned counsel for the appellants in support of his submissions has relied upon the decisions of the Apex Court in **K.S. Vidyanadam and others v. Vairavan (1997) 3 SCC 1; C.S. Venkatesh v. A.S.C. Murthy and others, (2020) 3 SCC 280 and Shenbagam and others v. K.K. Rathinavel, 2022 SCC OnLine SC 71.**

13. Shri Arvind Kumar Jauhari, learned counsel for the respondents while refuting the aforesaid submissions has submitted that the defendants themselves were responsible for the debacle by raising a false defence before the trial Court. Sarju Prasad had executed the agreement to sell dated 10.08.1983, however, falsely the defendants raised a defence that Sarju Prasad expired on 23.09.1982. It was also falsely averred that Sarju Prasad was physically and mentally weak and did not know the factum regarding execution of the agreement to sale. It is further urged that the plaintiffs had agreed to purchase the property for a sum of Rs.12,500/- and a sum of Rs.500/- was also paid as earnest money. The agreement to sell is a registered document which carries a presumption of its execution. It is only on account of death of Sarju Prasad that the sale-deed could not be executed within the time. The plaintiffs were always ready and willing to perform their part of contract and even called upon the defendants, who were the legal heirs of Sarju Prasad, to execute the sale-deed but they kept delaying the manner and thereafter the plaintiffs had to give a notice on 04.08.1984 which was not complied with by the defendants which led the plaintiffs to institute the suit for specific performance of contract.

14. It is further urged that the trial Court recorded a finding that the

defendants were unable to prove that Sarju Prasad had died prior to execution of the agreement to sell. It also returned a finding that the agreement to sell in question was executed by Sarju Prasad and this necessarily expressed the falsity of the defence. It is also submitted that the trial Court ought not to have refused the relief of specific performance since, the plaintiffs were always ready and willing to perform their part of contract which was specifically pleaded in the plaint and not specifically denied by the defendants. Moreover, there was no material brought on record to prove that the plaintiffs did not have the financial capacity to pay the consideration and purchase the property in dispute. The entire evidence which was led by the defendants was only to buttress their false defense that Sarju Prasad did not have right to execute the agreement and once all these findings were returned in favour of the plaintiffs, there was no justiciable reason for the trial Court to have refused the decree of specific performance. It is in the aforesaid backdrop that the lower Appellate Court considered the material as well as evidence in its correct perspective and reversed the findings of the trial Court while granting a decree of specific performance in favour of the plaintiffs-respondents.

15. It is also urged that the rise in prices of the property is a natural phenomenon and in any case there was no material on record to indicate that the amount of Rs.60,000/- which was referred to by the trial Court had any basis. Merely by extracting the figure from the deposition, in isolation, may not be the correct manner of reading the evidence and it is for the aforesaid reason that the trial Court erred in considering the value of the property being Rs.60,000/- against which it was sought to be sold for a sum of

Rs.12,500/- as per the agreement. It is thus urged that it is a case where the trial Court has misread the evidence and the same has been corrected by the lower Appellate Court, who has recorded clear findings and as such the judgment and decree passed by the lower Appellate Court does not suffer from any palpable error which may persuade this Court to interfere with the findings of fact in exercise of powers under Section 100 CPC, consequently, the appeal deserves to be dismissed.

16. Learned counsel for the respondents in support of his submissions has relied upon the decisions of the Apex Court in **Nirmala Anand v. Advent Corporation (P) Ltd. and others, 2002 (5) SCC; P. D'souza v. Shondrilo Naidu, (2004) 6 SCC 649; K. Prakash v. B.R. Sampath Kumar, (2015) 1 SCC 597.**

17. This Court has given its anxious consideration to the submissions of the learned counsel for the respective parties and also perused the material on record keeping in mind the substantial question of law involved.

18. This Court finds that the answer lies in the issue, as to, whether the lower appellate Court was justified in decreeing the suit for specific performance of contract or the trial Court was justified in invoking its discretion in terms of Section 20 of the Specific Relief Act, 1963 while refusing to grant a decree of specific performance and ordering the return of the earnest money along with interest.

19. Before advertng to the aforesaid aspect of the matter, it will be first necessary to notice what are the essential ingredients which enables a Court to grant a decree of specific performance and what

may be the conditions when the Court may exercise its discretion in terms of Section 20 of the Specific Relief Act, 1963 to refuse a decree of specific performance of contract.

20. This can be outlined by first noticing the relevant provisions of the Specific Relief Act, 1963 and then by taking the aid of the decisions of the Apex Court on the subject. Notably, Section 10 and 20 of the Specific Relief Act, 1963 was amended in the year 2018 vide Amending Act of 2018 which received the Presidential assent on 01.08.2018 and came into effect in the statute books from 01.10.2018.

21. Sections 10 and 20 of the Specific Relief Act, 1963 shall be noticed, both, as it stood prior to and after amendment in the year 2018.

(i) Prior to Amendment of 2018, Section 10 read as under:-

"10. Cases in which specific performance of contract enforceable.—
Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced—

(a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. Explanation.—Unless and until the contrary is proved, the court shall presume—

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:—

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.

(ii) Section 10 as amended by the Specific Relief (Amendment) Act, 2018, reads as under:-

"10. Specific performance in respect of contracts.—The specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16."

x x x-----x x x ----- x x
x -----x x x

22. Section 14 of the Specific Relief Act relates to certain contracts which are not specifically enforceable and reads as under:-

Section 14 Contracts not specifically enforceable.—(1) The following contracts cannot be specifically enforced, namely:—

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:—

(a) where the suit is for the enforcement of a contract,—

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once: Provided that where only a

part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company;

(b) where the suit is for,—

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land: Provided that the following conditions are fulfilled, namely:—

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed."

23. Section 15 of the Act of 1963 deals with who may obtain specific performance and it reads as under:-

"Section 15 Who may obtain specific performance.—Except as

otherwise provided by this Chapter, the specific performance of a contract may be obtained by—

(a) any party thereto;

(b) the representative in interest or the principal, of any party thereto: Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party;

(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder;

(d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman;

(e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

(f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

(g) when a company has entered into a contract and subsequently becomes amalgamated with another company, the

new company which arises out of the amalgamation; (h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company: Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract."

24. Importantly, Section 16 contains personal bars which can be invoked to refuse a decree of specific performance and it reads as under:-

"Section 16 Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation.—For the purposes of clause (c),—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) *the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."*

x x x-----x x x ----- x x
x -----x x x

25. Another key section is Section 19 of the Specific Relief Act which speaks of the relief to the parties and it also takes within its ambit the instances of a subsequent purchaser for valuable consideration without notice, and it reads as under:-

"Section 19 Relief against parties and persons claiming under them by subsequent title.—Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of

the company and such contract is warranted by the terms of the incorporation, the company: Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."

26. Having noticed the aforesaid provisions, it would reveal that in a suit for specific performance of contract relating to an immovable property, it is per-se essential for the plaintiff to prove the due execution of the agreement to sell and that it is capable of enforcement. It is also required to not only plead but also amply demonstrate by evidence that the plaintiff is and has been always ready and willing to perform his part of the contract from the time of the execution of the agreement and throughout the proceedings in the Court till it is concluded. The plaintiff is also required to indicate that it is the defendant who is responsible for non-implementation of the agreement and the defendant has failed to perform his legal obligation as per the terms of the agreement.

27. In light of the aforesaid legal provisions and propositions, it will now be worthwhile to notice certain leading decisions of the Apex Court which illuminates the scope and intent of the provisions as noticed hereinabove and its nuances.

28. Whether time is the essence of contract relating to an immovable property was considered by the Apex Court in **Chand Rani v. Kamla Rani, (1993) 1 SCC 519**, wherein it was held as under:-

"It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a

presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

29. The plea of readiness and willingness is an important and essential ingredient in relation to Section 16(c) of the Specific Relief Act, 1963 and it has been held that it is not a straight jacket formula. In **R.C. Chandiok v. Chuni Lal Sabharwal** (1970) 3 SCC 140, the Hon'ble Apex Court observed as under:-

"readiness and willingness cannot be treated as a straitjacket formula and the issue has to be decided keeping in view the facts and circumstances relevant to the intention and conduct of the party concerned"

30. In **Narinderjit Singh v. North Star Estate Promoters Limited**, (2012) 5 SCC 712, in para 21 to 23 held as under:-

"20. In our view, the concurrent findings recorded by the trial court and the lower appellate court on the issues of execution of the agreement by the appellant's father and the respondent's readiness and willingness to perform its part of the agreement were based on correct evaluation of the pleadings and evidence of

the parties and the learned Single Judge of the High Court did not commit any error by refusing to upset those findings. The argument of the learned Senior Counsel for the appellant that in the absence of specific pleading about continued readiness and willingness of the respondent to perform its part of the agreement and availability of funds necessary for payment of the sale consideration, the High Court should have set aside the concurrent finding recorded by the courts below sounds attractive but on a careful scrutiny of the record we do not find any valid ground to entertain the same.

21. In *R.C. Chandiok v. Chuni Lal Sabharwal* [(1970) 3 SCC 140] this Court observed that "readiness and willingness cannot be treated as a straitjacket formula and the issue has to be decided keeping in view the facts and circumstances relevant to the intention and conduct of the party concerned". The same view was reiterated in *P. D'Souza v. Shondriilo Naidu* [(2004) 6 SCC 649].

22. In *N.P. Thirugnanam v. R. Jagan Mohan Rao* [(1995) 5 SCC 115] the Court found that the appellant was dabbling in real estate transaction without means to purchase the property and observed: (SCC pp. 117-18, para 5)

"5. ... Section 16(c) of the Act envisages that the plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant

and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract.”

23. In *J.P. Builders v. A. Ramadas Rao* [(2011) 1 SCC 429 : (2011) 1 SCC (Civ) 227] the Court has merely reiterated the principles already laid down and no new proposition has been laid down which may help the cause of the appellant.”

31. Recently, this Court considered the issue of readiness and willingness with the aid of decided cases of the Apex Court in **Ramzan Ali and another v. Altafur Rahman, 2023:AHC-LKO-30146** and in paras 27 to 30 reads as under:-

"27. In the *Corpus Juris Secundum*, vol. 81 pp.950-951, the readiness and willingness has been interpreted to mean, a general principle of law that a person seeking specific

performance must show that he has performed or offered to perform or is ready, able and willing to perform, all the essential acts required by the contract and he must not remain quiet or hold himself aloof so as to enforce or abandon the contract as events may prove advantageous. The plaintiff is entitled to specific performance where he alleges and proves that he has complied substantially with the conditions of the contract or is able, ready and willing to perform the contract. (See also *Satya Jain v Anis Ahmed Rushdie* AIR 2013 SC 434).

28. In the case of *Bijai Bahadur v. Shri Shiv Kumar* AIR 1985 All 223, this Court held that so far as the question of readiness and willingness is concerned while 'willingness' is merely a mental process, 'readiness' is something to do with translating that will into action and is preceded by a necessary preparation for being in a position to be ready. As to the averments about this continuous readiness and willingness the law never insists on any particular form and the necessary averment may be made in any language the plaintiff may choose to employ. The language is not important. The crucial thing is that the totality of the averments made in the plaint must indicate the readiness and willingness of the plaintiff, even though by necessary inference.

29. This Court also notices the decision of the Apex Court in *His Holiness Acharya Swami Ganesh Dassji Vs. Sitaram Thapar*; 1996 (4) SCC 526 wherein the concept of readiness and willingness has been noticed and has been held as under:-

"2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By

readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, i.e., by 27-2-1975. The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willingness to perform plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bide for the time which disentitles him as time is of the essence of the contract."

30. Similarly, In J.P. Builders and Another Vs. A. Ramadas Rao and Another; 2011 (1) SCC 429 wherein the Apex Court in paragraph nos. 22 to 27 has observed as under:-

"22. The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contract. The distinction between

"readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

23. In N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao [(1995) 5 SCC 115] at SCC para 5, this Court held: (SCC pp. 117-18)

"5. ... Section 16(c) of the Act envisages that the plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the

plaintiff was ready and was always ready and willing to perform his part of the contract."

24. In *P. D'Souza v. Shondrilo Naidu* [(2004) 6 SCC 649] this Court observed: (SCC p. 654, paras 19 and 21)

"19. It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case. No straitjacket formula can be laid down in this behalf.

21. ... The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale."

25. Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff.

26. It has been rightly considered by this Court in *R.C. Chandiok v. Chuni Lal Sabharwal* [(1970) 3 SCC 140] that "readiness and willingness" cannot be treated as a straitjacket formula. This has to be determined from the entirety of the facts

and circumstances relevant to the intention and conduct of the party concerned.

27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties.""

32. Another aspect which does merit consideration is where in a suit for specific performance, the vendor executes a sale-deed in favour of a subsequent purchaser then in such circumstances, who all are to be made parties to a suit and what relief is to be claimed and whether the subsequent sale-deed is required to be cancelled is also a crucial issue of importance.

33. The effect of an agreement over a subsequent purchaser for valuable consideration without notice emerges from Section 19 of the Specific Relief Act, 1963 and it would reveal that a sale of immovable property is immune from specific performance of prior contract for sale only if transferee has acquired title for valuable consideration in good faith and without notice of prior contract of sale.

34. Initially, the classic view of the Courts was that subsequent purchaser did not have the right to challenge the agreement or raise the plea of readiness and willingness which was only available with the original vendor and not to the

subsequent purchaser who could only contest on his plea of proving that he was a bonafide purchaser in good faith for valuable consideration without notice and this was noticed in **Jugraj Singh and another v. Labh Singh and others (1995) 2 SCC 31.**

35. Later, there was a change in this legal position and made by the Apex Court while dealing with the aforesaid issue in **Ram Awadh and others v. Achhairbar Dubey and another, (2000) 2 SCC 428** and it permitted all the pleas including the plea of readiness and willingness being available to the subsequent purchaser and while doing so the Apex Court also overruled the decision of Jugraj Singh (supra). The view taken in Ram Awadh (supra) was followed and approved lately by a Larger Bench of the Apex Court in **Kadupugotla Varalakshmi v. Vudagiri Venkata Rao and others 2021 SCC OnLine SC 365.**

36. Now, it has been settled that in a suit for specific performance of contract where the vendor executes the sale-deed in favour of a subsequent purchaser then an appropriate remedy is to seek a decree of specific performance wherein the plaintiff apart from impleading the vendor as a defendant would also implead the subsequent purchaser and there is no requirement to seek cancellation or declaration of the subsequent sale-deed to be bad or null and void. The Courts can grant a decree of specific performance and a direction can be issued to the subsequent purchaser to join hands with the vendor to execute the deed in favour of the plaintiff succeeding in a suit for specific performance.

37. This issue was first considered by the Apex Court in **Durga Prasad v. Deep**

Chand, AIR 1954 SC 75 wherein their Lordships were pleased to approve a decision of the Calcutta High Court in **Kafiladdin v. Samiraddin, [AIR 1931 Cal 67]**. The relevant portion of the judgment of the Apex Court in **Durga Prasad** (supra) reads as under:-

“42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in **Kafiladdin v. Samiraddin [Kafiladdin v. Samiraddin, AIR 1931 Cal 67]**, and appears to be the English practice. (See Fry on Specific Performance, 6th Edn., p. 90, para 207 and also **Potter v. Sanders [(1846) 6 Hare 1 : 67 ER 1057]**.) We direct accordingly.”

38. This proposition was also noticed and followed in **R.C. Chandiok v. Chuni Lal Sabharwal (1970) 3 SCC 140** and it held as under:-

“9. It is common ground that the plot in dispute has been transferred by the respondents and therefore the proper form of the decree would be the same as indicated at SCR p. 369 in **Durga Prasad v. Deep Chand [AIR 1954 SC 75 : 1954 SCR 360]** viz.

‘to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the

plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff". (AIR p. 81, para 42)

We order accordingly. The decree of the courts below is hereby set aside and the appeal is allowed with costs in this Court and the High Court."

39. This aspect was also considered by the Apex Court in **Thomson Press (India) Ltd. v. Nanak Builders and Investors Private Limited and others, (2013) 5 SCC 397**, wherein the Apex Court held as under:-

"39. As discussed above, a decree for specific performance of a contract may be enforced against a person who claimed under the plaintiff (sic defendant), and title acquired subsequent to the contract. There is no dispute that such transfer made in favour of the subsequent purchaser is subject to the rider provided under Section 52 of the Transfer of Property Act and the restraint order passed by the Court.

40. The aforesaid question was considered by the Calcutta High Court in *Kafiladdin v. Samiraddin* [*Kafiladdin v. Samiraddin*, AIR 1931 Cal 67] , where Their Lordships referred to the English law on this point and quoted one of the passages of the book authored by Dart, on 'Vendors and Purchasers', 8th Edn., Vol. 2, which reads as under : (Kafiladdin case [*Kafiladdin v. Samiraddin*, AIR 1931 Cal 67] , AIR p. 68)

"Equity will enforce specific performance of the contract for sale against the vendor himself and against all persons claiming under him by a title arising

subsequently to the contract except purchasers for valuable consideration who have paid their money and taken a conveyance without notice to the original contract."

Discussing elaborately, the Court finally observed : (*Kafiladdin case* [*Kafiladdin v. Samiraddin*, AIR 1931 Cal 67] , AIR p. 68)

"This statement of the law is exactly what is meant by the first two clauses of Section 27 of the Specific Relief Act. It is not necessary to refer to the English cases in which decrees have been passed against both the contracting party and the subsequent purchaser. It is enough to mention some of them : *Daniels v. Davison* [(1809) 16 Ves Jun 249 : (1803-13) All ER Rep 432 : 33 ER 978], *Potter v. Sanders* [(1846) 6 Hare 1 : 67 ER 1057] and *Lightfoot v. Heron* [(1839) 3 Y&C Ex 586 : 160 ER 835] . The question did not pertinently arise in any reported case in India; but decrees in cases of specific performance of contract have been passed in several cases in different forms. In *Chunder Kant Roy v. Krishna Sunder Roy* [ILR (1884) 10 Cal 710] the decree passed against the contracting party only was upheld. So it was in *Kannan v. Krishnan* [ILR (1890) 13 Mad 324] . In *Himatlal Motilal v. Vasudev Ganesh Mhaskar* [ILR (1912) 36 Bom 446] the decree passed against the contracting defendant and the subsequent purchaser was approved. In *Faki Ibrahim v. Faki Gulam Mohidin* [AIR 1921 Bom 459] the decree passed against the subsequent purchaser only was adopted. In *Gangaram v. Laxman Ganoba Shet Chaudole* [ILR (1916) 40 Bom 498] the suit was by the subsequent purchaser and the decree was that he should convey the property to the person holding the prior

agreement to sale. It would appear that the procedure adopted in passing decrees in such cases is not uniform. But it is proper that English procedure supported by the Specific Relief Act should be adopted. The apparent reasoning is that unless both the contracting party and the subsequent purchaser join in the conveyance it is possible that subsequently difficulties may arise with regard to the plaintiff's title."

41. The Supreme Court in *Durga Prasad v. Deep Chand* [AIR 1954 SC 75 : 1954 SCR 360] referred to the aforementioned decision of the Calcutta High Court in *Kafiladdin v. Samiraddin*, AIR 1931 Cal 67] and finally held : (Durga Prasad case [AIR 1954 SC 75 : 1954 SCR 360] , AIR p. 81, para 42)

"42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in *Kafiladdin v. Samiraddin* [*Kafiladdin v. Samiraddin*, AIR 1931 Cal 67] , and appears to be the English practice. (See Fry on Specific Performance, 6th Edn., p. 90, para 207 and also *Potter v. Sanders* [(1846) 6 Hare 1 : 67 ER 1057] .) We direct accordingly."

42. Again in *R.C. Chandiok v. Chuni Lal Sabharwal* [(1970) 3 SCC 140 : AIR 1971 SC 1238] this Court referred to their earlier decision and observed : (SCC p. 146, para 9)

"9. It is common ground that the plot in dispute has been transferred by the respondents and therefore the proper form of the decree would be the same as indicated at SCR p. 369 in *Durga Prasad v. Deep Chand* [AIR 1954 SC 75 : 1954 SCR 360] viz.

"to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff". (AIR p. 81, para 42)

We order accordingly. The decree of the courts below is hereby set aside and the appeal is allowed with costs in this Court and the High Court."

43. This Court again in *Dwarka Prasad Singh v. Harikant Prasad Singh* [(1973) 1 SCC 179 : AIR 1973 SC 655] subscribed to its earlier view and held that in a suit for specific performance against a person with notice of a prior agreement of sale is a necessary party."

40. This proposition was approved and reiterated in ***Rathnavathi v. Kavita Ganashamdas*, (2015) 5 SCC 223**. Even, this Court in ***Smt. Rajeshwari and others v. Smt. Meharunnishan and others in Second Appeal No.375 of 2001***, decided on 24.02.2021 had followed the proposition as laid down in *Durga Prasad* (supra) and held as under:-

"... It is also equally true that in case of the sale-deed having been executed by the vendor in favour of the subsequent purchaser, the plaintiff is not required to seek the cancellation or declaration of the

sale-deed in favour of the third party. If the suit of the specific performance is decreed then the original vendor and the third party purchaser/subsequent purchaser is required to join and execute the sale-deed in favour of the plaintiffs to convey the full title.

This Court is fortified in its view based on the decision of the Apex Court in the case of **Lala Durga Prasad and another vs. Lala Deep Chand and others**, **AIR 1954 SC 75**, wherein in Para 40 to 42, it has been held as under:-

"40. First, we reach the position that the title to the property has validly passed from the vendor and resides in the subsequent transferee. The sale to him is not void but only voidable at the option of the earlier "contractor". As the title no longer rests in the vendor it would be illogical from a conveyancing point of view to compel him to convey to the plaintiff unless steps are taken to re-vest the title in him either by cancellation of the subsequent sale or by reconveyance from the subsequent purchaser to him. We do not know of any case in which a reconveyance to the vendor was ordered but Sulaiman, C.J. adopted the other course in Kali Charan v. Janak Deo [AIR 1932 All 694] . He directed cancellation of the subsequent sale and conveyance to the plaintiff by the vendor in accordance with the contract of sale of which the plaintiff sought specific performance. But though this sounds logical the objection to it is that it might bring in its train complications between the vendor and the subsequent purchaser. There may be covenants in the deed between them which it would be inequitable to disturb by cancellation of their deed. Accordingly, we do not think that is a desirable solution.

41. We are not enamoured of the next alternative either, namely, conveyance

by the subsequent purchaser alone to the plaintiff. It is true that would have the effect of vesting the title to the property in the plaintiff but it might be inequitable to compel the subsequent transferee to enter into terms and covenants in the vendor's agreement with the plaintiff to which he would never have agreed had he been a free agent; and if the original contract is varied by altering or omitting such terms the court will be remaking the contract, a thing it has no power to do; and in any case it will no longer be specifically enforcing the original contract but another and different one.

42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in Kafiladdin v. Samiraddin [AIR 1931 Cal 67] and appears to be the English practice. See Fry on Specific Performance, 6th Edn., p. 90, para 207; also Potter v. Sanders [67 ER 1057]. We direct accordingly."

41. This issue was was recently considered, followed and approved by the Apex Court in **P. Ramasubbamma v. V. Vijayalakshmi and others**, (2022) 7 SCC 384 and in paragraphs 16 and 17, it noticed as under:-

"16. In light of the aforesaid factual aspects and the findings recorded by the learned trial court, the decision of this Court in *Durga Prasad [Durga Parsad v.*

Deep Chand, 1954 SCR 360 : AIR 1954 SC 75] is required to be referred to. In para 42, it is observed and held as under: (AIR p. 81)

“42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in *Kafiladdin v. Samiraddin* [*Kafiladdin v. Samiraddin*, 1930 SCC OnLine Cal 46 : AIR 1931 Cal 67] and appears to be the English practice. See Fry on Specific Performance, 6th Edn., p. 90, Para 207; also *Potter v. Sanders* [*Potter v. Sanders*, (1846) 6 Hare 1 : 67 ER 1057] . We direct accordingly.”

The aforesaid decision has been subsequently referred to and followed by this Court in the subsequent decision in *Rathnavathi* [*Rathnavathi v. Kavita Ganashamdas*, (2015) 5 SCC 223 : (2015) 2 SCC (Civ) 736].

17. From the impugned judgment and order passed by the High Court, it appears that the High Court has heavily relied upon Section 34 of the Specific Relief Act. However, considering the fact that specific issues were framed with respect to sale deeds dated 3-5-2010 executed by original Defendant 2 in favour of Defendants 3 and 4 and the parties led the evidence also on the aforesaid issues and thereafter, when the learned trial court had given findings on the said issues and thereafter, had granted the declaration that

the sale deeds executed by original Defendant 2 in favour of Defendants 3 and 4 are not binding on Defendant 1 and the plaintiff and those sale deeds are nominal sale deeds and that Defendants 2 to 4 have failed to prove that agreement to sell dated 12-4-2005 is a created document and by virtue of the same no consideration has been paid, Section 34 of the Specific Relief Act, upon which reliance has been placed by the High Court will have no application.”

42. Now the stage is set and once the plaintiff proves the agreement, its enforceability, his readiness and willingness to perform its part of the contract during trial then, ordinarily, the plaintiff is entitled to a decree of specific performance. However, as the decree of specific performance is discretionary in nature, hence, only in certain cases the Court may be justified in refusing the grant of specific performance even though it may lawful to do so. This discretion which is vested in the Court must be exercised in accordance with law and should not be arbitrary or whimsical.

43. Now, in order to better appreciate this aspect of the matter, it will also be necessary to notice the source of this discretion which is embodied in Section 20 of the Specific Relief Act, 1963. This Section 20 too has undergone a legislative change in 2018. However, Section 20 of the Specific Relief Act, 1963 prior to its amendment was read as under:-

"Section 20. Discretion as to decreeing specific performance.—(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the

court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.— The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has

resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party."

44. However, the legislative changes made in the Specific Relief Act vide Amendment Act of 2018 and Section 20 of the Specific Relief Act, 1963 in particular has done away with the discretion and the relief of specific performance of contract relating to immovable property is now no more discretionary. The amended Section 20 reads as under:-

"20. Substituted performance of contract.— (1) Without prejudice to the generality of the provisions contained in the Indian Contract Act, 1872 (9 of 1872), and, except as otherwise agreed upon by the parties, where the contract is broken due to non-performance of promise by any party, the party who suffers by such breach shall have the option of substituted performance through a third party or by his own agency, and, recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach.

(2) No substituted performance of contract under sub-section (1) shall be

undertaken unless the party who suffers such breach has given a notice in writing, of not less than thirty days, to the party in breach calling upon him to perform the contract within such time as specified in the notice, and on his refusal or failure to do so, he may get the same performed by a third party or by his own agency:

Provided that the party who suffers such breach shall not be entitled to recover the expenses and costs under sub-section (1) unless he has got the contract performed through a third party or by his own agency.

(3) Where the party suffering breach of contract has got the contract performed through a third party or by his own agency after giving notice under sub-section (1), he shall not be entitled to claim relief of specific performance against the party in breach.

(4) Nothing in this section shall prevent the party who has suffered breach of contract from claiming compensation from the party in breach."

45. Though, the said amendment is not retrospective and would not apply to the transactions prior to the date of enforcement of the amendment i.e. 01.10.2018 and this question was answered by the Apex Court, lately in **Katta Sujatha Reddy and another v. Siddamsetty Infra Projects Private Limited and others, (2023) 1 SCC 355** wherein in Para 58 and 59, it was held as under:-

"58. In the case at hand, the Amendment Act contemplates that the said substituted provisions would come into force on such date as the Central Government may appoint, by

notification in the Official Gazette, or different dates may be appointed for different provisions of the Act. It may be noted that 1-10-2018 was the appointed date on which the amended provisions would come into effect.

59. In view of the above discussion, we do not have any hesitation in holding that the 2018 Amendment to the Specific Relief Act is prospective and cannot apply to those transactions that took place prior to its coming into force."

46. Since, in the case at hand, transaction is prior to 01.10.2018, hence Section 20 prior to its amendment shall apply. It would thus be seen that in any given circumstances where the Court comes to the conclusion that though the plaintiff is entitled to a decree of specific performance, but in case if such decree is executed then it may give rise to certain unconscionable consequences or the Court finds that the terms of the agreement in itself are unconscionable or there are certain accentuating circumstances revealing that in case the contract is specifically enforced then it may give an unfair advantage to one party and it will not be equitable to do so, then in such cases, the Court may be justified in refusing to grant a decree of specific performance and in lieu thereof may pass such orders including refund of earnest money in order to do complete and substantial justice between the parties.

47. It is also to be observed that a decree of specific performance is purely equitable in nature, accordingly, it is required that the plaintiff must come to the Court with clean hands and his conduct must not be blameworthy and while

weighing the circumstances for exercising the discretion, the Court is also obliged to ascertain that the defendants may not be benefited or rewarded for any of his own fault or his conduct and that the defendant must also be free from blame.

48. How the discretion is to be exercised can be ascertained with the help of the leading decisions of the Apex Court on the aforesaid point. In **K. Narendra v. Riviera Apartments (P) Ltd., (1999) 5 SCC 77**, it was held as under:-

29. Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant. The principle underlying Section 20 has been summed up by this Court in *Lourdu Mari David v. Louis Chinnaya Arogiaswamy* [(1996) 5 SCC 589 : AIR 1996 SC 2814] by stating that the decree for specific performance is in the discretion of the Court but the discretion should not

be used arbitrarily; the discretion should be exercised on sound principles of law capable of correction by an appellate court."

49. Again, in *G. Jayashree and others v. Bhagwandas S. Patel and others* (2009) 3 SCC 141, it was held as under:-

"32. The civil courts, in the matter of enforcement of an agreement to sell, exercise a discretionary jurisdiction. Discretionary jurisdiction albeit must be exercised judiciously and not arbitrarily or capriciously. A plaintiff is expected to approach the court with clean hands. His conduct plays an important role in the matter of exercise of discretionary jurisdiction by a court of law. In *Mohammadia Coop. Building Society Ltd. v. Lakshmi Srinivasa Coop. Building Society Ltd.* [(2008) 7 SCC 310] this Court held: (SCC p. 327, para 71)

"71. Grant of a decree for specific performance of contract is a discretionary relief. There cannot be any doubt whatsoever that the discretion has to be exercised judiciously and not arbitrarily. But for the said purpose, the conduct of the plaintiff plays an important role. The courts ordinarily would not grant any relief in favour of the person who approaches the court with a pair of dirty hands."

33. In *Sanjana M. Wig v. Hindustan Petroleum Corpn. Ltd.* [(2005) 8 SCC 242] in regard to exercise of the discretionary jurisdiction, this Court held that the same depends upon the facts and circumstances of each case wherefor no hard-and-fast rule can be laid down.

34. We may notice that *B.P. Jeevan Reddy, J. in K.S. Vidyadnam v.*

Vairavan [(1997) 3 SCC 1] held that a new look is required to be given and the rigour of the rule is required to be relaxed by the courts as regards the principle that time is not of the essence of the contract in case of immovable properties as when the said principle was evolved the prices and values were stable and inflation was unknown, stating: (SCC pp. 9-10, para 11)

“11. ... The learned counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribes certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties).”

This Court therein noticed the decision rendered in *Mademsetty Satyanarayana v. G. Yelloji Rao* [AIR 1965 SC 1405 : (1965) 2 SCR 221] where Subba Rao, J. (as His Lordship then was) made a

distinction between Indian law and the English law on the subject to hold that some delay may not be a bar in granting a relief of specific performance as the limitation for filing such suit is prescribed under the Limitation Act, 1963, stating: (*K.S. Vidyanadam case* [(1997) 3 SCC 1] , SCC p. 10, para 13)

“13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2½ years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices—according to the defendants, three times—between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff.”

50. The Apex Court again in **Ramesh Chandra v Asruddin**, (2016) 1 SCC 653, held as under:-

"8. Section 20 of the Specific Relief Act, 1963, provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so. However, the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles. Sub-section (2) of Section 20 of the Act provides the three situations in which the court may exercise discretion not to decree specific performance. One such situation is contained in clause (a) of sub-section (2) of Section 20 which provides that where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under

which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant, the decree of specific performance need not be passed. It is pertinent to mention here that in the present case, though execution of the agreement dated 21-6-2004 between the parties is proved, but it is nowhere pleaded or proved by the plaintiff that he got redeemed the mortgaged land in favour of Defendant 2 in terms of the agreement, nor is it specifically pleaded that he was ready and willing to get the property redeemed from the mortgage."

51. The Apex Court again in **K. Nanjappa v. R.A. Hameed, (2016) 1 SCC 762** considered the scope of Section 20 and in Paras 23 to 28 held as under:-

"23. In a suit for specific performance of a contract, the court has to keep in mind Section 20 of the Specific Relief Act, 1963. This Section preserves judicial discretion to grant decree for specific performance. However, the court is not bound to grant specific performance merely because it is lawful to do so. The court should meticulously consider all facts and circumstances of the case and to see that it is not used as an instrument of oppression to have an unfair advantage not only to the plaintiff but also to the defendant.

24. In *Surya Narain Upadhyay v. Ram Roop Pandey* [1995 Supp (4) SCC 542], this Court while considering Section 20 of the Specific Relief Act held as under: (SCC pp. 543-44, para 4)

"4. Though the decree for specific performance is a discretionary power, yet the court is not bound to grant such a relief

merely because it is lawful to do so; but the discretion of the court is not arbitrary, but sound and reasonable, guided by judicial principles of law and capable of correction by a court of appeal. Therefore, the discretion should be properly exercised keeping in view the settled principles of law as envisaged in Section 20 of the Act. This case demonstrates that the High Court [*Ram Roop Pandey v. Surya Narain Upadhyay*, Second Appeal No. 2385 of 1974, decided on 26-9-1979 (All) (unreported)] took irrelevant consideration into account to refuse to grant the decree for specific performance. It also committed manifest illegality in reversing the concurrent finding of facts recorded by the trial court as well as the first appellate court, namely, the appellant has always been ready and willing to perform his part of the contract."

25. It is equally well settled that relief of specific performance is discretionary but not arbitrary, hence, discretion must be exercised in accordance with sound and reasonably judicial principles. The cases providing for a guide to courts to exercise discretion one way or the other are only illustrative, they are not intended to be exhaustive. In England, the relief of specific performance pertains to the domain of equity, but in India the exercise of discretion is governed by the statutory provisions.

26. In *Mayawanti v. Kaushalya Devi* [(1990) 3 SCC 1], this Court observed as under: (SCC pp. 5-6, para 8)

"8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and

enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation.”

27. In *K. Prakash v. B.R. Sampath Kumar* [(2015) 1 SCC 597 : (2015) 1 SCC (Civ) 600], this Court held: (SCC pp. 604-05, paras 13-16)

“13. Indisputably, remedy for specific performance is an equitable remedy. The court while granting relief for specific performance exercises discretionary jurisdiction. Section 20 of the Act specifically provides that the court's jurisdiction to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with the sound and reasonable judicial principles.

14. The King's Bench in *Rooke's case* [(1598) 5 Co Rep 99b : 77 ER 209] said:

‘Discretion is a science, not to act arbitrarily according to men's will and

private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others, allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity is by the Constitution entrusted with.’

15. The Court of Chancery in *Attorney General v. Wheate* [(1759) 1 Eden 177 : 28 ER 652] followed *Rooke's case* [(1598) 5 Co Rep 99b : 77 ER 209] and observed: (ER p. 666)

‘... the law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be secundum discretionem boni viri, yet, when it is asked, vir bonus est quis? The answer is, qui consulta patrum, qui leges juraque servat. And as it is said in *Rooke's case* [(1598) 5 Co Rep 99b : 77 ER 209], that discretion is a science not to act arbitrarily according to men's wills and private affections; so the discretion which is to be exercised here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion, in some cases follows the law implicitly; in others assists it, and advances the remedy; in others, again, it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this

Court. That is a discretionary power, which neither this, nor any other court, not even the highest, acting in a judicial capacity, is by the Constitution entrusted with. This description is full and judicious, and what ought to be imprinted on the mind of every Judge.’

16. The principle which can be enunciated is that where the plaintiff brings a suit for specific performance of contract for sale, the law insists upon a condition precedent to the grant of decree for specific performance: that the plaintiff must show his continued readiness and willingness to perform his part of the contract in accordance with its terms from the date of contract to the date of hearing. Normally, when the trial court exercises its discretion in one way or the other after appreciation of entire evidence and materials on record, the appellate court should not interfere unless it is established that the discretion has been exercised perversely, arbitrarily or against judicial principles. The appellate court should also not exercise its discretion against the grant of specific performance on extraneous considerations or sympathetic considerations. It is true, as contemplated under Section 20 of the Specific Relief Act, that a party is not entitled to get a decree for specific performance merely because it is lawful to do so. Nevertheless once an agreement to sell is legal and validly proved and further requirements for getting such a decree are established then the court has to exercise its discretion in favour of granting relief for specific performance.”

28. Reference may also be made by this Court in *Zarina Siddiqui v. A. Ramalingam* [(2015) 1 SCC 705 : (2015) 1 SCC (Civ) 660] wherein this Court observed as under: (SCC p. 718, para 33)

“33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misleads the court then such discretion should not be exercised by refusing to grant specific performance.”

52. Yet another important aspect which is to be considered is whether mere rise in prices of the property during the pendency of the proceedings can be considered as an accentuating circumstances to enable the Court to exercise its discretion and refuse to grant of relief of specific performance.

53 . This issue was considered by the Apex Court in **Jayakantham and others v. Abaykumar**, (2017) 5 SCC 178 and it held as under:-

"7. While evaluating whether specific performance ought to have been decreed in the present case, it would be necessary to bear in mind the fundamental principles of law. The court is not bound to grant the relief of specific performance merely because it is lawful to do so. Section 20(1) of the Specific Relief Act, 1963 indicates that the jurisdiction to decree specific performance is discretionary. Yet, the discretion of the court is not arbitrary but is “sound and reasonable”, to be “guided by judicial principles”. The exercise of discretion is capable of being corrected by a court of appeal in the hierarchy of appellate courts. Sub-section (2) of Section 20 contains a

stipulation of those cases where the court may exercise its discretion not to grant specific performance. Sub-section (2) of Section 20 is in the following terms:

“20. (2) The following are cases in which the court may properly exercise discretion not to decree specific performance—

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.”

8. However, Explanation 1 stipulates that the mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, will not constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Moreover, Explanation 2 requires that the issue as to whether the performance of a contract involves hardship on the defendant has to be determined with reference to the circumstances existing at the time of the contract, except where the hardship has

been caused from an act of the plaintiff subsequent to the contract.

9. The precedent on the subject is elucidated below:

9.1. In *Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son* [Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son, 1987 Supp SCC 340 : AIR 1987 SC 2328], this Court held that : (SCC p. 345, para 14)

“14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of courts as to decreeing specific performance. The court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff.”

9.2. A similar view was adopted by this Court in *Sardar Singh v. Krishna Devi* [Sardar Singh v. Krishna Devi, (1994) 4 SCC 18] : (SCC p. 26, para 14)

“14. ... Section 20(1) of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief, merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. The grant of relief of specific performance is discretionary. The circumstances specified in Section 20 are

only illustrative and not exhaustive. The court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest under the contract.”

9.3. Reiterating the position in *K. Narendra v. Riviera Apartments (P) Ltd.* [*K. Narendra v. Riviera Apartments (P) Ltd.*, (1999) 5 SCC 77] , this Court held thus : (SCC p. 91, para 29)

“29. ... Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognised in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant. The principle underlying Section 20 has been summed up by this Court in *Lourdu Mari David v. Louis Chinnaya Arogiaswamy* [*Lourdu Mari David v. Louis Chinnaya Arogiaswamy*, (1996) 5 SCC 589] by stating that the decree for specific performance is in the discretion of the Court but the discretion should not be used arbitrarily; the discretion should be exercised on sound principles of law capable of correction by an appellate court.”

9.4. These principles were followed by this Court in *A.C. Arulappan v. Ahalya Naik* [*A.C. Arulappan v. Ahalya Naik*, (2001) 6 SCC 600] , with the

following observations : (SCC pp. 604 & 606, paras 7 & 15)

“7. The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff.

15. Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the court. ...”

9.5. A Bench of three Judges of this Court considered the position in *Nirmala Anand v. Advent Corpn. (P) Ltd.* [*Nirmala Anand v. Advent Corpn. (P) Ltd.*, (2002) 8 SCC 146] , and held thus : (SCC p. 150, para 6)

“6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen.”

54. This aspect regarding escalation of prices and its impact on the discretion of the Court was taken up by the Apex Court, who made an arduous exercise to trace and renew all the relevant cases on the said point and elucidated the position in

Ferrodous Estate (P) Ltd. v. P. Gopirathnam (Dead) and others, 2020 SCC OnLine SC 825. Though large number of decisions have been reviewed by the Apex Court, however, this Court is noticing few of the paras of the said judgment to clearly understand the proposition with the help of Paras 40, 42, 43, 45, 50 to 53 which reads as under:-

"40. Section 20, as it then stood, makes it clear that the jurisdiction to decree specific performance is discretionary; but that this discretion is not arbitrary but has to be exercised soundly and reasonably, guided by judicial principles, and capable of correction by a court of appeal - see section 20(1). Section 20(2) speaks of cases in which the court may properly exercise discretion not to decree specific performance. Significantly, under clause (a) of sub-section (2), what is to be seen is the terms of the contract or the conduct of the parties at the time of entering into the contract. Even “other circumstances under which the contract was entered into” refers only to circumstances that prevailed at the time of entering into the contract. It is only then that this exception kicks in - and this is when the plaintiff gets an unfair advantage over the defendant. Equally, under clause (b) of subsection (2), the hardship involved is again at the time of entering into the contract which is clear from the expression “which he did not foresee”. This is made clear beyond doubt by Explanation II of section 20 which states that the only exception to the hardship principle contained in clause (b) of sub-section (2) is where hardship results from an act of the plaintiff subsequent to the contract. In this case also, the act cannot be an act of a third party or of the court - the act must only be the act of the plaintiff. Clause (c) of sub-section (2) again refers to the defendant

entering into the contract under circumstances which makes it inequitable to enforce specific performance. Here again, the point of time at which this is to be judged is the time of entering into the contract.

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42. In *P.D'Souza v. Shondrilo Naidu*, (2004) 6 SCC 649, this Court held:

“39. It is not a case where the defendant did not foresee the hardship. It is furthermore not a case that non-performance of the agreement would not cause any hardship to the plaintiff. The defendant was the landlord of the plaintiff. He had accepted part-payments from the plaintiff from time to time without any demur whatsoever. He redeemed the mortgage only upon receipt of requisite payment from the plaintiff. Even in August 1981 i.e. just two months prior to the institution of suit, he had accepted Rs. 20,000 from the plaintiff. It is, therefore, too late for the appellant now to suggest that having regard to the escalation in price, the respondent should be denied the benefit of the decree passed in his favour. Explanation I appended to Section 20 clearly stipulates that merely inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature would not constitute an unfair advantage within the meaning of sub-section (2) of Section 20.

40. The decision of this Court in *Nirmala Anand* [(2002) 5 SCC 481] may be considered in the aforementioned context.

41. Raju, J. in the facts and circumstances of the matter obtaining therein

held that it would not only be unreasonable but too inequitable for courts to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of the flat in question, preserved all along by Respondents 1 and 2 by keeping alive the issues pending with the authorities of the Government and the municipal body. It was in the facts and circumstances of the case held : (SCC p. 501, para 23)

“23.... Specific performance being an equitable relief, balance of equities have also to be struck taking into account all these relevant aspects of the matter, including the lapses which occurred and parties respectively responsible therefor. Before decreeing specific performance, it is obligatory for courts to consider whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into (sic consideration) the totality of circumstances of each case.”

43. Bhan, J., however, while expressing his dissension in part observed : (SCC pp. 506 & 507, paras 38 & 40)

“38. It is well settled that in cases of contract for sale of immovable property the grant of relief of specific performance is a rule and its refusal an exception based on valid and cogent grounds. Further, the defendant cannot take advantage of his own wrong and then plead that decree for specific performance would be an unfair advantage to the plaintiff.

40. Escalation of price during the period may be a relevant consideration under certain circumstances for either refusing to grant the decree of specific

performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and compensate him. It would depend on the facts and circumstances of each case.”

44. The learned Judge further observed that delay in performance of the contract due to pendency of proceedings in court cannot by itself be a ground to refuse relief of specific performance in absence of any compelling circumstances to take a contrary view.

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45. The said decision cannot be said to constitute a binding precedent to the effect that in all cases where there had been an escalation of prices, the court should either refuse to pass a decree on specific performance of contract or direct the plaintiff to pay a higher sum. No law in absolute terms to that effect has been laid down by this Court nor is discernible from the aforementioned decision.”

43. In *P.S. Ranakrishna Reddy v. M.K. Bhagyalakshmi*, (2007) 10 SCC 231, this Court held:

“19. Submission of Mr. Chandrashekhar to the effect that having regard to the rise in price of an immovable property in Bangalore, the Court ought not to have exercised its discretionary jurisdiction under Section 20 of the Specific Relief Act is stated to be rejected. We have noticed hereinbefore that the appellant had entered into an agreement for sale with others also. He had, even after 11-5-1979, received a sum of Rs. 5000 from the respondent. He with a view to defeat the lawful claim of Respondent 1 had

raised a plea of having executed a prior agreement for sale in respect of self-same property in favour of his son-in-law who had never claimed any right thereunder or filed a suit for specific performance of contract. The courts below have categorically arrived at a finding that the said contention of the appellant was not acceptable. Rise in the price of an immovable property by itself is not a ground for refusal to enforce a lawful agreement of sale. (See *P. D'Souza* [(2004) 6 SCC 649] and *Jai Narain Parasrampur* [(2006) 7 SCC 756].)”

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45. In *Satya Jain v. Anis Ahmed Rushdie*, (2013) 8 SCC 131, this Court held:

“40. The discretion to direct specific performance of an agreement and that too after elapse of a long period of time, undoubtedly, has to be exercised on sound, reasonable, rational and acceptable principles. The parameters for the exercise of discretion vested by Section 20 of the Specific Relief Act, 1963 cannot be entrapped within any precise expression of language and the contours thereof will always depend on the facts and circumstances of each case. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the experienced judicial mind can perceive without any real difficulty. It must however be emphasised that efflux of time and escalation of price of property, by itself, cannot be a valid ground to deny the relief of specific performance. Such a view has been consistently adopted by this Court. By way of illustration opinions rendered in *P.S. Ranakrishna Reddy v. M.K. Bhagyalakshmi* [(2007) 10 SCC 231] and

more recently in *Narinderjit Singh v. North Star Estate Promoters Ltd.* [(2012) 5 SCC 712; (2012) 3 SCC (Civ) 379] may be usefully recapitulated.

41. The twin inhibiting factors identified above if are to be read as a bar to the grant of a decree of specific performance would amount to penalising the plaintiffs for no fault on their part; to deny them the real fruits of a protracted litigation wherein the issues arising are being answered in their favour. From another perspective it may also indicate the inadequacies of the law to deal with the long delays that, at times, occur while rendering the final verdict in a given case. The aforesaid two features, at best, may justify award of additional compensation to the vendor by grant of a price higher than what had been stipulated in the agreement which price, in a given case, may even be the market price as on date of the order of the final court.

42. Having given our anxious consideration to all the relevant aspects of the case we are of the view that the ends of justice would require this Court to intervene and set aside the findings and conclusions recorded by the High Court of Delhi in *Anis Ahmed Rushdiev. Bhiku Ram Jain* [*Anis Ahmed Rushdiev. Bhiku Ram Jain*, RFA (OS) No. 11 of 1984, decided on 31-10-2011 (Del)] and to decree the suit of the plaintiffs for specific performance of the agreement dated 22-12-1970. We are of the further view that the sale deed that will now have to be executed by the defendants in favour of the plaintiffs will be for the market price of the suit property as on the date of the present order. As no material, whatsoever is available to enable us to make a correct assessment of the market value of the suit property as on date we

request the learned trial Judge of the High Court of Delhi to undertake the said exercise with such expedition as may be possible in the prevailing facts and circumstances.”

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50. It is settled law that mere delay by itself, without more, cannot be the sole factor to deny specific performance - See *Mademsetty Satyanarayana v. G. Yelloji Rao*, (1965) 2 SCR 221 at pp. 229-230. Thus, in *K.S. Vidyadnam v. Vairavan*, (1997) 3 SCC 1, this Court made it clear that if property prices have risen dramatically within a period of two and a half years before filing of the suit for specific performance, and it is coupled with violation of the agreement by the plaintiff, specific performance will not be decreed. The Court held:

“10. ... In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised. Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades — particularly after 1973 [It is a well-known fact that the steep rise in the price of oil following the 1973 Arab-Israeli war set in inflationary trends all over the world. Particularly affected were countries like who import bulk of their requirement of oil]. In this case, the suit property is the house property situated in Madurai, which is one of the major cities of Tamil Nadu. The suit agreement was in December 1978 and the six months' period specified therein for completing the sale expired with 15-6-1979. The suit notice was issued by the

plaintiff only on 11-7-1981, i.e., more than two years after the expiry of six months' period. The question is what was the plaintiff doing in this interval of more than two years? ... The defendants' consistent refrain has been that the prices of house properties in Madurai have been rising fast, that within the said interval of 2½ years, the prices went up three times and that only because of the said circumstance has the plaintiff (who had earlier abandoned any idea of going forward with the purchase of the suit property) turned round and demanded specific performance. Having regard to the above circumstances and the oral evidence of the parties, we are inclined to accept the case put forward by Defendants 1 to 3. We reject the story put forward by the plaintiff that during the said period of 2½ years, he has been repeatedly asking the defendants to get the tenant vacated and execute the sale deed and that they were asking for time on the ground that tenant was not vacating. The above finding means that from 15-12-1978 till 11-7-1981, i.e., for a period of more than 2½ years, the plaintiff was sitting quiet without taking any steps to perform his part of the contract under the agreement though the agreement specified a period of six months within which he was expected to purchase stamp papers, tender the balance amount and call upon the defendants to execute the sale deed and deliver possession of the property. We are inclined to accept the defendants' case that the values of the house property in Madurai town were rising fast and this must have induced the plaintiff to wake up after 2½ years and demand specific performance.

11. Shri Sivasubramaniam cited the decision of the Madras High Court in *S.V. Sankaralinga Nadar v. P.T.S. Ratnaswami Nadar* [AIR 1952 Mad 389 :

(1952) 1 Mad LJ 44] holding that mere rise in prices is no ground for denying the specific performance. With great respect, we are unable to agree if the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the court by law. We cannot be oblivious to the reality — and the reality is constant and continuous rise in the values of urban properties — fuelled by large-scale migration of people from rural areas to urban centres and by inflation. Take this very case. The plaintiff had agreed to pay the balance consideration, purchase the stamp papers and ask for the execution of sale deed and delivery of possession within six months. He did nothing of the sort. The agreement expressly provides that if the plaintiff fails in performing his part of the contract, the defendants are entitled to forfeit the earnest money of Rs. 5000 and that if the defendants fail to perform their part of the contract, they are liable to pay double the said amount. Except paying the small amount of Rs. 5000 (as against the total consideration of Rs. 60,000) the plaintiff did nothing until he issued the suit notice 2½ years after the agreement. Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties — evolved in times when prices and values were stable and inflation was unknown — requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. The learned counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period

within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribe certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties).”

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“13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2½ years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices — according to the defendants, three times — between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff.

14. Shri Sivasubramaniam then relied upon the decision in *Jiwan Lal (Dr) v. Brij Mohan Mehra* [(1972) 2 SCC 757 : (1973) 2 SCR 230] to show that the delay of two years is not a ground to deny specific performance. But a perusal of the

judgment shows that there were good reasons for the plaintiff to wait in that case because of the pendency of an appeal against the order of requisition of the suit property. We may reiterate that the true principle is the one stated by the Constitution Bench in *Chand Rani* [(1993) 1 SCC 519]. Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property.”

51. Likewise, this Court, in *Saradamani Kandappan v. S. Rajalakshmi*, (2011) 12 SCC 18, made it clear that given the steep rise in urban land prices, it may not be correct now to say that time is not of essence in performance of a contract of sale of immovable property. Thus, where time can be said to be of the essence in the facts of a given case, and the purchaser does not take steps to complete the sale within the stipulated period and the vendor is not responsible for any delay, the steep rise in price within the stipulated time would be a circumstance which would make it inequitable to grant the relief of specific performance. This Court held:

“36. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market values of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed to be not material, or at all events considered as merely indicating the reasonable period within

which contract should be performed. The assumption was that grant of specific performance would not prejudice the vendor defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.

37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and “non-readiness”. The precedents from an era, when high inflation was unknown, holding

that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.

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41. A correct perspective relating to the question whether time is not of the essence of the contract in contracts relating to immovable property, is given by this Court in *K.S. Vidyanadam v. Vairavan* [(1997) 3 SCC 1] (by Jeevan Reddy, J. who incidentally was a member of the Constitution Bench in *Chand Rani* [(1993) 1 SCC 519]). This Court observed : (SCC pp. 7 & 9, paras 10-11)

“10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the

essence of the contract unless specifically provided to that effect. ... *in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades—particularly after 1973. ...*

11. ... *We cannot be oblivious to the reality—and the reality is constant and continuous rise in the values of urban properties—fuelled by large-scale migration of people from rural areas to urban centres and by inflation. ... Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties—evolved in times when prices and values were stable and inflation was unknown—requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so.”*

(emphasis in original)

42. Therefore there is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. We do not propose to undertake that exercise in this case, nor referring the matter to a larger Bench as we have held on facts in this case that time is the essence of the contract, even with reference to the principles in Chand Rani [(1993) 1 SCC 519] and other cases. Be that as it may.

43. Till the issue is considered in an appropriate case, we can only reiterate

what has been suggested in K.S. Vidyanadam [(1997) 3 SCC 1]:

(i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) The courts will apply greater scrutiny and strictness when considering whether the purchaser was “ready and willing” to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The courts will also “frown” upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three-year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part-performance, where equity shifts in favour of the purchaser.”

52. In *Nanjappan v. Ramasamy*, (2015) 14 SCC 341, the suit for specific performance was filed many years after the agreement dated 30.09.1987, which agreement was extended by three years twice and thereafter, by another two years. It was only after these extensions and exchange of legal notices between the parties that the respondents filed a suit for

specific performance. It was in this factual background that the Court held:

“10. In a suit for specific performance, the plaintiff has to aver and prove with satisfactory evidence that he was always ready and willing to perform his part of contract at all material time as mandatorily required under Section 16(c) of the Specific Relief Act, 1963. The first appellate court and the High Court recorded findings that the plaintiff was always ready and willing to perform his part of the contract. By a careful reading of the recitals in the agreement, the concurrent findings so recorded do not seem to reflect the conduct of the parties. As per recitals in Ext. P-1 agreement dated 30-9-1987, an amount of Rs. 25,000 was paid by the respondent-plaintiffs to the appellant-defendant. Balance amount of Rs. 20,000 was to be paid within 2½ years thereafter and get the sale executed. In the second agreement of sale (Ext. P-2 dated 21-3-1990) it is stated that the plaintiffs were unable to pay the balance amount within the stipulated period and get the sale deed executed and therefore the second sale agreement was executed extending the period for execution of sale deed for a further period of three years. As could be seen from the recitals from Ext. P-2, the respondents were unable to pay the balance sale consideration and get the sale deed executed. It is pertinent to note that the time for performance of contract was extended again and again totalling period of eight years. Even though the first appellate court and the High Court recorded findings that the respondent-plaintiffs were ready and willing to perform their part of contract, the fact that time was extended for eight years is to be kept in view while considering the question whether discretion is to be

exercised in favour of the respondent-plaintiffs.”

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“13. The first sale agreement was executed on 30-9-1987 about twenty-seven years ago. The property is situated in Coimbatore City and over these years, value of property in Coimbatore City would have considerably increased. In *Saradamani Kandappan v. S. Rajalakshmi* [(2011) 12 SCC 18 : (2012) 2 SCC (Civ) 104], this Court has held that the value of the property escalates in the urban areas very fast and it would not be equitable to grant specific performance after a lapse of long period of time. In the instant case, the first agreement was executed on 30-9-1987 i.e. twenty-seven years ago. In view of passage of time and escalation of value of the property, grant of specific relief of performance would give an unfair advantage to the respondent-plaintiffs whereas the performance of the contract would involve great hardship to the appellant-defendant and his family members.

14. Considering the totality and the facts and circumstances, in our view, it is not appropriate to grant discretionary relief of specific performance to the respondent-plaintiffs for more than one reason. Admittedly, the suit property is the only property of the appellant-defendant and the appellant is said to have constructed a house and where he is currently residing with the family. As compared to the respondents, the appellant will suffer significant hardship if a decree for specific performance is granted against the appellant. Considering the circumstances, such as the construction of

the residential house over the suit property, sale consideration, passage of time and hardship caused to the appellant, makes it inequitable to exercise the discretionary relief of specific performance and the concurrent finding of the first appellate court and the High Court decreeing the suit for specific performance is to be set aside.”

53. The resultant position in law is that a suit for specific performance filed within limitation cannot be dismissed on the sole ground of delay or laches. However, an exception to this rule is where immovable property is to be sold within a certain period, time being of the essence, and it is found that owing to some default on the part of the plaintiff, the sale could not take place within the stipulated time. Once a suit for specific performance has been filed, any delay as a result of the court process cannot be put against the plaintiff as a matter of law in decreeing specific performance. However, it is within the discretion of the Court, regard being had to the facts of each case, as to whether some additional amount ought or ought not to be paid by the plaintiff once a decree of specific performance is passed in its favour, even at the appellate stage."

55. Recently in **Shenbagam and others v. K.K. Rathinavel**, 2022 SCC OnLine SC 71, the Apex Court in paragraphs 36 to 41 held as under:-

"36. Even assuming that the respondent was willing to perform his obligations under the contract, we must decide whether it would be appropriate to direct the specific performance of the contract in this case. In *Zarina Siddiqui v. A. Ramalingam* (2015) 1 SCC 705 a two-judge Bench of this Court while dealing with a suit for specific performance of a

contract regarding the sale of immovable property observed that the remedy for specific performance is an equitable remedy and Section 20 of the Specific Relief Act confers a discretion on the Court. The Court held:

“24. It is well settled that remedy for specific performance is an equitable remedy. The court while granting decree of specific performance exercises its discretionary jurisdiction. Section 20 of the Specific Relief Act specifically provides that the Court's discretion to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with sound and reasonable judicial principles.”

37. In the context of the discretion under Section 20 of the Specific Relief Act, several decisions of this Court have considered whether it is appropriate to direct specific performance of a contract relating to the transfer of immovable property, especially given the efflux of time and the escalation of prices of property. In *Satya Jain v. Anis Ahmed Rushdie* (2013) 8 SCC 131 this Court held:

“39. The long efflux of time (over 40 years) that has occurred and the galloping value of real estate in the meantime are the twin inhibiting factors in this regard. The same, however, have to be balanced with the fact that the plaintiffs are in no way responsible for the delay that has occurred and their keen participation in the proceedings till date show the live interest on the part of the plaintiffs to have the agreement enforced in law.

40. The discretion to direct specific performance of an agreement and that too after elapse of a long period

of time, undoubtedly, has to be exercised on sound, reasonable, rational and acceptable principles. The parameters for the exercise of discretion vested by Section 20 of the Specific Relief Act, 1963 cannot be entrapped within any precise expression of language and the contours thereof will always depend on the facts and circumstances of each case. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the experienced judicial mind can perceive without any real difficulty. It must however be emphasised that efflux of time and escalation of price of property, by itself, cannot be a valid ground to deny the relief of specific performance. [...]

41. The twin inhibiting factors identified above if are to be read as a bar to the grant of a decree of specific performance would amount to penalising the plaintiffs for no fault on their part; to deny them the real fruits of a protracted litigation wherein the issues arising are being answered in their favour.”

(emphasis supplied)

38. In directing specific performance of the agreement, this Court in *Satya Jain (supra)* held that sale deed must be executed for the current market price of the suit property.

39. In *Nirmala Anand v. Advent Corporation (P.) Ltd.* (2002) 8 SCC 146, a three-judge Bench of this Court observed that in case of a phenomenal increase in the price of the land, the Court may impose a reasonable condition in the decree such as payment of an additional amount by the

purchaser. In decreeing the suit for specific performance, the Court observed:

“6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. **While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen.**”

(emphasis supplied)

40. In *KS Vidyanadam v. Vairavan* (1997) 3 SCC 1, an agreement to sell immovable property was entered into between the plaintiff-buyer and the defendant-seller for a consideration of Rs. 60,000, where earnest money of Rs. 5,000 had been paid in advance. The agreement stipulated that the plaintiff had to purchase stamp papers and pay the balance amount within six months and call upon the defendants to execute the sale deed. The plaintiff filed a suit for specific performance after a lapse of two and a half years seeking performance of the contract. The Court held:

“10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. **From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party.** That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing.

[...]

In this case, the suit property is the house property situated in Madurai, which is one of the major cities of Tamil

Nadu. The suit agreement was in December 1978 and the six months' period specified therein for completing the sale expired with 15-6-1979. The suit notice was issued by the plaintiff only on 11-7-1981, i.e., more than two years after the expiry of six months' period. The question is what was the plaintiff doing in this interval of more than two years? [...] **There is not a single letter or notice from the plaintiff to the defendants calling upon them to get the tenant vacated and get the sale deed executed until he issued the suit notice on 11-7-1981.** It is not the plaintiff's case that within six months', he purchased the stamp papers and offered to pay the balance consideration.

[...]

13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2½ years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices — according to the defendants, three times — between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff.”

(emphasis supplied)

41. True enough, generally speaking, time is not of the essence in an agreement for the sale of immoveable property. In deciding whether to grant the remedy of specific performance, specifically in suits relating to sale of immovable property, the courts must be

cognizant of the conduct of the parties, the escalation of the price of the suit property, and whether one party will unfairly benefit from the decree. The remedy provided must not cause injustice to a party, specifically when they are not at fault. In the present case, three decades have passed since the agreement to sell was entered into between the parties. The price of the suit property would undoubtedly have escalated. Given the blemished conduct of the respondent-plaintiff in indicating his willingness to perform the contract, we decline in any event to grant the remedy of specific performance of the contract. However, we order a refund of the consideration together with interest at 6% per annum."

56. Now after having taken note of the legal provisions and the settled propositions and the nuances which can be culled out from the decisions noted hereinabove and applying it to the facts and circumstances of the present case, it would be found that insofar as the registered agreement to sell dated 10.08.1983 is concerned, both the Courts have concurrently found that Sarju Prasad had executed the registered agreement to sell dated 10.08.1983 for a total sale consideration of Rs.12,500/- in pursuance whereof Rs.500/- was paid as earnest money. This finding has not been assailed by the appellants before this Court. However, what is urged is that the plaintiffs did not approach the Court with promptness nor the plaintiffs were ready and willing to perform their part of the contract and this is being urged by indicating that the agreement provided for a time limit of one month for executing the sale-deed whereas the notice issued by the plaintiffs to the defendants, prior to institution of the suit, is dated 04.08.1984 i.e. almost after a year and a half from the

time which was agreed in the agreement for execution of the sale-deed and again almost after a year and a half of issuance of notice the suit for specific performance was instituted which indicates that the plaintiffs were not serious in their readiness and willingness nor was it continuous from the date of the agreement and throughout the proceedings.

57. In order to buttress the aforesaid submissions, learned counsel for the appellants has relied upon the decision of the Apex Court in **Shenbagam** (supra) and has submitted that in the said case before the Apex Court, the agreement had provided a time for executing the sale-deed which was not adhered but rather the plaintiffs brought the suit with much delay and despite the suit having been decreed by the High Court, the Apex Court reversed the decree and returned the amount with interest.

58. It is also urged that in the aforesaid decision of **Shenbagam** (supra), the Apex Court had also noticed the earlier decision of the Apex Court in the case of **Nirmala Anand** (supra) which was cited by the respondents and thus it is submitted that the circumstances involved in the instant case are quite similar to the case in **Shenbagam** (supra), consequently, the exercise of discretion by the trial Court was right while it was not properly considered by the lower Appellate Court while reversing the findings and decreeing the suit.

59. In this regard, this Court finds that while filing the suit, the plaintiffs had referred to the agreement to sell dated 12.08.1983 and in Paragraph-4 it was stated that the plaintiffs were always ready and willing to perform their part of the contract

and still are. However, from a perusal of the written statement, it would be found that this averment has not been denied by the defendants. There is no denial of this fact nor it has been stated that the plaintiffs were never willing or ready to perform their part. The entire written statement revolved around two pleas (i) Sarju Prasad died on 23.09.1982 and, therefore, he could have executed the agreement to sell on 12.08.1983 and apparently the agreement was fraudulent (ii) Sarju Prasad was physically and mentally weak and even otherwise did not have the authority to sell, consequently, the agreement was void and not binding.

60. If the aforesaid pleas are tested, it would be found from the record that the burden of proving that Sarju Prasad died on 23.09.1982 was on the defendants. No adequate material was brought on record to indicate that Sarju Prasad expired on 23.09.1982. In order to establish the aforesaid plea, the defendants relied upon the death certificate issued by the Nagar Palika, Unnao dated 18.04.1985 indicating that it is recorded therein that Sarju Prasad died on 23.09.1982. This death certificate is the sheet anchor for the contention raised by the defendants, however, the same could not be proved in accordance with the law inasmuch as in order to establish, it was required to state and prove that the said death certificate was issued by the competent authority in accordance with law.

61. At this juncture, it will be necessary to notice that a death certificate is issued by the Registrar under The Registration of Birth and Death Act, 1969. The said Act was made applicable in the State of U.P. in pursuance of the notification dated 7th March, 1970 and was made effective from 1st April, 1970.

Certain relevant provisions of the Act of 1969 are being noticed hereinafter:-

"8 Persons required to register births and deaths.—(1) It shall be the duty of the persons specified below to give or cause to be given, either orally or in writing, according to the best of their knowledge and belief, within such time as may be prescribed, information to the Registrar of the several particulars required to be entered in the forms prescribed by the State Government under sub-section (1) of section 16,—

(a) in respect of births and deaths in a house, whether residential or non-residential, not being any place referred to in clauses (b) to (e), the head of the house or, in case more than one household live in the house, the head of the household, the person, who is so recognised by the house or the household, and if he is not present in the house at any time during the period within which the birth or death has to be reported, the nearest relative of the head present in the house, and in the absence of any such person, the oldest adult male person present therein during the said period;

(b) in respect of births and deaths in a hospital, health centre, maternity or nursing home or other like institution, the medical officer in charge or any person authorised by him in this behalf;

(c) in respect of births and deaths in a jail, the jailor in charge;

(d) in respect of births and deaths in a choultry, chattram, hostel, dharmasala, boarding-house, lodging-house, tavern, barrack, toddy shop or place of public resort, the person in charge thereof;

(e) in respect of any new-born child or dead body found deserted in a

public place, the headman or other corresponding officer of the village in the case of a village and the officer in charge of the local police station elsewhere: Provided that any person who finds such child or dead body, or in whose charge such child or dead body may be placed, shall notify such fact to the headman or officer aforesaid;

(f) in any other place, such person as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), the State Government, having regard to the conditions obtaining in a registration division, may by order require that for such period as may be specified in the order, any person specified by the State Government by designation in this behalf, shall give or cause to be given information regarding births and deaths in a house referred to in clause (a) of sub-section (1) instead of the persons specified in that clause."

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"11 Informant to sign the registrar.—Every person who has orally given to the Registrar any information required under this Act shall write in the register maintained in this behalf, his name, description and place of abode, and, if he cannot write, shall put his thumb mark in the register against his name, description and place of abode, the particulars being in such a case entered by the Registrar."

"12 Extracts of registration entries to be given to informant.—The Registrar shall, as soon as the registration of a birth or death has been completed give, free of charge, to the person who gives

information under section 8 or section 9 an extract of the prescribed particulars under his hand from the register relating to such birth or death."

"13 Delayed registration of births and deaths.—(1) Any birth of which information is given to the Registrar after the expiry of the period specified therefore, but within thirty days of its occurrence, shall be registered on payment of such late fee as may be prescribed.

(2) Any birth or death of which delayed information is given to the Registrar after thirty days but within one year of its occurrence shall be registered only with the written permission of the prescribed authority and on payment of the prescribed fee and the production of an affidavit made before a notary public or any other officer authorised in this behalf by the State Government.

(3) Any birth or death which has not been registered within one year of its occurrence, shall be registered only on an order made by a Magistrate of the first class or a Presidency Magistrate after verifying the correctness of the birth or death and on payment of the prescribed fee.

(4) The provisions of this section shall without prejudice to any action that may be taken against a person for failure on his part to register any birth or death within the time specified therefor and any such birth or death may be registered during the pendency of any such action."

62. From the perusal aforesaid sections, it would reveal that a complete procedure has been outlined in the Act of 1969 relating to the registration of birth and death. From a perusal of the aforesaid

sections, it would indicate that persons have been mentioned in Section 8 who are required to report the fact of birth and death with the authority concerned. The person, who gives the information is also required to sign on the register specifically made for the aforesaid purpose. Section 13 clearly indicates that in case any information regarding birth or death is given with delay, but within 30 days of its occurrence, then such information can be taken on payment of such fee as may be prescribed, however, if such information is given after 30 days, but within one year of its occurrence, it can only be registered with the written permission of the prescribed authority and production of an affidavit made before a public notary. Any birth or death which has not been registered within one year of its occurrence can be registered only by an order made by the Magistrate of first class after verifying the correctness of birth or death and on payment of prescribed fee.

63. Thus, it would be seen that in the instant case, there was no evidence led by the defendants to substantiate, who informed the authority and whether the information was accompanied by an affidavit of the informant. Since, apparently the death was registered with delay, there is no material on record to indicate that any order was passed by the Magistrate of first class permitting such registration. Accordingly, it cannot be said that the procedure as prescribed has been followed and, therefore, it casts a doubt over the alleged certificate which has been relied upon by the defendants. There is another aspect of the matter and i.e. the defendants in the written statement did not give any clear date of death of Sarju Prasad and only a vague averment was made that he died about 3-4 years prior to the date of filing of the written statement. The defendant did

not file any order of any Court in pursuance whereof the alleged death certificate was issued.

64. Another significant aspect is that Arjun son of Sarju Prasad was examined as DW-1 who deposed that at the time of Sarju Prasad's death, he was in Abhu Dhabhi and after he returned, he got the death certificate prepared by moving an application on 05.03.1984. On the same very date, he also got death certificate prepared of his brother who died about 5 years ago and his sister, who had died about 10 years ago. While it is alleged that an application was moved before the Nagar Palika on 15.09.1983 which was served upon the defendants on 16.02.1984 and the death certificate was issued on 05.03.1984. Thus, in light of the aforesaid facts and circumstances alongwith the evidence and the procedure and law as per the Act of 1969 the plea regarding date of death of Sarju Prasad was not proved and it did not find favour with the two Courts, who rejected the said plea.

65. The plea regarding the agreement being not executed by Sarju Prasad was also belied inasmuch as the plaintiffs had got the signatures/thumb impression verified through handwriting expert who stated that the signatures/thumb impression on the agreement and that on admitted document Exhibit-A-1, was that of Sarju Prasad. The defendants could not establish their plea to resist the suit and the lower Appellate Court also clearly confirmed the finding that the defendants could not substantiate their defence and hold that the agreement was actually executed by Sarju Prasad.

66. In view of the aforesaid, two things are clear (i) The agreement was

executed by Sarju Prasad which has been concurrently held by the two Courts. (ii) The defendants had raised a plea which was not bonafide and the defendants tried to cast a doubt over the entire transaction by resorting to different pleas including giving incorrect date of death of Sarju Prasad to shroud the execution of the agreement itself, with suspicion which could not be substantiated. Hence, the agreement, the payment of sale consideration, the issuance of notice prior to institution of the suit seeking specific performance and also instituting the suit for getting a decree of specific performance has been sufficiently proved by the plaintiffs. The readiness and willingness has been specifically pleaded by the plaintiffs and there is no denial either in the pleadings or in the evidence by the defendants. Thus, these important ingredients stand proved. There is no plea raised by the plaintiffs which is found to be false or not in good faith and thus it would be seen that the ingredients for grant of specific performance was proved by the plaintiffs.

67. Now, the only issue that requires to be resolved is whether the defendants were entitled to any discretion which was granted by the trial Court and whether it was justly reversed by the lower Appellate Court.

68. In this regard, upon a perusal of the material on record, this Court finds that neither there are any such terms in the agreement to sell which creates an unconscionable bargain in favour of the plaintiffs against the defendants. There is no circumstances pleaded or proved which may persuade this Court to hold that any discretion exercised in favour of the plaintiffs would cause an irreparable damage or injury to the defendants.

However, in order to exercise the discretion, one important aspect to be considered too, is in relation to the conduct of the respective parties qua the respective plea taken by them.

69. From the record, it indicates that the manner in which the defendants had raised a plea in their written statement denying the execution of the agreement to sell, giving incorrect date of death of Sarju Prasad and also alleging that there are certain mala-fides of the plaintiffs who had moved certain applications in the Nagar Palika. All these were belied from the evidence on record which indicates that the defendants had not raised the defence in good faith. In the aforesaid circumstances and considering the grounds taken by the trial Court in its judgment to refuse the decree of specific performance that the DW-1 Arjun Prasad had given the value of the property as Rs.60,000/- against the value given in the agreement to sell as Rs.12,500/- is not sufficient enough for the reason that there was no material to substantiate how and what was the basis of the statement of Arjun Prasad. If the statement of the witness on record is seen, it would indicate that the figure of Rs.60,000/- which has been mentioned is hypothetical and made by mere estimation and is not based on any material. The manner in which the trial Court has used the statement is clearly out of context and it has been read in isolation. Merely on the ground of escalation of price, the trial Court was not quite justified in refusing the decree of specific performance. This aspect has already been considered by this Court with the aid of decisions of the Apex Court while dealing with Section 20 of the Specific Relief Act and it is now settled that mere rise in the value of the property is not enough to refuse the grant of a decree

of specific performance, without any other accentuating circumstances.

70. This Court further finds that since the defence of the defendants was not in good faith and a suit for specific performance is an equitable relief and while exercising the discretion in terms of Section 20 of the Specific Relief Act, 1963, the conduct of the parties have to be seen and in this case, the conduct of the defendants was not such so as to tilt the discretion in favour of the defendants. For the aforesaid reasons, this Court is satisfied that the discretion which was exercised by the trial Court was not appropriate and the judgment and decree passed by the lower Appellate Court is justified in the facts and circumstances of the case.

71. While taking a holistic view of the matter, this Court while confirming the decree of the lower appellate Court cannot refrain from noticing the dictum of the Apex Court in **K. Prakash v. B.R. Sampath Kumar**, (2015) 1 SCC 597 and the relevant paragraphs 19 and 20 of the aforesaid report are quoted as under for convenience.

"19. However, the court may take notice of the fact that there has been an increase in the price of the property and considering the other facts and circumstances of the case, this Court while granting decree for specific performance can impose such condition which may to some extent compensate the defendant owner of the property. This aspect of the matter is considered by a three-Judge Bench of this Court in *Nirmala Anand v. Advent Corpn. (P) Ltd.* [(2002) 8 SCC 146], wherein this Court held: (SCC p. 150, para 6)

"6. It is true that grant of decree of specific performance lies in the

discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen."

20. As discussed above the agreement was entered into between the parties in 2003 for sale of the property for a total consideration of Rs 16,10,000. Ten years have passed by and now the price of the property in that area where it situates has increased by not less than five times. Keeping in mind the factual position we are

of the view that the appellant should pay a total consideration of Rs 25 lakhs, being the price for the said property."

72. Similarly, the Apex Court in **Zarina Siddiqui v. A. Ramalingam (2015) 1 SCC 705** held as under:-

"36. As held by this Court time and again, efflux of time and escalation of price of the property by itself cannot be a valid ground to deny the relief of specific performance. But the Court in its discretion may impose reasonable conditions including payment of additional amount to the vendor. It is equally well settled that the plaintiff is not to be denied specific performance only on account of phenomenal increase of price during the pendency of litigation.

37. The respondent-defendant alternatively pleaded in the written statement that even at the relevant time the price of the suit property was Rs 3,00,000 when the said agreement was executed for Rs 40,000 only. But on the other hand it has come in evidence that against Rs 40,000, the appellant-plaintiff has paid a total amount of Rs 65,000.

38. Be that as it may, in the facts and circumstances of the case and considering the phenomenal increase in price during the period the matter remained pending in different courts, we are of the considered opinion that the impugned order [A. Ramalingam v. H. Siddiqui, RFA No. 265 of 1999, decided on 1-3-2012 (KAR)] under appeal be set aside but with a condition imposed upon the appellant-plaintiff to pay a sum of Rs 15,00,000 (Rupees fifteen lakhs) in addition to the amount already paid by the appellant to the respondent. On deposit in the trial court of

the aforesaid amount by the appellant, for payment to the respondent, within three months from today, the respondent shall execute and register the sale deed in favour of the plaintiff in respect of the suit property. In the event the aforesaid condition of deposit of Rs 15 lakhs is fulfilled within the time stipulated hereinabove but if the defendant fails to comply with the direction, then the appellant shall be entitled to execute the decree in accordance with the procedure provided in law."

73. The Apex Court lately in **U.N. Krishnamurthy Vs. A.M. Krishnamurthy; 2022 SCC Online SC 840**, in paragraph nos. 38 to 42 has observed as under:-

"38. In this case, we cannot overlook the fact that the suit property is located in the industrial town of Hosur located about 30/40 kms. from Bengaluru. The Court is obliged to take judicial notice of the phenomenal rise in the price of real estate in Hosur. The proposition finds support from case reported in *K.S. Vidyanadam v. Vairavan (supra)*. To quote this Court "we cannot be oblivious to reality - and the reality is constant and continuous rise in the values of urban properties-fuelled by large scale migration of people from rural areas to urban centres and by inflation."

39. Mr. Venugopal argued that the Plaintiff had only paid an insignificant amount of Rs. 10,001/- as advance when the consideration was Rs. 15,10,000/-. Having paid an insignificant amount the Plaintiff was not entitled to discretionary equitable relief of Specific Performance, as observed by this Court in *Saradamani Kandappan v. S. Rajalakshmi (2011) 12*

SCC 18. The relevant paragraph of the judgment of this Court is set out hereinbelow:—

“37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and “non-readiness”. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and receiving rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees

ninety thousand, when the property value has risen to a crore of rupees.”

40. As argued by Mr. Venugopal, the fact that the suit had been filed after three years, just before expiry of the period of limitation, was also a ground to decline the Respondent Plaintiff the equitable relief of Specific Performance for purchase of immovable property. Mr. Venugopal's argument finds support from the judgments of this Court in *P.R. Deb and Associates v. Sunanda Roy* (1996) 4 SCC 423; *K.S. Vidyanadam v. Vairavan* (1997) 3 SCC 1; *Manjunath Anandappa v. Tammanasa* (2003) 10 SCC 390, *Azhar Sultana v. B. Rajamani* (2009) 17 SCC 27; *Saradamani Kandappan v. S. Rajalakshmi* (2011) 12 SCC 18.

41. In *K.S. Vidyanadam v. Vairavan* (supra) this Court held:

“10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that

because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this Court in Chand Rani v. Kamal Rani [(1993) 1 SCC 519] : (SCC p. 528, para 25)

“... it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are (evident?) : (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract.”

In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised...”

42. In *Azhar Sultana v. B. Rajamani* (supra) this Court held:—

“28. ...The court, keeping in view the fact that it exercises a discretionary jurisdiction, would be entitled to take into consideration as to whether the suit had been filed within a reasonable time. What would be a reasonable time would, however, depend upon the facts and circumstances of each case. No hard-and-fast law can be laid down therefor. The conduct of the parties in this behalf would also assume significance.

35. *We, therefore, are of the opinion that interest of justice would be subserved if this Court refuses to exercise its discretionary jurisdiction in terms of Section 20 of the Act, directing the defendant to pay a sum of Rs. 60,000 to the plaintiff which sum would include the amount of advance paid by her.”*

74. In this backdrop, this Court notices that the parties have been litigating since 1983 and almost 40 years have lapsed and the defendants, who are before this Court are residing in the said premises. The premises has come within the urban agglomeration with passage of time and the defendants must have made improvements too and also noticing the fact that in terms of the agreement against a sum of Rs.12,500/-, the plaintiffs-respondents had only paid a sum of Rs.500/- alone and considering that there are changed circumstances including escalation of price in respect of property in question, the inflationary trends and following the dictum of the Apex Court in this regard and for doing the substantial justice between the parties, this Court modifies the judgment and decree passed by the lower Appellate Court to the extent that the plaintiffs-respondents shall be entitled to a decree of specific performance in pursuance of the agreement to sell dated 10.08.1983 provided that now the respondents-plaintiffs shall pay a total sum of Rs.8,00,000/- to the defendants-appellants within a period of 90 days or in the alternate deposit the same before the Executing Court after adjusting any amount already paid or deposited. Upon payment of the aforesaid sum or deposit of Rs.8,00,000/- before the Executing Court, the plaintiffs-respondents shall be entitled to get the sale-deed executed from the defendants-appellants failing which they

shall be entitled to get the same executed through the Executing Court, in accordance with law. In case non-deposit of the amount by the plaintiffs-respondents in time as provided herein then the plaintiffs-respondents shall not be entitled to get the sale-deed in their favour.

75. Subject to the aforesaid modification in the judgment and decree dated 02.12.1992 passed in Civil Appeal No.37 of 1992 which is affirmed, this Court does not find merit in this appeal which is accordingly dismissed. In the facts and circumstances, there shall be no order as to costs. The record of the lower Court shall be returned expeditiously.

(2023) 7 ILRA 1025
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: LUCKNOW 05.07.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Matters U/A 227 No. 2511 of 2023

Sanjay Gupta ...Petitioner
Versus
Suresh Kumar Mishra & Anr. ...Respondents

Counsel for the Petitioner:
Prashant Singh Gaur, Vikrant Singh

Counsel for the Respondents:
Virendra Mishra

Civil Law-The Constitution of India-1950- Article 227 - The Arbitration & Conciliation Act, 1996 Sections 34 & 36 -The Code of Civil Procedure,1908-Section 47- Order 21- Objections under Section 47 of the Code are not maintainable in proceedings for the purposes of execution or enforceability of an arbitration award but nonetheless objections

raised by judgment debtor which do not touch upon the merits of the award or raise questions which cannot be raised under Section 34 of the Act of 1996 can very well be raised in such proceedings and to be adjudicated upon---Executing court is directed to decide the objections raised by petitioner excluding those pertaining to insufficiency of stamp duty and decree pertaining to movable property by the award. **(Para 19, 20 & 21)**

Petition partly allowed. (E-15)

List of Cases cited:

1. Y.B. Patil & ors. Vs Y.L. Patil reported in AIR 1977 SC 392 : (1976) 4 SCC 66
2. Paramjeet Singh Patheja Vs ICDS Ltd. reported in (2006) 13 SCC 322
3. Government of India Vs Vedanta Limited & ors., reported in (2006) 12 SCC 642
4. Amazon.Com NV Investment Holdings LCC Vs Future Retail Ltd & ors., reported in (2022) 1 SCC 209
5. M/s Larsen & Toubro Limited Vs M/s Maharai Educational Trust, reported in 2010 SCC OnLine All 1866
6. M/s Bharat Pumps and Compressors Ltd. Vs M/s Chopra Fabricators and Manufacturers Pvt. Ltd., reported in MANU/UP/1432/2022[Civil Revision No.53 of 2022]
7. Hindustan Zinc Ltd. Vs National Research Development Corporation, reported in 2023 SCC OnLine Del 330
8. Punjab St. Civil Supplies Corporation Ltd. & anr.Vs Atwal Rice & General Mills (2017) 8 SCC 116

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

1. Heard Mr.Prashant Singh Gaur and Mr.Vikrant Singh, learned counsel for petitioner and Mr. Virendra Mishra, assisted by Ms. Shraddha Mishra, learned

counsel for opposite party no.1. Opposite party no.2 being merely the Court concerned and being a proforma party, notices are dispensed with.

2. Petition under Article 227 of the Constitution of India has been filed challenging order dated 01.04.2023 passed in Misc. Case No.48 of 2023(Execution Case No.94 of 2020) whereby objections preferred by petitioner being judgment debtor, purportedly under Section 47 of the Code of Civil Procedure, 1908 has been rejected.

3. Learned counsel for petitioner submits that the parties to the dispute entered into a builders agreement dated 10.11.1996 with regard to the property in question but due to disputes arising out of the aforesaid agreement, the same was referred for adjudication to the sole arbitrator in an application filed under Section 11(6) of Arbitration and Conciliation Act, 1996(hereinafter referred to as the Act of 1996). Award in the same was pronounced on 12.01.2007 against petitioner and 19 others. Father of petitioner filed an Application under Section 34 of the Act of 1996 bearing Regular Suit No.11 of 2007 which was dismissed by means of judgment and order dated 25.07.2012. Against aforesaid judgment and order, Appeal under Section 37 of the Act was preferred bearing F.A.F.O. No.1040 of 2012 in which initially interim orders were passed but the same was dismissed in default of appearance on 30.01.2017. Restoration Application was also dismissed for want of prosecution whereafter a second application for restoration was filed. The same was also dismissed although a third Restoration Application is pending consideration.

4. Learned counsel for petitioner submits that subsequently an Application for execution of award was filed on 03.11.2017 in which petitioner being judgment debtor, filed an Application styled to be under Section 47 of the Code. It is submitted that the award of arbitrator was with regard to movable as well as immovable properties with movable being in the nature of a money decree. It is submitted that in the objections filed by petitioner, it was specifically stated that the relief as being prayed for in execution proceedings was not in consonance with the award with regard to immovable property inasmuch as possession of the properties being sought in execution proceedings were not decreed in favour of the decree holder. It is further submitted that objections regarding insufficiency of stamp duty pertaining to the award were also raised in the objections. Learned counsel for petitioner submits that in the award, learned sole arbitrator has specifically not awarded possession of five shops in the property in question and therefore their claim in execution proceedings would amount to granting a relief which has not been granted in the award itself. It is submitted that however by means of impugned order, objections regarding insufficiency of stamp duty were rejected on the ground that the aforesaid objections were earlier raised and rejected and, therefore, there is no question of adjudicating the same again. It is submitted that the other objections raised by the petitioner were rejected only on the ground that an Application under Section 47 of the Code is not maintainable in proceedings seeking execution of an arbitration award.

5. Learned counsel for petitioner submits that once Section 36 of the Act of 1996 specifically provides execution of an

award in accordance with the provisions of the Code of Civil Procedure in the same manner as if it was a decree of the court, then naturally the execution has to be sought under Order 21 of the Code due to which objections under Section 47 of the Code are clearly maintainable. It is thus submitted that the Code of Civil Procedure cannot be made applicable in a piecemeal basis and either applies in its entirety or not at all. It is therefore, submitted that once Section 36 of the Act of 1996 clearly prescribes enforcement of the arbitration award in terms of Code of Civil Procedure, all other provisions of the Code would therefore be attracted including the provisions of Section 47 of the Code.

6. To buttress his submissions, learned counsel has placed reliance on judgments rendered by Hon'ble the Supreme Court in **Punjab State Civil Supplies Corporation Ltd. and another v. Atwal Rice & General Mills** (2017) 8 SCC 116; **Firm Rajasthan Udyog and others v. Hindustan Engineering and Industries Ltd.**, reported in (2020) 6 SCC 660; and **M. Anasuya Devi and another v. M. Manik Reddy and others**, reported in (2003)8 SCC 565.

7. Learned counsel appearing on behalf of opposite party has refuted submissions advanced by learned counsel for petitioner with the submission that provisions of the Act of 1996 clearly indicates that an arbitration award is to be enforced as if it were a decree and therefore, the arbitration award does not come within the definition of a decree as envisaged under Section 2(2) of the Code of Civil Procedure since it would only have the status of a deemed decree due to which objections under Section 47 are clearly barred. It is submitted that by virtue of

Section 36 of the Act of 1996, it has only been prescribed that, only for the purposes of enforceability of the award, recourse can be taken to Order 21 of the Code while the application itself would be deemed to be under Section 36 of the Act of 1996 and not under Order 21 of the Code. As such, it is submitted that the basic purpose of applicability of the Code is only for providing a procedure for enforcement of the award and the Code itself has not been made applicable in its entirety due to which objections under Section 47 of the Code would not be maintainable as has rightly been held in the impugned order. Learned counsel has placed reliance on following decisions:-

(1) Decision of Hon'ble Supreme Court in **Paramjeet Singh Patheja v. ICDS Ltd.** reported in (2006) 13 SCC 322;

(2) Decision of Hon'ble Supreme Court in **Morgan Securities & Credit (P) Ltd. v. Modi Rubber Ltd.** reported in (2006) 12 SCC 642;

(3) Decision of Hon'ble Supreme Court in **Government of India v. Vedanta Limited and others**, reported in (2006) 12 SCC 642;

(4) Decision of Hon'ble Supreme Court in **Amazon.Com NV Investment Holdings LCC v. Future Retail Ltd and others**, reported in (2022) 1 SCC 209;

(5) Decision of this Court in **M/s Bharat Pumps and Compressors Ltd. v. M/s Chopra Fabricators and Manufacturers Pvt. Ltd.**, reported in MANU/UP/1432/2022[Civil Revision No.53 of 2022];

(6) Decision of Delhi High Court in **Hindustan Zinc Ltd. v. National Research Development Corporation**, reported in 2023 SCC OnLine Del 330;

(7) Decision of Delhi High Court in **M/s Larsen & Toubro Limited v. M/s**

Maharai Educational Trust, reported in 2010 SCC OnLine All 1866;

8. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it is evident that objections to the execution proceedings were filed by petitioner being judgment debtor in Execution Case no.94 of 2020 in the shape of objections under Section 47 of the Code of Civil Procedure. The objections pertaining to deficiency of stamp duty in the award as raised by petitioner was rejected by means of impugned order on the ground that such an objection was earlier raised by petitioner and was rejected on 03.12.2020 whereafter it was reiterated and again rejected on 17.10.2022. It is admitted that the aforesaid two orders have not been challenged by petitioner, which therefore have attained finality and therefore rejection of such objections having been raised for the third time and being rejected on that ground, are not required to be interfered with particularly in view of the settled law that principles of resjudicata are applicable at various stages of the same proceedings as has been held in **Y.B. Patil & others v. Y.L. Patil** reported in AIR 1977 SC 392 : (1976) 4 SCC 66.

9. So far as objections raised by petitioner with regard to enforceability of award pertaining to immovable property are concerned, the same have been rejected by impugned order on the ground that objections under Section 47 of the Code are not maintainable in execution proceedings for the purposes of enforcement of arbitration award.

10. So far as the question of maintainability of objections under Section 47 of the Code in execution proceedings for the purposes of enforcement of arbitration

award are concerned, Hon'ble the Supreme Court in a plethora of judgments starting from **Paramjeet Singh Patheja**(supra) onward has clearly held that awards rendered in arbitration proceedings are not covered under the definition of decree as defined under Section 2(2) of the Code and therefore objections which can be taken under Section 34 of the Act of 1996 cannot be taken in execution proceedings taking resort to Section 47 of the Code. The relevant paragraphs of the judgment are as follows:-

"28. It is settled by decisions of this Court that the words 'as if' in fact show the distinction between two things and such words are used for a limited purpose. They further show that a legal fiction must be limited to the purpose for which it was created."

"29. Section 36 of the Arbitration and Conciliation Act, 1996 which is in pari materia with Section 15 of the 1899 Act, is set out hereinbelow:"

"36. Enforcement. Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court."
(emphasis supplied)

In fact, Section 36 goes further than Section 15 of the 1899 Act and makes it clear beyond doubt that enforceability is only to be under CPC. It rules out any argument that enforceability as a decree can be sought under any other law or that initiating insolvency proceeding is a manner of enforcing a decree under CPC. Therefore the contention of the respondents that, an award rendered under the Arbitration and Conciliation Act, 1996 if

not challenged within the requisite period, the same becomes final and binding as provided under Section 35 and the same can be enforced as a decree as it is as binding and conclusive as provided under Section 36 and that there is no distinction between an award and a decree, does not hold water.' "

"42.The words 'as if' demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central. "

11. The aforesaid proposition of law has also been enunciated by Hon'ble the Supreme Court in **Government of India v. Vedanta Limited**(supra) as well as **Amazon.Com NV Investment Holdings LCC**(supra), which also holds that an application to enforce an award is in fact an Application under the Arbitration Act and not an Application under Order 21 of the Code. The relevant portion of the judgment is as follows:-

"77. The application under Sections 47 and 49 for enforcement of the foreign award, is a substantive petition filed under the Arbitration Act, 1996. It is a well-settled position that the Arbitration Act is a self-contained code. [Fuerst Day Lawson Ltd. v.Jindal Exports Ltd., (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178;Kandla Export Corpn. v.OCI Corpn., (2018) 14 SCC 715 : (2018) 4 SCC (Civ) 664;Shivnath Rai Harnarain (India) Co. v.Glencore Grain Rotterdam, 2009 SCC OnLine Del 3564 : (2009) 164 DLT 197;Usha Drager (P) Ltd. v.Dragerwerk AG, 2009 SCC OnLine Del 2975 : (2010) 170 DLT 628;Sumitomo Corpn. v.CDC

Financial Services (Mauritius) Ltd., (2008) 4 SCC 91;Conros Steels (P) Ltd. v.Lu Qin (Hong Kong) Co. Ltd., 2014 SCC OnLine Bom 2305 : (2015) 1 Arb LR 463 : (2015) 2 Bom CR 1] The application under Section 47 is not an application filed under any of the provisions of Order 21 CPC, 1908. The application is filed before the appropriate High Court for enforcement, which would take recourse to the provisions of Order 21 CPC only for the purposes of execution of the foreign award as a deemed decree. The bar contained in Section 5, which excludes an application filed under any of the provisions of Order 21 CPC, would not be applicable to a substantive petition filed under the Arbitration Act, 1996. Consequently, a party may file an application under Section 5 for condonation of delay, if required in the facts and circumstances of the case."

12. The same analogy has been followed by a coordinate Bench of this Court in **M/s Larsen & Toubro Limited**(supra) which has also been followed by another coordinate Bench in **M/s Bharat Pumps and Compressors Ltd.**(supra) as well as by Delhi High Court in **Hindustan Zinc Ltd.**(supra). Even in judgment relied upon by learned counsel for petitioner in **Punjab State Civil Supplies Corporation Ltd.** (supra), it has been held by Hon'ble the Supreme Court in paragraph 27.3 that all objections referred and ought to have been raised by the respondents before arbitrator or under Section 34 of the Act of 1996 cannot be allowed to be raised in execution once the award became final and attained finality as a decree of a Civil Court. The relevant paragraph of aforesaid judgment is as follows:-

"27.3. Thirdly, all the objections referred above ought to have been raised

by the respondents before the arbitrator or/and the Additional District Judge under Section 34 of the Act but certainly none of them could be allowed to be raised in execution once the award became final and attained finality as decree of the civil court. In other words, having regard to the nature of objections, it is clear that such objections were not capable of being tried in execution proceedings to challenge the award. It is for the reason that they were on facts and pertained to the merits of the controversy, which stood decided by the arbitrator resulting in passing of an award. None of the objections were in relation to the jurisdiction of the court affecting the root of the very passing of the decree. If the executing court had probed these objections then it would have travelled behind the decree, which was not permissible in law. An inquiry into facts, which ought to have been done in a suit or in an appeal arising out of the suit or in proceedings under Section 34 of the Act, cannot be held in execution proceedings in relation to such award/decreet."

13. Upon perusal of aforesaid judgments, the single thread running through all of them with regard to maintainability of objections under Section 47 of the Code is that such objections are not maintainable in execution proceedings for the enforcement of an arbitration award on the twin analogies that: (a) an arbitration award not having been passed by a ?court?, does not come within definition of a decree as envisaged under Section 2(2) of the Code; and (b) once the award attains finality, objections thereto can be taken only in proceedings under Section 34 of the Act of 1996 and the same cannot be bypassed to be taken in execution proceedings for the purposes of enforcement of the award.

14. So far as aforesaid twin analogies are concerned, it is now settled law as seen herein above that award passed by the arbitrator does not come within definition of a decree in terms of Section 2(2) of the Code and therefore objections under Section 47 of the Code are clearly not maintainable in execution proceedings for the purposes of enforcement of the arbitration award. Nonetheless, the second aspect of the matter on which it has been held that application under Section 47 of the Code would not be maintainable arises in such situations where objections to the award can be taken in proceedings under Section 34 of the Act of 1996. As a natural corollary, objections which cannot be taken under Section 34 of the Act of 1996 can very well be examined and decided by the executing court if they do not touch upon the merits of the award. In case these twin conditions apply, a judgment debtor cannot be left remediless.

15. A situational aspect with regard to aforesaid proposition would be in a case such as the present one where objections have been taken by judgment debtor to the fact that by means of execution application, a relief which was never awarded is being sought. In such a situation where objection is being raised to aforesaid extent, naturally cause of action arises only upon filing of an execution application for enforceability of award and in such circumstances there can be no occasion for the judgment debtor to raise such objections to award under Section 34 of the Act of 1996. However, in such circumstances also, a word of caution is required that such objections would be maintainable only in case they do not touch upon the merits of the award or where such objections can be taken under Section 34 of the Act of 1996. Although for the purposes of enforceability of an arbitration award in

terms of Section 36 of the Act of 1996, recourse can be taken to Order 21 of the Code of Civil Procedure, but in the circumstances delineated herein above, the execution court, in the considered opinion of this court, would have an inherent right even exercising such powers under Section 151 of the Code to examine that such objections are raised by judgment debtor which do not pertain to merits of the award or which cannot be taken under Section 34 of the Act of 1996.

16. The aforesaid proposition would find support from judgment of Hon'ble Supreme Court in **Punjab State Civil Supplies Corporation Ltd.**(supra) in which it has been held that it is a well-settled principle of law that the executing court has to execute the decree as it is and cannot go behind the decree but can undertake limited enquiry regarding jurisdictional issue which goes to root of the decree and has the effect of rendering the decree a nullity. Aforesaid enunciation of law although would not be completely applicable where enforceability of an arbitration award is concerned but nonetheless the aspect that the executing court can only execute the decree as it is and cannot go behind the decree would still be applicable.

17. In **Hindustan Zinc Ltd.**(supra), Delhi High Court has also held that for execution or enforceability of an arbitration award, the court can draw sustenance and guidance from the principles underlying the provisions contained in Order 21 of the Code as also that challenge to award on its merits cannot be made particularly when the scope of objections pertain to extending such objections to trial of questions touching upon the merits of award.

18. Even in **Paramjeet Singh Patheja**(supra), it has been held that

objections under Section 47 of the Code are not maintainable in proceedings for the purposes of enforcement of an arbitration award. Aforesaid enunciation of law is particularly on the aspect that validity of the award can be raised only in proceedings under Section 34 of the Act of 1996 and not by taking resort to Section 47 of the Code.

19. In view of discussions made herein above, as such it is evident that although objections under Section 47 of the Code are not maintainable in proceedings for the purposes of execution or enforceability of an arbitration award but nonetheless objections raised by judgment debtor which do not touch upon the merits of the award or raise questions which cannot be raised under Section 34 of the Act of 1996 can very well be raised in such proceedings and to be adjudicated upon.

20. In terms of aforesaid, it is clear that in the present case, the petitioner being judgment debtor has raised objections to the effect that the relief sought in execution proceedings are beyond the scope of arbitration award and as such ignoring the fact that such objections have been filed purportedly under Section 47 of the Code, in the considered opinion of this Court, the executing court would have an inherent right to decide such objections in view of what has been held herein above. However, the said determination would necessarily exclude objections raised to insufficiency of stamp duty which even otherwise was barred under the principles of res judicata.

21. In view of aforesaid, while not interfering with order dated 01.04.2023 so far as it holds that objections under Section 47 of the Code are not maintainable, the executing court is directed to decide the objections raised by petitioner excluding

covered under the expression 'final order' and being so revision would be maintainable under Section 12-C(6) of the Act--- Liberty granted to the petitioner to approach Revisional Authority, as provided under Section 12-C(6) of the Act--- If the petitioner prefers the revision within a period of 30 days, which is the limitation prescribed for preferring the revision assailing the order passed by Prescribed Authority, the same shall be decided on merits. **(Para 29-31)**

Petition disposed of. (E-15)

List of Cases cited:

1. Dori Lal Vs St. of U.P. & ors. 2017 SCC
OnLine All 3220

2. (Rajesh Kumar Vs Distt Judge Shrawasti & ors.) 2019 SCC OnLine All 4851

3. Writ Petition No.18420 (M/S) of 2019 (Kamal Kumar Dhuriya Vs Prescribed Authority, S.D.M., Lalganj, Dist.- Paratapgarh And Ors.)

4. Matters Under Article 227 No.31424 of 2021
(Parshuram Vs St. of U.P. & Others)

5. Writ - C No.33777 of 2022 Manoj Devi Vs St. of U.P. & ors.

6. Sajida Vs Sub Divisional Magistrate & Others;
reported in 2023 SCC OnLine All 11

7. Mohd. Mustafa Vs Up Ziladhikari; 2007 SCC OnLine All 1564

8. Orissa Administrative Tribunal Bar Association
Vs U.O.I. & ors.; 2023 SCC OnLine SC 309

9. Hari Vishnu Kamath Vs Syed Ahmad Ishaque & ors. AIR 1955 SC 233,

10. Dana Rajeshwari Vs Bodavula Hanumayamma & ors.; AIR 1997 SC 1541

11. Virender Kumar Rai & ors. Vs U.O.I. & ors.;
(2004) 13 SCC 463

12. Trai Foods Ltd. Vs National Insurance Co. & ors.; (2004) 13 SCC 656

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard.

2. Present petition has been filed for the following main reliefs:-

"(i) Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 05.06.2023 by opposite party No.2 i.e. Prescribed Authority/Sub Divisional Officer, Lalganj, District-Pratapgarh in Case No.3146/2021 (Computerized Case No.T2021102570203146), as Contained as Annexure No.1, in the interest of justice.

(ii) Issue a writ, order or direction in the nature of Mandamus commanding and directing the opposite parties not to interfere in the functioning of the Petitioner as validly elected Gram Pradhan of Gram Panchayat-Naubasta, Block Lakshmanpur, District-Pratapgarh, in the interest of justice."

3. At the very outset, learned counsel appearing for the side opposite stated that the present petition, challenging the order dated 05.06.2023 passed by the opposite party No.2-Prescribed Authority/Sub Divisional Officer, Lalganj, District-Pratapgarh, in the proceedings instituted under Section 12-C of U.P. Panchayat Raj Act, 1947 (in short "Act of 1947"), registered as Case No.3146 of 2021, Computerized Case No.T2021102570203146, whereby, the proceedings instituted under Section 12-C of the Act of 1947 have been finally concluded with a direction for recounting of votes, is not maintainable in view of statutory remedy available to the petitioner under Section 12-C of the Act of 1947. In other words, by the impugned order dated 05.06.2023 the opposite party No.2 has finally decided the case instituted under Section 12-C of the Act of 1947, as such, the

statutory remedy by way of filing of revision, as provided under Section 12-C(6) of the Act of 1947, would lie against the impugned order dated 05.06.2023.

4. Being relevant, operative portion of the order impugned dated 05.06.2023 is extracted herein:-

"उपरोक्त विवेचना एवं याचिकाकर्ता द्वारा प्रस्तुत विधि व्यवस्था के आलोक में याचिकाकर्ता द्वारा प्रस्तुत याचिका स्वीकार की जाती है। याचिका में वर्णित तथ्यों के आधार पर पुनर्मतगणना किये जाने का आदेश पारित किया जाता है। पुनर्मतगणना दिनांक 21.06.2023 को न्यायालय उपजिलाधिकारी लालगंज में सम्पन्न हो। आदेश की प्रति मुख्य विकास अधिकारी प्रतापगढ़ को प्रभारी अधिकारी पंच स्थानीय चुनाव प्रतापगढ़ सहायक जिला निर्वाचन अधिकारी पंच स्थानीय चुनाव प्रतापगढ़ को पुनर्मतगणना हेतु वांछित अभिलेखों को उपलब्ध कराने एवं जिला पंचायत राज अधिकारी प्रतापगढ़ को सूचनार्थ हेतु प्रेषित किया जाय। आदेश की एक प्रति खण्ड विकास अधिकारी लक्ष्मणपुर को अपने साथ पांच गणक के साथ उपस्थित रहकर पुनर्मतगणना में सहयोग करने एवं प्रभारी निरीक्षक लालगंज को उक्त समय आवश्यक सुरक्षा व्यवस्था सुनिश्चित करने हेतु प्रेषित। वाद आवश्यक कार्यवाही पत्रावली दाखिल दफ्तर हो। "

5. It appears from the operative portion of the impugned order dated 05.06.2023, quoted above, that the Prescribed Authority vide order 05.06.2023 allowed the election petition and directed for recounting of votes and also directed that after necessary action the matter be consigned to record.

6. Whereas the final relief which can be granted in election petition filed under Section 12-C of the Act of 1947, reflects from Section 12-C(4)(ii) which indicates that the Prescribed Authority can set aside the election or declare the election to be void or declare the applicant to be duly elected or any other relief can be granted to the petitioner.

7. In the instant case, a perusal of the order impugned dated 05.06.2023 would

indicate that the Prescribed Authority, while passing the order has neither set aside the election nor declared the election to be void nor declared the concerned to be duly elected rather has directed for re-counting of votes and allowed the election petition.

8. In response to the objection regarding maintainability of the present petition, Sri Manoj Kumar Mishra, learned counsel for the petitioner alongwith Sri Prabhat Kumar Ojha, Advocate and Sri Vinay Kumar, Advocate, submitted that the order of recounting of votes is an order of interlocutory in nature, as such, the present petition would be maintainable.

9. Further submitted that the order of recounting of votes on merits is completely mis-conceived, as such, considering the nature of impugned order dated 05.06.2023 and the observations made in the impugned order, the present petition is liable to be entertained.

10. On the issue of maintainability of present petition, learned counsel for the petitioner placed reliance on the following judgments:-

(a) Writ - C No.1223 of 2017 (Dori Lal vs. State of U.P. & 3 Others) 2017 SCC OnLine All 3220;

(b) Writ Petition No.9609 (M/S) of 2018 (Rajesh Kumar vs. Distt Judge Shrawasti & Ors.) 2019 SCC OnLine All 4851;

(c) Writ Petition No.18420 (M/S) of 2019 (Kamal Kumar Dhuriya vs. Prescribed Authority, S.D.M., Lalganj, Dist.-Paratapgarh And Ors.);

(d) Matters Under Article 227 No.31424 of 2021 (Parshuram vs. State of U.P. & Others); Writ - C No.33777 of

2022 (Manoj Devi vs. State of U.P. & 20 Others);

(e) Sajida vs. Sub Divisional Magistrate & Others; reported in 2023 SCC OnLine All 11.

11. Relevant paras of the judgment passed by this Court in the case of **Sajida (Supra)** on reproduction read as under:-

"13. It is well settled that it is important to maintain secrecy of ballot which is sacrosanct and it should not be allowed to be violated on frivolous, vague and indefinite allegations and before inspection is allowed, the allegations made against elected candidate must be clear and specific and must be supported by adequate statements of material facts (See, Bhabhi v. Sheo Govind, (1976) 1 SCC 687 : AIR 1975 SC 2117 and Ram Sewak Yadav v. Hussain Kamil Kidwai, AIR 1964 SC 1249). The discretion conferred on Courts should be not exercised in such a way so as to enable election petitioner to indulge in a roving enquiry in order to fish out materials for declaring election to be void.

14. Election petitioner has made a assertion in election petition that vote given in her favour were placed in the bundle of votes given in favour of returned candidate and during counting when election petitioner came to know that number of votes given in her favour are 990 and in favour of elected candidate are 993 and number of rejected votes are 157, she raised an objection and prayed for recounting but Election Officer has not paid attention. A further assertion has been made that bundle of 157 rejected votes included some valid votes also.

17. It is settled that order of recounting cannot be passed only for the sake of it and on the basis of vague allegation without specifying any

particular irregularity in counting as well as how it would affect election result materially. In the present case in the body of election petition vague assertions have been made regarding illegal rejection of valid votes which are not substantiated either in examination of election petitioner or otherwise on the basis of record available. Parties have to take proper pleadings by adducing evidence that by particular irregularity of illegality result of election has been materially affected. There is no dispute to the settled legal proposition that as a rule relief not founded in pleadings should not be granted [See, Arikala Narasa Reddy (supra)]."

12. Relevant paras of the judgment passed by this Court in the case of **Manoj Devi (Supra)** on reproduction read as under:-

"9. Before entering into merit of case, there is a hurdle which has to be overcome. The Prescribed Authority while passing order dated 05.11.2022 has accepted the election petition, i.e., it has granted final relief even before actual recounting could take place and, therefore, it become a functus officio. In this regard few paragraphs of the judgment passed by Coordinate Bench of this Court in Parshuram vs. State of U.P. and others (Matters Under Article 227 No. 31424 of 2021), decided on 23.12.2022 are relevant and reproduced as under:

"6. The legal question which has arisen in the instant petition is whether the Prescribed Authority has erred in law in directing for re-counting of votes while finally deciding the election petition inasmuch as to whether the Prescribed Authority could pass any further order on receipt of the result of the re-counting of votes once the election petition had been

finally decided and consequently the Prescribed Authority became 'functus officio'?"

"36. As already indicated above, the Apex Court in the case of Hari Vishnu Kamath (supra) has held that after the Election Tribunal finally pronounces its decision, it becomes 'functus officio' meaning thereby that it would not have any power to pass any order in the election petition after it pronounces its order. In the instant case what the Election Tribunal headed by the Prescribed Authority has done is that it has finally allowed the election petition and has directed for a recounting. Even if the result of recounting of the votes is to be either way, the Election Tribunal having become 'functus officio' after pronouncement of its decision/allowing the petition, it would not be able to pass any further orders. As such keeping in view the settled proposition of law, Article 243-O of the Constitution of India categorically providing that only by means of an election petition the election to the Panchayat can be called in question and the election petition having been finally decided, the Prescribed Authority/Election Tribunal, thus became functus officio and cannot pass any further orders in the matter. As such, the impugned order has to be treated as a final order in all respects and accordingly it is apparent that the Prescribed Authority has passed a patently perverse order and has failed to exercise jurisdiction vested in him i.e. of finally deciding an election petition either way.

37 Keeping in view the aforesaid discussion, the legal question which has arisen in the instant petition is answered below:-

The Prescribed Authority on finally deciding an election petition becomes functus officio and can not pass

any order subsequent thereto even if the election petition has been decided finally calling for the re-counting of votes."

13. In the case of **Kamal Kumar Dhuriya (Supra)**, the Prescribed Authority passed the order of recounting of electoral colleges/votes and disposed of the election petition without setting aside the election or declaring the election to be void or declaring the election petitioner to be duly elected and after considering the same the preliminary objection regarding maintainability of the petition was decided by the Co-ordinate Bench of this Court in following paragraphs:-

"As regards the preliminary objection of Shri Pathak this issue has been settled by a Division Bench of this Court in the case of Mohd. Mustafa Vs. Up Ziladhikari, Phoolpur, Azamgarh and Ors. reported in 2007 (103) RD 282. The said decision has also been followed recently by this very Bench while rendering a judgment on 12.04.2019 in Writ Petition No. 9609(M/S) of 2018. According to the said decision an order of recount being an interlocutory order which does not dispose of the proceedings finally no revision lies under Section 12-C(6) of the Act, 1947. The preliminary objection of Shri Pathak is, thus, rejected."

14. In the case of **Rajesh Kumar (Supra)**, Co-ordinate Bench of this Court dealt with the petition which was filed with the prayer that the election result declared on 13.12.2015 be declared as void ab-initio and a nullity and an order of recounting be passed and the petitioner be declared elected. In this case, the revision was filed challenging the order of recounting of votes during pendency of the election petition.

Relevant paras of the same on reproduction reads as under:-

"Having heard the learned counsel for the parties and perused the record, this Court finds that a Single Judge Bench of this Court at Allahabad noticing a judgment by a co-ordinate Bench in the case of (Abrar vs. State of U.P. & others) reported in 2004 (5) AWC 4088 taking a contrary view in the matter referred the the following questions for consideration by a Larger Bench.

"(I) Whether the revision under section 12-C(6) shall lie only against a final order passed by Prescribed Authority deciding the election petition under Section 12-C(1) or a writ petition can be filed against an order of recount, which has been passed after deciding certain issues raised in the election petition?

(II) Whether the judgment of learned Single Judge in Abrar v. State of U.P. and others, lays down correct law?"

Consequently the matter was placed before a Division Bench for consideration of the reference. The Division Bench in the case of **Mohd. Mustafa (supra)** considered the issues referred to it threadbare and came to the conclusion as under:-

"23. We answer the questions referred to by the learned Single as follows:-

(I) A revision under Section 12-C(6) of the Act shall lie only against a final order passed by the Prescribed Authority deciding the election application preferred under Section 12-C(1) and not against any interlocutory order or order of recount of votes by the Prescribed Authority.

(II) The judgment of the learned Single Judge in the case of Abrar v. State of U.P. and others, does not lay down the law correctly and is, therefore, overruled to the

extent of the question of maintainability of a revision petition, as indicated hereinabove.

(III) As a natural corollary to the above, we also hold that a writ petition would be maintainable against an order of recount passed by the Prescribed Authority while proceeding in an election application under Section 12-C of the U.P. Panchayat Raj Act, 1947."

As would be evident from the above extracted paragraph of the Division Bench Judgment, it was held that a Revision under 12-C(6) of the Act, 1947 shall lie only against a final order passed by the Prescribed Authority deciding the election application preferred under Section 12-C(1) and not against any interlocutory order or order of recount of votes by the Prescribed Authority. The decision of the Division Bench is so clear that it does not require any further elaboration or explanation.

Furthermore, the Division Bench held that the learned Single Judge in *Abrar Hussain* (supra) while holding that a Revision is maintainable against an order of re-counting, did not lay down the law correctly.

Thirdly, as a natural corollary to the above, it was held by the Division Bench that instead of a Revision under Section 12-C(6) a writ petition would be maintainable against an order of recount passed by the Prescribed Authority while proceeding in an election application under Section 12-C of the Act, 1947. This conclusion was arrived at, obviously, as an order of recount has an important consequence to the parties concerned which could not be left remedy-less as an order of recounting cannot be passed as a matter of course but can only be passed keeping in mind the pre-requisites laid down by the Supreme Court in a catena of

decisions and the Full Bench decision of this Court in the case of *Ram Adhar Singh vs. District Judge* reported in 1986 (2) RD 151; *Kattinokkula Murali Krishna vs. Veeramalla Kotewara Rao & others* reported in (2010) 1 SCC 466; *M. Chinnasamy vs. K.C. Palanisamy & others* reported in (2004) 6 SCC 341, *Mahendra Pratap vs. Krishn Pal and others* reported in (2003) 1 SCC 390; according to which firstly there has to be specific pleading making out a case for recounting and secondly there has to be proof of it, thirdly the degree of proof required is very high as the secrecy of ballots is to be maintained.

In support of the aforesaid conclusions the Division Bench gave cogent reasons in its judgment which need not be elaborated by this Court, but, suffice it to say that it considered the language used in Section 12-C(6) and the earlier precedents all of which took the same view as was taken by the Division Bench. One of the reasons given by the Division Bench requires mention by this Court. It opined that an order of recount is an order in aid of final determination which has to be made in respect of the election which have been made the basis for claiming such recount. The disposal of such an application by itself does not finally touch upon the result of the election and is not a final decision on the relief claimed in an election application. The ultimate relief claimed in an election application is to set aside the election of a successful candidate. Unless and until such an order is passed, finally determining the fate of the election, it cannot be said that an order passed for mere re-count attaches finality to the proceedings. The order of re-count by itself does not dispose of the election application finally and something more remains to be done thereafter; namely, the final decision on the basis of the evidence led on the

subject of re-count. There is very possibility of the election application being allowed after the Tribunal comes to the conclusion that the recount has materially affected the result and has tilted the balance in favour of the election petitioner. It is, therefore, obvious, that the final disposal will occur only after a decision is rendered upon the outcome of the recount. The Court further opined that mere reasons given or the mere passing of an order for re-count does not attach finality to the proceedings arising out of an election application under Section 12-C of the Act. It is the declaration of either the ultimate success or failure of the election application that attached finality to the proceedings.

The Division Bench also considered the phraseology used in sub section 6 of Section 12-C to the effect - 'aggrieved by an order' of the Prescribed Authority and came to the conclusion that the word 'an' refers to a specific order/incident/happening. It is equivalent to one as the term seldom refers to plurality of the intention of the legislature was that any order including an order of re-count could be challenged by filing a Revision under the said provision then the term used would have been 'any order'. The Division Bench further justified the view which was taken it by holding that the intention of the legislature while not providing the remedy of Revision against any order passed during the pendency of the election application seems to be to avoid prolonged litigation ad infinitum as it would not be in the interest of justice to allow a party to obtain a decision at primary point, challenge the same before the superior Courts upto the Hon'ble Supreme Court to disadvantage to the other side. Thus, the intention of the legislature according to it was that the Revision would not be maintainable against an order passed by

the Prescribed Authority unless the election application ,itself, stands finally disposed of.

In this context the reliance placed by learned Senior Advocate Sri Asit Chaturvedi upon the decision of learned Single Judge in Athar Hussain (supra) requires consideration in this case. In the said case twelve issues were framed, all of which were decided. However, it was not all that was done. What was further done was to allow the election petition partially with specific observations in this regard which have been quoted in the judgment of Athar Hussain (supra). Now in the context of law as discussed hereinabove, when this Court considers the order of the Prescribed Authority passed in the case no doubt two issues were framed and decided and the plea under Order VII Rule 11 of the CPC was also decided, but, what has yet not been decided is as to whether the election petition is to be allowed or is to be rejected. In fact while framing the issues a third issue as to whether the relief prayed for the Election Petition is liable to be granted or not was also required to be framed by the Prescribed Authority. Even if, it has not been framed, this will have to be decided after the recount takes place. Based on this recount the election petition could be dismissed or could be allowed. The fact of the matter is that as per the categorical enunciation of the law by the Division Bench and the answer given by it on the questions referred to it the election petition at hand has not been finally disposed of as yet and in view of the categorical enunciation of law by the Division Bench as quoted hereinabove, it is not possible for this Court to take any other view of the matter.

One additional reason which persuades the Court to take this view is that the law is very well settled that an order of

*recounting can be challenged even after final disposal of the election petition by filing a Revision and such challenge would be implicit in a challenge to the final order if requisite grounds are taken in this regard and also that an order of recounting cannot be justified by the result of the recounting. Relevant decisions of the Supreme Court have already been referred earlier; therefore, the opposite party no.3 is not left remedy less, firstly, in view of the judgment of the Division Bench in the case of **Mohd. Mustafa (supra)** he can file a writ petition before this Court under Article 226 of the Constitution India secondly, he can also challenge the said order if he so choses after the final disposal of the election petition in the revision proceedings while challenging the final order."*

15. Relevant paras of the judgment passed by this Court in the case of **Dori Lal (Supra)**, on reproduction read as under:-

*"11. Thus, revision under section 12-C (6) of the Act shall lie only against final order passed by the Prescribed Authority deciding the election application preferred under section 12-C (1) and not against any interlocutory order or order of recount of votes by the Prescribed Authority. writ petition would be maintainable against an order of recount passed by the Prescribed Authority while proceeding in an election application under section 12-C of the U.P. Panchayat Raj Act, 1947. Since today is the date fixed in the aforesaid revision filed by the respondent No. before the District Judge, Kanpur Dehat and as such this writ petition is disposed of giving liberty to the petitioner to raise objection as to maintainability of the revision in the light of the Division Bench judgment dated 11.7.2007 in the case of **Mohd. Mustafa v. Up-Ziladhikari,***

Phoolpur, Azamgarh (supra) and if such an objection is raised, the same shall be decided by the revisional authority within four weeks after hearing the parties on day-to-day basis."

16. In the case of **Parshuram (Supra)**, the Prescribed Authority disposed of the election petition with the direction for recounting of votes vide order dated 21.12.2021 and being aggrieved, a petition was filed which was entertained after taking note of the judgment passed by the Division Bench of this Court in the case of **Mohd. Mustafa vs. Up Ziladhikari**; reported in **2007 SCC OnLine All 1564** and at the stage of final disposal, the Co-ordinate Bench of this Court considered the impugned order dated 21.12.2021 in the light of the expression '*functus officio*' and also considered Section 12-C of the Act of 1947 and various judgments of this Court as also of the Hon'ble Apex Court including the judgment passed by the Division Bench of this Court in the case of **Mohd. Mustafa (Supra)** and held that after the Election Tribunal pronounces its decision, it becomes '*functus officio*'. Relevant portion of the judgment passed in the case of **Parshuram (Supra)**, on reproduction reads as under:-

"25. However, the legal issue which arises in the instant case is that when the Prescribed Authority has finally allowed the election petition by means of impugned order dated 21.12.2021 and has directed for recounting then after disposal of the election petition, the Election Tribunal would become 'functus officio' and no subsequent order can be passed in this regard by the Election Tribunal.

26. This aspect of the matter has been considered by a seven Judges Constitution Bench of Hon'ble Supreme

Court in the case of Hari Vishnu Kamath vs. Syed Ahmad Ishaque and others - AIR 1955 SC 233 wherein the Constitution Bench has held as under:-

"19. Looking at the substance of the matter, when once, it is held that the intention of the Constitution was to vest in the High Court a power to supervise decisions of Tribunals by the issue of appropriate writ and directions, the exercise of that power cannot be defeated by technical -considerations of form and procedure. In *P. C. Basappa v. T. Nagappa* -AIR 1954 SC 440, this Court observed:

"In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of 'certiorari' in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law"

It will be in consonance with these principles to hold that the High Courts have power under article 226 to issue writs of certiorari for quashing the decisions of Election Tribunals, notwithstanding that they become *functus officio* after pronouncing the decisions." (emphasis by the Court)

27. From a perusal of the aforesaid judgment, it is apparent that after the Election Tribunal pronounces its decision, it becomes 'functus officio'.

28. Further, the Constitution Bench has also laid down the law with respect to the powers of the High Court under Articles 226 and 227 of the Constitution of India. For the sake of

convenience, the relevant observations of the Constitution Bench are reproduced below:-

"We are also of opinion that the Election Tribunals are subject to the superintendence of the High Courts under article 227 of the Constitution, and that superintendence is both judicial and administrative. That was held by this Court in *Waryam Singh and another v. Amarnath and another*(2), where it was observed that in this respect article 227 went further than section 224 of the Government of India Act, 1935, under which the superintendence was purely administrative, and that it restored the position under section 107 of the Government of India Act, 1915. It may also be noted that while in a certiorari under article 226 the High Court can only annul the decision of the Tribunal, it can, under article 227, do that, and also issue further directions in the matter. We must accordingly hold that the application of the appellant for a writ of certiorari and for other reliefs was maintainable under articles 226 and 227 of the Constitution." (emphasis by the Court)

29. From a perusal of the aforesaid, it is apparent that the Constitution Bench has held that the High Court under Article 226 can not only annul the decision of the Tribunal but the High Court under Article 227 can also do that and also issue further directions in the matter.

30. Accordingly, when the Division Bench judgment in the case of **Mohd. Mustafa (supra)** is seen in the light of the Constitution Bench judgment in the case of *Hari Vishnu Kamath (supra)* it emerges that the Division Bench of this Court has not considered the aforesaid Constitution Bench judgment wherein it has been held that the Election Tribunal after pronouncing its decision becomes 'functus

officio' and consequently this Court while exercising power under Articles 226 and 227 of the Constitution of India can not only annul the decision of the Tribunal but can also issue further directions in the matter.

31. At this stage, it would also be relevant to deal with issue as to whether the law laid down by the Division Bench of this Court in the case of Mohd. Mustafa (supra) would be a binding precedent when the Division Bench has not considered the judgment of the Apex Court in the case of Hari Vishnu Kamath (supra).

32. In this regard, this Court may need not look further than the judgment of the Supreme Court in the case of Sundeep Kumar Bafna vs. State of Maharashtra - (2014) 16 SCC 623, wherein the Apex Court has held as under:-

"19. It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to

apply the earliest view as the succeeding ones would fall in the category of per incuriam."

(Emphasis by the Court)

33. Likewise, the Apex Court in the case of Punjab Land Development and Reclamation Corporation Limited vs. Labour Court - (1990) 3 SCC 682 has held as under:-

"40. We now deal with the question of per incuriam by reason of allegedly not following the Constitution Bench decisions. The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court. It can not be doubted that Art. 141 embodies, as a rule of law, the doctrine of precedents on which our judicial system is based. In Bengal Immunity Company Ltd. v. State of Bihar, [1955] 2 SCR 603, it was held that the words of Art. 141, "binding on all courts within the territory of India", though wide enough to include the Supreme Court, do not include the Supreme Court itself, and it is not bound by its own judgments but is free to reconsider them in appropriate cases. This is necessary for proper development of law and justice. May be for the same reasons before judgments were given in the House of Lords in Re-Dawson's Settlement Lloyds Bank Ltd. v. Dawson and Ors., [1966] 1 WLR 1234, on July 26, 1966 Lord Gardiner, L.C. made the following statement on behalf of himself and the Lords of Appeal in Ordinary:

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely

in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law."

34. From the aforesaid judgments in the case of Sundeep Kumar Bafna (*supra*) and Punjab Land Development and Reclamation Corporation Limited (*supra*), it emerges that the Apex Court has categorically held that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the *per incuriam* rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be *per incuriam* any provision in a statute, rule or regulation which was not brought to the notice of the Court or a decision or judgment can also be *per incuriam* if the decision of a High Court is not in consonance with the view of the Apex Court.

35. Accordingly, keeping in view the aforesaid judgments, the Division Bench judgment of this Court in the case of **Mohd. Mustafa (*supra*)** would run against the law laid down by the Constitution Bench judgment of the Apex Court in the

case of Hari Vishnu Kamath (*supra*) the Division Bench having not considered that the Election Tribunal becomes *functus officio* after finally deciding the election petition and thus it is the judgment of the Constitution Bench which would have to be followed by this Court.

36. As already indicated above, the Apex Court in the case of Hari Vishnu Kamath (*supra*) has held that after the Election Tribunal finally pronounces its decision, it becomes '*functus officio*' meaning thereby that it would not have any power to pass any order in the election petition after it pronounces its order. In the instant case what the Election Tribunal headed by the Prescribed Authority has done is that it has finally allowed the election petition and has directed for a recounting. Even if the result of recounting of the votes is to be either way, the Election Tribunal having become '*functus officio*' after pronouncement of its decision/allowing the petition, it would not be able to pass any further orders. As such keeping in view the settled proposition of law, Article 243-O of the Constitution of India categorically providing that only by means of an election petition the election to the Panchayat can be called in question and the election petition having been finally decided, the Prescribed Authority/Election Tribunal, thus became *functus officio* and cannot pass any further orders in the matter. As such, the impugned order has to be treated as a final order in all respects and accordingly it is apparent that the Prescribed Authority has passed a patently perverse order and has failed to exercise jurisdiction vested in him i.e. of finally deciding an election petition either way.

37. Keeping in view the aforesaid discussion, the legal question which has

arisen in the instant petition is answered below:-

The Prescribed Authority on finally deciding an election petition becomes functus officio and can not pass any order subsequent thereto even if the election petition has been decided finally calling for the re-counting of votes.

38. With the legal question now stands answered, the next question would be as to whether this Court while exercising jurisdiction under Article 227 of the Constitution of India can

17. Further, after observing as aforesaid, the Co-ordinate Bench of this Court in the case of **Parshuram (Supra)** declined to relegate the petitioner for filing the revision challenging the order of recounting of votes, whereby the election petition was also disposed of by the Prescribed Authority on the ground that the petition was entertained and interim order was granted as also that the law in this regard was not settled as to whether the order impugned would be considered to be a 'final order' or an interim order, as would appear from following para of the same:-

"39. Though it has been argued that the petitioner has a remedy of filing of a revision against the order impugned before the learned District Judge under sub-section (6) of Section 12-C of the Act, 1947 and as such he should be relegated to filing of a revision but considering that the petition had been entertained about a year back and an interim order had already been passed and the fact that the law in this regard was not settled as to whether the order impugned would be considered to be a final order or an interim order consequently this Court is exercising its powers as vested under Article 227 of the Constitution of India."

18. It also transpires from the judgment passed in the case of **Parshuram (Supra)** that the judgment passed in the case of **Mohd. Mustafa (Supra)** was considered in the light of the judgment passed by the Constitution Bench of the Hon'ble Supreme Court and this Court, based upon the same, held that the Election Tribunal/Prescribed Authority would become '*functus officio*' after final disposal of the case.

19. In the context of the present case, it would be appropriate to refer the judgment of the Hon'ble Apex Court passed in the case of **Orissa Administrative Tribunal Bar Association vs. Union of India and others**; reported in **2023 SCC OnLine SC 309**, wherein the Hon'ble Apex Court considered the expression '*functus officio*'. The relevant paras of the same on reproduction reads as under:-

"“A term applied to something which once has had a life and power, but which has become of no virtue whatsoever ... One who has fulfilled his office or is out of office; an authority who has performed the act authorised so that the authority is exhausted”

108. Black's Law Dictionary (5th edition) defines the term as follows:

“Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority ... an instrument, power, agency, etc. which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.”

109. The doctrine of *functus officio* gives effect to the principle of finality. Once a judge or a quasi-judicial authority has rendered a decision, it is not open to her to revisit the decision and amend, correct, clarify, or reverse it (except

in the exercise of the power of review, conferred by law). Once a judicial or quasi-judicial decision attains finality, it is subject to change only in proceedings before the appellate court.

110. For instance, Section 362 of the Code of Criminal Procedure 1973 provides that a court of law is not to alter its judgment once it is signed:

“362. Court not to alter judgment.-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.”

111. In *Hari Singh Mann v. Harbhajan Singh Bajwa*³⁵, this Court recognized that Section 362 was based on the doctrine of *functus officio*:

“10. ... The section is based on an acknowledged principle of law that once a matter is finally disposed of by a court, the said court in the absence of a specific statutory provision becomes *functus officio* and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes *functus officio* the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or an arithmetical error.”

112. The doctrine of *functus officio* exists to provide a clear point where the adjudicative process ends and to bring quietus to the dispute. Without it, decision-making bodies such as courts could endlessly revisit their decisions. With a definitive endpoint to a case before a court or quasi-judicial authority, parties are free to seek judicial review or to prefer an appeal. Alternatively, their rights are

determined with finality. Similar considerations do not apply to decisions by the state which are based entirely on policy or expediency.

113. Turning to the present case, the appellants' argument that the Union Government was rendered *functus officio* after establishing the OAT does not stand scrutiny. The decision to establish the OAT was administrative and based on policy considerations. If the doctrine of *functus officio* were to be applied to the sphere of administrative decision-making by the state, its executive power would be crippled. The state would find itself unable to change or reverse any policy or policy-based decision and its functioning would grind to a halt. All policies would attain finality and any change would be close to impossible to effectuate.

114. This would impact not only major policy decisions but also minor ones. For example, a minor policy decision such as a bus route would not be amenable to any modification once it was notified. Once determined, the bus route would stay the same regardless of the demand for, say, an additional stop at a popular destination. Major policy decisions such as those concerning subsidies, corporate governance, housing, education and social welfare would be frozen if the doctrine of *functus officio* were to be applied to administrative decisions. This is not conceivable because it would defeat the purpose of having a government and the foundation of governance. By their very nature, policies are subject to change depending on the circumstances prevailing in society at any given time. The doctrine of *functus officio* cannot ordinarily be applied in cases where the government is formulating and implementing a policy.

115. In the present case, the State and Union Governments' authority has not

been exhausted after the establishment of an SAT. Similarly, the State and Union Governments cannot be said to have fulfilled the purpose of their creation and to be of no further virtue or effect once they have established an SAT. The state may revisit its policy decisions in accordance with law. For these reasons, the Union Government was not rendered functus officio after establishing the OAT."

20. Thus, a conjoint reading of aforesaid would show that if the Prescribed Authority keeping the election petition pending directs for recounting of votes, then it would be an interlocutory order and against this order writ petition would be maintainable. If election petition is disposed of by the Prescribed Authority directing for recounting of votes, then it would be a 'final order' and against this order, the revision under Section 12-C(6) of the Act of 1947 would be maintainable.

21. Considered the submissions advanced by the learned counsel for the parties and perused the record as also considered the judgment(s), referred above.

22. This Court is not inclined to enter into factual matrix including the merits of the case as this Court is considering the issue of maintainability of the present petition only in the light of the operative portion of the impugned order dated 05.06.2023, quoted in earlier part of this judgment, whereby the Prescribed Authority concluded the proceedings of case/election petition instituted under Section 12-C of the Act of 1947 without granting the relief(s) as provided under Section 12-C(4)(ii) of the Act of 1947.

23. The judgment passed by the Division Bench of this Court in the case of

Mohd. Mustafa (Supra), which is the basis of judgment(s) passed by the Co-ordinate Bench, referred above, says that a revision under Section 12-C(6) of the Act of 1947 shall lie only against a 'final order' passed by the Prescribed Authority deciding the election application preferred under Section 12-C(1) and not against any interlocutory order or order of recount of votes by the Prescribed Authority.

24. The Division Bench opined aforesaid, as in the judgment passed in the case of **Abrar vs. State of U.P.**, reported in **(2004) 5 AWC 4088**, wherein the learned Single Judge was of the view that the disposal of application for recounting of votes would amount to a 'final order' as it disposes of the application for recounting of votes finally. The Division Bench of this Court also observed that 'final order' would be, if the election application is allowed or dismissed, as would appear from the relevant portion of the judgment passed in the case of **Mohd. Mustafa (Supra)**, which on reproduction reads as under:-

"22. We have carefully examined the reasoning given by a learned single Judge in Abrar's case (supra) wherein the learned single Judge opined that the disposal of an application for recount would amount to be a final order as it disposes of the application for recount finally. As explained by us, herein above, a mere order for recount does not finally alter the status of the contesting parties and it does not, in any way, finally determine the status of an elected candidate. The finality comes only after the disposal of the election application as the relief of setting aside an election or dismissing an election application comes at the final stage and not by mere disposal of an application of

recount or ordering recount on deciding the issue framed for this purpose.

23. The order impugned in the writ petition cannot be held to have disposed of the election application for the reason that the Election Tribunal framed following three issues:--

(1) Whether the counting in the election on the post of Pradhan of village Handia was conducted in accordance with law?

(2) Whether the agents of the applicant in election application, were forcibly removed from the place of counting and the votes cast in favour of the election applicant had been mixed up with the votes of the returned candidate (present petitioner) and on the basis of which opposite party No. 1 (present petitioner) was declared elected? And

(3) Whether on the facts and circumstances of the case, the recounting of votes is permissible and the election had been held in accordance with law?

24. It is evident from the order impugned that only the order of recount has been passed. However, the other issues are yet to be decided after recount of ballot papers as to whether the election had been held in accordance with law and as to whether the votes cast in favour of the contesting respondent have been mixed up with the votes of the returned candidate and on the basis of which the petitioner has been declared elected. It is further to be decided as to whether the election application is to be allowed or dismissed. Therefore, by no stretch of imagination, it can be held that the order of recount of votes has finally disposed of the election application.

25. We are, therefore, with the utmost respect, not able to circumscribe to the view taken by the learned single Judge in the Abrar's case (supra) for the reasons

aforesaid and, therefore, we have no hesitation on in holding that the said decision does not lay down the law correctly on the question of the maintainability of revision under Section 12-C(6) of the Act in respect of an application disposed of by the Prescribed Authority for recount. We further approve the law laid down the cases relied upon by the learned counsel for the petitioner. We answer the questions referred to by the learned single Judge as follows:--

(I) A revision under Section 12-C(6) of the Act shall lie only against a final order passed by the Prescribed Authority deciding the election application preferred under Section 12-C(1) and not against any interlocutory order or order of recount of votes by the Prescribed Authority.

(II) The judgment of, the learned single Judge in the case of Abrar v. State of U.P., (2004) 5 AWC 4088 : (2004 All LJ 2384) does not lay down the law correctly and is, therefore, overruled to the extent of the question of maintainability of a revision petition, as indicated hereinabove.

(III) As a natural corollary to the above, we also hold that a writ petition would be maintainable against an order of recount passed by the Prescribed Authority while proceeding in an election application under Section 12-C of the U.P. Panchayat Raj Act, 1947."

25. After the judgment passed by the Division Bench of this Court in the case of **Mohd. Mustafa (Supra)**, this Court in the judgment(s), referred above, entertained the writ petition(s) challenging the order(s) of recounting of votes considering it to be interlocutory order. In the case of **Parshuram (Supra)**, the Co-ordinate Bench of this Court, after considering the judgment passed in the case of **Mohd. Mustafa (Supra)** as also the order passed

by the Prescribed Authority in a case instituted under Section 12-C of the Act of 1947, whereby the Prescribed Authority while passing the order neither set aside the election nor declared the election to be void nor declared the concerned to be duly elected rather has directed for recounting of votes and allowed the election petition and considering the nature of the order as also the expression '*functus officio*' in the light of Constitutional Bench judgment passed in the case of **Hari Vishnu Kamath vs. Syed Ahmad Ishaque and Others**; reported in **AIR 1955 SC 233**, specifically observed that "after Election Tribunal pronounces its decision, it becomes '*functus officio*'". Co-ordinate Bench of this Court, after considering the relevant provisions of the Act of 1947 and the judgment passed by the Division Bench in the case of **Mohd. Mustafa (Supra)** as also the judgment passed by the Constitutional Bench of the Hon'ble Apex Court also observed in regard to such order that the same should be treated as 'final order' in all respects.

26. A conjoint reading of the judgment passed by the Division Bench of this Court in the case of **Mohd. Mustafa (Supra)** and the judgment passed by the Co-ordinate Bench of this Court in the case of **Parshuram (Supra)**, would make the point crystal clear that the revision under Section 12-C(6) of the Act of 1947 would be maintainable against the 'final order' passed in the election petition and not against an interlocutory order which includes the order passed for recounting of votes without concluding the proceedings instituted under Section 12-C(1) of the Act of 1947.

27. This Court has already observed that a conjoint reading of aforesaid would show that if the Prescribed Authority

keeping the election petition pending directs for recounting of votes then it would be an interlocutory order and against this order writ petition would be maintainable. If election petition is disposed of by the Prescribed Authority directing for recounting of votes, then it would be a 'final order' and against this order, the revision under Section 12-C(6) of the Act of 1947 would be maintainable.

28. The word '*functus officio*' has already been taken note of in earlier part of this judgment, as per which, once a judge or a quasi-judicial authority has rendered a decision, it is not open to revisit the decision and amend, correct, clarify, or reverse it, except in the exercise of the power of review, conferred by the law and once a judicial or quasi-judicial decision attains finality, it is subject to change only in proceedings before the appellate authority and in this case, as per statutory provision i.e. Section 12-C(6) of the Act of 1947, the District Judge is the Revisional Authority.

29. In the instant case, the Prescribed Authority has passed the 'final order', which is impugned in this petition, whereby, he allowed the election petition and directed for re-counting of votes with a further direction to the effect that after necessary action, the matter be consigned to record. As such, the order, in issue, is covered under the expression 'final order' and being so, this Court is of the view that the revision would be maintainable under Section 12-C(6) of the Act of 1947.

30. Accordingly, considering the statutory remedy available to the petitioner, this Court is not inclined to entertain this petition assailing the order dated 05.06.2023 passed by the Prescribed

List of Cases cited:

1. Gurpal Singh Vs St. of Pun. & ors. (2005) 5 SCC 136
2. St. of Uttaranchal Vs Balwant Singh Chaufal & ors. (2020) 3 SCC 402
3. Writ-C No.6658 of 2022; Rishipal Singh Vs St. of U.P. & ors. and other connected writ petitions reported in 2022 SCC OnLine All 829
4. Hinch Lal Tiwari Vs Kamala Devi, [2001 S.C. 3215]
5. Panna Lal Vs Dm Gautam buddh nagar [2009 (108) S.C. R.D. 481]
6. Jag Pal Singh Vs St. of Pun. & ors. [2011 S.C. 1123]
7. Om Prakash Verma Vs St. of U.P., [2014 (5) A.D.J. 427 (DB)]
8. Jagat narain & ors. Vs St. of UP & ors. [2015 (3) A.W.C. 2579]
9. Dayaram Yadav & ors. Vs St. of UP & ors., 2016 (6) A.D.J. 275 (DB)
10. Ram Laut Vs St. of U.P. & ors. [2016 (34) L.C.D. 2458]
11. Ram Bihari Dwivedi Vs St. of U.P. & ors. [2017 (135) RD 156]
12. Sri Raju Vs St. of U.P. & ors. [2020 (38) LCD 398]
13. Ghanshyam Verma Vs St. of U.P. [2021 (39) LCD 2021]

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

1. Heard Shri Alok Kumar Dixit, learned counsel for the petitioner, Shri Shailendra Kumar Singh, learned Chief Standing Counsel-II, Shri Yogesh Kumar Awasthi, learned Standing Counsel for the State-opposite parties and Shri Virendra Singh, learned counsel for the private opposite party Nos.6, 7 & 8. However, Sri

Ajay Kumar, learned counsel has accepted notice on behalf of opposite party No.5 i.e. the District Basic Education Officer, Hardoi.

2. Notably, this Court has passed a detailed and comprehensive order on 19.12.2022 considering the earlier orders passed by this Court on 05.08.2022 and 29.08.2022 wherein the prayer of the present Public Interest Litigation Petition (here-in-after referred to as the 'PIL') has been considered. Therefore, to understand the grievance of the petitioner which has been considered by this Court in earlier orders, the order dated 19.12.2022 is being reproduced here-in-below:-

"Heard learned counsel for the parties.

The present petition has been filed in the nature of Public Interest Litigation in relation to Gata Nos. 256 and 257 recorded as public utility land in revenue records of Village Tendua, Tehsil-Bilgram, District- Hardoi.

In the petition, it has been stated that the private opposite party Nos. 6 to 8 have destroyed the temple situated in the village as also raised constructions illegally on the said Gatas and also cut certain trees.

Considering the averments made in the writ petition as also the reliefs sought, this Court on 14.07.2022 directed the State counsel to seek instructions in the matter and thereafter, considering the instructions made available by the officer concerned, this Court on 05.08.2022 directed the District Magistrate- Hardoi to file his personal affidavit and in compliance thereof, the District Magistrate, Hardoi filed his personal affidavit, which was taken on record on 29.08.2022 and on the same date, the

petitioner also filed supplementary affidavit and after considering the entire facts and circumstances of the case, this Court on 29.08.2022, passed the following order:-

"Heard.

On 05.08.2022, following order was passed:

"1. Written instructions provided by learned Additional Chief Standing Counsel is taken on record.

2. Heard learned counsel for the petitioner and learned Standing Counsel.

3. The present petition in the nature of Public Interest Litigation has been filed with the following main prayer:-

"(i) Issue a writ, order or direction in the nature of mandamus commanding the Opposite Party Nos.2, 3, 4 and 5 to restrain the Opposite Party Nos.6, 7 & 8 from destroying the temple, cutting the green trees and making illegal constructions of Guesthouse and shops on Gata No.256 & 257-Kha, which are recorded as Public utility land in the revenue record.

(ii) Issue a writ, order or direction in the nature of mandamus directing the Opposite Party Nos.2, 3, 4 & 5 to conduct inquiry against the Opposite Party Nos.6, 7 & 8 with regard to occupy of public utility land."

4. In pursuance of the earlier order dated 14.07.2022, instructions are placed by Mr. Upendra Singh, Additional Chief Standing Counsel, duly signed by Sub Divisional Officer, Tehsildar, Revenue Inspector and Area Lekh Pal, Bilgram, District Hardoi. In the said instructions, it is mentioned that temple in question was 150 years old and said temple was constructed on the Abadi land i.e. Gata No.257-Kha. The Gata No.256 was recorded in the name of Ram Janki Temple and Gata No.257 is recorded as Abadi, Gata No.253 is recorded as public way and

Gata No.235-Kha is recorded as Usar Land. In the said instructions, it is also mentioned that temple in question was situated over Gata No.257-Kha, which was recorded as Abadi, therefore, it was demolished by the Village Pradhan with the intention to construct new Ram Janki Temple at Gata No.256. It is also mentioned that any encroachment is being made by the Village Pradhan by raising his personal building at Gata No.257 and one Lord Shiva Temple is situated over Gata No.257 Kha.

5. It is also mentioned in the aforesaid report that illegal construction of Gyanendra Pratap Singh, present Village Pradhan is found in Gata No.235 Kha recorded as Usar Land, hence, the proceeding for removal of the encroachment has been initiated. It is also mentioned that no any illegal cutting of the tree is found from the land recorded in the name of Gram Sabha and village pradhan has removed some tree situated in Gate No.256. The relevant part of the aforesaid report is reproduced as under:-

"माननीय उच्च न्यायालय इलाहाबाद, लखनऊ खण्डपीठ लखनऊ में योजित रिट याचिका संख्या-390/2022 (पी0आई0एल0) नन्हैलाल कनौजिया बनाम उ0प्र0 सरकार एवं अन्य के अनुपालन में स्थलीय एवं अभिलेखीय सत्यापन किया गया। जांच आख्या निम्नप्रकार है।

राजस्व ग्राम तेन्दुआ परगना मल्लावां व तहसील बिलग्राम की गाटा संख्या-256 (रामजानकी मंदिर), 257ख (आबादी), 235ख (ऊसर), 255(बाग-सं0भू0), 253(मार्ग), 234(नाला मिल्कियत सरकार) के नाम से ग्राम खतौनी में दर्ज भूमियां है (संलग्नक-01)। गाटा संख्या 257/0.051 हे0 पर जो आबादी के नाम दर्ज अभिलेख है पर रामजानकी मंदिर लगभग 150 वर्ष पुराना बना हुआ था, जिसे वर्तमान ग्राम प्रधान द्वारा गिराकर रामजानकी मंदिर के नाम गाटा संख्या 256/0.1120 हे0 पर जो रामजानकी मंदिर के नाम दर्ज अभिलेख है, नया रामजानकी मंदिर बनाया गया है। यह भी अवगत कराना है कि पुराना मंदिर जिस आबादी की गाटा संख्या 257 में बना हुआ था। वहां पर वर्तमान ग्राम प्रधान द्वारा कोई अवैध निजी निर्माण नहीं किया जा रहा है। गाटा संख्या 257 की भूमि में छोटा

सा महादेव मंदिर बना हुआ है। गाटा संख्या 257 की शेष भूमि में नवनिर्मित मंदिर के सहन में उपयोग की जा रही है। गाटा संख्या 235 ख (ऊसर) में ज्ञानेन्द्र प्रताप सिंह पुत्र रामजी कनौजिया का पक्का अवैध निर्माण पाया गया, जिसके विरुद्ध उ०प्र०रा०सं० 2006 की धारा 67 के तहत कार्यवाही न्यायालय तहसीलदार बिलग्राम जनपद हरदोई के न्यायालय में कर दी गयी है जिसकी वाद संख्या टी०२०२२१०३३०३०३५३२ है। इसके अतिरिक्त उक्त सार्वजनिक उपयोग की भूमियों पर कोई अवैध निर्माण नहीं पाया गया। उक्त सुरक्षित गाटों की भूमि से कोई पेड़ का कटान नहीं हुआ है। गाटा संख्या 255 याची व अन्य सहखातेदारों के नाम सं०भ० दर्ज अभिलेख है, जिसमें खड़े पेड़ों का कटान हुआ है, जो याची व अन्य सहखातेदारों की निजी भूमि है। काटे गये पेड़ सामान्य श्रेणी के थे। गाटा सं० 253/०.2150 हे० मौके पर रिक्त है जिस पर आवागमन सुचारु रूप से संचालित है। नजरी नक्शा संलग्न है। (संलग्नक-02)

अतः योजित रिट-याचिका के सम्बन्ध में यथा न्यायोचित कार्यवाही किये जाने हेतु अनुदेश सेवा में सादर प्रेषित है।"

6. Considering the arguments of learned counsel for the petitioner as well as going through the contents of the instructions placed by the learned Additional Chief Standing Counsel, the District Magistrate, Hardoi is directed to file his personal affidavit replying the pleading of writ petition, within one week.

7. List this case on 29.08.2022 as fresh for further order."

In compliance of the order of this Court dated 05.08.2022, personal affidavit of the District Magistrate has been filed by the learned counsel for the State, which is taken on record.

Counter affidavit filed by the learned counsel for the opposite party No.5 is also taken on record.

Considering the instructions quoted in the order dated 05.08.2022 and the avements made in the personal affidavit of the District Magistrate related to Gata No. 257 it is provided that till pronouncement of orders, parties are directed to maintain status-quo regarding Gata Nos. 256 and 257.

It is further directed that no construction shall be raised over the aforesaid Gata(s) by the parties to the proceedings and the District Magistrate is directed to ensure compliance of this order."

After the aforesaid order(s), this Court, on a query being put in Public Interest Litigation No. 560 of 2022 (Sukroo And Another v. State of U.P. and Others) related to District- Barabanki, was apprised that 4,675 cases of encroachment are pending in District- Barabanki itself.

Considering the aforesaid as also the pervasive problem of encroachment over public utility land in entire State of U.P., this Court is of the view that the officers of the State should be sensitised and also be apprised regarding the view of the Hon'ble Apex Court as also of this Court on the issue of illegal encroachment and eviction of encroachers from the Government land.

*In the case of **Hinch Lal Tiwari v. Kamala Devi**, [2001 S.C. 3215], the Hon'ble Apex Court observed as under:-*

"12. On this finding, in our view, the High Court ought to have confirmed the order of the Commissioner. However, it proceeded to hold that considering the said report the area of 10 biswas could only be allotted and the remaining five biswas of land which have still the character of a pond, could not be allotted. In our view, it is difficult to sustain the impugned order of the High Court. There is concurrent finding that a pond exists and the area covered by it varies in the rainy season. In such a case no part of it could have been allotted to anybody for construction of house building or any allied purposes.

13. It is important to notice that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain

delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution. The Government, including the Revenue Authorities i.e. Respondents 11 to 13, having noticed that a pond is falling in disuse, should have bestowed their attention to develop the same which would, on one hand, have prevented ecological disaster and on the other provided better environment for the benefit of the public at large. Such vigil is the best protection against knavish attempts to seek allotment in non-abadi sites.

14. For the aforementioned reasons, we set aside the order of the High Court, restore the order of the Additional Collector dated 25-2-1999 confirmed by the Commissioner on 12-3-1999. Consequently, Respondents 1 to 10 shall vacate the land, which was allotted to them, within six months from today. They will, however, be permitted to take away the material of the houses which they have constructed on the said land. If Respondents 1 to 10 do not vacate the land within the said period the official respondents i.e. Respondents 11 to 13 shall demolish the construction and get possession of the said land in accordance with law. The State including Respondents 11 to 13 shall restore the pond, develop and maintain the same as a recreational spot which will undoubtedly be in the best interest of the villagers. Further it will also help in maintaining ecological balance and protecting the environment in regard to which this Court has repeatedly expressed its concern. Such measures must begin at the grass-root level if they were to become the nation's pride."

*In the case of **Panna Lal vs Dm Gautam buddh nagar [2009 (108) S.C.***

***R.D. 481]**, the Hon'ble Apex Court observed as under:-*

"In these circumstances, the Principal Secretary to Government of U.P., Revenue Department, State of U.P. is hereby directed to issue necessary directions to all the District Magistrates of the State of Uttar Pradesh to ensure that the encroachments on Chakroads, Drains and other Public utility lands etc. are removed immediately after Survey and regular spot inspection by the Revenue authorities. The District Magistrates of the Districts shall direct the Sub Divisional Magistrates or the Assistant Collectors to act instantly on receiving the complaints regarding encroachments on Chakroads, Drains and Public utility lands etc. and remove the encroachments on Chakroads, Drains and Public utility lands etc. immediately by making spot inspections and after going through the relevant records. The District Magistrates shall also direct the Sub Divisional Magistrates and Assistant Collectors to decide the disputes/complaints regarding encroachments within a month from the date of receipt of such applications/complaints from any corner and take stringent and strict action with the help of the Police to remove the encroachments. The Sub Divisional Magistrates and the Assistant Collectors shall also make necessary and effective arrangements to stop future encroachments on Chakroads, Drains and Public utility lands by keeping constant vigil."

*In the case of **Jag Pal Singh vs State of Punjab and Others [2011 S.C. 1123]**, the Hon'ble Apex Court observed as under:-*

"22. Before parting with this case we give directions to all the State Governments in the country that they should prepare schemes for eviction of

illegal/unauthorised occupants of the Gram Sabha/Gram

Panchayat/poramboke/shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show-cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularising the illegal possession. Regularisation should only be permitted in exceptional cases e.g. where lease has been granted under some government notification to landless labourers or members of the Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land."

*In the case of **Om Prakash Verma v. State of U.P., [2014 (5) A.D.J. 427 (DB)]**, this Court observed as under:-*

"20. Thus, in case of failure by the land management committee or local authority to take action in accordance with Section 112-B, the Collector is duty bound to call upon the person concerned by issuing notice to refrain for causing damage or misappropriation, or to repair the damage, or to make good the loss or remove wrongful occupation and to pay damages in case of illegal occupation. The Collector has been empowered to act under Rule 115-D on an application by the Chairman and Member of Secretary of the Land Management Committee or on a report made by the Lekhpal under sub-rule

(3) of Rule 115-C, or on the report of local authority concerned or its official or on facts otherwise coming to his notice. Thus, the provision contained in Rule 115-D (d) is wide enough to permit any person to move application to the Collector for removal of unauthorized occupation from the gaon sabha land.

21. On a combined reading of Section 122-B, Rule 115-C and Rule 115-D, we have no hesitation to hold that U.P.Z.A & L.R. Act and Rules contain an adequate and appropriate procedure and statutory mechanism to take action not only to evict the illegal occupants from gaon sabha land but also to refrain any person from misappropriation and wrongful occupation of all gaon sabha lands.

23. We have also come across in various cases, the fact that even where after conclusion of the proceedings under Section 122-B of U.P.Z.A & L.R. Act, the orders for eviction and recovery of compensation for damages or misappropriation of gaon sabha land have been passed by the authorities concerned, the said orders are lying unattended and the same are not being executed. We cannot appreciate such state of affairs.

24. In view of the discussions made and reasons given above, the instant bunch of writ petitions is disposed of in the following terms:-

1. The District Collectors and other revenue authorities of the district shall ensure that the statutory duty cast on the Land Management Committee and the local authority under Section 122-B (1) of U.P.Z.A. & L.R. Act and Rule 115-C (1) and (2) of the U.P.Z.A & L.R. Rules is attended to in all seriousness.

2. The District Collectors shall ensure that Lekhpal of the area concerned attends his duty cast on him under sub-rule (3) of Rule 115-C of U.P.Z.A & L.R. Rules,

inasmuch as, the Lekhpal will report to the Collector through Tehsildar all cases of wrongful occupation of damage to; or misappropriation of the wrongful occupation of the gaon sabha property as soon as they come to his notice and in any case after the conclusion of Kharif and Rabi Partal every year.

3. The District Collectors shall also ensure that Tehsildar of the area concerned shall satisfy himself in the month of May every year that each Lekhpal has submitted reports as envisaged under sub-rule (3) of Rule 115-C of U.P.Z.A & L.R. Rules.

4. The District Collectors are also directed to take action in accordance with the provision of Rule 115-D in case of failure on the part of Land Management Committee or the local authority, as the case may be.

5. The Assistant Collector, within whose jurisdiction any illegal occupation or damage or misappropriation of gaon sabha land is reported, shall immediately institute the proceedings and conclude the same in accordance with law. The Assistant Collector (who in accordance with para 315 of Revenue Manual is the Tehsildar of the area concerned) shall not only institute the proceedings on information received/application made under Section 122-B (1) of U.P.Z.A & L.R. Act by Land Management Committee or the local authority concerned but will also act on an application moved otherwise by any person alleging therein illegal occupation on and damage caused to gaon sabha land and will conclude the same in accordance with law with expedition.

6. The District Collectors are also directed to ensure that once the order for eviction or payment of compensation as damages is passed, the same is executed at the earliest, in appropriate cases by using

such force as may be necessary. Realization of the amount of compensation for damage, misappropriation or wrongful occupation of gaon sabha land shall also be made from the person concerned as arrears of land revenue expeditiously.

7. So far as the illegal possession of the housing sites allotted to the individuals is concerned, we may refer to the provision contained in Section 122-D, which provides a complete procedure for restoration of possession of land allotted to any person for the purposes of building of house and on such land any person other than the allottee is in occupation. Under Section 122-D, as well, the Assistant Collector has been empowered to take action for restoration of the possession to the allottee of the land allotted for housing purpose, if the same is in illegal occupation of any other person.

8. Sub-section (2) of Section 122-D of U.P. Z.A. & L.R. Act provides that a person having been once evicted under Section 122-D (1) is liable to be punished with imprisonment for a term which may extend to two years and which shall not be less than three months and also with fine which may extend to three thousand rupees. Thus, in case any person re-occupies the land allotted as housing site, after once being evicted, he can be proceeded against by launching criminal prosecution under Section 122-D (2) of the Act. The District Collectors shall ensure that besides eviction proceedings under Section 122-D, criminal proceedings are also instituted against such persons.

25. In view of aforesaid observations/directions, all the writ petitions are finally disposed of with a further direction to the District Collectors and other revenue authorities of the district to take appropriate action and to act in accordance with the observations made in

this judgment and the provisions contained in U.P. Z.A. & L.R. Act and the Rules framed thereunder. The mechanism evolved under the Government Orders referred to hereinabove for monitoring the eviction proceedings and implementation of the orders of eviction shall continue."

In the case of Jagat narain and Others vs State of UP and Others [2015 (3) A.W.C. 2579], this Court observed as under:-

"29. With respect, we find that the view of the learned Single Judge holding that an order for eviction can be substituted by an order for the payment of damages in lieu of eviction is not consistent with law. In Budhaee (supra), the learned Single Judge was of the opinion that if on a 'small portion' of 100 to 200 sq. metres of land belonging to the Gaon Sabha, a person has constructed his house and the land is not reserved for any other public purpose and the house is in existence for long time, it would not be proper to direct eviction of the occupant. In Sukhdeo (supra), the learned Judge observed that if a person is in possession for more than 12 years, instead of eviction, an award of damages would be the appropriate relief. In Siya Ram (supra), the view of the learned Single Judge was that if the petitioner or any other person, who is a party to the proceedings, has constructed a house over a small portion of the land ad-measuring about 200 to 300 sq. mts. and the house is in existence for about 10 years, the Court may consider settling of the land over which the house is constructed by the occupant, on payment of market value of the land at the time of occupation. We have already indicated our reasons for disapproving this statement of law in the judgments of the learned Single Judge. The Act has not contemplated any such period nor has the Act carved out any such

category in sub-section (4-F) of Section 122-B.

30. For these reasons, we answer the reference as follows:

(i) The law laid down by the learned Single Judge in the decisions in Ajanta Udyog Mandal Vidyalay (supra), Budhaee (supra), Sukhdeo (supra), Kishore Singh (supra) and Siya Ram (and other decisions following the same line) do not reflect the correct position in law and those decisions are hence overruled;

(ii) A person against whom an order of eviction has been passed under Section 122-B would not be entitled to a protection against eviction on the grounds which have weighed with the learned Single Judges in the above cases. Once the legislature has, by enacting a specific provision in sub-section (4-F) of Section 122-B, made a specific statutory provision which overrides the other preceding sub-sections of Section 122-B, it would not be open for the Court in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution, to create a new legislative category and to issue a mandamus contrary to law;

(iii) The decision in Sukhdeo (supra) to the effect that if a person is in possession for more than 12 years, instead of eviction, an award of damages would be the appropriate relief, does not express the correct position in law. No such provision has been made by the legislature and it would not be open for the Court to introduce a new legislative category or to introduce a period of limitation as was purported to be done in the decisions of the learned Single Judge noted above.

31. The reference to the Division Bench is, accordingly, answered. The writ petition shall now be placed before the regular Bench according to the roster of

work for disposal in the light of the reference as answered."

In the case of **Dayaram Yadav and Others vs State of UP and Others, 2016 (6) A.D.J. 275 (DB)**, this Court observed as under:-

"5. Hence, we are of the view that within a period of one month from today, the Principal Secretary (Revenue) shall take all necessary steps to circulate a copy of the judgment and order of this Court dated 28 May 2014 and this judgment to all the District Collectors. The problem shall be addressed at various levels. Firstly, where there are complaints of unauthorized encroachments, these complaints must be duly registered by the District Collectors and steps have to be initiated to deal with the encroachments on public utility lands in accordance with law. In order to ensure transparency in administration, the Principal Secretary (Revenue) will formulate guidelines that would ensure that all complaints of unauthorized encroachments are registered. The details of the complaints must be maintained in a manner which is open for public inspection so that citizens are enabled to know the fate of the complaints and the proceedings which have been initiated. Secondly, the process of initiating proceedings under Section 67 must be streamlined so that the complaints are enquired into expeditiously and proceedings are adopted with due process of law and are concluded without delay. The circular shall also make provision for laying down time lines for redressal of complaints, completion of enquiries and steps to be taken for enforcement. The Principal Secretary (Revenue) is directed to highlight the mandate of Rule 67 (6) referred to above. Thirdly, where orders have been passed under Section 67 (or as the case may be in earlier proceedings under Section 122-B),

it is necessary that compliance of orders should be duly made under the applicable provisions of law.

6. Non-enforcement of orders under Section 122-B or, as the case may be, under Section 67 is also a serious matter since it amounts to dereliction of duties on the part of the administration to enforce compliance of the orders for the removal of unauthorized encroachments. Undoubtedly, the persons who are affected by proceedings and orders, are entitled to pursue their rights and remedies in accordance with law. Hence, when these issues repeatedly come before this Court, a direction is issued for the purpose of verifying whether the order continues to hold the field or is subject matter of any other proceedings before a revisional forum. Where stay has been granted and where revisional remedies are pursued, the matter must be brought to expeditious conclusion. These guidelines which we have laid down, in addition to those of the judgment of the Division Bench in *Om Prakash Verma (supra)*, are by way of guidelines to the Principal Secretary (Revenue) who is the head of the administration in such matters and matters pertaining to revenue. We now expect that the Principal Secretary shall duly apply his mind, preferably within a period of two months from today of the need to lay down a complete plan of action to ensure accountability on the part of the district administration and to ensure transparency in governance. The State is passing through a severe drought as a result of depletion of groundwater resources. Much of this situation is a result of rampant encroachments of the spaces which are earmarked for public utility purposes, including green areas, pasture lands and ponds etc. Unless serious steps are taken to

remedy the situation, the situation will become more serious than the present.

7. *In these circumstances, this Court would be constrained to reiterate the guidelines which were issued in Om Prakash Verma (supra) and to further direct the State to strengthen the procedure for enforcement so as to secure the interest of the public.*

8. *Insofar as the two lists (Annexure-14 and 15) are concerned, we direct the Collector and District Magistrate to cause a due verification of the facts which are set out in the writ petition. Where proceedings are pending, they shall be concluded expeditiously. Where orders have been passed and are awaiting enforcement, the district administration shall take necessary steps in accordance with law after verifying that the orders continue to hold the field and have not been stayed or modified by any higher forum."*

*In the case of **Ram Laut vs State of U.P. and Others [2016 (34) L.C.D. 2458]**, this Court observed as under:-*

"8. Without entering into merits of the case, am of the considered view that the petitioner being complainant cannot be necessary or proper party in the proceedings initiated under section 122-B U.P.Z.A.&L.R. Act or the revision preferred thereafter and on that basis file the instant writ petition. He cannot be said to be a "person aggrieved".

*In the case of **Ram Bihari Dwivedi vs State of U.P. and Others [2017 (135) RD 156]**, this Court observed as under:-*

"15. It is settled law that a valid survey must necessarily be made on the basis of fixed points. No fixed points are mentioned either in the report or in the map prepared after the alleged survey. Moreover, the map does not contain any measurements. The report therefore was

not in accordance with law and could not be the basis of the impugned order.

16. *Accordingly, I set aside the impugned order dated 02.06.2006 and remand the matter back to the revisional Court, the Chief Revenue Officer to ensure that a proper survey is conducted on the basis of fixed points and after recording the measurements made during the survey, in the map.*

21. *Writ petition no. 37953 of 2006 is allowed and the matter is remanded to the Chief Revenue Officer to proceed in accordance with the directions contained in the body of the judgment."*

*In the case of **Sri Raju vs State of U.P. and Others [2020 (38) LCD 398]**, this Court observed as under:-*

"14. Merely because a person lower in order of preference has encroached upon Gaon Sabha land, he cannot and should not be granted the benefit of Section 67A unless and until he is in a position to establish categorically that a person higher in preference is not available in the village. Any other interpretation of Section 67A would result in great injustice as an unauthorized occupant would be liable to be granted its benefit only on account of him or her having illegally encroached upon Gaon Sabha property, despite other needier and persons higher in preference being available in the village.

15. *Therefore, and for the reasons given above, this Court is constrained to hold that not only is the land in issue in this writ petitions not land governed by Section 63 of the Code, as it has not been reserved for allotment as abadi site, the petitioners are also, prima facie, not eligible to the benefit of Section 67A as their applications are bereft of necessary pleadings. Therefore on both*

counts the benefit of Section 67A cannot be extended to the petitioners."

*In the case of **Ghanshyam Verma vs State of U.P. [2021 (39) LCD 2021]**, this Court observed as under:-*

"20. In the present case the proceedings were drawn against the opposite party No. 5 with respect to 'Naveen Parti' land which is vested in Gaon Sabha, however, the notice was withdrawn on the ground that the opposite party No. 5 did not encroach over the land. Every member of Gram Panchayat has a right of user over Gaon Sabha land subject to the provisions of law in this regard, which is for the benefit of its members. It is also the duty of every member not only not to encroach but also to see that it is not encroached upon by others to protect the interest of the Gaon Sabha. The petitioners being members of the Gaon Sabha and the land being 'Naveen Parti' vested in Gaon Sabha, which they allege to have been encroached upon would be 'person aggrieved' from the order of the Assistant Collector by which the notice issued to the alleged encroacher has been withdrawn as by encroachment of Gaon Sabha land the benefits which the members of the Gaon Sabha may be legally entitled to receive, would be deprived of that entitlement."

In view of the aforesaid, the Principal Secretary/Additional Chief Secretary, Revenue, shall file an affidavit within eight weeks on the following points:-

(i) The number of pendency of cases pertaining to encroachment of Gaon Sabha land in entire state of U.P. and the total area involved therein.

(ii) The reasons for not deciding the pending cases, related to encroachment, instituted after enforcement of U.P. Revenue Code, 2006 in stipulated time i.e. 90 days provided under U.P. Revenue Code Rules, 2016 framed under

U.P. Revenue Code, 2006 as also the reasons for not concluding the proceedings of cases of the same nature instituted under the provisions of U.P. Z.A. & L.R. Act and Rules made thereunder.

(iii) The suggestions related to early disposal of cases pertaining to encroachments.

(iv) What action has been taken against the erring revenue officials for not taking proper action regarding the encroachments over Gaon Sabha/Public Utility Land in due time.

For the aforesaid, the Principal Secretary/Additional Chief Secretary, Revenue is expected to take note of the relevant statutory provisions viz. Sections 122B(1) and 122D(1) of U.P. Z.A. & L.R. Act; Rule(s) 115A(1), 115C, 115D, 115F and 115J of U.P. Z.A. & L.R. Rules; Rule 47 of Panchayat Raj Rules; Chapter II, Chapter A-V and Chapter XXXVII of Land Record Manual; Section 60, 61 and 67 of U.P. Revenue Code, 2006 read with the Rules framed thereunder, Governments Orders on the issue and also the judgments, referred above.

So far as the interim order dated 29.08.2022 passed by this Court is concerned, the same is modified in following terms:-

(i) No further damage shall be caused to Old Ram Janki Temple.

(ii) Construction of New Ram Janki Temple be completed as per the norms settled under the supervision of Sub Divisional Magistrate, Tehsil- Bilgram, District- Hardoi.

(iii) A detailed enquiry be conducted regarding demolition of Old Ram Janki Temple by District Magistrate and submit the report to this Court by the next date of listing.

(iv) District Magistrate shall also apprise this Court about the feasibility of

restoration/construction of Old Ram Janki Temple.

(v) The Revenue Officials shall not permit any encroachment over the Gatas, in issue.

List/put up this case on 15.02.2023 within top five cases.

Senior Registrar of this Court is directed to send a copy of this order to the Chief Secretary, State of U.P."

3. In compliance of the directions of this Court issued in the order dated 05.8.2022, the District Magistrate, Hardoi has filed a personal affidavit on 29.08.2022. Further, the District Magistrate, Hardoi has also filed a short counter affidavit dated 15/16.02.2023 to apprise the Court that the directions being issued by this Court in the present PIL have been followed in its letter and spirit. Besides, the relevant documents/ revenue records and the coloured photographs of the site in question have been filed to show the bonafide of the Competent Revenue Officers/ Officials. Not only the above, the personal affidavit of the Principal Secretary, Department of Revenue, Government of U.P., Lucknow has been filed on 16.02.2023. Thereafter, one short counter affidavit of the Principal Secretary of the Department of Revenue, U.P., Lucknow has been filed on 22.03.2023 to demonstrate that the Department of Revenue has complied with the directions of this Court issued vide order dated 19.12.2022 in its letter and spirit enclosing therewith the copy of report thereof from all the Districts of Uttar Pradesh, Government Orders and the orders being issued by the Board of Revenue etc.

4. Besides, the District Basic Education Officer, Hardoi has filed counter affidavit on 28.08.2022 and the private

opposite party Nos.6, 7 & 8 have also filed their counter affidavit on 14.02.2023.

5. Having perused the PIL, personal affidavits, short counter affidavit and the counter affidavits viz-a-viz enclosures which have been annexed with those affidavits and the contentions of learned counsel for the parties, it would be apt to observe that the prayers prayed in the instant PIL are appearing to have public interest at large but after considering the counter affidavit of the private opposite party Nos.6, 7 & 8 wherein the recital has been given that the present PIL has been filed having ulterior motives and extraneous design inasmuch as having grievance pitches up of private nature the present PIL has been filed, therefore, I would first examine the aforesaid aspect.

6. In para-4 of the PIL, the petitioner has stated that he has no personal or private interest in the matter and the result of the PIL would not lead any undue gain to him or anyone associated with him, but para-22 thereof indicates about Gata No.s234, 256, 257-Kha and 255 which are allegedly the public utility land, however, in the first prayer the Gata Nos. i.e. 256 & 257-Kha have been said to be a public utility land. Therefore, from bare perusal of the contents of the PIL it is not clear that as to why other than Gata Nos.234 & 255 have been indicated in para-22 of the PIL. As per copies of the Khatauni annexed with the PIL as Annexure Nos.3, 4 & 5 which have been indicated in para-22 and the ground No.(viii) of the PIL Gata No.255 is not a public utility land, therefore, it is unable to comprehend as to why the Gata No.255 has been indicated in the PIL.

7. Learned counsel for the private opposite party Nos.6, 7 & 8 has indicated

in paras-4 & 5 of the counter affidavit that the present PIL has been filed by the petitioner so as to safeguard his property situated at Gata No.255 enclosing therewith the copy of the civil suit filed for permanent injunction bearing Civil Suit No.32 of 2022,, pending before the court of Civil Judge, Senior Division, Hardoi, therefore, it has been stated that the present PIL may not be treated as PIL but it has been filed in a personal interest of the petitioner. It has also been indicated in the counter affidavit that the Gata No.255 is recorded in the name of the petitioner. The Gata No.256 is recorded as Ramjanki Mandir and Gata No.257-Kha is recorded as Abadi and Purana Mandir in the revenue record.

8. Further attention has been drawn towards copy of the Civil Suit (Annexure No.1 of the SCA) wherein the present petitioner is plaintiff No.2 whereas the private opposite party Nos.6, 7 & 8 of this PIL are the defendant Nos.1, 2 & 3 of the aforesaid suit. The subject matter of the aforesaid suit is Gata No.255 wherein the petitioner and other plaintiffs prayed that the decree be issued against the defendant Nos.1, 2 & 3 (the opposite party Nos. 6, 7 & 8 of the present PIL) restraining them not to cut the old trees standing on the aforesaid gata number and not to demolish the shops constructed on the aforesaid gata.

9. Learned counsel for the private opposite party Nos.6, 7 & 8 has stated that recital to this effect has not been given in the PIL. However, in paras-20 to 22 of the PIL the petitioner has given recital to the effect that the opposite party Nos.6 7 & 8 are illegally cutting down the green trees without any permission of the Competent Authority which were standing on the public utility land. The petitioner has stated

that the Gata Nos.234, 256, 257-Kha and 255 are the public utility land. The specific grounds to that effect have been taken in this PIL vide ground Nos. (v) to (vii). Therefore, it is clear that the petitioner has indicated some facts in the PIL which have been indicated in a civil suit but it has not been indicated in the PIL that he has filed any civil suit which is pending consideration before the Civil Judge, Senior Division, Hardoi. In view of the above, the present PIL may not be said to have been filed in a bonafide manner but it is an outcome of malafide intention of the petitioner having ulterior motives and extraneous design in his mind to file this PIL concealing relevant facts.

10. Having considered the aforesaid facts and circumstances, I would like to refer para-10 of the dictum of Apex Court rendered in the case in re: **Gurpal Singh vs. State of Punjab and others** reported in **(2005) 5 SCC 136**, which reads as under:-

"10. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fide and not for personal gain or private motive

or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

11. Further, the Apex Court in its very well celebrated judgment rendered in re: **State of Uttaranchal vs Balwant Singh Chaufal and others** reported in (2020) 3 SCC 402 has considered the finer aspects relating to the PIL and has observed that the PIL which has been filed having ulterior motives and extraneous design must be dismissed. Paras-143, 144, 145, 170 & 180 are being reproduced here-in-below.

"143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non- monetary directions by the courts.

"144. In BALCO Employees' Union (Retd.) v. Union of India & Others, (2002) 2 SCC 333: AIR 2002 SC 350, this Court recognized that there have been, in recent times, increasing instances of abuse of public interest litigation. Accordingly, the court has devised a number of strategies to ensure that the attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. Firstly, the Supreme Court has limited standing in PIL to individuals "acting bonafide." Secondly, the Supreme Court has sanctioned the imposition of "exemplary costs" as a deterrent against frivolous and vexatious public interest litigations. Thirdly, the Supreme Court has instructed the High Courts to be more selective in entertaining the public interest litigations.

145. In S. P. Gupta v. Union of India, 1981 Supp SCC 87, this Court has found that this liberal standard makes it critical to limit standing to individuals "acting bona fide. To avoid entertaining frivolous and vexatious petitions under the guise of PIL, the Court has excluded two groups of persons from obtaining standing in PIL petitions. First, the Supreme Court has rejected awarding standing to "meddlesome interlopers". Second, the Court has denied standing to interveners bringing public interest litigation for personal gain.

170. In Dattaraj Nathuji Thaware v. State of Maharashtra (2005) 1 SCC 590, this court again cautioned and observed that the court must look into the petition carefully and ensure that there is genuine public interest involved in the case before invoking its jurisdiction. The court should be careful that its jurisdiction is not abused by a person or a body of persons to further his or their personal causes or to satisfy his or their personal grudge or grudges. The

stream of justice should not be allowed to be polluted by unscrupulous litigants.

180. In our considered view, now it has become imperative to streamline the PIL."

12. In view of the facts and circumstances of the present PIL as considered above as well as the dictums of Apex Court in re: Gurpal Singh (supra) and Balwant Singh Chaufal (supra), I find that the present PIL has not been filed in a bonafide manner inasmuch as the relevant facts have been concealed and it appears that so as to settled the private score with the private opposite parties the petitioner has filed the present PIL, therefore, the present PIL is liable to be dismissed on the aforesaid ground alone. However, before filing the counter affidavit by the private opposite parties on 14.02.2023 this Court has passed a detailed order on 19.12.2022 (supra). Not only the above, in a personal affidavit of the District Magistrate, Hardoi dated 29.08.2022 the fact that any civil suit between the petitioner and the private opposite parties is pending consideration has not come into the notice of this Court, however, it has been indicated that Gata No.255 is not a public utility land but the aforesaid gata is recorded in the name of the petitioner and other co-tenure holders in the revenue record and this fact may be ascertained from Form CH-41 & CH-45 also. Therefore, the fact that one civil suit between the petitioner and the private opposite parties is pending consideration has come to the notice of this Court when the private opposite parties have filed their counter affidavit on 14.02.2023.

13. Since the aforesaid relevant fact was concealed, therefore, this Court has not observed anything regarding the aforesaid fact in its detailed orders dated 05.08.2022,

29.08.2022 and 19.12.2022. However, in compliance of the orders of this Court the appropriate steps have been taken by the Competent Revenue Officers i.e. the Principal Secretary, Revenue and the District Magistrate, Hardoi and those proper steps being taken by the Principal Secretary, Revenue are, of course, in the public interest and those steps would definitely be beneficial for the public interest at large viz-a-viz for the public utility land of the Gaon Sabhas of the entire Uttar Pradesh. Therefore, those proper steps would necessarily be made part of this order so that any illegal encroachment on any public utility land of the Gaon Sabha concerned be vacated/ removed in the light of those modalities and if any Competent Revenue Officer/ Official does not discharge his/ her duties strictly in terms of law as prescribed under the U.P. Revenue Code, rules thereof and the other statutory prescriptions relating to revenue / land laws, suitable and appropriate action may be taken against those erring officers/ officials.

14. Even though the malafide conduct of the petitioner of the PIL concealing the relevant fact convinces the Court to dismiss the PIL with the costs but if the present PIL is dismissed with costs, the appropriate and needful steps which have been taken by the State of U.P. to ensure that the public utility land of the Gaon Sabhas of the entire Uttar Pradesh is free from the encroachments and the same be existed in a same manner as has been indicated in the revenue record, would be frustrated and the Competent concerning Revenue Officers/ Officials would think that the PIL in question has already been dismissed, therefore, there is no need to abide by any of the directions issued in the aforesaid PIL. Therefore, instead of dismissing the

instant PIL with costs for the reasons indicated here-in-above, I am finally disposing of this PIL considering the proper and appropriate steps which have been taken on behalf of the State of U.P. making those steps, modalities and informations as a part of this order so that in future those steps etc. be considered as an example and instances. Besides, further directions which are being issued in this order shall also be followed in its letter and spirit.

15. In the short counter affidavit of the District Magistrate, Hardoi dated 15/16.02.2023, it has been categorically indicated that in compliance of the order dated 19.12.2022 the District Magistrate, Hardoi constituted a Team on 23.12.2022 under the Chairmanship of the City Magistrate, Hardoi with other members i.e. the Sub-Divisional Magistrate, Bilgram, Additional/ Incharge Officer Record Room, Consolidation Officer, Hardoi and the Circle Officer, Bilgram. The aforesaid team submitted the consolidated report on 08.02.2023. During investigation/ inquiry by the aforesaid team, the petitioner was asked to remain present at the time of investigation/ inquiry on 27.01.2023 and 06.02.2023 and the petitioner was present before the aforesaid Team. The aforesaid Team has submitted their exhaustive report on 08.02.2023. As per the aforesaid report, during spot inspection it was found that the said temple was already completely destroyed before filing the instant PIL for the reason that there was one huge Baniyan tree near the wall of the temple and huge branch of the aforesaid tree fell on the roof of the temple two years ago, resultant thereof, the roof and wall of the temple were damaged and an attempt was made to repair and improve the same but due to excessive damage the temple might

collapse at any time. Therefore, due to fear of any loss of life a new temple was constructed after a meeting of Gaon Sabha and on suggestions of many villagers all of Idols and Deities were repaired. The aforesaid temple completely belongs to the Gaon Sabha. No illegal possession over the temple or any part of the temple or any part of gata over which the temple is situated has been found. There are some shops constructed on such gata to sell out the 'Prasad and Puja Samagri' which were being tried to be encroached by the petitioner for the reason that the temple fence and the petitioner's garden are one in fence. Therefore, it was easy for the petitioner to encroach the shops of the temple. However, after the order passed by this Court the status-quo has been maintained on the spot.

16. As per the report dated 08.02.2023, at present the Gata No.256/0.122 hectare is recorded as Ram Janki Temple. On partial part of the said land i.e. 0.0270 hectare (15 mts. in North, 15 mts. in South, 15 mts. East and 25 mts. West) the new building and Dharmshala are partially built. Rest of the Raqba is being used as Temple.

17. In the same way, the Gata No.257-Kha/0.051 hectare is recorded as abadi land. On 6x3 mts.=0.001 hectare of the said land there is Shiv Temple (Old Shiv Temple) and on 4.40x1.5 mts = 0.0006 hectare there is new platform built and on which idols of deities are installed. Adjacent to this, there is a room of area 5.50 x 4.40 mts. = 0.0024 hectare. Rest of the raqba is in use as Temple building. In addition to this, on 0.0165 hectare (12 mts. West, 16 mts. East, 15 mts. North and 8.5 mts. South) of Gata No.257-Ka/0.0510 hectare, new building of Ram Janki Temple

and Dharamshala are partially built. Rest of raqba is in use as Temple building.

18. As per the aforesaid report, the petitioner gave his statement during inspection on 27.01.2023 and 06.02.2023, as copies of his statement have been enclosed with the short counter affidavit. He has stated that the old Ram Janki Temple is 150-200 years old and the said Temple was encroached by the Gram Pradhan and his brother and they raised constructions also by raising shops etc. The said constructions were stopped after the order of this Court. The new Temple has been build on the land of Shri Ram Janki Temple which has been named after death of his father late Ramji. This Ram Janki Temple was 150-200 years old and the Temple was built in a strong condition, which was demolished by the present Village Pradhan Satyendra Pratap Singh S/o late Ramji Kanojia and his two brothers, namely, Ramendra Pratap Singh and Gyanendra Pratap Singh from March, 2022. It has been demolished, its debris has been deposited in Gata No.258 of the pond and all the tree in Gata No.257 have been cut. The private shops and other walls have been erected by the Village Head and his two brothers for their selfishness, should be removed from here on the said land of the old Temple and after recovering money from these people, the government money will be used for the same. The Temple should be constructed accordingly.

19. During inspection, it came to notice that the old dilapidated Temple was demolished by the Village Head without obtaining permission from the government and a new Temple was constructed without informing the District Administration. The aforesaid act of the Village Head was considered against the provisions of U.P.

Punchayat Raj Act, 1947, therefore, the Government Order issued in this regard, for which notices under Section 95 of the U.P. Panchayat Raj Act has been issued against Sri Sachendra Singh. Copy of the notice has been annexed with the short counter affidavit.

20. Gata No.256/0.1120 hectare and Gata No.257-Kha/0.0510 hectare are a public utility land. Without the proposal of Land Management Committee it was completely unfair to do the constructions work on them and the then Area Lekhpal and the Revenue Inspector did not provide any information in his regard to the Tehsildar, Bilgram and the Sub-Divisional Magistrate, Bilgram for which the then Lekhpal and Revenue Inspector have been found guilty and adverse entry was given to the then Area Lekhpal Mr. Bandhu Lal and stern warning was given to the then Incharge Revenue Inspector Mr. Makrand Prasad Verma. The show cause notice has been issued to the Tehsildar, Bilgram and Sub-Divisional Magistrate, Bilgram for laxity and discharging the supervisory responsibility.

21. As per the aforesaid report, after 29.08.2022 no new construction has been done on the aforesaid gata numbers. Since some part of Gata No.234 has been illegally encroached by the son of opposite party No.8, the Tehsildar, Bilgram has initiated proceedings against him under Section 67 of the U.P. Revenue Code, 2006 and the order has been passed on 06.02.2023 on merits. Further, in the entire district of Hardoi the required exercised under Section 67 of the Code, 2006 and Section 122-B of U.P. Zamindari Abolition & Land Reforms Act, 1950 has been undertaken by instituting total 1529 cases for removal of illegal encroachment on

137.1665 hectare land of Gaon Sabha and strict directions have been issued to all the Tehsildars to decide those cases within the prescribed time of 90 days. Photographs are annexed with the short counter affidavit.

22. Therefore, learned Chief Standing Counsel has stated that in fact the prayers so prayed in the present PIL have been satisfied and the instant PIL has now been rendered infructuous.

23. However, further attention has been drawn towards the personal affidavit and short counter affidavit of the Principal Secretary, Department of Revenue, U.P. dated 16.02.2023 and 22.03.2023 respectively to apprise that some more decisions have been taken in compliance of order of this Court dated 19.12.2022 (*supra*) to streamline the Competent Revenue Officers/ Officials to discharge their respective duties to removed the illegal encroachments over the public utility land of Gaon Sabhas of entire Uttar Pradesh. Those modalities and required steps are made part of order as under:-

"7. So far as the early disposal of the cases pertaining to encroachments are concerned, the State Government and the Board of Revenue Authorities are reviewing the pending revenue cases for their expeditious disposal on merits. Also several directions have been given to the Commissions and the District Magistrates to monthly review the case status in various revenue Courts under their jurisdiction.

A. The Government Order dated 27.03.2018, copy of which is being annexed as Annexure No.CA-5 to this affidavit. Commissioners and the District Magistrates to review the case status in various revenue courts coming under their jurisdiction.

B. Board of Revenue order dated 18.09.2018 and Government Order dated 28.12.2021, copy of which are being annexed as Annexure No.CA-6 & CA-7 to this affidavit. Direction to all the District Magistrates for expeditious disposal and review of matters pertaining to Section 67 and Section 34 of the U.P. Revenue Code, 2006.

C. Board of Revenue order dated 09.09.2022, copy of which is being annexed as Annexure No.CA-8 to this affidavit. Direction to the Commissioners and the District Magistrates of all the districts to review the case status in various revenue courts coming under their jurisdiction. To identify officers who are not disposing the revenue cases in time bound manner and to give adequate entries in the ACR of the officer concerned.

D. Board of Revenue order dated 18.11.2022, copy of which is being annexed as Annexure No.CA-9 to this affidavit and the Government Order dated 26.12.2022, copy of which is being annexed as Annexure No.CA-10 to this affidavit. Direction to the Commissioners and the District Magistrates of all the districts to inspect revenue courts in their jurisdiction.

E . Board of Revenue order dated 12.12.2022, copy of which is being annexed as Annexure No.CA-11 to this affidavit. Direction to the District Magistrates of all the districts to review in the end of November, 2022 and to ensure the expeditious disposal of cases on merits by Presiding Officer.

8. So far as the action taken against the erring Revenue Officials is concerned, it is submitted that the Commissioners and the District Magistrates of all the districts have been directed for expeditious disposal of revenue cases on merits. It is also submitted that required information regarding the erring

Revenue Officials has been sought vide letter dated 19.01.2023 and so far information from 14 districts have been received, detailed information from each district has been enclosed with this affidavit. Reminder letter dated 10.02.2023 has also been sent to all the districts for providing required information in pursuance of the order dated 19.12.2022."

24. The aforesaid information has been supplied through personal affidavit of the Principal Secretary, Department of Revenue, U.P., Lucknow and some further time has been prayed to apprise some more information in respect of other districts.

25. In continuation to the personal affidavit of the Principal Secretary, Department of Revenue, U.P., Lucknow he has also filed short counter affidavit on 22.03.2023 indicating therein the reason as to why the illegal encroachments are not removed promptly and the modalities and directions being issued for entire U.P. to do the needful exercise for removing illegal encroachment with promptness. Paras-4 to 7 of the short counter affidavit dated 22.03.2023 are being reproduced here-in-below:-

"4. That in pursuance thereof report was sought from all the districts vide letter dated 19.01.2023. This letter asking for relevant information was sent by the Board of Revenue, U.P., Lucknow. Information sought has been supplied to the petitioner by way of a report dated 15.03.2023 and the copy of the same is being annexed as Annexure No.SCA-1 to this affidavit.

5. As far as the reasons for not deciding the pending cases are concerned, it is respectfully submitted as under:-

(a) Due to the strike of the learned advocates and Bar Councils.

(b) Because Presiding Officers of the Court concerned are busy with administrative duties.

(c) Because the parties concerned don't argue the case on the date fixed and time for filing objections, evidence etc. are being taken by them.

(d) A lot of time was taken up by the COVID-19.

6. So far as the early disposal of the cases pertaining to encroachments is concerned, State Government and the Board of Revenue Authorities are reviewing the pending revenue cases for their expeditious disposal on merits. Also several directions have been given to the Commissioners and the District Magistrates to monthly review the case status in various revenue courts under their jurisdiction:-

A. Government Order dated 27.03.2018, copy of which is being annexed as Annexure No.SCA-2 to this affidavit. The Commissioners and the District Magistrates to review the case status in various revenue courts coming under their jurisdiction.

B. Board of Revenue order dated 18.09.2018 and the Government Order dated 28.12.2021, copy of which are being annexed as Annexure Nos.SCA-3 & SCA-4 to this affidavit. Direction to all the District Magistrates for expeditious disposal and review of matters pertaining to Section 67 and Section 37 of the Revenue Code, 2006.

C. Board of Revenue order dated 09.09.2022, copy of which is being annexed as Annexure No.SCA-5 to this affidavit. Direction to Commissioners and the District Magistrates of all the districts to review the case status in various revenue courts coming under their jurisdiction. To identify officers who are not disposing of

the revenue cases in time bound manner and to give adequate entries in the ACR of the officer concerned.

D. Board of Revenue order daed 18.11.2022, copy of which is being annexed as Annexure No.SCA-6 to this affidavit and the Government Oder dated 26.12.2022, copy of which is being annexed as Annexure No.SCA-7 to this affidavit. Direction to Commissioners and the District Magistrates of all the districts to inspect the revenue courts in their jurisdiction.

E. Board of Revenue order dated 12.12.2022, copy of which is being annexed as Annexure No.SCA-8 to this affidavit. Direction to the District Magistrates of all the districts to review in the end of November, 2022 and to ensure the expeditious disposal of cases on merits by the Presiding Officer.

7. So far as the action taken against the erring Revenue Officials who have failed to take proper action regarding removal of encroachment from Gaon Sabha/ Public Utility Land in due time is concerned, the following is submitted:-

A. Show cause notice has been issued against 05 Sub-Divisional Magistrates and charge-sheet against one Sub-Divisional Magistrate has been sent to the State Government for approval.

B. 'Kathor Chetavani' has been given to 11 Tehsildars.

C. F.I.R. has been registered against one Naib Tehsildar.

D. F.I.R. has been registered against one Revenue Inspector. One Revenue Inspector has been given 'Kathor Chetavani'. Departmental proceedings have been initiated against 06 Revenue Inspectors and one Revenue Inspector has been suspended.

E. F.I.R. has been registered against 06 Lekhpals. 29 Lekhpals have

been given 'Kathor Chetavani'. Departmental proceedings have been initiated against 13 Lekhpals, adverse entry has been awarded to 18 Lekhpals and 29 Lekhpals have been suspended.

F. One Beet Incharge, one Executive Engineer, Irrigation Department have been given 'Kathor Chetavani'.

Copy of the report provided by all the districts regarding action taken against the erring officials is being annexed as Annexure No.SCA-9 to this affidavit."

26. In the order dated 19.12.2022 (supra), this Court has issued certain directions having regard to the specific mandate being issued by the Apex Court in certain cases e.g. **Hinch Lal Tiwari** (supra), **Panna Lal** (supra), **Jag Pal Singh** (supra) as well as the decisions of this Court in re: **Om Prakash Verma** (supra), **Jagat Narayan** (supra), **Daya Ram Yadav** (supra), **Ram Laut** (supra), **Ram Bihari Dwivedi** (supra), **Sri Raju** (supra) and **Ghanshyam Verma** (supra) and the Competent Revenue Authority has issued certain guidelines and the directions for all the Competent Revenue Officers/ Officials of the State of U.P., as considered here-in-above. Therefore, it is directed that all the Competent Revenue Officers/ Officials of the State of U.P. shall abide by the mandate and the directions being issued by the Apex Court, by this Court as well as by the Department of Revenue, U.P. in its letter and spirit, failing which, the strict and stringent action may be taken against those erring Officers/ Officials.

27. Further, it is reiterated that while following the aforesaid directions, the Competent Revenue Officers/ Officials shall also abide by the specific mandate, modalities and the legal formalities as has been issued/ mandated under the U.P.

Revenue Code, 2006, rules thereof 2016, U.P. Land Revenue Act, 1901 and ancillary rules etc. thereof, U.P. Zamindari Abolition & Land Reforms Act, 1950 and ancillary rules etc. thereof and the U.P. Consolidation of Holdings Act, 1953 and ancillary rules thereof as well as all other rules, regulations, manuals etc. dealing with the affairs relating to the revenue and consolidation matters in its letter and spirit. Those guidelines, circulars and government orders, which have been issued by the Revenue Department of the State of U.P. which have been considered in this order, shall be part of this order. Therefore, all the Competent Revenue Officers/ Officials are directed to treat those guidelines etc. as a mandamus being issued by this Court.

28. Sometimes it has been noticed that appropriate exercise/ steps are undertaken by the Competent Revenue Authority to remove the illegal encroachments from the public utility land of Gaon Sabha within a reasonable time and appropriate orders are also passed within a time prescribed under the law but no serious and appropriate steps are taken to execute those orders well in time, resultant thereof, the illegal encroachments etc. persist for quite long time and the very purpose to take prompt steps is frustrated. In some cases, I have seen that appropriate orders to remove the illegal encroachment are passed in the year 2000 or 2001 or 2002 or 2003 so on so forth as per rules but those orders have not been executed till the year 2023 and when any PIL or other writ petitions are filed then those facts are ascertained and verified. It not only gives pain to the Court but it results into anguish and in those cases an appropriate and suitable action is required against the erring Officers/ Officials. The excuse so taken by the concerning Officers/ Officials is that, an

application for recall of earlier order is pending consideration but when the specific instructions to that effect is called, the fact emerges that if the order was passed in the year 2000 or later on, the recall application is filed in the year 2022 or 2023 and on account of non disposal of such application the illegal encroachment is not removed. Notably, no proper steps have been taken immediately after the first order having been passed by the Tehsildar concerned.

29. Sometimes those applications are disposed of, thereafter the illegal encroacher avails a legal remedy to file appeal and on account of pendency of such appeal the illegal encroachment is not removed. To meet out the aforesaid unwarranted situation the Competent Revenue Officer i.e. the Assistant Revenue Collector, Ist Class / Officials must execute the first order being passed for removal/ vacation of illegal encroachment at the earliest as prescribed under the law so that if any person is aggrieved from such order either he would file an application for recall of order or he may challenge that order before the Appellate Authority and both the aforesaid applications/ appeal, as the case may be, should be decided at the earliest so that just after attaining finality of the proceedings the appropriate steps may be taken to remove the illegal encroachment over the public utility land. In that way, not much time would be consumed in removing the illegal encroachment.

30. It appears that keeping the appropriate steps pending for unlimited period or for substantially long period, the concerning Revenue Officers/ Officials might be having some ulterior motives and extraneous design in their mind or they are so callous or casual in discharging their

duties as per law and in both the cases the appropriate and suitable action must be taken against those erring Officers/ Officials. Therefore, the Sub-Divisional Officer, or District Magistrate, or Commissioner or the Board of Revenue, as the case may be, must be vigilant on this aspect and those officers must develop a mechanism to notice the aforesaid casual or callous approach of erring Officers/ Officials with promptness and as soon as such fact comes into notice of those Competent Officers, the required exercise to take appropriate and suitable action against the erring Officers/ Officials should be initiated strictly as per law.

31. The sense of deterrence is must inasmuch as unless and until the concerning Revenue Officers/ Officials are warned that if they commit any misconduct or show their callous approach in discharging their legal duty they shall be subjected to appropriate action/ punishment, the sense of responsibility towards discharging their duties as per law would not be improved and increased. At the same time, if the concerning Revenue Officers/ Officials discharge their duties as per law with promptness and the illegal encroachment etc. is removed well in time, those officers should be appreciated so that the other Revenue Officers/ Officials could aware that in case of good conduct they shall be appreciated and in case of misconduct they shall be punished. If the proper modalities are formulated on the aforesaid aspect, the work culture would definitely be improved which is necessary for betterment of not only affairs of all the villages of the State of U.P. but also for the country inasmuch as the soul of the country lives in the villages. Besides, in a democratic set up of the country where the three tier system of governance is

applicable, the affairs of the villages etc. is an integral part of that three tier system.

32. This Court noticed the judgment and order dated 02.12.2022 passed by this Court in the bunch of writ petitions bearing leading writ petition ***Writ-C No.6658 of 2022; Rishipal Singh vs. State of U.P. & others and other connected writ petitions reported in 2022 SCC OnLine All 829***, wherein almost similar question has been adjudicated and proper guidelines have been issued, which are necessary to be adhered by the competent Revenue Authorities in its letter and spirit besides the directions so issued in this order. In para-3 the question has been cropped up and in para-75 the guidelines have been issued, which are being reproduced here-in-below:-

“3. The common question of law that arises for consideration relates to the procedure to be adopted by the revenue authorities in exercise of their power under Section 67 of the U.P. Revenue Code, 2006 (hereinafter referred to as “Revenue Code”) and Section 26 thereof.

75. Thus, in my view, following guidelines be adopted as procedure to be applied to proceedings under Sections 67, 67A and 26 of the U.P. Revenue Code. It is all aimed at ensuring transparency in the procedure, judiciousness in approach by the authorities and to thwart every complaint made with ulterior and oblique motive to dislodge a long settled possession and causing of unnecessary harassment to an innocent villager:

(i) In case of complaint made on RC From 19, the official making it shall ensure that proper survey is done in the light of observations made in this judgment; the land, occupation of which has stood identified to be unauthorized is in

exact measurement and so also shown in the survey map prepared on scale, as per the Land Revenue Survey Regulations, 1978; the exact assessment of damages on the basis of circle rate with details of calculation made on that basis.

(ii) In a case of suo motu action, before issuing RC Form 20, the authority will ensure that proper report upon RC Form 19 is submitted as per para (i) above on parameters of sub rule 1 Rule 67.

(iii) RC Form 20 must be accompanied by a copy of report and spot survey submitted alongwith RC Form 19 to the person against whom proceedings have been instituted, or even otherwise submitted in case of suo motu action vide para (ii) above.

(iv) Upon reply being filed to the notice, if authority finds that spot survey/explanation report is not satisfactory, it may order for a fresh spot report to be prepared in presence of the party aggrieved.

(v) In the event, objection includes a plea of statutory protection/ benefit under Section 67-A, the authority should invite the objection from the Gaon Sabha, and will decide the same alongwith the matter under Section 67, without requiring aggrieved party to move separate application under Section 67-A.

(vi) If the report is admitted on record, may be in case no objection is filed, the authority must ensure presence of the person preparing the report before it, to prove the report by his statement, with a right to aggrieved party to cross question him.

(vii) The authority must endeavour to decide the case within time framed provided under the relevant Act and the Rules and should desist from granting adjournment to the parties in a routine manner.

(viii) In case of appeal under Section 67(5) of the U.P. Revenue Code, 2006, preferred/ filed within the time prescribed alongwith interim relief application, the interim relief application as far as possible should be decided within two weeks' time with prior notice to other side and where plea of settlement under Section 67-A has been taken before Assistant Collector-1st Class, and damages to the tune of 25% at-least of the total damages are paid and an affidavit of undertaking is filed for not raising any further construction upon the land in question, the authorities including civil administration should avoid taking any coercive measure pursuant to the order appealed against until the disposal of interim relief application. The Appellate authority may also consider granting interim relief on the very first day of filing of appeal with stay application if above conditions are fulfilled by the appellant.

(ix) The appellate authority should as far as possible decide the appeal within a period of two months of its presentation."

33. So far as the present PIL is concerned, the perusal of all the material which have been considered above make it crystal clear that the prayers prayed in the instant PIL have been addressed, rather, some more positive steps have been taken by the Revenue Department of the State of U.P.. Some further directions have been issued here-in-above and those directions shall be followed in its letter and spirit. Further, the guidelines and directions so issued by the Revenue Department of U.P. shall be treated as directions being issued by this Court and the Competent/ concerning Revenue Officers/ Officials shall abide by all the aforesaid directions in its letter and spirit, failing which, the

responsibility should be fixed not only upon the senior most Revenue Officer of the State of U.P. but also upon the Competent / concerning Revenue Officer/ Official of U.P. who is/ are in the down line of the Revenue Officers.

34. Let copy of this order be provided to the Additional Chief Secretary/ Principal Secretary, Department of Revenue, State of U.P. by the Senior Registrar of this Court within seven working days and the aforesaid officer shall circulate this order to the Board of Revenue as well as to all the District Magistrates of State of U.P. for its compliance.

35. It is needless to say that for making compliance of the directions of this order, further government order/ circular etc., if need be, may be issued strictly in accordance with law. In any case, all the Competent/ concerning Revenue Officers / Officials of the State of U.P. shall ensure that the public utility land of the Gaon Sabhas is free from illegal encroachment and as soon as the illegal encroachment is noticed, such encroachment shall be removed forthwith by adopting the due process of law inasmuch as any illegal encroachment over the public utility land of the Gaon Sabha does not only create hindrance in utilizing such land in a manner as has been prescribed in the revenue records but it also causes serious prejudice to the villagers at large who genuinely and seriously bank upon on that public utility land, e.g. pond, pasture land, Chakmarg, Khad Gaddha, Khalian, Banjar land etc. which are beneficial for the entire village in question.

36. In view of the aforesaid directions and observations, the present Public Interest Litigation Petition (PIL) is *disposed of finally*.

(2023) 7 ILRA 1071
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2023

BEFORE

**THE HON'BLE SURYA PRAKASH
 KESARWANI, J.**
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 27571 of 2022

Kishan Kumar Pathak ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Rahul Mishra, Sri Sanjay Mishra, Sri R.K. Ojha (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Pankaj Rai

**Civil Law-The Constitution of India-1950-
 Article 226 - The Code of Criminal
 Procedure, 1973-Section 25A---Writ of
 Quo Warranto---**

Respondent No.5 does not possess the eligibility/necessary qualification for appointment on the post of Director of Prosecution or Dy. Director of Prosecution or Addl. Director of Prosecution as Head of the Directorate of Prosecution, the respondent no. 5 is an IPS officer in police service---Sub-section (2) of Section 25A specifically provides that a person shall be eligible to be appointed as Director of Prosecution or Dy. Director of Prosecution only if he has been in practice as an Advocate for not less than 10 years and such appointment shall be made with the concurrence of Chief Justice of the High Court---Admittedly respondent no. 5 has not been in practice as an Advocate for not less than 10 years and also his appointment has been made without concurrence of Chief Justice of the High Court---Office in question is a public office which is being held by the respondent no. 5 without fulfilling the basic eligibility and thus he is a usurper of the public office holding the post without any legal authority and his appointment

is contrary to the provisions of Section 25A Cr.P.C---A writ of quo warranto can be issued when a person holding the public office does not fulfil the eligibility criteria prescribed for appointment to such an office or when the appointment is contrary to the statutory provisions---Appointment of Respondent No.5 illegal--Respondent No.1 & 2 directed to ensure that Director of Prosecution under Section 25A(2) Cr.P.C. is appointed within six months from today. **(Para 49, 50 & 57)**

Petition allowed. (E-15)

List of Cases cited:

1. National Human Rights Commission Vs St. of Guj. & ors. (2009) 6 SCC 767
2. Misc. Bench No. 7825 of 2011 Sadhana Sharma Vs St. of U.P. through Principal Secretary Law Department, & ors. and Misc. Bench No. 4097 of 2011Sadhana Sharma Vs St. of U.P. through Principal Secretary Law Department, Government of U.P.
3. SLP (C) No. 4042-4043 of 2012 St. of U.P. Vs Sadhana SharmaITC Ltd. Vs Agricultural Produce Market Committee (2002) 9 SCC 232
4. Zaverbhai Amaldas Vs St. of Bombay, AIR 1954 SC 752.
5. ESI Corporation Vs Mangalam Publication (India) (P.) Ltd., (2018) 11 SCC 438
6. Baleshwar Dass & ors. etc. Vs St. of U.P. & ors., (1980) 4 SCC 226
7. Gambhirdar K. Gadhvi Vs St. of Guj. & ors. (2022) 5 SCC 179
8. K. Anbazhagan Vs St. of Karnataka & ors. (2015) 6 SCC 158
9. Ajmer Singh Vs U.O.I., (1987) 3 SCC 340
10. Maru Ram Vs U.O.I. & ors., (1981) 1 SCC 107
11. Jeevan Lal Sharma Vs S.S. Parmar (2007) 51 AIC 842 (HP)
12. Jayaben Vs Tejas Kanubhai Zala & anr.(2022) 3 SCC 230
13. Civil Appeal No. 6706 of 2022 (St. of W.B. Vs Anindya Sundar Das & ors.) decided on 11.10.2022
14. Central Electricity Supply Utility of Odisha Vs Dhobie Sahoo & ors. (2014)1 SCC 161
15. Bharati Reddy Vs St. of Karn. (2018) 6 SCC 162
16. University of Mysore Vs C.D. Govindra Rao (1964 4 SCR 575
17. High Court of Gujarat Vs Gujarat Kishan Mazdoor Panchayat (2003) 4 SCR 712
18. B. Srinivasa Reddy Vs Karnataka Urban Water Supply and Drainage Board Employees' Assoc. (2006) 11 SCC 731
19. Bharati Reddy Vs The St. of Karnataka & ors. Civil Appeal No. 1763 of 2018 decided on 6.3.2018
20. Gambhirdan K. Gadhvi Vs St. of Guj. (2022) 5 SCC 179
21. Rajesh Awasthi Vs Nand Lal Jaiswal (2013) 1 SCC 501 at 514 & Armed Forces Medical Association Vs U.O.I. (2006) 11 SCC 731
22. Gambhirdan K Gadhvi Vs The St. of Guj. & ors.) (2022) 5 SCC 179
23. Official Liquidator Vs DhartiDhan (P) Ltd. (1977) 2 SCC 166
24. A.K. Roy Vs U.O.I. (1982) 1 SCC 271
25. Sub-Inspector Rooplal Vs Lt. Governor (2000) 1 SCC 644 (paragraph 12 and 13)
26. U.P. Power Corp. Ltd. V. Rajesh Kumar (2012) 7 SCC 1
27. JaisriSahu Vs Rajdewan Dubey AIR 1962 SC 83
28. Km. Shrilekha Vidyarthi & ors. Vs St. of U.P. & ors. (1991) 1 SCC 212

29. Union of India & ors. Vs Somasundaram Viswanath & ors. (1989) 1 SCC 175

30. SK Naushad Rahaman & ors. Vs U.O.I. & ors. 2022 SCC Online SC 297

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

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(Delivered by Hon'ble Jayant Banerji, J.)
(Concurring)

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1.	Judgment	1 to 18

(Delivered by Hon'ble Surya Prakash
Kesarwani, J.)

1. Heard Sri R.K. Ojha, learned Senior Advocate assisted by Sri Sanjay Mishra, learned counsel for the petitioner and Sri Manish Goyal, learned Additional Advocate General assisted by Sri Pankaj Rai, learned Additional Chief Standing Counsel for the State-respondents.

2. This writ petition has been filed praying for the following **reliefs**:

"a) To issue a writ order or direction in the nature of quo-warranto against the respondent No. 5 and holding their appointment as illegal and which is not in consonance with the statutory provision as provided under Section 25A of Criminal Procedure Code, 1973 (Cr.P.C. in Brevity) (Act No. II of 1974) and further show cause under what authority respondent No. 5 is holding the post.

b) To issue a writ order or direction in the nature of mandamus or other appropriate writ/direction to place

the person who is suitable and eligible in accordance with the Criminal Procedure Code, 1973 (in brevity Act No. II of 1973).

c) To issue any order or direction which this Hon'ble Court may deem fit and proper under the circumstances of the case."

3. This writ petition was heard on several occasions. Finally on 15.3.2023 learned counsels for the parties have made their submissions which were noted in the order dated 15.3.2023 and the judgement was reserved.

SUBMISSIONS:-

4. Sri R.K. Ojha, learned Senior Advocate, submits as under :

i. The Directorate of Prosecution already established by the State Government vide Office Memorandum of the Home Department No.7202/आठ-9-31(91)-79, dated 27.11.1980. Thus, sub Section (1) of Section 25A stood satisfied as the Directorate was already established.

ii. Sub Section (2) of Section 25A provides for eligibility of Director of Prosecution and Deputy Director of Prosecution. It provides that a person shall be eligible to be appointed as Director of Prosecution or Deputy Director of Prosecution only if he has been in practice as an Advocate for not less than 10 years and such appointment shall be made with the concurrence of the Chief Justice of the High Court. The Director of Prosecution or the Additional Director of Prosecution, by whatever name may be called, appointed by the State Government as head of the Directorate of Prosecution, is not eligible and does not fulfill the basic eligibility as provided under sub Section (2) of Section 25A of the Code of Criminal Procedure.

Therefore, the respondent no.5 does not have the basic eligibility for appointment. Hence a writ of quo warranto needs to be issued.

iii. The State Government is bound by the provisions of Section 25A Cr.P.C. enacted by parliament, in the absence of any specific provisions of law to the contrary enacted by the State legislature. Reference is made to Section 5 of the Cr.P.C. which recognises this proposition. Since State Government has not made any amendment in Section 25A(2) Cr.P.C. and instead as per original records produced, the State Government itself took decision not to make any amendment, therefore, the stand taken by State respondents in the counter affidavit that Section 25A Cr.P.C. is not applicable in the State of U.P. is wholly baseless and wholly misleading.

iv. Since the respondent no.5 is holding a public office and he does not have eligibility to hold the said post i.e. post of Director of Prosecution/Additional Director of Prosecution/Deputy Director of Prosecution and, therefore, he has incurred disqualification to continue to occupy the post. Hence a writ of quo warranto needs to be issued in view of the provisions of Section 25A Cr.P.C. and the law laid down by Hon'ble Supreme Court in the case of S.B. Shahane and others Vs. State of Maharashtra and another AIR 1995 SC 1628 (paragraphs 6 to 15) and a recent judgment of Hon'ble Supreme Court dated 10.01.2022 in Criminal Appeal No.1655 of 2021 (Jayben Vs. Tejas Kanubhai Zala and another) observing that Director of Prosecution is appointed by State Government in exercise of powers under Section 25A Cr.P.C. which stipulates a minimum legal experience of not less than ten years for a person to be eligible to be Director of Prosecution and his

appointment shall be made with the concurrence of the Chief Justice of the High Court, a writ of quo warranto deserves to be issued and appointment of the respondent no.5 deserves to be quashed.

5. Sri Manish Goyal, learned Additional Advocate General submits as under :

i. The Directorate of Prosecution was established by office memorandum dated 27.11.1980 pursuant to the 14th Law Commission Report.

ii. The State Government has not implemented Section 25A(1) Cr.P.C.. **After the decision taken by the State Government on 28.02.2014 not to amend Section 25A Cr.P.C.**, certain complaints were received in the year 2017 and thereupon an opinion of learned Advocate General was sought on 09.11.2020 and thereafter neither opinion was given nor any decision upon the complaints was taken. Thus, Section 25A has not been enforced in the State of Uttar Pradesh.

iii. Provisions of Section 25A Cr.P.C. are not mandatory but directory and, therefore, it is not a compulsory obligation of the State Government to abide by the provisions of Section 25A. Reliance is placed upon the Division Bench Judgment of the Kerala High Court in Writ (C) No.18844 of 2011 (Thankappan Vs. State of Kerala) decided on 21.10.2011 (paragraph 4).

iv. Interpretation of sub Section (1) of Section 25A Cr.P.C. is engaging attention of Hon'ble Supreme Court in Writ (C) No.923 of 2014 (All India Prosecutors Association and another Vs. Union of India through Cabinet Secretary and Ors.) wherein question No.1 has been framed as under :

"1. Whether the word 'may' in sub-section 1 of Section 25A of the Criminal Procedure Code, 1973 should be read as 'shall' and if so, is it mandatory for each State to establish a directorate of prosecution in terms of Section 25A?"

v. Since Section 25A Cr.P.C. has not yet been enforced in the State of Uttar Pradesh, therefore, the qualification of Director of Prosecution, as provided under sub Section (2) of Section 25A Cr.P.C. shall not be attracted. Hence, the writ of quo warranto cannot be issued.

vi. The respondent no.5 does not belong to the cadre, as provided under sub Section (2) of Section 25A Cr.P.C. inasmuch the respondent no.5 is neither the Director of Prosecution nor Deputy Director of Prosecution but Additional Director General of Prosecution. Hence, the respondent no.5 need not possess the eligibility, as provided under sub Section (2) of Section 25A Cr.P.C.

vii. The judgement of Hon'ble Supreme Court in the case of S.B. Shahane (supra) (paragraph nos. 10, 12 and 13) is with reference to appointment of Assistant Public Prosecutor in the Magistrate's Court. Therefore, this judgement has no relevance with regard to the eligibility of Director of Prosecution or the Additional Director General of Prosecution/respondent no.5.

viii. Section 5 of the Cr.P.C. does not come in the aid of the petitioner inasmuch as Office Memorandum dated 27.11.1980 is a law within the meaning of the Article 13 of the Constitution of India. Therefore, **there being a law in the form of Office Memorandum dated 27.11.1980, the provisions of Section 5 Cr.P.C. would not be applicable.**

ix. Unless the provision of Section **25A Cr.P.C.** is adopted by the State Legislature, the said provision **is not enforceable in the State of Uttar**

Pradesh. Hence, the State Government is not bound by the provision of Section 25A Cr.P.C. inasmuch as field of legislation regarding Section 25A is referable to Entry 2 and 26 of List III - Concurrent List of the VII Schedule to the Constitution of India.

6. No other submissions have been made by learned counsel for the parties before us.

DISCUSSIONS AND FINDINGS:-

7. Having carefully considered the submissions of learned counsel for the parties and perused the record of the writ petition as well as the original records as produced by the State respondents, discussion on the matter point wise, is as follows:-

(A) Preliminary objection of State respondents on account of pendency of Writ C No. 923 of 2014 (All India Prosecutors Association and another Vs. Union of India through Cabinet Secretary and others).

8. Learned Addl. Advocate General has raised a preliminary objection that interpretation of the word 'may' used in sub-section (1) of Section 25A of the Criminal Procedure Code (hereinafter referred to as the Cr.P.C.) is engaging attention of Hon'ble Supreme Court in Writ (C) No. 923 of 2014 and, therefore, this court may not entertain this writ petition.

9. We do not agree with the preliminary objection of the learned Addl. Advocate General. In the State of Uttar Pradesh a Directorate of Prosecution has already been established by the State Government which shall be discussed in

the later part of this judgement. That apart, against our order dated 1.3.2023 passed in this writ petition, the State respondents have filed SLP (Civil) Diary No. 9996 of 2023 (State of U.P. and others Vs. Kishan Kumar Pathak and others), which has been dismissed by Hon'ble Supreme Court by order dated 13.3.2023. Besides this Section 25A Cr.P.C. has been enforced in the State of U.P. Thus we do not find any substance in the aforesaid objection raised by the learned Addl. Advocate General. Therefore, the objection is rejected.

(B) CREATION OF DIRECTORATE OF PROSECUTION, UTTAR PRADESH:-

10. The Directorate of Prosecution was established by the State Government by Office Memorandum No. 7202/8/आठ-9-31(91)-79 dated 27.11.1980. As per the aforesaid Office Memorandum, Director of Prosecution is Head of the Department and Legal Advisor and his duty includes to give advice to the Police Department, District Level Departments and to apprise State Government with upto date status of prosecution etc. Dy. Director of Prosecution is drawing and disbursing officer who assist and advise the Director of Prosecution in legal and administrative matters. Apart from above, the Director and Dy. Director are required to discharge several other functions relating to prosecution. The aforesaid office memorandum dated 27.11.1980 (without annexures) is reproduced below:

"उत्तर प्रदेश शासन
गृह (पुलिस) अनुभाग-9
संख्या 7202/आठ-9-31(91)-79
लखनऊ, दिनांक 27 नवम्बर, 1980
कार्यालय-ज्ञाप

विषय:- अभियोजन निदेशालय, उत्तर प्रदेश की स्थापना।
अधोहस्ताक्षरी को यह कहने का निदेश हुआ है कि दण्ड

प्रक्रिया संहिता, 1973 के लागू होने के बाद प्रभावी एवं निष्पक्ष अभियोजन की दृष्टि से प्रदेश में एक स्वतन्त्र अभियोजन निदेशालय की स्थापना का प्रश्न पर्याप्त समय से शासन के विचाराधीन था। इस सिलसिले में भारत के विधि आयोग की 14वीं रिपोर्ट में की गयी संस्तुतियों एवं शासन द्वारा गठित ऋषिराय समिति की संस्तुतियों पर गम्भीरता पूर्वक विचार करने के उपरान्त राज्यपाल महोदय ने उक्त संहिता की धारा 25 के अधीन नियुक्त मैजिस्ट्रेट, न्यायालयों में पैरवी करने, वाले सहायक लोक अभि-योजकों, (असिस्टेंट पब्लिक प्रोसीक्यूटर्स) के समस्त कार्य पर प्रभावी नियन्त्रण एवं पर्यवेक्षण हेतु अलग से अभियोजन निदेशालय, जिसका मुख्यालय लखनऊ में होगा, स्थापित किये जाने की स्वीकृति प्रदान कर दी है।

2- राज्यपाल महोदय निदेशालय के मुख्यालय हेतु अनुलमक-1 में तथा उसके क्षेत्रीय कार्यालयों में तथा जिला कार्यालयों के लिए अनुलमक-2 में उल्लिखित अस्थाई पदों को, उसके सम्मुख निर्दिष्ट वेतनमानों में, पदों के भरे जाने की तिथि जो इस आदेश के पूर्व की न होगी से 28 फरवरी, 1981 तक, यदि उन्हें इसके पूर्व ही बिना किसी सूचना के समाप्त न कर दिया जाये, सृजित किये जाने की भी स्वीकृति प्रदान करते हैं।

3- स्वीकृत पदों के धारकों को अपने पद के वेतनमान में मिलने वाले वेतन के अतिरिक्त सरकार द्वारा समय-समय पर स्वीकृत महंगाई एवं अन्य भत्ते जो भी अनुमन्य हों, देय होंगे।

4- चूंकि अभियोजन निदेशालय की स्थापना, अधिकारी एवं कर्मचारी वर्ग के वेतन, भत्तों आदि पर होने वाले व्यय तथा अनुलमक-3 में अंकित स्टाफ कार, साज-सज्जा आदि के क्रय व अन्य मदों पर होने वाले व्यय के लिये चालू वित्तीय वर्ष 1980-81 के आय-व्ययक में कोई प्राविधान नहीं है और यह व्यय अत्यावश्यक एवं अपरिहार्य है, अतः इस प्रयोजन के लिये राज्य विधान मण्डल के अनुमोदन की प्रत्याशा में श्री राज्यपाल ने राज्य आकस्मिकता निधि से रूपया 12,68,000 (बारह लाख अड़सठ हजार रूपये) केवल की धनराशि अग्रिम के रूप में आहरित करने की भी स्वीकृति प्रदान कर दी है। इस धनराशि की प्रतिपूर्ति वाद में अनुपूरक मांगों के माध्यम से की जायेगी।

5- साज-सज्जा, उपकरण, फर्नीचर, स्टाफ कार आदि का क्रय निदेशक, अभियोजन निदेशालय द्वारा निर्धारित प्रक्रिया एवं नियमों के अनुसार किया जायेगा तथा क्रय किये गये वस्तुओं का विवरण वे यथासमय शासन को सूचित करेंगे तथा उसका लेखा जोखा विधिवत् रखना सुनिश्चित करेंगे।

6- अभियोजन निदेशालय का ढांचा अनुलमक-4 में दिया गया है। तदुसार मुख्यालय पर एक उप-निदेशक अभियोजन निदेशक की सहायता के लिये अन्य सपोर्टिंग स्टाफ के साथ रहेगा। प्रशासकीय सुविधा के लिये प्रदेश को 4 क्षेत्रों लखनऊ, बरेली, वाराणसी व आगरा में बाँट दिया गया है। प्रत्येक क्षेत्र के अन्तर्गत अनुलमक-4 में निर्दिष्ट मण्डल व जिले सम्मिलित रहेंगे।

7- अभियोजन निदेशक, उप निदेश अभियोजन (मुख्यालय), क्षेत्रीय उप निदेशक अभियोजन, ज्येष्ठ अभियोजन अधिकारी, अभियोजन अधिकारी तथा सहायक अभियोजन अधिकारी के कर्तव्य एवं दायित्व अनुलम्बक-5 में दिये हैं। ज्येष्ठ अभियोजन अधिकारियों, अभियोजन अधिकारियों तथा सहायक अभियोजन अधिकारियों का वर्तमान स्वीकृत नियत अनुलम्बक 6 में दिया गया है।

8- अभियोजन निदेशालय की स्थापना के फलस्वरूप अभियोजन शाखा के लिये पूर्व स्वीकृत सहायक अभियोजन अधिकारी/अभियोजन अधिकारी/ज्येष्ठ अभियोजन अधिकारी के समस्त पद तथा ज्येष्ठ अभियोजन अधिकारियों के कार्यालयों के लिये 11 जिलों (जिनके नाम अनुलम्बक-2 में इंगित हैं) में स्वीकृत कार्यालय चपरासी के पद तथा कार्यरत समस्त अधिकारी/कर्मचारी अभियोजन निदेशालय के प्रशासकीय नियन्त्रण में आ जायेंगे तथा उनसे सम्बन्धित अभिलेखादि पुलिस महानिरीक्षक द्वारा निदेशालय को शीघ्रातिशीघ्र हस्तांतरित किये जायेंगे।

9- निदेशक अभियोजन तथा उप निदेशक अभियोजन के पदों पर नियुक्ति तथा अधिकारों के प्रतिनियमन एवं अन्य नव सृजित पदों पर नियुक्ति की प्रक्रिया के संबंध में आदेश अलग से जारी किये जायेंगे।

10- नयी व्यवस्था के फलस्वरूप वर्षों से चली आ रही पुरानी व्यवस्था, जिसके अन्तर्गत पुलिस अधीक्षक, अभियोजन अधिकारियों के कार्य पर नियन्त्रण रखते थे, समाप्त हो जायेंगी। फलस्वरूप जिला स्तर पर सहायक अभियोजन अधिकारियों एवं अभियोजन अधिकारियों (प्रभारी अभियोजन अधिकारियों को छोड़कर) द्वारा मामलों की विवेचना के सम्बन्ध में दिये गये योगदान के बारे में वार्षिक मन्तव्य देने का अधिकार पुलिस अधीक्षक को होगा, किन्तु अभियोजन कार्य के बार में टिप्पणी करने का अधिकार इन्हें न होगा। प्रतिवेदक अधिकारी के लिये यह अनिवार्य होगा कि इस मन्तव्य को वह उनकी वार्षिक प्रविष्टि में अक्षरशः शामिल करेंगे तथा ज्येष्ठ अभियोजन अधिकारियों एवं प्रभारी अभियोजन अधिकारियों के सम्बन्ध में प्रतिवेदक अधिकारियों के लिये यह पर्याप्त होगा कि वह पुलिस अधीक्षक की राय प्राप्त कर वार्षिक प्रविष्टि देते समय उसका समुचित उपयोग करें।

11- अभियोजन निदेशालय की स्थापना के तुरन्त बाद ही अभियोजन अधिकारियों के साहाय्यतार्थ पुलिस विभाग में पूर्व स्वीकृत या पूर्व विद्यमान लिपिकीय तथा चतुर्थ श्रेणी के पदों को आवश्यकतानुसार बनाये रखने/ समाप्त करने/पुलिस विभाग में जहां तेजी से जिला फोर्स का विस्तार हो रहा है, समायोजित करने के विषय पर शासन द्वारा विचार किया जायेगा।

12- उपर्युक्त के अतिरिक्त अभियोजन निदेशालय के संबंध में निम्नलिखित निर्णय भी लिये गये हैं--

1- अभियोजन निदेशालय गृह विभाग के अधीन होगा और इसके अन्तर्गत मैजिस्ट्रेट न्यायालयों के अभियोजन कार्य तथा सहायक लोक अभियोजकों (सहायक अभियोजन अधिकारी/अभियोजन

अधिकारी/ज्येष्ठ अभियोजन अधिकारी) के समस्त कार्य नियन्त्रण एवं पर्यवेक्षण का कार्य होगा।

2- निदेशक अभियोजन, उत्तर प्रदेश के पद पर उप पुलिस महानिरीक्षक के स्तर के पुलिस सेवा के अधिकारी की नियुक्ति की जायेगी पर वह पुलिस महानिरीक्षक के नियन्त्रण में कार्य नहीं करेंगे और न ही पुलिस के अधिकारों का प्रयोग करेंगे।

3- जिन जनपदों में ज्येष्ठ अभियोजन अधिकारी के पद स्वीकृत हैं उनमें ज्येष्ठ अभियोजन अधिकारी जिला प्रभारी अधिकारी होंगे तथा अन्य जिलों में जहां ज्येष्ठ अभियोजन अधिकारी नियुक्त नहीं है वरिष्ठतम् अभियोजन अधिकारी प्रभारी अधिकारी होंगे।

4- नयी व्यवस्था को सफल एवं प्रभावी ढंग से लागू करने के लिये जिला स्तर पर जिला मैजिस्ट्रेट की प्रभावशाली भूमिका रहेगी और वह अभियोजनकार्यों तथा अभियोजन कार्यालय के अधिकारियों को कार्य पर प्रभावी नियन्त्रण रखने में और उसमें पूर्ण रुचि लेंगे। इस सम्बन्ध में निम्नांकित उत्तरदायित्वों का निर्वाह भी पूरी तरह से सुनिश्चित करेंगे:--

अ-- जिलाधिकारी--जनपद में ज्येष्ठ अभियोजन अधिकारियों पर तात्कालिक पर्यवेक्षण (इमीडिएट सुपरवीजन) रखेंगे।

ब-- जिला स्तर पर अभियोजन शाखा के अधिकारियों के आहरण एवं वितरण अधिकारी जिलाधिकारी होंगे तथा इन अधिकारियों के वेतन आदि के आहरण एवं वितरण का प्रबन्ध जिलाधिकारी कार्यालय द्वारा किया जायेगा।

स-- जिलाधिकारी सत्र न्यायालय में पैरवी करने वाले लोक अभियोजक और ज्येष्ठ अभियोजन अधिकारी/अभियोजन अधिकारी प्रभारी के बीच समुचित समन्वय सुनिश्चित करेंगे, जिसका मुख्यतः सम्बन्ध सत्र न्यायालय को संदर्भित मुकदमों के कलेन्डर, सत्र न्यायालयों में प्रेषित जमानत प्रार्थना-पत्र संबंधी अभिलेख, गवाहों के लिए अभियोजन अधिकारी के माध्यम से सम्मन जारी करवाने व अपील व विमुक्ति रिपोर्ट से होगा।

13- उपर्युक्त मदों पर होने वाला व्यय प्रथमतः राज्य आकस्मिकता निधि के नामे डाला जायेगा तथा बाद में .. वित्तीय वर्ष 1980-81 के आय-व्ययक में अनुदान संख्या 19 के अधीन लेखा शीर्षक "214-न्याय प्रशासन-आयोजनेतर-क-कानूनी सलाहकार और परामर्शदाता--लोक अभियोजन शाखा अधिष्ठान" के अन्तर्गत संगत प्राथमिक इकाइयों के नाम डाला जायेगा।

हरगोविन्द डबराल

संयुक्त सचिव। "

11. Duties and responsibilities of Director and Dy. Director of Prosecution have been provided in Annexure 5 to the aforesaid Office Memorandum dated 27.11.1980, as under:

"अनुलम्बक-5

अभियोजन निदेशक उत्तर प्रदेश के कर्तव्य एवं दायित्व

अभियोजन निदेशक प्रदेश के अभियोजन संगठन के अध्यक्ष होंगे तथा मैजिस्ट्रेट कोर्ट्स में पैरवी करने वाले समस्त लोक अभियोजकों का प्रशासकीय नियंत्रण सम्पूर्ण रूप से उनमें निहित होगा।

2- उनका स्तर विभागाध्याक्ष का होगा तथा उन्हें व सभी प्रशासकीय एवं वित्तीय अधिकार प्राप्त होंगे जो सामान्यतया एक विभागाध्यक्ष में प्रतिनिहित होते हैं।

3- वह अपने निदेशालय, क्षेत्रीय उपनिदेशकों के कार्यालय तथा ज्येष्ठ अभियोजन अधिकारियों के कार्यालयों के अराजपत्रित कर्मचारियों, अभियोजन अधिकारियों तथा सहायक अभियोजन अधिकारी के नियुक्ति अधिकारी होंगे तथा इन श्रेणियों के कर्मचारियों के स्थानान्तरण तैनाती आदि करने का उन्हें अधिकार होगा।

4- उनका प्रशासकीय नियंत्रण उपनिदेशक अभियोजन (मुख्यालय) क्षेत्रीय उपनिदेशकों तथा ज्येष्ठ अभियोजन अधिकारियों के ऊपर भी रहेगा और वे इन अधिकारियों की चरित्र पंचिकाओं में उनके कार्य तथा आचरण के बारे में वार्षिक गोपनीय रिपोर्ट अंकित करेंगे व उन्हें शासन को अन्तिम अनुमोदन हेतु भेजेंगे।

5- वह विधिक मामलों में फौजदारी कार्यवाही के किसी भी स्तर पर (तफतीश के स्तर को सम्मिलित करते हुए) जटिल व महत्वपूर्ण मामलों जैसे षड़यन्त्र, जालसाजी, घोखाधड़ी जिसमें साक्ष्य परिस्थितियों व उपलब्ध लेखा अभिलेखों पर आधारित हो, में पुलिस विभाग तथा शासन के जिला स्तरीय विभागों को आवश्यकानुसार परामर्श देंगे।

6- ऐसे समस्त विधिक/प्रशासकीय मामले जो क्षेत्रीय उपनिदेशक तथा ज्येष्ठ अभियोजन अधिकारियों द्वारा परामर्श/ आदेशों के लिए भेजे जाये उनमें परामर्श/आदेश देंगे।

6(ए)- पुलिस संगठन के राज्य स्तर पर विधि सलाहकार होंगे।

7- प्रदेश के समस्त अभियोजन कार्यालयों का निरीक्षण करेंगे व अभियोजन की स्थिति से शासन को आवधिक विवरण भेजकर अवगत करायेंगे।

8- ऐसे अन्य कार्य जो शासन द्वारा समय-समय पर सौंपे जायें।

उप निदेशक (मुख्यालय) के कर्तव्य एवं दायित्व

1- अभियोजन निदेशालय के अधिष्ठान के आहरण तथा वितरण अधिकारी होंगे।

2- विधिक तथा प्रशासकीय मामले में निदेशक की सहायता करेंगे व उन्हें उचित परामर्श देगे।

3- निदेशालय के अधीनस्थ कर्मचारियों के चरित्र एवं आचरण की वार्षिक प्रविष्टियों के रिपोर्टिंग अधिकारी होंगे तथा निदेशक को उन्हें अनुमोदनार्थ प्रस्तुत करेंगे।

4- वह अन्य कार्य जिन्हें निदेशक द्वारा उन्हें समय-समय पर सौंपा जायेगा।

क्षेत्रीय उपनिदेशक अभियोजन के कर्तव्य एवं दायित्व

1- अपने कार्यालय के कार्यालयाध्यक्ष होंगे।

2- अपने अधीनस्थ कर्मचारियों के अधिष्ठान के आहरण तथा वितरण अधिकारी होंगे।

3- अपने क्षेत्र के समस्त ज्येष्ठ अभियोजन अधिकारियों पर उनका प्रशासनिक नियंत्रण रहेगा।

4- ऐसे जटिल मामलों जिनमें ज्येष्ठ अभियोजन अधिकारी द्वारा उनसे परामर्श मांगा जाये, उन्हें अपना परामर्श देंगे।

5- अपने क्षेत्र के ज्येष्ठ अभियोजन अधिकारियों/अभियोजन अधिकारियों के कार्य का समय-समय पर निरीक्षण करेंगे व क्षेत्र के अभियोजन की स्थिति से अभियोजन निदेशक को आवधिक विवरण भेजकर अवगत करायेंगे।

6- क्षेत्र के ज्येष्ठ अभियोजन अधिकारियों की चरित्र पंचिकाओं में उनके कार्य तथा आचरण की वार्षिक गोपनीय रिपोर्ट प्रतिवर्दक अधिकारी के रूप में अंकित करेंगे तथा अनुमोदन हेतु उन्हें अभियोजन निदेशक को भेजेंगे। इसके अतिरिक्त क्षेत्र के अभियोजन सहायक अभियोजन/अधिकारियों की वार्षिक प्रविष्टियों के अनुमोदन अधिकारी होंगे।

6-(ए) संबंधित उप पुलिस महानिरीक्षकों के विधि सलाहकार होंगे।

7- ऐसे कार्य जो शासन अथवा निदेशक द्वारा समय-समय पर सौंपे जायें।

ज्येष्ठ अभियोजन अधिकारियों के कर्तव्य एवं दायित्व

1- ज्येष्ठ अभियोजन अधिकारी अपने जिले के अभियोजन अधिकारियों सहायक अभियोजन अधिकारियों व अन्य अधीनस्थ के प्रभारी अधिकारी होंगे।

2- जिले के समस्त अभियोजन अधिकारियों/सहायक अभियोजन अधिकारियों तथा अपने कार्यालय स्टाफ के आहरण व वितरण अधिकारी होंगे।

3- जिले के अभियोजन अधिकारियों/सहायक अभियोजन अधिकारियों के कार्य तथा आचरण की वार्षिक गोपनीय रिपोर्ट अंकित करेंगे तथा उन्हें अनुमोदनार्थ क्षेत्रीय उपनिदेशक अभियोजन को भेजेंगे।

4- जटिल व महत्वपूर्ण फौजदारी वादों की पैरवी स्वयं मैजिस्ट्रेट कोर्ट में करेंगे तथा अपने अधीनस्थ अभियोजन अधिकारियों/सहायक अभियोजन अधिकारियों को मार्गदर्शन देंगे तथा उनके कार्य का समय-समय पर निरीक्षण करेंगे और जिले की अभियोजन की स्थिति के सम्बन्ध में आवधिक विवरण क्षेत्रीय उप निदेशक अभियोजन व अभियोजन निदेशक को भेजा करेंगे।

5- वह जिला पुलिस अधीक्षक को उन सभी फौजदारी वादों में परामर्श देंगे जिन्हें जिला पुलिस अधीक्षक द्वारा उन्हें परामर्श हेतु भेजा जायेगा।

5(ए)- रैंज मुख्यालय पर पुलिस उप महानिरीक्षक के विधि सलाहकार होंगे।

6- ऐसे अन्य कार्य जो समय-समय पर क्षेत्रीय उप निदेशक अथवा निदेशक व जिला मैजिस्ट्रेट द्वारा सौंपा जाये।

नोट- जिन जिलों में अभियोजन अधिकारी प्रभारी अधिकारी होंगे वहां पर अभियोजन अधिकारी द्वारा उन सभी कर्तव्यों व दायित्वों का निर्वहन किया जायेगा जिनका सर्वहन अन्य जिलों में ज्येष्ठ अभियोजन अधिकारियों द्वारा किया जाता है।

अभियोजन अधिकारी/सहायक अभियोजन अधिकारी के कर्तव्य

1- मजिस्ट्रेट कोर्ट्स में फौजदारी वादों को शासन की ओर से पैरवी करना।

2- ज्येष्ठ अभियोजन अधिकारी के कार्य में सहायता देना व उनके मार्गदर्शन में कार्य करना।

3- जिला पुलिस अधीक्षक को अभियोजन के मामलों में विधिक परामर्श देना।

4- व्यक्ति व माल की शिनाख्त कार्यवाही में सहायता करना।

5- दोष मुक्त (*Aquittal*) रिपोर्ट तैयार करना।"

12. From perusal of the afore quoted office memorandum dated 27.11.1980 it is evident that **Directorate of Prosecution has been established in the State of U.P.** as an administrative decision pursuant to the recommendations of the 14th report of the Law Commission and the report of Rishi Rai Committee.

13. The background of enactment of Section 25A Cr.P.C. has been briefly summarised by Hon'ble Supreme Court in ***National Human Rights Commission Vs. State of Gujarat and others (2009) 6 SCC 767 (paragraphs 23 to 30)***, as under:

"23. The role of public prosecutors in ensuring a fair trial is of paramount importance. This Court in ***S.B. Shahane v. State of Maharashtra, 1995 Supp (3) SCC 37*** had stressed on the desirability of separation of prosecution agency from investigation agency. It was observed that such Assistant Public Prosecutors could not be allowed to continue as personnel of the Police Department and to continue to function under the control of the head of the Police Department. The State Governments were directed to constitute a separate cadre of Assistant Public Prosecutors by creating a separate prosecution Department making its head directly responsible to the State Government.

24. ***Many commonwealth countries like Australia have a Commonwealth Director of Public Prosecutions, which was set up by the Director of Public Prosecutions Act, 1983 and started operations in 1984. The nine States and territories of Australia also have their own DPPs. Ultimate authority for authorizing prosecutions lies with the Attorney General. However, since that is a political post, and it is desired to have a non-political (public service) post carry out this function in most circumstances, the prosecutorial powers of the AG are normally delegated to the DPP. However, in South Australia the AG may direct the DPP to prosecute or not to prosecute. This is a very rare occurrence. It is common for those who hold the office of Commonwealth or State DPP later to be appointed to a high judicial office.***

25. ***In Canada, each province's Crown Attorney Office (Canada) is responsible for the conduct of criminal prosecutions. In Ontario, local Crown Attorney in the Criminal Law Division is in charge of criminal cases. Only British Columbia, Nova Scotia and Quebec (a civil code jurisdiction) have a Director of Public Prosecutions office. Recent legislation passed by Parliament split the conduct of federal prosecutions from the Department of Justice (Canada), and created the Office of the Director of Public Prosecutions (officially to be called as Public Prosecution Service of Canada). This legislation came into effect from 12-12-2006. The Director of Public Prosecutions of Hong-Kong, China heads the prosecutions Division of the Department of Justice, which is responsible for prosecuting trials and appeals on behalf of the Hong Kong Special Administrative Region, providing legal advice to law enforcement agencies, acting***

on behalf of the Secretary for Justice in the institution of criminal proceedings, and providing advice and assistance to bureaux and departments in relation to any criminal law aspects of proposed legislation. DPP is superintended by the Secretary for Justice, who is also accountable for the decisions of DPP.

26. **The Director of Public Prosecutions in the Republic of Ireland** has been responsible for prosecution, in the name of the People, of all indictable criminal offences in the Republic of Ireland since the enactment of the Prosecution of Offences Act 1974. Before 1974, all crimes and offences were prosecuted at the suit of the Attorney General. DPP may also issue a certificate that a case should be referred to the Special Criminal Court; a juryless trial court usually reserved for terrorists and organized criminals.

27. **In South Africa** public prosecutions are conducted by an independent National Director of Public Prosecutions (NDPP). The NDPP is supported by a Chief Executive Officer, Marion Sparg, Deputies, Regional Directors of Public Prosecutions (DPPs), and several Special Directors. The National Director is also the head of the controversial Directorate of Special Operations (DSO) - commonly known as the Scorpions - which deals with priority and organized crime. In 2005, the unit instituted proceedings against the country's Deputy President, Jacob Zuma, leading to his dismissal.

28. **In England and Wales**, the office of the Director of Public Prosecutions was first created in 1880 as part of the Home Office, and had its own department from 1908. DPP was only responsible for the prosecution of a small number of major cases until 1986 when responsibility for prosecutions was

transferred to a new Crown Prosecution Service with DPP as its head. He/she is appointed by the Attorney General for England and Wales. In Northern Ireland a similar situation existed, and DPP now heads the Public Prosecution Service for Northern Ireland.

29. **The Law Commission in 1958 had recommended that a Director of Prosecutions be set up** having its own cadre, though this recommendation was not included in the Code then. **Again in 1996 the Law Commission in its 154th report identified as Independent Prosecuting Agency as one of the several areas** within the Code which required redesigning and restructuring. The Law Commission supported most of the proposed amendments to the Code as contained in the proposed Code of Criminal Procedure Amendment Bill, 1994. Recommendations related to the structure of a Directorate of Prosecutions at the State-level, to be adopted by a State Government in the event it decided to set up a cadre of Prosecutors. **The Law Commission further recommended that the structure of State-level Directorates of Prosecution be given statutory status through an amendment to the Code. Despite the absence of such a requirement and inadequacy of the Provisions in the Code a number of states mainly, Delhi, Andhra Pradesh, Bihar, Goa, Himachal Pradesh, Karnataka, Kerala, Madhya Pradesh, Orissa, Tamil Nadu and Uttaranchal, established a Directorate of Prosecution.**

30. **By an amendment in 2006, Section 25-A was inserted in the Code, which categorically legislated for the creation of a Directorate of Prosecution in every state:**

"25-A. Directorate of Prosecution.-(1) The State Government may establish a Directorate of Prosecution

consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit.

(2) A person shall be eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment shall be made with the concurrence of the Chief Justice of the High Court.

(3) The Head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the Head of the Home Department in the State.

(4) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.

(5) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (1), or as the case may be, sub-section (8), of Section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution.

(6) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (3), or as the case may be, sub-section (8), of Section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under sub-section (1) of Section 25 shall be subordinate to the Deputy Director of Prosecution.

(7) The powers and functions of the Director of Prosecution and the Deputy Directors of Prosecution and the areas for which each of the Deputy Directors of Prosecution have been appointed shall be such as the State Government may, by notification, specify.

(8) The provisions of this section shall not apply to the Advocate General for the State while performing the functions of a Public Prosecutor."

14. Since, despite recommendations of the Law Commission and also despite judgement of Hon'ble Supreme Court in S.B. Shahane v. State of Maharashtra AIR 1985 SC 1628 several States have not established Directorate of Prosecution while some of the States including the State of Uttar Pradesh have established a Directorate of Prosecution therefore, so as to give statutory status to the Directorate of Prosecution, the Parliament inserted Section 25A in Cr.P.C. by Section 4 of the Code of Criminal Procedure (Amendment) Act, 2005 (No. 25 of 2005) which received assent of the President on 23.6.2005 and was enforced by Notification No. S. O. 923(E) dated 21.6.2006 w.e.f. 23.6.2006.

(C) Whether Section 25A Cr.P.C. is applicable and enforced in the State of Uttar Pradesh?

15. Section 1(2) Cr.P.C. provides for applicability of the Code, as under:-

"1. Short title extent and commencement.

(1)

(2) It extends to the whole of India:

Provided that the provisions of this Code, other than those relating to Chapters VIII, X and XI thereof, shall not apply-

(a) to the State of Nagaland,

(b) to the tribal areas,

but the concerned State Government may, by notification, apply such provisions or any of them to the whole

or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications, as may be specified in the notification.

Explanation.- In this section, "tribal areas" means the territories which immediately before the 21st day of January, 1972, were included in the tribal areas of Assam, as referred to in paragraph 20 of the Sixth Schedule to the Constitution, other than those within the local limits of the municipality of Shillong."

16. Article 246(2) provides for legislative competence, Article 254 provides for legislative supremacy and Entry (2) of List-III of the VIIth Schedule provides for field of legislation on the subject of Criminal Procedure, as under:-

"246. Subject matter of laws made by Parliament and by the Legislatures of States.-

(1)

(2) Notwithstanding anything in clause (3), 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 (in this Constitution referred to as the "Concurrent List").

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.--(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law

made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State. State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

List III --- Concurrent List

Entry (2) of List-III of the VIIth Schedule to the Constitution of India:--

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution."

17. After enactment of Section 25A for establishment of a Directorate of Prosecution in every State, from the records of the State Government as produced before us; it appears that vide **minutes of the meeting dated 15.2.2008** under the Chairmanship of the Chief Secretary, U.P. consisting of several officers of the State Government including the Principal

Secretary, Home, Principal Secretary, Law, Director General of Police and **Director of Prosecution (Directorate of Prosecution, U.P.) proposed for State amendment in Section 25A Cr.P.C.** and for that purposes a Committee was constituted to submit a report. The minutes were approved by the Chief Minister on 26.2.2008. The Committee so constituted submitted its report suggesting to omit sub section (2) and sub section (4) of Section 25A besides some amendments in sub section (1) and sub sections (6) & (7). Thereafter a draft amendment was prepared and no objection/suggestion of various departments were also taken. Certain changes were suggested by the Legislative Department. Lastly the Home Department proposed the following amendments in Section 25A Cr.P.C. and sought approval of the Chief Minister on 15.7.2008, as under:

(1) दण्ड प्रक्रिया संहिता की धारा-25क की उपधारा (1) के स्थान पर निम्नलिखित उपधारा रख दी जायगी, अर्थात:-
“(1) राज्य सरकार अभियोजन निदेशालय स्थापित कर सकती है और अभियोजन निदेशक और ऐसे अन्य अधिकारियों की नियुक्ति कर सकती है जैसा वह उचित समझे।”

(2) दण्ड प्रक्रिया संहिता की धारा- 25क की उपधारा (2) निकाल दी जाएगी।

(3) दण्ड प्रक्रिया संहिता की धारा-25क की उपधारा (3) को यथावत बनाये रखा जाएगा।

(4) दण्ड प्रक्रिया संहिता की धारा-25क की उपधारा (4) निकाल दी जाएगी।

(5) दण्ड प्रक्रिया संहिता की धारा-25क की उपधारा (5) को यथावत बनाये रखा जाएगा।

(6) दण्ड प्रक्रिया संहिता की धारा- 25क की उपधारा (6) में शब्द "उप-निदेशक" के स्थान पर शब्द "निदेशक" रख दिया जाएगा।

(7) दण्ड प्रक्रिया संहिता की धारा- 25क की उपधारा (7) में शब्द "अभियोजन उप निदेशक और क्षेत्र, जिसके लिए प्रत्येक अभियोजन उप निदेशक की नियुक्ति की गई है, ऐसे होंगे जो राज्य सरकार, अधिसूचना द्वारा, विनिर्दिष्ट करे" के स्थान पर शब्द "अभियोजन निदेशालय के अन्य अधिकारी ऐसे होंगे जैसे राज्य सरकार निर्धारित करे", रख दिये जाएंगे।

दण्ड प्रक्रिया संहिता की धारा-25क की उपधारा (8) को यथावत बनाये रखा जाएगा।”

18. Thereafter the matter was referred for **opinion of the learned Advocate General** vide office note dated 20.7.2012 and 9.8.2012 **who gave his detailed opinion on 12.1.2014 and concluded as under:**

“the amendments proposed in Section 25-A of Cr.P.C. are not in consonance with various directions issued by Hon'ble Supreme Court as well as the reports of the Law Commission. The proposed amendment would completely defeat/frustrate the intention and object of incorporating Section 25-A in the Criminal Procedure Code.”

19. Thereafter an office note was put up on 30.1.2014 which was recommended/forwarded by the Secretary, Home on 18.02.2014 and by the Principal Secretary Home on 21.2.2014 and thereafter by the Chief Secretary, U.P. on 22.2.2014 and the same was placed before the Chief Minister for approval of the proposal as under:

“7- मा० महाधिवक्ता के परामर्श के आलोक में दण्ड प्रक्रिया संहिता, 1973 में दण्ड प्रक्रिया (संशोधन) अधिनियम, 2005 द्वारा जोड़ी गयी नयी धारा-25क में राज्य सरकार द्वारा प्रस्तावित संशोधन पर किसी अग्रतर कार्यवाही की आवश्यकता नहीं प्रतीत होती है।

अतः कृपया मुख्य सचिव महोदय के माध्यम से उपरोक्त प्रस्तर-7 के प्रस्ताव पर मा० मुख्यमंत्री जी का अनुमोदन प्राप्त करना चाहें।”

20. The Chief Minister approved the proposal (reproduced in para-19 above) on 28.2.2014 and thus the matter came to an end. **Nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to,**

amending, varying or repealing the law so made by the Legislature of the State. However, despite the aforementioned facts the Director of Prosecution and Dy. Director/Addl. Director General Prosecution continued to occupy the post without fulfilling the eligibility as provided under Section 25A(2) Cr.P.C.

21. Learned Addl. Advocate General has stated before us in his submissions, as afore noted, that **“After the decision taken by the State Government on 28.2.2014 not to amend Section 25A Cr.P.C., certain complaints were received in the year 2017 and thereupon an opinion of learned Advocate General was sought on 9.11.2020 but neither opinion was given nor any decision upon the complaints was taken.”** His statement itself shows that **the decision of the State Government dated 28.2.2014 dropping the proposed amendment and to implement Section 25A Cr.P.C. is wholly undisputed.**

22. Apart from above, on perusal of the record this court observed in paragraph 3 of its order dated 1.3.2023 that **“At page 44 of the record, it has been stated that provisions of sub-section(1) of Section 25-A is applicable and as per the provisions of sub-sections(2),(5), (6) and (7) of Section 25-A(1) Cr.P.C., the responsibilities and duties of prosecutors will automatically increase.”** **This has not been disputed by the learned Addl. Advocate General** although he was confronted with the order and the records were with him at the time of submissions.

23. The facts as noted above leaves no manner of doubt that **Section 25A read with Section 1(2) Cr.P.C. has been enforced in the State of U.P. w.e.f. 23.6.2006 and the State of U.P.**

consciously took decision not to amend Section 25A Cr.P.C. The Legislature of the State of Uttar Pradesh has not enacted a law to amend Section 25A Cr.P.C. with assent of the President of India under Article 254 of the as under Constitution of India. Thus, the provisions to **Section 25A are in force in the State of U.P. since 23.6.2006.** By enactment of Section 25A Cr.P.C., **the existing Directorate of Prosecution established by the aforesaid office memorandum dated 27.11.1980, has achieved statutory status. Section 25A Cr.P.C. has been enacted for creation of a Directorate of Prosecution in every State as has also been observed by Hon'ble Supreme Court in National Human Right Commission (supra) (Paras-29 and 30), aforequoted. Thus Section 25A Cr.P.C. would prevail over the aforesaid office memorandum dated 27.11.1980 including the eligibility for appointment on the post of Director of Prosecution and Dy. Director of Prosecution/ Additional Director General of Prosecution by whatever name called, to the extent the Office Memorandum 27.11.1980 is inconsistent with Section 25A Cr.P.C.**

(D) Effect of Division Bench Judgement dated 11.1.2012 in Misc. Bench No. 7825 of 2011 (Sadhana Sharma Vs. State of U.P. through Principal Secretary Law Department, and others) and Misc. Bench No. 4097 of 2011 (Sadhana Sharma Vs. State of U.P. through Principal Secretary Law Department, Government of U.P.) AND order of Hon'ble Supreme Court in SLP (C) No. 4042-4043 of 2012.

24. In the case of **Sadhana Sharma (supra)**, amongst other things; the constitutional validity of State amendment

by U.P. Act No. 18 of 1991 amending Section 24 Cr.P.C. was challenged. While considering the matter, the **Division Bench of this Court observed/held with respect to Section 25A Cr.P.C.** [in paragraphs 15, 168, 169, 175, 181, 183, 195(3), 195(7), and 195(8)], **as under:**

“15. Section 25-A was inserted by the Code of Criminal Procedure Amendment Act, 2005 (Act No.25 of 2005) S.4 enforced from 23.6.2006 constituting Directorate of Prosecution. Under Section 25A, the Head of Directorate of Prosecution shall be the Director of Prosecution. The Director of Prosecution shall be the person who has been in practice as Advocate for not less than 10 years and his appointment shall be with the concurrence of the Chief Justice of High Court. Thus, reading of Section 25-A reveals that the Directorate of Prosecution shall be an independent body of the State discharging their obligation under the Director of the Prosecution who is appointed with the concurrence of Chief Justice of the High Court and will have supervisory jurisdiction on the Government counsels, prosecuting officers appointed under section 24 and 25 of the CrPC.

168. Section 25-A inserted by Act No.25 of 2005, has been given effect from 23.6.2006. It provides that the State Government shall establish a Directorate of Prosecution consisting of a Director of Prosecution and Deputy Director of Prosecution. The Director of Prosecution shall be appointed with the concurrence of Chief Justice of High Court who shall have administrative control over the Directorate. The Deputy Director of Prosecution shall be subordinate to Director of Prosecution and every Prosecutor, Additional Public Prosecutor

as under and Special Public Prosecutor appointed under Section 24 shall be subordinate to Director of Prosecution. Thus, the Parliament had regulated the appointment of prosecuting branch making it almost independent and out of the purview of the Government. The concurrence of Chief Justice in filling of vacancy of Director of Prosecution is an effort to make prosecution independent.

169. Proviso of Clause (2) of Article 254 empowers the Parliament to legislate the law on a subject matter already occupied by the State Government under List-III of Seventh Schedule. To the extent of repugnancy, the State Law shall be deemed to be modified, invalid or void.

175. In view of the aforesaid settled proposition of law, in case the impugned amendment is considered simultaneously along with Section 25-A of CrPC or given effect to, then there appears to be inconsistency which is irreconcilable. In case said amendment is given effect to, it would lead to disobeying the provisions of Section 25-A. The letter and spirit of Section 25-A is to make Prosecution Branch independent. That is why, the Parliament provided that Director of Prosecution, shall be appointed with concurrence of the Chief Justice of High Court and the Public Prosecutor appointed to the High Court, shall be subordinate to the Director of Prosecution whereas, the Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed under sub-section (3) or sub-section (8) or Section 24, shall conduct cases before the court and every Special Public Prosecutor appointed under Section 25, shall work under the Deputy Director of Prosecution. There appears to be no dispute that the District Government Counsels are appointed in pursuance of the statutory provisions contained in sub-

section (3) of Section 24 of CrPC. The Deputy Director of Prosecution has to work under the Director of Prosecution.

181. **Much argument has been advanced by the learned Senior Counsel appearing for the State.** The word, 'may', used in Section 25-A of Code of Criminal Procedure, is not mandatory. The argument advanced by the learned counsel, seems to be not correct. Section 25-A was added by the Parliament within the presumption that entire Section 24 is in operation without taking into account the deletion made by the State Government.

183. What the Parliament has done by enacting Section 25-A, the independent power conferred on the State Government to appoint Special Counsel, under Section 24 (8) of the CrPC has been diluted to some extent that now, though the Government may appoint Special Counsel but the counsel so appointed, shall discharge his/her obligation under the Directorate of Prosecution constituted under Section 25-A of the Code of Criminal Procedure. The provisions seems to have been made to check abuse of power by the State Government while dealing with the cases pending in the subordinate courts while prosecuting or defending the cases by the State through the counsel appointed by it.

195. Subject to discussion and finding recorded hereinabove in the proceeding paragraphs, the impugned amendment seems to be ultra vires and not sustainable and we sum up the finding as under:

(1)

(2)

(3) *The special counsel is different class than the District Government Counsel appointed under sub-section (4), (5) and (6) of Section 24 of Code of Criminal Procedure. Thus, so far*

as the supervisory or statutory control is concerned by inserting Section 25-A, Parliament removed the difference between the counsel appointed on the recommendation of the District Judge and District Magistrate and a special counsel appointed by the Government straight way in a particular case. Accordingly, in case impugned amendment is sustained, then it shall be in derogation of letter and spirit of Section 25-A of CrPC and shall be repugnant to Central Act in view of proviso to Clause (2) of Article 254 of the Constitution. Both cannot stand together.

(7) *The impugned amendment is hit by the proviso of Clause (2) of Article 254 of the Constitution of India and repugnant to Section 25-A of CrPC. Both cannot stand together inasmuch as, following one, will make the other ineffective.*

(8) **The purpose of Section 25-A of CrPC is to make prosecuting branch independent from the Government to optimum level.** That is why even Special Counsel appointed under sub-section (8) of Section 24 has been placed under the Directorate of Prosecution.”

(Emphasis supplied)

25. **Brief Summary of the judgment, in the case of Sadhana Sharma (supra) considering Section 25A Cr.P.C., is as under:**

“i. Under Section 25A, the Head of Directorate of Prosecution shall be the Director of Prosecution. The Director of Prosecution shall be the person who has been in practice as Advocate for not less than 10 years and his appointment shall be with the concurrence of the Chief Justice of High Court.

ii. Reading of Section 25-A reveals that the Directorate of

Prosecution shall be an independent body of the State discharging their obligation under the Director of the Prosecution who is appointed with the concurrence of Chief Justice of the High Court and will have supervisory jurisdiction on the Government counsels, prosecuting officers appointed under section 24 and 25 of the CrPC.

iii. Section 25-A inserted by Act No.25 of 2005, has been given effect from 23.6.2006.

iv. The Parliament had regulated the appointment of prosecuting branch making it almost independent and out of the purview of the Government. The concurrence of Chief Justice in filling of vacancy of Director of Prosecution is an effort to make prosecution independent.

v. Proviso of Clause (2) of Article 254 empowers the Parliament to legislate the law on a subject matter already occupied by the State Government under List-III of Seventh Schedule. **To the extent of repugnancy, the State Law shall be deemed to be modified, invalid or void.**

vi. In view of the aforesaid settled proposition of law, in case the impugned amendment is considered simultaneously along with Section 25-A of CrPC or given effect to, then there appears to be inconsistency which is irreconcilable. In case said amendment is given effect to, it would lead to disobeying the provisions of Section 25-A. **The letter and spirit of Section 25-A is to make Prosecution Branch independent. That is why, the Parliament provided that Director of Prosecution, shall be appointed with concurrence of the Chief Justice of High Court.**

vii. Much argument has been advanced by the learned Senior Counsel appearing for the State. The word, 'may',

used in Section 25-A of Code of Criminal Procedure, is not mandatory. The argument advanced by the learned counsel, seems to be not correct. Section 25-A was added by the Parliament within the presumption that entire Section 24 is in operation without taking into account the deletion made by the State Government.

viii. Subject to discussion and finding recorded hereinabove in the proceeding paragraphs, the impugned amendment seems to be ultra vires and not sustainable.

ix. **The impugned amendment is hit by the proviso of Clause (2) of Article 254 of the Constitution of India and repugnant to Section 25-A of CrPC.** Both cannot stand together inasmuch as, following one, will make the other ineffective.

x. **The purpose of Section 25-A of CrPC is to make prosecuting branch independent from the Government to optimum level."**

26. Against the aforesaid Division Bench judgement in the case of Sadahna Sharma (supra) **S.L.P. (c) No. 4042-4043 of 2012** (State of U.P. Vs. Sadhana Sharma) were filed by the State of U.P. which were **dismissed by the Hon'ble Supreme Court by order dated 17.7.2012, as under:**

"SLP (C) No. 4042-4043

Counsel appearing for the State of U.P. seeks leave to withdraw these Special Leave Petitions filed by the State in view of the policy decision of the State that they wish to implement the judgment of the High Court in its entirety and would continue to adopt the same policy in future as well.

These special leave petitions are, accordingly, dismissed as withdrawn."

27. Thus, **the State Government gave an undertaking before the Hon'ble Supreme Court to implement the aforesaid judgement of the High Court in the case of Sadhana Sharma (supra) in its entirety.** Therefore, apart from our findings, as noted in paragraphs 14 to 23, it is evident that by judicial pronouncement in the case of Sadahna Sharma (supra) the enforceability of Section 25A Cr.P.C. was accepted by the State of Uttar Pradesh and the SLP was withdrawn with an undertaking to implement the judgement of the High Court in its entirety. Section 25A was held to be applicable which fact was accepted by the State of U.P. **Therefore, the stand taken by the respondents that Section 25A Cr.P.C. is not applicable in the State of U.P. is wholly baseless and infact it is a disrespect being shown by them to the Parliament, the binding judgment in the case of Sadhana Sharma (supra), the statement made on behalf of State of U.P. before Hon'ble Supreme Court and the constitutional provisions including Article 141.**

(E) Whether Section 25A shall prevail over the office memorandum dated 27.11.1980?

28. Criminal Procedure Code, 1973 has been enacted by the Parliament in exercise of powers conferred under Article 246(2) with respect to the field of legislation provided in entry 2 of List III - concurrent list to the VII schedule of the Constitution of India. Sub-section (2) of Section 1 of Cr.P.C. aforequoted leaves no manner of doubt that the provisions of Cr.P.C. extends to the whole of India provided that provisions of the Code, other than those relating to Chapter VIII, X and XI thereof shall not apply to the State of Nagaland and to the tribal areas but the

concerned State Government, may, by notification, apply such provisions or anyone of them to the whole part of the State of Nagaland or such tribal areas. Thus as per sub-section (2) of Section 1 Cr.P.C. the provision of Section 25A Cr.P.C. are applicable in the State of Uttar Pradesh. The U.P. Legislature has not enacted any law to amend the aforesaid Section 25A Cr.P.C. with the assent of the President of India. Office Memorandum dated 27.11.1980 is not a law yet if the office memorandum dated 27.11.1980 is presumed to be a law still Section 25A Cr.P.C. shall prevail over it. Article 254(2) of the Constitution of India deals with the question of legislative supermacy as held in **ITC Ltd. V. Agricultural Produce Market Committee (2002) 9 SCC 232.** If a State law is in conflict with the law made by Parliament in the field of legislation falling under the concurrent list, then the law enacted by Parliament shall prevail and to the extent of repugnancy the State law shall be void. Reference in this regard may be had to the law laid down by the Hon'ble Supreme Court in the case of **Zaverbhai Amaidas V. State of Bombay, AIR 1954 SC 752.**

29. In the case of Zaverbhai Amaidas (supra) a Constitution Bench of Hon'ble Supreme Court held as under

“Now, by the proviso to Article 254(2) the Constitution has enlarged the powers of Parliament, and under that proviso, Parliament can do what the Central Legislature could not under section 107(2) of the Government of India Act, and enact a law adding to, amending, varying or repealing a law of the State, when it relates to a matter mentioned in the Concurrent List. The position then is that under the Constitution Parliament can,

acting under the proviso to Article 254(2), repeal a State law. But where it does not expressly do so, even then, the State law will be void under that provision if it conflicts with a later “law with respect to the same matter” that may be enacted by Parliament.”

(Emphasis supplied)

30. In the case of **ESI Corporation vs. Mangalam Publication (India)(P.) Ltd., (2018) 11 SCC 438 (para-16)**, Hon'ble Supreme Court held that the effect of ESI Act enacted by Parliament cannot be circumvented by the department's office memorandum. In the case of **Baleshwar Dass and others etc. vs. State of U.P. and others, (1980) 4 SCC 226 (Para-28)**, Hon'ble Supreme Court held that *“Memorandum cannot over-ride the Rules themselves but will operate subject to them in case of inconsistency.”* In the case of **Gambhirdar K. Gadhvi vs. State of Gujrat and others (2022) 5 SCC 179 (Para-50)**, Hon'ble Supreme Court in the matter of a writ petition for quo warranto, while considering the State Legislation and the U.G.C. Regulations, held that U.G.C. Regulation being Central Legislation shall prevail by applying the rule of repugnancy as enunciated in Article 254 of the Constitution of India since the subject "Education" is in the Concurrent List.

31. In view of the law settled by Hon'ble Supreme Court as discussed above we hold that the essential qualification as provided in Section 25A(2) Cr.P.C. for the post of Director of Prosecution or Dy. Director of Prosecution shall prevail over the qualification for the said posts provided under the office memorandum dated 27.11.1980.

(F) Whether Section 24, 25 and 25A Cr.P.C. needs to be understood as a singular Scheme?

32. Section 24 provides for appointment of Public Prosecutors and Addl. Public Prosecutors. Section 25 provides for appointment of Assistant Public Prosecutors. Sub section (1) of Section 25A creates obligation upon the State Government to establish a Directorate of Prosecution consisting of Director of Prosecution and as many Dy. Director of Prosecution as it may think fit. In the State of Uttar Pradesh Directorate of Prosecution has already been established. Sub section (2) of Section 25A provides for eligibility of a person for appointment as a Director of Prosecution or Dy. Director of Prosecution and such appointments has to be made with the concurrence of the Chief Justice of the High Court. Sub section (3) provides that the Director of Prosecution shall be the Head of the Directorate of Prosecution who shall function under the administrative control of the Head of the Home Department in the State. Sub section (4) provides that every Dy. Director of Prosecution shall be subordinate to the Director of Prosecution. Sub Section (5) provides that every Public Prosecutor, Addl. Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub section (1) or as the case may be, under sub-section (8) of Section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution. Sub section (6) provides that every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (3), or as the case may be, sub-section (8) of section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under sub-section (1) of section 25 shall be subordinate to the Deputy Director of Prosecution. Sub-section (7) empowers the State Government to issue

notification to specify the functions of the Director of Prosecution and the Dy. Director of Prosecution and the areas for which each of Dy. Director of Prosecution have been appointed. Thus while Sections 24 and 25 Cr.P.C. provide for appointment of Public Prosecutor, Addl. Public Prosecutor, Special Public Prosecutor and Assistant Public Prosecutor, Section 25A provides for establishment of Directorate of Prosecution and the hierarchy for smooth, independent and efficient functioning of the Directorate of Prosecution. Thus Sections 24, 25 and 25A are part of one singular Scheme which makes a perceptible demarcation and compartmentalization for the Public Prosecutor in the High Court and District Courts and administrative control and hierarchy in the Department of Prosecution i.e. Directorate of Prosecution.

33. Similar view has been expressed by Hon'ble Supreme Court in the case of **K. Anbazhagan V. State of Karnataka and others (2015) 6 SCC 158** (Paragraph 28) while considering the provisions of Section 24, 25 and 25A Cr.P.C., as under:

“28. The aforesaid provisions have to be appreciated in a schematic context. All the provisions reproduced hereinabove are to be read and understood as one singular scheme. They cannot be read bereft of their text and context. If they are read as parts of different schemes, there is bound to be anomaly. Such an interpretation is to be avoided, and the careful reading of the Criminal Procedure Code, in reality, avoids the same. The dictionary clause in 2(u) only refers to a person appointed under Section 24 CrPC and includes any person acting under the directions of a Public Prosecutor. The class or status of the Public Prosecutor is controlled by

Sections 24 and 25-A, CrPC. On a careful x-ray of the provisions of Section 24 it is clearly demonstrable that Section 24(1) has restricted the appointment of Public Prosecutor for the High Court, for the provision commences with words "for every High Court." Sub-section (3) deals with the appointment of Public Prosecutor or Additional Public Prosecutor for the districts. There is a procedure for appointment with which we are not concerned. Sub-section (8) of Section 24 deals with appointment of Special Public Prosecutor for any case or class of cases. A Public Prosecutor who is appointed in connection with a district his working sphere has to be restricted to the district unless he is specially engaged to appear before the higher court. A Special Public Prosecutor when he is appointed for any specific case and that too for any specific court, it is a restricted appointment. In this context Section 25-A of the Code renders immense assistance. The State Government is under obligation to establish Directorate of Prosecution. Section 25-A clearly stipulates that Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor who are appointed by the State Government under sub-Section (1) or under sub-Section (8) of Section 24 to conduct cases in the High Court, shall be subordinate to the Director of Prosecution. Sub-section (6) postulates that the three categories named herein appointed by the State Government to conduct cases in the district courts shall be subordinate to Deputy Director of Prosecution. Thus, the scheme makes a perceptible demarcation and compartmentalization for the Public Prosecutor in the High Court and the district courts.”

(G) Whether the Office Memorandum dated 27.11.1980 is a law under Section 5 Cr.P.C.:-

34. Section 5 Cr.P.C. is a saving provision so as to save a special law 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 **in the absence of specific provision to the contrary in Cr.P.C.** Section 2(y) Cr.P.C. provides that the words and expressions used and not defined but defined in Indian Penal Code (45 of 1860), have the meaning respectively assigned to them in that Code. As per **Section 41 Cr.P.C.**, a “special law” is a law applicable to a particular subject. As per **Section 42 Cr.P.C.**, a “local law” is a law applicable only to a particular part of India. Office Memorandum dated 27.11.1980 to fall under Section 5 Cr.P.C., must be a special law or a local law as defined in Section 41 and Section 42 I.P.C. It has neither been argued by the learned Additional Advocate General nor any material has been placed to demonstrate that the Office Memorandum dated 27.11.1980 is a special law or a local law. Therefore, the Office Memorandum dated 27.11.1980 is not a law referable to Section 5 Cr.P.C. Instances of special law are Army Act, Navy Act and Air Force Act etc. which embody a completely self-contained comprehensive Code. Reference in this regard may be had to the judgment of Hon’ble Supreme Court in **Ajmer Singh vs. Union of India, (1987) 3 SCC 340 (para-7). In Maru Ram vs. Union of India and others, (1981) 1 SCC 107 (Paras-32 to 36)**, a Constitution Bench of Hon’ble Supreme Court considered Section 433A Cr.P.C. enacted by Parliament, Remission Rules and legislative competence of State Legislature to enact a law under Entry-4 of List-II and held that broadly speaking, there are three components of Section 5 Cr.P.C. **Firstly**, the Procedure Code generally governs the

matters covered by it, **secondly**, if a special or local law exists covering the same area, this latter law will be saved and will prevail and **thirdly**, if there is specific provision to the contrary in Cr.P.C., then that will override the special or local law and that shall be the last word and will hold even against the special law or local law. Since the Office Memorandum dated 27.11.1980 is neither a special law nor a local law, therefore, it shall not be covered by Section 5 Cr.P.C. The Office Memorandum dated 27.11.1980 was an administrative decision to establish a Directorate of Prosecution and Section 25A Cr.P.C. has given a statutory recognition to the already established Directorate of Prosecution.

(H) Whether Section 25A(2) Cr.P.C. is mandatory?

35. It is admitted case of the respondents that the Directorate of Prosecution has been established in the State of Uttar Pradesh. In the case of *Sadhana Sharma (supra)* the State Government has accepted that Section 25A Cr.P.C. is mandatory. Therefore, there is no need to enter into the interpretation of the word “may” used in sub section (1) of Section 25A Cr.P.C. **Once a Directorate of Prosecution has been established in the State of Uttar Pradesh, the qualification of Director of Prosecution and Dy. Director of Prosecution as provided in sub section (2) of Section 25A are mandatory particularly when Section 25A(2) Cr.P.C. has not been amended by the U.P. Legislature.** In the case of *Jeevan Lal Sharma Vs. S.S. Parmar (2007) 51 AIC 842 (HP) (paragraphs 7,9,11,12 and 15)*, a Division Bench of Himachal Pradesh High Court has considered the question as to whether sub section (2) of Section 25A is mandatory?

and held it to be mandatory observing that no person can be permitted to hold the charge of the office of Director of Prosecution until he conforms with the eligibility requirement as contained in sub section (2) of Section 25A.

36. Since the Director of Prosecution performs the statutory duties relating to criminal justice system, therefore, **the Parliament understandably enacted the aforesaid provision of law keeping in mind the fact that persons other than those mentioned in sub-section (2) are not equipped with the necessary wherewithal as well as the bent of mind to perform the functions of the Director Prosecution. Provisions of Section 25A(2) providing eligibility of a person for appointment on the post of Director of Prosecution or Dy. Director of Prosecution that he must be in practice as an Advocate for not less than 10 years and such appointment shall be made with the concurrence of the Chief Justice of the High Court, is mandatory.** It is admitted case of the respondents that the respondent no. 5 does not possess the eligibility for appointment as Director of Prosecution or Additional Director of Prosecution or Dy. Director of Prosecution, by whatever named called.

(I) Whether the respondent no. 5 possesses the basic qualification/eligibility under section 25A Cr.P.C. to hold the public office of the post in question?

37. In paragraph 14 of the writ petition, the petitioner has stated that the respondent no. 5 is not eligible and suitable for the post in question as per provisions of Cr.P.C. but is holding the said post. In paragraph 19 of the counter affidavit the

respondent no. 2 has stated that the respondent no. 5 is fully eligible. In paragraph 6 of the counter affidavit, the respondent no. 2 has stated that the respondent no. 5 is an IPS Officer and has joined the duties as A.D.G. Prosecution on 28.8.2019 in compliance to the order of Addl. Chief Secretary, Home dated 26.8.2019. In paragraph 7 it has been stated that the respondent no. 5 is posted as A.D.G. Prosecution (Addl. Director General of Prosecution) and not as Director of Prosecution.

38. In paragraph 5 of his short counter affidavit, the respondent no. 5 has stated that he has joined on 28.8.2019 as A.D.G. Prosecution in compliance to the order of the Addl. Chief Secretary Home dated 26.8.2019. Averments made in paragraph 8,9 and 10 of the short counter affidavit, the respondent no. 5 has given various details of the duties discharged by him as A.D.G. Prosecution which leaves no manner of doubt that the respondent no. 5 is functioning as Head of the Directorate of Prosecution under the administrative control of the Head of the Home Department of the State of U.P. Thus the respondent no. 5 is discharging duties of Director of Prosecution under the administrative control of the Head of the Home Department in the State of U.P. As per office memorandum dated 27.11.1980 there is no post of A.D.G. Prosecution or A.D.G. Prosecution Police. Admittedly, the respondent no. 5 is discharging the duties of Director of Prosecution referable to sub section (3) of Section 25A Cr.P.C. Since we have already held that Section 25A (2) Cr.P.C. is a mandatory provision, therefore, the respondent no. 5 can hold the aforesaid Public office only if he possess the eligibility as provided in sub-section (2) of Section 25A Cr.P.C.

39. In a recent judgement in the case of *Jayaben Vs. Tejas Kanubhai Zala and another (2022) 3 SCC 230* (paragraph 22), the Hon'ble Supreme Court held that the post of Director of Prosecution is a very important post in so far as the administration of justice in criminal matters is concerned. It is the duty of the Director of Prosecution to take prompt decisions. Given that crimes are treated as a wrong against the society as a whole, the role of the Director of Prosecution in the administration of justice is crucial. **He is appointed by the State Government in exercise of powers under Section 25A of the Code of Criminal Procedure. His crucial role is evident from conditions in Section 25A(2) of the Code, which stipulates a minimum legal experience of not less than ten years to be eligible to be Director of Prosecution and that such an appointment shall be made with the concurrence of the Chief Justice of the High Court.**

40. Thus, a person to be eligible for appointment as Director of Prosecution or Dy. Director of Prosecution, he must have been in practice as an Advocate for not less than 10 years and the appointment can be made only with the concurrence of the Chief Justice of the High Court. Since the respondent no. 5 does not fulfil the aforesaid basic eligibility provided in sub-section (2) of Section 25A Cr.P.C. and yet is discharging the functions as A.D.G. Prosecution as Head of the Directorate of Prosecution, therefore, he cannot be held to possess the mandatory eligibility under section 25A(2) Cr.P.C. That apart he has been appointed without the concurrence of the Chief Justice of the High Court.

(J) Whether as per pleadings, the respondent No.5 is an usurper of the

public office and is holding the post without eligibility and without any authority of law:-

41. In paragraphs-24, 25 and 26, the petitioner has made specific averment that the respondent No.5 is an usurper of public office and is holding the said public post without any legal authority, eligibility and suitability and, therefore, a writ of quo warranto to be issued against the respondent No.5 holding his appointment as illegal and not in consonance with the statutory provisions of Section 25A Cr.P.C. Averments of these paragraphs-24, 25 and 26 of the writ petition have not been denied in paragraph-20 of the counter affidavit filed on behalf of the respondent No.2 (the Principal Secretary, Home Department), which has been sworn by Dr. Paulson, Secretary, Home Department, Government of U.P. Lucknow. **Paragraphs-24, 25 and 26 of the writ petition and Paragraph-20 of the counter affidavit are reproduced below:**

Paragraphs-24, 25 and 26 of the writ petition	Paragraph-20 of the counter affidavit (Reply of Paragraphs-24, 25 and 26 of the writ petition)
<i>24. That the public office is held by Respondent No. 5 a usurper without legal authority and various judgment by Hon'ble Apex Court and various Hon'ble. High Courts, Law Commission</i>	<i>20. That the contents of paragraph No. 17, 18, 19, 20, 21, 22, 23, 24, 25 & 26 of the writ petition being matters of record need no comments, which could be verified from the record itself for the sake of brevity.</i>

<i>Reports implies that respondent No. 5 is a usurpt and is holding the public office without any legal authority. The copy of the compilation of various judgment by Hon'ble Apex Court and various Hon'ble High Courts, Law Commission Reports is being filed herewith and marked as Annexure No. 1 to this writ petition.</i> <i>25. That the petitioner being the citizen of the country and has right to challenge the authority of respondent No. 5 who is holding the public office without any legal authority, eligibility and suitability.</i> <i>26. That in view of the aforesaid facts and circumstances of the case it is expedient in the interest of justice that this Hon'ble Court may kindly be pleased to issue a writ in the nature of quo-</i>		<i>warranto against the respondent No. 5 and holding their appointment as illegal and which is not in Consonance with the statutory provision as provided under Section 25A of Criminal Procedure Code 1973 (Cr. P.C. in Brevity) (Act No. II of 1974) and further show cause under what authority respondent No. 5 is holding the post issue writ of mandamus or other appropriate writ / directions to place the person who is, suitable and eligible in accordance with the Criminal Procedure Code, 1973 (in brevity Act No. II of 1973) , otherwise the petitioner shall suffer irreparable loss and injury.</i>	

42. In paragraphs-8 and 9 of his short counter affidavit, the respondent No.5 has stated as under:

“8. That as ADG Prosecution, I have tried to improve the coordination between different stakeholders of criminal justice system, and inform the government about the prosecution status regarding the Trial Cases against Mafia, as well as crime against women etc. implementation of e-Prosecution and ICIS in U.P., monitoring of acquittal and conviction reports, provision of facilities to improve professional competence and working environment.

9. That to improve the/welfare of prosecutors and staff so as to improve their morale and working conditions. Effort was made to make their work paperless by introducing e-Prosecution Portal, e-Prosecution Mobile App, e-Office and e-HRMS (Manav Sampada Portal) and training and grievance redressal through webinar.”

43. In paragraph-10 of his short counter affidavit, the respondent No.5 referred to a seminar on implementation of POCSO Act held in the Auditorium of the Supreme Court from 10.12.2022 to 11.12.2022 **where all the Directors of Prosecution from all the States of India were present and were advised to follow the model of prosecution being implemented by A.D.G., Prosecution, U.P. Averment of paragraphs-8 and 9 read with paragraph-10 goes to show that the respondent No.5 under the nomenclature of A.D.G., Prosecution, U.P. is discharging the functions of Director of Prosecution.** It is not the case of the State-respondents that any person other than the respondent No.5 is functioning as head of the Directorate of Prosecution, Uttar Pradesh.

44. The averments made in the aforequoted Paragraphs No.24, 25 and 26

of the writ petition have not been denied by the State-respondents in paragraph-20 of the counter affidavit. Thus, it stands admitted to the respondents that the respondent No.5 is an usurper of the public office which is held by him without any legal authority and without eligibility prescribed in Section 25A(2) of the Cr.P.C. While replying the contents of Para-26 of the writ petition in para-20 of the counter affidavit, the State-respondents have not denied the averments of the petitioner that a writ of quo warranto may be issued against the respondent No.5 and a writ of mandamus may be issued to place a suitable and eligible person in accordance with Section 25A of the Cr.P.C. Therefore, a writ of quo warranto needs to be issued against the respondent No.5.

(K) Law of Writ of Quo Warranto and Locus Standi

45. In **Civil Appeal No. 6706 of 2022 (State of West Bengal Vs. Anindya Sundar Das and others) decided on 11.10.2022** (Paragraphs 9, 23, 24 and 26) reported in AIR 2022 SC 4902, Hon'ble Supreme Court referred to its earlier judgments in *Central Electricity Supply Utility of Odisha Vs. Dhobie Sahoo and others* (2014) 1 SCC 161, *Bharati Reddy Vs. State of Karnataka* (2018) 6 SCC 162, *University of Mysore Vs. C.D. Govindra Rao* (1964 4 SCR 575, *High Court of Gujarat Vs. Gujarat Kishan Mazdoor Panchayat* (2003) 4 SCR 712, *B. Srinivasa Reddy Vs. Karnataka Urban Water Supply and Drainage Board Employees' Association* (2006) 11 SCC 731 and held/observed as under:-

“9. The Division Bench of the High Court relied upon the judgments of this court in Central Electricity Supply

Utility of Odisha v. Dhobei Sahoo, (2014) 1 SCC 161 and Bharati Reddy v. State of Karnataka, (2018) 6 SCC 162 and noted that a writ of quo warranto can be issued when:

(i) A person holding public office lacks eligibility criteria prescribed for such appointment; and

(ii) The appointment is made contrary to the statutory provisions or rules.

23. Through a line of cases, this Court has laid out the terms on which the writ of quo warranto may be exercised. In ***University of Mysore v C.D. Govindra Rao, (1964) 4 SCR 575***, a Constitution Bench of this Court, speaking through Justice Gajendragadkar (as he then was), held that:

6. [...]

Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, ***the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right.*** It would thus be seen that if these proceedings are adopted subject to the conditions recognized in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons, not entitled to public office may be allowed to occupy them and to continue to hold them

as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that ***before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not.***

(emphasis supplied)

24. In ***High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat, (2003) 4 SCC 712*** in his concurring opinion in a three judge Bench, Justice SB Sinha, held that:

22. The High Court in exercise of its writ jurisdiction in a matter of this nature is required to determine at the outset as to whether a case has been made out for issuance of a writ of certiorari or a writ of quo warranto. The jurisdiction of the High Court to issue a writ of quo warranto is a limited one. ***While issuing such a writ, the Court merely makes a public declaration but will not consider the respective impact on the candidates or other factors which may be relevant for issuance of a writ of certiorari. (See R.K. Jain v. Union of India, SCC para 74.)***

23. A writ of quo warranto can only be issued when the appointment is contrary to the statutory rules. (See *Mor Modern Coop. Transport Society Ltd. v. Financial Commr. & Secy. to Govt. of Haryana.*)

26. In ***Central Electricity Supply Utility of Odisha v. Dhobei Sahoo, (2014) 1 SCC 161***, another two judge Bench of this Court reiterated that:

21. [...] the jurisdiction of the High Court while issuing a writ of quo warranto is a limited one and can only be issued when the person holding the public office lacks the eligibility criteria or when the appointment is contrary to the statutory rules. That apart, the concept of locus standi which is strictly applicable to service jurisprudence for the purpose of canvassing the legality or correctness of the action should not be allowed to have any entry, for such allowance is likely to exceed the limits of quo warranto which is impermissible. **The basic purpose of a writ of quo warranto is to confer jurisdiction on the constitutional courts to see that a public office is not held by usurper without any legal authority.**

(emphasis supplied)

46. In the case of **Bharati Reddy Vs. The State of Karnataka and others Civil Appeal No. 1763 of 2018 decided on 6.3.2018** (Paragraph-30) Hon'ble Supreme Court has considered the question of issuance of writ of quo warranto and held as under:

30. *In B.R. Kapur Vs. State of Tamil Nadu & Anr.* 8 the Constitution Bench was called upon to consider the situation where a person convicted for a criminal offence and whose conviction has not been suspended pending appeal, could be sworn in as the Chief Minister of a State and continue to function as such. The Court was called upon to answer the controversy on the basis of indisputable fact that the incumbent Chief Minister had already been convicted of a criminal offence and such conviction had not been suspended in the pending criminal appeal. After considering the purport of Article 164 and Article 173 of the Constitution, the Court concluded that the appointment of the second respondent

in the appeal as the Chief Minister was in clear violation of the constitutional provisions and thus a writ of quo warranto was inevitable. The substratum of the exposition was the factum of basic ineligibility of the person to be appointed or continue as Chief Minister. In a concurring judgment by Brijesh Kumar, J. (as His Lordship then was) the nature of **writ of quo warranto** has been explicated in the following words:

“79. **A writ of quo warranto is a writ which lies against the person, who according to the relator is not entitled to hold an office of public nature and is only a usurper of the office. It is the person, against whom the writ of quo warranto is directed, who is required to show, by what authority that person is entitled to hold the office.** The challenge can be made on various grounds, including on the grounds that the possessor of the office does not fulfil the required qualifications or suffers from any disqualification, which debars the person to hold such office.”

47. In a recent judgement in the case of **Gambhirdan K. Gadhvi Vs. State of Gujrat (2022) 5 SCC 179** (Paragraphs 16 and 17), Hon'ble Supreme Court referred to its earlier judgements in **Rajesh Awasthi Vs. Nand Lal Jaiswal (2013) 1 SCC 501 at 514** and **Armed Forces Medical Association Vs. Union of India (2006) 11 SCC 731** and reiterated similar principles.

48. Thus a **Writ of Quo Warranto** will lie when the appointment is made contrary to the statutory provisions. Broadly stated, the quo warranto proceedings affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to

show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by a judicial order. It gives the judiciary a weapon to control the executive from making appointments to public office against law and to protect citizens from being deprived of public office to which they have a right. It protects the public from usurpers of public office. Therefore, a person can effectively claim a writ of quo-warranto, if he satisfies the court that the office in question is a public office and is held by an usurper without legal authority. This inevitably would lead to an enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not. Thus, a writ of quo-warranto can only be issued when a person holding a public office does not fulfill the eligibility criteria prescribed for appointment to such an office or when the appointment is contrary to statutory provisions.

(L) Whether on facts of the present case writ of quo-warranto needs to be issued?

49. Indisputedly the respondent no. 5 holds a public office. As discussed in foregoing paragraphs of this judgement, he does not possess the eligibility/necessary qualification for appointment on the post of Director of Prosecution or Dy. Director of Prosecution or Addl. Director of Prosecution as Head of the Directorate of Prosecution. Indisputedly the respondent no. 5 is an IPS officer in police service. Sub-section (2) of Section 25A specifically provides that a person shall be eligible to be appointed as Director of Prosecution or Dy. Director of Prosecution only if he has been in practice as an Advocate for not less

than 10 years and such appointment shall be made with the concurrence of Chief Justice of the High Court. It is admitted to all the respondents that the respondent no. 5 has not been in practice as an Advocate for not less than 10 years and also his appointment has been made without concurrence of Chief Justice of the High Court. The petitioner is a practising Advocate and has satisfied the Court by drawing attention to the relevant facts and the relevant provisions of law that the office in question is a public office which is being held by the respondent no. 5 without fulfilling the basic eligibility and thus he is a usurper of the public office holding the post without any legal authority and his appointment is contrary to the provisions of Section 25A Cr.P.C. A writ of quo warranto can be issued when a person holding the public office does not fulfil the eligibility criteria prescribed for appointment to such an office or when the appointment is contrary to the statutory provisions. Reference in this regard may be had to the recent judgement of the Hon'ble Supreme Court dated 3.3.2022 in *Writ Petition (Civil) No. 1525 of 2019 (Gambhirdan K Gadhi Vs. The State of Gujarat and others)* reported in (2022) 5 SCC 179.

50. In the present set of facts we have already held that the appointment of the respondent no. 5 is contrary to the provisions of sub-section (2) of Section 25A Cr.P.C. inasmuch as he neither possesses the eligibility provide under the said provisions nor his appointment was made with the concurrence of the Chief Justice of the High Court. Therefore, we hold that the respondent no. 5 is usurper of a public office and his appointment was in breach of sub-section (2) of Section 25A Cr.P.C.

(M) Judgements relied by the State respondents:-

51. Learned Addl. Advocate General has relied upon the judgements of Hon'ble Supreme Court in the case of **Official Liquidator Vs. DhartiDhan (P) Ltd. (1977) 2 SCC 166 (paragraph 8)** for interpretation of the word 'may'. We find that the said judgement has no relevance on the facts of the present case. In view of the fact that the Directorate of Prosecution has been established in the State of U.P. and legal position in our finding in detail has been recorded in the foregoing paragraphs of this judgement.

52. The second judgement relied upon by the learned Addl. Advocate General is the judgement of Hon'ble Supreme Court in **A.K. Roy Vs. Union of India (1982) 1 SCC 271 (Paragraph 50)** for the proposition that the State Legislature can opt for non-enforcement of a particular provision in the statute if the statute provides for a discreton. In the present set of facts there is nothing on record to show that the State legislature has amended the provision of Section 25A Cr.P.C. On the contrary the State of U.P. has declined to bring any amendment in Section 25A Cr.P.C.

53. The next judgements relied upon by the learned Addl. Advocate General are in **Sub-Inspector Rooplal Vs. Lt. Governor (2000) 1 SCC 644 (paragraph 12 and 13)**, **U.P. Power Corporation Ltd. V. Rajesh Kumar (2012) 7 SCC 1 (paragraph 16 to 21)** and **JaisriSahu Vs. Rajdewan Dubey AIR 1962 SC 83** for proposition that if different view is taken by a Coordinate Bench, judicial propriety demands that the matter be referred to a larger Bench. These judgements are of no help to the

respondents inasmuch as no contrary view is being taken by this Court. The present judgement is based on facts as emerging from own records of the respondents, the law laid down by the Hon'ble Supreme Court and the undertaking given by the State of U.P. before Hon'ble Supreme Court in the case of **Sadhana Sharma (supra)**.

54. The next judgement of Hon'ble Supreme Court relied by learned Addl. Advocate General in **Union of India Vs. Hansoli Devi (2002) 7 SCC 273**, **Sukhdev Singh Vs. State of Haryana (2013) 2 SCC 212** and **Raghunath Rai Bareja Vs. Punjab National Bank (2007) 2 SCC 230** for the proposition that that penal statutes should be strictly construed. In the present set of facts and the conclusion reached by us leaves no manner of doubt that these judgements are of no help to the respondents.

55. The next series of judgements relied by learned Addl. Advocate General are the judgements of Hon'ble Supreme Court in **India Cement Ltd. Vs. State of Tamil Nadu (1990) 1 SCC 12**, **Kartar Singh Vs. State of Punjab (1994) 3 SCC 569**, **Union of India Vs. Shah Goverdhan L. Kabra Teacher's College (2002) 8 SCC 228**, **Atiabari Tea Co. Ltd. Vs. State of Assam AIR (1961) SC 232** and **State of Karnataka Vs. State of Meghalaya (2022) SCC Online SC 350** for the proposition that pith and substance of the legislative enactment is to be looked while two entries of concurrent list are overlapping. We have already discussed in detail the provisions of Section 25A, the breakdown of this enactment, its enforceability in the State of U.P., own undertaking of the State of U.P. in the case of **Sadhana Sharma (supra)** and the various judgements of Hon'ble Supreme

Court dealing directly with section 25A Cr.P.C. Thus the judgements relied by the learned Addl. Advocate General are of no help to the respondents.

(N) Brief Summary of Conclusions:-

56. The conclusions reached above by us are briefly summarised as under:-

(i) By office memorandum dated 27.11.1980, **Directorate of Prosecution has been established in the State of U.P.** as an administrative decision pursuant to the recommendations of the 14th report of the Law Commission and the report of Rishi Rai Committee.

(ii) Since, despite recommendations of the Law Commission and also despite judgement of Hon'ble Supreme Court in S.B. Shahane v. State of Maharashtra AIR 1985 SC 1628 several States have not established Directorate of Prosecution **while some of the States including the State of Uttar Pradesh have established a Directorate of Prosecution therefore, so as to give statutory status to the Directorate of Prosecution, the Parliament inserted Section 25A in Cr.P.C.** by Section 4 of the Code of Criminal Procedure (Amendment) Act, 2005 (No. 25 of 2005) which received assent of the President on 23.6.2005 and was **enforced by Notification No. S. O. 923(E)** dated 21.6.2006 w.e.f. 23.6.2006.

(iii) **The Chief Minister approved the proposal (reproduced in para-19 above) on 28.2.2014** not to amend Section 25A Cr.P.C. Statement of learned Additional Advocate General as noted in Para 21 above itself shows that the decision of the State Government dated 28.02.2014 dropping the proposed amendment and to implement Section 25A Cr.P.C. is undisputed.

(iv) **Section 25A read with Section 1(2) Cr.P.C. has been enforced in the State of U.P. w.e.f. 23.6.2006 and the State of U.P. consciously took decision not to amend Section 25A Cr.P.C.** The Legislature of the State of Uttar Pradesh has not enacted a law to amend Section 25A Cr.P.C. with assent of the President of India under Article 254 of the Constitution of India. By enactment of Section 25A Cr.P.C., **the existing Directorate of Prosecution established by the aforesaid office memorandum dated 27.11.1980, has achieved statutory status. Thus, Section 25A Cr.P.C. would prevail over the aforesaid office memorandum dated 27.11.1980 including the eligibility for appointment on the post of Director of Prosecution and Dy. Director of Prosecution/ Additional Director General of Prosecution by whatever name called, to the extent the Office Memorandum 27.11.1980 is inconsistent with Section 25A Cr.P.C.**

(v) As per sub-section (2) of Section 1 Cr.P.C. the provision of Section 25A Cr.P.C. are applicable in the State of Uttar Pradesh. The U.P. Legislature has not enacted any law to amend Section 25A Cr.P.C. with the assent of the President of India. The State Government gave an undertaking before the Hon'ble Supreme Court to implement the judgement of the High Court in the case of Sadhana Sharma (supra) in its entirety. **Therefore, the stand taken by the respondents that Section 25A Cr.P.C. is not applicable in the State of U.P. is wholly baseless and infact it is a disrespect being shown by them to the Parliament, the binding judgment in the case of Sadhana Sharma (supra), the statement made on behalf of State of U.P. before Hon'ble Supreme Court and the constitutional provisions including Article 141.**

(vi) Office Memorandum dated 27.11.1980 is not a law under Section 5 Cr.P.C. as it is neither a general law nor a special law as defined in Sections 41 and 42 I.P.C. read with Section 2(y) Cr.P.C., yet for the sake of argument if the office memorandum dated 27.11.1980 is presumed to be a law still Section 25A Cr.P.C. shall prevail over it. Article 254(2) of the Constitution of India deals with the question of legislative supremacy. If a State law is in conflict with the law made by Parliament in the field of legislation falling under the concurrent list, then the law enacted by Parliament shall prevail and to the extent of repugnancy the State law shall be void. Therefore, the essential qualification as provided in Section 25A(2) Cr.P.C. for the post of Director of Prosecution or Dy. Director of Prosecution shall prevail over the qualification for the said posts provided under the office memorandum dated 27.11.1980.

(vii) **Sections 24, 25 and 25A are part of one singular Scheme** which makes a perceptible demarcation and compartmentalization for the Public Prosecutor in the High Court and District Courts and administrative control and hierarchy in the Department of Prosecution i.e. Directorate of Prosecution.

(viii) Since the Office Memorandum dated 27.11.1980 is neither a special law nor a local law, as defined in Sections 41 and 42 I.P.C. read with Section 2(y) Cr.P.C., therefore, it shall not be covered by Section 5 Cr.P.C. The Office Memorandum dated 27.11.1980 was an administrative decision to establish a Directorate of Prosecution and Section 25A Cr.P.C. has given a statutory recognition to the already established Directorate of Prosecution.

(ix) **Provisions of Section 25A(2)** providing essential

qualification/eligibility of a person and necessary condition for appointment on the post of Director of Prosecution or Dy. Director of Prosecution that he must be in practice as an Advocate for not less than 10 years and such appointment shall be made with the concurrence of the Chief Justice of the High Court, **are mandatory**. The respondent No.5 neither possesses the essential qualification nor his appointment has been made with the concurrence of the Chief Justice of the High Court.

(x) Section 25A(3) Cr.P.C. provides that the Head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the Head of the Home Department in the State. The respondent no. 5 has been appointed by the Head of the Home Department of the State Government by order dated 26.08.2019. As per particulars disclosed by him in paragraphs 8, 9 and 10 of his short counter affidavit he is functioning as Head of the Directorate of Prosecution under the administrative control of the Head of the Home Department of the State of Uttar Pradesh. There is no post named as A.D.G. Prosecution or A.D.G. Prosecution Police under the Office Memorandum dated 27.11.1980. Thus, the respondent no. 5 is functioning as the Director of Prosecution under the administrative control of the Head of the Home Department of the State of Uttar Pradesh, without any legal authority.

(xi) In paragraph-20 of the counter affidavit the State respondents have not denied the averments of paragraphs-24, 25 and 26 of the writ petition that the respondent No.5 is an usurper of the public office held by him without legal authority and without eligibility and suitability, a writ of quo warranto needs to be issued against the respondent No.5 holding his

appointment as illegal and not in consonance with the statutory provisions of Section 25A Cr.P.C.

(xii) **A writ of Quo Warranto will lie when the appointment is made contrary to the statutory provisions. Broadly stated, the quo warranto proceedings affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by a judicial order. Therefore, a person can effectively claim a writ of quo-warranto, if he satisfies the court that the office in question is a public office and is held by an usurper without legal authority. Thus a writ of quo-warranto can only be issued when a person holding a public office does not fulfill the eligibility criteria prescribed for appointment to such an office or when the appointment is contrary to statutory provisions.**

(xiii) Since the appointment of the respondent no. 5 is without authority of law, illegal and contrary to the provisions of sub-section (2) of Section 25A Cr.P.C., therefore, it is declared that the respondent no. 5 is usurper of a public office and his appointment is illegal.

Relief Granted:-

57. For all the reasons aforesaid, **we issue a writ of quo warranto** declaring that the appointment of respondent no. 5 as Addl. Director General of Police Prosecution, Uttar Pradesh, Lucknow as Head of the Directorate of Prosecution is without authority of law, illegal and contrary to the statutory provisions of

Section 25A(2) of the Cr.P.C. The respondent Nos.1 and 2 are directed to ensure that Director of Prosecution under Section 25A(2) Cr.P.C. is appointed within six months from today. **The writ petition is allowed.**

(Delivered by Hon'ble Jayant Banerji, J.)
(Concurring)

1. I have had the privilege, benefit and advantage of reading the erudite draft judgment shared by my esteemed brother. However, I would like to add a few words of my own.

2. The office memorandum dated 27.11.1980, which is apparently made and issued in exercise of the executive power conferred under Article 162 of the Constitution of India, has been filed as enclosure to the affidavit filed by the respondents. The subject of the O.M. is: 'Establishment of Directorate of Prosecution, Uttar Pradesh'. The contents of the aforesaid O.M. have already been quoted above and are not being repeated for brevity.

3. The O.M. narrates that after implementation of the Criminal Procedure Code, 1973, for purpose of effective and impartial prosecution and for establishment of independent Directorate of Prosecution, the matter has been under consideration of the Government for some time and in this regard after seriously considering the recommendations made in the 14th Law Commission of India and the recommendations of the Rishi Rai Committee constituted by the Government, the Hon'ble Governor has granted approval for establishment of a separate Directorate of Prosecution with its Headquarters in Lucknow, for effective control and

supervision of the entire work of Assistant Public Prosecutors, appointed under Section 25 of the Code, in the Courts of the Magistrates.

4. It is pertinent to refer to some provisions of the Code. Sections 24 and 25 of the Code read as under:

“24. Public Prosecutors.- (1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district, or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in

the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).

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

(a) "regular Cadre of Prosecuting Officers" means a Cadre of Prosecuting Officers which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post;

(b) "Prosecuting Officer" means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an

advocate for not less than ten years as a Special Public Prosecutor.

Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.

(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.

25. Assistant Public Prosecutors.- (1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

(1-A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class or cases in the Courts of Magistrates.

(2) Save as otherwise provided in sub-section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case:

Provided that a police officer shall not be so appointed -

(a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

(b) if he is below the rank of Inspector.”

5. Certain amendments in the aforesaid provisions of the Code having a bearing on this discussion are being mentioned. Section 24 was substituted and sub-section (1A) of Section 25 was inserted by the Code of Criminal Procedure (Amendment) Act, 1978. The Explanation in sub-section (6) of Section 24 was inserted by the Code of Criminal Procedure (Amendment) Act, 2005 with retrospective effect from 18.12.1978.

By the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1991 (U.P. Act No.18 of 1991), inter alia, the following amendment was introduced:

"2. In Section 24 of the Code of Criminal Procedure, 1973, hereinafter referred to as the said Code:-

(a) in sub-section (1), the words "after consultation with the High Court", shall be omitted;

(b) sub-sections (4), (5) and (6) shall be omitted;

(c) in sub-section (7), the word, "or sub-section (6)" shall be omitted."

By U.P. Act 16 of 1976, in sub-section (2) of Section 25, the following proviso was inserted and deemed always to have been inserted, namely:

“Provided that nothing in this sub-section shall be construed to prohibit the State Government from exercising its control over Assistant Public Prosecutors through police officers.”

6. Section 25-A of the Code was inserted by Code of Criminal Procedure (Amendment) Act, 2005 with effect from 23.6.2006 which reads as under:

“25-A. Directorate of Prosecution. - (1) The State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit.

(2) A person shall be eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment shall be made with the concurrence of the Chief Justice of the High Court.

(3) The Head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the Head of the Home Department in the State.

(4) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.

(5) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (1), or as the case may be, sub-section (8), of Section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution.

(6) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (3), or as the case may be, sub-section (8), of Section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under sub-section (1) of Section 25 shall be subordinate to the Deputy Director of Prosecution.

(7) The powers and functions of the Director of Prosecution and the Deputy Directors of Prosecution and the areas for which each of the Deputy Directors of Prosecution have been appointed shall be

such as the State Government may, by notification, specify.

(8) The provisions of section shall not apply to the Advocate General for the State while performing the functions of a Public Prosecutor.”

7. In the matter of **Sadhana Sharma v. State of U.P. and others**, which has been referred to at length by my esteemed brother hereinabove, the constitutional validity of Section 2 of U.P. Act No.18 of 1991 was challenged. After considering a gamut of case laws, the court referred to the importance of the recommendations made by the Law Commission of India in its Reports, and the Statement of Objects and Reasons mentioned in the Prefatory Note to the amending Act and observed that nothing was brought on record as to how the consultation of the District Judge causes delay and how the State is deprived to choose a counsel of its choice. This court referred to the judgment of **Km. Shrilekha Vidyarthi and others v. State of U.P. and others** and held that the State Legislation has not considered that judgment and recorded its dissent, as to why they wish to overrule it by legislation. This court held that the objects and reasons were based on unfounded facts having no nexus with the object sought to be achieved and hence the amendment suffers from unreasonableness and hit by Article 14 of the Constitution of India. In its discussion on this aspect this Court referred to the aforesaid amendment and Section 25-A of the Code, including the interplay of the provisions, and observed that:

“155. Apart from the above, as is evident from Section 25-A of CrPC and keeping in view the amendment done to make the prosecuting agency independent, it shall always be obligatory on the part of

the State to make selection process more independent than enforcing the spoil system for the recruitment of District Government Counsels.

156. The letter and spirit of Section 25-A reveals that Parliament to its wisdom provides that Directorate of Prosecution shall be established and appointment of Director of Prosecution shall be with the concurrence of Chief Justice. Thus, it is evident that the intention of Parliament is to make the prosecuting agency more independent than what we possess.

.....

170. Parliament has inserted Section 25-A (supra) to make the Prosecution Branch more independent than earlier was. Under sub-section (8) of Section 24 of CrPC, power was conferred on the State Government to appoint special counsel that too, without obtaining opinion from the District Judge or even the District Magistrate. Meaning thereby, special counsel were under the direct command and control of the State Government with regard to employment and discharge of duty.

By inserting Section 25-A, Parliament provided that even special counsel shall discharge their obligation under the Directorate of Prosecution. Though, the power of State Government to appoint special counsel has been maintained but he/she shall fall within the administrative control of Director of Prosecution. Thus, in case the special counsel is different class than the District Government Counsel appointed under sub-sections (4), (5) and (6) of Section 25 of Code of Criminal Procedure. Hence, so far as the supervisory or statutory control is concerned, by inserting Section 25-A, Parliament removed the difference between

the counsel appointed on the recommendation of the District Judge and District Magistrate and a special counsel appointed by the Government straight away in a particular case. Accordingly, in case impugned amendment is sustained, then it shall be in derogation of letter and spirit of Section 25-A of CrPC and shall be repugnant to Central Act in view of proviso to Clause (2) of Article 254 of the Constitution. Both cannot stand together.”

8. This court therefore, in **Sadhana Sharma**, while declaring Section 2 of the Act No.18 of 1991 ultra vires, unconstitutional, void and illegal, directed restoration of the original provision with natural consequences to the extent it relates to amendment done in Section 24 of the Code.

9. The Special Leave Petitions filed by the State Government against the aforesaid judgment of this Court in **Sadhana Sharma** were dismissed as withdrawn in view of the policy decision of the State Government that they wish to implement the judgment of the High Court in its entirety and would continue to adopt the same policy in future as well.

10. In this backdrop, the operation of the O.M. with respect to the provisions of Sections 24, 25 and 25-A of the Code would require consideration.

11. Section 5 of the Code reads as follows:

“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.”

Section 5 thus provides that 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. Under the aforesaid O.M., for exercising effective control and supervision of the works of the Assistant Public Prosecutors who are pursuing matters in the Court of Magistrates appointed under Section 25 of the Code, the Directorate of Prosecution was set up with the posts of Director of Prosecution, Deputy Director of Prosecution and other posts. Therefore, by the O.M., jurisdiction and powers have been conferred on the Director of Prosecution for purpose of control and supervision as circumscribed therein.

12. In the judgment of the **Union of India and others Vs. Somasundaram Viswanath and others** reported in (1989) 1 SCC 175, while considering executive instructions made under Article 162 and rules made under Article 309 of the Constitution of India, the Supreme Court observed as follows:

“6. It is well settled that the norms regarding recruitment and promotion of officers belonging to the Civil Services can be laid down either by a law made by the appropriate legislature or by rules made under the proviso to Article 309 of the Constitution of India or by means of executive instructions issued under Article 73 of the Constitution of India in the case of Civil Services under the Union of India and under Article 162 of the Constitution of India in the case of Civil Services under the

State Governments. If there is a conflict between the executive instructions and the rules made under the proviso to Article 309 of the Constitution of India, the rules made under proviso to Article 309 of the Constitution of India prevail, and if there is a conflict between the rules made under the proviso to Article 309 of the Constitution of India and the law made by the appropriate legislature the law made by the appropriate legislature prevails.

.....

Unless there is anything in the Rules made under the proviso to Article 309 of the Constitution of India, which is repugnant to the instructions contained in the Office Memorandum, the Office Memorandum which is apparently issued under Article 73 of the Constitution of India is entitled to be treated as valid and binding on all concerned.”

13. In a recent judgment of the Supreme Court in the case of **SK Naushad Rahaman and others Vs. Union of India and others** reported in 2022 SCC Online SC 297, the Supreme Court iterated certain basic precepts of service jurisprudence and observed as follows:

“29. Fourth, norms applicable to the recruitment and conditions of service of officers belonging to the civil services can be stipulated 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.

30. Fifth, where there is a conflict between executive 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.

31. 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.

.....

34. There is a fundamental fallacy in the submission which has been urged on behalf of the appellants. Administrative instructions, it is well-settled, can supplement rules which are framed under the proviso to Article 309 of the Constitution in a manner which does not lead to any inconsistencies. Executive instructions may fill up the gaps in the rules. But supplementing the exercise of the rule making power with the aid of administrative or executive instructions is distinct from taking the aid of administrative instructions contrary to the express provision or the necessary intendment of the rules which have been framed under Article 309.”

14. At the time of making the O.M. the provisions of Section 25-A of the Code were neither comprehended nor contemplated. The content and tenor of the O.M. is exclusively for establishment of a separate Directorate of Prosecution for effective control and supervision of the entire work of Assistant Public Prosecutors, appointed under Section 25 of the Code, in the Courts of the Magistrates. The administrative structure of

the Directorate of Prosecution has been elaborated in the aforesaid O.M. The establishment, pay scales, conditions of service, structure of Directorate, duties and responsibilities of the Director of Prosecution, etc. have been specified in the annexures to the O.M.

Annexure-1 lists the sanctioned staff of the headquarters of the Directorate with the names of the posts, the number of posts and pay scales. Annexure-2 lists the number of posts, pay scales and names of posts of the sanctioned staff in the office of the Regional Deputy Director and in the office of the senior Prosecuting Officer/In-charge Prosecuting Officer at the district level. Annexure-3 is the estimate of expenses on the establishment of the Directorate of Prosecution. Annexure 4 lists the structure of the Directorate including creation of four regions, each under the control of a Deputy Director of Prosecution. Annexure-5 lists the duties and responsibilities of the Director of Prosecution, Deputy Director (Headquarters), Regional Deputy Directors of Prosecution, and of Senior Prosecuting Officers, and, also the duties of the Prosecuting Officers / Assistant Prosecuting Officers. Annexure-6 lists the number of permanent and temporary post of Senior Prosecuting Officers, Prosecuting Officers and Assistant Prosecuting Officers and the pay scales of the staff.

Clause 9 of the O.M. provides that for appointment to the post of Director of Prosecution, Deputy Director of Prosecution, delegation of powers and procedure for appointment to the newly created posts, a separate order would be issued. However, no separate order, as provided in clause 9 of the O.M., has been brought on record by the respondents.

It is pertinent to mention here that sub-clause 2 of Clause 12 of the O.M.

provides that to the post of Director of Prosecution, an officer in the police service of the rank of Deputy Inspector General of Police would be appointed but he will not work under the control of the Inspector General of Police nor will he exercise the authority of police.

15. My esteemed brother has referred to the judgment of a three Judge bench of the Supreme Court in the case of **K. Anbazhagan v. State of Karnataka** in the discussion made in his judgment on whether Sections 24, 25 and 25-A of the Code need to be understood as a singular scheme. In **K. Anbazhagan** it was held that the State Government is under obligation to establish Directorate of Prosecution and that the scheme makes a perceptible demarcation and compartmentalisation for the Public Prosecutor in the High Court and the district courts.

16. Section 25-A of the Code is thus like an 'umbrella' provision that provides for establishment of an independent Directorate of Prosecution, which is an agency for effective and impartial prosecution, and which is separate from the investigation agency. This Directorate is to be headed by a duly qualified Director of Prosecution with a structured organisation. Public Prosecutors, Additional Public Prosecutors and Special Public Prosecutors appointed by the State Government under sub-section (1), or as the case may be, sub-section (8), of Section 24 to conduct cases in the High Court would be subordinate to the Director of Prosecution. Further, the Deputy Director of Prosecution, who is required to be duly qualified and appointed under sub-section (1) of Section 25-A of the Code, is subordinate to the Director of Prosecution. Public Prosecutors, Additional Public Prosecutors and Special Public

Prosecutors appointed by the State Government under sub-section (3), or as the case may be, sub-section (8), of Section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under sub-section (1) of Section 25 shall be subordinate to the Deputy Director of Prosecution.

It is pertinent to note here that subordination of Assistant Public Prosecutors appointed by the District Magistrate under sub-section (3) of Section 25 of the Code is not within the ambit of Section 25-A.

17. The proviso inserted in sub-section (2) of Section 25 by U.P. Act No.16 of 1976 which provides that 'nothing in this sub-section shall be construed to prohibit the State Government from exercising its control over Assistant Public Prosecutors through police officers', appears to be in conflict with the provisions of Section 25-A of the Code, and therefore, the conflict / repugnancy would have to be viewed in light of the proviso to clause (2) of Article 254 of the Constitution of India. In the judgment of the Constitution Bench of the Supreme Court that has been cited by my esteemed brother being in the matter of **Zaverbhai Amaldas v. State of Bombay** it has been held that under the Constitution Parliament can, acting under the proviso to Article 254(2), repeal a State law, but where it does not expressly do so, even then, the State law will be void under that provision if it conflicts with a later "law with respect to the same matter" that may be enacted by Parliament.

18. Even otherwise, given the provision of Section 5 of the Code the O.M. would have to yield to the provisions of Section 25-A of the Code. That is to say,

in view of the specific provision to the contrary in Section 25-A regarding the subordination of Assistant Public Prosecutors appointed under sub-section (1) of Section 25 to the Deputy Director of Prosecution, the provision of the O.M. providing for appointment of a high ranking serving police officer to the post of Director of Prosecution for control and supervision of the Assistant Public Prosecutors is not saved by Section 5 of the Code to that extent.

19. The emphasis made on the use of the word 'may' appearing in sub-section (1) of Section 25-A by the State Government for the purpose of not implementing the provisions of Section 25-A of the Code is illogical and irrational. The use of the word 'may' in sub-section (1) was also considered by the Division Bench of this Court in **Sadhana Sharma** wherein this Court opined that the purpose of Section 25-A of the Code is to make the prosecuting branch independent from the Government to optimum level. Therefore, in view of the existing provisions of law, in view of the stand taken by the State Government before the Supreme Court while withdrawing the Special Leave Petitions as aforesaid, and in view of the facts and circumstances, the State cannot take the stand that it will not constitute a Directorate of Prosecution under sub-section (1) of Section 25-A Code but would continue with the Directorate of Prosecution as established under the aforesaid O.M.. Accordingly, the adjudication of this case would proceed on the premise of the applicability of Section 25-A of the Code as it stands in its full depth and vigour. As such, inconsistencies to Section 25-A brought to the fore by State Government amendments and executive instructions by means of the O.M. would not be given credence by this Court.

20. There is another aspect of the matter. On 9 February 2023, Shri Ashutosh Pandey, the respondent no.5, swore an affidavit highlighting inter-alia, the initiatives taken by him in capacity as Director of Prosecution. Extracts of his statements in the affidavit are as follows:

“That as ADG Prosecution, I have tried to improve the coordination between different stakeholders of criminal justice system, and inform the government about the prosecution status regarding the Trial Cases against Mafia, as well as crime against women, etc, implementation of e-Prosecution and ICJS in U.P., monitoring of acquittal and conviction reports, provision of facilities to improve professional competence and working environment.

That to improve the welfare of prosecutors and staff so as to improve their morale and working conditions. Effort was made to make their work paperless by introducing e-Prosecution Portal, e-Prosecution Mobile App, e-Office and e-HRMS (Manav Sampada Portal) and training and grievance redressal through webinar.

That after posting as ADG Prosecution, a concerted and determined effort was made to bring dignity and glory to the work of prosecutors by coordinating and cooperating with all stakeholders of criminal justice system. The new work culture among prosecutors and its sharp impact on conviction and disposal was very much appreciated by the Hon. Supreme Court of India to the extent that during national seminar on the implementation of POCSO Act held in the auditorium of the Supreme Court of India from 10.12.2022 to 11.12.2022 where all the directors of prosecution and police officers from all the states of India were present, were advised

to follow the model of prosecution being implemented by ADG Prosecution UP. Besides, the MHA of the Government of India awarded First Prize to UP Prosecution twice during last two consecutive years for the best performance in prosecution all over India.

Officers of different states of India visit UP to see and learn the exemplary work culture of UP Prosecution. Recently, officers of Karnataka, Madhya Pradesh and Sikkim made a visit to Lucknow to get the first hand information of functioning of UP Prosecution. The Director of Prosecution, Orissa also enquired to know about the functioning of UP Prosecution with reference to the advice of the Hon. Supreme Court of India. Telangana, Punjab, Chhattisgarh and Jammu & Kashmir also showed keen interest in knowing the strategies adopted by the UP Prosecution.

There are two systems of prosecution in UP-

- i. First system is under the Law Department where DGCs, ADGCs and public prosecutors plead the trial cases where punishment is more than 7 years.

- ii. Second system is under the Home Department where APOs, POs and SPOs plead the trial cases where punishment is less than 7 years.

There was wide gap among these two different sets of prosecutors in terms of mutual cooperation and respect which impeded the sharing of information and professional knowledge and spread of common work culture among them.

There was constant problem of not knowing which prosecutor is doing what in different courts in different cases. DGCs and ADGCs were treating themselves outside the purview of prosecution and functioning under LR manual. To bridge this fractured system of

Prosecution, e-Prosecution portal under ICJS (Interoperable Criminal Justice System) platform was started which is a part of Digital India Mission. This was to make their work easy, accurate and effective. All the prosecutors were given laptops and e-Prosecution mobile app so that they can feed their work from anywhere. Hands-on training was given to all prosecutors on computers with repetition at regular intervals in district itself by master trainers. This helped in monitoring and evaluation of prosecutors and tracking of cases. This has helped prosecutors to fetch FIR from Police (CCTNS) and all case details or causelist from Court (e-Court) at the click of the mouse and feed their own performances in courts on e-Prosecution portal which helped in speedy trial and effective prosecution. UP Prosecution is now the domain expert in developing and modifying e-Prosecution software of NIC. The number of prosecution officers using NIC digital platform themselves is highest compared to Police and Judiciary in UP.

This experiment created an environment where two different sets of prosecutors started functioning together on same platform. This emerged as the biggest surprise all over India. Technology became a great enabler and leveler.

To monitor and evaluate the performance of prosecutors, 12 point KPI (Key Performance Indicator) were fixed after due discussion with all prosecutors and a platform was developed by NIC on e-Prosecution portal. Both sets of prosecutors including DGCs, ADGCs, APOs, POs and SPOs have started feeding on it.

To implement this strategy, letters were issued from ACS Home to DMs and from Principal Secretary Law to DGSs, ADGCs and public prosecutors of UP after due discussion.

Prosecutors were awarded certificates in recognition of their effort towards speedy trial and effective prosecution.

Year 2021		
Sl. No.	Rank	No. of certificates.
1.	JD	29
2.	SPO	21
3.	PO	35
4.	APO	127
5.	DGC	20
6.	ADGC	38
7.	Special Public Prosecutor	3

Year 2022		
Sl. No.	Rank	No. of certificates.
1.	JD	5
2.	SPO	23
3.	PO	13
4.	APO	35
5.	DGC	5
6.	ADGC	23
7.	Special Public Prosecutor	7

This created a huge impetus in galvanizing the Prosecution in UP and the MHA, Government of India awarded the First Prize and trophy for the best performance in Prosecution among all states of India twice consecutively in 2021 and 2022.

For speedy trial and effective prosecution, with the coordination from Judiciary, Magistracy and Police, three important monthly meetings of districts (Monitoring Cell meeting headed by DJ, Prosecution meeting headed by DM and

Crime meeting of Police SP) were made agenda based for tasking and monitoring officers of Prosecution and Police.

To make effective the Monitoring Cell meeting, by coordinating with ACS Home and Principal Secretary Law, a letter was issued from Registrar Hon. High Court Allahabad for keeping and discussing 'Process Register' so as to improve the production and examination of witness.

To make effective the DM's Prosecution meeting, by coordinating with ACS Home, a letter was issued for all DMs to hold such meeting on 13 point agenda and send monthly report to the Government and the Prosecution Department.

To make effective the SP's Crime meeting, by coordinating with DGP UP, a letter was issued to all SSPs SPs and Police Commissioners to improve the quality of investigation by getting legal opinion, service delivery of summons and adopt success stories of highly performing districts.

IMPACT OF SUCH INNOVATION EFFORTS:

Over last 3 years, there is pronounced significant result in convictions in crimes against women. During 2020 in POCSO cases, convictions were awarded in 535 such cases; while in 2021, convictions in 1230 cases and in year 2022, convictions in 2313 cases leading to a jump of 332% in the year 2022 compared to 2020.

In cases of rape, conviction were 177 in year 2020, 370 in year 2021 and 671 in year 2022 leading to a jump of 280% in year 2022 compared to 2020.

Convictions in POCSO cases within 1 month from charge framed to judgement increased from 5 in year 2020 to 34 in year 2022.

During 2022, altogether 16 Mafia were convicted in 23 different cases. A campaign was launched to get charges framed in cases of listed mafias of UP.

Tracking and monitoring of cases and prioritizing the production and examination of witnesses has yielded profound result. Compared to 2021, the number of witness examined increased by 2 to 4 times in 22 districts and more than 4 times in 5 districts of UP. For example in district Ballia, 325 police witnesses were examined in 2021 while in 2022 this numbered increased to 987.

Except north-eastern states, Uttar Pradesh tops the list with the highest conviction rate of 59.1% in crime against women in 2021. It is 123% of national average of 26.5. UP is consistently number 1 in highest conviction rate in such cases over last 3 years.

Maximum number of convictions in
shortest time
by effective pairvi in courts
Coordination by Police,
Prosecution and Govt.

According to crime in India 2021 data published by the National Crime Records Bureau

> Uttar Pradesh ranks first in the entire country for the completion of trial cases in the shortest period of time by various courts for IPC and SLL (Special and Local Law) offences.

> The maximum number of 1310 cases have been convicted in the District and Sessions Courts in just one month in Uttar Pradesh which is the highest in the entire country. At the second place is Kerala with 803 cases and at the third place is Maharashtra with 224 cases.

> Similarly, in awarding punishments in just one month in trial cases by the Fast Track Courts, Uttar Pradesh has the highest number of 202 such convictions

in the entire country, which is 67 percent of the total such sentences awarded in the country. At the second place is Andhra Pradesh with 72 cases and at the third place is Tamil Nadu with 10 cases.

> In awarding punishments in 1 to 3 months in trial cases by the Fast Track Courts, Uttar Pradesh again ranks first in the country with convictions in 417 cases, followed by 72 convictions in Andhra Pradesh and 10 in Tamil Nadu.

> In awarding punishments only within 3 months in trial cases by the Special Courts, Uttar Pradesh ranks first in the country with convictions in 2195 cases followed by 998 convictions each in Madhya Pradesh and Maharashtra at the second place.

> In awarding punishments only within 3 months in trial cases by the SC/ST Courts, Uttar Pradesh ranks first in the country with convictions in 170 cases, followed by convictions in 106 cases in Madhya Pradesh and 40 in Rajasthan.

21. There appears to be no doubt, given the elaborate presentation made by the respondent No. 5 in his affidavit, who is a high ranking serving police officer, that landmark initiatives have been taken by him in monitoring and evaluating the performance of all prosecutors which led to creation of an environment where two different sets of prosecutors started functioning together on the same platform which created a huge impetus in galvanizing the prosecution in State of Uttar Pradesh.

It is stated in his narration that the impact of the initiatives made by him is that there is pronounced significant result in convictions in crimes against women. As regards POCSO cases, the convictions in the year 2022 led to a jump of of 332% as

compared to the year 2020. In cases of rape, the conviction in year 2022, compared to the year 2020, recorded a jump of 280%. During 2022, altogether 16 mafias were convicted in 23 different cases. There has been a significant increase in examination of witnesses.

22. This Court would like to place on record the empathy and appreciation it has for devoted police officers who are discharging their duties with creativity and with holistic understanding of the ground realities of prosecution. However, the initiatives undertaken by the respondent no.5, in purported exercise of jurisdiction conferred under the O.M., evinces that he is exercising the lofty and overarching jurisdiction of a Director of Prosecution as envisaged in Section 25-A of the Code. The Parliament in its wisdom has framed Section 25-A of the Code precisely to bring about fundamental and comprehensive changes in prosecution in the country to uphold the rule of law. Alas! if only the appointment of respondent no.5 was in accordance with the provisions of Section 25-A of the Code.

23. Therefore, this Court cannot but grant the relief as directed by my esteemed brother.

(2023) 7 ILRA 1115
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.07.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. Anticipatory Bail Application No. 5431
of 2023

(Under Section 438 Cr.P.C.)

Mohit Upadhyay & Ors. ...Applicants

Versus

State of U.P. & Anr.

...Respondents

Counsel for the Applicants:

Sri Krishna Kant Vishwakarma, Sri Rajesh Kumar Singh

Counsel for the Respondents:

G.A., Sri B.N. Singh, Sri Manish Kumar Singh, Sri Shakti Shanker Tiwari, Sri Subhash Chandra Tiwari, Sri V.M. Zaidi (Sr. Advocate)

Criminal Law-The Code of Criminal Procedure, 1973-Section 438--- The applicants have approached this Court directly u/s 438 CrPC without taking recourse to the Sessions Court--- The applicants have been granted anticipatory bail in Case Crime No.99 of 2017, P.S. Swaroop Nagar, District Kanpur Nagar and they have already furnished their bail bonds at the court concerned, the argument of having apprehension of being assaulted at the District Court, Kanpur Nagar pales into insignificance--- There is criminal history of eleven cases assigned to the applicants. **(Para 12 & 13)**

Anticipatory bail application is found devoid of merits and is accordingly rejected. (E-15)

List of Cases cited:

Shivam Vs St. of U.P. & anr.2021 SCC OnLine All 264

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

1. List has been revised.

2. Heard Sri Rajesh Kumar Singh, learned counsel for the applicants, Sri V.M. Zaidi, learned Senior Counsel assisted by Sri Subhash Chandra Tiwari, learned counsel for the informant and Sri P.K. Giri, learned Additional Advocate General assisted by Sri V.K.S. Parmar, learned A.G.A. for the State as well as perused the material placed on record.

3. The applicants have approached this Court directly without taking recourse to the Sessions Court, Kanpur Nagar.

4. Learned counsel for the applicant has stated that there is an exceptional ground for the applicants as the brother-in-law of the informant Radhey Krishna Upadhyay is an practising advocate at Kanpur Nagar and is an influential person who alongwith his juniors pressurises the applicants and there is every apprehension of the applicants being assaulted by them.

5. The present anticipatory bail application has been filed on behalf of the applicant in Criminal Case No.70490 of 2021 (State vs. Mohit Upadhyay) arising out of Case Crime No.22 of 2021 registered under Sections 308, 341, 504 and 506 IPC at Police Station- Barra, District Kanpur Nagar with a prayer to enlarge him on anticipatory bail.

PROSECUTION STORY:

6. The applicants are stated to have assaulted the wife of the informant on 10.08.2016 at about 10:00 PM by danda, thereby caused grievous injuries to her.

RIVAL CONTENTIONS

(Arguments on behalf of applicants)

7. Learned counsel for the applicants has stated that initially a case was instituted under Section 323, 504 and 506 I.P.C. as an NCR only and the said NCR is delayed by three days and there is no explanation of the said delay caused. Learned counsel has further stated that after much delay of about three years, an order under Section 155(2) Cr.P.C. has been passed by the Special

Chief Judicial Magistrate, Kanpur Nagar on 16.11.2019 to investigate the matter. After investigation, the final report (charge-sheet) has been filed against the applicants in added Section of 308 I.P.C. Learned counsel has further stated that the injury report is suspicious as initially the injured person was admitted to a private hospital and was treated there and was then referred to a government hospital and at the government hospital, it was observed that there was a stitched wound on her left parietal region of head and another injury was abrasion which was simple in nature.

8. Learned counsel has further stated that there is an observation made by the Investigating Officer that the informant had telephonically tried to pressurize him by saying that he is a journalist, as such the case may be transformed under Section 308 I.P.C. Despite, the said observation, under the duress of the informant, the present final report (charge-sheet) has been filed under Section 308 I.P.C. The applicants and the informant are having a long dispute pending between them. Learned counsel has further stated that in all eleven cases have been instituted against the applicants by the informant and his family members, which stands explained as four of those cases were instituted as an NCR, one is complaint case and other six cases are between the same parties. The applicants have annexed the orders of two cases mentioned in the criminal history. There is no other criminal history of the applicants except the said cases.

9. Learned counsel has further stated that the applicants had challenged the said final report (charge-sheet) before this Court by filing a petition U/S 482 Cr.P.C. No.15394 of 2021 and this Court was pleased to grant interim protection to the

applicants, but later on, on 14.02.2023, the said petition was dismissed on merits and the interim protection was set aside. Learned counsel has further stated that they have challenged the said order of rejection before the Apex Court by preferring S.L.P. No.5848 of 2023, which is still pending.

(Arguments on behalf of informant/State)

10. Per contra, learned Senior Counsel for the informant has vehemently opposed the anticipatory bail application on the ground that there is no exceptional ground present before this Court to entertain the present anticipatory bail application as there is no FIR/medical report to corroborate the allegations against the relative of the informant. Learned Senior Counsel has further stated that the applicants are the criminals as they have been involved in repeatedly committing similar nature of crimes. The victim herein is a lady and had sustained grievous injuries to her head. The applicants have criminal history of eleven cases and they have not properly explained the said criminal cases as they have not annexed the bail orders of other cases.

11. Learned Senior Counsel has further stated that the petition U/S 482 Cr.P.C. has been decided once for all and the case, being of assault, is squarely covered with paragraph 43 of the judgment of this Court passed in the case of **Shivam vs. State of U.P. and Another**¹, as such the applicants are not entitled for anticipatory bail. Learned Senior Counsel has further stated that there is no interim order in the said S.L.P. and the pendency cannot be taken into consideration at this point of time.

13. Learned A.G.A. has also vehemently opposed the anticipatory bail application on the ground that there is criminal history of eleven cases assigned to the applicants.

CONCLUSION:

12. Taking into consideration the fact as mentioned by the counsel for the applicant that there is apprehension in their minds to the fact that they may be assaulted at the premises of the District Court, Kanpur Nagar, as already stated by the counsel for the applicants that the applicants have been granted anticipatory bail in Case Crime No.99 of 2017, under Sections 307, 504 and 506 I.P.C., P.S. Swaroop Nagar, District Kanpur Nagar and they have already furnished their bail bonds at the court concerned, the said argument of having apprehension of being assaulted at the District Court, Kanpur Nagar pales into insignificance.

13. After hearing learned counsel for the parties and taking into consideration the judgment of this Court passed in **Shivam (supra)** and also the fact that there is criminal history of eleven cases assigned to the applicants, I do not find it a fit case for grant of anticipatory bail to the applicant. The present anticipatory bail application is hereby found devoid of merits and is accordingly **rejected**.

14. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of anticipatory bail application and the said observations shall have no bearing on the merits of the case during trial.

(2023) 7 ILRA 1118
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.07.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. Anticipatory Bail Application No. 7760
of 2023
(U/s 438 Cr.P.C)

Sandeep Kumar Garg & Anr. ...Applicants
Versus
State of U.P. ...Respondent

Counsel for the Applicants:

Sri Abhinav Gaur, Sri Mohd. Rashid Siddiqui, Sri Prateek Rai, Sri Anoop Trivedi (Sr. Advocate)

Counsel for the Respondent:

G.A., Sri Alok Ranjan Mishram, Sri Gopal Swaroop Chaturvedi (Sr. Advocate)

Criminal Law-The Code of Criminal Procedure,1973 - Section 438--- Applicant has a criminal history of five cases and he has not been enlarged in any of the cases, as such, the said criminal history goes unexplained--- Applicant already agitated the provisions of Section 482 Cr.P.C. without any success--- **Anticipatory bail application is found devoid of merits and is accordingly rejected. (Para 23, 24 & 25) (E-15)**

List of Cases cited:

1. Kamlesh & anr. Vs The St. of Raj. & anr.Criminal Appeal No. 1006 of 2019 (Arising out of SLP (Crl.) No. 1530 of 2018 decided on 9.7.2019
2. Ravindra Saxena Vs St. of Raj. (2010) 1 SCC 684
3. Bharat Chaudhary & anr.Vs St. of Bihar & anr.(2003) 8 SCC 77
4. Vinod Kumar Sharma & anr.Vs St. of U.P. & anr.SLP (Crl.) No. 6057 of 2021 decided on 16.11.2021

5. Shivam Vs St. of U.P. & anr.AirOnline 2021 All 484

6. Satender Kumar Antil Vs Central Bureau of Investigation & anr.2022 SCC Online SC 825

7. Aman Preet Singh Vs C.B.I. through Director AIR 2021 SC 4154

8. Siddharth Vs The St. of U.P. & anr.(2022) 1 SCC 676

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

1. Counter affidavit filed by learned counsel for the informant and rejoinder affidavit and supplementary affidavit filed by learned counsel for the applicants are taken on record.

2. Heard Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Abhinav Gaur, learned counsel for the applicants and Sri Gopal Swaroop Chaturvedi, learned Senior Advocate assisted by Sri Alok Ranjan Mishra, learned counsel for the informant as well as Sri V.K.S. Parmar, learned A.G.A. for the State and also perused the material available on record.

3. The present anticipatory bail application has been filed on behalf of the applicants in F.I.R./Case Crime No. 128 of 2018, under Sections 406, 409, 420, 467, 468, 471, 120(B) IPC, Police Station Swarup Nagar, District Kanpur Nagar, with a prayer to enlarge them on anticipatory bail.

PROSECUTION STORY:

4. As per allegations in FIR, the applicants and the informant are the directors in MTG Infra Power Private Ltd. Company. It was agreed upon by the directors that the said company shall file

tenders for contracts in the State departments and the released amount shall be deposited in the joint account of the informant and the named accused persons in the FIR.

5. On 30.9.2013, ten tenders were issued in favour of the company, but the applicants and co-accused persons Somendra Mehta and Romendra Mehta are stated to have committed criminal breach of trust and had deposited the said amount in different account numbers to which the informant was not the authorized signatory. The said account numbers are A/c No. 2336002100016082 of PNB, Panki, Kanpur, A/c No. 032605008262 of ICICI Bank, Govind Nagar, Kanpur and A/c No. 07271300000712 Punjab and Sind Bank, Transport Nagar, Kanpur. Thus, the whole amount was usurped by the applicants and other named co-accused persons in collusion with other unknown persons. The applicants and the co-accused persons are stated to have filed forged documents in the official records and also had filed fake bank guarantees before State Authorities.

6. Subsequent to it, another Bank A/c No. 0043002100062099 was also opened in PNB Bareilly, and Rs.19 crores were deposited in it, which was debited by the applicants and the other co-accused persons illegally.

7. On 18.4.2016 and 25.4.2016, the applicants are even stated to have purchased two BMW Cars with registration no. UP 78 E 7722 and UP 78 EH 0055 worth Rs. 65 lakhs each. They are even purported to have purchased another Fortuner Toyota Car worth Rs. 35 lakhs in the month of May-June 2018. Thus, they have illegally and with malicious intent, misused about Rs. 1 crore 50 lakhs of the company.

8. In September-October 2017, a new Bank A/c No. 4845214000005 was opened in Canara Bank, Civil Lines, Kanpur, to which applicant no. 1, Sandeep Kumar Garg and co-accused person Somendra Mehta were authorized signatories, and an amount of about Rs. 30 crores is stated to have been deposited in it and withdrawn by them. The applicants and other co-accused persons are even stated to have deposited fake bank guarantees in the department. It is also mentioned in the FIR that the applicants have criminal antecedents.

RIVAL CONTENTIONS:
CONTENTIONS ON BEHALF OF THE
APPLICANTS:

9. Learned Senior Counsel for the applicants has stated that the applicants are maliciously being prosecuted in the present case due to ulterior motive. They have the apprehension of their arrest. The applicants have nothing to do with the said offence as alleged by the prosecution. Learned Senior Counsel has stated that in the said case, closure report was filed by the investigating officer after a detailed investigation. A protest petition was filed by the informant and the applicants were summoned by the court concerned by rejecting the closure report, and the court concerned was pleased to take cognizance in the case under Sections 406, 420 and 120-B IPC vide order dated 29.10.2021.

10. Subsequent to it, the informant had filed a criminal revision before the Sessions Judge, Kanpur, whereby the said cognizance order was set aside vide order dated 15.3.2022 and the Magistrate concerned was ordered to pass a fresh order after hearing the parties on merits, as such, the learned Magistrate concerned summoned the applicants under Sections 406, 420, 467, 471 and 120-B IPC.

11. Learned Senior Counsel has stated that the co-accused persons Somendra Mehta and one another person had challenged the said summoning order by filing a petition u/s 482 Cr.P.C. No. 11879 of 2021 in which the proceedings were stayed vide order dated 7.9.2021. It is next stated that the applicants have been put to double jeopardy as the matter is of civil nature and already it is pending before the NCLT with respect to the said company matter.

12. Learned counsel has further stated that another petition u/s 482 Cr.P.C No. 35335 of 2022 has been dismissed by this Court vide order dated 2.1.2023. Learned counsel has also stated that applicant nos. 1 and 2 are father and son. The applicant no. 2- son has nothing to do with the said offence and has been implicated owing to his relationship with the applicant no. 1-his father. It is further argued that the applicant no. 1 is terminally ill and is suffering from brain tumour.

13. Learned counsel has placed reliance on the judgements of the Apex Court passed in **Kamlesh & another vs. The State of Rajasthan & Another**¹.

14. Learned counsel has also placed reliance on the judgement of the Apex Court in **Ravindra Saxena vs. State of Rajasthan**², whereby the anticipatory bail was granted to the applicants therein, on the ground that the matter was purely of civil in nature and the complainant had already filed a suit for specific performance.

15. Learned counsel has also placed reliance on the judgement of the Apex Court in **Bharat Chaudhary and another vs. State of Bihar and another**³.

16. Learned counsel has also placed reliance on the judgement of the Apex Court in **Vinod Kumar Sharma and another vs. State of Uttar Pradesh and another**⁴, whereby the petitioners had challenged the said filing of charge sheet and were granted time by the court concerned to apply for regular bail. Instead, the applicants herein had applied for anticipatory bail, as such, it was opined that the bail includes anticipatory bail.

17. Learned counsel has also stated that already the petition before the NCLT is pending in which the interim order was passed on 15.11.2021 for both the parties to appear before the Court in the AGM, and it is the informant, who had defrauded the said order and has not complied with it. As such, the applicants had even filed contempt petition before the NCLT, which is still pending. It is next stated that the applicant no. 2 has no criminal history. The criminal history of the applicant no. 1 stands explained as there are the FIRs instituted by his tenants as Case Crime No. 160 of 2021, P.S. Gwaltoli, District Kanpur Nagar and another Case Crime No. 187 of 2021, P.S. Gwaltoli, District Kanpur Nagar, Case Crime No. 2 of 2023, P.S. Collectorganj, district Kanpur Nagar and Case Crime No. 26 of 2016 pending at Police Station-Sector 49, Noida, district Gautambudh Nagar. It is next stated that in the case at Noida, the applicant no. 1 was not named. Rather, it was against the company itself and the matter has been referred to Lokayukt after passing through various forums. The said criminal history stands explained vide rejoinder affidavit.

CONTENTIONS ON BEHALF OF
THE INFORMANT AND STATE:

18. On the other hand, learned A.G.A. and learned Senior Counsel for the informant have vehemently opposed the prayer for grant of anticipatory bail on the ground that already the applicants had agitated the provisions of Section 482 Cr.P.C. at this Court and had failed as no stay order has been granted in the present case, as such, they have approached this Court by filing anticipatory bail. This tantamounts to forum hunting as the applicants, who are habitual in using various courts, are themselves deliberately evading arrest. Learned counsel has placed reliance on the judgement of this Court passed in Criminal Misc. Anticipatory Bail Application u/s 438 Cr.P.C. No. 2529 of 2022 (Sabir Ali and State of U.P. and 2 others) whereby in a detailed order, it has been stated that if the applicants had filed a petition u/s 482 Cr.P.C., no anticipatory bail application can be entertained.

19. Learned Senior Counsel for the first informant has stated that the applicant has not come with clean hands, as he has concealed the fact that he had filed Criminal Misc. Application u/s 482 Cr.P.C. No. 15383 of 2022 before this Court challenging the order dated 15.3.2022 passed by the Additional District and Sessions Judge, Court No. 12, Kanpur Nagar, in 283 of 2021, arising out of Case Crime No. 128 of 2018 (present case). Learned Senior Counsel has next stated that no protection has been granted to the applicant despite the case being taken up four times.

20. Thus, the case law settled by this Court in **Shivam v. State of U.P. and another**⁵ applies to the case of the applicants and they are not entitled for anticipatory bail. Learned Senior Counsel has also placed reliance on the judgement

of this Court passed in Criminal Misc. Anticipatory Bail Application u/s 438 Cr.P.C. No. 2529 of 2022, whereby much reliance has been placed on the judgement passed by the Apex Court in *Satender Kumar Antil vs. Central Bureau of Investigation* and another⁶, *Aman Preet Singh vs. C.B.I. through Director*⁷ and *Siddharth vs. The State of Uttar Pradesh* and another⁸. No anticipatory bail can be entertained after having agitated the provisions of Section 482 Cr.P.C.

21. In rebuttal, learned Senior Counsel for the applicant has stated that the applicant has every right to file anticipatory bail as the word 'bail' includes 'anticipatory bail' also.

CONCLUSION:

22. It is true that the word 'bail' includes 'anticipatory bail' also, as such, the anticipatory bail has been heard at length. The present case does not fall within the category to be of civil nature only. The judgement of **Kamlesh and another** (supra) does not apply to this case, as the matter pertains to the State of Rajasthan, where the petition u/s 482 Cr.P.C. is entertained before the filing of final report (charge sheet), as such, in the case, FIR has been challenged while in the present case, that stage has already passed.

23. The judgements of **Ravindra Saxena** (supra), **Bharat Chaudhary and another** (supra) and **Vinod Kumar Sharma** (supra) also do not apply to the present case in clear terms. It is an admitted fact that the applicant no. 1 Sandeep Kumar Garg has a criminal history of five cases and he has not been enlarged in any of the cases, as such, the said criminal history goes unexplained.

25. In view of the above, the present anticipatory bail application is found devoid of merits and is, accordingly, **rejected**.

Criminal Law-The Code of Criminal Procedure, 1973-Section 439--- The applicant is languishing in jail for the last 14 years and 8 months---Co-accused person granted bail--- Applicant is also entitled to get bail on the basis of parity--- In order to ensure public peace and the welfare of the society, such convicted criminals who are kidnappers, heinous and habitual criminals, habitual offenders in crimes related to genocide--- To ensure public peace and the well-being of the society, life convicts who are hardened criminals, repeat offenders, kidnappers, in crimes related to massacre

4. आवेदक के विद्वान अधिवक्ता ने तर्क प्रस्तुत किया कि आवेदन को इस प्रकरण में गलत व फर्जी तरीके से झूठा फंसाया गया है, उसने कथित अपराध कारित नहीं किया है। आवेदक प्रथम सूचना रिपोर्ट में नामजद नहीं है। आवेदन का नाम मामले में कथित घटना के दस माह उपरांत प्रकाश में लाया गया है। आवेदक को तथा

कथित घटनास्थल से गिरफ्तार भी नहीं किया गया है, आवेदक की गिरफ्तारी उसके घर से की गयी है। आवेदन को मामले में रजिशन नामित किया गया है। आवेदन विगत लगभग चौदह वर्ष आठ माह से कारागार में निरूद्ध है। आवेदक निर्दोष तथा गरीब व्यक्ति है, जो अपने परिवार के जीविका के लिए मजदूरी का कार्य करता है। उनका यह भी कथन है कि मामले के सहअभियुक्त बच्चे उर्फ बच्चेलाल की जमानत, जमानत आवेदन पत्र सं० 30610/2008 में इस न्यायालय के अन्य न्यायपीठ के आदेश दि० 27/08/2009 द्वारा स्वीकार की जा चुकी है, आवेदन भी सहअभियुक्तगण के समानता के आदार पर जमानत पाने का अधिकारी है एवं मामले के अन्य सहअभियुक्तगण क्रमशः Narvir Alias Ranvir Alias Pahalwal, Ballister@Bargad@Fakkhar, Majanu Alias Lalu, Chhanga Alias Sumer Alias Gabbar And Others, Ompal Yadav, Updesh And Others, Ajeet, Madan Pal @ Jantaroo की जमानत, जमानत आवेदन पत्र सं० 8793/2009, 24203/2009, 33888/2009, 2778/2010, 3592/2010, 7576/2010, 11166/2010, 41522/2017 में इस न्यायालय के विभिन्न न्यायपीठ के विभिन्न आदेश दिनांक क्रमशः 11/01/2010, 11/09/2009, 09/12/2009, 29/11/2010, 15/02/2010, 05/04/2010, 10/05/2010, 30/10/2017 द्वारा स्वीकार की जा चुकी है। आवेदन निर्दोष है तथा दिनांक 28/10/2008 से कारागार में निरूद्ध है। इसलिए आवेदक को जमानत पर छोड़ दिया जाय।

5. विद्वान अपर शासकीय अधिवक्ता ने आवेदन के जमानत का प्रबल विरोध करते हुए तर्क प्रस्तुत किया कि अभियुक्त द्वारा अन्य सहअभियुक्तगण के साथ मिलकर पुलिस बल पर घातक आयुधों से सुसज्जित होकर हमला किया गया, जिससे कई लोग घायल हुए व पुलिस बल के आरक्षी यशवीर सिंह की गोली मारकर हत्या कर दिया गया। अभियुक्त धारा 302 भा०दं०वि० से संबंधित प्रकरण में दोषसिद्ध अपराधी है एवं अभियुक्त का आपराधिक इतिहास है, जो निम्न है:-

1- मु०अ०सं० 684/2007, धारा 147,148,149,307,302 भा०दं०वि०, थाना जलालाबाद, शाहजहांपुर।

2- मु०अ०सं० 368/2008, धारा 307,504 भा०दं०वि०, थाना जलालाबाद, शाहजहांपुर।

3- मु०अ०सं० 440/2008, धारा 147,148,149,302,449 भा०दं०वि०, थाना जलालाबाद, शाहजहांपुर।

4- मु०अ०सं० 421/2008, धारा 147,148,149,307 भा०दं०वि० व धारा 7 सी०एल०ए० एक्ट, थाना जलालाबाद, शाहजहांपुर।

5- मु०अ०सं० 56/2004, 147,323,504,506,332,353,224 भा०दं०वि० व धारा 7 सी०एल०ए० एक्ट, थाना जलालाबाद, शाहजहांपुर।

6. उनका यह भी कथन है कि अभियुक्तगण द्वारा कारित अपराध अंति गंभीर व जघन्य है। इस अपराध में आवेदक की भूमिका हत्या जैसे गंभीर अपराध में दर्शित है तथा अभियुक्त का पूर्व में धारा 302 भा०दं०वि० के अंतर्गत दोषसिद्ध होने के तथ्य पुनः हत्या जैसे अपराध कारित करने कृत्य को दृष्टिगत रखते हुए अभियुक्त को जमानत पर मुक्त किया जाना उचित प्रतीत नहीं हो रहा है एवं मामले के साक्षीगण भी प्रतिकूल ढंग से प्रभावित किये जा सकते हैं। उनका यह भी कथन है कि अभियुक्त रू० 50,000/- इनामी नरेशा धीमर के गैंग का सक्रिय सदस्य है तथा अभियुक्त व सहअभियुक्तगण का समाज में इतना भय व आतंक प्रसारित है कि अभियोजन साक्षीगण अवर न्यायालय में गवाही देने के लिए उपस्थित नहीं हो रहे हैं। इसलिए आवेदक को जमानत पर मुक्त न किया जाय। उन्होंने अपने तर्क के समर्थन में मा० उच्चतम न्यायालय के SAUDAN SINGH Vs. THE STATE OF UTTAR PRADESH में दि० 05/10/2021 को प्रतिपादित निम्न विधि-व्यवस्था की ओर ध्यान आकृष्ट किया:-

In these suggestions, there are some exceptions sought to be carved out which have been extracted as under:-

“1. Heinous nature of Crime:

(a) Prohibited categories: To ensure public peace and the well-being of the society, life convicts who are hardened criminals, repeat offenders, kidnappers, in crimes related to massacre (three or more than three murders), habitual criminals, and fall in prohibited categories as per the U.P. Jail Standing Policy ? no bail should be granted.?”

We are also conscious of a scenario where an appeal comes up for hearing and the appellant may be seeking adjournment rather than arguing the appeal. That case certainly would not be one for grant of bail

as the court is willing to bestow consideration on the merits of the appeal.

7. विद्वान अपर शासकीय अधिवक्ता के तर्कों के परिप्रेक्ष्य में पत्रावली पर उपलब्ध साक्ष्यों के आधार पर आवेदन को जमानत पर मुक्त किए जाने का कोई औचित्य नहीं है तथा यह जमानत आवेदन पत्र निरस्त किए जाने योग्य है।

8. सार्वजनिक शांति और समाज की भलाई सुनिश्चित करने के लिए, ऐसे सजा पाए अपराधी जो अपहरणकर्ता, जघन्य व अभ्यस्त अपराधी हो, नरसंहार से संबंधित अपराधों में आदतन अपराधी हो। यह मामला निश्चित रूप से जमानत देने के योग्य उचित नहीं है एवं उपरोक्त तथ्यों के दृष्टिगत वाद के गुण-दोष पर बिना कोई टिप्पणी किए हुए, आवेदक का जमानत आवेदन पत्र निरस्त किया जाता है।

9. इस स्तर पर आवेदक के विद्वान अधिवक्ता ने पुनः अनुरोध किया कि आवेदक विगत 14 वर्ष 8 माह से कारागार में निरूद्ध है, इसलिए अवर न्यायालय को निर्देश कर दिया जाये कि इस वाद से संबंधित सत्र परीक्षण का निस्तारण शीघ्रता के आधार पर करना सुनिश्चित किया जाय।

10. उनके अनुरोध को देखते हुए संबंधित अवर न्यायालय को यह निर्देशित किया जाता है कि इस वाद से संबंधित सत्र परीक्षण का निस्तारण दिन-प्रति-दिन की सुनवाई करने के आधार पर बिना किसी अनाश्यक स्थगन के शीघ्रता के आधार पर करना सुनिश्चित किया जाय तथा न्यायालय नियमानुसार गवाहों की उपस्थित सुनिश्चित करने के लिए गवाहों के विरूद्ध आवश्यक प्रपीडक कार्यवाही अमल में ला सकती है तथा विद्वान अपर शासकीय अधिवक्ता ने कथन किया है कि अभियुक्त एवं अन्य सहअभियुक्तगण के भय एवं आतंक से अभियोजन साक्षीगण अवर न्यायालय में बयान देने हेतु उपस्थित नहीं हो रहे हैं।

11. इसलिए संबंधित अवर न्यायालय को भी निर्देशित किया जाता है कि संबंधित वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक को मामले के साक्षीगण की सुरक्षा हेतु पत्र प्रस्तुत करके उनको पर्याप्त सुरक्षा-व्यवस्था मुहैया करवाया जाय तथा साक्षीगण को न्यायालय में पुलिस सुरक्षा में लाया जाय एवं उनके बयान समुचित वीडियोग्राफी के साथ अंकित कराये जाय।

(2023) 7 ILRA 1124

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 14.07.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

Second Appeal No. 416 of 1986

Ram Deo

...Appellant

Versus

Paras Nath Singh & Ors.

...Respondents

Counsel for the Appellant:

R.C. Bajpai, Amit Kukherjee, Amit Mukherjee, D.C. Mukherjee, H.S. Sahai, Mukesh Kumar Sharma

Counsel for the Respondents:

Abid Ali, Atiya Abid, Indra Pratap Singh. M. Khalid, Mohammad Abid Ali, Mohd, Ali, Sarita Verma, Satya Prakash, Sudhir Srivastava

Civil Law-The Code of Civil Procedure, 1908 - Section 100 - The Specific Relief Act, 1963-Sections 16(c), 19 & 20 ---

Second appeal assailing a judgment of reversal passed by the lower appellate Court---Though the plaintiff had St.d in the plaint that he was ready and willing to perform his part of the contract but unfortunately there is no averment in the examination-in-chief regarding the plaintiff being ready and willing to perform his part of the contract. There is no averment in the plaint and in the evidence that the plaintiff had the requisite funds or that he had offered the same to the defendant who refused it. There is no details regarding the date or any other such particular to substantiate that he had requested the defendant to accept the balance sale consideration and execute the sale deed or to obtain the permission. There has been no averment regarding any overt act done by the plaintiff to suggest his readiness and willingness---Defendants were bona fide purchasers for valuable consideration without notice---wherein the issue of escalation in the prices of property and balancing the equities between the parties has been considered and noticing that 40 years have lapsed and the prices of the property have escalated and the value of money on account of inflation has also been affected severely---Defendants shall refund a sum of Rs. 3 lacs to the plaintiff-

appellant within a period of 60 days from today.
(Para 25, 33 & 37)

Appeal dismissed. (E-15)

List of Cases cited:

1. Arjun Prasad & ors. Vs Ganesh Prasad & ors. 2023:AHC-LKO:43190: 2023 SCC Online Allahabad 364
2. Ramzan Ali & anr.Vs Altafur Rahman 2023:AHC-LKO:30146
3. Ritu Saxena Vs J.S. Grover & anr.(2019) 9 SCC 132
4. K. Prakash Vs B.R. Sampath Kumar, (2015) 1 SCC 597
5. Zarina Siddiqui Vs A. Ramalingam (2015) 1 SCC 705
6. U.N. Krishnamurthy Vs A.M. Krishnamurthy, 2022 SCC Online SC 840

(Delivered by Hon'ble Jaspreet Singh, J.)

1. This is the plaintiff's second appeal assailing a judgment of reversal passed by the lower appellate Court in Civil Appeal No. 39 of 1982 dated 28.04.1986 whereby the suit bearing R.S. No. 167 of 1980 for specific performance of contract of the plaintiff, which was decreed by the trial Court by means of judgment and decree dated 23.12.1981 was set aside and dismissed by the lower appellate Court.

2. The instant second appeal was admitted by the Court on 15.07.1986 and on the application for interim relief moved by the plaintiff-appellant, it was provided that in case, if the plaintiff is in possession, it shall not be disturbed in execution of the decree. During pendency of the instant second appeal, the original plaintiff, namely, Ram Dev and the defendants-respondents Paras Nath and Raj Karan

Verma expired and the legal heirs have been brought on record.

3. The Court has heard Shri Mukesh Sharma, learned counsel for the appellant and Ms. Atiya Abid, learned counsel for the respondents.

4. Before advertng to the substantial questions of law, it will be appropriate to take a glance at the facts giving rise to the instant appeal.

5. Shri Ram Dev, the original plaintiff instituted a suit for specific performance of contract registered as regular suit No.167 of 1980 pleading that Shri Raj Karan Singh, father of Paras Nath Singh had executed a registered agreement to sell in favour of the plaintiff on 29.11.1979 in respect of the property in question which was morefully described in the agreement as situate on *Chak* No.232 measuring 1 *bigha*, 6 *biswa* and 15 *dhur* situate in Mauja Asharapur Barwa, Pargana- Minjhaura, Tehsil-Akbarpur, District- Faizabad (now District Ambedkar Nagar).

6. In pursuance of the aforesaid agreement to sell, the plaintiff had paid a sum of Rs.2,000/- as earnest money and a sum of Rs. 1,600/- was agreed to be paid at the time of the execution of the sale deed. It was also agreed that the defendant Raj Karan Singh would seek the permission for executing the sale deed as the consolidation operations were in progress in the village and thereafter, the sale deed would be executed. It was also pleaded that the plaintiff had requested Raj Karan Singh to seek the permission, however, he delayed and evaded the same. However, it is also pleaded that in April, 1980, the plaintiff came to know that Raj Karan Singh had received the permission and then again he

was requested to execute the sale deed. This was again ignored, consequently, the plaintiff sent a notice on 28.04.1980 to execute the sale deed and that the plaintiff is ready and willing to pay remaining sum of Rs.1,600/-, however, the defendant did not reply to the said notice and later on 13.05.1980, the plaintiff became aware that Raj Karan Singh has already executed a sale deed in favour of defendants No.2 and 3, namely, Raj Karan Verma And Ram Charan Verma. It is in the aforesaid backdrop that the plaintiff instituted the suit of specific performance of contract also pleading that the defendants No.2 and 3 may be directed to join the said sale deed to convey the proper title to the plaintiff.

7. The defendants No.2 and 3 filed their joint written statement and denied the averments of the plaint. It set up the case that the original vendor, namely, Raj Karan Singh had already entered into an agreement with the defendants No.2 and 3 on 10.01.1975 for a total sale consideration of Rs.10,000/- out of which Rs.8,000/- was paid and Rs.2,000/- was to be paid at the time of execution of the sale deed. It is in view thereof that the defendant No.1 had taken the permission and executed the sale deed in favour of the defendants No. 2 and 3 on 28.03.1980 and as such the defendants No.2 and 3 are bona fide purchasers for valuable consideration, without notice of the agreement and their rights could not be defeated at the behest of the plaintiff on the basis of his agreement.

8. Upon exchange of the pleadings, the trial Court framed seven issues, however, the relevant issues upon which suit came to be contested were:-

(i) Whether the defendant No.1 had executed any agreement on 29.11.1979 in favour of the plaintiff?

(ii) Whether the defendant No.1 had executed any agreement in favour of the defendants No.2 and 3 as stated by the defendants in their written statement?

(iii) Whether the defendants No.2 and 3 are bona fide purchasers for valuable consideration without notice?

(iv) Whether the defendant No.1 had executed the sale deed in favour of the defendants No.2 and 3 in pursuance of the agreement dated 10.01.1975 and if so, its effect?

9. The trial Court considered the issue regarding the agreement dated 29.11.1979 in favour of the plaintiff and the alleged agreement dated 10.01.1975 which was unregistered and in favour of the defendants No.2 and 3 was held to be fraudulent. Thereafter, the trial Court considered the issue regarding the fact as to whether the defendants No.2 and 3 were bona fide purchasers for valuable consideration without notice and held that in view of the statement given by the P.W.-2 that he had spoken to the defendant No.2 that he was going to witness the agreement being executed by the defendant No.1 and the plaintiff. This indicated that the defendants No.2 and 3 had knowledge of the agreement, hence, they were not bona fide purchasers for valuable consideration, without notice and consequently, by means of judgment and decree dated 23.12.1981, the suit for specific performance was decreed in favour of the plaintiff.

10. The defendants No.2 and 3 preferred a regular civil appeal under Section 96 C.P.C. and the appellate Court reversed the findings and dismissed the suit on the ground that the plaintiff had failed to prove that they were ready and willing to perform their part of contract and this being a essential condition, hence, without the

same being proved, the suit could not have been decreed. The lower appellate Court also reversed another finding and held that the evidence of P.W.-2 was not clear to suggest that the defendants No.2 and 3 were not bona fide purchasers for valuable consideration without notice and with the aforesaid two findings being reversed, the judgment and decree passed by the trial Court was set aside and consequently, the suit was dismissed.

11. In the instant second appeal the questions of law, which have been urged by the learned counsel for the appellant upon which the appeal was admitted, are:-

(i) Whether the plaintiff-appellant was ready and willing to perform their part of contract and that the lower appellate Court was not justified in reversing the said finding by carving out a new case especially when no issue regarding readiness and willingness was framed by the trial Court.

(ii) Whether the lower appellate Court has erred in misreading the evidence of P.W.-1 and P.W.-2 in coming to the conclusion that the defendants No. 2 and 3 were bona fide purchasers for valuable consideration without notice and thus, the suit has been wrongly dismissed by the lower appellate Court?

12. Shri Mukesh Sharma, learned counsel for the appellant has vehemently argued that the plaintiff had instituted the suit for specific performance of contract in respect of a registered agreement to sell dated 29.11.1979 in pursuance whereof Rs.2,000/- had already been paid as earnest money and Rs. 1,600/- was to be paid at the time of execution of the sale deed. It was the duty of the defendant No.1 to seek permission as the consolidation operations

were going on in the village. It was pleaded in the plaint that the plaintiff had requested the defendant No.1 to seek the permission and all necessary help, which may be required from the plaintiff, he was ready to cooperate, however, the defendant No.1 evaded to obtain the permission.

13. It is further urged that even in the plaint specifically it was averred that the plaintiff was ready and willing to perform his part of contract and it was actually the defendant No.1, who had violated and breached the terms of the agreement. There is no denial of the fact by the original vendor that the plaintiff was not ready and willing to perform his part of contract, moreover, the defendant No.1 did not appear before the Court at all and in this view of the fact, the averments made by the plaintiff remain uncontroverted. The conduct of plaintiff was unblemished and as such as soon as he became aware in the month of April that the defendant No.1 has obtained the permission, he had issued a notice to the defendant on 28.04.1980, which was not complied with and though, the defendant No.1 in breach of the terms and conditions of the agreement to sell in favour of the plaintiff executed a sale deed in favour of defendants No.2 and 3 and soon thereafter, the plaintiff filed a suit for specific performance of contract. This all indicates that the plaintiff was ready and willing to perform his part of contract and there was no lethargy on the part of the plaintiff which could be seen as an impediment for the grant of the decree for specific performance of contract dated 29.11.1979.

14. The learned counsel for the appellant has further urged that the trial Court had returned a finding that the alleged agreement set up by the defendants

No.2 and 3 was found to be forged and as such categorical averment as well as evidence of the P.W.-2 clearly reflected that the defendants No.2 and 3 were aware of the registered agreement in favour of the plaintiff. Hence, they were not bona fide purchasers for valuable consideration, without notice and in the given facts and circumstances, the suit was rightly decreed by the trial Court, but the lower appellate Court has reversed the finding on the issue of readiness and willingness, which was not even in controversy as no issue was framed by the trial Court in this regard. Even otherwise, the lower appellate Court has taken a technical view as the issue of readiness and willingness is not to be construed in a *strait jacket formula* and has to be ascertained in light of the averments in the plaint and the surrounding circumstance and evidence which has not been done resulting in the findings being vitiated.

15. The learned counsel for the appellant has further urged that it was the burden on the defendants No.2 and 3 to establish that they were bona fide purchasers for valuable consideration without notice, however, the lower appellate Court has failed to appreciate that this burden could not have been shifted on the plaintiff and by doing so, it has completely given an incorrect complexion to the entire litigation and the defendants No.2 and 3, in any case, could not establish that they were bona fide purchasers for valuable consideration without notice and therefore, the findings returned by the lower appellate Court are not sustainable in law and as such the said judgment deserves to be set aside.

16. Lastly, it has been stated that the plaintiff has been in possession of the

disputed property since the date of execution of the agreement, accordingly, in the aforesaid circumstances as the possession of the plaintiff was protected by the interim order granted by this Court and about 40 years have gone by in the aforesaid circumstances, the discretion also must be exercised in favour of the appellant who is still ready and willing to perform his part of contract and consequently, the appeal deserves to be allowed.

In support of his submissions, the learned counsel for the appellant has relied upon the decisions of the Apex Court in '*Aniglase Yohannan vs. Ramlatha and others* (2005) 7 SCC 534; *R.K. Mohammed Ubaidullah and others vs. Hajee C. Abdul Wahab (D) by Lrs. and others* (2000) 6 SCC 402; *Sargunam (dead) by Lr. vs. Chidambaram and another* (2005) 1 SCC 162; *Dattu Sakharam Khairnar @ Sutar vs. Punja Laxman Shinde, 1997 lawsuit (Bombay) 95*; *Sathy vs. Sayed Mohamed Ali Usmanali, 1997 lawsuit (KER) 279*; *Salamatullah & another vs. Charittar Doeri, 2017 (9) ADJ 37*; *Ram Yagga vs. Ram Niwaz 2021 (39) LCD 1512*'.

17. Ms. Atiya Abid, learned counsel appearing for the respondents combating the aforesaid submissions has urged that the entire contention of the counsel for the appellant is misfounded. It is urged that in a suit for specific performance of contract, it is a duty cast upon the plaintiff not only to aver the readiness and willingness as required in terms of Section 16 (c) of the Specific Relief Act, but the same also has to be proved by cogent evidence and not only it must be present and proved at the time of institution of the suit, but this readiness and willingness must continue throughout the proceedings in the Court. In

support of her submission she has relied upon a decision of this Court in ***Hari Om and others vs. Shri Gopal 1997 (15) LCD 351***. It is submitted that even if at all, the issue has not been framed yet, the fact remains that this was the duty of the plaintiff to have averred and proved this fact, without which, he was not entitled to any decree of specific performance. The plaintiff by making a bald averment in the plaint but not substantiating the same by proof already missed the boat and was not entitled to the decree of specific performance, however, this aspect was not considered by the trial Court. The lower appellate Court took note of this fact and finding that the plaintiff was not able to prove his readiness and willingness, rightly reversed the decree of the trial court which cannot be faulted.

18. Learned Counsel for the respondents has further urged that the defendant No.1 had already executed an unregistered agreement in the year 1975 in terms whereof he had accepted a sum of Rs.8,000/- as earnest money and a sum of Rs.2,000/- was to be paid at the time of the execution of the sale deed after the defendant No.1 had obtained the permission. Since the permission had been obtained in April, accordingly, the defendant No.1 executed the sale deed in favour of the defendants No.2 and 3 in pursuance of the agreement to sell and therefore, there was no requirement for the defendants No.2 and 3 to establish that they were bona fide purchasers of valuable consideration without notice as the sale deed was in pursuance of an earlier agreement of 1975 and the plaintiff is claiming on the basis of a subsequent agreement.

19. It is further submitted that even otherwise, if the statements of the P.W.-1 and P.W.-2 are seen, then it cannot be said

that there was any averment which could construe notice to the defendants No.2 and 3 regarding the registered agreement to sell of the plaintiff dated 29.11.1979. It is urged that there is a difference between the word "knowledge" and "notice". The word "notice" has a wider implication and unless and until it was shown that the defendant had notice of the agreement, it cannot be said that the defendant had committed any error in getting the sale deed executed. In support of her submission regarding the issue of notice and knowledge, she has relied upon a decision of the Apex Court in case of ***Ram Niwas (dead) through LRS. vs. Bano (Smt) and others (2000) 6 SCC 685***.

20. Lastly, it has been urged that the plaintiff has not been in possession of the property in question nor there was any evidence to the aforesaid fact, hence, to state that the plaintiff has been in possession for last 40 years is incorrect. It is also urged that the findings returned by the lower appellate Court are based on proper appreciation of evidence. Accordingly, the findings of fact are not liable to be distributed in exercise of powers under Section 100 C.P.C. Consequently, the appeal deserves to fail.

21. The Court has considered the rival submissions and also perused the material on record.

22. The first issue which arises for consideration is regarding the readiness and willingness of the plaintiff and its nuances in a suit for specific performance of contract. The primary submission of the learned counsel for the appellant is that the plaintiff had averred in his plaint that he was ready and willing to perform his part of the contract and even in the evidence, it

was stated that the plaintiff had issued a notice and as soon as he became aware that the defendant No.1 had executed a sale deed in favour of the defendants No.2 and 3, he promptly filed the suit for specific performance, all this indicates his readiness and willingness and that in absence of an issue, the lower appellate Court had erred in reversing the decree for the aforesaid point.

23. If the aforesaid contention is noticed, it would be found that first and foremost Section 16(c) of Specific Relief Act clearly indicates that the plaintiff must aver in his plaint that he is ready and willing to perform his part of the contract. Taking a glance at the plaint, it would indicate that definitely the plaintiff has averred that he was ready and willing to perform his part of the contract, but perhaps that is not enough. The issue of readiness and willingness has two separate connotations. The same not only has to be averred but it has to be even proved. The readiness and willingness has to be present throughout the proceedings. The issue of readiness and willingness was considered recently by this Court in *Arjun Prasad and others vs. Ganesh Prasad and others* 2023:AHC-LKO:43190: 2023 SCC Online Allahabad 364 in the following paragraphs:-

"29. The plea of readiness and willingness is an important and essential ingredient in relation to Section 16(c) of the Specific Relief Act, 1963 and it has been held that it is not a straight jacket formula. In R.C. Chandiok v. Chuni Lal Sabharwal (1970) 3 SCC 140, the Hon'ble Apex Court observed as under:-

"readiness and willingness cannot be treated as a straitjacket formula and the issue has to be decided keeping in

view the facts and circumstances relevant to the intention and conduct of the party concerned"

30. In *Narinderjit Singh v. North Star Estate Promoters Limited*, (2012) 5 SCC 712, in para 21 to 23 held as under:-

"20. In our view, the concurrent findings recorded by the trial court and the lower appellate court on the issues of execution of the agreement by the appellant's father and the respondent's readiness and willingness to perform its part of the agreement were based on correct evaluation of the pleadings and evidence of the parties and the learned Single Judge of the High Court did not commit any error by refusing to upset those findings. The argument of the learned Senior Counsel for the appellant that in the absence of specific pleading about continued readiness and willingness of the respondent to perform its part of the agreement and availability of funds necessary for payment of the sale consideration, the High Court should have set aside the concurrent finding recorded by the courts below sounds attractive but on a careful scrutiny of the record we do not find any valid ground to entertain the same.

21. In *R.C. Chandiok v. Chuni Lal Sabharwal* [(1970) 3 SCC 140] this Court observed that "readiness and willingness cannot be treated as a straitjacket formula and the issue has to be decided keeping in view the facts and circumstances relevant to the intention and conduct of the party concerned". The same view was reiterated in *P. D'Souza v. Shondriilo Naidu* [(2004) 6 SCC 649].

22. In *N.P. Thirugnanam v. R. Jagan Mohan Rao* [(1995) 5 SCC 115] the Court found that the appellant was dabbling in real estate transaction without

means to purchase the property and observed: (SCC pp. 117-18, para 5)

“5. ... Section 16(c) of the Act envisages that the plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract.”

23. In *J.P. Builders v. A. Ramadas Rao* [(2011) 1 SCC 429 : (2011) 1 SCC (Civ) 227] the Court has merely reiterated the principles already laid down and no new proposition has been laid down which may help the cause of the appellant.”

24. In the aforesaid decision of *Arjun Prasad* (supra), this Court had the occasion to consider various nuances relating to a suit for specific performance and in respect of readiness and willingness, it also noticed an earlier decisions of this Court in *Ramzan Ali and another vs. Altafur Rahman 2023:AHC-LKO:30146* wherein with the aid of decisions of the Apex Court, the issue of readiness and willingness has been considered in the following paragraphs:-

“27. In the *Corpus Juris Secundum*, vol. 81 pp.950-951, the readiness and willingness has been interpreted to mean, a general principle of law that a person seeking specific performance must show that he has performed or offered to perform or is ready, able and willing to perform, all the essential acts required by the contract and he must not remain quiet or hold himself aloof so as to enforce or abandon the contract as events may prove advantageous. The plaintiff is entitled to specific performance where he alleges and proves that he has complied substantially with the conditions of the contract or is able, ready and willing to perform the contract. (See also *Satya Jain v Anis Ahmed Rushdie* AIR 2013 SC 434).

28. In the case of *Bijai Bahadur v. Shri Shiv Kumar* AIR 1985 All 223, this Court held that so far as the question of readiness and willingness is concerned while 'willingness' is merely a mental process, 'readiness' is something to do with translating that will into action and is preceded by a necessary preparation for being in a position to be ready. As to the averments about this continuous readiness and willingness the law never insists on any particular form and the necessary averment may be made in any language the plaintiff

may choose to employ. The language is not important. The crucial thing is that the totality of the averments made in the plaint must indicate the readiness and willingness of the plaintiff, even though by necessary inference.

29. This Court also notices the decision of the Apex Court in His Holiness Acharya Swami Ganesh Dassji Vs. Sitaram Thapar; 1996 (4) SCC 526 wherein the concept of readiness and willingness has been noticed and has been held as under:-

"2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, i.e., by 27-2-1975. The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willingness to perform plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the capacity to perform his part of the contract as he had no financial capacity to

pay the consideration in cash as contracted and intended to bide for the time which disentitles him as time is of the essence of the contract."

30. Similarly, In J.P. Builders and Another Vs. A. Ramadas Rao and Another; 2011 (1) SCC 429 wherein the Apex Court in paragraph nos. 22 to 27 has observed as under:-

"22. The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contract. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

23. In N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao [(1995) 5 SCC 115] at SCC para 5, this Court held: (SCC pp. 117-18)

"5. ... Section 16(c) of the Act envisages that the plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has

to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."

24. In *P. D'Souza v. Shondrilo Naidu* [(2004) 6 SCC 649] this Court observed: (SCC p. 654, paras 19 and 21)

"19. It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case. No straitjacket formula can be laid down in this behalf.

21. ... The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale."

25. Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff.

26. It has been rightly considered by this Court in *R.C. Chandiok v. Chuni Lal Sabharwal* [(1970) 3 SCC 140] that "readiness and willingness" cannot be treated as a straitjacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned.

27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."

25. Thus, taking note of the aforesaid aspect of the matter in context with the averments and material available on record, this Court finds that though, the plaintiff had stated in the plaint that he was ready and willing to perform his part of the contract but unfortunately, while he examined himself as a witness, there is no averment to the aforesaid effect in his deposition. Even though, if the issue of readiness and willingness is not to be taken as a strait jacket formula, yet it still needs to be seen as to whether there has been sufficient compliance in light of the averments and the statement made on oath. It would be found that the plaintiff in his examination-in-chief has merely stated that the defendant No.1 had entered in a registered agreement to sell with the plaintiff in pursuance whereof he had paid

a sum of Rs.2,000/- and Rs. 1,600/- was to be paid at the time of the execution of the sale deed. Permission was required to be obtained by the defendant No.1, which he evaded and later, as soon as the plaintiff became aware that he had obtained the permission, he had sent a notice and thereafter, once the defendant No.1 has sold the property to the defendants No.2 and 3, he immediately filed the suit. Despite having made a statement in his examination-in-chief as noted above, what this Court finds is that there is no averment in the examination-in-chief regarding the plaintiff being ready and willing to perform his part of the contract. There is no averment in the plaint and in the evidence that the plaintiff had the requisite funds or that he had offered the same to the defendant who refused it. There is no details regarding the date or any other such particular to substantiate that he had requested the defendant to accept the balance sale consideration and execute the sale deed or to obtain the permission. There has been no averment regarding any overt act done by the plaintiff to suggest his readiness and willingness.

26. There is another issue which has to be seen in respect of readiness and willingness i.e. to say, that it was incumbent upon the plaintiff-appellant to not only aver the readiness and willingness and prove the same, but it was also required to substantiate the same by the financial capacity. In this regard, this Court finds that mere self-serving statement of the plaintiff regarding his income and readiness and willingness, without its actual proof may not come to the aid of the plaintiff. In *Ritu Saxena vs. J.S. Grover and another* (2019) 9 SCC 132, the Apex Court in respect of the financial capacity of the plaintiff held that mere self-serving

statement of income without proof of financial resources is not sufficient to prove that the plaintiff was ready and willing to perform his part of the contract.

27. Applying the aforesaid dictum and string of judgments noticed in *Arjun Prasad* (supra) and *Ramzan Ali* (supra) to the instant case, it would be evident that there is no averment at all in the evidence regarding readiness and willingness and as already noticed above, there is no detail regarding the date or time when the amount was offered to the defendant. Thus, for all the aforesaid reasons, this Court does not find that the plaintiff was able to establish his readiness and willingness by cogent evidence.

28. In view of the aforesaid, this Court does not find that the lower appellate Court has committed an error in reversing the finding on the aforesaid issue of readiness and willingness. Insofar as the submission of the learned counsel for the appellant that no issue of readiness and willingness was framed by the trial Court and therefore, the lower appellate Court could not have entered into the issue is misconceived for the reason that it is now well settled that irrespective of the fact whether the defendant raises a defence regarding the non-willingness and readiness of the plaintiff yet, it is the duty of the plaintiff not only to aver but also to prove his readiness and willingness and this must continue throughout the proceedings. The Court will not exercise its jurisdiction and discretion to grant a decree of specific performance without recording a finding on readiness and willingness.

29. It can be argued that since the plaintiff had averred in the plaint that he was ready and willing and the defendant

No.1 who did not appear to contest the suit and remained ex-parte, while the defendants No.2 and 3 raised their defence, but did not deny the readiness and willingness in their written statement and therefore, for that reason, an issue may not have been framed, but nevertheless in order to decree the suit, the Court is required to return a finding on readiness and willingness and this aspect of the matter was lost sight of by the trial Court and has been correctly and appropriately noticed by the lower appellate Court.

30. Even the submission of the learned counsel for the appellant that there was ample evidence to suggest the readiness and willingness of the plaintiff does not find favour with this Court for the reasons that have already indicated hereinabove, the plaintiff did not make a single statement in his examination-in-chief nor it could be pointed out that there were any overt acts done by the plaintiff to prove his readiness and willingness. Vague averments or indirect inferences cannot be construed to arrive at and record any cogent and positive finding regarding readiness and willingness of the plaintiff. In this regard, if the decisions cited by the learned counsel for the appellant is seen, it would indicate that in *Aniglase Yohannan (supra)*, the Apex Court has reiterated the proposition which has been already noticed above and the proposition is not disputed. Insofar as the fact that the plaintiff's conduct has been blemishless and entitles him to relief of specific performance has to be seen in context with Section 20 of the Specific Relief Act. It is nobody's case that the conduct of the plaintiff suffers from any blemish rather the issue before the Court is regarding the readiness and willingness. In light of the detailed discussion as well as the reference to the decisions of the Apex

Court as well as this Court in *Arjun Prasad (supra)*, *Ramzan Ali (supra)*, the proposition is crystal clear that the plaintiff has to aver and prove with cogent evidence his readiness and willingness and for the reasons recorded above, the plaintiff has not been able to establish the same. Hence, it cannot be said that the lower appellate Court has committed an error. The first issue is answered accordingly.

31. The second question whether the defendants No.2 and 3 are bona fide purchasers for valuable consideration without notice is concerned, the same was to be established by the defendant. P.W.-2 has categorically stated that he had met the defendant No.2 and informed that he was going to Akbarpur for witnessing an agreement between the defendant No.1 and the plaintiff. However, this statement was the *sheet anchor* for the trial Court while it returned the finding that the defendant No.2 and 3 were not bona fide purchasers for valuable consideration without notice. However, the lower appellate Court reversed the finding of fact after taking note of the evidence of the P.W.-2 as well as the P.W.-1 in this regard. The fact was clearly disputed by the defendant in its statement. The lower appellate Court has taken note of the evidence of P.W.-1 himself who stated that the defendant No.2 was aware of the agreement between the plaintiff and the defendant No.1 as the defendant No.2 was present during the said conversation when the terms for the agreement were being settled. This is in direct contradiction and contrast to the statement of the P.W.-2, who stated that while he was going to Akbarpur for witnessing the agreement, the defendant No.2 had asked him where he was going and for the said statement, it is inferred that the defendant No.2 became aware that there

was an agreement between the plaintiff and the defendant No.1. From the perusal of the aforesaid, it would indicate that there is clear variance in the statements and the version of both the P.W.1 and P.W.2 ascribing knowledge/notice to the defendant No.2 regarding the agreement to sell. On the other hand, this fact is disputed by the defendant No.2 stating that they were not aware of the agreement moreso, when they already had an agreement in their favour from the defendant No.1 relating to the year 1975 and prior in time.

32. Be that as it may, the finding given by the lower appellate Court that the defendants No.2 and 3 were bona fide purchasers for valuable consideration without notice is based on appreciation of evidence and has been recorded after taking note of the statement of the witnesses, which cannot be said to be perverse. This Court in exercise of powers under Section 100 C.P.C. is not required to reappraise the evidence unless it is found to be perverse. It cannot be said that the view taken by the lower appellate Court is based on no evidence or on the evidence, which is not admissible or has been recorded relying upon incorrect reading of the statement and the view formed is such which no reasonable person could form in the given facts and circumstances.

33. Thus for the aforesaid reason, this Court is not inclined to interfere in the aforesaid finding of fact which is affirmed. This Court, thus, holds that the defendants No.2 and 3 were the bona fide purchasers for valuable consideration without notice. Having said so, this Court is also required to look into the fact as to whether the plaintiff has been in possession since last 40 years as stated, however, this issue may not detained this Court for long as there is

no material evidence in this regard before this Court. The suit was filed in the year 1980 and the instant second appeal has been pending before this Court since the year 1986, but not a single document evidencing the possession of the plaintiff has been brought on record. Since there is no finding by either of the two Courts below on this fact and in absence of any cogent evidence before this Court, this Court is not inclined to return any finding on the issue of possession. Thus, for the said reason, the Court does not find favour with the submission that the plaintiff is in possession for the last 40 years and for this sole reason, he is entitled to the discretion in terms of Section 20 of grant of decree of specific performance.

34. It will also be relevant to point out that even if, all the ingredients required for grant of specific performance is made out, even then, it is not necessary for the Court to grant a decree of specific performance as it is purely equitable and discretionary in nature. This aspect has also been dealt with in detail by this Court by taking aid of the various decisions of the Apex Court and considered in *Arjun Prasad (supra)*.

35. The decisions which have been cited by the learned counsel for the appellant in context of Section 19 of the Act of 1963 regarding the plea of the defendants being bona fide purchasers for valuable consideration without notice, as a proposition is not disputed. However, at the same time, this being a question of fact is to be ascertained on the basis of the evidence which is available on record and thus, in the light of the discussions made hereinabove, though the proposition in the decisions cited by the learned counsel for the appellant is not disputed but its applicability in the instant case does not aid

the appellant. Thus with all humility, this Court is unable to accept the submissions of the learned counsel for the appellant.

36. Having taken a wholesome view of the facts and situation and also noticing that the appellant has a registered agreement to sell in his favour in terms whereof he had already paid a sum of Rs.2,000/- as earnest money in the year 1979 and has been litigating since last 44 years and considering the fact that the defendant No.1 did not contest the proceedings whereas the defendants No.2 and 3 having purchased the property from the defendant No.1 during the currency of the agreement executed by the defendant No.1 in favour of the plaintiff hence, the defendants No.2 and 3 has stepped into the shoes of the original vendor and accordingly, looking into the circumstances even though, the plaintiff may not be entitled to a decree of specific performance yet, he is entitled to refund of the aforesaid sum.

37. This Court taking note of the decisions of the Apex Court in *K. Prakash vs. B.R. Sampath Kumar, (2015) 1 SCC 597; Zarina Siddiqui vs. A. Ramalingam (2015) 1 SCC 705 and U.N. Krishnamurthy vs. A.M. Krishnamurthy, 2022 SCC Online SC 840*, wherein the issue of escalation in the prices of property and balancing the equities between the parties has been considered and noticing that 40 years have lapsed and the prices of the property have escalated and the value of money on account of inflation has also been affected severely, hence, applying the dictum of the Apex Court in *K. Prakash (supra), Zarina Siddiqui (supra) and A.M. Krishnamurthy (supra)* and in the given facts and circumstances, this Court deems appropriate that while affirming the

judgment and decree dated 28.04.1986 passed in Civil appeal No.39 of 1982 by the Second Additional District Judge, Faizabad, this Court further directs that the defendants No.2 and 3 shall refund a sum of Rs. 3 lacs to the plaintiff-appellant within a period of 60 days from today. In case, if the aforesaid sum is not paid to the plaintiff, the plaintiff-appellant shall be entitled to recover the same from the defendants No.2 and 3 in accordance with law by moving an execution application.

38. In light of the aforesaid discussions and subject to the aforesaid modification in the judgment and decree dated 28.04.1986 passed in civil appeal No. 39 of 1982, this second appeal is **dismissed**. In the facts and circumstances, there shall be no order as to costs. The record of the trial court shall be returned.

(2023) 7 ILRA 1137
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.07.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 792 of 1998

Deepak Joshi **...Petitioner**
Versus
Asst. General Manager, Central Bank of India **...Respondent**

Counsel for the Petitioner:

Prashant Chandra, Chandra Shekher Pandey

Counsel for the Respondent:

N.K. Seth, C.S.C., Gopal K Srivastava

Central Bank of India, disciplinary proceedings, natural justice, suspension, removal from service, Bipartite Settlement - Article 14 - Article

311(2) - Central Vigilance Commission, subsistence allowance, reinstatement, back wages. The petitioner, Deepak Joshi, a Clerk at the Central Bank of India, was suspended on March 2, 1995, based on an anticipated complaint of forging a Khazana deposit passbook. A charge-sheet dated July 3, 1995, alleged seven acts of misconduct, including non-deposit of funds and fake entries. The petitioner denied the charges, claiming the complaint was fabricated. The enquiry, commencing July 18, 1995, and concluding September 18, 1996, relied on ex-parte statements, denied cross-examination of complainants, and ignored the bank's non-loss. The petitioner was not paid full subsistence allowance after one year, as mandated by the Bipartite Settlement. The Enquiry Officer's report, submitted ex-parte on December 17, 1996, ignored the petitioner's written arguments. The disciplinary authority confirmed removal from service on May 26, 1997, upheld by the appellate authority on December 23, 1997. The petitioner challenged these orders, alleging violations of natural justice, discriminatory treatment, and non-compliance with the Central Vigilance Commission's circular dated July 3, 1984. The Court emphasized that disciplinary proceedings are quasi-judicial and cannot be conducted casually or with bias. The Enquiry Officer must act impartially, ensuring fairness is manifestly seen. The failure to produce complainants or prove the complaint's authenticity undermines the enquiry's foundation. The Court noted that the bank's reliance on a fabricated complaint and unproven confession reflected a predetermined intent to punish the petitioner.

The writ petition was allowed.

Precedents Relied Upon:

1. A.K. Saxena Vs St. Bank of Patiala, (2016) SCC OnLine SC 187.
2. Pawan Kumar Agarwala Vs St. Bank of India, 2015 SCC OnLine SC 1260
3. Kumaon Mandal Vikas Nigam Vs Girja Shankar Pant, (2001) 1 SCC 182
4. St. Bank of India Vs T.J. Paul, (1999) 4 SCC 759

5. Capt M. Paul Anthony Vs Bharat Gold Mines Ltd., (1999) 3 SCC 679
6. Kuldeep Singh Vs Commissioner of Police, (1999) 2 SCC 10
7. P.C. Kacker Vs United Commercial Bank, 1999 (4) AWC 3263
8. R.C. Sood Vs High Court of Rajasthan, (1998) 5 SCC 493
9. St. Bank of India Vs D.C. Aggarwal, AIR 1993 SC 1197
10. Fakirbhai Fulabhai Solanki Vs Presiding Officer, (1986) 3 SCC 131
11. Anil Kumar Vs Presiding Officer, (1984) 3 SCC 378
12. Pradeep Vs Manganese Ore (India) Ltd., (2002) 3 SCC 683
13. St. of U.P. Vs Saroj Kumar Sinha, (2010) 2 SCC 772
14. Roop Singh Negi Vs Punjab National Bank, (2009) 2 SCC 570

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Shri Prashant Chandra, learned Senior Advocate assisted by Ms. Radhika Singh, learned counsel for the petitioner and Shri Gopal K Srivastava, learned counsel for the respondent-Bank.

2. By means of the present writ petition, the petitioner has prayed for the following reliefs:

(a) issue a writ of certiorari or a writ, order or direction in the nature of certiorari quashing the orders dated 26.5.1997 and 23.12.1997 passed by the opposite parties nos.2 and 1 contained as Annexure nos.1 and 2 respectively to the writ petition.

(b) issue a writ of mandamus or a writ, order or direction in the nature of mandamus commanding the respondents not to give effect to the orders dated 26.5.1997 and 23.12.1997 passed by the opposite party nos.2 and 1 contained in Annexure nos.1 and 2 respectively to the writ petition.

(c) issue a writ of mandamus or a writ, order or direction in the nature of mandamus commanding the respondents to allow the petitioner to resume his duties forthwith with full back wages/ salary, and to continue to pay salary to the petitioner regularly each month as and when its falls due.

(d) issue an appropriate writ, order or direction requiring the opposite parties to pay heavy cost to the petitioner for subjecting him to unwarranted harassment and mental anguish.

(e) issue any other appropriate writ, order or direction which this Hon'ble Court may deem just and necessary in the circumstances of the case may also be passed; and

(f) to allow the writ petition with costs."

3. Facts of the case are that the petitioner was employed as a Clerk with the Central Bank of India and terms and conditions of service of the petitioner were governed by bipartite settlement as amended from time to time. While posted at Vivekanand Polyclinic Branch, Lucknow the petitioner was placed under suspension vide an order dated 2.3.1995 on the complaint of a customer that he had prepared a forged Khazana deposit pass book to defraud the bank. On 18.5.1995 the opposite party no.2 issued a memo to the petitioner in respect of 7 lapses allegedly committed by the petitioner. The petitioner submitted his

reply to the said memo on 8.6.1995 denying the alleged lapses.

On 3.7.1995, the petitioner was served with a charge-sheet for having committed certain alleged acts of misconduct as detailed therein. It is pertinent to point out that a bare reading of the charge-sheet would indicate that it already recorded findings of guilt and was not a memo of charge. The said charge-sheet did not contain list of documents/ witnesses and copies of prior statements which is also in violation of circular dated 23.8.1984 issued by the Central Office of the Bank to all its Chief Managers, which is based on directions issued by the Government of India through the Central Vigilance Commission vide letter dated 3.7.1984.

The enquiry commenced on 18.7.1995 and concluded on 18.9.1996. The said enquiry is vitiated as the statements of witnesses recorded exparte were taken into account by the Enquiry Officer, though despite specific demand by the petitioner, he was refused cross examination of the said witnesses. Significantly, the so called complainants informed the enquiry officer that they had no complaint against the petitioner, but instead of dropping the charges be proceeded with the enquiry. The factum of bank having suffered no losses has been completely ignored while recording the findings of the enquiry.

Although the report of the vigilance implicated the petitioner along with other officers as well but no proceedings have been initiated against the other officers and the petitioner has been singled out and subjected to hostile discrimination in contravention of Article 14 of the Constitution. The said officers are Mrs R. Natrajan, Branch Manager, K.C. Jain, Assistant Branch Manager, Prabhat

Kapoor, Sub-Accountant, Prabhakar Chaturvedi, Sub Accountant, Navin Chaturvedi, Cash Officer and Gulab T. Bhatia, Teller.

The petitioner had requested the Enquiry Officer to send for certain documents having material bearing on the charges levelled against the petitioner but the Enquiry Officer refused to call for those documents and proceeded with the enquiry in breach of principles of natural justice. The petitioner was suspended on 2.3.1995. He was paid subsistence allowance at the rate of 50% of the salary. In accordance with the provisions of bipartite settlement the petitioner was entitled to subsistence allowance after a lapse of one year at the rate of full pay. The petitioner was not given the mandatory subsistence allowance w.e.f. 2.3.1996 although the petitioner consistently demanded the same and even apprised the enquiry officer that failure to pay the same would vitiate the entire enquiry proceedings. Non-payment of full subsistence allowance has handicapped the petitioner to effectively defend the enquiry rendering the entire enquiry proceedings null and void.

On 18.9.1996, at the time of conclusion of the enquiry the Enquiry Officer granted 10 days time to the bank's representative to file arguments with an advance copy to the petitioner and 10 days to the petitioner to file counter arguments. However, the arguments on behalf of the bank were filed after a lapse of 55 days. The petitioner's representative had requested for time upto 20.12.1996 for filing of counter arguments and the same were actually filed on 20.12.1996 i.e. within 37 days. The Enquiry Officer, however, without awaiting the petitioner's counter reply and even without considering his request for extension of time, recorded his finding on 17.12.1996.

On 20.12.1996, when the petitioner filed his counter arguments beyond the Enquiry Officer, he himself acknowledged receipt of the same, but mischievously did not disclosed that he had already given his finding without awaiting the petitioner's reply.

On 30.12.1996, the petitioner received a memo dated 28.12.1996 issued by the opposite party no.2 stating therein that the Enquiry Officer had given an exparte report dated 17.12.1996 as the petitioner failed to submit his written arguments upto 17.12.1996. There was absolutely no mention of the fact that the petitioner's representative had prayed time upto 20.12.1996 before which he had received the arguments dated 20.12.1996 but did not deal with the same. The disciplinary authority vide the said memo dated 28.12.1996 expressed argument with the findings of the Enquiry Officer and directed to the petitioner to submit his explanation to the findings dated 17.12.1996 and 21.12.1996.

Vide letters dated 6.1.1997 and 13.1.1997 the petitioner submitted his explanations specifically complaining that the Enquiry Officer had submitted his report without considering the written arguments of the petitioner, to which the disciplinary authority had mechanically nodded, reflecting of prejudice and bias. On 24/25.2.1997 the opposite party no.2 issued proposed consolidated punishment of removal from service under paragraph 19.6(b) of the bipartite settlement and explanation was called from the petitioner requiring of him to show cause why the proposed punishment be not made final.

On 27.3.1997 and 21.4.1997, the petitioner replied to the proposed punishment inter alia pointing out that the punishment of removal from service could not be awarded to the petitioner under

Paragraph 19.6(b) as it was not applicable at the time of alleged commission of the charges and the removal from service was introduced by the Vith bipartite settlement which came into effect from 14.2.1995. The petitioner had also prayed that in view of the various irregularities pointed by him the enquiry was apparently vitiated and at best a fresh enquiry be conducted, adhering to the official circulars and the principles of natural justice. Nothing was heard by the petitioner from the opposite party no.2 in response to the above and no opportunity was given to the petitioner to explain his case.

Vide an order dated 26.5.1997, the punishment of removal from service was confirmed by the opposite party no.2. The petitioner thereafter preferred an appeal dated 26.6.1997 before the opposite party no.1 against the order dated 26.5.1997 passed by opposite party no.2. The order dated 23.12.1997 is illegal, arbitrary and bereft of any reasoning and is vitiated for want of application of mind as none of the grounds urged in appeal having been dealt with. The order of removal from service is violative of the provisions contained in Article 20(1) of the Constitution.

4. Learned counsel for the petitioner submitted that the petitioner was employed as a Clerk in Central Bank of India and the terms and conditions of his services were/ are governed by Bipartite Settlement (BPS) as amended from time to time. He next submitted that while posted at Vivekanand Polyclinic Branch, Lucknow the petitioner was placed under suspension vide order dated 2.3.1995 on an apprehension that some complaint would be lodged against him for preparing a forged Khajana deposit pass book with an intention to defraud the bank.

5. Learned counsel for the petitioner next submitted that disciplinary proceedings were initiated on the basis of a complaint dated 7.3.1995 written by the Branch Manager (MW1) and said to have been signed by the joint account holders namely Mr. B.K. Upadhyay and Mr. P.K. Upadhyay. Even before the complaint came into existence, the suspension order was passed on 2.3.1995.

6. Learned counsel for the petitioner next submitted that the said complaint dated 7.3.1995 was refuted by the complainants as having been lodged by them. He next submitted that a charge-sheet dated 3.7.1995 was issued to the petitioner levelling 7 charges/ acts that the petitioner allegedly received certain sums from the joint account holders namely Mr. B.K. Upadhyay and Mr. P.K. Upadhyay but he did not deposit the same in the bank, made fake withdrawals from their account, made fake entries in the pass books etc. On the top of the last page of the charge-sheet it is sum-upped that the aforesaid acts of the petitioner are prejudicial to the interest of the bank and constitute misconduct within the meaning of Para-19.5(j) of the Bipartite Settlement.

7. Learned counsel for the petitioner next submitted that it was neither spelt out in the charge sheet nor brought out in the enquiry or in the order of punishment that what type of prejudice to the interest of the bank or what loss, if any, was caused to the Bank. The account holder denied any such irregularity in the account. Significantly no motive on the part of the petitioner was established for being involved in the said transaction which is a sine qua non for invoking Para 19.5 (j) of the Bipartite Settlement.

8. Learned counsel for the petitioner next submitted that all the charges levelled

in the chargesheet dated 3.7.1995 are in respect of only one account holder (joint account holders and real brothers Mr. B.K. Upadhyay and Mr. P.K. Upadhyay), and relate to the period 4.10.1994 to 2.2.1995 when Vth Bipartite Settlement was in force. It is reemphasized that the joint account holders namely Mr. B.K. Upadhyay and Mr. P.K. Upadhyay had denied making of any complaint dated 7.3.1995. The alleged complaint dated 7.3.1995 is in the handwriting of the then Branch Manager of the Bank (M.W.1) and on a copy of the complaint dated 7.3.1995, Mr. B.K. Upadhyay and Mr. P.K. Upadhyay both have made an endorsement that they have no concern with the complaint and they are also not well versed with the language (English) in which the complaint/ letter dated 7.3.1995 had been made.

9. Learned counsel for the petitioner submits that the charge-sheet dated 3.7.1995 did not contain list of documents and witnesses in utter violation of circular dated 23.8.1984 issued by the central office of the bank to all its Chief Managers. He next submits that the Government of India had issued directions through Central Vigilance Commission vide letter dated 3.7.1984 to all the nationalized banks and in turn the Deputy General Manager of the Central Bank of India had also issued a circular dated 23.8.1984.

10. Learned counsel for the petitioner next submitted that the order of suspension was passed on 2.3.1995 not on the basis of the alleged confessional statement but on the basis of an anticipated complaint which may be filed and the chargesheet was also formulated not on the basis of the so-called confessional statement but on the basis of a complaint filed on 7.3.1995 subsequent to the order of suspension.

11. Learned counsel for the petitioner next submitted that filing of the complaint was thus preempted and in anticipation the order of suspension was passed but the alleged confessional statement was not taken into consideration either while formulating an opinion to suspend the petitioner or while holding the enquiry against him. The list of documents and witnesses were supplied subsequent to commencement of the enquiry and the so-called confessional statement has not been referred to in the list of documents on which reliance was proposed to be placed in the enquiry.

12. Learned counsel for the petitioner next submitted that the petitioner was required to answer the charges formulated against him in the charge-sheet and was also encountered with the documents mentioned in the list which as submitted above did not include the alleged confessional statement. Primarily, three witnesses on behalf of the management, being the Branch Manager and two other employees (also to be involved along with the petitioner) were examined. The complainant on whose complaints the enquiry had been set up, were not produced despite repeated requests made by the petitioner to produce them for verification of the complaint s aid to have been made by them and forming the basis of the enquiry against the petitioner.

13. Learned counsel for the petitioner next submitted that the Government of India had issued directions through Central Vigilance Commission vide letter dated 3.7.1984 to all the nationalized banks and in turn the Deputy General Manager of the Central Bank of India had also issued a circular dated 23.8.1984 directing all disciplinary Authorities to supply a list of

documents and witnesses along with the chargesheet. The said circular also indicates that failure to provide list of documents and the witnesses on the basis of which the charges are proposed to be sustained amounts to failure to give a reasonable opportunity to a charged officer to defend himself.

14. Learned counsel for the petitioner next submitted that the vigilance officer's report was prepared on the basis of previous statements of various persons which were recorded behind the back of the petitioner but none of the persons having made the statements before the vigilance officer have been summoned/ examined. He next submitted that an alleged confessional statement recorded by the vigilance officer was made voluntarily which was witnessed by Mr. S.J. Mehrotra (an officer of the bank). The petitioner had requested for production of Mr. S.J. Mehrotra but he was not produced.

15. Learned counsel for the petitioner next submitted that noticeably, the Vigilance Officer had held that 7 persons including the Branch Manager, Shri R. Natrajan (MW1), petitioner and five other employees of the bank were guilty. While no action was taken against others, only the petitioner was singled out and made a scape goat.

16. Learned counsel for the petitioner next submits that there is no whisper about any confession having been made before the Vigilance Officer in the charge-sheet dated 3.7.1995. Even the list of documents and witnesses which were supplied during the enquiry on 18.7.1995 do not contain the Vigilance Officer's report and/or confession or the name of vigilance officer as witness.

17. Learned counsel for the petitioner next submitted that admittedly the Bank has suffered no loss. This is so because the complaint itself was fabricated by the Branch Manager. While passing the order of punishment dated 26.5.1997, the opposite party no.2 with meticulous predetermination and bias to punish the petitioner, has concluded that the petitioner has tarnished the image of the bank in the eyes of the customers. The said finding recorded by the opposite parties is based on no evidence and unsustainable. Punishment of removal from service could not have been awarded to the petitioner under Para 19.6(b) of the Bipartite Settlement applicable at the relevant point of time.

18. Learned counsel for the petitioner next submitted that the petitioner was placed under suspension on 2.3.1995. As per the Bipartite Settlement, the petitioner was entitled to the subsistence allowance @ full pay w.e.f. 2.3.1996. Since the petitioner was not paid the full subsistence allowance as per the Bipartite Settlement, therefore the enquiry held against him was vitiated.

19. In support of his submissions, learned counsel for the respondent has placed reliance upon the following judgments:

(i) A.K. Saxena v. State Bank of Patiala and others reported in (2016) SCC Online SC 187

(ii) Pawan Kumar Agarwala v. General Manager-II & Appointing Authority, State bank of India and others reported in 2015 SCC Online SC 1260

(iii) Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and others reported in (2001)1 SCC 182

(iv) State bank of India and others v. T.J. Paul reported in (1999)4 SCC 759

(v) Capt M. Paul Anthony v. Bharat Gold Mines Ltd and another reported in (1999)3 SCC 679

(vi) Kuldeep Singh v. Commissioner of Police and others reported in (1999)2 SCC 10

(vii) P.C. Kacker v. Chairman and managing Director, United Commercial bank and others reported in 1999(4) AWC 3263

(viii) R.C. Sood v. High Court of judicature at Rajasthan and others reported in (1998) 5 SCC 493

(ix) State Bank of India and others v. D.C. Aggarwal and another reported in AIR 1993 SC 1197

(x) Fakirbhai Fulabhai Solanki v. Presiding Officer and another reported in (1986) 3 SCC 131

(xi) Anil Kumar v. Presiding Officer and others reported in (1984)3 SCC 378

(xii) Pradeep v. Manganese Ore (India) Ltd. reported in (2002)3 SCC 683: 2021 SCC OnLine 1292 at page 683

(xiii) State of U.P. v. Saroj Kumar sinha reported in (2010)2 SCC 772: (2010)1SCC (L&S) 673: 2010 SCC OnLine SC 248 at page 782

(xiv) Roop singh Negi v. Punjab National Bank reported in (2009)2 SCC 570: (2009)1 SCC (L&S) 398: 2008 SCC OnLine SC 1947 at page 577

20. On the other hand, learned counsel for the respondent-Bank submitted that all the charges against petitioner were found to be proved in departmental enquiry on consideration of overwhelming documentary and other evidence which clearly proved against petitioner. He next submitted that during the course of

departmental proceeding/ enquiry, the petitioner was granted fair and reasonable opportunity to defend himself throughout.

21. Learned counsel for the respondent-Bank next submitted that on 21.04.1997, the petitioner appeared for personal hearing though the representative of his choice and there upon the arguments on behalf of petitioner as well as the written submission of petitioner, which were earlier enclosed along with the representation dated 27.03.1997, were considered in order to appreciate the report of the Enquiry Officer.

22. Learned counsel for the respondent-Bank next submitted that the enquiry Officer during the course of Enquiry has repeatedly advised the petitioner to cross examine three Management witnesses but the the petitioner did not cross examine the said witnesses on his own and therefore it follows that the petitioner never addressed himself to the merits of the case but continued to raise frivolous and untenable objections which were seemingly procedural.

23. Learned counsel for the respondent-Bank next submitted that a bare perusal of the Appellate authority's order dated 23.12.1997 shows that unassailable findings have been recorded therein on the basis of the entire record of the case and after providing opportunity to the petitioner to make his submissions of his case before the appellate authority.

24. Learned counsel for the respondent-Bank next submitted that removal of service of the petitioner is further justified on the ground of complete loss of confidence which is an integral part

of any service. He next submitted that the petitioner was paid prescribed subsistence allowance which is payable to a workman employee of the bank in terms of Bipartite settlement. In the settlement it was provided that if after one year the Enquiry is not delayed for the reasons attributable to the workman or employee full pay and allowances shall be paid. It is said that the delay in departmental enquiry was on the part of the petitioner and his representative, therefore, the petitioner was not eligible for full subsistence allowance.

25. In support of his submissions, learned counsel for the respondent-Bank placed reliance upon the following judgments:

(i) **Tara Chand Vyas v. Chairman & Disciplinary Authority** reported in (1997)4 SCC 565: 1997 SCC (L&S) 1241 at page 567

(ii) **L.K. Verma v. H.M.T. Ltd & Anr** decided on 31.1.2006 in Appeal (civil) No.881 of 2006

(iii) **Vice-Chairman , Kendriya Vidyalaya Sangathan and another** reported in (2004)6 Supreme Court Cases 325

(iv) **State Bank of India and others v. Narendra Kumar Pandey** reported in (2013) 2 Supreme Court Cases 745: (2013) 1 SCC (L&S) 459: 2013 SCC OnLine SC 54 at page 748

(v) **State Bank of India v. Bela Baghi** reported in 2005(7)SCC 435

(vi) **Disciplinary Authority-cum-Regional manager v. Nikunj Bihari** reported in 1996(9) SCC 69

(vii) **A.P.S.R.T.C. v. Raghuda Siva Sankar Prasad** reported in (2007)1 SCC 22: (2007)1 SCC (L& S) 151: 2006 SCC OnLine SC 1170 at page 226

(viii) **T.N.C.S. Corporation v. K. Meera Bai** reported in (2006) 2 SCC 255: 2006 (SCC) (L&S) 265: 2006 SCC OnLine SC 109 at Page 267.

(ix) **A. Sudhakar v. Postmaster General** reported in (2006)4 SCC 348: 2006 SCC (L&S) 817: 2006 SCC OnLine 335 at page 358.

(xi) **Dy. Registrar, Cooperative Societies v. Bunni Lal Chaurasia** reported in (2005) 11 SCC 570: 2006 SCC (L&S)399: 2005 SCC OnLine SC 687 at Page 570.

(x) **State of U.P. v. Raj Kishore Yadav** reported in (2006) 5 SCC 673: 2006 SCC (L&S) 1185: 2006 SCC OnLine SC 648 at page 674.

(xi) **V. Ramana v. A.P.S.R.T.C.** reported in (2005)7 SCC 338: 2006 SCC (L&S)69: 2005 SCC OnLine SC 1288 at page 341.

(xii) **Ganesh Santa Ram Sirur v. State Bank of India** reported in (2005)1 SCC 13: 2006 SC (L&S) 537: 2004 SCC OnLine SC 1437 at page 20.

(xiii) **Government of A.P. v. Mohd. Nasrullah Khan** reported in (2006)2 SCC 373: 2006 SCC (L&S) 316: 2006 SCC OnLine SC 135 at page 378.

26. I have considered the submissions advanced by learned counsel for the parties and perused the material on record as well as law-report cited by learned counsel for the parties.

27. To resolve the controversy involved in the present writ petition, the operative portions of the judgment relied upon by learned counsel for the parties are extracted hereinbelow

Judgements relied upon by learned counsel for the petitioner:

(i) A.K. Saxena (supra):-

2. On the basis of the report of the enquiry the appellant was dismissed from service on 2-7-1993. The appellant preferred a departmental appeal which was rejected. Since the Labour Court was of the view that enquiry conducted by the Management was not fair and proper, by final award dated 17-12-1997 it was held that the termination of the appellant was illegal and there was direction for his reinstatement with back wages. The award was challenged by the respondent Bank before the High Court. The High Court allowed [State Bank of Patiala v. Union of India, 2011 SCC OnLine All 380 : (2011) 129 FLR 594] the petition and thus, the appellant is before this Court. When the matter was pending before the High Court pursuant to interim order passed by the Court, we are informed that it is not disputed that the appellant has been paid an amount of Rs 14,05,417 towards back wages and an amount of Rs 9,34,573 towards Section 17-B of the Industrial Disputes Act, 1947.

5. In the above factual matrix, we put query to the learned counsel for the Bank as to how the appellant alone is discriminated and dismissed from service. The learned counsel has invited our attention extensively to the evidence that the appellant was the kingpin of the whole transaction, being a Head Cashier, the other three have only obeyed his request for consequential steps. We find it difficult to appreciate the submission in view of the factual position as noted above.

6. In the above circumstances, we are of the view that the interest of justice would be advanced in case the punishment imposed on the appellant is suitably altered. The appellant has attained the age of superannuation and that he has received hefty amounts from the Bank while

remaining out of service after 1993. Hence, it is ordered that the appellant shall be treated to have been retired from service on completion of 15 years of service and accordingly, his retiral benefits shall be settled for the purpose of future pension from the month of February 2016. Since he has already received wages in between, there shall be no arrears of pension.

(ii) Pawan Kumar Agarwala (supra):-

18. Further, it is brought to our notice by Mr Vijay Hansaria, learned Senior Counsel for the appellant that the loan amount lent by Mr Pradeep Kumar Das, the Manager of Hallydayganj Branch, the same has been cleared by Mr Tapan Kumar Sangma with interest by paying Rs 1,61,000. The overdraft is beyond the permissible limit is held to be not proved. The finding of the learned Single Judge while examining the entire enquiry report, on which strong reliance is placed by the respondent Bank, the learned Single Judge in exercise of his extraordinary and original jurisdiction examined the case on merits and referred to Rule 68(1)(IX)(a) of the State Bank of India Service Rules, wherein it mandates the disciplinary authority to furnish the delinquent the list of documents through which the charges are proposed to be proved. It is the case of the appellant that such a list of witnesses and copies of documents were not furnished either by the disciplinary authority or the enquiry officer which are vital aspects of the case, based on which the finding is recorded on the charges by the enquiry officer, referred to supra, holding that the same are proved against the appellant.

(iii) Kumaon Mandal Vikas Nigam (supra):-

22. *The sixty-five page report has been sent to the Managing Director of the Nigam against the petitioner recording therein that the charges against him stand proved — what is the basis? Was the enquiry officer justified in coming to such a conclusion on the basis of the charge-sheet only? The answer cannot possibly be in the affirmative; if the records have been considered, the immediate necessity would be to consider as to who is the person who has produced the same and the next issue could be as regards the nature of the records — unfortunately there is not a whisper in the rather longish report in that regard. Where is the presenting officer? Where is the notice fixing the date of hearing? Where is the list of witnesses? What has happened to the defence witnesses? All these questions arise but unfortunately no answer is to be found in the rather longish report. But if one does not have it — can it be termed to be in consonance with the concept of justice or the same tantamounts to a total miscarriage of justice. The High Court answers it as miscarriage of justice and we do lend our concurrence therewith. The whole issue has been dealt with in such a way that it cannot but be termed to be totally devoid of any justifiable reason and in this context a decision of the King's Bench Division in the case of Denby (William) and Sons Ltd. v. Minister of Health [(1936) 1 KB 337 : 105 LJKB 134 : 154 LT 180] may be considered. Swift, J. while dealing with the administrative duties of the Minister has the following to state:*

“I do not think that it is right to say that the Minister of Health or any other officer of the State who has to administer an Act of Parliament is a judicial officer. He is an administrative officer, carrying out the duties of an administrative office, and administering the provisions of

particular Acts of Parliament. From time to time, in the course of administrative duties, he has to perform acts which require him to interfere with the rights and property of individuals, and in doing that the courts have said that he must act fairly and reasonably; not capriciously, but in accordance with the ordinary dictates of justice. The performance of those duties entails the exercise of the Minister's discretion, and I think what was said by Lord Halsbury in Sharp v. Wakefield [1891 AC 173 : 60 LJ MC 73 : 64 LT 180 (HL)] (AC at p. 179) is important to consider with reference to the exercise of such discretion. He there said:

‘ “Discretion” means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke case [(1598) 5 Co Rep 99b, 100a] ; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.’ ”

26. *“Bias” in common English parlance means and implies — predisposition or prejudice. The Managing Director admittedly, was not well disposed of towards the respondent herein by reason wherefor, the respondent was denuded of the financial power as also the administrative management of the department. It is the selfsame Managing Director who levels thirteen charges against the respondent and is the person who appoints the enquiry officer, but affords a pretended hearing himself late in the afternoon on 26-11-1993 and communicates the order of termination consisting of eighteen pages by early*

evening, the chain is complete: prejudice apparent: bias as stated stands proved.

(iv) State Bank of India (supra):-

18. But this does not conclude the matter. The learned Senior Counsel for the respondent, Shri P.P. Rao is right in contending that the appellate authority, once it came to the conclusion that the punishment of dismissal was not warranted in the facts of the case, it could not have awarded the punishment of "removal" which was not one of the enumerated penalties under para 22(v) of the rules. In fact, the learned Single Judge also adverted to this aspect. If one reads the order of the appellate authority, it is clear that the said authority went by Rule 49(g) of the State Bank of India (Supervising Staff) Service Rules which admittedly, is not applicable to charges pertaining to the period 1977-81 when the rules of Cochin Bank applied. The amalgamation of Bank of Cochin with State Bank of India took place only on 27-4-1985. It may be that the rules of the State Bank of India provided for a punishment of removal, but in the rules relating to penalties for "major misconduct" in para 22(v) of the rules applicable to the employees of Bank of Cochin, removal is not one of the enumerated punishments which could be imposed. The said punishment is not the same thing as "condoning misconduct and merely discharging from service" as provided in para 22(v)(e) of the said rules.

19. Learned Senior Counsel for the appellants, Shri T.R. Andhyarujina tried to submit that if the appellate authority decided not to dismiss the respondent, it still had inherent power to award a punishment of "removal", which was lesser in severity. Learned Senior Counsel contended that the discretion of

the authorities to award such an appropriate punishment could not be interfered with in view of the decision of this Court in Union of India v. G. Ganayutham [(1997) 7 SCC 463 : 1997 SCC (L&S) 1806] . In our view, this decision is not applicable to the facts of the case. Here the Court is not interfering with the punishment awarded by the employer on the ground that in the opinion of the Court the punishment awarded is disproportionate to the gravity of the misconduct. Here, the gradation of the punishments has been fixed by the rules themselves, namely, the rules of Bank of Cochin and the Court is merely insisting that the authority is confined to the limits of its discretion as restricted by the rules. Inasmuch as the rules of Bank of Cochin have enumerated and listed out the punishments for "major misconduct", we are of the view that the punishment of "removal" could not have been imposed by the appellate authority and all that was permissible for the Bank was to confine itself to one or the other punishment for major misconduct enumerated in para 22(v) of the rules, other than dismissal without notice. This conclusion of ours also requires the setting aside of the punishment of "removal" that was awarded by the appellate authority. Now the other punishments enumerated under para 22(v) are "warning or censure or adverse remark being entered, or fine, or stoppage of increments/reduction of basic pay or to condone the misconduct and merely discharge from service". The setting aside of the removal by the High Court and the relief of consequential benefits is thus sustained. The matter has, therefore, to go back to the appellate authority for considering imposition of one or the other punishment in para 22(v) other than dismissal without notice.

(v) M. Paul Anthony:-

23. In the instant case, the Superintendent of Police had raided the residential premises of the appellant and had recovered a mining sponge gold ball weighing 4.5 grams and 1276 grams of "gold-bearing sand". It was on this basis that a criminal case was launched against him. On the same set of facts, constituting the raid and recovery, departmental proceedings were initiated against the appellant as the "recovery" was treated to be a "misconduct". On the service of the charge-sheet, the appellant raised an objection that the departmental proceedings may be stayed as the basis of these proceedings was the raid conducted at his residence on which basis a criminal case had already been launched against him. He requested that the decision of the criminal case may be awaited, but his request was turned down. The request made a second time for that purpose also met the same fate. When the appellant approached the High Court, liberty was given to the respondents to stay the departmental proceedings if they considered it appropriate but they were directed to dispose of the appellant's appeal against the order by which he was placed under suspension. The order of the High Court had no effect on the respondents and they decided to continue with the departmental proceedings which could not be attended by the appellant as he informed the enquiry officer that he was ill. His request for adjournment of the departmental proceedings on that ground was not acceded to and the proceedings continued ex parte against him. He was ultimately found guilty of the charges and was dismissed from service.

(vi) Kuldeep Singh :-

32. Apart from the above, Rule 16(3) has to be considered in the light of the provisions contained in Article 311(2) of the Constitution to find out whether it purports to provide reasonable opportunity of hearing to the delinquent. Reasonable opportunity contemplated by Article 311(2) means "hearing" in accordance with the principles of natural justice under which one of the basic requirements is that all the witnesses in the departmental enquiry shall be examined in the presence of the delinquent who shall be given an opportunity to cross-examine them. Where a statement previously made by a witness, either during the course of preliminary enquiry or investigation, is proposed to be brought on record in the departmental proceedings, the law as laid down by this Court is that a copy of that statement should first be supplied to the delinquent who should thereafter be given an opportunity to cross-examine that witness.

41. Smt Meena Mishra, appearing as a witness for the Department, denied having made any payment to the appellant on that day. The labourers to whom the payment is said to have been made have not been produced at the domestic enquiry. Their so-called previous statement could not have been brought on record under Rule 16(3). As such, there was absolutely no evidence in support of the charge framed against the appellant and the entire findings recorded by the enquiry officer are vitiated by reason of the fact that they are not supported by any evidence on record and are wholly perverse.

(vii) P.C. Kacker (supra):-

4. We would have ordinarily not interfered with the impugned order but for the fact that one M. L. Keshwani the Branch Manager was also charge-sheeted

on similar charge as the petitioner. On 7.9.95. this Court directed learned counsel for the Bank to file a supplementary affidavit stating about the action taken by the Bank against M. L. Keshwani who was also charge-sheeted for the overdraft. Thereafter the Bank filed an affidavit stating that Sri Keshwani was also charge-sheeted for similar misconduct as the petitioner. Sri Keshwani granted overdrafts of several lacs of rupees whereas according to the finding of the enquiry officer, the overdrafts granted by the petitioner, was less than Rs. 20,000. However Sri Keshwani was given the punishment of withholding one increment only. Hence it is urged that there is discrimination against the petitioner.

(viii) R.C. Sood (supra):-

22. Based on such type of evidence, the Committee submitted its report on 4-1-1995 signed by all the three Judges. It is but natural that highest standard of integrity is expected of and is required to be maintained by every judicial officer. It is with this in view that even though the impugned initiation of proceedings is being alleged to be for mala fide reasons that it is proper to see whether the allegations against the petitioner were such which in any way warranted the holding of a disciplinary proceeding. We have, therefore, carefully seen the report of the Committee and the complaints against the petitioner in order to satisfy ourselves whether there was any cogent material which warranted initiation of disciplinary proceedings. We do not find, after such examination, that any material existed which could justify the initiation of the impugned action. The allegations against the petitioner were generally vague or were such which stood explained from the record itself or were such which did not show that

the petitioner had committed any irregularity, leave alone illegality. For example one of the main allegations against the petitioner was of his having committed irregularity in obtaining loan for constructing a house. Apart from the fact that this loan was sanctioned by the then Chief Justice, the petitioner has with the assistance of the loan constructed the house and is living there and the loan amount already stands returned. In such circumstances for the Committee to come to a conclusion that the disciplinary proceedings should be initiated was clearly unwarranted.

25. Normally, enquiry committees are set up in order to ascertain correct facts. Here, however, we have a situation where a Committee consisting of a local Judge and two transferred Judges was set up with the local Judge sitting alone and collecting a menagerie of witnesses who had a grudge against the petitioner and were thus sure to depose against him. Some of these witnesses were those who had not sent any complaint against the petitioner prior to 30-11-1994 and it is only the local Judge who, wanting to gather statements against the petitioner, could have known whom to approach and call for evidence. Of the two transferred Judges who were members of the Committee, one never took part in any proceeding when evidence was recorded between 20-2-1995 (sic 20-11-1994) and 2-1-1995. Yet he signs the report dated 4-1-1995. The other transferee Judge is the person who set the ball rolling with his conjuring up Vijay Singh's complaint which had originally been circulated long before the Judge's transfer to Rajasthan. The respondent's counsel was unable to explain as to how this complaint was conveniently placed in this Judge's hand. It is evident that there was a deliberate design to bring to a premature end the

judicial career of the petitioner, whose name, at that time, was being actively considered for elevation as High Court Judge. This is apparent from the fact that in the resolutions dated 30-11-1994 and 5-1-1995 it was resolved by the Full Court that the President of India and the Chief Justice of India should be informed about the holding of the departmental enquiry against the petitioner. Acting on the basis of the Committee's biased report, the Full Court, we are sad to note, continued in a similar vein and proceeded to nail the petitioner by taking a decision which lacked objectivity. Apparently stung by the judgment dated 22-11-1994 [1994 Supp (3) SCC 711 : 1995 SCC (L&S) 231] of this Court, it retaliated by launching a fresh set of charges against the petitioner clearly with a view to ruin his judicial career. We have no doubt that the action taken by the Court was not bona fide and amounts to victimisation. This is certainly not expected from a judicial forum, least of all the High Court, which is expected to discharge its administrative duties as fairly and objectively as it is required to discharge its judicial functions.

26. The proceedings of the meeting of the Full Court are normally supposed to be confidential. How is it then that a number of complaints were received against the petitioner at about that time, i.e., 30-11-1994. Some of the complaints on the file of the three-Judge Committee are undated and it is not known when they were received. On two complaints, the date is 26-11-1994, but they do not have supporting affidavits. It is, therefore, possible that these complaints may have been antedated specially when none of these complaints bear an endorsement signifying the date of their receipt. The complaint of Mitruka is dated 30-11-1994 but the affidavit supporting is dated 1-12-

1994. The fact that an enquiry was going to be conducted against the petitioner was not publicly advertised which could have resulted in complaints being filed, how is it then that after the judgment of this Court on 22-11-1994 [1994 Supp (3) SCC 711 : 1995 SCC (L&S) 231] and about the time the resolution dated 30-11-1994 was passed, unsolicited complaints started coming in. We have no doubt that all these complaints were procured solely with a view to show that apart from the original complaint of Vijay Singh there were other complaints against the petitioner which represented new material justifying a fresh enquiry. These complaints, some of them being made by discredited persons containing vague and general allegations could not, in our view, be regarded as fresh material which required disciplinary proceedings being initiated. The said complaints did not merit any serious considerations and reference to them by the High Court was uncalled for. In this connection, we reiterate the sentiments expressed by this Court while allowing the petitioner's writ petition on the earlier occasion when at p. 716 of the Report it was observed as follows: (SCC p. 716, para 14)

“14. This case leaves us very sad. Entrustment of the ‘control’ of the subordinate judiciary to the High Courts by enactment of the relevant provisions in the Constitution of India, particularly Article 235 therein is for the purpose of ensuring their independence and protection from executive interference. At a time when fairness and non-arbitrariness are the essential requirements of every administrative State action, it is more so for any administrative act of the Judges. It is necessary that members of the subordinate judiciary get no occasion to think otherwise. We are afraid, this

incident appears to shake this faith. We do hope it is an inadvertent exception."

We are sorry to note that the said hope stands belied and notwithstanding the aforesaid observations, the High Court acted in a manner which can only be termed as arbitrary and unwarranted, to say the least.

(ix) State Bank of India (supra):-

6. Even the submission of no prejudice is not well founded. The respondent was a very senior officer of the bank. He was promoted to the top executive grade in August 1980. We have refrained from entering into merits but once the disciplinary authority found that the action of the respondent did not cause any harm to the bank nor the respondent gained out of it the High Court cannot be said to have misdirected itself in quashing the order for procedural error.

(x) Fakirbhai Fulabhai Solanki :-

11. It is likely that in some cases filed under Section 33(1) or Section 33(3) of the Act (which are "permission" clauses and not "approval" clauses) pending before any authority, the management may not be paying any subsistence allowance to the workman concerned. We, therefore, clarify that in such cases it shall be open to the management to pay within a reasonable time to be fixed by the authority, the subsistence allowance for the period during which the workman is kept under suspension without wages and to continue the proceedings. Such subsistence allowance shall be the amount fixed under the standing orders, if any, which the management is liable to pay to the workman if he is kept under suspension during the pendency of such application or

in the absence of any such standing order by the authority before which such application is pending. In a case where the proceedings are completed and the order of dismissal is successfully challenged on the ground of non-payment of subsistence allowance for the period of suspension during the pendency of the application under Section 33(1) or Section 33(3) of the Act it shall be open to the management to ask for the permission of the authority again under Section 33(1) or Section 33(3) of the Act after paying or offering to pay to the workman concerned within a reasonable time to be fixed by the authority concerned the arrears of subsistence allowance at the rate stated above. But in the instant case however having regard to the circumstances of this case we do not wish to grant any such opportunity to the management to apply for permission again under Section 33(3) of the Act. On facts we are of the view that the punishment of dismissal imposed in this case on the appellant appears to be excessive but our decision however is not based on this ground.

12. We, therefore, set aside the order/award of the Tribunal and dismiss the application made by the management under Section 33(3) of the Act. We accept the complaint filed by the appellant under Section 33-A of the Act. The management is directed to reinstate the appellant in its service and to pay him all the wages and allowances due to him from August 13, 1979 as if there was no break in the continuity of his service. The appeals are accordingly allowed with costs.

(xi) Anil Kumar:-

5. We have extracted the charges framed against the appellant. We have also pointed out in clear terms the report of the enquiry officer. It is well-settled that a

disciplinary enquiry has to be a quasi-judicial enquiry held according to the principles of natural justice and the enquiry officer has a duty to act judicially. The enquiry officer did not apply his mind to the evidence. Save setting out the names of the witnesses, he did not discuss the evidence. He merely recorded his ipse dixit that the charges are proved. He did not assign a single reason why the evidence produced by the appellant did not appeal to him or was considered not creditworthy. He did not permit a peep into his mind as to why the evidence produced by the management appealed to him in preference to the evidence produced by the appellant. An enquiry report in a quasi-judicial enquiry must show the reasons for the conclusion. It cannot be an ipse dixit of the enquiry officer. It has to be a speaking order in the sense that the conclusion is supported by reasons. This is too well settled to be supported by a precedent. In Madhya Pradesh Industries Ltd. v. Union of India [AIR 1966 SC 671 : (1966) 1 SCR 466 : (1966) 1 SCJ 204] this Court observed that a speaking order will at best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard. Similarly in Mahabir Prasad Santosh Kumar v. State of U.P. [AIR 1966 SC 671 : (1971) 1 SCR 201] this Court reiterated that satisfactory decision of a disputed claim may be reached only if it be supported by the most cogent reasons that appealed to the authority. It should all the more be so where the quasi-judicial enquiry may result in deprivation of livelihood or attach a stigma to the character. In this case the enquiry report is an order sheet which merely produces the stage through which the enquiry passed. It clearly disclosed a total non-application of mind and it is this report on which the General Manager

acted in terminating the service of the appellant. There could not have been a more gross case of non-application of mind and it is such an enquiry which has found favour with the Labour Court and the High Court.

6. Where a disciplinary enquiry affects the livelihood and is likely to cast a stigma and it has to be held in accordance with the principles of natural justice, the minimum expectation is that the report must be a reasoned one. The Court then may not enter into the adequacy or sufficiency of evidence. But where the evidence is annexed to an order sheet and no correlation is established between the two showing application of mind, we are constrained to observe that it is not an enquiry report at all. Therefore, there was no enquiry in this case worth the name and the order of termination based on such proceeding disclosing non-application of mind would be unsustainable.

(xii) Pradeep (supra):-

6. The Bench of two the learned Judges in the said case has, after reviewing of case law which included survey of two earlier three Judges Benches [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53] , [Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court, (1980) 4 SCC 443 : 1981 SCC (L&S) 16] of this Court, concluded as follows : (Deepali Gundu Surwase case [Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324 : (2014) 2 SCC (L&S) 184] , SCC pp. 356-59, paras 38 & 42)

38.5. The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or

tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

(xiii) State of U.P.:-

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the un rebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

29. Apart from the above, by virtue of Article 311(2) of the Constitution of India the departmental enquiry had to be conducted in accordance with the rules of natural justice. It is a basic requirement of the rules of natural justice that an

employee be given a reasonable opportunity of being heard in any proceedings which may culminate in punishment being imposed on the employee.

30. When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service.

31. In Shaughnessy v. United States [97 L Ed 956 : 345 US 206 (1952)] (Jackson, J.), a Judge of the United States Supreme Court has said: (L Ed p. 969)

"... Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."

32. The affect of non-disclosure of relevant documents has been stated in Judicial Review of Administrative Action by De Smith, Woolf and Jowell, 5th Edn., p. 442 as follows:

"If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing. This proposition can be illustrated by a large number of modern cases involving the use of undisclosed reports by administrative tribunals and other adjudicating bodies. If the deciding body is or has the trappings of a judicial

tribunal and receives or appears to receive evidence ex parte which is not fully disclosed, or holds ex parte inspections during the course or after the conclusion of the hearing, the case for setting the decision aside is obviously very strong; the maxim that justice must be seen to be done can readily be invoked.”

In our opinion the aforesaid maxim is fully applicable in the facts and circumstances of this case.

33. *As noticed earlier in the present case not only the respondent has been denied access to documents sought to be relied upon against him, but he has been condemned unheard as the inquiry officer failed to fix any date for conduct of the enquiry. In other words, not a single witness has been examined in support of the charges levelled against the respondent. The High Court, therefore, has rightly observed that the entire proceedings are vitiated having been conducted in complete violation of the principles of natural justice and total disregard of fair play. The respondent never had any opportunity at any stage of the proceedings to offer an explanation against the allegations made in the charge-sheet.*

34. *This Court in Kashinath Dikshita v. Union of India [(1986) 3 SCC 229 : 1986 SCC (L&S) 502 : (1986) 1 ATC 176] , had clearly stated the rationale for the rule requiring supply of copies of the documents, sought to be relied upon by the authorities to prove the charges levelled against a government servant. In that case the enquiry proceedings had been challenged on the ground that non-supply of the statements of the witnesses and copies of the documents had resulted in the breach of rules of natural justice. The appellant therein had requested for supply of the copies of the documents as well as the statements of the witnesses at the*

preliminary enquiry. The request made by the appellant was in terms turned down by the disciplinary authority.

35. *In considering the importance of access to documents in statements of witnesses to meet the charges in an effective manner this Court observed as follows: (Kashinath Dikshita case [(1986) 3 SCC 229 : 1986 SCC (L&S) 502 : (1986) 1 ATC 176] , SCC pp. 234-35, para 10)*

“10. ... When a government servant is facing a disciplinary proceeding, he is entitled to be afforded a reasonable opportunity to meet the charges against him in an effective manner. And no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies, how can the employee concerned prepare his defence, cross-examine the witnesses, and point out the inconsistencies with a view to show that the allegations are incredible? It is difficult to comprehend why the disciplinary authority assumed an intransigent posture and refused to furnish the copies notwithstanding the specific request made by the appellant in this behalf. Perhaps the disciplinary authority made it a prestige issue. If only the disciplinary authority had asked itself the question: ‘What is the harm in making available the material?’ and weighed the pros and cons, the disciplinary authority could not reasonably have adopted such a rigid and adamant attitude. On the one hand there was the risk of the time and effort invested in the departmental enquiry being wasted if the courts came to the conclusion that failure to supply these materials would be tantamount to denial of reasonable opportunity to the appellant to defend himself. On the other hand by making available the copies of the

documents and statements the disciplinary authority was not running any risk. There was nothing confidential or privileged in it."

36. *On an examination of the facts in that case, the submission on behalf of the authority that no prejudice had been caused to the appellant, was rejected, with the following observations: (Kashinath Dikshita case [(1986) 3 SCC 229 : 1986 SCC (L&S) 502 : (1986) 1 ATC 176], SCC p. 236, para 12)*

"12. Be that as it may, even without going into minute details it is evident that the appellant was entitled to have an access to the documents and statements throughout the course of the inquiry. He would have needed these documents and statements in order to cross-examine the 38 witnesses who were produced at the inquiry to establish the charges against him. So also at the time of arguments, he would have needed the copies of the documents. So also he would have needed the copies of the documents to enable him to effectively cross-examine the witnesses with reference to the contents of the documents. It is obvious that he could not have done so if copies had not been made available to him. Taking an overall view of the matter we have no doubt in our mind that the appellant has been denied a reasonable opportunity of exonerating himself."

37. *We are of the considered opinion that the aforesaid observations are fully applicable in the facts and circumstances of this case. Non-disclosure of documents having a potential to cause prejudice to a government servant in the enquiry proceedings would clearly be denial of a reasonable opportunity to submit a plausible and effective rebuttal to the charges being enquired into against the government servant.*

38. *The aforesaid proposition of law has been reiterated in Tirlok Nath v. Union of India [1967 SLR 759 (SC)] wherein it was held that non-supply of the documents amounted to denial of reasonable opportunity. It was held as follows: (SLR pp. 764-65)*

"... Had he decided to do so, the documents would have been useful to the appellant for cross-examining the witnesses who deposed against him. Again had the copies of the documents been furnished to the appellant he might, after perusing them, would have exercised his right under the rule and asked for an oral inquiry to be held. Therefore, in our view the failure of the inquiry officer to furnish the appellant with copies of the documents such as the first information report and the statements recorded at the Shidipura house and during the investigation must be held to have caused prejudice to the appellant in making his defence at the inquiry."

39. *The proposition of law that a government employee facing a departmental enquiry is entitled to all the relevant statements, documents and other materials to enable him to have a reasonable opportunity to defend himself in the departmental enquiry against the charges is too well established to need any further reiteration. Nevertheless given the facts of this case we may re-emphasise the law as stated by this Court in State of Punjab v. Bhagat Ram [(1975) 1 SCC 155 : 1975 SCC (L&S) 18] : (SCC p. 156, paras 6-8)*

"6. The State contended that the respondent was not entitled to get copies of statements. The reasoning of the State was that the respondent was given the opportunity to cross-examine the witnesses and during the cross-examination the respondent would have the opportunity of confronting the witnesses with the

statements. It is contended that the synopsis was adequate to acquaint the respondent with the gist of the evidence.

7. The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the government servant is afforded a reasonable opportunity to defend himself against charges on which inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. He can do so by cross-examining the witnesses produced against him. The object of supplying statements is that the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against the government servant. Unless the statements are given to the government servant he will not be able to have an effective and useful cross-examination.

8. It is unjust and unfair to deny the government servant copies of statements of witnesses examined during investigation and produced at the inquiry in support of the charges levelled against the government servant. A synopsis does not satisfy the requirements of giving the government servant a reasonable opportunity of showing cause against the action proposed to be taken."

40. We may also notice here that the counsel for the appellant sought to argue that the respondent had even failed to give a reply to the show-cause notice issued under Rule 9. The removal order, according to him, was therefore justified. We are unable to accept the aforesaid submission. The first enquiry report dated 3-8-2001, is clearly vitiated, for the reasons stated earlier. The second enquiry report cannot legally be termed as an enquiry report as it is a reiteration of the

earlier enquiry report. Asking the respondent to give reply to the enquiry report without supply of the documents is to add insult to injury.

41. In our opinion the appellants have deliberately misconstrued the directions issued by the High Court in Writ Petition No. 937 of 2003. In terms of the aforesaid order the respondent was required to submit a reply to the charge-sheet upon supply of the necessary document by the appellant. It is for this reason that the High Court subsequently while passing an interim order on 7-6-2004 in Writ Petition No. 793 of 2004 directed the appellant to ensure compliance of the order passed by the Division Bench on 23-7-2003. In our opinion the actions of the inquiry officers in preparing the reports ex parte without supplying the relevant documents has resulted in miscarriage of justice to the respondent. The conclusion is irresistible that the respondent has been denied a reasonable opportunity to defend himself in the enquiry proceedings.

42. In our opinion, the appellants have miserably failed to give any reasonable explanation as to why the documents have not been supplied to the respondent. The Division Bench of the High Court, therefore, very appropriately set aside the order of removal.

43. Taking into consideration the facts and circumstances of this case we have no hesitation in coming to the conclusion that the respondent had been denied a reasonable opportunity to defend himself in the inquiry. We, therefore, have no reason to interfere with the judgment of the High Court.

(xiv) Roop Singh Negi:-

14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-

judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, *inter alia*, was placed by the enquiry officer on the FIR which could not have been treated as evidence.

15. We have noticed hereinbefore that the only basic evidence whereupon reliance has been placed by the enquiry officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station. The appellant being an employee of the Bank, the said confession should have been proved. Some evidence should have been brought on record to show that he had indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the enquiry officer had made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left.

Judgements relied upon by learned counsel for the respondent-Bank:

(i) Tara Chand Vyas :-

3. Shri B.D. Sharma, learned counsel for the petitioner, contends that for proof of the charges none of the witnesses

was examined nor any opportunity was given to cross-examine them and the petitioner has disputed his liability. As a consequence, the entire enquiry was vitiated by manifest error apparent on the face of the record. We find no force in the contention. The thrust of the imputation of charges was that he had not discharged his duty as a responsible officer to safeguard the interest of the Bank by securing adequate security before the grant of the loans to the dealers, and had not ensured supply of goods to the loanees. It is based upon the documentary evidence which has already been part of the record and copies thereof had been supplied to the petitioner. Under those circumstances, we do not think that there is any manifest error apparent on the face of the record warranting interference. It is then contended that no reasons have been given in support of the conclusions to substantiate the charges. The enquiry officer had elaborately discussed each charge and given reasons which were considered by the disciplinary authority and reached the conclusion that the charges were proved. So had the appellate authority. They are not like a civil court.

(ii) L.K. Verma (supra):-

The Labour Commissioner, in our considered opinion, misdirected himself in passing the said order. Whereas, on the one hand, he noticed that the Appellant, herein had stated that during the preliminary enquiry he made those utterances owing to tension in his mind, he opined that no evidence had been produced against him for which he has been dismissed from service. It is now well-settled that things admitted need not be proved. [See Vice-Chairman, Kendriya Vidyalaya Sangathan and Another v. Girdharilal Yadav, (2004) 6 SCC 325] Once the Appellant accepted that

he made utterances which admittedly lack civility and he also threatened a superior officer, it was for him to show that he later on felt remorse therefor. If he was under tension, he, at a later stage, could have at least tendered an apology. He did not do so. Furthermore, before the Enquiry Officer, the witnesses were examined for proving the said charges. The officer concerned, namely, Shri Sinha had also submitted a report mentioning the incident of misbehaviour of the Appellant on 18.5.1996. The Enquiry Officer came to the conclusion that both the Management and the witnesses corroborated each other's statements and although they had been cross-examined thoroughly, no contradiction was found in their statements in regard to the said charge.

(iii) Vice-Chairman, Kendriya Vidyalaya Sangathan:-

11. The admitted facts appointing authority but also by the Appellate Authority. In terms of Section 58 of the Evidence Act, 1872 facts admitted need not be proved. It is also a well-settled principle of law that the principles of natural justice should not be stretched too far and the same cannot be put in a straitjacket formula. In Bar Council of India v. High Court of Kerala [(2004) 6 SCC 311] this Court has noticed that: (SCC p. 324, paras 49-50)

“ ‘24. The principles of natural justice, it is well settled, cannot be put into a straitjacket formula. Its application will depend upon the facts and circumstances of each case. It is also well settled that if a party after having proper notice chose not to appear, he at later stage cannot be permitted to say that he had not been given a fair opportunity of hearing. The question had been considered by a Bench of this Court in Sohan Lal Gupta v. Asha Devi

Gupta [(2003) 7 SCC 492] of which two of us (V.N. Khare, C.J. and Sinha, J.) are parties wherein upon noticing a large number of decisions it was held: (SCC p. 506, para 29)

“29. The principles of natural justice, it is trite, cannot be put in a straitjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby.”

25. The principles of natural justice, it is well settled, must not be stretched too far.’

(See also Mardia Chemicals Ltd. v. Union of India [(2004) 4 SCC 311 : (2004) 4 Scale 338] and Canara Bank v. Debasis Das [(2003) 4 SCC 557 : 2003 SCC (L&S) 507] .)

In Union of India v. Tulsiram Patel [(1985) 3 SCC 398 : 1985 SCC (L&S) 672] whereupon reliance has been placed by Mr Reddy, this Court held: (SCC p. 477, para 97)

‘97. Though the two rules of natural justice, namely, nemo judex in causa sua and audi alteram partem, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal straitjacket. They are not immutable but flexible. These rules can be adapted and modified by statutes and statutory rules and also by the constitution of the Tribunal which has to decide a particular matter and the rules by which such Tribunal is governed.’ ”

(iv) SBI v. Narendra Kumar Pandey:-

20. We are of the view that the High Court has committed an error in holding that the charge-sheet should have mentioned about the details of the documents and the names of the witnesses which the Bank proposed to examine and a list to that effect should have been appended to the charge-sheet. We may point out that the charge-sheet need not contain the details of the documents or the names of the witnesses proposed to be examined to prove the charges or a list to that effect unless there is a specific provision to that effect. Charge-sheet, in other words, is not expected to be a record of evidence. Fair procedure does not mean giving of copies of the documents or list of witnesses along with the charge-sheet. Of course, statement of allegations has to accompany the charge-sheet, when required by the Service Rules.

22. We are of the view that the High Court also committed an error in holding that since no witness was examined in support of the charges, it was a case of no evidence. In an *ex parte* inquiry, in our view, if the charges are borne out from the documents kept in the normal course of business, no oral evidence is necessary to prove those charges. When the charged officer does not attend the inquiry, then he cannot contend that the inquiring authority should not have relied upon the documents which were not made available or disclosed to him. Of course, even in an *ex parte* inquiry, some evidence is necessary to establish the charges, especially when the charged officer denies the charges, uncontroverted documentary evidence in such situation is sufficient to prove the charges.

25. The High Court, in our view, under Article 226 of the Constitution of

India was not justified in interfering with the order of dismissal passed by the appointing authority after a full-fledged inquiry, especially when the Service Rules provide for an alternative remedy of appeal. It is a well-accepted principle of law that the High Court while exercising powers under Article 226 of the Constitution does not act as an appellate authority. Of course, its jurisdiction is circumscribed and confined to correct an error of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of the principles of natural justice. In *SBI v. Ramesh Dinkar Punde* [(2006) 7 SCC 212 : 2006 SCC (L&S) 1573] this Court held that the High Court cannot reappreciate the evidence acting as a court of appeal. We have, on facts, found that no procedural irregularity has been committed either by the Bank, presenting officer or the inquiring authority. Disciplinary proceedings were conducted strictly in accordance with the Service Rules.

27. This Court in *Lakshmi Devi Sugar Mills Ltd. v. Ram Sarup* [AIR 1957 SC 82] held that where a workman intentionally refuses to participate in the inquiry, he cannot complain that the dismissal is against the principles of natural justice. Once the inquiry proceeds *ex parte*, it is not necessary for the inquiring authority to again ask the charged officer to state his defence orally or in writing. We cannot appreciate the conduct of the charged officer in the instant case, who did not appear before the inquiring authority and offered any explanation to the charges levelled against him but approached the High Court stating that the principles of natural justice had been violated.

(v) State Bank of India:-

15. A bank officer is required to exercise higher standards of honesty and integrity. He deals with money of the depositors and the customers. Every officer/employee of the bank is required to take all possible steps to protect the interests of the bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the bank. As was observed by this Court in *Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik* [(1996) 9 SCC 69 : 1996 SCC (L&S) 1194], it is no defence available to say that there was no loss or profit which resulted in the case, when the officer/employee acted without authority. The very discipline of an organisation more particularly a bank is dependent upon each of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and is a misconduct. The charges against the employee were not casual in nature and were serious. That being so, the plea about absence of loss is also sans substance.

(vi) Disciplinary Authority-cum-Regional Manager:-

7. It may be mentioned that in the memorandum of charges, the aforesaid two regulations are said to have been violated by the respondent. Regulation 3 requires every officer/employee of the bank to take all possible steps to protect the interests of the bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a bank officer. It requires the officer/employee to maintain good conduct and discipline and to act to the

best of his judgment in performance of his official duties or in exercise of the powers conferred upon him. Breach of Regulation 3 is 'misconduct' within the meaning of Regulation 24. The findings of the Inquiry Officer which have been accepted by the disciplinary authority, and which have not been disturbed by the High Court, clearly show that in a number of instances the respondent allowed overdrafts or passed cheques involving substantial amounts beyond his authority. True, it is that in some cases, no loss has resulted from such acts. It is also true that in some other instances such acts have yielded profit to the Bank but it is equally true that in some other instances, the funds of the Bank have been placed in jeopardy; the advances have become sticky and irrecoverable. It is not a single act; it is a course of action spreading over a sufficiently long period and involving a large number of transactions. In the case of a bank — for that matter, in the case of any other organisation — every officer/employee is supposed to act within the limits of his authority. If each officer/employee is allowed to act beyond his authority, the discipline of the organisation/bank will disappear; the functioning of the bank would become chaotic and unmanageable. Each officer of the bank cannot be allowed to carve out his own little empire wherein he dispenses favours and largesse. No organisation, more particularly, a bank can function properly and effectively if its officers and employees do not observe the prescribed norms and discipline. Such indiscipline cannot be condoned on the specious ground that it was not actuated by ulterior motives or by extraneous considerations. The very act of acting beyond authority — that too a course of conduct spread over a sufficiently long period and involving innumerable

instances — is by itself a misconduct. Such acts, if permitted, may bring in profit in some cases but they may also lead to huge losses. Such adventures are not given to the employees of banks which deal with public funds. If what we hear about the reasons for the collapse of Barings Bank is true, it is attributable to the acts of one of its employees, Nick Leeson, a minor officer stationed at Singapore, who was allowed by his superiors to act far beyond his authority. As mentioned hereinbefore, the very discipline of an organisation and more particularly, a bank is dependent upon each of its employees and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and a breach of Regulation 3. It constitutes misconduct within the meaning of Regulation 24. No further proof of loss is really necessary though as a matter of fact, in this case there are findings that several advances and overdrawals allowed by the respondent beyond his authority have become sticky and irrecoverable. Just because, similar acts have fetched some profit — huge profit, as the High Court characterises it — they are no less blameworthy. It is wrong to characterise them as errors of judgment. It is not suggested that the respondent being a Class I Officer was not aware of the limits of his authority or of his powers. Indeed, Charge 9, which has been held established in full is to the effect that in spite of instructions by the Regional Office to stop such practice, the respondent continued to indulge in such acts. The Inquiry Officer has recorded a clear finding that the respondent did flout the said instructions and has thereby committed an act of disobedience of lawful orders. Similarly, Charge 8, which has also been established in full is to the effect that in spite of reminders, the respondent did not submit

“Control Returns” to the Regional Office. We fail to understand how could all this be characterised as errors of judgment and not as misconduct as defined by the Regulations. We are of the opinion that the High Court has committed a clear error in holding that the aforesaid conduct of the respondent does not amount to misconduct or that it does not constitute violation of Regulations 3 and 24.

8. We must mention that Shri V.A. Mohta, the learned counsel for the respondent, stated fairly before us that it is not possible for him to sustain the reasoning and approach of the High Court in this case. His only submission was that having regard to the age of the respondent (37 years) and the facts and circumstances of the case, this Court may substitute the punishment awarded to the respondent by a lesser punishment. The learned counsel suggested that any punishment other than dismissal may be imposed by this Court. We considered this request with the care it deserves, but we regret that we are unable to accede to it. The learned counsel for the Bank, Shri V.R. Reddy, Additional Solicitor General, also stated, on instructions of the Bank, that it is not possible for the Bank to accommodate the respondent in its service in view of his conduct.

(vii) A.P.S.R.T.C. (supra):-

15. We have carefully considered the rival submissions and perused the orders passed by the Labour Court and of the High Court and other annexures. In our opinion, the High Court has failed to appreciate that the delinquent employee categorically admitted that he had stolen the property of the Corporation. The Labour Court, on a careful perusal of the evidence, rightly ordered removal of the respondent from service. When the delinquent employee admitted his guilt

before the enquiry officer that he had handed over the alternator from pan shop to the police authorities and further deposed that he had handed over the stolen property and requested the Labour Court to excuse him since it was his first offence, the Tribunal rightly set aside the request by taking into consideration the entire factual circumstances on record and after careful examination of the same and held that the delinquent employee does not deserve any sympathy and therefore he ordered removal from service.

17. Likewise, the learned Judges of the Division Bench also failed to appreciate that once the Labour Court in its award held removal from service by taking into consideration the entire facts and circumstances of the case, it does not deserve interference and that the High Court in its extraordinary jurisdiction under Article 226 of the Constitution could not have interfered with the said orders of the removal.

18. The enquiry reports also clearly reveal that the departmental enquiry was conducted after giving fair and reasonable opportunity to the delinquent official, after following the procedure and as per the Regulations.

19. The learned Single Judge considered the past conduct of the delinquent employee as one of the grounds in taking a lenient view. In our view, past conduct of workman is not relevant in departmental proceedings. Likewise, the learned Single Judge has erred in holding that the workman did not involve in any misconduct of theft during his past services and on that ground, granted reinstatement with continuity of service.

20. The learned Judges of the High Court have also failed to appreciate that once an employee has lost the confidence of the employer, it would not be

safe and in the interest of the Corporation to continue the employee in the service. The punishment, imposed by the management in the facts and circumstances of the case, is not disproportionate and that the punishment of removal from service is just and reasonable and proportionate to the proved misconduct.

21. In our view, the theft committed by the respondent amounts to misconduct and, therefore, we have no hesitation to set aside the orders passed by the learned Single Judge and also of the Division Bench and restore the order of removal of the respondent from service. When the Labour Court has proved the charges, no interference by the learned Single Judge or by the Division Bench of the High Court was called for. In the instant case, the jurisdiction vested with the Labour Court has been exercised judiciously and fairly. In our opinion, the conclusion arrived at by the High Court in ordering reinstatement, continuity of service was shockingly disproportionate to the nature of charges already proved which is in the nature of theft.

22. It is also not open to the tribunal and courts to substitute their subjective opinion in place of the one arrived at the domestic tribunal. In the instant case, the opinion arrived at by the Corporation was rightly accepted by the Tribunal but not by the Court. We, therefore, hold that the order of reinstatement passed by the Single Judge and the Division Bench of the High Court is contrary to the law on the basis of a catena of decisions of this Court. In such cases, there is no place for generosity or sympathy on the part of the judicial forums for interfering with the quantum of punishment of removal which cannot be justified. Similarly, the High Court can modify the punishment in exercise of its

jurisdiction under Article 226 of the Constitution only when it finds that the punishment imposed is shockingly disproportionate to the charges proved.

23. *Interfering therefore with the quantum of punishment of the respondent herein, is not called for. In our opinion, the respondent has no legal right to continue in the Corporation. As held by this Court, in a catena of judgments that the loss of confidence occupies the primary factor and not the amount of money and that sympathy and generosity cannot be a factor which is permissible in law in such matters. When the employee is found guilty of theft, there is nothing wrong in the Corporation losing confidence or faith in such an employee and awarding punishment of removal. In such cases, there is no place of generosity or place of sympathy on the part of the judicial forums and interfering with the quantum of the punishment.*

(viii) T.N.C.S. Corpn. Ltd. (supra):-

28. *The other contentions made by Mr Francis are in respect of procedural irregularity which, according to him, cannot be termed to be negligence on the part of the respondent. We have already held that both the disciplinary authority and the Appellate Authority have given ample reasons for arriving at their conclusions. This Court has held in a catena of decisions that interference is not permissible unless the orders passed by the quasi-judicial authorities are clearly unreasonable or perverse or manifestly illegal or grossly unjust.*

29. *Mr Francis also submitted that a sum of Rs 34,436.85 being 5% of the total loss of Rs 6,88,737.12 is sought to be recovered from the respondent and that the present departmental proceedings is the only known allegation against the*

respondent and there was no such allegation earlier and, therefore, a lenient view should be taken by this Court and relief prayed for by both the parties can be suitably moulded by this Court. We are unable to agree with the above submission which, in our opinion, has no force. The scope of judicial review is very limited. Sympathy or generosity as a factor is impermissible. In our view, loss of confidence is the primary factor and not the amount of money misappropriated. In the instant case, the respondent employee is found guilty of misappropriating the Corporation funds. There is nothing wrong in the Corporation losing confidence or faith in such an employee and awarding punishment of dismissal. In such cases, there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefor with the quantum of punishment awarded by the disciplinary and Appellate Authority.

35. *In the instant case, the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning and, therefore, in our opinion, the matter should be dealt with firmly with firm hands and not leniently. In the instant case, the respondent deals with public money and is engaged in financial transactions or acts in a fiduciary capacity and, therefore, highest degree of integrity and trustworthiness is a must and unexceptionable. Judged in that background, the conclusion of the learned Single Judge as affirmed by the Division Bench of the High Court do not appear to be proper. We have no hesitation to set aside the same and restore the order passed by the disciplinary authorities upholding the order of dismissal.*

(ix) A. Sudhakar:-

27. *Contention of Dr. Pillai relating to the quantum of punishment cannot be accepted, having regard to the fact that temporary defalcation of any amount itself was sufficient for the disciplinary authority to impose the punishment of compulsory retirement upon the appellant and in that view of the matter, the question that the third charge had been partially proved takes a back seat.*

28. *In Hombe Gowda Educational Trust v. State of Karnataka [(2006) 1 SCC 430 : 2006 SCC (L&S) 133] this Bench opined: (SCC pp. 436-37, paras 17-20)*

“17. The Tribunal's jurisdiction is akin to one under Section 11-A of the Industrial Disputes Act. While exercising such discretionary jurisdiction, no doubt it is open to the Tribunal to substitute one punishment by another; but it is also trite that the Tribunal exercises a limited jurisdiction in this behalf. The jurisdiction to interfere with the quantum of punishment could be exercised only when, inter alia, it is found to be grossly disproportionate.

18. This Court repeatedly has laid down the law that such interference at the hands of the Tribunal should be inter alia on arriving at a finding that no reasonable person could inflict such punishment. The Tribunal may furthermore exercise its jurisdiction when relevant facts are not taken into consideration by the management which would have direct bearing on the question of quantum of punishment.

19. Assaulting a superior at a workplace amounts to an act of gross indiscipline. The respondent is a teacher. Even under grave provocation a teacher is not expected to abuse the head of the institution in a filthy language and assault him with a chappal. Punishment of dismissal from services, therefore, cannot

be said to be wholly disproportionate so as to shock one's conscience.

20. A person, when dismissed from service, is put to a great hardship but that would not mean that a grave misconduct should go unpunished. Although the doctrine of proportionality may be applicable in such matters, but a punishment of dismissal from service for such a misconduct cannot be said to be unheard of. Maintenance of discipline of an institution is equally important. Keeping the aforementioned principles in view, we may hereinafter notice a few recent decisions of this Court.”

(See also State of U.P. v. Sheo Shanker Lal Srivastava [(2006) 3 SCC 276 : JT (2006) 3 SC 48] , Workmen v. Bhurkunda Colliery of Central Coalfields Ltd. [(2006) 3 SCC 297 : JT (2006) 2 SC 1] , Syndicate Bank v. Venkatesh Gururao Kurati [(2006) 3 SCC 150 : JT (2006) 2 SC 73] , L.K. Verma v. H.M.T. Ltd. [(2006) 2 SCC 269 : 2006 SCC (L&S) 278 : JT (2006) 2 SC 99] and Commr. of Police v. Syed Hussain [(2006) 3 SCC 173 : JT (2006) 2 SC 332] .)

(x) Dy. Registrar, Coop. Societies :-

2. Briefly stated, the facts of the case are as follows:

The respondent was appointed as a Cooperative Supervisor in the Uttar Pradesh Cooperative Federal Authority. He was placed under suspension in contemplation of departmental proceedings initiated against him under Section 68 of the Uttar Pradesh Cooperative Societies Act (hereinafter referred to as “the Act”). After the inquiry officer submitted his report, a resolution was passed on 21-12-1993, to dispense with the services of the respondent and to recover the amount from him under Section 68 of the Act. Thereafter,

by the impugned order dated 20-1-1994, his services were terminated, preceded by a notice on the proposed punishment. Aggrieved thereby, the respondent filed a writ petition in the High Court of Judicature at Allahabad. The learned Single Judge, after threadbare consideration of the submissions made by the respondent, dismissed the writ petition. We may mention here that the only contention raised in the writ petition was the violation of principles of natural justice inasmuch as no notice was purported to have been given to him affording an opportunity to explain his case. This contention was repelled by the learned Single Judge that sufficient notices were sent to him by registered post by the appellant but he failed to appear before the disciplinary authority. The learned Single Judge also noticed that on 10-7-1993 the respondent did not appear. Notices were also published in Dainik Jagran newspaper on 2-10-1993, 9-10-1993 and 28-11-1993. The respondent also moved as many as three applications on 13-7-1993, 2-10-1993 and 28-11-1993. From the finding recorded by the learned Single Judge, it appears that sufficient opportunity has been afforded to the respondent. Having failed to avail the opportunity, the respondent now is not permitted to turn back to say that no opportunity has been afforded to him.

3. The Division Bench of the High Court upset the order passed by the learned Single Judge mainly on two grounds. Firstly, no notice of proposed punishment has been given to the respondent. This finding is demolished by notice dated 13-7-1993. From the aforesaid notice, it is clear that the respondent was put to notice as to why he should not be dismissed from service. It appears that the respondent did not give a reply to the aforesaid notice. Therefore, the first ground on which the

Division Bench upset the order of the learned Single Judge is erroneous. The second ground on which the Division Bench upset the order of the learned Single Judge is that, under Section 68 of the Act, there is no provision to order dismissal or removal of the respondent. While it is true that under Section 68 of the Act, there is no such provision but the learned counsel appearing for the appellant contended that, in fact, the order of dismissal was passed under Regulation 68 and not under Section 68 of the Act. The learned counsel has also taken us to the provisions of Regulation 68 of the Cooperative Federal Authority (Business) Regulations, 1976. A reading of Regulation 68, which is annexed to the additional affidavit filed by the appellant, would clearly show that it empowers the authority to impose major punishment like dismissal, removal or reduction in rank. It appears from the facts and circumstances of this case that the authority was confused between Section 68 of the Act and Regulation 68. Be that as it may, a reading of the notice on proposed punishment dated 13-7-1993 clearly shows that the proposed punishment on the respondent appears to have been passed under Regulation 68 and not under Section 68 of the Act, although the impugned order mentions Section 68 of the Act.

(xi) State of U.P:-

4. On a consideration of the entire materials placed before the authorities, they came to the conclusion that the order of dismissal would meet the ends of justice. When a writ petition was filed challenging the correctness of the order of dismissal, the High Court interfered with the order of dismissal on the ground that the acts complained of were sheer mistakes or errors on the part of the respondent herein and for that no

punishment could be attributed to the respondent. In our opinion, the order passed by the High Court quashing the order of dismissal is nothing but an error of judgment. In our opinion, the High Court was not justified in allowing the writ petition and quashing the order of dismissal and granting continuity of service with all pecuniary and consequential service benefits. It is a settled law that the High Court has limited scope of interference in the administrative action of the State in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India and, therefore, the findings recorded by the enquiry officer and the consequent order of punishment of dismissal from service should not be disturbed. As already noticed, the charges are very serious in nature and the same have been proved beyond any doubt. We have also carefully gone through the enquiry report and the order of the disciplinary authority and of the Tribunal and we are unable to agree with the reasons given by the High Court in modifying the punishment imposed by the disciplinary authority. In short, the judgment of the High Court is nothing but perverse. We, therefore, have no other option except to set aside the order passed by the High Court and restore the order passed by the disciplinary authority ordering dismissal of the respondent herein from service. It is ordered accordingly. The civil appeal stands allowed.

(xii) V. Ramana (supra):-

4. In support of the appeal learned counsel for the appellant submitted that the High Court should have considered the question of quantum of punishment by applying the principles of Section 11-A of the Industrial Disputes Act, 1947 (in short "the Act"). It was further submitted there

were minor lapses and smallness of the amount has not been considered in the proper perspective and order of termination of service should not have been passed. Learned counsel for the respondent Corporation supported the order of the Tribunal and judgment of the High Court. In Karnataka SRTC v. B.S. Hullikatti [(2001) 2 SCC 574 : 2001 SCC (L&S) 469 : JT (2001) 2 SC 72] , it was held that misconduct in such cases where the bus conductor either had not issued tickets to a large number of passengers or had issued tickets of lower denomination, punishment of removal is proper. It is the responsibility of the conductors to collect correct fare charges from the passengers and deposit the same with the Corporation. They act in fiduciary capacity and it would be a case of gross misconduct if they do not collect any fare or the correct amount of fare. A conductor holds a post of trust. A person guilty of breach of trust should be imposed punishment of removal from service. The factual position shows that the appellant's conduct in collecting fare at the designated place and not collecting fare from persons who had already travelled were in violation of various regulations contained in the Andhra Pradesh State Road Transport Corporation Employees (Conduct) Regulations, 1963 (in short "the Regulations"). In Karnataka State Road Transport case [(2001) 2 SCC 574 : 2001 SCC (L&S) 469 : JT (2001) 2 SC 72] it was held that it is misplaced sympathy by courts in awarding lesser punishments where on checking it is found that the bus conductors have either not issued tickets to a large number of passengers, though they should have, or have issued tickets of a lower denomination knowing fully well the correct fare to be charged. It was finally held that the order of dismissal should not have been set aside. The view was

reiterated by a three-Judge Bench in Regional Manager, RSRTC v. Ghanshyam Sharma [(2002) 10 SCC 330 : 2003 SCC (L&S) 714 : (2002) 1 LLJ 234] , where it was additionally observed that the proved acts amount either to a case of dishonesty or of gross negligence, and bus conductors who by their actions or inactions cause financial loss to the Corporation are not fit to be retained in service.

6. *The scope of interference with quantum of punishment has been the subject-matter of various decisions of this Court. Such interference cannot be a routine matter.*

11. *The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in Wednesbury case [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision for that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.*

12. *To put it differently unless the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the court/Tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly*

disproportionate it would be appropriate to direct the disciplinary authority or the Appellate Authority to reconsider the penalty imposed.

(xiii) Ganesh Santa Ram Sirur:-

14. *In regard to the second contention that the consideration of the charge which had not been proved by the appellate authority, Mr Ramamoorthy submitted that the appellate authority had considered the charges which were not proved while enhancing the punishment. According to Mr Ramamoorthy, the appellate authority was merely concerned with Charge 5 regarding disbursement of loan to the wife of the appellant in violation of Rule 34(3)(1) of the Service Rules and that the order of the appellate authority does not in any manner disclose that the same was passed by considering the circumstances germane to the charge against the appellant which had been proved. Even accepting the contention of Mr Ramamoorthy on Charge 1, the appellant cannot come out of Charge 5, which is more serious and grave in nature. However, we observe that the observations made by the appellate authority on Charge 1 while considering Charge 5, should be treated only as a passing observation and at the same time we cannot ignore or close our eyes in regard to the finding of the appellate authority on Charge 5 which is more serious and grave in nature. The appellate authority had enhanced the punishment imposed by following the procedure laid down in the Service Rules and we see no reason to interfere with the same. As already noticed, the appellant had himself admitted his misconduct and therefore, there is no reason why the appellate authority's finding on Charge 5 should not be accepted.*

16. *It is true that the appellate authority has proposed to enhance the punishment and*

imposed the penalty of dismissal on the appellant. However, the appellate authority was convinced with regard to the explanation submitted by the appellant and reduced the penalty further considering the adverse family circumstances, which could be seen from the following observation in the appellate order:

“I, therefore, direct that the earlier penalty of reduction in basic pay by one stage imposed on him by the appointing authority be enhanced to removal from service in terms of Rule 67(g) of the State Bank of India Officers Service Rules. The tentative decision taken while serving the show-cause notice was to dismiss Shri Sirur from service. Although, considering the acts of misdemeanour of the appellant, this was the appropriate penalty, I have taken a lenient view of the matter because of his adverse family circumstances. Removal from service would enable him to draw higher terminal benefits as compared to dismissal. The removal will take effect from the date of communication of this order and the intervening period will be treated as under suspension. I order accordingly.”

31. Mr Salve invited our attention to para 17 of the judgment in *State Bank of Patiala v. S.K. Sharma* [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] which deals with the opinion of the House of Lords in the United Kingdom. He also drew our attention to *S.L. Kapoor v. Jagmohan* [(1980) 4 SCC 379] and *Managing Director, ECIL v. B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] in SCC paras 25, 26 and 28. The decisions relied on and cited above make one thing clear, namely, principles of natural justice cannot be reduced to any hard-and-fast formulae and as said in *Russell v. Duke of Norfolk* [(1949) 1 All ER 109 (CA)] , these principles cannot be put

in a straitjacket. Their applicability depends upon the context and the facts and circumstances of each case. The objective is to ensure a fair hearing, a fair deal to a person whose rights are going to be affected. In our opinion, the approach and test adopted in Karunakar case [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] should govern all cases where the complaint is not that there was no hearing, no notice, no opportunity and no hearing but one of not affording a proper hearing that is adequate or a full hearing or violation of a procedural rule or requirement governing the enquiry.

34. The bank manager/officer and employees of any bank, nationalised/or non-nationalised, are expected to act and discharge their functions in accordance with the rules and regulations of the bank. Acting beyond one's authority is by itself a breach of discipline and trust and a misconduct. In the instant case Charge 5 framed against the appellant is very serious and grave in nature. We have already extracted the relevant Rule which prohibits the bank manager to sanction a loan to his wife or his relative or to any partner. While sanctioning the loan the appellant did not appear to have kept this aspect in mind and acted illegally and sanctioned the loan. He realised the mistake later and tried to salvage the same by not encashing the draft issued in the maiden name of his wife though the draft was issued but not encashed. The decision to sanction a loan is not an honest decision. Rule 34(3)(1) is a rule of integrity and, therefore, as rightly pointed out by Mr Salve, the respondent Bank cannot afford to have the appellant as bank manager. The punishment of removal awarded by the appellate authority is just and proper in the facts and circumstances of the case. Before concluding, we may usefully rely on the judgment *Regional*

Manager, U.P. SRTC v. Hoti Lal [(2003) 3 SCC 605 : 2003 SCC (L&S) 363] wherein this Court has held as under: (SCC p. 614, para 10)

“If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts in a fiduciary capacity, the highest degree of integrity and trustworthiness is a must and unexceptionable. Judged in that background, conclusions of the Division Bench of the High Court do not appear to be proper. We set aside the same and restore order of the learned Single Judge upholding the order of dismissal.”

36. We have, therefore, no hesitation in dismissing the appeal filed by the appellant and confirming the order passed by the Division Bench of the High Court. However, we make it clear that in the peculiar facts and circumstances of the case the appellant will be entitled to full pension and gratuity irrespective of his total period of service. No costs.

(xiv) Government of A.P. (supra):-

8. At this stage, we may point out that there is no allegation of violation of principles of natural justice, or that the inquiry was conducted without following the procedures or rules and regulations. The only case put up before us by the respondent is that the theft or removal of lens by the respondent was not proved in the course of inquiry. This contention need not detain us any longer because going through the report of the inquiry, the inquiry officer, after examining PWs 1, 2, 3 and 4 and after affording adequate

opportunity to the respondent, has come to the conclusion that the charge levelled against the respondent stands proved.

11. By now it is a well-established principle of law that the High Court exercising power of judicial review under Article 226 of the Constitution does not act as an appellate authority. Its jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. Judicial review is not akin to adjudication on merit by reappreciating the evidence as an appellate authority.

15. This takes us to the last submission of the counsel for the respondent. Learned counsel for the respondent contended that the offence, said to have been committed, being minor in nature and no loss being caused to the owner of the property, inasmuch as the same had been recovered on the spot, lenient punishment may be awarded in place of dismissal from service. We are unable to countenance this submission. The gravity of the offence must necessarily be measured with the nature of the offence. The respondent was a member of a disciplined force holding the rank of Head Constable. The duty assigned to him was a “bandobast” duty during the visit of the then President Bill Clinton, who ran a security risk of the highest grade. His misconduct could have led to serious security lapse resulting in fatal consequences. But, because of timely detection by the electrician, PW 4, the lens was recovered and immediately restored. We entirely agree with the inquiry officer that the charges are serious in nature, being committed by a member of a disciplined force, who deserved stringent punishment. To instil the confidence of the

public in the establishment, the only appropriate punishment in such cases is dismissal from service, which has been correctly awarded.

16. It is stated that the respondent was reinstated on 19-6-2004, pursuant to the order passed by the High Court and has been working since then and pay and allowances have been paid from 19-6-2004. Since he has been paid for the period he has worked, the salary and allowances already paid to him shall not be disturbed. The respondent, however, shall not get his back wages.

17. In the premises aforesaid, we are clearly of the view that the High Court has committed patent error of law which has resulted in miscarriage of justice. The order of the High Court is, accordingly, quashed. The appeal is allowed. Consequently, the writ petition filed by the respondent stands dismissed. Parties are asked to bear their own costs."

28. Perusal of the above-extracted judgments relied upon by learned counsel for the petitioner indicates that reasonable opportunity contemplated by Article 311(2) means "hearing" in accordance with the principles of natural justice under which one of the basic requirements is that all the witnesses in the departmental enquiry shall be examined in the presence of the delinquent who shall be given an opportunity to cross-examine them. Where a statement previously made by a witness, either during the course of preliminary enquiry or investigation, is proposed to be brought on record in the departmental proceedings, the law as laid down by this Court is that a copy of that statement should first be supplied to the delinquent who should thereafter be given an opportunity to cross examine the witnesses. Where a disciplinary enquiry affects the

livelihood and is likely to cast a stigma and it has to be held in accordance with the principles of natural justice, the minimum expectation is that the report must be a reasoned one. When a departmental enquiry is conducted against the delinquent it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rule of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a delinquent is treated fairly in proceeding which may culminate in imposition of punishment including dismissal/ removal from service.

In a case where the proceedings are completed and the order of dismissal is successfully challenged on the ground of non-payment of subsistence allowance for the period of suspension during the pendency of the application it shall be open to the Management to ask for the permission of the authority again after paying or offering to pay to the workman concerned within a reasonable time to be fixed by the authority concerned the arrears of subsistence allowance.

29. It also indicates from bare perusal of the judgment relied upon by learned counsel for the petitioner that when a delinquent is facing a disciplinary proceeding, he is entitled to be afforded a reasonable opportunity to meet the charges against him in an effective manner. And no one facing departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In absence of such copies, how can the employee concerned prepare

his defence, cross-examine the witnesses, and point out the inconsistencies with a view to show that the allegation are incredible?

30. Perusal of the above-extracted judgments relied upon by learned counsel for the respondent-Bank indicates that principle of natural justice should not be stretched too far and the same cannot be put in a straitjacket formula. If a party having proper notice chose not to appear, he at later stage cannot be permitted to say that he had not been given a fair opportunity of hearing. In an ex parte inquiry, if the charges are borne out from the documents kept in normal course of business, no oral evidence is necessary to prove those charges. When the charged officer does not attend the inquiry, then he cannot contend that the inquiry authority should not have relied upon the documents which were not made available or disclosed to him.

It also reveals that every officer/employee of the bank to take all possible steps to protect the interest of the bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a bank officer. It requires the officer/employee to maintain good conduct and discipline and to act to the best of his judgment in performance of his official duties or in exercise of the power conferred upon him. If each officer/employee is allowed to act beyond his authority, the discipline of the organization/ bank will disappear, the function of the bank would become chaotic and unmanageable. Each officer of the bank cannot be allowed to carve out his own little empire wherein he dispense favours and largesse.

31. It also reveals from perusal of the judgment relied upon by learned counsel for the respondent-Bank that if the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts in a fiduciary capacity, the highest degree of integrity and trustworthiness is a must and unexceptional.

32. Perusal of the material on record shows that the petitioner was employed as a Clerk. Vide order dated 2.3.1995, the petitioner was put under suspension. On 18.5.1995, the opposite party no.2 issued a memo to the petitioner in respect of seven lapses allegedly committed by the petitioner, to which the petitioner submitted his reply on 8.6.1995. On 3.7.1995, the petitioner was served with a charge-sheet for having committed certain alleged acts of misconduct. The enquiry commenced on 18.7.1995 and concluded on 18.9.1996.

On 30.12.1996, the petitioner received a memo dated 28.12.1996 issued by the opposite party no.2 stating that the enquiry officer had given an ex parte report dated 17.12.1996 as the petitioner failed to submit his written arguments upto 17.12.1996. The Disciplinary authority vide the memo dated 28.12.1996 directed the petitioner to submit his explanation to the findings dated 17.12.1996 and 21.12.1996, to which vide letters dated 6.1.1997 and 13.1.1997 the petitioner submitted his explanations specifically complaining that the enquiry officer had submitted his report without considering the written argument of the petitioner. On 24/25.2.1997, the

opposite party no.2 issued proposed consolidated punishment of removal from services under paragraph 19.6(b) of the bipartite settlement and explanation was recalled from the petitioner requiring him to show cause why the proposed punishment be not made final, to which on 27.3.1997 and 21.4.1997. Vide order dated 26.5.1997, the punishment of removal from services was confirmed by the opposite party no.2. Thereafter, the petitioner preferred an appeal on 26.6.1997 which was dismissed vide order dated 23.12.1997.

33. I have carefully examined the material on record in the light of the law-reports cited by learned counsel for the parties.

34. On examination, it is found that the petitioner was served with a chargesheet for having committed certain acts of misconduct on 3.7.1995 and the same did not contain list of documents/witnesses and copies which itself is also in violation of Circular dated 23.8.1984 issued by the Central Office of the Bank to all its Chief Managers, which is based on directions issued by the Government of India through the Central Vigilance Commission vide letter dated 3.7.1984. Primarily, three witnesses on behalf of the Management being the Branch Manager and two other employees (co-accused) were examined. The complainants on whose complaints the enquiry had been set up were not produced despite repeated requests made by the petitioner to produce them for verification of the complaint said to have been made by them and forming the basis of the enquiry against the petitioner. The said circular also indicates that failure to provide list of documents and the witnesses on the basis of which the charges are proposed to be

sustained amounts to failure to give a reasonable opportunity to a charged officer to defend himself.

35. It is also found that the complainants denied making of any complaint dated 7.3.1995 whereon they have made an endorsement that they have no concern with the complaint and they are also not well versed with the language (English) in which the complaint/ letter dated 7.3.1995 had been made. The complaint has not been proved as the complaint was not examined and consequently the entire proceedings are vitiated on the basic premise that the foundation having been removed, the entire structure falls.

The Vigilance Officer submitted a report in which seven officers of the Bank had been implicated. The report had contained as an annexure a confessional statement of the petitioner given on 24.2.1995 more than two weeks before the alleged complaint had been made by complainants. Significantly, even the order of suspension had been passed on 2.3.1995 whereas the complaint on which the suspension is based was given on 7.3.1995. Neither the complaint nor the complainants were produced and while enquiry officer had placed reliance on the so-called confessional statement which was an annexure to the report submitted by the Vigilance Officer, the petitioner was not put to notice and the enquiry officer placed ex-parte reliance on the same even without proving the said statement.

In the written brief submitted on behalf of the petitioner, it has specifically been stated that no confessional statement had been given by the petitioner and that the said statement had been procured by the Vigilance Officer under threat and

coercion. Neither the alleged confessional statement had been made part of show cause memo dated 18.5.1995 nor was it a part of the charge-sheet and was consequently beyond the domain of the enquiry. One Sri S.J. Mehrotra is alleged to have signed the said statement as a witness, but he was not produced in evidence, although categorically requested by the petitioner before the enquiry officer, recording that it was prerogative of the Management to produce any witness or not.

On 21.12.1996, the second enquiry report was submitted in which the enquiry officer has only relied upon the deposition of the Branch Manager who was a co-accused and the vigilance officer's report and the alleged confession which were not enlisted in the list of documents. In the explanation before Disciplinary Authority, it has specifically been complained by the petitioner that the enquiry officer had submitted his report without considering the written arguments, to which the Disciplinary Authority had mechanically nodded.

36. It is also found that the petitioner was placed under suspension on 2.3.1995. As per the Bipartite settlement, the petitioner was entitled to the subsistence allowance @ full pay w.e.f. 2.3.1996. Since the petitioner was not paid the full subsistence allowance as per the Bipartite Settlement, therefore the enquiry held against him was vitiated.

37. It is well settled principle of law that a statement made outside the departmental enquiry cannot be placed reliance and any document relied upon has necessarily to be proved by the Enquiry Officer in accordance with law. In the present case, neither a copy of the alleged statement provided to the

petitioner nor was it referred to in the charges or in the list of documents and was merely handed over to the enquiry officer by the Vigilance Officer. The denial by the petitioner specially pleaded in the written brief was not considered and the charge of confessional statement was dropped at the appellate and 2nd appellate stage concurrently.

38. Considering in totalities of facts and circumstances of the case, this Court is of the considered opinion that when an employee is facing disciplinary proceeding, he is entitled to be afforded a reasonable opportunity to meet the charges against him in an effective manner and no one facing a departmental enquiry can effectively meet the charges made available to him. In the absence of such copies, how can the employee concerned prepare his defence, cross-examination the witnesses and point out the inconsistencies with a view to show that the allegations are incredible. It is also of view that failure of the inquiry officer to furnish the petitioner with list of documents must be held to have caused prejudiced to the petitioner in making his defence at the inquiry. The enquiry held against the petitioner was a mere eye wash and violative of principles of natural justice.

39. It is also of the opinion that when a departmental enquiry is conducted against the employee, it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that the employee is

treated fairly in proceedings which may culminate in imposition of punishment including dismissal/ removal from service.

In a case where the proceedings are completed and the order of dismissal successfully challenged, it shall be open to the Management to ask for the permission of the authority again after paying or offering to pay to the woman concerned within a reasonable time to be fixed by the authority concerned the arrears of subsistence allowance, but in the instant case nothing has been done for payment of subsistence allowance after expiry of one year. The judgments relied upon by learned counsel for the respondent-Bank are not squarely covered to the facts and circumstances of the case as the departmental enquiry has been conducted not in accordance Circular dated 23.8.1984 issued by the Central Office of the Bank to all its Chief Managers, which is based on directions issued by the Government of India through the Central Vigilance Commission vide letter dated 3.7.1984 and in violation of principles of natural justice.

40. In view of the above, this writ petition is **allowed**. Orders dated 26.5.1997 and 23.12.1997 passed by opposite party nos.2 and 1 respectively are quashed. The respondents are directed to reinstate the petitioner in service and pay him all the wages and allowance due to him.

(2023) 7 ILRA 1175

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 04.07.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 1797 of 2014

Mudita Bajpai

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Ishita Yadu, Gaurav Mehrotra, Ravi Shankar Tiwari

Counsel for the Respondents:

C.S.C., Ashok Shukla

The petitioner, a dependent of freedom fighter Late Laxmi Shankar Bajpai, applied for Lecturer posts per the advertisement dated 07.02.2014, which did not mention age relaxation for dependents of freedom fighters, unlike prior advertisements (2013). Government orders (e.g., 27.09.1972) and the 1993 Act provide for age relaxation and reservation for dependents of freedom fighters. The court noted that government orders (e.g., 27.09.1972) and the 1993 Act mandate age relaxation for dependents of freedom fighters. The omission of this relaxation in the 2014 advertisement, unlike prior advertisements, was deemed arbitrary and violative of Articles 14 and 16. The court upheld the petitioner's right to be considered under the dependents of freedom fighters quota, rectifying the respondents' error. The court directed the respondents to consider the petitioner's candidature under the dependents of freedom fighters quota against one of the vacant posts.

The writ petition was allowed.

Precedents cited:

1. Ramesh Chandra Sankla Vs Vikram Cement [(2008) 14 SCC 58]
2. Shangrila Food Products Vs LIC [(1996) 5 SCC 54]
3. Shaheen Parveen Vs St. of U.P. [(2015) SCC OnLine All 9489]
4. St. of U.P. Vs Dr. Dina Nath Shukla [(1997) 9 SCC 662]
5. Dr. Suresh Chandra Verma Vs Nagpur University [(1990) 4 SCC 55]

6. Daveshe Nagalya Vs Pradeep Kumar [(2021) 9 SCC 796] Vs Motor & General Traders [(1975) 1 SCC 770]

7. Rajesh Kumar Daria Vs Rajasthan Public Service Commission [(2007) 8 SCC 785] reservations.

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Gaurav Mehrotra, learned counsel for the petitioner and learned Standing Counsel for the State-respondent and Sri R.K. Upadhyay, learned counsel for the respondent-Commission.

2. By means of the present writ petition, the petitioner has prayed for the following reliefs :-

"i) to issue a writ, order or direction in the nature of Mandamus commanding the opposite parties to provide the relaxation in maximum age and consider the application form/ candidature of the petitioner for the post for which the petitioner has applied in pursuance of the advertisement dated 07.02.2014 (Annexure No.3 to the writ petition).

1)(a) to issue a writ, order or direction in the nature of certiorari quashing the Government orders dated 14.11.1985, 03.09.1992 and 31.10.2013.

ii) to pass any other suitable order or direction which is deemed just and proper in the circumstances of the case may also be passed.

iii) to allow the writ petition with costs.

iv) Issue a writ order or direction in the nature of certiorari, quashing the final result declared by the Respondents on 30.10.2018 (Annexure No. 11) to the extent that the candidate placed at serial no. 47 has been given benefit of reservation under

the Dependents of Freedom fighters category;

v) Issue a writ, order or direction in the nature of mandamus commanding the respondents to consider the candidature of the petitioner against the vacancy reserved for category of candidates belonging to dependents of freedom fighters in the selections at hand;"

3. Brief fact of the case is that the State Government issued a government order dated 27.9.1972, providing age relaxation to the dependent of freedom fighters. In addition to the aforesaid government order, the State Government issued government orders dated 1.11.1947, 31.1.1957, 14.8.1972, 19.2.1977, 14.11.1985, 3.9.1992 and 31.10.2013 on the issue involved in the present writ petition.

Prior to government order dated 14.8.1972, the exemption/ relaxation in age limit was four years and vide government order dated 14.8.1972, the same was of five years and the government orders are beneficial in nature and by the said government orders, relaxation was given to the freedom fighters, the dependent/ family members of freedom fighters, as defined from time to time and in the said government orders, no time limit is prescribed in relation to the benefit provided.

4. In the year 1993, the State Government promulgated the U.P. Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 (in short, 'the Act, 1993) and the Act was lastly amended in the year 2009 and as per the Act, the petitioner is dependent of freedom

fighter namely, Late Laxmi Shankar Bajpai, the grandfather of the petitioner.

5. The petitioner was appointed as Assistant Teacher in Basic Shiksha Parishad in the year 1999. The respondent No.2 published an advertisement for appointment/ recruitment dated 7.2.2014 on the post of Lecturers in the State Council for Education Research and Training (S.C.E.R.T.). In the said advertisement, it has not been mentioned that relaxation in age will be given to the dependents of freedom fighters. The petitioner has applied in pursuance to the aforesaid advertisement.

6. The respondent No.2 had also issued advertisement No.A-1/E-1/2-13 dated 23.3.2013, A-2/E-1/2013 dated 23.5.2013 and advertisement No.A-3/E-1/2013 dated 14.6.2013 and in the said notifications, age relaxation of five years is provided to the dependents of freedom fighters.

7. During the pendency of the writ petition, the petitioner had been permitted to appear in the selection process and having been declared successful in the written examination, she was called for interview which was held on 12.10.2018 only for the post of Lecturer in Social Work.

Final result of the selection has been declared, subject to the final outcome of the instant writ petition. However, the name of the petitioner did not find place in the final result declared for appointments made on the post of Lecturer in Social Work.

8. During the pendency of the instant writ petition, the petitioner has been

provided certain information by the respondent No.3 under the Right to Information Act, pertaining to the category wise cut-off marks obtained by the selected candidates in the selection in question as well as copy of the final result.

9. Submission of learned counsel for the petitioner is that from perusal of the information provided by the respondent No.3, it is evident that the respondents have adopted a pick and choose policy while selecting candidates in the selections at hand which has not been made in fair and transparent manner, thereby violating the fundamental right enshrined under Articles 14 and 16 of the Constitution of India.

10. It is submitted that the petitioner is the dependent of freedom fighter as defined in Section 2(b) (ii) of the Act, 1993 and is entitled to age relaxation in the light of the government order dated 27.9.1972 in the process of recruitment initiated by the respondent No.2 for the post of Lecturers under the U.P. Teachers Education (Lecturers Cadre) Service Rules, 2010 and in the advertisement dated 7.2.2014, the relaxation of age has not been mentioned to the dependents of freedom fighters.

11. He submits that for the purposes of carrying out the functions of S.C.E.R.T. including recruitment on the post of Lecturers, guidelines were framed by the Central Government and in the year 2010, on the issue of recruitment of Lecturer, the State Government framed the Rules of 2010 under the proviso Article 309 of the Constitution of India.

As per Rule 2 of the Rules of 2010, the Lecturers cadre service is Subordinate Non Gazette Service i.e. Group-C post. As per Rule 3(d),

Commission means U.P. Public Services Commission. Rule 5 of the Rules of 2010 says that recruitment to the various categories of post in the service, as defined under rule 2(j), shall be made by direct recruitment through the Commission. Rule 6 of the Rules of 2010 relates to giving reservation to certain class such as scheduled caste, scheduled tribe including the persons covered under the Act of 1993. Rule 10, as amended vide Notification dated 22.08.2013, relates to age of a candidate for direct recruitment and according to the same, a candidate for direct recruitment must have attained the age of 21 years and must not have attained the age of more than 40 years on the first day of July of the calendar year in which vacancies are advertised and proviso of Rule 10 says that the upper age limit in the case of candidates belonging to Scheduled Castes, Scheduled Tribes and such other categories as may be notified by the Government from time to time shall be greater by such number of years as may be specified. Rule 24 of the Rules of 2010 gives power of relaxation to the State Government and rule 25 specifically says that nothing in these rules affect reservations and other concessions required to be provided for the candidates belonging to Scheduled Caste, Scheduled Tribe and other special categories of persons in accordance with the orders of the Government issued from time to time in this regard.

12. He submits that the government order dated 27.09.1972 relates to relaxation of upper age limit and reservation in government services to the dependants of freedom fighters and as per the same five years relaxation in upper age limit in the recruitment process has to be given to the dependants of freedom fighters and in the

year 1993 the Act of 1993 was promulgated to provide reservation to certain classes mentioned in the Act of 1993.

13. It is further submitted that the petitioner has a good academic record and she was appointed as Assistant Teacher in Basic Shiksha Parishad on 11.12.1999 and at that point of time the petitioner was M.Sc. (Botany) and B.Ed. and thereafter in the year 2002, she obtained the certificate of computer and in the year 2010, she passed M.A. (Education) and got 68% marks and thereafter, in the year 2012 she passed M.A. (Social Work) with 72.4%. It is also pointed out that the petitioner passed High School with 60%, Intermediate with 53%, B.Sc. with 59%, M.Sc. with 60% and B.Ed. with 58% in the year 1986, 1988, 1991, 1993 and 1997 respectively.

14. It is also submitted that the present is presently holding the post of Assistant Teacher in Junior High School, as she has been promoted from the post of Assistant Teacher (Primary School) and has also performed the duties in the District Institute of Education and Training (D.I.E.T.), District Raebareli as Teacher Educator. He further submitted that selection/recruitment on the posts of Lecturers under the Rule of 2010, advertisement No. 5/2013-2014 dated 07.02.2014 was issued by opposite party No.2 and as per the said advertisement the last date of submitting the application form was 11.03.2014 and submitting the documents was 21.03.2014 and as per the said advertisement, the minimum age for the post advertised is 21 years and maximum is 40 years and the said advertisement in regard to the relaxation of age only says "relaxation on age, as per rules" and as per condition No.4, the age aforesaid has to be calculated on

01.07.2014. The said condition also prescribed relaxation in to certain classes of person. In the said age condition there is no mention about providing relaxation of age to the dependants of freedom fighters and the said act of the opposite parties is arbitrary and illegal and is unsustainable.

15. He further submitted that the respondent No.2 had also issued advertisement No.A-1/E-1/2013 dated 23.03.2013, A-2/E-1/2013 dated 23.05.2013 and advertisement No.A-3/E-1/2013 dated 14.06.2013, copies whereof have been filed herewith as Annexure No.5, 6 and 7 to the writ petition respectively, and a bare perusal of the condition No.14 (1), 12 and 14 (2) respectively of the above mentioned advertisements would show that the age relaxation of 5 year is provided to the dependents of freedom fighters but in the present case the said benefit has not been extended to the dependents of freedom fighters including the petitioner and as per Rules of 1993 as amended in 2009 vide notification dated 20.08.2009, the petitioner is dependent of freedom fighter namely Late Laxmi Shankar Bajpai, the grandfather of the petitioner and as such the petitioner has suffered irreparable loss and injury. Copy of the certificate dated 26.12.1997 has been filed as Annexure No.8 to the writ petition.

16. In pursuance of the advertisement dated 07.02.2014 the petitioner has applied for the post of Lecturer (Biology), Lecturer (Education) and Lecturer (Social Work) for which she is fully eligible and qualified.

The advertisement dated 07.02.2014 is silent on the issue of providing the relaxation in maximum age to the dependents of freedom fighters and it

is a possibility that the respondent No.2 will reject the application form of the petitioner on the ground of maximum age and due to the same, the petitioner has approached this Hon'ble Court for a direction to the opposite parties to provide age relaxation to the petitioner.

It is next submitted that the opposite parties are not extending the benefit of age relaxation to the dependent of freedom fighters in clear terms as would appear from the advertisement dated 07.02.2014 and, thus, the action of the opposite parties is arbitrary and illegal and liable to be interfered by this Hon'ble Court.

17. It is also argued that the opposite parties are providing the age relaxation to the dependents of freedom fighters, as would appear from the advertisement dated 23.03.2013 and 14.06.2013 mentioned hereinabove, but on the other hand are not providing the same in the advertisement dated 07.02.2014 and, thus, the action of the respondents is contrary to the spirit of Article 14 of the Constitution of India. It is also pertinent to mention that in view of Government Order dated 27.09.1972 and aforesaid facts and circumstances, the petitioner is entitled to relaxation in age of 5 years. The Act of 1993 and Government Order dated 27.09.1972 are relevant and are applicable to the case of the petitioner and the opposite parties are under obligation to extend the benefits of the same in reasonable and fair manner.

18. It is submitted by learned counsel for the petitioner that from a perusal of the final result, it is evident that out of the 70 total vacancies for the post of Lecturer (Social Work), 35 seats have been allotted for candidates belonging to unreserved category, 15 seats for scheduled castes

category candidates, one seat for scheduled tribes category candidate and 19 seats have been allotted for candidates belonging to other backward classes. In the horizontal category of reservation, one seat has been allotted for candidates belonging to dependents of freedom fighters (related to the instant matter), 3 seats for ex-servicemen, 14 seats for women candidates and three seats have been allotted to candidates belonging to disability quota.

19. During the pendency of the present writ petition, the petitioner had applied under the Right to Information Act vide letters dated 02.02.2019 and 20.04.2019, seeking certain information pertaining to the category wise cut off marks obtained by the selected candidates in the selection in question. In response thereto, vide office memorandum dated 02.05.2019 issued by the Public Information officer of respondent No.2, the petitioner has been provided the the following category wise cut off marks:

Unreserved category-	56
Other Backward Classes-	50
Scheduled Castes-	45
Scheduled Tribes-	45
Women-	53
Dependents Of Freedom Fighters/O.B.C.-	52
Ex-servicemen-	not available
Disability (locomotor)-	42
Disability (auditory)-	42
Disability (blindness)-	not available

Copy of the said office memorandum dated 02.05.2019 has been annexed herewith as Annexure No.12 to the writ petition.

20. He submits that moreover vide office memorandum dated 17.01.2019 issued by the Public Information Officer of respondent No.3 whereby the petitioner was provided a copy of the final result, copy whereof is annexed as Annexure no. 11 to the writ petition, the petitioner has also been provided the following information:

"1. The petitioner has been awarded 50 marks in the interview.

2. The cut-off marks of the last selected candidate belonging to unreserved category is 56 marks."

Copy of the office memorandum dated 17.01.2019 has been annexed as Annexure No.13 to the writ petition.

21. Learned counsel for the petitioner submits that it is relevant to note that under the category of candidates belonging to dependents of freedom fighters, three candidates had been invited for appearing in the interview, namely Sri Shrayas Yadav, Sri Rajnish Kumar and the petitioner. To the best knowledge of the petitioner, out of the aforesaid three candidates, Sri Rajnish Kumar obtained less than 50 marks, because of which he was not selected in either category of OBC or dependents of freedom fighter, to which he belonged. The petitioner has obtained 50 marks and Sri Shrayas Yadav has obtained 52 marks, thus, Sri Shrayas Yadav consequently got selected on the single post which was reserved for candidates belonging to category of dependents of freedom fighters. Copy of the relevant extract of the list of candidates who were called for interview in the selection, wherein name of Sri Rajnish Kumar finds at serial No.14 has been annexed as Annexure no. 14 to the writ petition.

22. It is further submitted that name of Sri Shrayas Yadav finds mention at serial No.47 of the final select list, wherein it has been also clearly mentioned that Sri Shrayas Yadav belongs to both categories of other backward classes as well as dependent of freedom fighters, however, since the cut-off marks of the of the candidates belonging to other backward classes is 50 marks, whereas as per the information provided to the petitioner under the Right to Information Act, the cut-off marks of the candidates belonging to the category of dependents of freedom fighters is 52 marks, which appear to be the marks obtained by Sri Shrayas Yadav, it is evident that Sri Shrayas Yadav has been selected on the single post reserved for candidates belonging to category of dependents of freedom fighters, even though Sri Shrayas Yadav ought to have been selected on one of the posts reserved for candidates belonging to other backward caste, since he obtained more marks than the last selected candidate belonging to other backward caste (i.e. more than 50 marks).

It is also pertinent to draw attention to clause 13.6 of the advertisement dated 11.03.2014 on the basis of which the selection at hand took place. In clause 13.6 of the advertisement dated 11.03.2014, it has been categorically mentioned that those candidates who are seeking reservation under two different categories, shall be given and be eligible for reservation under only one category, being that category which is more beneficial for such candidate. Therefore, Sri Shrayas Yadav ought to have been selected under the category of other backward caste and not on the single post which was reserved for candidates belonging to dependents of freedom

fighters, meaning thereby that the single post reserved for candidates belonging to category of dependents of freedom fighters ought to have been filled by the petitioner, who was next in line after Shri Shrayas Yadav in order of merit.

23. He submitted that the impugned action of the respondents in granting benefit of double reservation to certain candidates while depriving the petitioner of benefit of reservation under the category of dependents of freedom fighters does not withstand the litmus test of reasonableness, fairness and equality, which are the necessary ingredients of every administrative action and are not only illegal and arbitrary but also unsustainable in the eyes of the law.

24. In support of his submission, learned counsel for the petitioner placed reliance upon the following judgments :-

(i) Ramesh Chandra Sankla & Others Vs. Vikram Cement & Others [(2008) 14 SCC 58]; paragraphs 97 and 98

(ii) Shangrila Food Products & Another Vs. Life Insurance Corporation of India & Another [(1996) 5 SCC 54]; paragraph 11

(iii) Shaheen Parveen & Another Vs. State of U.P. & Others [(2015) SCC OnLine All 9489]; paragraph 17

(iv) State of U.P. Vs. Dr. Dina Nath Shukla & Another [(1997) 9 SCC 662]; paragraphs 11 and 13

(v) Dr. Suresh Chandra Verma & Others Vs. The Chancellor, Nagpur University & Others [(1990) 4 SCC 55]; paragraphs 10 and 11

(vi) Daveshe Nagalya (Dead) & Others Vs. Pradeep Kumar (Dead)

**through Legal Representatives & Others
[(2021) 9 SCC 796]; paragraph 12**

**(vii) Pasupuleti
Venkateshwarlu Vs. The Motor and
General Traders [(1975) 1 SCC 770];
paragraph 4**

25. On the other hand, learned counsel for the respondent-Commission submits that the Commission had issued an advertisement No.5/2013-14 dated 7.2.2014 for the post of Lecturer in State Council for Education Research and Training. In pursuance of government order No.724/dk-2013 dated 31.10.2023 in the advertisement, no relaxation in the upper age limit to the Dependents of Freedom Fighters was provided. It is submitted that the petitioner's claim of relaxation in the upper age limit in the aforesaid category in view of the government order No.7/2/72-Niyukti-4 dated 27.9.1972 is misconceived as the said government order is not applicable as is evident from the government order No.724/dk-2013 dated 31.10.2023. However, the petitioner was allowed relaxation in upper age limit on account of being a government servant and her online application was accepted and she was allowed to participate in the selection process.

26. He submits that the petitioner was called for an interview for the post of Lecturer, Social Work. The interview of the petitioner was conducted on 12.10.2018. The result for all 70 posts of Lecturer, Social Work was declared on 30.10.2018 but the petitioner could not succeed. Thereafter, the petitioner has challenged the result by making an amendment to the prayer clause of the writ petition. The claim of the petitioner is mainly based on the point that she belongs to the category of dependents of freedom fighters and instead of declaring her

successful against one vacancy reserved for dependents of freedom fighters another person namely Shreyas Yadav has wrongly been selected against one vacancy reserved for dependents of freedom fighters whereas he was already selected against the vacancy of OBC. Thus, she has been allowed the reservation under two categories i.e. OBC and dependents of freedom fighters category.

27. It is further submitted by learned counsel for the respondent that Shreyas Yadav is an OBC candidate and also belongs to dependents of freedom fighters, got 52 marks, therefore, he was selected under the OBC quota (cut-off marks for OBC is 50). Since he also belongs to the dependents of freedom fighters category, therefore, he has been adjusted against the quota of dependents of freedom fighters. The horizontal reservations are made in accordance with the provisions contained in the Uttar Pradesh Public Service (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993, which is in consonance with the law laid down in respect of horizontal reservations in the case of **Indra Sawhney Vs. Union of India** [1992 Supp (3) SCC 217], paragraph 812, which has further been reiterated in the case of **Anil Kumar Gupta Vs. State of U.P. & Others** [(1995) 5 SCC 173], paragraph 18 and **Rajesh Kumar Daria Vs. Rajasthan Public Service Commission and others** [(2007) 8 SCC 785], paragraph 6.

28. After having heard the rival submission advanced by learned counsel for the parties, I perused the material on record.

29. Learned counsel for the petitioner relied upon a judgment in the case of **Ramesh Chandra Sankla** (Supra), relevant paragraphs 97 and 98 are being quoted below :-

"97. The learned counsel for the Company placed heavy reliance on *Shangrilla Food Products Ltd. v. Life Insurance Corporation of India*, (1996) 5 SCC 54. In a suit by A, an order was passed by the Estate Officer against B holding that it was in unauthorized occupation and was liable to be evicted under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. He also ordered B to pay damages of Rs. 12 lakhs. An appeal was filed by B against the order and the Appellate Authority confirmed the order of eviction. The High Court, however, felt that an opportunity ought to have been afforded to B to prove that it was a lawful sub-tenant. The matter, therefore, required remand. At that stage, A prayed that in that case, the matter be remanded as a whole to be decided afresh considering the question of payment of rent/damages also. The High Court upheld the plea, negating the contention of B that A had never challenged the order setting aside the direction as to payment of damages. B approached this Court. Dismissing the appeal, confirming the order of the High Court and advertent to substantial justice, this Court stated :

""It is well-settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognizance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priorly, before invoking the jurisdiction of the High Court, the court can take into account the unfair advantage gained and can require the

party to shed the unfair gain before granting relief. What precisely has been done by the learned Single Judge, is clear from the above emphasised words which be re-read with advantage. The question of claim to damages and their ascertainment would only arise in the event of the Life Insurance Corporation, respondent, succeeding to prove that the appellant Company was an unlawful sub-tenant and therefore in unauthorised occupation of public premises. If the finding were to go in favour of the appellant Company and it is proved to be a lawful sub-tenant and hence not an unauthorised occupant, the direction to adjudge the claim for damages would be rendered sterile and otiose. It is only in the event of the appellant Company being held to be an unlawful sub-tenant and hence an unauthorised occupant that the claim for damages would be determinable. We see therefore no fault in the High Court adopting such course in order to balance the equities between the contestants especially when it otherwise had power of superintendence under Article 227 of the Constitution in addition. We cannot be oblivious to the fact that when the occupation of the premises in question was a factor in continuation the liability to pay for the use and occupation thereof, be it in the form of rent or damages, was also a continuing factor. The cause of justice, as viewed by the High Court, did clearly warrant that both these questions be viewed inter-dependently. For those who seek equity must bow to equity". (emphasis supplied)""

98. From the above cases, it clearly transpires that powers under Articles 226 and 227 are discretionary and equitable and are required to be exercised in the larger interest of justice. While granting relief in favour of the applicant, the Court must take into account balancing

interests and equities. It can mould relief considering the facts of the case. It can pass an appropriate order which justice may demand and equities may project. As observed by this Court in Shiv Shankar Dal Mills v. State of Haryana, (1980) 1 SCR 1170, Courts of equity should go much further both to give and refuse relief in furtherance of public interest. Granting or withholding of relief may properly be dependent upon considerations of justice, equity and good conscience."

30. He relied upon a judgment in the case of **Shangrila Food Products** (Supra), relevant paragraph 11 is being quoted below :-

"11. It is well-settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognisance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priority, before invoking the jurisdiction of the High Court, the court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief. What precisely has been done by the learned Single Judge, is clear from the above emphasised words which be re-read with advantage. The question of claim to damages and their ascertainment would only arise in the event of the Life Insurance Corporation, respondent, succeeding to prove that the appellant Company was an unlawful sub-tenant and therefore in unauthorised occupation of

public premises. If the finding were to go in favour of the appellant Company and it is proved to be a lawful sub-tenant and hence not an unauthorised occupant, the direction to adjudge the claim for damages would be rendered sterile and otiose. It is only in the event of the appellant Company being held to be an unlawful sub-tenant and hence an unauthorised occupant that the claim for damages would be determinable. We see therefore no fault in the High Court adopting such course in order to balance the equities between the contestants especially when it otherwise had power of superintendence under Article 227 of the Constitution in addition. We cannot be oblivious to the fact that when the occupation of the premises in question was a factor in continuation the liability to pay for the use and occupation thereof, be it in the form of rent or damages, was also a continuing factor. The cause of justice, as viewed by the High Court, did clearly warrant that both these questions be viewed inter-dependently. For those who seek equity must bow to equity."

31. He relied upon a judgment in the case of **Shaheen Parveen** (Supra), relevant paragraph 17 is being quoted below :-

"17. The writ court, being a court of equity, must take into consideration all relevant factors brought before it to deliver substantial justice. Equity justifies bending the rules, where fair play is not violated, with a view to promote substantial justice. A writ court cannot contemplate any limitation on its power to deliver substantial justice. It has to be ensured that a consumer of justice gets complete justice, instead of going into the nicety of law. Under the circumstances, the court cannot be a mere onlooker if injustice is likely to be caused."

32. He relied upon a judgment in the case of **State of U.P. Vs. Dr. Dina Nath Shukla & Another** (Supra), relevant paragraphs 11 and 13 are being quoted below :-

"11. In Dr. Suresh Chandra Verma & Ors. vs. The Chancellor, Nagpur University & Ors. [(1990) 4 SCC 55] instead of making subjectwise recruitment, an advertisement in respect of total of 77 posts including 13 posts of Professors, 29 posts of Readers and 35 posts of Lecturers were issued and recruitment was sought to be made. When it was questioned, this Court tested the principle on the anvil of equality and fairness of procedure posing the question thus:

""Is non-reserving the posts of University teachers subjectwise in the employment notice a breach of letter and spirit of reservation policy contained in Section 77-C read with Section 57 of the Act?""

This Court had laid down in paras 10 to 12 thus:

As regards the first question, we have narrated earlier the method which was adopted by the University for reserving the posts. It announced the posts categorywise as professors, Readers and Lecturers in different subjects and made a blanket declaration that 6 of the posts of Professors, 12 of the posts of Readers and 16 of the posts of Lecturers would be reserved for backward casts. Neither the University nor the candidates knew at that time as to for which of the subjects and in what number the said posts were reserved. The result was that the candidates belonging to the reserved category in particular, who wanted to apply for the reserved posts did not know for which of the posts they could apply and whether they could apply at all for the posts in the

subjects in which they were qualified. That this could be the expected consequence of such an employment notice can legitimately be inferred and need not be and indeed cannot be, demonstrated by evidence of what actually happened, for there may be a number of candidates who on account of the said uncertainty might to take a chance. What is further, the selection committees which were appointed to interview that candidates for the respective posts did not also know whether they were interviewing the candidates for reserved posts or not, and to assess merits of the candidates from the reserved category as such candidates. The contention advanced on behalf of the appellants that the selection committee even without knowing to the candidates from the reserved category and, therefore, it cannot be said that any injustice had resulted to them is without merit. In the first instance, the contention proceeds on the footing that all those belonging to the reserved category who wanted to apply for all the said posts had done so even without knowing that the concerned posts were reserved. Secondly, it also presumes that all eligible candidates from unreserved category had applied for the posts without knowing whether the posts were reserved or not. The possibility that many eligible candidates belonging to both reserved and unreserved categories might not have taken the risk and chosen to gamble cannot be ruled out. This argument further ignores the fact, that the suitability of a candidate from a reserved category to the particular post has to be adjudged by taking into consideration various factors and the desired result cannot be obtained by merely giving uniform weightage marks to the candidates concerned which was the only method followed by the selection committees while selecting the candidates. Further, there is nothing on record to show

that this method of giving weightage to the candidate was not followed in respect of reserved category candidates even if they had not applied for the post in the reserved seats. What is more, there is also nothing on record to show whether any candidate belonging to the reserved category had applied for a particular post in a reserved seat, without the prior knowledge that the post was reserved. It is, therefore, difficult to understand as to how the selection committees proceeded to give weightage to the candidates without knowing whether they had applied for reserved or non-reserved seats. What is more objectionable in the procedure was that its Executive Council proceeded to classify the posts in different subjects between reserved and non-reserved posts after the lists of selected candidates were received from different selection committees. This method was open to an obvious objection since it gave a scope to eliminate unwanted selected candidates at that stage. Whether it occurred in the present case or not is immaterial for testing the validity and the propriety of the method followed by the university. As has been stated earlier, in fact, after the receipt of the list of selected candidates not only the Executive Council constituted yet another committee to decide which of the subjectwise posts should be reserved or not but the Executive Council also decided that although candidates for 47 posts were selected only 30 of the posts were set apart although the candidates were selected for them, and they were so set apart for being filled in afresh by candidates belonging to the reserved category. Interestingly, however, the employment notice issued subsequently for these posts mentioned reservations postwise (subjectwise).

According to us, the word "post" used in the context has a relation to the

faculty, discipline, or the subject for which it is created. When, therefore, reservations are required to be made "in posts", the reservations have to be postwise, i.e. subjectwise. The mere announcement of the number of reserved posts is no better than inviting applications for posts without mentioning the subjects for which the posts are advertised. When, therefore, Section 57(4)(a) requires that the advertisement or the employment notice would indicate the number of reserved posts, if any, it implies that the employment notice cannot be vague and has to indicate the specific post, i.e., the subject in which the post is vacant and for which the applications are invited from the candidates belonging to the reserved class. A non-indication of the post in this manner itself defeats the purpose for which the applications are invited from the reserved category candidates and consequently negates the object of the reservation policy. That this is also the intention of the legislature is made clear by Section 57(4)(d) which requires the selection committees to interview and adjudge the merits of each candidate and recommend him or her for appointment to "the general posts" and "the reserved posts", if any, advertised. A support was also sought to be derived by the appellants to their contention from the policy of reservation as enunciated in Government Resolution dated March 30, 1981 wherein instructions are issued in the matter in exercise of the power conferred on the Government under Section 77 (c) of the Act."

13. Thus, it could be seen that if the subjectwise recruitment is adopted in each service or post in each cadre in each faculty, discipline, speciality or super-speciality, it would not only be clear to the candidates who seek recruitment but also there would not be an over-lapping in

application of the rule of reservation to the service or posts as specified and made applicable by Section 3 of the Act. On the other hand, if the total posts are advertised without subjectwise specifications, in every faculty, discipline, speciality or super-speciality, it would be difficult for the candidates to know as to which of the posts be available either to the general or reserved candidates or whether or not they fulfil or qualify the requirements so as to apply for a particular post and seek selection. As indicated earlier, if there is any single post of Professor, Reader or Lecturer in each faculty, discipline, speciality or super-speciality which cannot be reserved for reserved candidates, it should be clubbed roster applied and be made available for the reserved candidates in terms of Section 3(5) of the Act. Even if there exists any isolated post, rule of rotation by application of roster should be adopted for appointment. For achieving the said object, the Vice-Chancellor, who is responsible authority under Section 4 to enforce the Act, would ensure that single posts in each category are clubbed since admittedly all the posts in each of the categories of Professors, Readers or Lecturers carry the same scale of pay. Therefore, their fusion is constitutional and permissible. The Vice-Chancellor should apply the rule of rotation and the roster as envisaged under sub-section (5) of Section 3. The advertisements are required to be issued so that the reserved and the general candidates would apply for consideration of their claims of recruitment in accordance therewith. This interpretation would subserve and elongate constitutional objective and public policy of socio-economic justice serving adequacy of representation in a service or post, grade or cadre as mandated and envisaged in Articles 335 and 16(4) read with Articles

14 and 16(1), Preamble, Article 38 and Article 46 of the Constitution and all other cognate provisions.

33. He relied upon a judgment in the case of **Dr. Suresh Chandra Verma** (Supra), relevant paragraphs 10 and 11 are being quoted below :-

"10. As regards the first question, we have narrated earlier the method which was adopted by the University for reserving the posts. It announced the posts categorywise as Professors, Readers and Lecturers in different subject and made a blanket declaration that 6 of the posts of Professor, 12 of the posts of Readers and 16 of the posts of Lecturers would be reserved for backward castes. Neither the University nor the candidates knew at that time as to for which of the subjects and in what number the said posts were reserved. The result was that the candidates belonging to the reserved category in particular, who wanted to apply for the reserved posts did not know for which of the posts they could apply and whether they could apply at all for the posts in the subjects in which they were qualified. That this could be the expected consequence of such an employment notice can legitimately be inferred and need not be and indeed cannot be, demonstrated by evidence of what actually happened, for there may be number of candidates who on account of the said uncertainty might have refrained from applying for the posts as against those who applied to take a chance. What is further, the selection committees which were appointed to interview the candidates for the respective posts did not also know whether they were interviewing the candidates for reserved posts or not, and to assess merits of the candidates from the reserved category as such candidates. The

contention advanced on behalf of the appellants that the selection committees even without knowing whether the posts concerned were reserved or not, had given weightage to the candidates from the reserved category and, therefore, it cannot be said that any injustice had resulted to them is without merit. In the first instance, the contention proceeds on the footing that all those belonging to the reserved category who wanted to apply for all the said posts had done so even without knowing that the concerned posts were reserved. Secondly, it also presumes that all eligible candidates from unreserved category had applied for the posts without knowing whether the posts were reserved or not. The possibility that many eligible candidates belonging to both reserved and unreserved categories might not have taken the risk and chosen to gamble cannot be ruled out. This argument further ignores the fact that the suitability of a candidate from a reserved category to the particular post has to be adjudged by taking into consideration various factors and the desired result cannot be obtained by merely giving uniform weightage marks to the candidates concerned which was the only method followed by the selection committees while selecting the candidates. Further, there is nothing on record to show that this method of giving weightage to the candidate was not followed in respect of reserved category candidates even if they had not applied for the post in the reserved seats. What is more, there is also nothing on record to show whether any candidates belonging to the reserved category has applied for a particular post in a reserved seat, without the prior knowledge that the post was reserved. It is, therefore, difficult to understand as to how the selection committees proceeded to give weightage to the candidates without knowing whether

they had applied for reserved or nonreserved seats. What is more objectionable in the procedure was that its Executive Council proceeded to classify the posts in different subjects between reserved and non-reserved posts after the lists of selected candidates were received from different selection committees. This method was open to an obvious objection since it gave a scope to eliminate unwanted selected candidates at that stage. Whether it occurred in the present case or not is immaterial for testing the validity and the propriety of the method followed by the University. As has been stated earlier, in fact, after the receipt of the list of selected candidates not only the Executive Council constituted yet another committee to decide which of the subjectwise posts should be reserved or not but the Executive Council also decided that although candidates for 47 posts were selected only 30 of them should be appointed permanently. The latter included some backward class candidates for reserved posts so categorised later. But 17 of the posts were set apart although the candidates were selected for them, and they were so set apart for being filled in afresh by candidates belonging to the reserved category. Interestingly, however, the employment notice issued subsequently for these 17 posts mentioned reservations postwise (subjectwise).

11. The argument based on Section 57(4)(a) of the Act to support the procedure adopted by the University is, according to us, not well merited. The contention is that since Section 57(4)(a) requires the University to state in the advertisement only the total number of posts and the number of reserved posts and not postwise, i.e., subjectwise, the employment notice in question was not bad in law. According to us, the word "post"

used in the context has a relation to the faculty, discipline, or the subject for which it is created. When, therefore, reservations are required to be made "in posts", the reservations have to be postwise, i.e., subjectwise. The mere announcement of the number of reserved posts is no better than inviting applications for posts without mentioning the subjects for which the posts are advertised. When, therefore, Section 57(4)(a) requires that the advertisement or the employment notice would indicate the number of reserved posts, if any, it implies that the employment notice cannot be vague and has to indicate the specific post, i.e., the subject in which the post is vacant and for which the applications are invited from the candidates belonging to the reserved classes. A non-indication of the post in this manner itself defeats the purpose for which the applications are invited from the reserved category candidates and consequently negates the object of the reservation policy. That this is also the intention of the legislature is made clear by Section 57(4)(d) which requires the selection committees to interview and adjudge the merits of each candidate and recommend him or her for appointment to "the general posts" and "the reserved posts", if any, advertised."

34. He relied upon a judgment in the case of **Davesh Nagalya** (Supra), relevant paragraph 12 being quoted below :-

"12. The argument of the learned counsel for the appellant is that subsequent events consequent to the order passed by the District Magistrate had to be taken into consideration. The High Court however failed to take into consideration death of one of the partners leading to deemed vacation of the premises. The appellant relied upon the judgment of this Court in

*Pasupuleti Venkateswarlu v. The Motor & General Traders*⁴ wherein it has been held as under: "4. We feel the submissions devoid of substance. First about the jurisdiction and propriety vis-à-vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is not violated, with a view to promote substantial justice- subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. On both occasions the High Court, in revision, correctly took

this view. The later recovery of another accommodation by the landlord, during the pendency of the case, has as the High Court twice pointed out, a material bearing on the right to evict, in view of the inhibition written into Section 10(3) (iii) itself. We are not disposed to disturb this approach in law or finding of fact."

35. He relied upon a judgment in the case of **Pasupuleti Venkateshwarlu** (Supra), relevant paragraph 4 is being quoted below :-

"4. We feel the submissions devoid of substance. First about the jurisdiction and propriety vis a vis circumstances which come into being Subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice--subject, of course, to the absence of other disentitling (actors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for

applications of this equitable rule are myraid. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. On both occasions the High Court, in revision, correctly took this view. The later recovery of another accommodation by the landlord, during the pendency of the case, has as the High Court twice pointed out, a material bearing on the right to evict in view of the inhibition written into s. 10(3) (iii) itself. We are not disposed to disturb this approach in law or finding of fact."

36. Learned counsel for the respondent relied upon a judgment in the case of **Rajesh Kumar Daria** (Supra), whereby the other two judgments i.e. **Indra Sawhney** (Supra) and **Anil Kumar Gupta** (Supra) have been considered. Relevant paragraph 9 in the case of **Rajesh Kumar Daria** (Supra) is being quoted below :-

"9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their

numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide - Indira Sawhney (Supra), R. K. Sabharwal vs. State of Punjab (1995 (2) SCC 745), Union of India vs. Virpal Singh Chauhan (1995 (6) SCC 684 and Ritesh R. Sah vs. Dr. Y. L. Yamul (1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example : If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates

shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four.]"

37. In the judgment of **Ramesh Chandra Sankla** (Supra), the Apex Court has held that powers under Articles 226 and 227 are discretionary and equitable and are required to be exercised in the larger interest of justice. While granting relief in favour of the applicant, the Court must take into account balancing interests and equities. It can mould relief considering the facts of the case. It can pass an appropriate order which justice may demand and equities may project. Further in the case of **Shangrila Food Products** (Supra), it has been held that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognisance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable

keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priority, before invoking the jurisdiction of the High Court, the court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief.

Similar view has been taken in the case of **Shaheen Parveen** (Supra), wherein it has been held that the writ court, being a court of equity, must take into consideration all relevant factors brought before it to deliver substantial justice. Equity justifies bending the rules, where fair play is not violated, with a view to promote substantial justice. A writ court cannot contemplate any limitation on its power to deliver substantial justice. It has to be ensured that a consumer of justice gets complete justice, instead of going into the nicety of law. Under the circumstances, the court cannot be a mere onlooker if injustice is likely to be caused.

In the case of **State of U.P. Vs. Dr. Dina Nath Shukla & Another** (Supra), it has been held that the advertisements are required to be issued so that the reserved and the general candidates would apply for consideration of their claims of recruitment in accordance therewith. This interpretation would subserve and elongate constitutional objective and public policy of socio-economic justice serving adequacy of representation in a service or post, grade or cadre as mandated and envisaged in Articles 335 and 16(4) read with Articles 14 and 16(1), Preamble, Article 38 and Article 46 of the Constitution and all other cognate provisions.

Similar view has been taken in the case of **Dr. Suresh Chandra Verma**

(Supra). In the case of **Davesh Nagalya** (Supra), the Supreme Court has affirmed the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. Lastly, in the case of **Pasupuleti Venkateshwarlu** (Supra), the Supreme Court has held that if a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice--subject, of course, to the absence of other disentitling (actors or just circumstances.

38. On overall consideration of the facts and circumstances of the case as also the judgments relied upon by learned counsel for the parties, it is found that once Shreyas Yadav has obtained more marks than the O.B.C. category candidate, which is 50 marks and he has obtained 52 marks, therefore, he would have been selected under O.B.C. category and not by giving benefit of horizontal reservation under O.B.C. category of dependents of freedom fighter quota. In case, he is selected under O.B.C. category, being higher in merit, his selection shall be deemed to be made under O.B.C. category.

39. The judgment relied upon by learned counsel for the respondent in the case of **Rajesh Kumar Daria** (Supra),

7 All. C/M, Vaidik Kanya Inter College, Dadri, Distt: Gautam Buddh Nagar & Anr. Vs. State of U.P. & Ors.

thus, is clearly distinguishable and does not apply to the present facts and circumstances of the case.

40. In the supplementary affidavit filed on 12.3.2021, there is a categorical statement of fact on the basis of information furnished under Right to Information Act, 2005 that there are four vacancies lying vacant. This information was furnished vide letter dated 6.8.2019.

41. In view of the above, to meet out the substantial justice and in order to balance equities, in case the candidature of the petitioner be considered under dependents of freedom fighter against one vacancy, nobody is going to be affected.

42. Accordingly, in view of the foregoing discussion as also on the basis of catena of judgments of the Hon'ble Supreme Court, this writ petition succeeds and is **allowed** to the extent that the candidature of the petitioner shall be considered in the light of the observation made above against one vacancy of dependents of freedom fighters quota and in case, she comes under the category of dependents of freedom fighters quota, she shall be given appointment forthwith.

(2023) 7 ILRA 1193
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.04.2023

BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ-A No. 7096 of 2020
WITH
Writ-A No. 3608 of 2021 and Other Connected
Cases

**C/M, Vaidik Kanya Inter College, Dadri,
Distt: Gautam Buddh Nagar & Anr.**

...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Sri Bhem Singh

Counsel for the Respondents:

C.S.C., Sri Jagannath Singh, Sri Sunil
Kumar Srivastava

The core dispute revolved around the seniority between Smt. Ratan Prabha and Smt. Anupama, lecturers at Vaidik Kanya Inter College, to determine who should serve as the officiating Principal. **Committee of Management and Anupama:** Quash the Regional Joint Director's order and uphold Anupama's appointment as officiating Principal. **Ratan Prabha:** Enforce her seniority, appoint her as officiating Principal, and grant salary arrears from 26.07.2006. The court applied *actus curiae neminem gravabit*, holding that Ratan Prabha's seniority and pay protection could not be denied due to litigation delays. Her status was revived by the Division Bench, treating her 2006 joining as continuous for seniority purposes. The absence of a formal appointment letter was immaterial, as the Director's order under Regulation 17 and her joining established her substantive appointment.

Precedents cited:

1. Satish Kumar Vs St. of U.P. (22.09.2006)
2. Odisha Forest Development Corp. Vs M/s Anupam Traders [(2020) 15 SCC 146]
3. Vijay Narain Sharma Vs District Inspector of Schools [1985 Law Suits (All) 480]
4. Vir Singh Vs St. of U.P. [2015 (11) ADJ 637 (DB)]
5. Ashwin S. Mehta Vs U.O.I. [(2012) 1 SCC 83]
7. Charan Lal Sahu Vs U.O.I. [AIR 1990 SC 1480]

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

1. Heard Sri Bheem Singh, learned counsel appearing for the petitioner Committee of Management Vaidik Kanya Inter College, Dadri, District Gautam Budh Nagar in Writ A No. 7096 of 2020 and on behalf of Smt. Anupama in Writ A No. 3608 of 2021 and Sri Jagannath Singh, learned counsel appearing for petitioner Smt. Ratan Prabha in Writ A No. 866 of 2020 and Writ A No. 9586 of 2021. In all the writ petitions controversy relates to seniority between one Smt. Ratan Prabha and Anupama in the institution so as to hold charge of officiating Principal. Smt. Anupama has been permitted by the Committee of Management to officiate as Principal of the institution. In Writ A No. 7096 of 2020 and in Writ A No. 3608 of 2021, the order passed by the Regional Joint Director of Education dated 25.10.2019 holding the petitioner senior most lecturer is under challenge. In Writ A No. 866 of 2020, the prayer is to the effect to direct the Committee of Management to give effect to the order passed by the Regional Joint Director of Education i.e. directing the petitioner to be the senior most teacher in the institution, whereas in Writ A No. 9586 of 2021, the officiating charge given to Smt. Anupama by order dated 24.8.2019 and attestation of signature of Smt. Anupama was given on 17.10.2019. The case has a checkered history, and, therefore, needs lucid detail of facts which are stated as under:

2. The petitioner Ratan Prabha applied for the post of lecturer (Civics) pursuant to advertisement being no. 1 of 2004 issued by U.P. Secondary Services Selection Board (hereinafter referred as 'Board'). In the selection held by the Board, petitioner Ratan Prabha got selected and

was recommended initially for being appointed as a lecturer (Civics) in Nagar Palika Inter College, Badaun. However, in the absence of vacancy, there at Badaun she was not permitted to join and consequently filed writ petition before this Court being Writ A No. 19955 of 2006. The said writ petition was disposed of, vide order dated 10.4.2006, issuing a direction to the Board to make a recommendation for adjustment of petitioner in some other institution where vacancy exists. The order passed by this Court dated 10.4.2006 is quoted below:-

"The petitioner is a selected candidate and was recommended by the Board to join the institution concerned but was not allowed to join. The District Inspector of Schools has intimated that the post in question has already been filled up by way of promotion and, therefore there is no vacancy.

Sri A.K. Yadav, the learned counsel for the Selection Board, upon instructions received by him, admits this fact.

In view of the aforesaid, the writ petition is allowed and a mandamus is issued to the Selection Board to pass fresh orders, recommending the name of the petitioner in another institution, where a vacancy exists, within one month from the date of the production of a certified copy of this order."

3. In compliance of the orders so passed above by the Court, the Board made recommendation on 17.5.2006 adjusting the petitioner as a lecturer (Civics) in Vaidik Kanya Inter College, District Gautam Budh Nagar, the institution been run by the petitioner in writ petition no. 7096 of 2020. It appears that when the recommendation was not being put to

action at the end of the institution, a clear directive was issued by the Director Secondary Education U.P. Lucknow on 20.7.2006 asking the District Inspector of Schools to ensure joining of the petitioner Ratan Prabha and in the event of failure on the part of the Committee of Management not issuing the appointment order, take action under Regulation 17 of 1998 Regulations. The letter issued by the Director of Secondary Education U.P. Lucknow dated 20.7.2006 for its better appraisal is reproduced hereinunder:

"प्रेषक,

शिक्षा निदेशक माध्यमिक,
उत्तर प्रदेश, लखनऊ

सेवा में,

जिला विद्यालय निरीक्षक,
गौतमबुद्ध नगर

पत्रांक

डी०ई०/708/2006-07

दिनांक जुलाई 20, 2006

विषय:- सुश्री रत्नप्रभा चयनबोर्ड द्वारा चयनित प्रवक्ता नागरिक शास्त्र की वैदिक कन्या इण्टर कालेज दादरी गौतमबुद्ध नगर में कार्यभार ग्रहण कराने के संबंध में।

महोदय,

कृपया उपर्युक्त विषयक अपर शिक्षा निदेशक माध्यमिक के पत्रांक सामान्य 1046/2006-07 दिनांक 30-6-2006 का संदर्भ ग्रहण करें जिसके द्वारा सुश्री रत्नप्रभा को अविलम्ब कार्यभार ग्रहण कराये जाने के निर्देश दिये गये हैं। इस संबंध में आपका ध्यान आपके पत्रांक मा०-2/92-93-06-07 दिनांक 17-4-2006

की ओर आकृष्ट किया जाता है जिसके द्वारा आपने सचिव, चयनबोर्ड को सुश्री रत्नप्रभा को वैदिक कन्या इण्टर कालेज, दादरी गौतमबुद्ध नगर में अनुसूचित जाति हेतु अध्यापक पद के प्रति समायोजित करने की संस्तुति स्वयं की है।

कृपया सुश्री रत्नप्रभा को कार्यभार ग्रहण कराये जाने की नियमानुसार कार्यवाही करें तथा विद्यालय प्रबन्धक द्वारा नियुक्ति पत्र निर्गत न करने की स्थिति में धारा 17 के अन्तर्गत कार्यवाही सुनिश्चित करें। संबंधित शिक्षिका सुश्री रत्नप्रभा का इस कार्यालय में प्राप्त आवेदन पत्र मूलरूप में संलग्न है।

संलग्नक: उक्तवत्

भवदीय

संजय मोहन

शिक्षा निदेशक मा०

उ०प्र०

"

4. It is upon the above order been passed by the Director of Secondary Education that petitioner was given joining directly in the institution by the Principal of the institution on 1.7.2006. This joining report is endorsed by the then Principal of the institution. However, one Kamal Verma. filed a Writ Petition before this Court challenging the order of Board being Writ-A No. 41691 of 2006. The said writ petition was entertained by this Court and expressing prima facie view that Board had no power to make adjustment of an impaneled candidate against a vacancy not advertised, granted interim order to the effect that present petitioner who was respondent no. 5 in the said petition would

not be permitted to join and if already joined she may be permitted to work but shall not be paid salary without leave of the Court. The operative portion of the order of this Court dated 21.8.2006 is reproduced hereinunder:

"In the opinion of the Court, adjustment so made is apparently contrary to the provisions of U.P. Secondary Education Services Selection Board Act and Rules framed therein. A selected candidate, in pursuance of an advertisement if not permitted to join in the institution for certain reasons in the institution, for which he has been empaneled, has right to be considered in accordance with the merit secured in the selection against other vacancy, which were subject matter of advertisement qua the sme selection. Adjustment against subsequent vacancies, which may be subject matter of another advertisement, is not contemplated by the rules.

Petitioner has, therefore, made out a case for grant on interim order.

*Till the next date of listing respondent no. 5 shall not be permitted to join at Vaidik Kanya Inter College, Dadri, Gautam Buddh Nagar. **In case she has already joined, she may be permitted to work but she shall not be paid salary without leave of the Court.**"*

(emphasis added)

5. Ultimately, the said writ petition came to be allowed by this Court holding that unadvertised vacancy cannot be filled up from amongst the candidates who have been selected in previous selections. The order was passed on the basis of judgment of the Division Bench of this Court in the case of **Satish Kumar Vs. State of U.P. and others**. Paragraphs 6, 7, 8, 9 and 10 of

the said judgment is reproduced hereinunder:-

*"6. The question is whether such a candidate can be adjusted or appointed against a post which was not advertised in a particular selection has been considered by Division Bench of this Court in **Satish Kumar Vs. State of U.P. & Others**, decided on 22.09.2006 wherein the Division Bench has held :*

"For the reasons and the conclusions drawn herein above, our answer to Question No.1 is:

*"An unadvertised vacancy cannot be filled up from amongst the candidate who has been selected in any previous selections and to that extent we declare that the pronouncement of the learned Single Judge in the case of **Savita Gupta Vs. State of U.P. & Ors; 2004(2) UPLBEC**, does not lay down the law correctly and is hereby overruled."*

and to Question No.2 is:

"The U.P. Secondary Education Services Selected Board constituted under the U.P. Act No. 5 of the 1982 cannot, with the aid of the Government Order dated 12th March has been intimated and notified but not advertised."

7. Hence the law is now well settled that the vacancy which was not advertised in a particular selection, the candidate selected therein cannot be adjusted against such unadvertised vacancy.

8. Learned counsel for the Commission informed that Rules have been amended in the year 2007 wherein such adjustment is permitted and the validity thereof is under consideration before this court. Be that as it may, it is evident that the aforesaid rules having been notified in January 2007 would not cover the question involved in the present case because

admittedly the rule did not exist at the relevant time.

9. In view thereof, the writ petition is accordingly allowed.

10. The impugned order dated 20.07.2006 is hereby quashed. However, this order shall not preclude the respondents from adjusting respondent no. 5 against any other vacancy which was part and parcel of the recruitment made in 2004 wherein she (respondent no.5) was selected."

6. Against the said judgment, petitioner Ratan Prabha filed Special Appeal being No. 873 of 2012 and the Division Bench this time set aside the judgment of learned Single Judge dated 30.11.2010 in the light of the judgment passed by the Supreme Court in Civil Appeal No. 10808 of 2017 wherein it was held that the Board had the power to make adjustment against the available vacancies may or may not be advertised. Operative portion of the order of the Division Bench dated 12.1.2018 is reproduced hereinunder:-

"Heard learned counsel for the appellant and Sri A.K.Yadav, learned counsel for the respondent/Board.

The appeal questions the correctness of the impugned judgment of the learned Single Judge dated 30.11.2010 whereby the petition filed by the respondent no.7/petitioner has been allowed in relation to the selection and appointment of the appellant and on the post of Lecturer in Civics in Vaidik Kanya Inter College, Dadri, district Gautam Budh Nagar.

The respondent no.7/petitioner is represented by Sri Anoop Trivedi but it appears that on account of the fact that the respondent no.7 Smt. Kamlesh Verma has already attained the age of superannuation,

the case is not being contested by her and Sri Trivedi is also not present.

The appellant is aggrieved by the impugned judgment as her placement after selection by the Board as Lecturer in Civics in the institution has been quashed by the learned Single Judge, who came to the conclusion that in view of the Division Bench judgment in the case of Satish Kumar Vs. State of U.P. and others, decided on 22.09.2006 and the answer given by the Division Bench therein since the vacancy was not advertised for selection on the post in the institution, the appellant could not be adjusted against an unadvertised vacancy.

The very same legal issue was raised before the Apex Court by the respondent/Board in Civil Appeal No.10808 of 2017 and the Apex Court disposed of the appeal holding that the Board had the power to make such adjustments and further indicated that the accommodation will have to be made either in available or even in a vacancy arising further.

The appellant being a selected candidate by the Board contends that she deserves to be considered as per the view expressed by the Apex Court that alters and modifies the ratio of the judgment in the case of Satish Kumar Vs. State of U.P. and others (Supra).

Sri A.K.Yadav, learned counsel for the respondent/Board could not dispute the directions issued by the Apex Court to be available for consideration in the present case as well. No one else has opposed the appeal. In the aforesaid circumstances we allow this appeal and set aside the impugned judgment dated 30.11.2010.

We dispose of the writ petition and appeal with a direction that the claim of the appellant shall be considered by the

Board as expeditiously as possible keeping in view the nature of the vacancy available preferably within a period of three months from the date of production of the certified copy of this order, in the event her selection is valid in accordance with the Rules and the vacancy is available to accommodate her in view of the directions issued by the Apex Court vide judgment dated 23.08.2017."

7. It is after the judgment was passed in special appeal that the District Inspector of Schools issued an order dated 12.8.2018 directing the Committee of Management to ensure joining of the petitioner. It is relevant here to quote the two last paragraphs of the order of District Inspector of Schools dated 8.2.2018 and the same is reproduced hereinunder:-

"प्रश्नगत प्रकरण के सन्दर्भ में अनुक्रमांक 080531931 रत्न प्रभा पुत्री विष्णु दयाल ई-29/ए सिद्धार्थ नगर पो० जंगपुरा नई दिल्ली-14 प्रवक्ता नागरिक शास्त्र वर्ग -02 पद पर आवंटित संस्था वैदिक कन्या इन्टर कालिज दादरी गौतमबुद्ध नगर के प्रति चयन/समायोजन कार्यालय के पत्रांक/मा० शि० च-बो०/7979-80/दिनांक-20-5-2006 के माध्यम से भेजा गया है। माननीय उच्च न्यायालय में योजित विशेष अपील सं०-873/2012 रत्न प्रभा बनाम उ०प्र० राज्य व अन्य में पारित दिनांक-12-1-2018 के अनुपालन में कार्यभार ग्रहण करायें।

अतः आपको निर्देशित किया जाता है कि माननीय उच्च न्यायालय में योजित विशेष अपील सं०-873/2012 रत्न प्रभा बनाम उ०प्र० राज्य व अन्य में पारित दिनांक-12-1-2018 के अनुपालन में अनुक्रमांक 080531931 रत्न प्रभा

पुत्री विष्णु दयाल ई-29/ए सिद्धार्थ नगर पो० जंगपुरा नई दिल्ली-14 प्रवक्ता नागरिक शास्त्र वर्ग -02 पद पर कार्यभार सुनिश्चित करें।"

8. The petitioner Ratan Prabha in her claim has taken a plea that at no point of time any appointment order was issued to the petitioner and the petitioner was directly given joining in the year 2006 and it was the management who was not permitting him to sign attendance register on the plea that there was order operating in the writ petition filed by one Kamal Verma. It was after the fresh order was issued by the District Inspector of Schools as quoted above that the petitioner was permitted to sign the attendance register and so started getting salary.

9. In writ petition no. 3608 of 2021 the petitioner Anupama Verma has pleaded that she was selected and recommended by the Board pursuant to the advertisement no. 02 of 2010 against the post of lecturer (Sanskrit) in the institution and so she submitted her joining pursuant to the letter of the District Inspector of Schools dated 27.7.2012 and the consequential letter issued by the Manager of the institution on 7.8.2012. The letter issued by the District Inspector of Schools dated 27.7.2012 is reproduced hereinunder:-

"दिनांक-27/17/12

विषय- विज्ञापन सं० 2/2010 प्रवक्ता पदों के प्रति उ०प्र० माध्यमिक शिक्षा सेवा चयन बोर्ड नियमावली 1998 के नियम (12) उप नियम (a) तथा (10) के अधीन निर्मित वर्ग इण्टरमीडिएट विषय संस्कृत वर्ग 1 व 2 के पद के लिए उपर्युक्त अर्थियों के लिए 1 पैनल का नियम 12 (11) के अधीन प्रेषण।

महोदय,

उपर्युक्त विषयक सचिव उ० प्र० मा० शि० सेवा चयन बोर्ड इलाहाबाद की विज्ञप्ति सं०मा०शि०च०बो० /1044/2012-13 दिनांक 7-08-12के उपरान्त चयन बोर्ड के पत्रांक / मा०शि०च० बो० / चयन/ 2605-2666/2012-13 दिनांक 08-0-12 में दिये गये निर्देशों के अनुरूप सूचित किया जाता है कि आपके विद्यालय में मौलिक रूप से प्रवक्ता विषय संस्कृत वर्ग 1 व 2 के रिक्त पद पर सचिव उ० प्र० ना० शि० सेवा चयन बोर्ड इलाहाबाद के चयनित अभ्यर्थी का नाम नियुक्ति हेतु अथको प्रेषित किया जा रहा है। सम्बन्धित अभ्यर्थी को प्रबन्धकीय सकल्प के अधीन नियमानुसार नियुक्ति पत्र संलग्न प्रारूप पर जारी करें।

क्र० सं०	नाम	पता
1	श्रीमतीअनुपमादेवीपत्नीकु वरचंचलसिंहजाति- अनु०जाति अनु०-020601871	349/4 बी. चाँदपुरसले री (ओमगाय त्रीनगर) पो० तेलियरगंज इलाहाबाद।

उक्त के सन्दर्भ में यह भी सूच्य है कि यदि आपके विद्यालय में प्रवक्ता संस्कृत वर्ग 1 व 2 के रिक्त पद पर मा० उच्च न्यायालय इलाहाबाद के आदेश से कार्यरत है अथवा विनियमित है तो कृपया उसके आदेशों की प्रति सहित इस कार्यालय को तत्काल उपलब्ध कराये।

आपको चयन बोर्ड नियमावली 1908 के नियम 13 (1) के खण्ड (क), (दो) तथा तीन

के अर्न्तगत एवं 13 के उपनियम (20) के किया जाता है कि आप संलग्न परिशिष्ट पर नियुक्ति पत्र सम्बन्धित अभ्यर्थी को नियमानुसार भेजते हुये नियुक्ति के आदेश की प्रति इस कार्यालय एवं सम्बन्धित अधिकारी को तत्काल भेजे कार्यभार ग्रहण कराने से पूर्व शैक्षिक योग्यता सम्बन्धी प्रमाण-पत्रों का भलि भाति परीक्षण करने पूर्ण उत्तरदायित्व आपका होगा साथ ही प्रमाण पत्र तथा अभ्यर्थी की अर्हताओं से सम्बन्धित प्रमाण पत्रों की प्रतियां अपने स्तर पर एक प्रति रखते एक प्रति अद्योहस्ताक्षरी को प्राप्त कराना सुनिश्चित करे।

संलग्नक- निर्धारित प्रारूप पत्र

भवदीय

(ज्योति प्रसाद)

जिला विद्यालय निरीक्षक

गौतमबुद्ध नगर। "

(emphasis added)

10. Pursuant to the above order of the District Inspector of Schools, the Manager issued a letter to the rival petitioner Anupama Verma on 7.8.2010 which is reproduced hereinunder:-

"महोदय,

"आप द्वारा अगसारित प्रार्थना पत्र दिनांक 06/08/2012 जो कि श्रीमति अनुपमा देवी का संस्कृत विषय की प्रवक्ता पद पर कार्यभार ग्रहण करने के सम्बंध में है एवं जिला विद्यालय निरीक्षक गौतम बुद्ध नगर के कार्यालय आदेश पत्रांक न० पृ० सं० / च० वो० / 1796-1800 / 2012-13 दिनांक 27/07/12 का सन्दर्भ ग्रहण करते हुये, आपको निर्देशित किया जाता है कि श्रीमति अनुपमा देवी का संस्कृत विषय की प्रवक्ता पद पर जिनको मा० शि०

सेवा चयन बोर्ड ने नियुक्ति प्रदान की है, कार्यभार ग्रहण करा दे। कार्यभार ग्रहण एवं दैनिक उपस्थिति पंजिका में नाम पंजिकरण से पूर्व इनकी शैक्षिक योग्यता सम्बन्धित प्रमाण पत्रों का भलि भाति परिक्षण कर ले। परिक्षण उपरांत शैक्षिक प्रमाण पत्रों की एक प्रति विद्यालय रिकार्ड में सजोकर रखे। सभी प्रमाण पत्रों पर आप द्वारा *seen* कर एक एक प्रति जिला विद्यालय निरीक्षक गौतम बुद्ध नगर के कार्यालय को भी उपलब्ध करा दे।"

(emphasis added)

11. This is how the rival petitioner Anupama Verma has been working in the institution since 7.8.2012 as lecturer (Sanskrit) and has been drawing salary. The petitioner Ratan Prabha took a plea that she being the senior most having been recommended and appointed as lecturer (Civics) in institution way back in the year 2006 should be taken to be the senior most and raised a seniority issue and so filed a writ petition before this Court being Writ-A No. 5797 of 2019 in which a direction was issued to the Regional Joint Director of Education to consider the claim of the petitioner.

12. The Regional Joint Director of Education after hearing the petitioner and the Committee of Management, has come to pass an order dated 25.10.2019 holding the petitioner to be the senior most lecturer working in the institution and directed payment of salary since 26.7.2006 and so also accorded seniority w.e.f. 26.7.2006 and also directed for payment of arrears of salary accordingly. The payment of arrears of salary was made subject to the certificate to be obtained by the Committee of Management regarding petitioner's working

in the institution during the period in question.

13. The Committee of Management filed writ petition no. 7096 of 2020 questioning the Regional Joint Director of Education holding petitioner Ratan Prabha to be the senior most having taken charge on 26.7.2006. Subsequently, Smt. Anupama the other petitioner also filed a writ petition before this Court being Writ A No. 3608 of 2021 assailing the order passed by the Regional Joint Director of Education, Ist Region, Meerut. Smt. Anupama has taken the plea that she has not been heard in the matter of determination of seniority even though she was a necessary party. It is further argued that since the petitioner Ratan Prabha has been reinstated only in the year 2018 under the orders of the High Court dated 12.1.2018, there would be break in service between 2006 and 2018 and therefore, the petitioner Ratan Prabha would not be entitled to seniority over and above, the petitioner Anupama.

14. The two legal questions that arise for consideration in this case are: (i) whether petitioner Ratan Prabha who had been given charge and had been permitted to join as assistant teacher on 26.7.2006 but she could not function thereafter on account of the interim order passed by this Court, can be denied seniority, over and above, the teachers appointed during interregnum period, (between her first joining and her resuming charge vide order dated 18.2.2018); and (ii) whether looking the facts undisputed, an opportunity of hearing if given to petitioner Anupama would have changed the order, impugned in her petition, compelling the authority to arrive at a different conclusion and so order

would be bad for violation of principles of natural justice.

15. Yet another question arises about the maintainability of the writ petition at the instance of Committee of Management in a seniority dispute between the two teachers.

16. On the first question, Sri Bheem Singh, learned counsel appearing for second petitioner Ms. Anupama Verma has raised following grounds:-

i. There was no appointment order issued to the petitioner Ratan Prabha, so as to entitle her to join institution and therefore, her joining was null and void;

ii. The order issued by the District Inspector of Schools dated 8.2.2018 as a consequence to the order passed by Division Bench of this Court dated 12.1.2018, in Special Appeal No. 873 of 2012 itself, demonstrates that the Committee of Management was directed to ensure joining of the petitioner no. 1 on the post of lecturer (Civics). Therefore, according to him petitioner had never been given joining prior to 8.12.2018;

iii. The third point argued in that he ought to have been given one opportunity to represent her case before Regional Joint Director of Education as this Court under its order dated 15.4.2019 passed in Writ A No. 5797 of 2019 had provided that opportunity of hearing was to be given not only to the Committee of Management but also any other person likely to be affected by decision;

17. Thus, it is argued that the order being in violation of principles of natural justice as well as the non compliance of the order of High Court, is liable to be set aside

and matter should be remitted to be decided as fresh.

18. *Per Contra*, it is argued by Learned Counsel appearing for the first respondent Ratan Prabha that the petitioner was given joining by the Order of the Director of Education exercising power under Section 17 of 1998 Regulations and it is in consequence to the said order that petitioner was given joining. He submits that the order dated 20.07.2006 had been acted upon 01.07.2006 and the petitioner was not being paid salary only on account of the order passed by this Court dated 21.08.2006 in Writ Petition No. 41691 of 2006. However, petitioner's interest was protected by observing that if she had joined, she would be permitted to work.

19. It is further argued that in the event Committee of Management did not permit the petitioner to work and sign attendance register, it was in violation to the interim protection granted under the said order. As far as the order dated 18.02.2018 is concerned, he submits that the legal position since has been that the law declared by constitutional court is to be taken always to be the law in existence, the interim order passed by the Court Writ Petition No. 41691 of 2006 and the final judgment passed in the said Writ Petition in which it was held that adjustment of selected candidates against a non advertised post was bad, could be taken to be a wrong view in view of the judgment of the Supreme Court and thus the interim order as well as the Judgment of the Leaned Single Judge merged with the Judgment of Special Appeal No. 873 of 2012 which held the adjustment of the petitioner to be valid in law. According to Learned Counsel, the order dated 08.02.2018 for the reinstatement was only for the reason that

committee of Management did not cooperate with the petitioner and did not permit him to sign attendance register. He argues that matter since had remained pending in this court at the instance of a 3rd Party, the pendency by itself would not negate the rights of a litigant which he would have been otherwise entitled to. He takes the plea of maxim '*actus curiae neminem gravabit*'.

20. On the question that other petitioner Smt. Anupama Verma had not been heard, learned counsel for first petitioner Ratan Prabha, has argued that the matter should not be remanded just for the sake of opportunity of hearing if otherwise facts are admitted to the parties. He submits that the opportunity of hearing cannot be put into a straight jacket formula to be applied in every case more especially in cases where even after the remand the result is bound to be same as per the legal position. He argues that the petitioner no. 2 has not been able to demonstrate as to how petitioner's initial appointment was bad and could not be able to dispute that the petitioner was a duly selected candidate by the Board when she was permitted to join the institution and Petitioner Anupama was nowhere in scene.

21. On the point of locus of the Committee of Management to file writ petition to question the decision, it is argued by the learned counsel for petitioner Ratan Prabha that Committee of Management can have no grievance in the matter of seniority inter se amongst the lecturers. As far as question of payment of arrears of salary is concerned, it is argued that order permits the Committee of Management to verify the period but state being the paying authority, Management should not have any technical objection.

22. Having heard learned counsel for respective parties and having perused the records, pleadings raised, as well as the order impugned, I find that basic issue to be whether petitioner should be taken to be validly selected and appointed lecturer in the institution way back in the year 2006. It is a case and so also the admitted position on record that petitioner after having been selected by the Board, and an impaneled candidate to be appointed in a particular institution in the name of Nagar Palika Inter College, Badaun was not being permitted joining so he filed a writ petition before this Court being Writ No. 19955 of 2006 in which a judicial order was passed issuing a writ of mandamus to the Selection Board to pass fresh order recommending the name of the petitioner for another institution. This was a judicial order passed on 10.4.2006 which was never appealed against. It was in compliance of this Order that a fresh panel was issued on 20.5.2006 directing adjustment of the petitioner in the institution in question and so, when the petitioner was not being issued any appointment and not permitted joining, the then the Director of Education on 20.7.2006 passed an order directing the District Inspector of Schools to ensure joining even in the event no appointment order was issued by the management, taking recourse to Regulation 17 of 1998 Regulations. Pursuant to this direction, the District Inspector of Schools immediately ensured joining of petitioner in the institution in question and the petitioner was given joining on 1.7.2006. In the meanwhile, the writ petition no. 41691 of 2006 was filed in which interim order was passed only on 21.8.2006 which provided that the respondent if had already joined, she would be permitted to work. Ratan Prabha was respondent in said case who had already joined. Thus, she was to be

permitted to work but she was not to be paid salary. It is in these circumstances that the petitioner Ratan Prabha continued to report in the institution continuously and yet she was not permitted to sign in the attendance register and obviously was not paid salary. Her joining was held bad by the learned Single Judge of this Court while allowing writ petition no. 41691 of 2006 but that order got reversed in the order of Special Appeal filed by Ratan Prabha wherein adjustment of the appellant was held to be in accordance with law as had been held by the Supreme Court. It is worth noticing here that after the Division Bench passed the order on 12.1.2018, no fresh appointment order was issued and the District Inspector of Schools only directed the management under its order dated 8.2.2018 to ensure joining to the petitioner.

23. Thus, in the total circumspect of the facts that emerge it is clear that interim order passed by Court in writ petition no. 4169 of 2006 being subsequent to the joining of the petitioner would be taken to have protected the interest of the petitioner Ratan Prabha and thus, it would be absolutely wrong to hold now that though she was lawfully selected but wrongly permitted joining without there being any appointment order. It is well settled legal position that mere pendency of a litigation cannot deny a rightful claim which otherwise vests in a party. The interim order would be taken to have partially eclipsed Ratan Prabha's status and even if final judgment upset her status, it got revived in the final order of special appeal as it is well settled that appeal is continuation of original proceedings. So, it will be taken that petitioner was lawfully adjusted against the vacancy and in my considered view, status would not be lost for mere pendency of the writ petition, which ultimately stood dismissed in appeal.

24. In the present case and looking to the facts as discussed above, the interim order was passed by the Court in the earlier petition to the effect that fifth petitioner namely Ratan Prabha herein would not be permitted to join and if already joined would not be paid salary. Petitioner has established the case of joining and non-payment of salary to her was only for the interim order passed by this Court. Ultimately when the interim order resulted in the final order allowing the writ petition and when came to be reversed in Special Appeal, then obviously a plea cannot be permitted to be taken by either the State or the private respondent that since petitioner did not work or was not paid salary for certain period because of pendency of the case, said period cannot be taken into account even for the purposes of pay protection and seniority. Thus, the maxim *actus curiae neminem gravabit* would be applicable very much to this case. The maxim means no party should suffer due to the act of the Court. In this case, once the petitioner had been directed to be given joining under the order passed by the authorities, but the orders came to be challenged before this Court and which remained pending adjudication for number of years and even though the orders ultimately were set aside but since they have been upheld in the Special Appeal, petitioner cannot be permitted to run the risk of being given joining. It is the respondent State authorities who were required to balance the equity by not only giving notional pay protection but also seniority. In the case of **Odisha Foresh Development Corporation Vs. M/s Anupam Traders (2020) 15 SCC 146**, it has been held that interim order was passed for protection and the subsequent auction for Kendu leaves was deferred for such interim order and if the Court directed to

make certain deposits to the petitioner towards agreement and the writ petitioner himself withdrew the writ petition then department cannot be made to suffer. Whether a writ petition is dismissed as withdrawn or is dismissed, the result was bound to be the same. In the present case also petitioner was not permitted to pay salary and so the management did not permitted her to sign the attendance register but for the interim order. Vide paragraph 20, the Supreme Court has held thus:-

*"20. As noticed above, the Appellant in any event would have the right to detrmine the loss suffered and recover the same in accordance with law as the process to re-tender, was at the '.....cost and risk' of the private Respondent as stated in the notice of termination. In that circumstance, when it is prima-facie indicated that due to the delay caused at the instance of the privatye Respondents the value of the Kendu leaves had reduced, thereby, causing loss, in view of legal proceedings initiated by the private Respondents, the Court will have to bear in mind the maxim **actus curiae neminem gravabit**, namely, no party should suffer due to the act of Court. In such event, since the opinion be permitted to retain the amount and complete the process by providing opportunity to the private Respondents."*

25. I may also observe here that it is not the seniority as such in dispute for any fact there being that both were selected and appointed under the same advertisement but one could join earlier than the other one. Questioning the joining of the petitioner, in the light of the interim order passed earlier by this Court would be questioning the very appointment of the petitioner which in my considered view,

another teacher claiming seniority does not have the locus. It has been held time and again that while examining the matter of inter se seniority the authority cannot go into question of legality of appointment.

26. In the case of **Vijay Narain Sharma v. District Inspector of Schools and Others, 1985 Law Suits (All) 480** it has been held that in the matters of adjudication of seniority dispute on the question of right to promotion in preference to the other teachers, it is not open for such a teacher claiming seniority to challenge validity of selection and appointment of another colleague teacher. Vide para 18 & 19, the Court took judicial notice of growing tendency amongst the teachers to question validity of appointment of colleagues while issue of *inter-se* seniority crops up to occupy the position of officiating Principal. Thus, vide paras 25, 26, 27, 28 & 29 the Court held that appointment of a teacher who has acquired substantive position, cannot be questioned while adjudicating inter-se seniority. Paragraph nos. 18, 19, 20, 23, 24, 25, 26, 27 & 28 of the judgment are reproduced hereunder:-

"18. Judicial notice can be taken of the fact that in this State, in every College, there are series of litigation amongst the teachers challenging the seniority list prepared by the various colleges. The question of seniority has assumed great importance because of the provisions in the Act and the Regulations framed thereunder governing these colleges. It has been Laid down that; the senior-most teacher in the college shall officiate as Principal of the college in the absence of the Principal. As a result of these litigations inter se, fighting and groupism amongst the teachers has taken

the upper hand which has completely shattered the discipline in the college. It has come to my notice that in cases relating to seniority, it has almost become a practice to challenge the appointments and promotion of all the teachers creating a state of uncertainty and making a sword of democles hang on every teacher. This creates great dissatisfaction and aggressive teachers take an upper hand. This also results in the lack of proper teaching because most of the time the teachers are involved in maintaining the validity of their appointments and promotion rather than concentrating on the teaching which is their primary duty.

19. It has been often found that appointments and promotion are challenged after more than one or two decades. The position of the records is that neither the Managing Committees maintain proper records in a regular manner nor the records are available with the District Inspector of Schools. In fact, the Managing Committees change so often and they are also litigating so frequently that a decision by one Managing Committee is not supported by a succeeding Managing Committee. The post of the District Inspector of Schools is also transferable and it often transpires that the District Inspector of Schools, who had earlier passed the order, is not available to justify the approval given by him to the appointment or promotion made of a teacher. It is in the light of these circumstances that the contention raised by the Learned Counsel for Dinesh Chandra Dube has to be examined.

23. It is, therefore, clear that even in the case of a promotion of a teacher to the lecturer's grade or to the L.T. grade, a teacher aggrieved by the decision of the Committee of Management has got a remedy to challenge the said decision

before the District Inspector of Schools. From the above provisions therefore, the scheme of the Act is that at the time when the appointment is made or when the promotion is made, the said appointment or promotion made by the Managing Committee can be challenged to the higher authority prescribed under the Act and the regulations framed thereunder.

24. Regulation 3 of Chapter II lays down the principles on which the seniority list has to be prepared. I have already quoted Regulation 3 of Chapter II, which lays down the manner in which the seniority is to be determined. The relevant factors for determining the validity of the seniority list are the grade in which the teacher is working, whether he is appointed on the substantive post or not, whether the appointment is permanent or temporary, the date of the appointment or promotion and the age of the teachers.

25. On a reading of Regulation 3 of Chapter II, it is clear that it nowhere contemplates that the teacher who challenges the seniority list can again challenge the validity of the appointment or promotion of a teacher in the college. He can only be aggrieved by the factors, if wrongly decided, as mentioned in Regulation 3. That dispute can be taken in appeal under Clause (f) of Regulation 3, quoted above. In my -opinion, it is clear that while disputing the validity of the seniority list, it is not open to a teacher to challenge the appointment and promotion which had already been done. The challenge to the appointment and promotion has been specifically provided. If no challenge is made at that stage then the appointment and promotion becomes final. If the Legislature intended that the appointment and promotion can be challenged at the time of determining seniority, the Legislature would have

specifically provided in the Regulations. This has not been done.

26. There is another aspect of the matter that once the appointment or promotion becomes final, a vested right is created in favour of a teacher. A colleague of his in the institution having acquiesced to the appointment and promotion cannot be, subsequently, permitted to raise the dispute.

27. In this view of the matter, I am of the opinion that the contention raised by the Learned Counsel for the Respondent is well founded. In proceedings for determining the validity of the seniority list prepared by the college, it is not open to a teacher of the said college to challenge the appointment or promotion of any other teacher in the same college.

28. Learned Counsel for the Respondent has cited a decision of this Court in Civil Misc. Writ No. 471 of 1974, Madan Pal Sharma v. The Chancellor, Meerut University, decided on 2nd July, 1980. In that case, while challenging the seniority list it was sought to be urged that the appointment of the teacher in the R. G. College, Meerut, was not a valid appointment. In that case, a Division Bench of this Court observed as under:

"In our opinion, it is not open to the Petitioner to challenge the validity of the selection or appointment of Smt. Usha Rani Gupta as lecturer in Raghunath Girls College in the present collateral proceedings."

27. Again in the case of Vir Singh v. State of U.P. & Ors, 2015 (11) ADJ 637 (DB), this Court has held that while considering the dispute of inter-se seniority between two teachers at the time of promotion, the person claiming the seniority over and above the other colleague teacher working in the same Institution, does not

have any locus to challenge appointment of such other teacher. Vide para 21 & 22 the Division Bench has held thus:

"21. Additionally we find that quite apart from the seventh respondent not having any locus standi to challenge the appointment and adjustment of the appellant [in the sense of the appellant being a Lecturer in Physics and the seventh respondent being a Lecturer in Chemistry] he only assailed the consequential orders of adjustment made in respect of the appellant. The parent order of the Director and the Board directing adjustment of the appellant were never subjected to challenge till the filing of the writ petition which gives rise to the present appeal.

22. More fundamentally when one views the reliefs sought by the seventh respondent in his writ petition it is apparent that the primary cause for challenge to the adjustment of the appellant was the consequential effect it would have on the inter se seniority. In our opinion the validity of an appointment cannot be the subject matter of scrutiny or adjudication while deciding the issue of inter se seniority. We therefore find that the learned Single Judge has clearly erred in proceeding to annul and set aside the initial appointment and adjustment of the appellant.

Consequently we are of the view that the Special Appeal preferred by the appellant is liable to succeed and the writ petition of the seventh respondent must consequentially stand dismissed. For reasons noted above, we find merit in the conclusions arrived at by the learned Single Judge in respect of the status of the seventh respondent being reverted to that of an L.T. Grade teacher. The appeal of the seventh respondent must consequentially fail."

28. So far as the third argument is concerned, that opportunity of hearing

ought to have been afforded to the petitioner no. 2 Anupama Verma also before order was to be passed by the Regional Joint Director of Education, this argument in my view, does not hold water for there being no dispute of different selections and appointments of the respective petitioner. It is a case where petitioner Ratan Prabha was selected and empaneled pursuant to an advertisement issued being no. 2 of 2010. Her joining is being questioned only at the strength of an interim order passed by this Court in writ petition No. 4169 of 2006 which I have already discussed, had been protected petitioner's joining in its interim order. Still further, for interpretation of a particular provision of law, if petitioner was not paid salary and that interpretation ultimately got reversed by the Supreme Court, the petitioner automatically had become entitled to her joining and salary and continuance thereafter cannot be questioned. The petitioner Anupama having been empanelled on 27.7.2012 and given joining on 7.8.2012 cannot score any seniority over and above the petitioner Ratan Prabha. It is worth also noticing here that the order dated 7.8.2012 which is being relied upon by the petitioner Anupama in her writ petition being no. 3608 of 2021, cannot itself be said to be an appointment order technically sound. It records that the Selection Board had made an appointment so she was to ensure her joining by producing her credentials. These are not the recitals that would form an appointment order and appointment should be clear enough that a candidate upon being recommended by the Board is being hereby appointed by the Committee of Management. This I am referring only for the argument raised on behalf of Ms. Anupama to question appointment of Ms. Ratan Prabha. So if petitioner had no

appointment order as claimed by the petitioner Anupama, she also had no appointment order, technically and yet she was permitted joining and she has been working. These observations are not made to demerit the appointment and working of the petitioner Anupama in the institution but only to appreciate the argument raised in her behalf to question appointment of petitioner Ratan Prabha, to be ultimately rejected and is hereby rejected.

29. Upon a pointed query made, learned counsel for petitioner Anupama as to what is the clinching evidence to show that if matter is remitted, that would reverse the findings recorded in the order impugned, learned counsel for petitioner Anupama argued that given an opportunity of hearing, appropriate evidence would be placed to be appreciated. In my considered view, it is highly misplaced an argument. A matter can be remitted provided some factual dispute is in issue. I have already discussed above and find no controversy except working period of the petitioner for the purposes of payment of arrears of salary. That is an issue with the management only and management is left free to put up such objection as it may want on the question of payment of arrears of salary. As far as notional seniority as well as the protection of pay is concerned that finds favour with petitioner Ratan Prabha in law. Hence, I do not find this case to be remitted only on the question of opportunity of hearing.

30. In the case of *Ashwin S. Mehta and Another Vs. Union of India and Others (2012) 1 SCC 83*, Supreme Court has dealt with the law relating to principles of opportunity of hearing more especially in the field of administrative law developed for exercise of administrative and quasi

judicial powers. Elaborating the principles vide paragraphs 40, 41 and 42, the Court has held thus:-

"40. It is true that the rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by any authority, irrespective of whether the power which is conferred on a statutory body or Tribunal is administrative or quasi-judicial. The concept of "natural justice" implies a duty to act fairly i.e. fair play in action. As observed in A.K. Kraipak Vs. Union of India, (1969) 2 SCC 262 the aim of rules of natural justice is to secure justice or to put it negatively, to prevent miscarriage of justice.

"41. In Swadeshi Cotton Mills Vs. Union of India (1981) 1 SCC 664, R.S. Sarkaria, J., speaking for the majority in a three-Judge Bench, lucidly explained the meaning and scope of the concept of "natural justice". Referring to several decisions, His Lordship observed thus: (SCC p. 666)

"Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice viz. (i) audi alteram partem (ii) memo judex in re sua. The audi alteram partem rule has many facets, two of them being (a) notice of the case to be met; and (b) opportunity to explain. This rule cannot be sacrificed at the altar of administrative convenience or celerity. The general principle--as distinguished from an absolute rule of uniform application-- seems to be that where a statute does not, in terms, exclude

this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing, shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."

(emphasis supplied by us)

42. It is thus, trite that the requirement of giving reasonable opportunity of being heard before an order is made by an administrative, quasi judicial or judicial authority, particularly when such an order entails adverse civil consequences, which would include infraction of property, personal rights and material deprivation for the party affected, cannot be sacrificed at the alter of administrative exigency or celerity.

Undoubtedly, there can be exceptions to the said doctrine and as aforesaid the extent and its application cannot be put in a strait-jacket formula. The question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred; the purpose for which the power is conferred and the final effect of the exercise of that power on the rights of the person affected."

31. The Constitution Bench in the case of **Charan Lal Sahu v. Union of India**, AIR 1990 SC 1480 has discussed the issue of post decisional hearing also while observing that the principles of natural justice cannot be put into a cast iron formula. Vide para 109 the Constitution Bench has held thus:

"109. The fact that the phrase 'natural justice' is not capable of static and precise definition. It could not be imprisoned in the straight-jacket or a cast-iron formula. Rules of natural justice are not embodied rules. Hence, it was not possible to make an exhaustive catalogue of such rules. This Court reiterated that audi alteram partem is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power. The rules of natural justice can operate only in areas not covered by any law validly made. The general principle as distinguished from an absolute rule of uniform application seems to be that where a statute does not in terms exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits then such a statute would be construed as

excluding the audi alteram partem rule at the pre-decisional stage. If the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected the administrative decision after post-decisional hearing was good."

32. The Constitution Bench further took the view that principles of natural justice must be seen with circumstantial flexibility. No doubt that in the earlier order passed by this Court while remitting the matter, direction was issued that affected party may also be heard, but now since I have granted hearing to Sri Bheem Singh, learned counsel appearing for petitioner Anupama who could be the affected party, I have accept appointment of petitioner Ratan Prabha raising the issue of there being no appointment order and so the consequential joining to be bad, Mr. Singh could not dispute that petitioner Ratan Prabha was empaneled in the year 2006 and there was a direction of this Court to her joining in some other Institution. He could also not dispute that it is for this joining given to her that a writ petition came to be filed being Writ Petition No. 41691 of 2006 in which interim stay order was passed.

33. If one applies the above law to the facts of the case, one would find that selection of the petitioner Ratan Prabha to be prior in point of time than that of petitioner Anupama, is not in disputed. This Court has already held joining of petitioner Anupama to be valid as the Committee was not issuing appointment order. Naturally even after the interim order was passed protecting her interest by this Court in a writ petition questioning her appointment in the institution, which was not subject matter of advertisement, the

management did not permit her to sign the attendance register. If the joining part of the petitioner Ratan Prabha's selection and appointment is held to be valid, no further fact remains in dispute. The payment of salary is the part to be performed by Committee of Management by finalizing bills and so forwarding the same and, therefore, petitioner Anupama cannot have any grievance. In such circumstances and background of facts, petitioner Anupama even if was allowed to be heard, it would not have changed the legal position that she was subject to subsequent selection to join subsequently.

34. Thus, even after giving opportunity of hearing to the petitioner Anupama through her counsel, I do not find that the order passed by the authority deserves to be interfered with. So in my considered view remitting the matter for hearing afresh would only be an empty formality as the result ultimately is bound to be the same.

35. All these issues cannot be raised possibly by Mr. Singh for simple reason that his client petitioner Anupama was no where in the scene in the year 2006. Mr. Singh could not argue anything further.

36. All the three arguments, therefore, raised by the counsel appearing on behalf of the petitioner Anupama, are hereby rejected.

37. On the question of locus standi of the Committee of Management to challenge the order Sri Bheem Singh who appears as counsel for Committee of Management also, could not show any law which supports the petition. The only issue that could have been, the arrears of payment of salary as it is the management

which is to forward the bills. In my view management's right stands protected in the order impugned passed by the Regional Joint Director of Education and to that extent Committee of Management is always free to take up this issue with the authority, if legally permissible.

38. In view of the above, therefore, I hold that the writ petition of Committee of Management to be not maintainable for challenging the order passed by the Regional Joint Director of Education to be not maintainable and so the petition filed by the Committee of Management being no. 7096 of 2020 is, **dismissed** subject to what has been observed above.

39. Writ petition filed by petitioner Anupama being no. 3608 of 2021 is also **dismissed** for what has been discussed and held above in this judgment. Writ petition no. 866 of 2020 and writ petition no. 9586 of 2021 succeed and are **allowed**. The order dated 24.08.2019 passed by the Committee of Management as well as the consequential order passed by the District Inspector of Schools dated 17.10.2019 are hereby set aside. The Committee of Management is directed to appoint petitioner as officiating Principal of the institution till any regularly selected Principal comes and joins and also forward her papers for attestation of signatures as officiating Principal of the institution. With the attestation of signatures of the petitioner Ratan Prabha as Principal of the institution, she will be paid regular salary of the Principal of the institution without any fail, month by month as it falls due.

40. There will be no order as to cost.

of Urban Premises Tenancy Act, 2021 (hereinafter referred to as new Tenancy Act, 2021), which has come into force vide gazette notification w.e.f. 16th September, 1972.

4. In SCC Revision No. 48 of 2022, the revision applicant has questioned the order dated 13th July, 2022 passed by the District Judge, Saharanpur in SCC Suit No. Nil of 2022 dismissing the SCC Suit at the very threshold holding it to be not maintainable in view of enforcement of Tenancy Act, 2021 and the provisions contained therein.

5. Thus two legal questions arise for consideration before this Court:

(a). Whether a Small Cause Suit already instituted, since prior to coming into force of the new Tenancy Act, 2021 and so also such SCC revision arising therefrom would stand saved or the SCC suit and SCC Revision being not mentioned in the repeal and saving clause of Section 46, the proceedings of such suit and revision would stand abated; and

(b). Whether the bar created under Section 38 of the Tenancy Act is not an absolute one and so Small Cause Suit for arrears of recovery of Rent and Eviction (SCC Suit) and SCC Revision arising therefrom would still be maintainable even after the enforcement of the New Tenancy Act, 2021 qua the of tenancies not covered by tenancy agreements provided for under Tenancy Act, 2021.

6. In respect of question “(a)” following arguments have been advanced by Sri Prakhar Tandon, learned counsel, appearing for the applicant in revision no. 158 of 2022:

(i) Section 46 of the New Tenancy Act, 2021 saves certain proceedings already instituted and pending under the U.P. Urban Building (Regulation of Letting Rent and Eviction) Act, 1972, but does not mention to the suits instituted under the proviso to Sub Section 3 of Section 15 of the Provincial Small Causes Courts Act, 1887 in its application to the state vide U.P. Civil Laws Amendment Act, 1972 and so repeal and saving clause would not apply to the proceedings of SCC suits and SCC revisions;

(ii) Section 46 of the New Tenancy Act, 2021 is meant to replace Act No. 13 of 1972 and has made the operation of this new Act to be prospective only to ensure that already pending proceedings under the repealed U.P. Urban Building (Letting of Rent and Eviction) Act, 1972 are not frustrated;

(iii) New Act provides for a forum to initiate proceedings by land lord against tenant and since new Act replaces the old Act and has been enacted by a competent legislature on a subject falling in the State list of the Schedule VII of the Constitution, it will occupy the field to the exclusion of all other Acts framed by the competent legislature on the subject in the list 2, and therefore, the provisions as enacted by the State legislature vide U.P. Civil Laws Amendment Act, 1972 would also stand impliedly repealed. Thus according to Mr. Tandon, in so far as proviso to sub section 3 of Section 15 of the Provincial Small Causes Courts Act, 1887 and Bangal, Agra and Assam Civil Courts Act, 1887 in its application to Uttar Pradesh, would stand repealed.

7. Sri Saurabh Srivastava, learned counsel for the respondent has raised an argument that since forum of Small Causes

Court is available by virtue of U.P. Civil Laws Amendment Act, 1972 and the new Tenancy Act having no Presidential assent, the forum of Small Causes Court would continue to remain there and there can be two forums simultaneously and may be with the passage of time, the forum of Small Causes Courts loses its relevance and significance for there being only written tenancy agreement and old tenancies coming to end. He has emphasized the two Acts namely New Tenancy Act, 2021 and Amendment Act, 1972 to be having parallel operation and on principle of doctrine of election, a party bringing an actionable claim, can choose either of the two.

8. Per contra, the submissions advanced by Sri Ashish Kumar Singh, learned Advocate are as under:

(I) U.P. Civil Laws amendment Act, 1972 was brought into, to make the Central Act namely Provincial Small Causes Courts Act, 1887, and the Bangal, Agra, Assam Civil Courts Act, 1887 to maintain a suit by lessor for the eviction of lessee from the building after the determination of lease i.e. a suit for recovery of rent and occupation of building and this Act having received assent of the President and so also the Central Act would continue to occupy the field for maintenance of such suits even after the enactment of the new Tenancy Act, 2021;

(II) The bar created under Section 38 is limited to the cases where rights and obligations flow from the agreement reached and presented under the New Tenancy Act, otherwise remedy of small cause suit is there and will continue to be available until the legislature repeals the U.P. Civil Laws Amending Act, 1972 and provides alternative forum for these

cases in which no agreement in writing has been signed.

(III) Since U.P. Civil Laws Amendment Act, 1972 made the Provincial Small Courts Act, 1887 in its application to the State of U.P. for providing a forum of Small Causes Court, until such a provision is repealed with retrospective effect, such suit proceedings would continue be brought to their logical end.

9. Rival submissions fall for consideration.

10. In order to find answer to the questions that arise for consideration in the two cases, as to what extent the new State Tenancy Act would cover the field of tenancy law in the state; as to whether it intrudes the field already occupied by the central act like Transfer of property Act, 1872; as to whether it saves suits already instituted and whether forum of small causes courts provided for vide UP Civil Laws Amendment Act, 1972 having Presidential assent would still be available, it is first necessary to look into legislative relationship between centre and State as our constitution prescribes for.

11. Three lists provided in VIIIth schedule of the constitution referred to as Union List, State List and Concurrent list, are indicative of federal structure of our constitution.

12. Article 272 saves pre-constitution laws until are repealed by competent legislature. Article 252 provides for power of central legislature and states' power to legislate.

13. The concurrent list subjects fall within the legislative competence of both the central and state legislatures provided

of course, field is not already occupied by any Central Act and if this is so then a State Act shall have to have Presidential assent. Likewise any State Act if is having presidential assent it's effect would be taken away, to wit; by express or implied repeal, only if a subsequent Act also has a presidential assent.

14. With this above principle enshrined in our constitution governing legislative relationship between centre and state I proceed to examine certain provisions of the new Tenancy Act that are relevant to the controversy involved in the cases in hand.

15. Prior to this new Tenancy Act the earlier Act, namely, U.P. Urban Buildings (Regulation of Letting and Eviction) Act, 1972 (hereinafter referred to as "Rent Control Act") barred suits relating to buildings falling in urban areas in matters of tenancy dispute except on specified grounds as prescribed for under section 20 of the said Act. In Oder to ensure expeditious disposal of such suits as it would not involve title dispute and would require only summary trial, the state legislature brought in U.P. Civil Laws Amendment Act, 1972 (hereinafter referred to as Amendment Act, 1972) adding a proviso to section 3 of the Provincial Small Causes Courts Act, 1887 in its application to the state and so also amending Bengal, Awadh and Assam Civil Courts Act, providing forum of civil courts having territorial jurisdiction to be designated as Small Causes courts. This Amendment Act, 1972 received Presidential assent on 12.09.1972 and is still not repealed.

16. Thus small causes suits came to be maintainable in matters of tenancy

disputes *qua* urban buildings defined under the rent control Act and Amendment Act.

17. The new Tenancy Act completely repealed the old rent control Act and has even barred the suits in respect of tenancy disputes relating to premises defined under section 2(c) situate in areas provided under section 1. Section 1 provides for its areas of application as under:

“(1) This Act may be called the Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021.

(2) It extends to the whole of the Uttar Pradesh.

(3) It shall apply to:-

(a) every city as defined in the Uttar Pradesh Municipal Corporation Act, 1959 (U.P. Act no. 2 of 1959);

(b) every municipal area as defined in the Uttar Pradesh Municipalities Act, 1916 (U.P. Act no. 2 of 1916);

(c) every development area notified under Uttar Pradesh Urban Planning and Development Act, 1973 (President's Act no. 11 of 1973);

(d) every special development area notified under the Uttar Pradesh Special Area Development Authorities Act, 1986 (U.P. Act. no. 9 of 1986);

(e) every Industrial Development Area notified under Uttar Pradesh Industrial Area Development Act, 1976 (U.P. Act no. 6 of 1976);

(f) every Regulated area notified under the Uttar Pradesh (Regulation of Building Operations) Act, 1958 (U.P. Act. no. 34 of 1958); and

(g) every area relating to various housing schemes of Uttar Pradesh Avas Evam Vikas Parishad constituted under the Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 (U.P. Act. no. 1 of 1966):

Provided that the State Government, if it is satisfied that it is necessary or expedient so to do in the interest of the general public, residing in any other local area, may by notification in the Gazette declare that this Act or any part thereof shall apply to such area, and thereupon this Act or part shall apply to such area.

(4) It shall be deemed to have come into force with effect from January 11, 2021."

(emphasis added)

18. Section 2 (c) defines premises as under :

" "Premises" means any building or part of a building which is, or is intended to be, let on rent for the purpose of residence or for commercial or for educational use, except for industrial use and includes-

(i) garden, garage or closed parking area, vacant land, grounds and out-houses, if any, appertaining to such building or part of the building; and

(ii) any fitting to such building or part of the building for the more beneficial enjoyment thereof, but does not include premises such as hotel, lodging house, dharamshala or inn;

(j) "Tenant", whether called lessee or by any other name, means a person by whom or on whose account or on behalf of whom, the rent of any premises is payable to the landlord under a tenancy agreement and includes any person occupying the premises as a sub-tenant and also, any person continuing in possession after the termination of his tenancy whether before or after the commencement of this Act; but shall not include any person against whom any order or decree for eviction has been made."

(Emphasis added)

19. Section 32 of New Tenancy Act, 2021 provides for constitution of Rent Tribunal and Rent Authority as under:

"The Rent Tribunal shall be presided over by the District Judge himself or by Additional District Judge nominated by the District Judge in each district."

20. Section 34 provides for powers of Rent Authority and Tribunal as under:

"(1) The Rent Authority and the Rent Tribunal shall, for discharging their functions under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (Act. No. 5 of 1908) for the purposes of,-

*(a) summoning and enforcing the attendance of any person and examining **him on oath;***

(b) requiring the discovery and production of documents;

(c) issuing commission for examination of the witnesses or documents;

(d) issuing commission for local investigation;

(e) receiving evidence on affidavits;

(f) dismissing an application or appeal for default or deciding it ex-parte;

(g) setting aside any order of dismissal of any application or appeal for default or any other order passed by it ex-parte;

(h) any other matter, which may be prescribed.

(2) Any proceeding before the Rent Authority or Rent Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purpose of Section 196 of the Indian Penal Code, 1860 (Act. No. 45 of 1860); and the Rent Authority and the Rent Tribunal shall be deemed to be a civil court for the purposes of Section 195 and

Chapter XXVI of the Code of Criminal Procedure, 1973 (Act. No. 2 of 1974).

(3) *For the purposes of holding any inquiry or discharging any duty under this Act, the Rent Authority may,-*

(a) after giving not less than twenty-four hours' notice in writing, enter and inspect or authorize any officer subordinate to it, to enter and inspect any premises at any time between sunrise and sunset;

(b) by a written order, require any person to produce for its inspection such books or documents relevant to the inquiry, at such time and at such place as may be specified in the order.

(4) The Rent Authority may, if it thinks fit, appoint one or more persons having special knowledge of the matter under consideration as an assessor or valuer to advise it in the proceeding before it.

(5) Any clerical or arithmetical mistake in any order passed by the Rent Authority or any other error arising out of any accidental omission may, at any time, be corrected by the Rent Authority on an application received by it in this behalf from any of the parties or otherwise.

(6) The Rent Authority may exercise the powers of a Judicial Magistrate of the First Class for the recovery of the fine under the provisions of the Code of Criminal Procedure, 1973 (Act. no. 2 of 1974) and the Rent Authority shall be deemed to be a Magistrate under the said Code for the purposes of such recovery.

(7) An order made by a Rent Authority or an order passed in appeal under this Chapter shall be executable by the Rent Authority as a decree of a Civil Court and for this purpose, the Rent Authority shall have the powers of a Civil Court.

(8) The Rent Authority may set aside or recall any order passed ex-parte if

the aggrieved party files an application and satisfies it that the notice was not duly served or that he was prevented by any sufficient cause from appearing when the case was taken up for hearing.

(9) Save as otherwise expressly provided in this Act, every order made by the Rent Authority shall, subject to decision in appeal, be final and shall not be called in question in any original suit, application or execution proceedings."

(emphasis added)

21. Section 35 provides for appeal to rent tribunal as under:

(1) Any person aggrieved by an order passed by the Rent Authority may prefer an appeal along with a certified copy of such order to the Rent Tribunal within the local limits of which the premises is situated, within a period of thirty days from the date of that order:

Provided that no appeal shall lie unless the appellant pre-deposits fifty percent of the entire payable amount under the impugned order of the Rent Authority.

(2) Upon filing an appeal under sub-section (1), the Rent Tribunal shall serve notice, along with a copy of memorandum of appeal to the respondent and fix a hearing not later than thirty days from the date of service of notice of appeal on the respondent and the appeal shall be disposed of within a period of sixty days from such date of service.

(3) Where the Rent Tribunal considers it necessary in the interest of arriving at a just and proper decision, it may allow filing of documents at any stage of the proceedings in appeal:

Provided that no such document shall be allowed more than once during the hearing.

(4) The Rent Tribunal may, in its discretion, pass such interlocutory order during the pendency of the appeal, as it may deem fit.

(5) While deciding the appeal, the Rent Tribunal may, after recording reasons therefor, confirm, set aside or modify the order passed by a Rent Authority.

(emphasis added)

22. Section 36 provides for execution of order under:

“(1) The Rent Authority shall, on an application filed by any party, execute an order of a Rent Tribunal or any other order made under this Act, in such manner as may be prescribed, by-

(a) delivering possession of the premises to the person in whose favour the decision has been made; or

(b) attaching one or more bank accounts of the opposite party for the purpose of recovering the amount specified in such order; or

(c) appointing any advocate or any other competent person including officers of the Rent Authority or local administration or local body for the execution of such order; or

(d) attachment of salary and allowance of the opposite party; or

(e) attachment and sale of the movable or immovable property of the opposite party.

(2) The Rent Authority may take the help from the local police for execution of the final orders:

Provided that no applicant shall obtain help of the police unless he pays such costs as may be decided by the Rent Authority.

(3) The Rent Authority shall conduct the execution proceedings, in relation to its order or an order of a Rent Tribunal or any other order passed under this Act, in a summary manner and dispose of the application for execution made under this section within a period of thirty days from the date of service of notice on the opposite party.”

23. Section 38 bars jurisdiction of civil courts barred in respect of certain matters as under:

“(1) Save as otherwise provided in this Act, no Civil Court shall entertain any suit or proceeding in so far as it relates to the provisions of this Act.

(2) The jurisdiction of the Rent Authority shall be limited to tenancy agreement submitted to it as specified in the First Schedule and shall not extend to the question of title or ownership of premises.”

(emphasis added)

24. Section 42 gives overriding effect to the Tenancy Act as under:

“The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law of the State of Uttar Pradesh for the time being in force.”

25. Section 46 provides for repeal and saving clause as under:

“(1) The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act no. 13 of 1972) and the Uttar Pradesh Regulation of Urban Premises Tenancy (Second)

Ordinance, 2021 (U.P. Ordinance no. 3 of 2021) is hereby repealed.

(2) Notwithstanding such repeal, all cases and other proceedings under the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act no. 13 of 1972) pending, at the commencement of this Act, shall be continued and disposed of in accordance with the provisions of the said Act of 1972 as if that Act had continued to be in force and this Act had not been promulgated.

(3) All cases and proceedings relating to any dispute between a landlord and a tenant under any law other than the law repealed by sub-section (1) pending before the Civil Court or in appeal before any other Court on the date of commencement of this Act, in respect of the premises to which this Act applies, shall be continued before such Court and disposed of in accordance with such applicable law.

(4) Notwithstanding such repeal anything done or any action taken under the Uttar Pradesh Regulation of Urban Premises Tenancy Ordinance, 2021 (U.P. Ordinance no. 2 of 2021) and the Uttar Pradesh Regulation of Urban Premises Tenancy (Second) Ordinance, 2021 (U.P. Ordinance no. 3 of 2021) shall be deemed to have been done or taken under the corresponding provisions of this Act."

(emphasis added)

26. The application clause vide section 1 of the new Tenancy Act, 2021 makes it applicable to the areas falling in municipalities, civil and industrial development authority areas including the areas covered under the U. P. (Regulation of Building Operations) Act, 1958 and the areas of housing schemes of U.P. Awam Vikas Parishad. Buildings are

defined as premises vide section 2(c) above with exception to those referred under section 3 of the new Tenancy Act, 2021 except buildings let out for industrial use.

27. The new Tenancy Act, 2021 provides for constitution of Rent Authority and Tribunal for rent dispute resolution and so consequently bars jurisdiction of civil courts vide section 38.

28. The argument advanced by Mr. Tandon was that since section 42 does not refer to the small causes courts, so the suits pending before small causes courts and small causes revisions shall abate with the enforcement of the Tenancy Act. He had argued that on conjoint reading of sections 38, 42 and 46 it would lead to inevitable conclusion that the Amendment Act, 1972 got impliedly repealed.

29. Before I proceed to examine these three sections I need to examine the scope of power that vests with the Rent Authority that is created first, to adjudicate upon the lis between lessor (landlord) and lessee (tenant).

30. Under the new Tenancy Act, 2021 much emphasis is upon written agreement vide section 4 that runs as under:

" (1) Notwithstanding anything contained in this Act or any other law for the time being in force, no person shall, after the commencement of this Act, let or take on rent any premises except by an agreement in writing, which shall be informed to the Rent Authority by the landlord and tenant jointly, in the form specified in the First Schedule within a period of two months from the date of tenancy agreement:

Provided that in cases of residential tenancies for a period of less than twelve months, the landlord and tenant shall not be required to inform the Rent Authority about, such tenancy.

(2) Where the landlord and the tenant fail to jointly inform the execution of the tenancy agreement referred to in sub-section (1), the landlord and tenant shall separately inform the execution of tenancy agreement to the Rent Authority within a period of one month from the date of expiry of the period specified in sub-section (1).

(3) ***Where, in relation to a tenancy created before the commencement of this Act,-***

(a) ***if an agreement in writing was entered*** into between the landlord and the tenant, they shall jointly present a copy thereof to the Rent Authority within three months of the commencement of this Act.

(b) ***if no agreement in writing was entered into, the landlord and the tenant shall enter into an agreement in writing*** with regard to that tenancy and present the same to the Rent Authority ***within three months of the commencement of this Act:***

Provided that where the landlord or the tenant fail to present jointly a copy of the tenancy agreement or fail to reach an agreement within specified period, such landlord and tenant shall separately file the particulars about such tenancy with the Rent Authority within one month from the date of expiry of period mentioned in clause (b) above, in the form specified in First Schedule. If the landlord has submitted his particulars within the specified period but tenant fails to submit such particulars, the landlord may file an application for eviction on this ground alone:

Provided further that during such eviction proceedings, the Rent Authority

shall, notwithstanding anything contained in this Act, decide interim rent payable by the tenant during such adjudication.

(4) The State Government shall, put in place a digital platform in the Hindi or English language for enabling submissions of document in such form and manner as may be prescribed.

(5) The Rent Authority shall, after receiving information about the execution of tenancy agreement along with the documents specified in the First Schedule, provide a unique identification number to the parties.

(6) The terms of authorization of the property manager, if any, by the landlord to deal with the tenant shall be such as agreed to by the landlord and tenant in that behalf in the tenancy agreement.

(7) The information provided under sub-sections (1), (2) and (3) shall be conclusive proof of the facts relating to tenancy and matters connected therewith, and in the absence of any statement of information, the landlord may file an application for eviction on this ground alone.”

(emphasis added)

31. The obligation cast upon the parties namely landlord and tenant, is to enter an agreement in writing and inform Rent Authority within two months of such agreement either jointly or separately, provided of course, tenancy is for a period of 12 months or more. In case of old/existing tenancies on the date of commencement of new Tenancy Act, 2021, parties are expected to enter an agreement in writing and inform the Rent Authority within three months of the commencement of the said Act and in case of existence of written agreement it is obligation cast upon

the parties to jointly present that to the Rent Authority.

32. The first proviso to section 4 (3) makes it obligatory upon the landlord to give particulars as per form prescribed in the First Schedule *qua* tenancy to Rent Authority within one month of the expiry of three months period referred to above in the event no agreement is entered in writing and in such an eventuality the tenant will also be required to give his particulars and in the event of failure on the part of the tenant in discharging his part of obligation, he will be liable to eviction.

33. So the question arises as to the tenancy where even land lord fails to discharge his part of obligation under the first proviso to section 4(3). The first proviso to section 4(1) leaves open for a tenancy of eleven months to continue without reporting any agreement in writing to the Rent Authority and further provisions relating to revision of rent under the Tenancy Act also provides for revision in respect of old existing tenancies. Reading all theses above provisions together one can safely conclude that in cases of no tenancy agreement and none of the parties furnishing any agreement, would lead to an inevitable conclusion that tenancy is either for less than 12 months or on month to month basis. Still further in the event landlord not furnishing his particulars of existing tenancy even after commencement of new Tenancy Act 2021, the Act is silent as to consequences. Again an inevitable conclusion would be, therefore, oral agreements of understanding for less than 12 months are protected under section 21 against the right of landlord to seek eviction. It would be worth producing section 21 and 22 here and are reproduced hereunder:

“21-(1) Protection of tenant against eviction.- (1) A tenant shall not be evicted during the continuance of tenancy agreement unless otherwise agreed to in writing by the landlord and tenant, except in accordance with the provisions of sub-section (2) or in accordance with the provisions of section 22:

Provided that where the landlord has acquired the premises by sale deed after the commencement of this Act and it was in the occupation of a tenant since before its purchase, no application for recovery of possession of such premises shall be made under this section unless a period of one years has elapsed from the date of such acquisition, or expiry of tenancy agreement executed in between the erstwhile landlord and the tenant, whichever is earlier:

Provided further that after acquisition of the premises by the landlord under preceding proviso the landlord shall also intimate to the tenant in possession, within one month of such acquisition.

(2) The Rent Authority may, on an application made to it by the landlord in such manner as may be prescribed, make an order for eviction and recovery of possession of the premises on one or more of the following grounds, namely:-

(a) that the tenant does not agree to pay the rent payable under section 8;

(b) that the tenant has not paid the arrears of rent and other charges payable in full as specified in sub-section (1) of section 13 for two consecutive months, including interest for delayed payment as may be specified in the tenancy agreement within a period of one month from the date of service of notice of demand for payment of such arrears of rent and other charges payable to the landlord:

Provided that in relation to a tenant who is a member of the armed forces

of the Union and in whose favour the prescribed authority under the Indian Soldiers (Litigation) Act, 1925 (Act No. 4 of 1925) has issued a certificate that he is serving under special conditions within the meaning of section 3 of that Act or where he has died by enemy action while so serving, then in relation to his heirs, the words "two months" in this clause shall be deemed to have been substituted by the words "one year";

(c) that the tenant has, after the commencement of this Act, parted with the possession of whole or any part of the premises without obtaining the written consent of the landlord:

Provided that in case, the tenant is a firm, then in case Of change of proprietor or partners of firm or its nature of business, the prior endorsement of landlord has not been obtained in writing;

(d) that the tenant has continued to misuse the premises even after receipt of notice from the landlord to desist from such misuse.

Explanation.-For the purposes of this clause, "misuse of premises" means encroachment of additional space by the tenant or use of premises for a purpose other than the purpose permitted in the tenancy agreement or use of premises which causes public nuisance or causes damage to the property or is detrimental to the interest of the landlord or for immoral or illegal purposes;

(e) where it is necessary for the landlord to carry out any repair or construction or rebuilding or addition or alteration or demolition in respect of the premises or any part thereof, which is not possible to be carried out without the premises being vacated:

Provided that after such repair, construction, rebuilding, addition or alteration, the tenant may be allowed to

reoccupy the premises only when it has been mutually agreed to between the landlord and the tenant and a new tenancy agreement has been submitted with the Rent Authority:

Provided further that the tenant shall not be allowed to reoccupy the premises:

(i) in the absence of submission of such mutual tenancy agreement with the Rent Authority; and

(ii) in cases where the tenant has been evicted under the orders of a Rent Authority;

(f) that the premises or any part thereof is required by the landlord for carrying out any repairs, construction, rebuilding, additions, alterations or demolition, for change of its use as a consequence of change of land use by the competent authority;

Explanation:-For the purposes of this clause, the expression "competent authority" means the Municipal Corporation or the Municipality or the Development Authority or any other authority, as the case may be, which provides permission on matters relating to repair or redevelopment or demolition of building or permission for change in land use;

(g) that the tenant has given written notice to vacate the premises let out on rent and in consequence of that notice the landlord has contracted to sell the said premises or has taken any other step, as a result of which his interests would seriously suffer if he is not put in possession of that premises;

(h) that the tenant has carried out any structural change or erected any permanent structure in the premises let out on rent without the written consent of the landlord;

(i) that in violation of section 7, the tenant has sub-let whole or part of the premises held by him or has transferred or assigned his rights in the tenancy agreement or part thereof;

(j) that where the tenancy stands determined by efflux of time;

(k) that the tenant has allowed the premises to be occupied by any person who is not a member of his family;

Explanation:-For the purposes of this clause, family means spouse, male lineal descendants, such parents, grandparents any unmarried, widowed, divorced, judicially separated daughter, daughter of a male descendant, or widowed daughter-in-law as may have been normally residing with him or her;

(l) that the tenant has substantially removed his effects from the premises;

(m) that the premises are required by landlord either in its existing form or after demolition and new construction thereof for the purpose of its occupation by landlord.

(3) No order for eviction of the tenant on account of failure to pay the rent specified in clause (b) of sub-section (2) shall be made, if the tenant makes payment to the landlord or deposits with the Rent Authority the arrears of rent and other payable charges, if any, including interest within one month from the date of service of the said demand notice upon him.

(4) Where the tenant fails to pay the rent consecutively for two months subsequent to the grant of the relief specified in sub-section (3) in any one year, then the tenant shall not be entitled to such relief again.

(5) In any proceedings for eviction under clause (e) of sub-section (2), the Rent Authority may allow eviction from

only a part of the premises, if the landlord agrees for the same."

Section 22 - Eviction and recovery of possession of premises in case of death of the landlord- (1) (1)

Notwithstanding anything contained in this Act or any other law for the time being in force, in case of death of the landlord, where there is a requirement of the premises let out on rent by the legal heirs of the landlord during the period of tenancy, such legal heirs may file an application in this behalf for eviction and recovery of possession of the said premises before the Rent Authority in such form and manner, as may be prescribed.

(2) The Rent Authority may, on an application made to it under sub-section (1), if it is satisfied that the legal heirs of the deceased landlord are in requirement of the premises let out on rent, pass necessary orders against the tenant for handing over vacant possession of the said premises to the legal heirs of the deceased landlord.

(emphasis added)

34. Section as quoted above protects tenant from eviction during continuation of tenancy agreement with exception to what is provided under section 22. However, a subsequent purchaser of the premises has a right to seek eviction after one year of such acquisition or on expiry of rent agreement whichever falls earlier and with notice to tenant in possession to be issued within one month of such acquisition. Subsection (2) provides for contingencies in which a landlord may apply for eviction. A careful reading of various clauses of subsection (2) it shows almost every eventuality has been covered to seek eviction of a defaulting tenant and need of the premises by landlord for occupation thereof. What is important to notice is clause (j) of subsection (2) as it refers to an eventuality of determination of

tenancy by efflux of time. This of course would cover the tenancies where term under written agreement has expired or for that matter 11 months unwritten tenancy.

35. There can *equally* be a claim of tenant to seek protection under section 112 to 114 A of relating to waiver of forfeiture, waiver of notice to quit, relief against forfeiture for non payment of rent, relief against forfeiture in certain cases of the of Transfer of Property Act 1882 and so provisions under new Tenancy Act, 2021 would certainly give way to central Act to the extent of repugnancy, as it occupies the field and would prevail by virtue of Article 254 of the Constitution until state legislates any amending law to modify Transfer of Property Act, 1882 in its application to the state and such amending law gets Presidential assent.

36. Now the question arises for remedies. In matters of eviction both the old Rent Control Act and the New Tenancy Act have one thing common and that is designated prescribed authority/rent authority. However, under the old Act suits were maintainable in certain specified contingencies. Under the new Tenancy Act those very eventualities though do count for as ground for eviction but by way of application before the Rent Authority only. Protection granted under section 20(4) of the Rent Control Act has also been granted with little modification under section 21(3) of the new Tenancy Act. Section 21(3) runs as under:

“No order for eviction of the tenant on account of failure to pay the rent specified in clause (b) of sub-section (2) shall be made, if the tenant makes payment to the landlord or deposits with the Rent Authority the arrears of rent and other

payable charges, if any, including interest within one month from the date of service of the said demand notice upon him.”

37. It appears that since the old Rent Control Act provided for suits, state legislature thought it better to provide a forum for summary disposal of such suits as it would be involving only landlord-tenant dispute and mostly there were orally agreed tenancies. Thus a trial was necessary but at the same time it's expeditious disposal. Resultantly U.P. Civil Laws Amendment Act, 1972 was enacted inserting a proviso to section 15(3) of The Provincial Small Causes Courts Act, 1887. Section 2 of the Amendment Act, 1972 is reproduced hereunder:

“ 2. Amendment Of Section 15 Of Act IX Of 1887 :- *In Section 15 of the Provincial Small Cause Courts Act, 1887, as amended in its application to Uttar Pradesh, hereinafter referred to as the principal Act, in sub-section (3), the following proviso shall be inserted, namely:*

"Provided that in relation to suits by the lessor for the eviction of a lessee from a building after the determination of his lease, or for recovery from him of rent in respect of the period of occupation thereof during the continuance of the lease, or of compensation for the use and occupation thereof after such determination of lease, the reference in this sub-section to two thousand rupees shall be construed as a reference to five thousand rupees.

Explanation.--For the purposes of this sub-section, the expression building has the same meaning as in Art. (4) in the Second Schedule."

38. As a consequence to the above incorporation of proviso court's power of revision against eviction decree became

available under section 25 of Act, 1887. Accordingly a proviso was also added vide section 3 of the Amendment Act as under:

"In Section 25 of the principal Act the following proviso thereto shall be inserted, namely :

"Provided that in relation to any case decided by a District Judge or Additional District Judge exercising the jurisdiction of Judge of Small Causes, the power of revision under this section shall vest in the High Court."

39. Further the word building came to be redefined by amending Article(4) of the second schedule of the Principal Act vide Section 4 that runs as under:

"In the Second Schedule to the principal Act, for Art. (4) the following Article shall be substitute, namely :

"(4) a suit for the possession of immovable property or for the recovery of an interest in such property, but not including a suit by a lessor for the eviction of a lessee from a building after the determination of his lease, and for the recovery from him of compensation for the use and occupation of that building after such determination of lease.

Explanation.--For the purposes of this Article, the expression 'buildings, means a residential or non-residential roofed structure, and includes any land (including any garden), garages and out-houses, appurtenant to such building, and also includes any fittings and fixtures affixed to the building for the more beneficial enjoyment thereof."

40. Consequential amendments were also made under section 25 of Bengal Agra and Assam Civil Courts Act, 1887, section

115 of CPC, 1908 in its application to Uttar Pradesh.

41. Further vide section 9 of the Amendment Act, 2021 all such suits pending before the Munsif's court where transferred to small causes court except where oral evidence had started.

42. Now since the new Tenancy Act does not talk of suits, so suits, it was argued would not be maintainable as the new regime of tenancy law under the Act of 2021 covers all kinds of tenancy disputes short of unwritten tenancy agreements and it appears also why the legislature in its wisdom thought it to be not necessary to amend Amendment Act, 1972.

43. Amendment Act, 1972 has received Presidential assent on 12th September 1972 and came into force with Gazette notification on 16th September 1972. This Act modifies Provincial Small Causes Courts Act, 1887 and Bengal, Agra and Assam Act, 1887 both central Acts in their application to suits relating to tenancy dispute in Uttar Pradesh to be maintainable on specified grounds vide Section 20 of old Rent Control Act. Section 20 of old Rent control Act provides as under:

20. Bar of suit for eviction of tenant except on specified grounds- (1) *Save as provided in sub-section (2), [* * *] no suit shall be instituted for the eviction of a tenant from a building, notwithstanding the determination of his tenancy by efflux of time or on the expiration of a notice to quit or in any other manner:*

Provided that nothing in this sub-section shall bar a suit for the eviction of a tenant on the determination of his tenancy by efflux of time where the tenancy for a

fixed term was entered into by or in pursuance of a compromise or adjustment arrived at with reference to a suit, appeal, revision or execution proceeding, which is either recorded in Court or otherwise reduced to writing and signed by the tenant.

(2) A suit for the eviction of a tenant from a building after the determination of his tenancy may be instituted on one or more of the following grounds, namely:

(a) that the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand:

Provided that in relation to a tenant who is a member of the armed forces of the Union and in whose favour the prescribed authority under the Indian Soldiers (Litigation) Act, 1925 (Act No. IV of 1925), has issued a certificate that he is serving under special conditions within the meaning of Section 3 of that Act or where he has died by enemy action while so serving, then in relation to his heirs, the words "four months" in this clause shall be deemed to have been substituted by the words "one year";

(b) that the tenant has wilfully caused or permitted to be caused substantial damage to the building;

(c) that the tenant has without the permission in writing of the landlord made or permitted to be made any such construction or structural alteration in the building as is likely to diminish its value or utility or to disfigure it;

(d) that the tenant [has without the consent in writing of the landlord used it for a purpose other than the purpose for which he was admitted to the tenancy of the building or otherwise done any act which is inconsistent with such use], or has been

convicted under any law for the time being in force of an offence of using the building or allowing it to be used for illegal or immoral purpose;

(e) that the tenant has sub-let, in contravention of the provisions of Section 25, or as the case may be, of the old Act the whole or any part of the building;

(f) that the tenant has renounced his character as such or denied the title of the landlord, and the letter has not waived his right of reentry or condoned the conduct of the tenant;

(g) that the tenant was allowed to occupy the building as part of his contract of employment under the landlord, and his employment has ceased.

[* *]*

(4) In any suit for eviction on the ground mentioned in clause (a) of sub-section (2), if at the first hearing of the suit the tenant unconditionally pays of [tenders to the landlord or deposits in Court] the entire amount of rent and damages for use and occupation of the building due from him (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine per cent per annum and the landlord's costs of the suit in respect thereof, after deducting therefrom any amount already deposited by the tenant under sub-section (1) of Section 30, the Court may, in lieu of passing a decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on that ground:

Provided that nothing in this sub-section shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building in the same city, municipality, notified area or town area.

[Explanation--For the purposes of this sub-section--

(a) the expression "first hearing" means the first date for any step or proceeding mentioned in the summons served on the defendant;

(b) the expression "cost of the suit" includes one-half of the amount of Counsel's fee taxable for a contested suit.]

(5) Nothing in this section shall affect the power of the Court to pass a decree on the basis of an agreement, compromise or satisfaction recorded under Rule 3 of Order XXIII of the First Schedule to the Code of Civil Procedure, 1908.

[(6) Any amount deposited by the tenant under sub-section (4) or under Rule 5 of Order XV of the First Schedule to the Code of Civil Procedure, 1908 shall be paid to the landlord forthwith on his application without prejudice to the parties' pleadings and subject to the ultimate decision in the suits.]

(emphasis added)

44. The Amendment Act, 2021 brought amendment to Article 4 of Second Schedule of the PSCC Act 1887 that provide exception clause and so excluded suits for possession and any recovery of interest. For better appreciation original Article 4 of second schedule of PSCC Act is reproduced hereunder:

"(4) a suit for the possession of immovable property or for the recovery of an interest in such property."

45. Now since suits under section 20 of rent control Act were prescribed for on certain specified grounds in that very section the UP Legislature amended article 4 of the second Schedule of the SCC Act in its application to Uttar Pradesh to maintain small cause suits in matters of eviction of

tenants on grounds specified under section 20 of the Rent Control Act. The Amended Article 4 is already reproduced above in paragraph 39.

46. A comparative study of the original Article as is there on central statute and amended one by virtue of UP Amendment shows that legislature in order to maintain an eviction suit at the instance of a lessor in respect of buildings as defined under section 3(i) of old rent control Act, added such suits as exception. The definition of building given under section 3(i) stands incorporated in the explanation added to amended Article 4 of Second Schedule of PSCC Act.

47. Consequently vide same Amendment Act a proviso was added to Section 15(3) of SCC Act enhancing valuation and so also section 25 of the Bengal, Agra and Assam Act, 1887 was amended enhancing valuation of such suits. Further in order to maintain such suits even before the District Judge or for that matter before the Additional District Judge for enhanced valuation subsection (2) was added to section 25 of the said Act.

48. Section 25 of Bengal, Agra and Assam Act, 1887 as it stands after 1972 amendments in its application is reproduced hereunder:

"Section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887, as amend in its application to Uttar Pradesh shall be re-numbered as sub-section (1) thereof, and—

(i) in sub-section (1), as so re-numbered, for the existing proviso, the following proviso shall be substitute, namely :

"Provided that in relation to suits of the nature referred to in the proviso to subsection (3) of Section 15 of the said Act the references in this sub-section to one thousand rupees and five hundred rupees shall be construed respectively as references to five thousand rupees and one thousand rupees."

(ii) after sub-section (1) as so re-numbered, the following sub-section shall be inserted, namely :

"(2) The State Government may by notification in the official Gazette, confer upon any District Judge or Additional District Judge the jurisdiction of a Judge of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887, for the trial of all suits (irrespective of their value), by the lessor for the eviction of a lessee from a building after the determination of his lease, or for the recovery from him of rent in respect of the period of occupation thereof during the continuance of the lease or of compensation for the use and occupation thereof after such determination of lease, and may withdraw any jurisdiction so conferred.

Explanation--For the purposes of this sub-section, the expression 'building' has same meaning as in Art. (4) in the Second Schedule to the said Act.

(3) The State Government may by notification in the official Gazette delegate to the High Court its powers under this section."

49. The above provisions of Old Rent Control Act, PSCC Act, 1887 (with UP Amendments) and Bengal, Agra and Assam Act make following two things absolutely clear about the legal position prior to new Tenancy Act.

a)- A suit by lessor for arrears of rent, eviction of tenant of premises/building

and consequential possession of such premises was maintainable as small causes suit only and that too only on specified grounds mentioned under section 20 of Rent Control Act; and

b)- Civil Courts defined under section 3 of Bengal, Agra and Assam Civil Courts Act, 1887 were notified as small causes courts to function as such to try tenancy dispute related suits under the PSCC Act, 1887. .

50. Thus the Small Causes Courts notified as such under the Civil Courts Act, 1887 are basically civil courts. Small Causes Courts are courts especially provided for under a special law and their power to try suits is limited as per the jurisdiction defined under the PSCC Act, 1887 though the procedure will be of CPC as provided for under section 17 of the SCC Act. Further suits before the Small Causes Courts were the suits referred to and saved under Section 20 of the Old Rent Control Act.

51. Now coming to the arguments of Mr. Tandon as to whether proceedings pending in small causes courts Act relating to eviction suits and SCC revisions would abate after new Tenancy Act coming into force.

52. Entry 18 read with Entry 65 of the State Legislature empowers the State to legislate on subjects like "land tenures including relation of land lord and tenant" and "jurisdiction and powers of all courts except the Supreme Court with respect to any matters in this list". Accordingly, the State of U.P. amended the Small Causes Courts Act in its application to the State to enable the Courts to entertain and try suits as saved under Section 20 of the old Rent Control Act.

53. On the point of repeal and implied repeal so as to suggest that U.P. Civil Laws Amendment Act, 1972 would stand repealed, Mr. Tandon put emphasis upon provisions as contained under Section 42 of the new Tenancy Act, 2021. He argued that reading provisions as contained under Section 42 alongwith Section 46 of the Act, the language in which they are couched so as to specifically not include SCC Suits and SCC Revisions coupled with the fact that Section 38 bars Civil Suits, would lead one to conclude the intendment of legislature to repealing Amendment Act, 1972.

54. In support of his above interpretation of the relevant provisions of the new Act, Mr. Tandon has relied upon certain authority of the Supreme Court in case of **New India Insurance Co. Ltd. v. Smt. Shanti Misra, AIR 1976 SC 237**, Section 38 and 46 of the Tenancy Act, 2021, has already been reproduced above in this judgment. Section 42 of the said Act at the cost of repetition is reproduced hereunder:

“42. Overriding effect- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law of the State of Uttar Pradesh for the time being in force.”

55. From a bare reading of Section 42, it clearly comes out that despite inconsistency with any other law of the State dealing with the subject, in force, the new Tenancy Act would prevail. The question still remains as to whether by the new Act, Amendment Act, 1972 would stand repealed so as to hold that suits not saved under Section 46, would abate for inconsistency with the new Tenancy Act, 2021 and forum of Small Causes Court would thus be not available

56. In the case of New India Insurance Company Ltd. (*supra*), the Court was interpreting the amendment brought in the then existing Motor Vehicles Act, 1939 by the Parliament as to the forum to adjudicate the claims. While the old provision provided forum of Civil Court to entertain claim petitions, but by virtue of Amendment Act, 100 of 1956 enacted by Parliament/ Central Legislature, new Section 110- A to 100-F were inserted and the original provision of Section 110 was deleted. Since Central Act 100 of 1956 came into force w.e.f 16.02.1956, the issue was as to whether in respect of accident taking place prior to 16.02.1956, the old forum would continue to entertain claim petitions. Further the issue was that since the Claim Tribunals were not constituted immediately by the State Governments and so the issue was if once Tribunals got constituted, whether civil courts still would continue to hear and decide the pending claim petitions.

57. By virtue of Amending Act, 100 of 1956, civil courts' jurisdiction in claim matters was absolutely barred unlike Section 38 of the Tenancy Act, 2021, which specified that Rent Authority would entertain petitions relating to agreements as entered on format prescribed in schedule 1 of the Act only. Section 110 A to 110F of the amending Act 100 of 1956 provide for change of forum, and Civil Courts' jurisdiction to entertain suits arising out of accident claim was clearly barred. The limitation of 60 days prescribed under sections 110 A(3) “led the High Courts to fall back upon the proviso to sub section (3), and let others to say that the Tribunal will have no jurisdiction to entertain such an application and remedy of going to the Civil Court in such a situation was not barred under Section 110 F of the Act”

Supreme Court held “High Court failed to notice that primarily the law engrafted in Sections 110A and 110 F was a law relating to the change of forum . Vide Paragraph 6 of the Court held thus:

“In our opinion in view of the clear and unambiguous language of section 110 A and 110F it is not reasonable and proper to allow the law of change of forum give way to the bar of limitation provided in sub-section (3) of section 110A. It must be vice versa. The change. Of the procedural law of forum must be given effect to. The underlying principle of the change of law brought about by the amendment in the year 1956 was to enable the claimants to have a cheap remedy of approaching the Claims Tribunal on payment of a nominal court fee where as a large amount of ad valorem court fee was required to be paid in Civil Court. It is legitimate to think that the legislature did not think it necessary to affect the pending suits but wanted the cheap remedy to be available as soon as the Tribunal was constituted by the State Governments, in all cases, irrespective of the date of the accident, provided the remedy of going to the Court was not barred on the date of the constitution of the Tribunal. Then, how is the difficulty of limitation in such cases to be solved is the question. “

58. Elaborately principle vide paragraph 10, the Court held thus:

Apropos the bar of limitation provided in section 110 A(3), one can say, on the basis of the authorities aforesaid that strictly speaking the bar does not operate in relation to an application for compensation arising out of an accident which occurred prior to the constitution of the Claims Tribunal. But since in such a

case there is a change of forum, unlike the fact of the said cases, the reasonable view to take would be that such an application can be filed within a reasonable time of the constitution of the Tribunal, which ordinarily and generally would be the time of limitation mentioned in sub-section (3). If the application could not be made within that time from the date of the constitution of the Tribunal, in a given case, the further time taken in the making of the application may be held to be the reasonable time on the facts of that case for the making of the application or the delay made after the expiry of the period of limitation provided in subsection (3) from the date of the constitution of the Tribunal can be condoned under the proviso to that sub-section. In any view of the matter, in our opinion, the jurisdiction of the Civil Court is ousted as soon as the Claims Tribunal is constituted and the filing of the application before the Tribunal is the only remedy available to the claimant. On the facts of this case, we hold that the remedy available to the respondents was to go before the Claims Tribunal and since the law was not very clear on the point, the time of about four months taken in approaching the Tribunal after its constitution can be held to be either a reasonable time or the delay of less than 2 months could well be condoned under the proviso to sub-section (3) of section 110 A.

59. In my considered view, there should be no quarrel about the above proposition but one should equally acknowledge the fact that and it was Central Legislature that had amended a Central Act. So, there was no issue of competency involved. Had the State made new Tenancy Act, 2021 comprehensive enough to amend both the Transfer of Properties Act, 1882 and Provincial Small

Cause Courts Act, 1887 with presidential assent, in their application to the State of U.P. with the Presidential assent the Amendment Act 1972, which had the presidential assent would have stood repealed. So, this judgment does not address the issue involved in the present case and hence would be of no help to Mr. Tandon.

60. In the case of **M/s Gamon India Ltd. Special Chief Secretary and Others, 2006(2) Supreme 454**, Mr. Tandon has relied upon paragraph 45, 46 and 47 to assert that saving clause (section 46 of the new Tenancy Act) deliberately did not save Small Causes suits and Small Causes Revisions. Paragraphs 45, 46 and 47 of this judgment are reproduced hereunder:

45. *A Seven Judge Bench of this Court by majority laid down in Keshavan Madhava Menon vs. The State of Bombay, (1951) SCR 228, that the Court was concerned with the legality of the prosecution of the appellant for contravention of the Indian Press (Emergency Powers) Act, 1931. The offence had been committed before the Constitution came into force and a prosecution launched earlier was pending after January 26, 1950. The enactment which created the offence was held to be void under Article 19(1)(a) read with Article 13 as being inconsistent with one of the Fundamental rights guaranteed by Part III of the Constitution. In the circumstances, the point that was debated before this Court was whether the prosecution could be continued after the enactment became void. In this case, the Court by a majority judgment held that the Constitution was prospective in its operation and that Art. 13(1) would not affect the validity of these proceedings commenced under pre-*

Constitution laws which were valid up to the date of the Constitution coming into force, for to hold that the validity of these proceedings were affected would in effect be treating the Constitution as retrospective. Therefore, it was considered that there was no legal objection to the continuance of the prosecution.

46. *The controversy in issue was dealt with comprehensively with meticulous precision by a Constitution Bench of this Court in State of Punjab vs. Mohar Singh (1955) 1 SCR 893. Respondent Mohar Singh filed a claim as an evacuee under the East Punjab Refugees (Registration of Land Claims) Act, 1948. The claim was investigated into and it was found to be false; it was held to be an offence under the Act. At the trial, on his confession, the respondent was convicted and sentenced to imprisonment. On suo motu revision, the District Magistrate found the sentence to be inadequate and referred the case to the High Court. The High Court found that since the ordinance was repealed, he could not be convicted under Section 7 of the Act. This Court, on appeal, reversed the decision and upheld the conviction applying Section 6 of the General Clauses Act.*

47. *The principle which has been laid down in this case is that whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purposes of determining whether they indicate a different intention. The line of enquiry would be, not whether the new*

Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore, subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section.”
(emphasis added)

61. Learned Advocate has tried to put emphasis upon words and expression “unless a different intention appears” used in paragraph 47 highlighted above, argued that when the legislature was placing saving Clause 46 under the new Tenancy Act, 2021, it consciously avoided to mention SCC Suits and Revisions and thus intendment of legislature reflected is that such suits and revisions would abate.

62. Advancing the argument of his interpretation of the saving clause and thereby by drawing intendment of legislature as he places, Mr. Tandon asserted that for taking the language of the statutory provision in its simple and plain form as they have been put in by the legislature.

63. On the point of Rule of construction Mr. Tandon has relied upon the judgment in the case of **Sri Jeyaram Educational Trust and Others v. A.G.Syed Mohideen and Others**, AIR 2010 SC 671, in which vide paragraph 6 the Court has held thus:

“6. It is now well settled that a provision of a statute should have to be read as it is, in a natural manner, plain and straight, without adding, substituting or

omitting any words. While doing so, the words used in the provision should be assigned and ascribed their natural, ordinary or popular meaning. Only when such plain and straight reading, or ascribing the natural and normal meaning to the words on such reading, leads to ambiguity, vagueness, uncertainty, or absurdity which were not obviously intended by the Legislature or the Lawmaker, a court should open its interpretation tool kit containing the settled rules of construction and interpretation, to arrive at the true meaning of the provision. While using the tools of interpretation, the court should remember that it is not the author of the Statute who is empowered to amend, substitute or delete, so as to change the structure and contents. A court as an interpreter cannot alter or amend the law. It can only interpret the provision, to make it meaningful and workable so as to achieve the legislative object, when there is vagueness, ambiguity or absurdity. The purpose of interpretation is not to make a provision what the Judge thinks it should be, but to make it what the legislature intended it to be.”

64. Relying upon the aforesaid, Mr. Tandon submits that the relevant provisions that are in issue here in the case of new Tenancy Act, if taken in their plain and simple language the words “civil court” or “appeal before any other court” and of course such proceedings “under any law” would denote the proceeding before civil courts and appeal arising out of that. The words “any law” would denote the law that then prevailed/enforced. He thus, argues that SCC Suits and Revisions having not been expressly saved by the legislature, would mean that such suits and revisions would not any more continue and would abate.

65. Sri Ashish Kumar Singh and Sri Saurabh Srivastava, learned Advocates both have termed the interpretation placed above by Mr. Tandon to draw intendment of legislature, to be highly misplaced one. They argued that while upon rule of interpretation, there was no dispute but by borrowing that Rule to interpret the provisions of Tenancy Act, 2021 subject to scrutiny of this Court, the conclusion as sought to be drawn by Mr. Tandon cannot be supported. They argued that Mr. Tandon had developed a notion that since Tenancy Act dealt with the land lord- tenant relationship and had repealed the Old Rent Control Act, it would automatically become an exhaustive code and, therefore, the words and expression “any other law time being enforce” occurring in Section 42 would include all laws relating to subject matter.

66. Mr. Singh, to be specific has placed reliance upon judgment of this Court in the case of **Ram Gopal and Others v Hari Shankar, 1985 SCC OnLine All 132** and placed paragraph 15 and 16 of the said judgment that run as under:

“15. The rule of construction is to intend the Legislature to have meant what they have actually expressed. The object of all interpretation is to discover the intention of Parliament “but the intention of Parliament must be deducted from the language used”. The primary or literal construction according to Maxwell: Interpretation of Statutes (12th Edition) 29 implies that:—

“Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. “The decision in this case,” said Lord Morris of Borth-y-Gest in revenue case,

“Calls for a full and fair application of particular statutory language to particular facts as found. The desirability or the undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision”. Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the court as to what is just and expedient: words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reasons appears why they should not be embraced or excluded. The duty of the court is to expound the law as it stands, and to “leave the remedy (if one be resolved upon) to others”.

16. With regard to what is meant by the expression, “the plain meaning of the words of a Statute”, it is necessary on all occasions to give the Legislature credit for employing these words which will express its meaning more clearly than any other words”. The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Act themselves. If the words of the Statute are themselves precise and unambiguous, then no more can be necessary than to expound these words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver”. Graies on Statute Law, 7th Edition (1971) at p. 64-65.”

67. I have very carefully examined all sections of new Tenancy Act, 2021 and especially Sections 38, 42 and 46 and also sections of old Rent Control Act including

its Section 20 and have also gone through the authorities cited above and paragraphs thereof extracted hereinabove:

68. Firstly, Rule of Interpretation is placed by counsel appearing for the respective parties is not an issue and there could be no two opinions about that as well.

69. The Rule of literal construction of provision in an enactment is a well established rule on the principle that one should adhere as close as possible to literal meaning of the words used. This being cardinal Rule of Interpretation one should not ordinarily make any departure from this rule in a zeal to draw in a larger spectrum in its application as to the scope of the provision. “ *The cardinal rule of construction of statutes is to read the statutes literally, that is, by giving to the words their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning, the court may adopt the same. But if no such alternative construction is possible, the court must adopt the ordinary rule of literal interpretation.* (S.R.Das J: Jugalkishore Saraf v. Raw Cotton Co. Ltd AIR 1955 SC 376 p. 381).

70. Sri G.P.Singh in his treatise “**Statutory Interpretation**” incorporating Rule of construction has quoted justice Frank Furter on rule constitution and writes “*Thus the justification of the rule that the words are to be understood in their natural, ordinary or popular sense is well expressed by Justice FRANK FURTER: “After all legislation when not expressed in technical terms is addressed to common run (sic) of men and is therefore to be understood according to sense of the thing, as the ordinary man has a right*

to rely on ordinary words addressed. In determining, therefore, whether a particular import is included within the ordinary meaning of a given word, one may have regard to the answer which every one conversant with the word and the subject-matter of statute and to whom the legislation is addressed, will give if the problem were put to him. (14th Edition p. 113)

71. Emphasising upon preference to exact meaning than a loose meaning, he writes “ *there is presumption that words are used in Act of Parliament correctly and exactly and not loosely and inexactly In ascribing to the word ‘contiguous’ its exact meaning i.e., ‘touching’ in preference to its loose meaning i.e. ‘neighbouring’, LORD HEWART, C.J., stated: “It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broke, the burden of establishing their proposition lies heavily, and they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred. (14th Edition pp. 115)”*

72. However, it is a question to be answered as to how with the above aid of rule of the construction, one can interpret Section 46 of new Tenancy act, 2021 to have not saved SCC suits and Revisions and so in view of sections 38 and 42, the suits would fall under a repeal Act and that Rent Authority and Tribunal as conceived of under the new Tenancy Act, 2021 would be only forums and as such suits and revisions would abate and so must not continue any longer. Here, it is necessary first to refer to Section 6 of General Clauses Act, 1897.

"6 Effect of repeal. Where this Act, or any 1 [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not.

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

(emphasis added)

73. So applying above section 6, the pending SCC suits and revisions would stand saved unless and until it is held that Section 46 expressly abates such suits and revisions even though having not referred to them, to wit, intention appears to be so.

74. In **M/s Gamon India Ltd.** (*supra*), the Supreme Court referred to an earlier judgment in the case of *Brihan Maharashtra Sugar Syndicate v. Janardan* AIR, 1960 SC 794, that interpreted Section

6 and held vide paragraph 48, 49 and 50 thus:

48. In the case of *Brihan Maharashtra Sugar Syndicate v. Janardan* AIR 1960 SC 794, it was observed as under:

" Section 6 of the General Clauses Act provides that where an Act is repealed, then, unless a different intention appears, the repeal shall not affect any right or liability acquired or incurred under the repealed enactment or any legal proceeding in respect of such right or liability and the legal proceeding may be continued as if the repealing Act had not been passed. There is no dispute that Section 153- C of the Act of 1913 gave certain rights to the share-holders of a company and put the company as also its directors and managing agents under certain liabilities. The application under that section was for enforcement of these rights and liabilities. Section 6 of the General Clauses Act would therefore preserve the rights and liabilities created by Section 153-C of the Act of 1913 and a continuance of the proceeding in respect thereof would be competent in spite of the repeal of the Act of 1913, unless of course a different intention could be gathered."

49. A Constitution Bench of this Court in *State of Orissa v. M.A. Tulloch and Co.*, (1963) 4 SCR 461, also had an occasion to examine the controversy regarding repeal of the Act. The submission in this case was that the supersession of the Orissa Act by the Central Act was neither more nor less than a repeal. The reference was made to Section 6 of the General Clauses Act, 1897 which has been reproduced (*supra*). In the said case, the submission was that the interpretation of the Section was two-fold: (1) the word 'repeal' used in the opening paragraph was

not confined to express repeal but that the word was comprehensive enough to include cases of implied repeals; (2) it was submitted that if the expression 'repeal' in Section 6(b) be deduced as being confined to express repeals, still the principle underlying Section 6 was of general application and capable of being attracted to cases of implied repeals also.

50. In *M.A. Tulloch's case* (*supra*), the Court aptly observed that we have to inquire the principle on which the saving clause in Section 6 is based. It is manifest that every later enactment which supersedes an earlier one or puts an end to an earlier state of the law is presumed to intend the continuance of rights accrued and liabilities incurred under the superseded enactment unless there were sufficient indications - express or implied - in the later enactment designed to completely obliterate the earlier state of the law.

75. Section 42 of new Tenancy Act, 2021 could have been read to mean that Amendment Act, 1972 having not been saved, it stood repealed but the issue is of competency of legislature. The State legislature is competent to repeal an Act having presidential assent by enacting a provision with presidential assent but it is not a case here.

76. Legislative competence of the State has to be read down in the spirit of legislative scheme provided under the Constitution and the subject matter provided for in the entries in different lists of the seventh schedule of the Constitution.

77. Law of "implied repeal" would be applied provided the method and manner in which a thing is required under the constitution is done in that manner alone.

Here it is a case where Central Legislature's competency in enacting Transfer of Property Act, 1882 and the Provincial Small Causes Courts Act, 1887 is not an issue and they have continued to operate in the field since prior to constitution and are saved by virtue of Article 272 of the Constitution and so also Amendment Act of 1972 has been brought into force with the assent of the President of India by the State of U.P. making modification to the Small Causes Courts Act. The provisions so incorporated in its application to the State of U.P. would equally continue to apply and new Tenancy Act, 2021 would not be competent enough to encroach upon that field and if it encroaches then to that extent it would be repugnant. Whether there is mention or no mention of Small Cause suits and revisions under Section 46, such suits and revisions would continue at the prescribed forums. Any other interpretation to draw in intendment of legislature as argued by Mr. Tandon that such suits and revisions would abate not only would amount to reading something not provided but would also be contrary to the provisions as contained under Sub-Article 2 of Article 254 of the Constitution and thereby eroding the principle of relationship between Central and State legislature as conceptualized in our constitution.

78. As I have already discussed above small causes courts are special courts constituted under the PSCC Act, 1887 which is a central Act and state amendments brought into it for its application vide presidential assent in modified form, would continue to be in force in their application to the State until such state amendments are repealed with presidential assent. The Amendment Act, 1972 stands saved by virtue provisions

contained under sub-article (2) of Article 254 of the constitution. Article 254 is reproduced hereunder:

“(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

*(2) Where a law made by the Legislature of a State[***] with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:*

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.”

79. Looking at and examining all the provisions of the new Tenancy Act, 2021, I find that in the entire regime of the Act the written tenancy agreement has been made the only recognized mode of tenancy except for eleven months tenancy and even the old tenancies are made to survive but for written agreement. The Legislature in

its wisdom seems to have given go by to unwritten tenancy agreements but no mechanism was laid down to meet claims arising out of such tenancy, possibly because the SCC suits were taken to be still maintainable as Amendment Act, 1972 was already in force. Thus by no canon of construction Section 38 and 42 can be taken to have made SCC suits not maintainable any further more even in respect of unwritten existing tenancies.

80. While it is true that finding a defect in an enactment a judge should not sit back to find fault with the draftsman and should endeavour for an interpretation to find real intention of the Parliament but then he can not do violence to a provision in the zeal of achieving a law by substituting words or placing words in between the words, moreso when issue is of legislative competence. It was rightly held “we can not aid the Legislature’s defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there (Crawford v. Spooner (1846) Moore PC 1 pp 8,9)”. “It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so (Renula Bose (Smt.) v. Rai Manmathnath Bose, AIR 1945 PC 108, p.110). Similarly it is wrong and dangerous to proceed by substituting some other words for words of the statute (Pinner v. Everett, (1969) 3 All ER 257, p. 259) Speaking briefly the court cannot reframe the legislation for the very good reason that it has no power to legislate (State of Kerala v. Mathai Verghese, (1986) 4 SCC 746. (Statutory Interpretation by Justice G.P.Singh, 14th Edition pp 68,69)

81. So entire scheme of the new Tenancy Act if is minutely scrutinised, the legislative intent appears to be to enact a

comprehensive law embracing every aspect of tenancy law relating to urban buildings viz a viz tenant-landlord relationship referable to entry 18 of the state list of the VIIth schedule of the constitution. However, still certain grey areas have remained unattended and in my view willingly by the lawmakers looking to the existing central enactments.

82. This above view of mine is for rule of harmonious construction in interpreting the provisions of the new Tenancy Act 2021, Amendment Act, 1972 and Transfer of Property Act 1882. The courts while they examine scope and ambit of an enactment must assume that lawmakers have surely held deliberations while enacting law covering a particular field and so also must have given due consideration to the existing law touching the field and if still some areas have been left untouched, the legislative intent to permit interplay of existing law not expressly repealed, must be assumed. This assumption is based on sound principle that wisdom of Parliament is unquestionable and all that courts do is to interpret a provision in synthesis with the other to draw a meaning in context with the object with which the law is enacted. Any interpretation that makes a provision redundant or any over zealous approach to place in a word so as to enlarge the scope of a provision, would amount to substituting court's wisdom to that of law makers and that must be avoided. Courts interpret provisions of an Act to ensure that objectivity with which such law must have been enacted, is not lost and any effort of court beyond that would be intruding the field of legislation which is definitely beyond the competence of law courts.

83. In the present case the literal constructions leads to no apparent absurdity

and therefore, there can be no compelling reason for departing from that golden rule of construction.

84. Thus to sum up on fist question “(a)”, I hold that pending SCC suits and SCC revisions on the date of enforcement of the new Tenancy Act, 2021, shall not abate notwithstanding the provisions as contained under Section 42 of the New Tenancy Act, 2021 as no such intendment can be drawn inasmuch as, Section 6 of General Clauses Act would apply. Still further SCC suits would stand saved as where conceived of under old Rent Control Act, proceedings whereof have been saved under sub section 2 of Section 46 of the new Tenancy Act, 2021.

85. Now coming to the question “(b)”, Sri Srivastava, learned Advocate appearing for the respondent in the leading case, had submitted that the absence of competent legislative enactment to repeal an existing Act, saved under Article 254 (2) of the Constitution, both the Acts would continue to operate in their respective fields.

86. He had argued that since State had enacted a new Tenancy Act, 2021 to apply to the cases covered under the agreement referable to schedule 1 of the said Act , the bar of Section 38 would operate to that extent and argued that in all other matters other matters where tenancy continued without agreement the eviction suit could be filed and so also SCC revisions arising therefrom under the Provincial Small Causes Courts Act, 1887. He had submitted that provisions under the new Tenancy Act relating to old tenancies could not be said to be exhaustive, nor did they provide that any tenancy would stand *void* for non compliance of the provisions. He had

argued that if tenancy was without any agreement in writing and land lord also failed to submit details as per schedule-1 of the new Act, new Act was a silent to meet that eventuality.

87. In such above situation, according to Mr. Srivastava either a civil suit would lie to evict the tenant and such tenancy dispute would stand covered under the Transfer of Property Act to attract Small Cause Suit.

88. Mr. Srivastava submitted that any right if accrued under the Transfer of Property Act, 1882 to a lessee would be enforceable at an appropriate forum and to that extent a provision of new Tenancy Act, 2021 was if found to be inconsistent, it would be liable to be held repugnant and for this repugnancy, the Tenancy Act, 2021 give way to the Central Act already occupying the field.

89. Mr. Srivastava, in support of his argument, relied upon the judgment of the Supreme Court in the case of **State of Tamil Nadu and Another etc. v. Adhiyaman Educational and Research Institute and Others etc.**, 1995 AIR SCW 2179:: (1995) 2 SCR 1075 (SC) and emphasized upon paragraph 15 of the judgment that runs as under:

“15. What emerges from the above discussion is as follows:

[i] The expression "coordination" used in Entry 66 of the Union List of the Seventh Schedule to the Constitution does not merely mean evaluation. It means harmonisation with a view to forge a uniform pattern for a concerted action according to a certain design, scheme or plan of development. It, therefore, includes action not only for removal of disparities in

standards but also for preventing the occurrence of such disparities. It would, therefore, also include power to do all things which are necessary to prevent what would make "coordination" either impossible or difficult. This power is absolute and unconditional and in the absence of any valid compelling reasons, it must be given its full effect according to its plain and express intention.

[ii] To the extent that the State legislation is in conflict with the Central legislation though the former is purported to have been made under Entry 25 of the Concurrent List but in effect encroaches upon legislation including subordinate legislation made by the Centre under Entry 25 of the Concurrent List or to give effect to Entry 66 of the Union List, it would be void and inoperative.

[iii] If there is a conflict between the two legislations, unless the State legislation is saved by the provisions of the main part of clause [2] of Article 254, the State legislation being repugnant to the Central legislation, the same would be inoperative.

[iv] Whether the State law encroaches upon Entry 66 of the Union List or is repugnant to the law made by the Centre under Entry 25 of the Concurrent List, will have to be determined by the examination of the two laws and will depend upon the facts of each case.

*(v)
(vi) ”*

90. Besides the argument *qua* repugnancy, Sri Srivastava also placed the judgment of the Supreme Court in the case of **A.A. Padmanbhan v. State of Kerala and Others**, (2018) 4 SCC 537, which exhaustively covers not only the principle of repugnancy but also deals with doctrine of occupied field and that of “pith and

substance”. He has placed paragraph 32 to 35 that are discussed and referred to by various previous authority of that Court. Paragraph 30 to 35 are reproduced hereunder:

“30. The principles for ascertaining the inconsistency/ repugnancy between two statutes were laid down by this Court in *Deep Chand Vs. State of U.P and others*, AIR 1959 SC 648. K. Subba Rao, J. speaking for the Court stated following in paragraph 29:

“29.....Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:

(1) Whether there is direct conflict between the two provisions;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature and (3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field.”

31. This Court in *State of Kerala and others Vs. Mar Appraem Kuri Company Limited and another*, (2012) 7 SCC 106, in paragraph 47 held that:

“47. The question of repugnancy between parliamentary legislation and State legislation arises in two ways. First, where the legislations, though enacted with respect to matters in their allotted spheres, overlap and conflict. Second, where the two legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, the Parliamentary legislation will predominate, in the first, by virtue of non obstante clause in Article 246 (1); in the second, by reason of Article 254(1).”

There cannot be any dispute to the proposition laid down by this Court to the *State of Kerala case (supra)*.

32. This Court has time and again emphasised that in the event any overlapping is found in two Entries of Seventh Schedule or two legislations, it is the duty of the Court to find out its true intent and purpose and to examine the particular legislation in its pith and substance. In *Kartar Singh Vs. State of Punjab*, (1994) 3 SCC 569, in paragraphs 59 and 60 following has been held:

“59....But before we do so we may briefly indicate the principles that are applied for construing the entries in the legislative lists. It has been laid down that the entries must not be construed in a narrow and pedantic sense and that widest amplitude must be given to the language of these entries. Sometimes the entries in different lists or the same list may be found to overlap or to be in direct conflict with each other. In that event it is the duty of the court to find out its true intent and purpose and to examine the particular legislation in its ‘pith and substance’ to determine whether it fits in one or other of the lists. [See : *Synthetics and Chemicals Ltd. v. State of U.P*; *India Cement Ltd. v. State of T.N.*]

60. This doctrine of ‘pith and substance’ is applied when the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in the various lists i.e. a law dealing with the subject in one list is also touching on a subject in another list. In such a case, what has to be ascertained is the pith and substance of the enactment. On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e. on a matter included in the list belonging to

the other legislature. To say differently, incidental encroachment is not altogether forbidden."

33. In *A.S. Krishna and others Vs. State of Madras*, AIR 1957 SC 297 this Court laid down following in paragraph 10:

"10. This point arose directly for decision before the Privy Council in *Prafulla Kumar Mukherjee v. The Bank of Commerce Ltd.* [1946 74 I.A. 23 There, the question was whether the Bengal Money-Lenders Act, 1940, which limited the amount recoverable by a money-lender for principal and interest on his loans, was valid in so far as it related to promissory notes. Money-lending is within the exclusive competence of the Provincial Legislature under Item 27 of List II, but promissory note is a topic reserved for the center, vide List I, Item 28. It was held by the Privy Council that the pith and substance of the impugned legislation begin money-lending, it was valid notwithstanding that it incidentally encroached on a field of legislation reserve for the center under Enter 28. After quoting its approval the observations of Sir Maurice Gwyer C.J. in *Subrahmanyam Chettiar v. Muttuswami Goundan*, (supra) above quoted, Lord Porter observed :

"Their Lordships agree that this passage correctly describes the grounds on which the rule is founded, and that it applies to Indian as well as to Dominion legislation.

No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars, and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provision should be attributed and those which are merely

incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two, or even by arranging for a hierarchy of jurisdictions. Subjects must still overlap, and where they do, the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, must beneficent legislation would be satisfied at birth, and many of the subjects entrusted to Provincial legislation could never effectively be dealt with."...

34. Further in *Union of India and others Vs. Shah Goverdhan L. Kabra Teachers' College*, (2002) 8 SCC 228 in paragraph 7 following was laid down:

"7. It is further a well-settled principle that entries in the different lists should be read together without giving a narrow meaning to any of them. Power of Parliament as well as the State Legislature are expressed in precise and definite terms. While an entry is to be given its widest meaning but it cannot be so interpreted as to override another entry or make another entry meaningless and in case of an apparent conflict between different entries, it is the duty of the court to reconcile them. When it appears to the court that there is apparent overlapping between the two entries the doctrine of "pith and substance" has to be applied to find out the true nature of a legislation and the entry within which it would fall. In case of conflict between entries in List I and List II, the same has to be decided by application of the principle of "pith and substance". The doctrine of "pith and substance" means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature which enacted it, it cannot be held to be invalid, merely because it incidentally

encroaches on matters assigned to another legislature. When a law is impugned as being ultra vires of the legislative competence, what is required to be ascertained is the true character of the legislation. If on such an examination it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid in its entirety even though it might incidentally trench on matters which are beyond its competence. In order to examine the true character of the enactment, the entire Act, its object, scope and effect, is required to be gone into. The question of invasion into the territory of another legislation is to be determined not by degree but by substance. The doctrine of "pith and substance" has to be applied not only in cases of conflict between the powers of two legislatures but in any case where the question arises whether a legislation is covered by particular legislative power in exercise of which it is purported to be made."

35. Even if it is assumed that, in working of two legislations which pertain to different subject matters, there is an incidental encroachment in respect of small area of operation of two legislations, it cannot be held that one legislation overrides the other. When we look into the pith and substance of both the legislations, i.e., Act, 1958 and Act, 2013, it is clear that they operate in different fields and it cannot be said that Act, 1958 is repugnant to Act, 2013. It is also relevant to note that under Section 15(2) it is provided that where any school has vested in the Government under sub-section (1), compensation shall be paid to the persons entitled thereto on the basis of the market value thereof as on the date of the notification.

(emphasis added)

91. Yet another judgment of the Supreme Court in the case of **Transcore v.**

Union of India and Another, (2008) 1 SCC 125 had been placed by Srivastava to develop an argument that both the forum can simultaneously be utilized and may be an existing forum on the date of enforcement of new Tenancy Act, 2021 loses its significance with the passage of time and existing provisions that governed the filed become obsolete or redundant.

92. He had argued that since the new Tenancy Act, 2021 vide Section 4 provided that there can be tenancy except the one in writing as per first schedule, they saved old tenancies under Section 4(3) of the said Act and these old tenancies would be an extinct specie with passage of time. So, according to Mr. Srivastava every dispute would be referable to Section 21-22 and both the Provincial Small Causes Courts Act, 1887 and Transfer of Property Act in their application to buildings covered under the Tenancy Act, 2022 would become obsolete law.

93. Sri A.K.Singh, learned Advocate while argued that month to month tenancy was not covered under the new Tenancy Act as there would be no written agreement as per schedule 1. Section 38 would not be sufficient enough to encompass within it such tenancy disputes. He had further argued that only civil suit being barred, SCC suit would stand automatically exempted from the rigors of Section 38 of the new Tenancy Act, 2021.

94. Sri Singh had also adopted the argument advanced by Mr. Srivastava on point no. (b).

95. Basically Mr. Srivastava and Mr. Singh had sought to draw in doctrine of election to choose a forum of the two available. Again, I have carefully examined

the relevant provisions of new Tenancy Act, 2021 and have gone through the authorities that were cited and placed before me by the learned Advocate.

96. In earlier part of this judgment, I have already referred to scope and ambit of the provisions of the new Tenancy Act, 2021 with reference to individual sections therein and I have also discussed the tenancy agreement referable to Section 4 of the new Act. During discussion in respect of point no. (a) above, I found, while 11 months unwritten agreement tenancy was conceived under the new Act but the remedial aspects so as to enable land lord to seek eviction of tenant had not been touched by the legislature. Section 38(2) defines jurisdiction of Rent Authority and limits it to dispute relating to tenancy agreement submitted to it as specified in the first schedule. First schedule agreements are there that create tenancy after new Tenancy Act has come into existence and also the written tenancy agreements that were in existence when the new Act came into force, provided such agreements were submitted to the Rent Authority as per Section 4(3) of the new Act. The word “tenant” though includes old tenant at the time of enforcement of the new Act vide Section 2(j) but only for agreement in writing as per Rule 4 (3) and if there is no agreement in writing as per Rule 4(3), such tenant can be evicted only in one condition that is where land lord has submitted details as per first schedule but tenant has failed to discharge his part of obligation vide proviso to Section 4(3) of the new Tenancy Act. However, if land lord also fails and so also the tenant to comply with Section 4(3), no eviction of tenant has been provided for.

97. Thus the tenant has a narrow escape as noticed above and that is

sufficient for him but the land lord cannot be left remediless. So if section 21 of the new Tenancy Act is found to be unworkable, a SCC suit would be the only remedy available. Section 21(2)(j) which provides for land lord to apply for eviction “*where the tenancy stands determined by efflux of time*” would be referable to such tenancy that are by written agreements and such agreements expired or 11 months unwritten agreement tenancy and would not apply to tenancies, not conceptualized under Section 4 but are in existence

98. The judgment cited by Mr. Srivastava in Transcore case (*supra*) related to issue therein *qua* proceedings instituted under the Debt Recovery Tribunal Act, 1993 in the face of the fact that Section 13 of the subsequent Act, namely, Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 empowered the financial institution to directly take action in cases where loan account got rendered NPA (Non Performing Assets Account). The argument in the said case was that Debt Recover Tribunal Act, 1993 was complete code for recovery of Debt and 2002 Act vide Section 13(4) empowered the bank to enforce measures against defaulting borrower to recover the amount. So the issue arose, whether there would be parallel proceedings with parallel remedies provided under the two Acts. Vide paragraph 37 of the said judgment, the Court framed following three issues.

“37 Points for determination:

Three points arise for determination in these cases. They are as follows:

(i) *Whether the banks or financial institutions having elected to seek their remedy in terms of DRT Act, 1993 can still*

invoke the NPA Act, 2002 for realizing the secured assets without withdrawing or abandoning the O.A. filed before the DRT under the DRT Act.

(ii) Whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.

(iii) Whether ad valorem court fee prescribed under Rule 7 of the DRT (Procedure) Rules, 1993 is payable on an application under Section 17(1) of the NPA Act in the absence of any rule framed under the said Act. “

99. In my considered view, point no. 1 is the only point referable herein for the argument advanced by learned counsel for the respondent in counter to what was argued by Mr. Tandon. Rejecting the argument in the first instance that both the Acts contemplated parallel proceedings, the Court vide paragraph 63 held thus:

Therefore, when Section 13(4) talks about taking possession of the secured assets or management of the business of the borrower, it is because a right is created by the borrower in favour of the bank/ FI when he takes a loan secured by pledge, hypothecation, mortgage or charge. For example, when a company takes a loan and pledges its financial asset, it is the duty of that company to see that the margin between what the company borrows and the extent to which the loan is covered by the value of the financial asset hypothecated is retained. If the borrower company does not repay, becomes a defaulter and does not keep up the value of the financial asset which depletes then the borrower fails in its obligation which results in a mis- match between the asset and the liability in the books of the bank/ FI. Therefore, Sections 5 and 9

*talks of acquisition of the secured interest so that the balance sheet of the bank/ FI remains clean. Same applies to immovable property charged or mortgaged to the bank/ FI. These are some of the factors which the Authorised Officer of the bank/ FI has to keep in mind when he gives notice under Section 13(2) of the NPA Act. Hence, equity, exists in the bank/FI and not in the borrower. Therefore, apart from obligation to repay, the borrower undertakes to keep the margin and the value of the securities hypothecated so that there is no mis-match between the asset-liability in the books of the bank/FI. This obligation is different and distinct from the obligation to repay. It is the former obligation of the borrower which attracts the provisions of NPA Act which seeks to enforce it by measures mentioned in Section 13(4) of NPA Act, which measures are not contemplated by **DRT Act** and, therefore, it is wrong to say that the two Acts provide parallel remedies as held by the judgment of the High Court in **M/s Kalyani Sales Co.**. As stated, the remedy under DRT Act falls short as compared to NPA Act which refers to acquisition and assignment of the receivables to the asset reconstruction company and which authorizes banks/ FIs. to take possession or to take over management which is not there in the DRT Act. It is for this reason that NPA Act is treated as an additional remedy (Section 37) , which is not inconsistent with the DRT Act.*

(emphasis added)

100. The Court also rejected the argument of any application of doctrine of election in respect of the two Acts providing two remedies, vide paragraph 64 which runs as under:

“In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more

remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American Jurisprudence, 2d, Vol. 25, page 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Equity (Thirty-first Edition, page 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application. “

(emphasis added)

101. Thereafter, the Court discussed various provisos of the two Acts and provisions as contained under Section 23 of the Code of Civil Procedure, 1908 and finally concluded that it was not necessary to first get the OA pending before Debt Recovery Tribunal withdrawn while pursuing remedy by the bank / financial institution under 2002 Act. Thus, two Acts having not been held to be complementary to each other as the Court has held that the scope of operation of 93 Act was to a certain extent. This judgment does not help the learned advocates in developing their argument that provisions may be continued for there being parallel remedies and doctrine of election should be made to apply.

102. Entry 6 of the concurrent list provides for Transfer of Property other than agricultural land. It means Central

Legislature is competent to enact law on this subject and a lease of immovable property for possession and occupation for agreed rent should not be an exception. Section 105 to 108 of Transfer of Property Act, 1882 are relevant here and so are reproduced hereunder:

105. Lease defined.—A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.—The transferor is called the lessor; the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

[106. Duration of certain leases in absence of written contract or local usage.—(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls

short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.]

107. Leases how made.— *A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.*

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

[Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:]

*Provided that the State Government may, (***) from time to time, by notification in the Official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.]*

108. Rights and liabilities of lessor and lessee.— *In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are*

subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—

(A) Rights and liabilities of the lessor

(a) the lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover:

(b) the lessor is bound on the lessee's request to put him in possession of the property:

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption. The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested;

(B) Rights and liabilities of the lessee

(d) if during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease:

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and 39 permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to

avail himself of the benefit of this provision:

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor:

(g) if the lessor neglects to make any payment which he is bound to make, and which if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor:

(h) the lessee may 1[even after the determination of the lease] remove, at any time 2[whilst he is in possession of the property leased but not afterwards,] all things which he has attached to the earth: provided he leaves the property in the state in which he received it:

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them:

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease:

nothing in this clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue,

or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee:

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest:

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf:

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such

defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left:

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor:

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it

was leased, or fell I[or sell] timber, pull down or damage buildings I[belonging to the lessor or] work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto:

(p) he must not, without the lessor's consent, correct on the property any permanent structure, except for agricultural purposes:

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property."

103. Upon bare reading of the above provisions, I find that Transfer of Property Act No. 1882 defines lease vide Section 105 and refers to duration of lease, rights and obligations vide Section 106 and 108, but both these Sections save contracts, operation of local law and usage. Section 107 provides how lease could be made. It refers to oral agreement if accompanied by delivery of possession, such contracts once stand saved under Section 107, in my considered view would not be rendered bad just for there being no agreement in writing and so right and obligation under Section 108 would be enforceable .

104. Entry 18 of the State list provides for States to make law related to land tenures including relationship of landlord and tenant. This being subject matter in the State list and it is the State that enacts laws relating to that, it would not be said to be in conflict with any power of Central Legislature but of course in the areas not covered under the Central Act.

105. The new Tenancy Act, 2021 having not covered the unwritten tenancies and rights and obligations in respect thereof, the existing law under the Transfer of Property Act, 1882 and the forum of

SCC Suits, even in respect of buildings situate in areas covered under the Tenancy Act, 2021, therefore shall apply.

106. In my considered view when entry 18 of the State list provides for the State to enact law in matters of land tenure including land lord - tenants relationship, this power is exclusive to that extent, moreso in the face of the fact that contracts, local laws and usages have been saved under Section 105 and 108 of Transfer of Property Act in matters of Rent leases/ agreements. The Transfer of Property Act is pre-constitutional law saved under Article 272 and so power of State under entry 18 of the State list stands only protected to the extent of consistency. However, the areas of rent agreement that are left untouched in the State enactment, the Central Act would continue to prevail as per the constitutional scheme.

107. To sum up on question "(b)" I am of the view and so hold that Small Cause Suits would still be maintainable in cases of tenancies not covered under Section 4 and relating to rights accrued, if any under the Transfer Property Act, 1882 where a tenancy is unwritten, and a tenancy is on month to month basis. Overriding effect of Section 42 will give way to the Central Act, and there could be no doubt about that if the Central Act has occupied the field to certain extent. .

108. In view of above, I decline to interfere with the order impugned in SCC Revision No. 158 of 2022, however since suit is of the oldest category being of the year, 2009, the revision petition is disposed of with direction to the Judge, Small Causes to expedite hearing of the suit and decide the same within next six months time.

109. In so far as SCC Revision (Def.) No. 48 of 2022 is concerned, the order passed by Judge, Small Causes dated 13.07.2022 passed by District Judge, Saharanpur in Small Cause Suit No. Nil of 2022, impugned in revision petition is hereby set aside and the matter is remitted to be decided afresh by the Judge, Small Cause on the point of maintainability of the suit in the light of this judgment, expeditiously, preferably within three months.

110. Thus both the revision petitions stand disposed of.

111. Cost made easy.

(2023) 7 ILRA 1248
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.07.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR
UPADHYAYA, J
THE HON'BLE OM PRAKASH SHUKLA, J.

Special Appeal Defective No. 430 of 2023

Shailesh Kumar Shukla **...Appellant**
Versus
U.O.I. & Ors. **...Respondents**

Counsel for the Appellant:
Sameer Kalia, Srideep Chatterjee

Counsel for the Respondents:
A.S.G.I.

Service Law - The Central Reserve Police Force Rules/Regulations/Scheme, 1955. - Persons with Disabilities Act 1995 - Central Reserve Police Force, promotion, HIV positive, SHAPE-1 medical category, discrimination, fundamental rights, -Standing Order 04/2008, non-discrimination in employment

The appellant, a Constable in the Central Reserve Police Force (CRPF) challenged the order dated, removing his name from the approved list for promotion to Head Constable due to his HIV-positive status and consequent SHAPE-2 medical categorization. Despite completing the required Section Commander Course (SCC) in 2006 and being promoted to Head Constable, his promotion was cancelled after a 2013 medical examination reclassified him as SHAPE-2 (P-2, physical capacity). The appellant argued that his HIV status did not impair his duties, and the denial of promotion was discriminatory. The Single Judge dismissed his writ petition, finding no illegality in the cancellation. The appellant filed this intra-court appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, alleging violation of his fundamental rights and discriminatory treatment. The special appeal was allowed, the Single Judge's order, was set aside, and the orders denying promotion were quashed. The respondents were directed to grant the appellant promotion benefits from the date his juniors were promoted, with no order as to costs. The delay condonation application was also allowed. The High Court allowed the appeal, set aside the Single Judge's order and quashed the orders denying the appellant's promotion.

The appeal is allowed.

List of Cases referred:

1. Bishamber Dutt Vs U.O.I., 2010 (2) LLR Punjab & Haryana 228
2. SGT Chaman Lal Vs U.O.I., (2018) 14 SCC 455
3. Lieutenant Colonel Nitisha Vs U.O.I., (2021) 15 SCC 125
4. U.O.I. Vs Devendra Kumar Pant, (2009) 14 SCC 546
5. Air Commodore Naveen Jain Vs U.O.I., 2019 (10) SCC 34

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.

&
Hon'ble Om Prakash Shukla, J.)

C.M. Application No. 1 of 2023 :
Application for condonation of delay .

(1) Heard Shri Sameer Kalia and Shri Srideep Chatterjee, learned Counsel representing the appellants and Shri Surya Bhan Pandey, learned Senior Advocate/Deputy Solicitor General of India assisted by Shri Sudhanshu Chauhan, representing the respondents.

(2) Having gone through the averments made in the affidavit filed in support of the application seeking condonation of delay, this Court is satisfied that delay has sufficiently been explained.

(3) The application is, accordingly, **allowed** and delay in filing the special appeal is hereby condoned.

Order on Appeal

(4) The present *intra Court* appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 has been filed by the appellant/writ petitioner whereby the judgment and order dated 24.05.2023 passed by the learned Single Judge in Writ-A No.18903 of 2021 has been sought to be interdicted. Apparently, the appellant is aggrieved by an order dated 17.05.2021 issued by the Inspector General of Police, Central Sector, Central Reserve Police Force, Lucknow, whereby the appellant's name for promotion to the post of Head Constable made on 26.02.2013 has been removed from the approved list A/GD-11/2009 on the ground of him having been found Human Immunodeficiency Virus (hereinafter

referred to as 'HIV') Positive, which according to him was not just, proper and legal. Since, the appellant's proposition did not find any favour with the learned Single Judge, his writ petition (*supra*) was dismissed/rejected and as such the appellant is before us in special appeal.

A. FACTUAL BACKGROUND

(5) The appellant was recruited as a Constable (General Duty-GD) in the Central Reserve Police Force (hereinafter referred as 'CRPF') on 28.08.1993. He was initially allocated to 16th Battalion, Jammu & Kashmir Zone.

(6) The post of Lance Naik and Naik came to be abolished by the respondents on 10.10.1997 and as such any Constable in **CRPF**, if found to be eligible, was directly promoted to the post of Head Constable on or after the said date. The appellant having not been promoted to the said post of Head Constable, even after two decades of service, approached this Court by instituting the writ petition.

(7) It would be pertinent to mention herein that Standing order No. 06/1999 lays down the procedure for promotion for members of the force from the rank of Constable to Head Constable. The promotional course to be undergone is as per Clause-B and sub-Clause 1 says that promotional course of section commander course (SCC) has to be qualified by a member of the force to be eligible for promotion from the rank of constable to the rank of Head Constable. Admittedly, the appellant successfully underwent the said course bearing No. 35 at CTC-3 Nanded in the year 2006.

(8) The appellant, although had completed 13 years of service and also had underwent the aforesaid SCC successfully, however he was not promoted to Head Constable in the year 2006, albeit the Standing Order No. 06/1999 prescribed 8 years of completed service as Constable to be promoted to the post of Head Constable.

(9) Nevertheless, in the year 2006, Standing Order No. 06/2006 was issued laying down the action plan on HIV/AIDS for awareness, prevention, detection, treatment and rehabilitation of the members of the force. However, the provision for medical examination and classification of members of the force is contained in Standing Order No. 04/2008, which invariably lays down the instructions/procedure for carrying out annual medical examination. Further, there also exists an Establishment Manual which provides for various procedures and modalities to be followed with respect to grant of promotion and other conditions of service of the members of the force, wherein it is mandatorily required that in order to be eligible for being considered for inclusion in the approved list for promotion, the medical category should be SHAPE-I.

(10) In the intervening period, on or about 18.02.2008, the appellant was diagnosed with HIV positive and put on Anti-Retroviral therapy (ART) and subsequently on 21.01.2009 was given medical categorization as SHAPE-2. However, in terms of the aforesaid Standing Order No. 04/2008, the appellant was made to undergo annual medical examination in the year 2011, in which he was declared to be in SHAPE-I category and as such his name was brought in the Special Approved List-A/ GD(Male) (11 of 2009) on 04.01.2011 and he was granted

the seniority No. 8545-A, which was communicated to the appellant vide office order dated 14.07.2011.

(11) Apparently, the medical examination of the appellant was again conducted on 04.01.2012, wherein his case was categorized as 'SHAPE-I'. Thereafter, on due consideration along with other eligible candidates, the Deputy Inspector General of Police (Establishment), vide letter dated 26.02.2013, promoted the appellant along with other eligible candidates to the post of Head Constable (General Duty), subject to the condition that all effected personnel ought to be free from vigilance angle and no departmental inquiry, prosecution for criminal charge was pending against them and were not undergoing punishment of withholding of increment and were 'SHAPE-I' as per Standing Order No. 4/2008. The name of the appellant in the aforesaid letter dated 26.02.2013 was at Serial No. 2094. Therefore, the appellant was promoted and posted at 183 Battalion by the order of Deputy Inspector General, South Srinagar dated 06.04.2013.

(12) However, as per the facts of the present case, the appellant was not relived from his duties while working at Amethi and on 17.05.2013, he was made to undergo another annual medical examination wherein on having been found HIV Positive, he was medically categorized in SHAPE-2 (T-24) and was further advised regular treatment for the said ailment. Coincidentally, the grading of SHAPE-2 was acquired on the basis of factor-P i.e physical as '2', whereas the other factors were mentioned as '1' only.

(13) Furthermore, as the appellant was placed in the temporary low medical classification (LMC), he was to undergo Review Medical Examination after 24

weeks as per Para-9 of Standing Order No. 4/2008. Thus, the said review examination was conducted on 17.12.2013, wherein the appellant was again granted medical category of 'SHAPE-2' falling in the category 'P2' under the factor physical capacity. As the appellant was advised to remain under observation beyond permissible period of 24 weeks i.e. 6 months, he was placed in permanent low medical classification and his name was removed from the approved list and as per the rules, it could only be reconsidered for the approved list after expiry of one year from the date of removal of low medical category under sub-clause 6 of clause 11.2 of the CRPF Manual, 1976.

(14) It would be apt to mention here that since the appellant was suffering from HIV, the relevant provisions of Part-IV, clause 22.5(g) of the Standing order No. 04/2008 would also apply to his case, which also gives an insight on the physical endurance of different categories of recruits placed after the AME.

(15) According to the appellant, there was no impediment in granting him promotion to the post of Head Constable as he had been till date performing all his duties attached to his post without any kind of assistance. In the meantime, another Standing Order being No.01/2015 came to be issued in supersession of the earlier Standing Order No. 06/1999 and again the procedure for promotion from the rank of Constable to the rank of Head Constable has been laid down.

(16) In any case, the appellant was again made to face the annual medical examination on 13.04.2019 and was given the medical category of 'SHAPE-2 (P)' on account of being HIV Positive and was advised regular

treatment. It is the case of the appellant that he had been sending several representation to the competent authority to consider his case favorably, as he was promoted to Head Constable when he was placed in medical category of SHAPE-1 earlier. He had also represented before the authorities that about 81 incumbents junior to the appellant had already been promoted from Constable to Head Constable on 13.10.2000 and it was not fair that he continued to be working as Constable for the reason that being HIV positive, could not be the solitary reason for his discrimination. According to him, his medical categorization continued to be SHAPE-2 as is evident from medical examination held on 30.01.2016, 13.04.2019 and 24.06.2021. According to him, clause 4.13 containing restriction of ineligibility of candidates for not being in SHAPE-1 medical category for promotion does not have any rationale nexus with the object sought to be achieved.

(17) It is the case of the appellant that vide order dated 17.05.2021 issued by the respondent, his name was removed from the approved list, namely, A/GD-11/2009 and as such all his avenues to be promoted stands shattered.

(18) Thus, the appellant preferred Writ-A No. 18903 of 2021, wherein vide the impugned order dated 02.05.2023, the learned Single Judge did not find any illegality or perversity or violation of constitutional rights in cancellation of the promotion order of the appellant and as such dismissed the writ petition. It is this order dated 02.05.2023, which has been assailed in the instant *intra Court* appeal.

B. SUBMISSIONS

(19) Learned Counsel for the appellant has contended that the denial of

promotion to the appellant on the solitary ground of being HIV positive is arbitrary and discriminatory as two similarly situated persons, who were recruited and junior to the appellant are working on the post of Assistant Sub-Inspector, whereas the appellant is working on the post of Constable for no fault on his part. According to him, as per the Standing Orders/Circulars/ CRPF Manual, the only requirement for posting of a recruit like the appellant, who suffered from HIV positive is to the place where ART facility is available and not to any difficult and solitary locations. It was argued that the recruits of CRPF are posted throughout the length and breadth of the country including the Metro and Tier-I cities, where ART facility is readily available. Therefore, as the appellant is fit for all duties subject to the aforesaid condition, there is no rationale behind denial of promotion to employees, like the appellant, who are in SHAPE-II category.

(20) Inviting our attention to Clause 4.13 of the Standing Order No. 4/2008, learned Counsel for the appellant has contended that Clause 4.13 of the Standing Order No. 4/2008 is contradictory to Clause 25.5 (g) inasmuch as Clause 4.13 prescribes a restriction with respect to promotion of the incumbents who are not in SHAPE-I medical category, while Clause 25.5 (g) prescribes that incumbents who are SHAPE (P) 2 medical category are fit for all duties. His contention is that Clause 4.13 is irrational for the reason that as an incumbent moves up in hierarchy in the service, the physical endurance required relatively reduces. Moreso, as a Constable, the requirement of physical efficiency of the appellant is much higher than what would be required after he would be promoted on higher positions. Thus, it is

the contention of the appellant that when the respondents have found him fit for the work of Constable, which requires greater physical endurance, it is difficult to understand as in what capacity he would be lacking for the promotion post of Head Constable, which in all circumstances, requires less physical endurance than a Constable.

(21) Learned Counsel for the appellant has further argued that removal of the name of the appellant from the approved list amounts to reversion and infringement of his fundamental and civil rights and which could not have been done without affording the appellant an opportunity of hearing, however, in the instant case, before removing the name of the appellant from the approved list amounting to cancellation of his promotion, no notice of any kind was ever served upon the appellant although he had been regularly promoted vide order dated 26.02.2013.

(22) Learned Counsel for the appellant has urged that it is an admitted case of the respondents that the appellant was found fit in all aspects and was granted promotion to the post of Head Constable and only after his joining at his new place of posting, he was diagnosed as HIV positive. According to him, promotion of the appellant on the post of Head Constable (General Duty) was granted on the basis of evaluation of his work, conduct and medical condition prior to issuance of promotion order and thus, the same cannot be cancelled/rescinded on the basis of his medical condition post issuance of his promotion order.

(23) Learned Counsel for the appellant, thus, has submitted that the

learned Single Judge, while passing the judgment and order appears to have not taken into account the aforesaid aspects of the matter while passing the impugned order, therefore, he prays that the instant special appeal be allowed to meet the ends of justice.

(24) On the other hand, learned Senior Counsel representing the Union of India, has opposed the aforesaid submissions of the learned counsel for the appellant and has argued that the essential eligibility condition for promotion from the post of Constable (General Duty) to Head Constable (General Duty) in CRPF is that the individual should be in the medical category of SHAPE-I. According to him, in the instant case, the appellant falls in the medical category of SHAPE-2 and as such the appellant lacks requisite eligibility of promotion to the post of Head Constable (General Duty). Therefore, the learned Single Judge has rightly dismissed the writ petition.

(25) Learned Senior Counsel representing the Union of India has further submitted that Para-6 of Clause-11.2 of the CRPF Manual provides for review of approved list which provides for annual review and names of persons who failed to keep the required standards of efficiency may be removed from the approved list by the competent authority. According to him, such removal was not to be a permanent bar for the individual for being reconsidered for the approved list, provided that no action is to be initiated before expiry of one year from the date of removal. According to the learned Senior Counsel, one of the mandatory conditions for being considered for promotion from the post of Constable to that of Head Constable as per Clause 11.5 of the CRPF

Manual is that the recruit must be in medical category SHAPE-I, but in the instant case, the appellant does not fulfill this mandatory eligibility condition, hence his promotion was rightly denied by the competent authority.

(26) Placing reliance upon the judgment of the Apex Court in **SGT Chaman Lal Vs. Union of India and others** : (2018) 14 SCC 455, **Lieutenant Colonel Nitisha and others Vs. Union of India and others** : (2021) 15 SCC 125, **Union of India Vs. Devendra Kumar Pant and others** : (2009) 14 SCC 546, and **Air Commodore Naveen Jain Vs. Union of India and others** : 2019 (10) SCC 34, learned Senior Counsel for the Union of India, has assertively argued that the learned Single Judge has rightly dismissed the writ petition by means of the impugned order and has prayed that the impugned order does not merit any interference by this court.

C. RELEVANT ACT/RULES/STANDING ORDERS

(27) We have given our thoughtful consideration to the rival submissions made by the learned counsel for the parties and have also gone through the records available before this Court on this special appeal.

(28) Before proceeding further, it would be worthwhile to take note of some relevant provisions of law, particularly those dealing with the right of the recruit of CRPF seeking promotion to the post of Head Constable (General Duty), as applicable to the subject.

C.1. Central Police Force Act, 1949 & Central Police Force Rules, 1955.

(29) The recruits of the CRPF are governed by the Central Police Force Act, 1949 (hereinafter referred to as ‘**CRPF Act, 1949**’), which *inter alia* provides for constitution and regulation of an armed Central Reserve Police Force. Section 3 of the CRPF Act, 1949 provides for the constitution of the force, which is reproduced as under :-

“3. Constitution of the Force.—

(1) There shall continue to be an armed force maintained by the Central Government and called the Central Reserve Police Force.

(2) The Force shall be constituted in such manner, and the members of the Force shall receive such pay, pension and other remuneration, as may be prescribed.”

(30) Section 8 of the CRPF Act, 1949 vests the superintendence, control and administration of force upon the Central Government. Section 18 of the CRPF Act, 1949 deals with power to make rules, which reads as under :-

“18. Power to make rules.-(1)

The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) regulating the classes and grades of, and the pay, pension and other remuneration of, members of the Force, and their conditions of service in the Force;

(b) regulating the powers and duties of officers authorised to exercise any functions by or under this Act;

(c) fixing the period of service for members of the Force;

(d) regulating the award of minor punishments under section 11, and providing for appeals from, or the revision of, orders under that section, or the remission of fines imposed under that section, and the remission of deductions made under section 13;

(e) regulating the several or collective liability of members of the Force in the case of the loss or theft of weapons and ammunition;

(f) for the disposal of criminal cases arising under this Act and for specifying the prison in which a person convicted in any such case may be confined.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.]”

(31) In exercise of the power conferred upon it by the aforesaid Section 18 of the CRPF Act, 1949, the Central Government has framed rules, namely, Central Reserve Police Force Rules, 1955 (hereinafter referred to as “**CRPF Rules, 1955**”). Chapter IX of the CRPF Rules, 1955 lays down the provisions relating to promotion of the member of force. Rule 55 of CRPF Rules, 1955 provides that all

promotions shall be governed by merit and other things being equal, seniority shall count for promotion. Rule 55 of CRPF Rules, 1955 is reproduced as under :-

**“CHAPTER – IX
RULES FOR PROMOTION
SECTION-I GENERAL PRINCIPLES**

55. Merit: (a) All promotions shall be governed by merit. Other things being equal seniority shall count for promotion. For promotion, a member of the Force must be qualified and recommended by the Commandant, Assistant Commandant or Company Commander as the case may be.

(b) For exceptional reasons the Commandant may promote an unqualified Head Constable to the rank of Sub-Inspector or an unqualified Sub-Inspector to the rank of Subedar(Inspector) with the prior approval of the Deputy Inspector General or Inspector General respectively, provided that such promotions in either case do not exceed ten percent of the sanctioned strength in such ranks.”

(32) Rule 61 of the Rules, 1955 provides for maintenance of list of approved candidates. Rule 62 of Rules, 1955 provides for the procedure for preparing of list of approved candidates. Rule 61 and 62 of the Rules, 1955 are reproduced as under :-

“61. Maintenance of Lists of Approved Candidates: Lists of approved candidates for promotion to various ranks, required to be maintained under sub-rule (b) of rule 62, shall be kept in the office of the Commandant, and promotions shall ordinarily be made from these lists according to the provisions of Rule 55.

62. Preparation of Lists of Approved Candidates: (a) The

Commandant may for special reasons, promote to the next higher rank any qualified candidate whose name is not on the appropriate approved list. In the case of Subedars(Inspectors) and Sub-Inspectors prior approval of the Inspector General and Deputy Inspector General respectively shall be obtained.

(b) Promotions shall be made from among the best men in the Force as whole and for this purpose the Commandant shall maintain separate lists for promotion to different ranks as shown below:-

(1) List 'A' containing names of Constables fit for promotion to the rank of Lance Naik

(2) List 'B' containing names of Lance Naiks suitable for promotion to the rank of Naik.

(3) List 'C' containing names of Naiks suitable for promotion to the rank of Head Constables.

(4) List 'D' containing names of suitable Head Constables for promotion to the rank of Sub-Inspectors.

(5) List 'E' containing names of suitable Sub-Inspectors for promotion to the rank of Subedar(Inspectors).

(c) Ordinarily, only those men shall be considered for inclusion in List 'A' who have passed the prescribed course for Drill instructors and are sufficiently educated to be able to read and write Hindi, Roman and Hindi Numerical. Higher educational qualification is necessary for promotion above the rank of Head Constable, but the normal standard shall be Third Class for promotion from Constable to Lance Naik and Second Class from Naik to Head Constable. A selected for promotion should have initiative, power and leadership the making of an officer. Men on promotion list for Naiks and above shall be on probation for at least one year

and names of those one the list who do not come upto the required standard shall be removed thereof from time to time. Entry of names of lists A, B and C shall be made by the Commandant and lists D and E by the Commandant with the approval of the Deputy Inspector General of Police and Inspector General of Police respectively.”

(33) Rule 67 of the CRPF Rules, 1955 lays down the requisite qualification for promotion to the post of Head Constable, which reads as under :-

“67. Head Constables: Promotions to the rank of Head Constable shall be made by the Commandant according to seniority from the list 'C' referred to in Rule 62 subject to the general provisions of Rule 55 on the recommendations of Company Commanders. The requisite qualification for such promotions are the passing of the Senior Cadre Course and the possession of the Second Class Certificate of Education or a Matriculation or equivalent or higher academic qualification certificate(GSR 527 dated 6.6.1981)”

(34) Perusal of the aforesaid Rule 67 of CRPF Rules, 1955 reveals that promotion to the rank of Head Constable shall be made by the Commandant according to seniority from the list 'C' referred to in Rule 62 subject to general provisions of Rule 55 on the recommendations of Company Commanders. Further, two things have been made mandatory for promoting to the post of Head Constable, the first being passing of the senior cadre course and second being the possession of the second class certificate of education or a matriculation or equivalent or higher academic qualification certificate.

C.2. ESTABLISHMENT MANUAL CRPF, 1976

(35) The Establishment Manual CRPF, 1976 (corrected upto 11.5.2022) was published under the Authority of Government of India, Ministry of Home Affairs, U.O. No. 1390/76-Pers-1, dated 21.04.1976 and subsequent executive orders issued by the Government and Director General, CRPF, from time to time. The criteria of promotion from Constable to Head Constable has been set out in Para-11.5 of the Establishment Manual CRPF, 1976, which reads as under :-

“11.5 APPD LIST-'A' (GD) FOR PROMOTION FROM CT TO HC.

The CTs who fulfill the following conditions will be eligible for being considered for inclusion in Appd List-'A'/GD:-

i) Must have completed minimum five years regular service as Constable including three years in a duty Battalion.

ii) Must have qualified Section Commander Course (SCC)/Head Constable promotional Course (HCPC) or any other course prescribed by the DG, CRPF as per requirement.

iii) Must be in Medical Category SHAPE-1.

iv) Must not have adverse report in Confidential Card in preceding five years.

v) Must not have major punishment in preceding five years.

vi) Must have good record of service.

Constables who fulfill above conditions upto a particular seniority as notified by the Dte.Genl from time to time and found fit by a Selection Board as per Standing Orders on the subject shall be brought on Approved List-'A'(GD) drawn

by DIGP of GC/Principal/Commandant and their particulars forwarded to Dte.Genl, Estt Branch duly consolidated at Range/Sector/Zone Officers. After having arranged the Lists on Force Level seniority, Dte General will circulate it for the information of all concerned and they will be released on promotion as per availability of vacancy.

Note-1 Where juniors who have completed their qualifying or eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying or eligibility service by more than half of such qualifying or eligibility service or two years, whichever is less and have successfully completed their probation period for promotion to the next higher grade alongwith the juniors who have already completed such qualifying eligibility service.

Note-2 For the purpose of computing minimum qualifying service for promotion, the service rendered on a regular basis by an officer prior to the 1 January, 2006, the date from which the revised pay structure based on the sixth Pay Commission recommendations has been extended, shall be deemed to be service rendered in the corresponding scale of pay and grade pay extended based on the recommendations of the commission.

Note-3 Qualitative requirement of field service shall be deemed to have been condoned in the cases of Head Constables who are actively engaged in Central Sports or games by representing the Force at the All India Police Games or who serve as coaches or trainers of teams participating at least at national level or those posted Training Staff in Training Institutions."

C.3. STANDING ORDERS

(36) Rule 4 under Chapter II of CRPF Rules, 1955 deals with the Powers of the

Central Government and Certain Officers of the Force, which reads as under :-

"4. Powers of the Central Government and Certain Officers of the Force:

(a) In all cases not specifically provided, for in these rules, instructions issued from time to time by the Central Government or the Director General or under his directions by the Additional Director General or the Inspector General shall regulate working of the Force. (Substituted vide GSR-784 dtd 8/10/88)

(b) Omitted vide GSR 784 dated 8.10.88

(c) Omitted vide GSR 784 dated 8.10.88"

(37) Pursuant to the power conferred under Section 4 of the CRPF Rules, 1955, Standing Orders have been issued by the competent authority from time to time.

(38) The Director General, CRPF in supersession of earlier Standing Order Nos. 4/79, 3/95 and 1/96 (including all subsequent addendum/amendments) for governing promotions of NG (Executive, Trade and Technical including signal) personnel had issued Standing Order No. 6/99. Clause A of the Standing Order No. 6/99 lays down the eligibility conditions for promotion. Sub-clause (I) of Clause (A) deals with promotion from the post of Constable to the post of Head Constable, which reads as under :-

"(A) (I) Constable to Head Constable :-

a) Must have completed minimum 8 Years service as Ct. from the date of enlistment.

b) Must have qualified in Junior Cadre Course and Section Commander Course.

c) Must not have adverse report in Confidential Card in preceding five years.

d) Must not have major punishment in preceding five years.

e) Service record should be generally good.”

(39) The brief details and eligibility for the promotional courses has been laid down in Clause B of the Standing Order No. 06/1999. Sub-clause (I) of Clause B of the Standing Order No. 06/1999 deals with the promotional course of Section Commander Course (SCC), which is required to be qualified by a member of the force in order to be eligible for promotion from the rank of Constable to the rank of Head Constable. Sub-Clause (I) of Clause (B) of Standing Order No. 06/1999 reads as under :-

“B. Brief Details & Eligibility for the promotional courses

I. From Constable to Head Constable

i) Must have completed seven years’ service as Constable from the date of enlistment.

ii) Must have qualified in JCC

iii) Constables will be detailed for SCC strictly in accordance with their seniority.

iv) SCC of 6 weeks duration will be conducted in Training Institution and if need be by Zone/Sectors/Ranges as per requirement in accordance with the syllabus prescribed by Training Directorate.

v) Note more than three chances shall admissible.

(40) The Director General CRPF has also issued a Standing Order No. 06/2006

on 03.09.2006, laying down the action plan on HIV/AIDS for awareness, prevention, detection, treatment and rehabilitation of the members of the force. Under the caption ‘Management of HIV/AIDS cases’ in the aforesaid Standing Order No. 06/2006, it has been stated as under :-

“As the CRPF is an armed Force and mostly deployed in the disturbed areas across the country. Hence, there is a need to maintain the high standard of physical fitness of the personnel. HIV infection is such a type of problem/disease which decreases the physical stamina of the individual in several stages in a long run. Therefore, there is a need to amend the Standing Order-1/2003 in regards to HIV infection (S/O-1/2003 is under review) so that the new SHAPE SYSTEM could be introduced for medical categorization and invalidation. The following points may also be incorporated in the policy in consultation with Government of India:-

a. Promotion of active participation of affected personnel in all functions.

b. No discrimination in posting/promotion/social activities.

c. Creation of self help group for PLWHA.

d. Enabling the environment for care and support.

e. Care by the family members and others.”

(41) Thereafter, the Director General CRPF has issued Standing Order No. 04/2008 : *Health Care System in Central Para Military Forces-Instructions for Medical Examination and Classification of Personnel in CPMF's* on 15.12.2008 in supersession of Standing Order No. 1/2003. Standing order 04/2008 lays down the instructions/procedure for carrying out

annual medical examination and classification of the combatised officers and other personnel in CRPF. Clause-4 lays down the Annual Medical Examination. Sub-Clause 4.10 of the Standing Order No. 04/2008 lays down the procedure for Annual Medical Examination (AME), which reads as under :-

“4.10 Procedure for AME

a. The individual officer/personnel undergoing AME will ensure availability of his/her original Health card and previous year's AME in proforma 3 duly certified, while reporting for AME. No fresh/new Health card will be opened unless a COI has been conducted and responsibility fixed for loss of the previous health card to the satisfaction of the concerned controlling Officer.

b. The examining Medical Officer Board will endorse the medical categorization on completion of AME. The MO Board will also enter the findings/remarks in a register to be maintained at the unit/Hospital level for record.

c. When ever an individual is already in temporary low medical category (LMC) in any factor of SHAPE system at the time of AME and his re-categorization medical board is due within next 3 months, the AME will be suitably advanced so that both are carried out together. If the gap is 6 months or more, both will be held separately.

d. The medical category in AME will remain valid for one year unless his/her medical category has been changed for reasons of subsequent diseases or injury in that case, the changed grade will prevail till next AME or reclassification if recommended earlier for temporary LMC.

e. Officers on deputation with other Govt/PSUs at Delhi will have their

AME got done at their respective Force CH/Station Hospitals at Delhi. Others, who are away from Delhi will get the same done at the nearest respective CH of any CPF, for which they shall apply in advance through their administrative authorities.

f. The previous year's AME report will be made available to the AMA/Medical board as the case may be, by the unit insist this from the previous unit at the time, the member of the Force is received in the unit on transfer/attachment. In case the report is not received, the unit will demand the same in advance, much before AME before AME.

g. The body weight will be checked as per the chart given in Appendix-E/F. Those found over weight, will be disposed of as per guidelines in Pan-III 23.5(e).”

(42) Clause 4.13 of the aforesaid Standing Order No. 04/2008 says that SHAPE-I is the essential condition for promotion of combatised personnel and in case of personnel whose illness is of permanent nature and who are not SHAPE-I will be declared unfit for promotion, even if, they otherwise attain SHAPE-I. The illness of temporary nature, DPC would grade them as fit for promotion subject after attaining SHAPE-I. Clause 4.13 reads as under :-

“Medical Category SHAPE-I will be an essential condition for promotion of all combatised personnel in all groups/ranks/cadres in the CPMFs. In case of those whose illness is of permanent nature and who are not SHAPE-I, they will be considered for promotion by DPC but will be declared unfit for promotion, even if they at otherwise it for promotion. In case of those personnel, whose illness is of temporary nature, after considering their

cases for promotion along with others, if they are otherwise fit, the DPC will grade them as 'fit for promotion' subject to attaining SHAPE-I medical category. As and when they regain the SHAPE-I medical category, they will be promoted as per recommendations of DPC. But they will not be entitled to back wages. However they will retain their seniority.”

(43) Clause-5 contained in Part-II of the aforesaid Standing Order No. 04/2008 deals with procedure for medical categorization. Clause 5.3 of the aforesaid Standing Order lays down the classification principles for assessing fitness of the members of the force in terms of the code letters SHAPE as under :-

“S- Psychological
H- Hearing
A- Appendages
P- Physical Capacity
E- Eye sight.”

(44) Clause 5.4 of the aforesaid Standing Order lays down that functional capacities of the members of the force would be graded in the scale of 1 to 5 indicating declining functional efficacy and increasing employability limitations. The detailed guidelines with respect to each of the aforesaid functional capacity and employability as per the aforesaid factors (SHAPE) are contained in Part-IV of the aforesaid Standing Order. At this juncture, clause 22.4 contained in Part-IV is relevant, which is reproduced as under :-

“22.4. “P” FACTOR (PHYSICAL CAPACITY)”

This factor shall cover to describe in details about the physical capacity, strength, endurance, mobility, agility and a

person, which might be restricted by Medical/surgical conditions and those which are not covered under actors Concessions are embedded as a function of age under this factor, since stamina and endurance do decrease with ageing process without any obvious pathology being visible.

Numerical Grading	Functional Capacity	Employability limitations
P-1	Has full functional capacity and physical stamina. Minor impairment fully under control, but has full physical stamina	Fit for all duties any where Fit for all duties any where but under medical observation, having no employability restrictions.
P-2	Has moderate physical capacity and stamina. Suffered from constitutional metabolic/infective disease operative procedures, but now well stabilized.	Fit for duties not requiring severe stress. May have restrictions in employability at high altitude (above 2,700 meters/9,000 feet in hilly terrain and extreme cold areas)
P-3	Has major disablement with limited physical capacity and stamina	Fit for sedentary duties not involving undue stress. May have restricted employability as advised by medical authorities such as :- a. To avoid places with high humidity level 75% round the year. b. Have access to specialist services near by. c. To avoid driving/ handling of weapons near water, fire or heavy machinery. d. Restricting physical excess, work in desert/snow bound areas etc. e. Restricting active participation in hoses, counter insurgency operations etc. (excluding staff logistics and allied support duties)
P-4	On Sick/leave on	Temporarily unfit for force

	medical ground in hospital	duties
P-5	Gross limitations on physical capacity and stamina	Permanently unfit for Force Service

(45) Clause 5.5 of the aforesaid Standing Order lays down the functional capacity scale, which reads as under :-

“5.5. Functional Capacity Scale

1. Fit for all duties any where
2. Fit for all duties except with limitations in duties involving severe physical/mental strain. They would also require perfect acuity of vision and hearing.

3. Except S Factor, fit for routine or sedentary duties but have limitations of employability; both job wise and Terrain wise as spelt out in classification against each factor as specified in Part-IV.

4. Temporarily unfit for duties in the force on account of hospitalization/sick leave.

5. Permanently unfit for service for any type in the force.”

(46) Clause-6 of the aforesaid Standing Order says that it is obligatory for the Temporary Low Medical Category to appear before re-classification Medical Board at stipulated time and permanent Low Medical Category is to be revised after two years. Clause-6 of the aforesaid Standing Order reads as under :-

“For individuals placed in temporary LMC it is obligatory for them to appear before the reclassification medical board at the stipulated time as given in the previous medical board proceedings/ medical examination. No early premature review will be allowed in case of any temporary LMC, irrespective of the

duration. In permanent LMC, the individual will be reviewed after two years. However early review can be requested provided, the AMA certifies that the individual's condition has improved materially, along with a technical report on convincing grounds. This has to be recommended by the unit commandant certifying normal performance of the individual and this will be forwarded to the Director (Medical) for granting early review or otherwise.”

(47) Clause-9 says that temporary classification in factor will be permissible for a maximum period of 24 weeks. If an individual requires observation beyond permissible period, he/she will be placed in permanent LMC except in ‘S’ Factor. Opinion given by a Specialist for review in Proforma as per Appendix-D will be valid for a period of three months only.

(48) Clause-15 of the aforesaid Standing Order provides for the appeal against the findings of a medical Board with regard to low medical categorization. Clause-16 and 17 of the aforesaid Standing Order lays down the reclassification of personnel in Low Medical Category, which reads as under :-

15 RECLASSIFICATION OF PERSONNEL IN LMC

When one is placed in a medical category lower than SHAPE-ONE, whether temporary or permanent, it is obligatory on his/her part to appear before a reclassification medical board on time. It is re-emphasized that it is the responsibility of the unit/establishment in which the officer is serving to ensure compliance of this mandatory requirement. It will be ensured by the unit/Commandant/OC that it an individual who is due for such reclassification is not sent on annual

leave/long casual leave temporary out station duty if the board is due. He can be detailed for a course/temporary duty only after taking prior permission from the MO IC of the respective Unit/GC/Composite Hospital in case of SO & ORS and from the Director (Medical) in the case of officers; at least 2 weeks in advance with adequate justification for either postponing the medical board or for holding it the station to which the individual is proceeding on longer attachment duty:

17. When ever a reclassification Medical board/ Examination falls due during the period of AME, the Individual will undergo reclassification first and the fresh medical category will be reflected in the AME when held subsequently. When AME falls due before reclassification both will be held independent of each other and in no circumstances, the date of reclassification medical board will be changed. In case of permanent LMC board, it is to be preponed by 3 months to be held first, followed by the AME.

(49) Clause 22.5 (g) deals with the HIV/AIDS cases, which reads as under :-

Individuals who are only HIV positive but asymptomatic will be categorized P-2 & required to be observed periodically. Those who are HIV positive and symptomatic with or without opportunistic infection (AIDS disease), shall be assessed on their physical/medical condition and placed in P-3 permanent if ambulatory to facilitate continued ARTV, provided that they fully co-operate with management plan. If the disability percentage goes beyond 50%, individual will be placed in P-5

The medical classification for HIV positive personnel will be done as provided below:-

P1	HIV Positive Asymptomatic Not on ART , CD8 Count normal Parameters like Viral load Normal	Fit for all duties anywhere
P2	HIV Positive Weight Loss more than 10% (Above 200 Cells/Microlite) , Count within normal range Total Lymphocyte Count above 1200/mm3 Mucocutaneous Manifestations/minor infections with or without ART	Fit for all duties anywhere except at difficult and solitary locations, preferably where ART facilities are available.
P3	HIV Positive Weight loss more than 10%CD4 Count less than 200 Cells/Microlite Viral load more than 50,000 copies Unexplained chronic, Diarrhea/fever more than 1 month Opportunistic infections :- (1) Pulmonary TB (2) Oral thrush (3) Herpes Zoster more than 1 month (4) Leukoplakia etc. on ART	Fit for sedentary duties only and only at locations were advance medical facilities are available
P4	Hospitalization/leave due to HIV related diseases/AIDS	Temporary UNFIT for Force duties
P5	Unsatisfied response to ART, (CD4 count less than 200 cells/microlitre with ART) HIV wasting syndrome, Disabling Neurological/Psychiatric Problems Disseminated Tuberculosis Poor Physical endurance Malignancies associated with AIDS Functional disability more than 50%	Permanently UNFIT for any type of service, invalidation.

(50) Subsequently, on 12.03.2015, the Director General CRPF has issued Standing Order No. 01/2015 in supersession of Standing Order No. 6/1999, wherein the procedure for promotion of NGO (GD) Executive Personnel (Male) to various ranks from Constable to Head Constable has been laid. Clause 3 (A) of the Standing Order No. 01/2015 lays down the eligibility conditions for promotion from Constable

(GD/PUG/Mali/PTR) to Head Constable, which reads as under :-

**“(A) CONSTABLE
(GD/BUG/MALE/PTR) TO HEAD
CONSTABLE :-**

a) Must have completed minimum 3 years of service as Constable (GD/Bug/Mali/Painter) from the date of enlistment including three years’ service in a duty Bn.

b) Must have qualified Section Commander Course or Head Constable Promotional Course (SCC or HCPC).

c) Service records should be good viz. must not have major punishment and adverse report in Confidential Card (APAR) in preceding five years.

d) Out of last five years grading in Confidential Card (APAR), there must be at least ‘Good’ including the grading of latest year i.e. the year preceding the drawal of Appd. List.

e) Must be in medical category SHAPE-One as per instructions existing on medical SHAPE system.”

D. ANALYSIS

(51) Having noticed above the Act, Rules, Establishment Manual and the Standing Orders issued by the respondents from time to time, this Court is of the view that this Special Appeal has to be decided in its own peculiar facts and circumstances.

(52) It is manifest from the records available on the special appeal that the appellant herein was recruited on the post of Constable (General Duty) on 28.08.1993. Although the appellant had completed 13 years of service and had also successfully underwent the mandatorily required Senior Cadre Course (SCC) in the year 2006 as per Rule 67 of the CRPF Rules, 1955, however

the appellant was not promoted to Head Constable, dehors the Standing Order No. 06/1999, which prescribed merely completion of 8 years of service as Constable to be promoted to the post of Head Constable.

(53) As the facts unfold, it is found that the appellant was diagnosed with HIV Positive and sent for Anti-Retroviral Therapy on 18.02.2008 and was also apparently given medical categorization SHAPE-2 in the year 2009. However his Annual Medical Examination (AME) was conducted in the year 2011 by which he was declared to be in SHAPE-I category. Therefore, considering the nature of the disease and service record of the appellant, his name was brought in the Special Approved List -A/GD (Male) (11 of 2009) and he was also granted Seniority No. 8545-A. Thereafter, vide order dated 26.02.2013, appellant was promoted to the rank of Head Constable (General Duty) and was posted in Jammu & Kashmir Zone, Srinagar Sector.

(54) It is available on record that the appellant belongs to 16th Battalion, Jammu & Kashmir Zone, but has been posted at 93rd Battalion, Lucknow from the year 2008 to January, 2022 and till date he has been posted at Mathura. Thus, the posting of the appellant has been either static or not severe during all these years. Apparently, after promotion order dated 26.02.2013, the appellant was posted at 183 Battalion, however on account of non-relieving from Amethi, the appellant was again sent for Annual Medical Examination on 17.05.2013, wherein he was medically categorized as SHAPE-II (T-24) and advised for regular treatment for the said ailment.

(55) Perusal of the Annual Medical Examination dated 17.05.2013 reveals that the grading of the medical condition of the appellant was S-I, H-I, A-I, P-2, E-I, which

reflects that the appellant was found to lack only 'P' factor relating to physical capacity. However, 'P-2' as contained in Clause 22.4 of Part-IV of the Standing Order No. 04/2008, which deals with procedure for medical categorization, corresponds to **"Fit for duties not requiring severe stress"** in the tabular chart. The said categorization is extracted as follows:

Numerical Grading	Functional Capacity	Employability limitations
P-2	Has moderate physical capacity and stamina. Suffered from constitutional metabolic/infective disease operative procedures, but now well stabilized.	Fit for duties not requiring severe stress. May have restrictions in employability at high altitude (above 2,700 meters/9,000 feet in hilly terrain and extreme cold areas)

(56) The aforesaid grading of medical condition of the appellant indicates that although he has been placed in SHAPE-2, but he is physically fit for duty and the employability limitation indicates that he may have restriction in employability at high altitude.

(57) This Court finds that CRPF was sensitive and alive to the fact that HIV positive recruits could not be treated differently from their other recruits, who did not suffer from this disability as far as promotion and other conditions of the service were concerned. Clause 22.5 (g) of the Standing Order No. 04/2008 deals with the case of HIV/AIDS cases, which invariably says that **"P2" category of HIV Positive recruit would be fit for all duties anywhere except at difficult and solitary locations, preferably where ART facilities are available.** Although, Clause 4.13 and Clause 22.5(g) are borne out of the same Standing Order, however they are

at stark difference, as on the one hand the General Clause 4.13 prescribes a recruit to be in SHAPE-1, whereas the special provisions related to HIV positive says that a personnel having even SHAPE-2 medication conditions is fit for duties.

(58) Further, this Court finds that the Director General CRPF has also issued a Standing Order No. 06/2006 on 03.09.2006, laying down the action plan on HIV/AIDS for awareness, prevention, detection, treatment and rehabilitation of the members of the force. Under the caption 'Management of HIV/AIDS cases' in the aforesaid Standing Order No. 06/2006, it has been specifically stated in Clause (b) that **adequate policy should be made in consultation with the Government of India, so that there is no discrimination in posting/ promotion and social activities of these HIV infected employees.**

(59) Further, it is decipherable from records that the medical category 'P-2' does not in any manner affect the promotional avenue of the person but only prescribes for employability limitations, keeping in mind that promotion is nothing but an incidence of employment. However, Clause 4.13 of the Standing order No. 04/2008 merely prioritizes by saying that medical category SHAPE-1 would be essential condition for promotion of all combatised personnel. The word "Combatised Personnel" is of great significance as the word loosely means personnel who are involved in actual fighting duty, which generally involves handling and using weapons of various types and actual engagement with people causing unrest or disturbing public peace and tranquility. Whereas holders of non-combat posts are those that facilitate the work of the combatants, which include

services like supply, administration, transport, general logistics, intelligence gathering etc. The said Clause 4.13 primarily relates to 'combatised' personnel and it cannot be construed to be applicable to all across the board, keeping in view of Clause 22.5 (g) of the Standing Order No. 04/2008. Further, the said clause itself dilutes the requirement of SHAPE-1, wherein it mentions that in case of personnel whose illness is of permanent nature and who are not SHAPE-I, they will be declared unfit for promotion, even if, they otherwise attain SHAPE-I and most importantly it says, in case the illness is of temporary nature, DPC would grade them as fit for promotion subject to attaining SHAPE-1. Thus, a personnel can go off and come in combatised post as per his medical evaluation. However, in the view of this Court, the said clause does not relate to promotional avenue, especially when there is no similar embargo/restriction in the Act, 1949 or the Rules of 1995 for HIV positive personnel. To the similar effect is clause 11.5 (iii) and clause 11.6 (iii) of the Establishment Manual CRPF 1976, which contain the prescription of ineligibility of candidates not being in SHAPE-1, medical category for being promoted and Clause 3 (A) (e) and Clause 3 (B) (e) of Standing Order of 2015 dated 12.03.2015.

60) This Court cannot be oblivious to the fact that it is common knowledge that once a personnel moves higher up in hierarchy in the service, the requirement of his physical endurance relatively reduces and in that sense it could be well construed that the appellant who is presently performing and is found fit physically for the post of Constable can be always be found fit for a less physically enduring duties of Head Constable. The said analogy has been drawn keeping in mind the

peculiar fact that in the AME of the appellant, only the physical endurance of the appellant has been categorized as 'P-2', whereas all other requirements in SHAPE have been given one (1) and most importantly the said medical conditions has been consistent as can be found from medical examination held on 30.01.2016, 13.04.2019 and 24.06.2021.

(61) Further, this Court is of the view that protection against discrimination is a fundamental right guaranteed to Citizen of India. No one can be discriminated on the basis of his HIV/AIDS status in India. Even the CRPF Standing Orders issued from time to time reverberate their belief to provide equal status and opportunity to these affected personnel. HIV/AIDS patients have a right of equal treatment everywhere and they cannot be denied job opportunity or discriminated in employment matters on the ground of their HIV/AIDS status. Even in case of promotion, the said non-discrimination is echoed in Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act of 1995), which inter-alia states:

“47. Non-discrimination in Government employments -

(i) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service.

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits;

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary

post until suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.”

(62) A perusal of the aforesaid section reveals that sub-section (2) of Section 47 mandates that no promotion shall be denied to a person merely on the ground of his disability.

E. Conclusion

(63) Appellant has relied upon a judgment passed by the Hon’ble Punjab & Haryana High Court in **“Bishamber Dutt Vs Union of India and others”** reported in 2010 (2) LLR Punjab & Haryana 228, wherein a Single Judge of Punjab & Haryana High Court was called upon to decide the issue of promotion of an identically placed personnel of ITBP as that of the appellant herein. The learned. Single Judge in that judgment after recording the various contention as well as the departmental instructions as applicable to ITBP, observed that the policy and the rules provided for continuance of HIV positive personnel in the job of Para Military forces except those falling in unfit category. The learned. Single Judge found in that case that although the petitioner had been detected with HIV positive in the year 1995, he continued to be in service till the passing of the order on 2010 and as

such concluded that there was no reason to deny him the promotion.

(64) In the facts of the present case, this Court does not have even an iota of doubt that the aforesaid judgment has a persuasive effect. The appellant was detected with HIV positive in the year 2008 and he was promoted in the year 2013 and he was reversed from the promotion in 2014 and even today after close to 9 years, the appellant continues to be employed as Constable with the respondents and is in the same medical condition of SHAPE-2. This Court finds that the aforesaid judgment relied upon by the appellant contains a similar chart of physical endurances similar to clause 22.4 of Part-IV of the Standing Order No. 04/2008, which deals with procedure for medical categorization. Since, the appellant has been found fit for duties, this Court also finds no reasons as to why his promotion could not have been granted.

(65) This Court is of the view that since a person, who is otherwise fit, could not be denied employment only on the ground that he or she is HIV positive and this principle also extends to grant of promotion. In any case, a person’s HIV status cannot be a ground for denial of promotion in employment as it would be discriminatory and would violate the principles laid down in Articles 14 (right to equality), 16 (right to non-discrimination in state employment) and 21 (right to life) of the Constitution of India.

(66) As a consequence of the above discussion, while we set-aside the impugned order dated 24.05.2023 passed by the learned Single Judge, it is declared

that the appellant would be entitled to full benefits of promotions as is extended to those who do not suffer from HIV Positive. All the directions and orders impugned in the present case which denied or deprived the appellant the chance or right to occupy the promotional posts are hereby quashed. The respondents are directed to issue consequential orders with effect from the date the appellant's junior(s) were/was promoted.

(67) The appeal is *allowed* in the aforesaid terms.

(68) There shall be no orders as to cost.

(2023) 7 ILRA 1267
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.07.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR
UPADHYAYA, J
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 18675 of 2020

Dinesh Chandra Verma **...Petitioner**
Versus
State of U.P. & Ors. **...Respondent**

Counsel for the Petitioner:
Shireesh Kumar

Counsel for the Respondent:
C.S.C., A.S.G., Gaurav Mehrotra

Service Benefits – Domestic Help Allowance – Entitlement of retired Vice-Chairman, Central Administrative Tribunal (CAT) Rules, 1985 – Rule 15-A - Parity with retired High Court Judges –Mandate is statutory and binding

Rule 15-A of the Central Administrative Tribunal (Salaries and Allowances and Conditions of Service of Chairman, Vice-Chairman and Members) Rules, 1985 provides that the conditions of service and perquisites of the Chairman and Vice-Chairman shall be the same as those of a serving High Court Judge under the High Court Judges (Conditions of Service) Act, 1954 and the High Court Judges (Travelling Allowances) Rules, 1956. Retirement benefits including Domestic Help Allowance fall within the ambit of "pension" under Section 2(gg) of the 1954 Act, which includes not only pecuniary pension but also any retirement benefit. Thus, denial of Domestic Help Allowance to a retired Vice-Chairman of CAT, who earlier served in U.P. District Judiciary and was receiving such allowance post-retirement until 2007, is arbitrary and violative of statutory mandate. Petitioner entitled to Domestic Help Allowance with periodical revision. St. directed to make payment of arrears within two months, without interest.

List of Cases cited:

Devendra Kumar Agarwal Vs U.O.I., 102 (2003) DLT 461

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Om Prakash Shukla, J.)

1. Heard Sri Shireesh Kumar, learned counsel for petitioner, Sri Shailendra Kumar Singh, learned Chief Standing Counsel and Sri Prakhar Mishra for the State-respondents, Sri Gaurav Mehrotra, learned counsel representing the High Court of Judicature at Allahabad and Sri Dev Rishi Kumar, learned counsel for Union of India.

2. Jurisdiction of this Court under Article 226 of the Constitution of India has been invoked by the petitioner, who is a retired Vice Chairman of Central Administrative Tribunal, a statutory

tribunal created under the Administrative Tribunal Act, 1985, to challenge the order dated 26.12.2019, passed by the State Government whereby his representation claiming the benefit of Domestic Help Allowance has been rejected. A further prayer has been made by the petitioner that a direction be issued to the respondents to pay the said allowance in accordance with the provisions contained in the Government Order dated 20.04.1999 with effect from 01.03.2008 along with periodical revisions and arrears with interest at the rate of 12%.

3. The impugned order dated 26.12.2019 rejecting the representation of the petitioner in respect of his claim was passed in compliance of the order dated 03.07.2019 passed by a coordinate Bench of this Court in Writ Petition No.29103 (S/B) of 2017 as corrected vide order dated 31.07.2019.

4. By the said order the coordinate Bench of this Court while setting aside the order dated 09.08.2017 directed the State Government in the Department of Law and Justice to reconsider and decide the claim of the petitioner in the light of Government Order dated 05.04.2007, Office Memorandum dated 21.02.2003 as well as Rule 15-A of the Central Administrative Tribunal (Salaries and Allowances and Conditions of Service of Chairman, Vice-Chairman and Members) Rules, 1985 (hereinafter referred to as 'Rules, 1985').

5. The petitioner has been a Member of district judiciary in the State of U.P. and while working on the post of District Judge, he took voluntary retirement and on selection joined as a Member of Central Administrative Tribunal. He, subsequently, was appointed as Vice-Chairman of the said Tribunal and retired on 22.05.2005 from

the post of Vice-Chairman. Initially, after his retirement, he was paid the Domestic Help Allowance till 31.12.2007, however, for subsequent quarters he was not paid this allowance and accordingly agitated his matter with the authorities. He also invoked the jurisdiction of this Court and instituted writ petition, namely, Writ Petition No. 29103 (S/B) of 2017, which as observed above, was decided with a direction to the State Government in the Department of Law and Justice to reconsider his claim. The said claim has, however, been denied to him by the State Government by passing the order dated 26.12.2019 which is under challenge before us in this writ petition.

6. Rules, 1985 have been framed in exercise of the powers conferred by Section 35 (2) (c) of the Administrative Tribunal Act, 1985 by the Central Government and as such these Rules have binding force being statutory in nature. The said Rules have been framed by the Central Government for regulating the salaries and allowances and conditions of service of the Chairman, Vice-Chairman and Members of the Central Administrative Tribunal. According to Rule 15-A, the conditions of service and other perquisites available to the Chairman and Vice-Chairman of the Central Administrative Tribunal shall be the same as admissible to a serving Judge of a High Court as contained in the High Court Judges (Conditions of Service) Act, 1954 (hereinafter referred to as 'Act, 1954') and High Court Judges (Travelling Allowances) Rules, 1956 (hereinafter referred to as 'Rules, 1956'). Rule 15-A of Rules 1985 is extracted herein below:-

“15-A. Notwithstanding anything contained in Rule 4 to 15 of the said rules, the conditions of service and other perquisites available to the

Chairman and Vice-Chairman of the Central Administrative Tribunal shall be the same as admissible to a serving Judge of a High Court as contained in the High Court Judges (Conditions of Service) Act, 1954 and High Court Judges (Travelling Allowances) Rules, 1956 ”

7. A bare perusal of afore-quoted Rule 15-A of the Rules 1985 makes it abundantly clear that conditions of service and other perquisites to Chairman and Vice-Chairman of Tribunal is to be the same as are admissible to Judges of High Courts in terms of the provisions contained in Act, 1954.

8. The Parliament for the purpose of regulating certain conditions of service of Judges of High Courts has enacted Act, 1954. Section 2 of the said Act contains definition clause and according to section 2 (gg), ‘pension’ has been defined to mean pension of any kind whatsoever payable to or in respect of a Judge and includes any gratuity or other sum or sums so payable by way of death or retirement benefits. Section 2 (gg) of Act 1954 is extracted herein below:-

“2(gg) ‘pension’ means a pension of any kind whatsoever payable to or in respect of a Judge, and includes any gratuity or other sum or sums so payable by way of death or retirement benefits.”

9. Thus, it is clear from a perusal of the definition of the expression ‘pension’ as occurring in Section 2(gg) of Act 1954 that pension does not mean the pension of any kind alone payable in respect of a Judge but it also includes gratuity or other sum or sums payable by way of death or retirement benefits. Thus, if any sum is payable to a Judge of High Court by way of retirement

benefits, such sum will also be included in the definition of the expression ‘pension’.

10. It is not denied at the bar that a High Court Judge after retirement is entitled to the Domestic Help Allowance. As per mandate of Rule 15-A of Rules 1985, the Chairman and Vice-Chairman of the Central Administrative Tribunal are also entitled to perquisites available to a High Court Judge as contained in Act, 1954.

11. Since the definition of the expression ‘pension’ as occurring in Section 2(gg) of Act, 1954 includes any sum payable by way of retirement benefits as well, in our opinion, we have no doubt that in case any retirement benefit is available to a retired High Court Judge, the same shall also be available to the Chairman and Vice-Chairman of the Central Administrative Tribunal.

12. As already observed above, Rule 15-A is statutory in nature and, thus, the said Rule binds all concerned.

13. It is also to be noticed that in Rule 15-A of Rules 1985, the word to be taken note of is “shall” which occurs therein and accordingly it is mandatory. Thus, mandate of Rules 1985 is that the conditions of service and other perquisites as available to a Judge of High Court shall be made available to the Chairman and Vice-Chairman of the Central Administrative Tribunal as well. The very mandatory nature of the language occurring in Rule 15-A makes it obligatory on the part of respondents to make available all the perquisites which, in our opinion, shall include the Domestic Help Allowance as well. The benefit of Domestic Help Allowance is, in fact, a retirement benefit and hence it will be included in the

expression 'pension' as occurring in Section 2(gg) of Act 1954.

14. Apart from the aforesaid discussion, we may also notice certain other facts which strengthen the case of the petitioner.

15. Hon'ble High Court of Judicature at Allahabad vide its letter dated 07.08.2014 as is available in annexure no.11 to the writ petition, has already made a recommendation to grant the claim of the petitioner to the State Government.

16. We may also refer to a judgment of Hon'ble High Court of Delhi in the case of **Mr Devendra Kumar Agarwal vs. Union of India, reported in 102 (2003) DLT 461**. Certain claims were made by the petitioner in the said case, who also had retired as Vice-Chairman of the Central Administrative Tribunal. Hon'ble High Court of Delhi by means of judgment rendered in the said case on 07.11.2002 held that grant of pension in terms of Rule 15-A of Rules 1985 and service conditions have to be applied to the petitioner of the said case and his pension is to be determined in accordance with the Part- III of First Schedule to Act 1954.

17. In compliance of the said judgment of Hon'ble High Court of Delhi, a letter was issued by the Government of India in the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training on 21.02.2003 for implementation of the said judgment dated 07.11.2002. The State Government thereafter vide its office order dated 12.11.2009 has provided the benefit of pension in compliance of judgment of Hon'ble High Court of Delhi and has also

provided the benefit of Domestic Help Allowance to said Sri D.K.Agarwal.

18. It is also to be noticed that Sri D.K.Agarwal prior to appointed as Chairman, had also served the district judiciary in the State of U.P. and he had retired as District Judge.

19. The case of the petitioner herein, thus, stands on the similar footing with that of Sri D.K.Agarwal and accordingly we do not see any reason, whatsoever, as to why the benefits which have been made available to Sri D.K.Agarwal can be denied to the petitioner in this case.

20. As noticed above, the Government of India in its letter dated 21.02.2003 which was issued for ensuring compliance of the judgment of Hon'ble High Court of Delhi, dated 07.11.2002 in the matter of Sri D.K.Agarwal, has requested that pensionary benefits in respect of said Vice-Chairmen of the Central Administrative Tribunal, who prior to his appointment in the Tribunal have held any pensionable post under the Union of India or the State, be revised in the manner provided in Act 1954.

21. For all the aforesaid reasons, we are of the considered opinion that the petitioner is also entitled to Domestic Help Allowance.

22. Coming to the reasons indicated in the order dated 26.12.2019, passed by the State Government whereby the benefit being claimed by the petitioner has been denied, we may notice that the State Government has stated in the said order that in respect of pension the clear provision is not available in Rules 1956,

namely, High Court Judges (Travelling Allowances) Rules, 1956.

23. The reason given in the impugned order further is that since the said Rules 1956 do not make any provision for pensionary benefits/domestic help allowance, as such the petitioner is not entitled to his claim. Another reason assigned by the State Government while passing the impugned order is that on the basis of parity any pensioner can lay any claim only under statutory rules and not otherwise. The aforesaid reasons indicated by the State Government while passing the impugned order dated 26.12.2019 are absolutely untenable and fallacious for the reason that the statutory provision where the petitioner can trace his claim for payment of domestic help allowance is available in Rule 15-A of Rules 1985 which clearly mandates that conditions of service and other perquisites shall be made available to the Chairman and Vice-Chairman of the Central Administrative Tribunal as are admissible to a Judge of a High Court in terms of the provisions contained in Act, 1954. We have already noticed the definition of the expression 'pension' as occurring in Section 2(gg) of Act, 1954 which includes not only pecuniary pension but also other retirement benefits. Accordingly, if any retirement benefits such as benefit of Domestic Help Allowance has been made available to a retired High Court Judge in terms of the provisions contained in Act, 1954, the same shall be made available to a retired Chairman and Vice-Chairman of the Central Administrative Tribunal as well.

24. For the discussion made and reasons given above, we are unable to find ourselves in agreement with the reasons assigned by the State Government while

rejecting the claim of the petitioner by means of the order dated 26.12.2019.

25. Resultantly, the writ petition is **allowed** and the impugned order dated 26.12.2019, passed by the State Government, as is contained in annexure no.15 to the writ petition, is hereby quashed. A direction is issued to the concerned respondent to make available the benefit of Domestic Help Allowance to the petitioner with effect from 01.03.2008 along with periodical revision, if any, within a month from today. He shall also be paid arrears of the said allowance within next two months. However, in the facts and circumstances of the case, he shall not be entitled to payment of interest.

26. This order shall be communicated by learned Chief Standing Counsel to all concerned forthwith.

27. There shall be no order as to costs.

(2023) 7 ILRA 1271
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE PRAKASH PADIA, J.

Civil Misc. Review Application No. 293 of 2021
 IN
 Civil Misc. Writ Petition No. 9803 of 2021

Union Bank of India **...Petitioner**
Versus
A.D.M., Meerut & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Suresh Chandra Pandey

Counsel for the Respondents:
 C.S.C., Sri Anjani Kumar Chaurasiya

Civil Law - The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Code of Civil Procedure, 1908 - Order XLVII Rule 1 - review application, error apparent on the face of the record, alternative remedy, Debt Recovery Tribunal, successive review applications, exemplary costs

The Union Bank of India filed a review application seeking to review the judgment dated April 19, 2021, which dismissed its writ petition (No. 9803 of 2021) challenging the Additional District Magistrate's (ADM) order dated October 30, 2019, rejecting the Bank's application under Section 14 of the SARFAESI Act, 2002, for physical possession of property. The writ petition was dismissed on the ground of an available statutory alternative remedy under Section 17 of the SARFAESI Act before the Debt Recovery Tribunal (DRT), relying on *United Bank of India Vs Satyawati Tandon* (2010) 8 SCC 110. The Bank argued that Section 17 remedy is available only to borrowers, guarantors, lessees, or tenants, not secured creditors, and that the dismissal was based on an error apparent on the face of the record. A prior review application (No. 168 of 2021) on similar grounds was dismissed on September 9, 2021, without liberty to file a fresh review. The review application was dismissed on merits and for being a second review application on the same grounds, with exemplary costs of Rs. 50,000 to be deposited with the Registrar General within one month, to be transmitted to the High Court Legal Services Committee, Allahabad. The delay condonation application was allowed. No error apparent on the face of the record existed in the judgment dated April 19, 2021. The dismissal was based on the settled law in *Satyawati Tandon*, which mandates exhausting statutory remedies under Section 17 before invoking Article 226. The Bank's contention that Section 17 applies only to borrowers or guarantors required reasoning and was not a patent error. The second review application was not maintainable, as successive review applications on the same grounds are impermissible under Order XLVII Rule 1 CPC. The earlier review application (No. 168 of 2021) was dismissed without granting liberty to file afresh, and no new evidence or sufficient reason analogous to Order XLVII was presented.

The review application is dismissed.

List of Cases referred:

1. *Chajju Ram Vs Neki*, AIR 1922 PC 112: No review for incorrect exposition of law.
2. *T.C. Basappa Vs T. Nagappa*, AIR 1954 SC 440
3. *Hari Vishnu Kamath Vs Ahmad Ishaque*, AIR 1955 SC 233
4. *Patel Narshi Thakershi Vs Pradyuman Singhji*, (1971) 3 SCC 844
5. *Aribam Tuleshwar Sharma Vs Aribam Pishak Sharma*, (1979) 4 SCC 389
6. *Col. Avatar Singh Sekhon Vs U.O.I.*, 1980 Supp SCC 562
7. *S. Nagaraj Vs St. of Karn.*, 1993 Supp (4) SCC 595
8. *Meera Bhanja Vs Nirmala Kumari Choudhury*, (1995) 1 SCC 170
9. *Parsion Devi Vs Sumitri Devi*, (1997) 8 SCC 715
10. *Lily Thomas Vs U.O.I.*, (2000) 6 SCC 224
11. *Common Cause Vs U.O.I.*, (2003) 10 SCC 264
12. *Kerala St. Electricity Board Vs Hitech Electrothermics*, (2005) 6 SCC 651
13. *Jain Studios Ltd. Vs Shin Satellite Public Co. Ltd.*, (2006) 5 SCC 501
14. *St. of West Bengal Vs Kamal Sengupta*, (2008) 8 SCC 612
15. *Kamlesh Verma Vs Mayawati*, (2013) 8 SCC 320
16. *Ram Sahu Vs Vinod Kumar Rawat*, 2020 SCC Online SC 896
17. *S. Madhusudhan Reddy Vs VS Narayana Reddy*, 2022 SCC Online SC 1034

18. *Govt. of NCT of Delhi Vs K.L. Rathi Steels Ltd.*, 2023 SCC Online SC 288

19. *Irtaza Ali Vs District Judge Moradabad*, (1982) 2 ARC 514

20. *Vinod Kumar Vs St. of U.P.*, 2022 (11) ADJ 25 (DB)

21. *Y.P. Chawla Vs M.P. Tiwari*, AIR 1992 SC 1360

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

**Order on Civil Misc. Delay
Condonation Application:-**

1. Heard.
2. Cause shown for the delay in filing the restoration application is sufficient. The delay is condoned.
3. The application is allowed.

**Order on Civil Misc. Review
Application:-**

1. Heard Shri Saurabh Pandey, Advocate holding brief of Shri Suresh Chandra Pandey, learned counsel for the review-applicant and Shri Anjani Kumar Chaurasiya, learned counsel for the opposite party.

2. The present review application has been filed seeking review of the judgment and order dated 19.04.2021 passed in Civil Misc. Writ Petition No. 9803 of 2021 (Union Bank of India vs. Additional District Magistrate, Meerut and 2 others).

3. Facts in brief in the present case are that the writ petition in question was filed by the petitioner challenging the decision taken by the Additional District Magistrate (Finance & Revenue), Meerut dated

30.10.2019 by which the application filed by the Bank under sub-section 1 of Section 14 of the SARFAESI Act, 2002 seeking physical possession of the property was rejected.

4. After hearing counsel for the parties, the writ petition filed by the petitioner was dismissed by this Court vide its judgment and order dated 19.04.2021 on the ground of availability of statutory alternative remedy to the petitioner as provided under Section 17 of SARFAESI Act, 2002 before the Debt Recovery Tribunal. The order passed by the Writ Court dated 19.04.2021 is reads as follows:-

“The matter is taken up through Video Conferencing.

Sri Suresh Chandra Pandey, learned counsel appears on behalf of petitioner.

Learned Standing Counsel appears on behalf of respondent no.1.

Challenge in this petition is to order dated 30.11.2019 passed by Additional District Magistrate (Finance and Revenue) under Section 14 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002.

In the case of United Bank of India v. Satyawati Tandon and Others, (2010) 8 SCC 110 wherein in paragraph 42 and 43 it is held:

"42. There is another reason why the impugned order should be set aside. If respondent No.1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also

guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."

In view of the law laid down by the Supreme Court the petitioner has a remedy against the said order under Section 17 of the SARFAESI Act before the Debt Recovery Tribunal, therefore, we are not inclined to cause any indulgence.

Consequently, petition is dismissed with the liberty to petitioner to seek redressal of his grievance before Debt Recovery Tribunal. "

5. In order to review the aforesaid final judgment dated 19.04.2021 as quoted above, various grounds are taken in the present review application. The basic ground which is taken and argued before us is that the alternative remedy under Section 17 of the Act, 2002 is available only for the borrower, guarantor, lessee, tenant but not to the secured creditor. It is further argued that the judgment delivered by the Hon'ble Apex Court in the case of **Satyamati Tandon (Supra)**, relied upon while dismissing the writ petition would have no bearing on the preset case as the same deals and operate on a very distinct field, i.e., to safeguard the interest of the financial institution. It is further argued that the order dated 19.04.2021 rejecting the writ petition suffers from a mistake which is patent, manifest and self-evident. It is further argued that alternative remedy is not a complete bar to the jurisdiction of this Court, if the proceedings challenged are wholly without jurisdiction.

6. Before proceeding further it would be appropriate to take note of Order XLVII Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred as the CPC) as well as scope of the review as per the settled law.

7. The grounds available for filing a review application against a judgment have been set out in Order XLVII of the Code of Civil Procedure in the following words:

1. Application for review of judgment - (1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or Order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the Appellant, or when, being Respondent, he can present to the Appellate Court the case on which he applies for the review.

[Explanation-The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.]

8. A glance at the aforesaid provisions makes it clear that a review application would be maintainable on

(i) discovery of new and important matters or evidence which, after exercise of due diligence, were not within the knowledge of the applicant or could not be

produced by him when the decree was passed or the order made;

(ii) on account of some mistake or error apparent on the face of the record; or

(iii) for any other sufficient reason.

9. Privy Council in the case of **Chajju Ram vs. Neki AIR 1922 P.C. 112; Bisheshwar Pratap Sahi vs. Parath Nath AIR 1934 P.C. 213**; held that there cannot be a review on the ground that the judgment proceeded on an incorrect exposition of law. Further, the Court has no jurisdiction to review because it was of the opinion that a different conclusion of law should have been arrived at. It was also observed that if a decision is erroneous in law that is not a ground for ordering review. If a court has decided a point erroneously, the error could not be one apparent on the face of the record or even analogous to it. Therefore, subsequent events or the fact that the Court took a different view in a subsequent case is not a sufficient reason for granting review (vide Explanation to Order XLVII Rule 1 CPC). ”

10. What can be said to be an error apparent on the face of the proceedings has been dealt with and considered by the Hon'ble Apex Court in the case of **T.C. Basappa vs. T.Nagappa, AIR 1954 SC 440**. It is held that such an error is an error which is a patent error and not a mere wrong decision.

11. In the case of **Hari Vishnu Kamath vs. Ahmad Ishaque, AIR 1955 SC 233**, it is observed as under:

"It is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with

reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated."

12. In **Patel Narshi Thakershi and Ors. v. Shri Pradyuman Singhji Arjunsinghji (1971) 3 SCC 844**, the Hon'ble Apex Court held as follows:

4..... It is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. No provision in the Act was brought to notice from which it could be gathered that the Government had power to review its own order. If the Government had no power to review its own order, it is obvious that its delegate could not have reviewed its order.....

13. In **Aribam Tuleshwar Sharma v. Aribam Pishak Sharma (1979) 4 SCC 389**, the Hon'ble Apex Court was examining an order passed by the Judicial Commissioner who was reviewing an earlier judgment that went in favour of the Appellant, while deciding a review application filed by the Respondents therein who took a ground that the predecessor Court had overlooked two important documents that showed that the Respondents were in possession of the sites through which the Appellant had sought easementary rights to access his home- stead. The said appeal was allowed by the Hon'ble Apex Court with the following observations:

3...It is true as observed by this Court in Shivdeo Singh and Ors. v. State of Punjab (1979) 4 SCC 389 there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court.

(emphasis added)

14. In **Col. Avatar Singh Sekhon v. Union of India and Ors. 1980 Supp SCC 562**, the Hon'ble Apex Court observed that a review of an earlier order cannot be done unless the court is satisfied that the material error which is manifest on the face of the order, would result in miscarriage of justice or undermine its soundness. The observations made are as under:

12. A review is not a routine procedure. Here we resolved to hear Shri Kapil at length to remove any feeling that the party has been hurt without being heard. But we cannot review our earlier

order unless satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. In **Sow Chandra Kante and Anr. v. Sheikh Habib (1975) 1 SCC 674** the Hon'ble Apex Court observed:

A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.... The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality.

(emphasis added)

15. In **S. Nagaraj and Ors. v. State of Karnataka and Anr. 1993 Supp (4) SCC 595**, the Hon'ble Apex Court explained as to when a review jurisdiction could be treated as statutory or inherent and held thus:

18. Justice is a virtue which transcends all barriers. Neither the Rules of procedure nor technicalities of law can stand in its way. The order of the court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification,

depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court.

16. Again, in **Meera Bhanja v. Nirmala Kumari Choudhury (1995) 1 SCC 170** while quoting with approval a passage from **Aribam Tuleshwar Sharma v. Aribam Pishak Sharma (1979) 4 SCC 389** the Honb'le Apex Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 Code of Civil Procedure.

9. Under Order 47 Rule 1 Code of Civil Procedure a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review Under Order 47 Rule 1 Code of Civil Procedure. In exercise of this jurisdiction Under Order 47 Rule 1 Code of Civil Procedure it is not permissible for an erroneous decision to be 'reheard and corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'.

[emphasis added]

17. In **Parsion Devi and Ors. v. Sumitri Devi and Ors.:(1997) 8 SCC 715**, stating that an error that is not self-evident and the one that has to be detected by the process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise the powers of review, the Honb'le Apex Court held as under:

“7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 Code of Civil Procedure. In **Thungabhadra Industries Ltd. v. Govt. of A.P., 1964 SCR (5) 174** the Hon’ble Apex Court opined:

11. What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an 'error apparent on the face of the record'. The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an 'error apparent on the face of the record', for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.”

18. **The error referred to under the Rule, must be apparent on the face of the record and not one which has to be searched out.** While discussing the scope and ambit of Article 137 that empowers the Hon’ble Supreme Court to review its judgments and in the course of discussing the contours of review jurisdiction Under Order XLVII Rule 1 of the Code of Civil Procedure in **Lily Thomas vs. Union of India** reported in **(2000) 6 SC 224**, the Hon’ble Apex Court held as under:

54. Article 137 empowers this Court to review its judgments subject to the provisions of any law made by Parliament

or any Rules made Under Article 145 of the Constitution. The Supreme Court Rules made in exercise of the powers Under Article 145 of the Constitution prescribe that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Code of Civil Procedure which provides:

56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The Rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised. However, this Court in exercise of its powers Under Article 136 or Article 32 of the Constitution and upon satisfaction that the earlier judgments have resulted in deprivation of fundamental rights of a citizen or rights created under any other statute, can take a different view notwithstanding the earlier judgment.

58. Otherwise also no ground as envisaged Under Order XL of the Hon’ble Supreme Court Rules read with Order 47 of the Code of Civil Procedure has been pleaded in the review petition or canvassed before us during the arguments for the purposes of reviewing the judgment in **Sarla Mudgal case**. It is not the case of the Petitioners that they have discovered any new and important matter which after the exercise of due diligence was not within their knowledge or could not be brought to

the notice of the Court at the time of passing of the judgment. All pleas raised before us were in fact addressed for and on behalf of the Petitioners before the Bench which, after considering those pleas, passed the judgment in **Sarla Mudgal case**. We have also not found any mistake or error apparent on the face of the record requiring a review. **Error contemplated under the Rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence.** No such error has been pointed out by the learned Counsel appearing for the parties seeking review of the judgment. The only arguments advanced were that the judgment interpreting Section 494 amounted to violation of some of the fundamental rights. No other sufficient cause has been shown for reviewing the judgment. **The words "any-other sufficient reason appearing in Order 47 Rule 1 Code of Civil Procedure" must mean "a reason sufficient on grounds at least analogous to those specified in the rule" as was held in Chajju Ram v. Neki Ram : AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos. v. Most Rev. Mar Poulouse Athanasius : 1955 SCR 520. Error apparent on the face of the proceedings is an error which is based on clear ignorance or disregard of the provisions of law. in T.C. Basappa v. T. Nagappa : 1955 SCR 250 the Hon'ble Apex Court held that such error is an error which is a patent error and not a mere wrong decision. In Hari Vishnu Kamath v. Ahmad : AIR 1955 SC 233, it was held:**

It is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty

with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error, cease to be mere error and become an error apparent on the face of the record? Learned Counsel on either side were unable to suggest any clear-cut Rule by which the boundary between the two classes of errors could be demarcated.

Mr. Pathak for the first Respondent contended on the strength of certain observations of Chagla, CJ in - 'Batur K. Vyas v. Surat Boroug Municipality: ILR 1953 Bom 191, that no error could be said to be apparent on the face of the record if it was not self-evident and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. **The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case.**

Therefore, it can safely be held that the Petitioners have not made out any case within the meaning of Article 137 read with Order XL of the Supreme Court Rules and Order 47 Rule 1 Code of Civil Procedure for reviewing the judgment in Sarla Mudgal case⁶. The petition is misconceived and bereft of any substance.

(emphasis added)

19. It is also settled law that in exercise of review jurisdiction, the Court cannot reappreciate the evidence to arrive

at a different conclusion even if two views are possible in a matter. In **Kerala State Electricity Board v. Hitech Electrothermics & Hydropower Ltd. and Ors. (2005) 6 SCC 651**, the Hon'ble Apex Court observed as follows:

10.....In a review petition it is not open to this Court to reappraise the evidence and reach a different conclusion, even if that is possible. Learned Counsel for the Board at best sought to impress us that the correspondence exchanged between the parties did not support the conclusion reached by this Court. We are afraid such a submission cannot be permitted to be advanced in a review petition. The appreciation of evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has not been contended before us that there is any error apparent on the face of the record. To permit the review Petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise.

20. Under the garb of filing a review application, a party cannot be permitted to repeat old and overruled arguments for reopening the conclusions arrived at in a judgment. The power of review is not to be confused with the appellate power which enables the Hon'ble Supreme Court to correct errors committed by a subordinate Court. This point has been elucidated by the Hon'ble Supreme Court in **Jain Studios Ltd. v. Shin Satellite**

Public Co. Ltd. : (2006) 5 SCC 501 where it was held thus:

11. So far as the grievance of the applicant on merits is concerned, the learned Counsel for the opponent is right in submitting that virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had been negated. Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.

12. When a prayer to appoint an arbitrator by the applicant herein had been made at the time when the arbitration petition was heard and was rejected, the same relief cannot be sought by an indirect method by filing a review petition. Such petition, in my opinion, is in the nature of 'second innings' which is impermissible and unwarranted and cannot be granted.

21. In **State of West Bengal and Ors. v. Kamal Sengupta and Anr. (2008) 8 SCC 612**, the Hon'ble Apex Court emphasized the requirement of the review Petitioner who approaches a Court on the ground of discovery of a new matter or evidence, to demonstrate that the same was not within his knowledge and held thus:

“At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review *ex debito justitiae*. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier.

In the captioned judgment, the term 'mistake or error apparent' has been discussed in the following words:

22. The term 'mistake or error apparent' by its very connotation signifies an error which is evident *per se* from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 Code of Civil Procedure or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.”

22. After discussing a series of decisions on review jurisdiction in **Kamlesh Verma v. Mayawati and Ors. (2013) 8 SCC 320**, the Hon'ble Supreme Court observed that review proceedings

have to be strictly confined to the scope and ambit of Order XLVII Rule 1, Code of Civil Procedure. As long as the point sought to be raised in the review application has already been dealt with and answered, parties are not entitled to challenge the impugned judgment only because an alternative view is possible. The principles for exercising review jurisdiction were succinctly summarized in the captioned case as below:

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(I) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the Petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words “any other sufficient reason” have been interpreted in *Chhajju Ram v. Neki* and approved by this Court in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius* to mean “a reason sufficient on grounds at least analogous to those specified in the rule”. The same principles have been reiterated in *Union of India v. Sundur Manganese & Iron Ores Ltd.*

20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

23. In **Ram Sahu (Dead) Through LRs and Ors. v. Vinod Kumar Rawat and Ors.**, 2020 SCC Online SC 896, citing previous decisions and expounding on the scope and ambit of Section 114 read with Order XLVII Rule 1, the Hon'ble Apex Court has observed that Section 114 Code of Civil Procedure does not lay any conditions precedent for exercising the power of review; and nor does the Section prohibit the Court from exercising its power to review a decision. However, an order can be reviewed by the Court only on the grounds prescribed in Order XLVII Rule 1 Code of Civil Procedure. The said power cannot be exercised as an inherent power and nor can appellate power be exercised in the guise of exercising the power of review.

24. Very recently in the case of **S. Madhusudhan Reddy vs. V. Narayana**

Reddy and others repored in 2022 SCC OnLine SC 1034, it was again held by the Hon'ble Apex Court that the courts jurisdiction of review is not the same as that of an appeal. A judgment can be open to review, if there is a mistake or error apparent on the face on record but an error that to be detected by process of reasoning cannot be prescribed on the face of the record. Paragraph-31 of the aforesaid judgment is reproduced below:-

“As can be seen from the above exposition of law, it has been consistently held by this Court in several judicial pronouncements that the Court's jurisdiction of review, is not the same as that of an appeal. A judgment can be open to review if there is a mistake or an error apparent on the face of the record, but an error that has to be detected by a **process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise its powers of review under Order XLVII Rule 1 CPC. In the guise of exercising powers of review, the Court can correct a mistake but not substitute the view taken earlier merely because there is a possibility of taking two views in a matter.** A judgment may also be open to review when any new or important matter of evidence has emerged after passing of the judgment, subject to the condition that such evidence was not within the knowledge of the party seeking review or could not be produced by it when the order was made despite undertaking an exercise of due diligence. **There is a clear distinction between an erroneous decision as against an error apparent on the face of the record. An erroneous decision can be corrected by the Superior Court, however an error apparent on the face of the record can only be corrected by exercising review**

jurisdiction. Yet another circumstance referred to in Order XLVII Rule 1 for reviewing a judgment has been described as “for any other sufficient reason”. The said phrase has been explained to mean “a reason sufficient on grounds, at least analogous to those specified in the rule” (Refer: Chajju Ram v. Neki Ram¹⁷ and Moran Mar Basselios Catholicos and Anr. v. Most Rev. Mar Poulouse Athanasius¹⁸). ”

25. The same principle has been reiterated by the Hon’ble Apex Court in the case of **Govt. of NCT of Delhi Through the Secretary, Land and Building Department and Another vs. K.L. Rathi Steels Limited and others reported in 2023 SCC OnLine SC 288.**

26. Although, the expression “for any other sufficient reason” in Order XLVII Rule 1 CPC is wide enough to take within its scope and ambit many circumstances or situations which do not fall in the earlier part of the Order XLVII Rule 1 CPC which are the two grounds (i) and (ii) referred to para 4 of this judgment, in our view, the Explanation to the said provision carves out an exception to the expression “for any other sufficient reason” as a ground for review of a judgment in ground (iii). The Explanation being in the nature of an exception is to be read outside the scope of the expression “for any other sufficient reason” in Order XLVII Rule 1 CPC. In other words, if, on a question of law, a decision of a Court is reversed by a subsequent decision of a superior Court and the same is reopened on the basis of the said subsequent decision there would be no finality of judgments of the Court even between the parties thereto. It is, hence, observed that even an erroneous judgment or order is binding on the parties thereto even if subsequently that very judgment is

reversed in a subsequent decision of a superior Court. Otherwise, there would be chaos and no finality of any decision of a Court which is against public policy. Judgments rendered by a Court of competent jurisdiction as per the prevailing law are binding on the parties to the said judgment. Merely because that judgment is subsequently overruled by a subsequent decision of a superior Court in any other case, the same shall not be a ground for review of such judgment.

27. In this context, the object and purpose of the Explanation to Order XLVII Rule 1 CPC cannot be lost sight of and it needs to be emphasized. In our view, the Explanation to Order XLVII Rule 1 CPC is in the nature of an exception to the expression “for any other sufficient reason”. This would mean that if, in the mind of a Court there is a sufficient reason for the review of a judgment, it cannot be on the ground/reason covered in the Explanation to Order XLVII Rule 1 CPC. Thus, the circumstances mentioned in the Explanation would be an exception and is outside the scope and ambit of “for any other sufficient reason”.

28. An Explanation is at times appended to a Section to explain the object and content as well as the meaning of words contained in the Section. An Explanation may be added to include something within or to exclude something from the ambit of the main enactment or the connotation of some words occurring in it. Even a negative Explanation which excludes certain types or a category from the ambit of the Section may have the effect of showing that the category leaving aside the excepted types is included within it. An Explanation can also be added to serve as a proviso to the main Section as

has been held by the Hon'ble Supreme Court in the case of *Y.P. Chawla and Others vs. M.P. Tiwari and another AIR 1992 SC 1360*. When an Explanation is in the nature of a proviso, it is used to remove special cases from the general provision and provide for them especially. Sometimes an Explanation is added to clarify a doubtful point of law as in the instant case the Explanation to Order XLVII Rule 1 CPC has been inserted by the amendment made in the year 1976. [Source: G.P. Singh's "Principles of Statutory Interpretation" – 15th Edition].

29. It is also in the nature of an exception intended to restrain the enacting clause to particular cases. The Explanation in the instant case being in the nature of a proviso is a qualifying or excepting provision to what is stated in Order XLVII Rule 1 CPC which state the grounds for seeking a review. Hence, the object and intendment of the proviso must be given its full effect. The object and purpose of the Explanation can be related to the following three maxims:

(i) *Nemo debet bis vexari pro una et eadem causa* (No man should be vexed twice for the same cause);

(ii) *Interest reipublicae ut sit finis litium* (It is in the interest of the State that there should be an end to a litigation); and

(iii) *Res judicata pro veritate occipitur* (A judicial decision must be accepted as correct).

30. These maxims would indicate that there must be an end to litigation otherwise the rights of persons would be in an endless confusion and justice would suffer.

31. At the same time, there are a line of decisions which have held that

exercising power of review for "for any other sufficient reason" must be analogous to the two reasons mentioned in the provision therein, namely-

"1) who from the discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order was made; or 2) on account of some mistake or error apparent on the face of the record."

32. Recently a Division Bench of this Court in the case of *Vinod Kumar vs. State of U.P. and others* reported in 2022 (11) ADJ 25 (DB), has considered the entire history and scope of Section 114 and order 47 Rule 1 of the Code of Civil Procedure and explained the scope of review.

33. As can be seen from the above exposition of law, it has been consistently held by the Hon'ble Apex Court in several judicial pronouncements that the Court's jurisdiction of review, is not the same as that of an appeal. A judgment can be open to review if there is a mistake or an error apparent on the face of the record, but an error that has to be detected by a process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise its powers of review Under Order XLVII Rule 1 Code of Civil Procedure. In the guise of exercising powers of review, the Court can correct a mistake but not substitute the view taken earlier merely because there is a possibility of taking two views in a matter. A judgment may also be open to review when any new or important evidence has emerged after passing of the judgment, subject to the condition that such evidence was not within the knowledge of the party seeking review

or could not be produced by it when the order was made despite undertaking an exercise of due diligence. There is a clear distinction between an erroneous decision as against an error apparent on the face of the record. An erroneous decision can be corrected by the (Hon'ble Superior Court) however an error apparent on the face of the record can only be corrected by exercising review jurisdiction.

34. Heard counsel for the parties and perused the record.

35. After hearing the counsel for the parties and going through the averments made in the review application, the Court is of the opinion that all these grounds were available to the petitioner at the time when the arguments were made in the writ petition. Nothing has been brought on record that how the present review application will fall within the ambit of Order 47 Rule 1 of the Code of Civil Procedure. A detailed discussion has already been made by us in respect of the grounds on which the review application is maintainable.

36. From perusal of the grounds contained in the review application as well as from the arguments advanced by the counsel for the petitioner, we are of the opinion that there is no error apparent on the face of record to review in the guise of exercising powers of review, the Court can correct the mistake but not substitute the view taken earlier merely because there is a possibility of taking two views in the matter. As quoted above, it has already been held by the privy counsel in the case of **Chajju Ram (Supra)**, way back more than 100 years ago which was subsequently followed by the Hon'ble Apex Court as well as by the different High Court till date

that there cannot be a review on the ground that the judgment proceeded on an incorrect exposition of law.

37. One relevant fact which should have been pointed out by the counsel for the applicant, though on record however not mentioned is that the applicant has earlier filed a Review Application No.168 of 2021, on the same grounds, for review of judgment dated 19.04.2021 passed in Writ Petition No. 9803 of 2021, which has been dismissed by this Court by the order dated 09.09.2021, which is as under:-

“By means of this application, the applicant-petitioner has prayed for review of the order dated 19.4.2021 passed by this Court.

The review application is not in consonance with Order 47 Rule 1 of Code of Civil Procedure.

The review application is highly misconceived.

It is accordingly rejected. ”

38. Thus, it is clear that no liberty was granted to the applicant to file fresh review application on the same grounds. Hence, the second review application on the same grounds is not maintainable. Law in this connection is well settled that successive review application against the original judgement is not maintainable.

39. The Hon'ble Apex Court in the case of Common Cause A Regd. Society Vs. Union of India and another reported in (2003) 10 SCC 264 held as follows:-

“After delivering of the judgment in a writ petition filed under Article 32, a review petition had been filed, and that review petition had been entertained and finally disposed of. The present application

purports to be a review petition against the reviewed judgment. This application is wholly misconceived and there is no provision anywhere to file successive review petitions. The review petition is accordingly dismissed.”

40. The same view was again taken by the Hon’ble Supreme Court in the case of ***M. Satyanaryan Murthy and others Vs. Mandal Revenue Officer Cum Land Acquisition Officer, reported in (1998) 7 SCC 445***. It was held by the Hon’ble Supreme Court in this case that second review application against the same order is not maintainable and amounts to abuse of process of law, more so when no satisfactory explanation was given. While dismissing the aforesaid review application a cost of Rs.5000/- was also imposed by the Hon’ble Apex Court in this case. The order passed by the Hon’ble Supreme Court in the aforesaid case reproduced below:-

“There is a delay of 2 years and 32] days in filing this review petition. The explanation for the delay contained in the application seeking condonation of delay is wholly unsatisfactory and not at all reasonable. Besides, we also find that the petitioners had filed earlier also a Review f Petition No, 214 of 1995 against the same order which was dismissed by this Court on 22-2-1995. Both in the memorandum of the review petition and in the application seeking condonation of delay, though this fact is mentioned, but the number of the review petition has been left blank and so also the date on which the same was dismissed. This shows the casual manner in which this second review petition has been filed. Recourse to successive review petitions against the same order is not permissible more so because no error g apparent on the record has been brought

out. It appears to us that the petitioners are unnecessarily taking liberties. The filing of the second review petition is an abuse of the process of the court. We, therefore, dismiss this review petition both on the ground of unexplained inordinate delay and on merits with Rs 5000 as costs. The directions with regard to disbursement of the costs shall be issued after the same are deposited in the Registry.”

41. The same view has again taken by the Hon’ble Supreme Court in the case of ***S. Madhusudhan Reddy Vs. V. Narayana Reddy and others reported in 2022 SCC Online SC 1034***. In paragraph 35 of the aforesaid judgement it was held that recourse to successive review application against the same order is impermissible, more so when the respondents have miserably failed to draw the attention of this Court to any circumstances that would entitle them to invoke review jurisdiction within the ambit of the Rules. In paragraph 36 of the aforesaid judgement it was held that second set of review applications were nothing short of an abuse of the process of the court and ought to have been rejected by the High Court as not maintainable. The paragraph Nos.35 and 36 are reproduced below:-

35. *In our opinion, even otherwise, recourse to successive review petitions against the same order is impermissible more so, when the Respondents have miserably failed to draw the attention of this Court to any circumstances that would entitle them to invoke review jurisdiction within the ambit of the Rules. Under the rules, the Respondents were not required to produce "genuine" documents but new documents/evidence that was not within their knowledge and could not have been so even after exercise of due diligence, which*

could have turned the tables in their favour. Nor has any error apparent on the face of the record been brought out by them.

36. Thereafter an application for review was made on 3-4-1979. If there was some error apparent in the order dated 21-3-1979 surely the same should have been pointed out In the first review application which was made on 3-4-1979, but in fact, the petitioner has claimed a right to move successive review applications. 4. Such a right cannot be allowed to him. Barlier the review application was rejected by the trial court then the petitioner filed an infructuous revision, thereafter, he filed a writ petition and lastly be filed the instant second review application.

42. Apart from the same, this Court also in the case of Irtaza Ali Vs. The District Judge Moradabad and others reported in (1982) 2 ARC 514 held that successive review applications are not maintainable even though the earlier review application was dismissed as infructuous. The relevant paragraph is reproduced below:-

“Thereafter an application for review was made on 3-4-1979. If there was some error apparent in the order dated 21-3-1979 surely the same should have been pointed out In the first review application which was made on 3-4-1979, but in fact, the petitioner has claimed a right to move successive review applications.

4. Such a right cannot be allowed to him. Barlier the review application was rejected by the trial court then the petitioner filed an infructuous revision, thereafter, he filed a writ petition and lastly be filed the instant second review application.”Hence the second review petition is not maintainable on the same ground.

43. In this view of the matter, we are of the firm opinion that the present review application filed by the petitioner is being the second review application is not maintainable. The review application has been filed to misuse the process of law and process of Court, hence the same is liable to be dismissed with exemplary costs.

44. In view of the above discussion made hereinabove, the present review application is dismissed on merits as review proceedings cannot be equated with the original hearing and a review is by no means as appeal in disguise whereby an alleged erroneous decision is reheard and corrected.

45. Present review application being second review application for the same cause of action is rejected on the ground of maintainability as well.

46. Accordingly, this review application stands rejected with a cost of Rs. 50,000/(Rs. Fifty Thousand), which the applicant shall deposit with the Registrar General of this Court within a period of one month from today. On deposit of such cost, it shall be transmitted to the account of ‘High Court Legal Services Committee, Allahabad’.

(2023) 7 ILRA 1287

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 29.05.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 2000885 of 2005

Naipal Singh

...Petitioner

Versus

U.P. Housing & Development Board & Anr.

...Respondents**Counsel for the Petitioner:**

Sri Ravindra Kumar, Gaurav Mehrotra, K.N. Vishwakarma, Rani Singh, Ravindra Kumar

Counsel for the Respondents:

R.K.Mehrotra, Anurag Srivastava, Mahesh Chandra, Manoj Singh, O P Srivastava, Puneet Chandra

Subject: Service Law – Disciplinary Proceedings – Financial Irregularities – Dismissal – Natural Justice

An Executive Engineer with the U.P. Housing Development Board, was dismissed on 29.07.2004, two days before his retirement, following a 2002 audit report alleging financial irregularities in construction work at Ambedkar Nagar. A charge sheet with eight charges was issued on 30.07.2002. The petitioner alleged non-supply of documents, hindering his defense. Two charges were found proved, and a show cause notice was published in newspapers due to his unavailability. The inquiry report was provided on 20.07.2004, and dismissal followed. The petitioner challenged the order, alleging procedural lapses, bias, and disproportionate punishment. The case reinforces that disciplinary proceedings must adhere to natural justice but upheld the dismissal when evidence supports charges and the delinquent admits guilt, even partially. It also clarifies that publication of a show cause notice can suffice when personal service is not possible.

List of Cases cited:

1. M/s Magadh Sugar & Energy Ltd. Vs St. of Bihar & ors.Civil Appeal No. 5728 of 2021
2. Whirlpool Corp. Vs Registrar of Trade Marks Citation: (1998) 8 SCC 1
3. Rajendra Prasad Upadhyaya Vs St. of U.P. & ors.Citation: (2012) 93 ALR 403 (All), Durga Enterprise (P) Ltd. Vs Principal Secretary, Govt. of U.P. & ors.Citation: (2004) 13 SCC 665
4. St. of U.P. & ors.Vs Saroj Kumar Sinha Citation: (2010) 2 SCC 772

5. Roop Singh Negi Vs Punjab National Bank Citation: (2009) 2 SCC 570

6. Radhey Kant Khare Vs U.P. Cooperative Sugar Factories Federation Ltd. : (2002) SCC Online All 1575

7. Smt. Mazda Begum & ors.Vs St. of U.P. & ors.: (2017) SCC Online All 2909

8. Moni Shankar Vs U.O.I. & ors.: (2008) 2 SCC 484

9. M.VS Bijlani Vs U.O.I. & Ors.: (2006) 5 SCC 88

10. Chamoli District Cooperative Bank Ltd. Vs Raghunath Singh Rana : (2016) 12 SCC 204

11. Smt. Chinta Yadav Vs St. of U.P. & ors.Citation: (2008) SCC Online All 2125

12. Subhas Yadav Vs St. of U.P. & ors.Citation: (2008) SCC Online All 2121

13. S.R. Tewari Vs U.O.I. & anr.Citation: (2013) 6 SCC 602

14. Union Bank of India Vs Bodupalli Gopalaswami Citation: (2011) 13 SCC 553

15. Charanjit Lamba Vs Commanding Officer, Army Southern Command & ors.Citation: (2010) 11 SCC 314

16. Chairman-cum-Managing Director, Coal India Ltd. Vs Mukul Kumar Choudhuri & ors.Citation: (2009) 15 SCC 620

17. Dinesh Kumar Verma Vs St. of U.P. & anr.Citation: Writ-A No. 20837 of 2020, Judgment dated 24.03.2022

18. Prakash Chandra Agarwal Vs St. of U.P. & anr.Citation: Writ-A No. 2555 of 2022, Judgment dated 07.05.2022

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Gaurav Mehrotra, learned counsel for the petitioner and Sri

Puneet Chandra, learned counsel for the respondent(s).

2. By means of present writ petition, the petitioner has prayed for issuance of a writ, order or direction in the nature of certiorari quashing the impugned dismissal order dated 29.07.2004 passed by respondent No.2 contained as Annexure-1 to the writ petition with a further prayer to issue a writ, order or direction in the nature of mandamus commanding the respondents to pay all benefits including post-retiral benefits to the petitioner.

3. Brief facts giving rise to the present writ petition are as under:

Sr. No.	Relevant Facts of the Case
a.	The petitioner was appointed as Assistant Engineer vide order dated 08.07.1970. In the year 1982, he was confirmed on the said post. Subsequently, he was promoted on the post of Executive Engineer in U.P. Housing Development Board (for short, "Board").
b.	In the year 1996, the State Government created a new district, namely, Ambedkar Nagar and the Board was given the work of constructing Collectorate Building. In pursuance thereof, a construction unit was established in the year 1996-97 and the petitioner was posted as Project Manager for the aforesaid unit.
c.	In the year 2002, an inspection was made by Sri R.N. Goel, Superintending Engineer, Lok Nirman Vibhag, U.P., who inspected

	the deposit work done by the petitioner as a Project Manager. The Superintending Engineer without seeking reply from the petitioner, submitted his report vide letter dated 27.07.2002 and recommended for initiation of departmental inquiry against the petitioner.
d.	On 27.07.2002, on the basis of said report departmental inquiry was initiated against the petitioner and he was charge sheeted. In the charge sheet dated 30.07.2002, eight charges were levelled against the petitioner.
e.	When the petitioner did not find necessary documents enclosed along with charge sheet, vide letters dated 01.08.2002 and 14.08.2002, he requested to supply necessary documents and demanded measurement books, PCR files.
f.	Vide letter dated 07.10.2002, the petitioner submitted reply to avoid the delay, however, he mentioned that in spite of repeated requests, no documents have been made available to him.
g.	Out of eight charges, two charges have been found proved against the petitioner.
h.	On 24.06.2004, a show cause notice was issued to the petitioner, which was received by him on 01.07.2004 stipulating time of 15 days to submit reply along with relevant evidence.
i.	The petitioner submitted reply to the said show cause notice on 07.07.2004 through registered post and requested to supply copy of enquiry report and conclusion report of the board. In this regard, he also

	moved a reminder on 14.07.2004.
j.	The petitioner received copy of inquiry report dated 22.04.2004 on 20.07.2004. Vide letter dated 19.07.2004, he was asked to submit reply within a week.
k.	A perusal of impugned order shows that reply of the petitioner was not submitted within time.
l.	The news that several officers of the Housing Board had been punished, was published in news paper on 25.06.2004. The petitioner was General Secretary of Engineer's Association and other directly recruited engineers.
m.	The Engineers Association Evam Diploma Engineers Association, U.P. Avas Evam Vikas Parishad, Lucknow given a protest letter signed by the General Secretaries that in case of the petitioner, show cause notice was issued to the petitioner and reply of the same was awaited, even then the news had been published in daily news papers and has also been telecasted on TV channels.
n.	Just two days before petitioner's retirement i.e. 31.07.2005, the impugned order of dismissal was passed against the petitioner on 29.07.2005.
o.	The petitioner made several requests and approached the authorities for reconsideration of the matter, but when heed was paid to his requests, the present writ petition has been filed.

4. Submission of learned counsel for the petitioners is that the impugned order of

dismissal dated 29.07.2005 is bad in law, illegal and is violative of principles of natural justice. He further submitted that the entire proceeding initiated against the petitioner is in blatant disregard of service regulation.

5. He next submitted that the disciplinary proceeding initiated against the petitioner has been conducted in utter disregard of Regulation of the Board. He submitted that the relevant documents in regard to charge sheet and inquiry report were never supplied to the petitioner nor he was allowed to inspect the same, which has caused serious prejudice to him.

6. He further submitted that the respondents with biased mind to oust the petitioner from service have not supplied relevant documents to the petitioner to furnish proper reply and passed the impugned order of dismissal against the petitioner.

7. He next submitted that the inquiry officer did not apply its own mind to the facts and circumstances of the case and has proceeded on the dictate of the authorities, which is itself evident from the fact that out of eight charges levelled against the petitioner, six charges are baseless, arbitrary and without assigning any reason.

8. He further submitted that the impugned order of dismissal is discriminatory in nature and is against the provisions of Article 14 and 16 of the Constitution of India.

9. He lastly submitted that the even if the charge Nos.3 & 6 are found proved against the petitioner, even then major punishment awarded to the petitioner is disproportionate to the charges, therefore,

the quantum of punishment is excessive and arbitrary in nature. In support of his submissions, he placed reliance upon the following judgments:

On the point that availability of statutory alternative remedy is not an absolute bar, he placed reliance upon following judgments:		
Judgment	Citation	Paragraphs
M/s Magadh Sugar & Energy Ltd. vs. The State of Bihar and others	Judgment and order dated 24.09.2021 passed in Civil Appeal No.5728 of 2021	19, 20, 21, 22 & 25
Whirlpool Corporation Vs. Registrar of Trade Marks	1998 (8) SCC 1	15, 16, 17, 18, 19, 20 & 21
Rajendra Prasad Upadhyaya Vs. State of U.P. and others	judgment and order dated 29.03.2012 passed in Special Appeal No.5827 of 2021 : (2012) 93 ALR 403 (All)	page Nos.23, 24, 25 & 26
On the point that if a writ petition remained pending for a long time and pleadings have been exchanged, the matter may not be relegated to alternative remedy, he has placed reliance upon following judgments:		
Judgment	Citation	Paragraphs

		Paragraphs
Durga Enterprise (P) Ltd. and another Vs. Principal Secretary Govt. of U.P. and others	(2004) 13 SCC 665	3
On the point that each charge need to be independently and separately proved by witnesses and oral enquiry is must, he has placed reliance upon following judgments:		
Judgment	Citation	Paragraphs
State of U.P and Ors. Vs. Saroj Kumar Sinha	(2010) 2 SCC 772.	28, 29, 30, 33, 34, 35, 38, 39, 41 & 42
Roop Singh Negi Vs. Punjab National Bank	(2009) 2 SCC 570	14, 15, 17 & 21
Radhey Kant Khare Vs. U.P. Cooperative Sugar Factories Federation Ltd.	(2002) SCC Online All 1575	6, 7, 8, 9 & 22
On the point that enquiry officer is a quasi-judicial officer and not merely a representative of department, he has placed reliance upon following judgment:		
Judgment(s)	Citation	Paragraphs
Smt. Mazda Begum and Ors. Vs. State of U.P. and others	(2017) SCC Online All 2909	43
On the point that documents relied upon by enquiry officer / disciplinary		

authority needs to be provided to delinquent employee, he has placed reliance upon following judgment:		
Judgment(s)	Citation	Paragraphs
State of U.P. and Others Vs. Saroj Kumar Sinha	(2010) SCC 772	2 24, 29 & 31
• On the point that courts exercising power of judicial review are entitled to consider as to whether relevant pieces of evidence have been taken into account or not, he has placed reliance upon following judgment:		
Judgment(s)	Citation	Paragraphs
Moni Shankar Vs. Union of India and others	(2008) SCC 484	2 17
On the point that order based on improper enquiry report, which is vitiated due to non-adherence to principles of natural justice is not sustainable, he placed reliance upon following judgment:		
Judgment(s)	Citation	Paragraphs
MV Bijlani Vs. Union of India	(2006) SCC 88	5 21, 25, 26, 27 & 28
On the point that mandatory requirement of disciplinary enquiry is holding an inquiry, where charges are refuted, he placed reliance upon following judgment:		
Judgment(s)	Citation	Paragraphs
Chamoli District Cooperative Bank Ltd. Vs. Raghunath	(2016) SCC 204	12 22.2 & 22.4

Singh Rana		
On the point that in absence of reasoning as to why the reply submitted by delinquent employee to show cause notice was not satisfactory, the punishment order passed cannot sustain, he place reliance upon following judgments:		
Judgment(s)	Citation	Paragraphs
Smt. Chinta Yadav Vs. State of U.P. and others	(2008) SCC Online All 2125	59, 60 & 21
Subhas Yadav Vs. State of U.P. and others	(2008) SCC Online All 2121	8 & 9
On the point that quantum of punishment is so disproportionate to gravity of offence shocks the conscience of Hon'ble Court, he has placed reliance upon following judgments:		
Judgment(s)	Citation	Paragraphs
S.R. Tewari vs. Union of India and another	(2013) SCC 602	6 6, 17, 24, 25, 26, 30, 31 & 34
Union Bank of India Vs. Bodupalli Gopalaswami	(2011) SCC 553	13 28, 30, 33, 34, 46, 47, 48 & 49
Charanjit Lamba Vs. Commanding Officer, Army Southern Comman and others	(2010) SCC 314	11 12, 13, 14 & 19
On the point that award of punishment, which is grossly in excess to allegations cannot claim immunity and remains open for interference under limited		

scope of judicial review, he has placed reliance upon following judgment:

Judgment(s)	Citation	Paragraphs
Chairman-cum-Managing Director, Coal India Ltd. and another Vs. Mukul Kumar Choudhuri and others	(2009) 15 SCC 620	18, 19 & 20

On the point that fixing date, time and place of enquiry is must by the disciplinary authority for proving / disproving of charges, he has placed reliance upon following judgments:

Judgment(s)	Citation	Paragraphs
Dinesh Kumar Verma Vs. State of U.P. and another	judgment and order dated 24.03.2022 passed in Writ-A No.20837 of 2020.	5, 7, 11 & 12
Prakash Chandra Agarwal Vs. State of U.P. and another	judgment and order dated 07.05.2022 passed in Writ-A No.2555 of 2022	4, 5, 6, 7 & 11
Sanjay Misra vs. Director SGPGI and another	judgment and order dated 18.09.2019 passed in Writ Petition No.1192 (S/S) of 2008	15, 16, 17 & 18

On the point that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would not ipso fact constitute misconduct, he placed reliance upon following judgment:

Judgment(s)	Citation	Paragraphs
Union of India and others Vs. J. Ahmed	(1979) 2 SCC 286	7, 9 & 11

10. On the other hand, learned counsel for the respondents submitted that the audit department submitted special audit report, wherein financial irregularities were found against the petitioner in deposit work done at Ambedkar Nagar. Thereafter, taking into consideration the audit report, an inquiry was initiated against the petitioner. It has been submitted that the inquiry report has been submitted in accordance with law by affording full opportunity to the petitioner.

11. He next submitted that relevant documents relating to charges were supplied to the petitioner vide letter dated 14.07.2004. He submitted that after due inquiry, a charge sheet containing eight charges was served upon the petitioner on 30.07.2002 along with evidence and found the charge Nos.3& 6 to be proved against the petitioner.

12. He further submitted that the petitioner himself accepted the charges against him and made a request that he should be awarded minor punishment, which itself proves that the inquiry was just and proper. He submitted that show cause notice dated 24.06.2004 could not be served upon the petitioner as he was not

available in his office / residence and his family members have also denied from receiving the same. Thereafter, the said notice was published in daily news papers Dainik Jagran and Times of India on 29.06.2004 for information upon the petitioner.

13. He lastly submitted that the inquiry report was based on documentary and other evidences and on the basis of same, the impugned order of dismissal has been passed against the petitioner, which is just and valid.

14. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

15. To resolve the controversy involved in the matter, the judgments relied upon by learned counsel for the petitioner are being quoted below:

• Judgment relied upon by learned counsel for the petitioner:

a) M/s Magadh Sugar & Energy Ltd. (Supra):

19. While a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious alternate remedy is available, the existence of an alternate remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallized by this Court in Whirpool Corporation v. Registrar of Trademarks, Mumbai 19 and Harbanslal Sahni Vs. Indian Oil Corporation Ltd.. Recently, in Radha Krishan Industries Vs. State of Himachal Pradesh and Others, a two judge

Bench of this Court of which one of us was a part of (Justice DY Chandrachud) has summarized the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternate remedy. This Court has observed:

“28. The principles of law which emerge are that:

(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

(iii) Exceptions to the rule of alternate remedy arise where

(a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution;

(b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;

(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

(v) *When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and*

(vi) *In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.”*

The principle of alternate remedies and its exceptions was also reiterated recently in the decision in Assistant Commissioner of State Tax Vs. M/s Commercial Steel Limited. In State of HP VS. Gujarat Ambuja Cement Ltd., this Court has held that a writ petition is maintainable before the High Court if the taxing authorities have acted beyond the scope of their jurisdiction. This Court observed:

“23. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to

force him to adopt the remedies provided by the statute. It was noted by this Court in L. Hirday Narain Vs. ITO [(1970) 2 SCC 355: AIR 1971 SC 33] that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition.”

20. The above principle was reiterated by a three-judge Bench of this Court in Executive Engineer Vs. Seetaram Rice Mill. In that case, a show cause notice/provisional assessment order was issued to the assessee on the ground of an unauthorized use of electricity under Section 126 (1) of the Electricity Act, 2003 and a demand for payment of electricity charges was raised. The assessee contended that Section 126 was not applicable to it and challenged the jurisdiction of the taxing authorities to issue such a notice, before the High Court in its writ jurisdiction. The High Court entertained the writ petition. When the judgement of the High Court was appealed before this Court, it held that the High Court did not commit any error in exercising its jurisdiction in respect of the challenge raised on the jurisdiction of the revenue authorities. This Court made the following observations:

“ 81. Should the courts determine on merits of the case or should they preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent

authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where they involve primary questions of jurisdiction or the matters which go to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act.

82. It is argued and to some extent correctly that the High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the above stated class of cases. It is a settled principle that the courts/tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, *lex nil frustra facit*, nor to enforce one which would be frivolous—*lex neminem cogit ad vana seu inutilia*—the law will not force anyone to do a thing vain and fruitless. In other words, if exercise of jurisdiction by the tribunal *ex facie* appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction. This issue is no longer *res integra* and has been settled by a catena of judgments of this Court, which we find entirely unnecessary to refer to in detail..." (emphasis supplied)

21. In *Union of India v State of Haryana* 25 the assessing authorities imposed sales tax on the rentals charged for supply of telephones. Writ petitions were filed in the High Court challenging the levy. The writ

petitions were dismissed on the ground that an alternative remedy of a statutory appeal was available. An appeal against these orders was filed before this Court. The appeal was allowed and the matter was remanded back to the High Court for determination since it involved a question of law on whether the supply of telephones amounted to sale.

22. It is not the case of the appellant that the respondents have miscalculated the duty and penalty imposed on it. The appellant contends that the State Government does not have the power to levy tax on its sale of electricity to BSEB. Thus, the plea strikes at the exercise of jurisdiction by the Government. In view of the law discussed above on the rule of alternate remedy, the High Court can exercise its writ jurisdiction if the order of the authority is challenged for want of authority and jurisdiction, which is a pure question of law.

25. We are of the considered view that the High Court made an error in declining to entertain the writ petition and it would be appropriate to restore the proceedings back to the High Court for a fresh disposal. In order to facilitate the decision on remand, we have recorded the broad submissions of the parties on merits but leave the matter open for a fresh evaluation by the High Court. We accordingly allow the appeal and set aside the judgement of the High Court dated 18 September 2017 arising out of CWJC No 4300 of 2015. The writ petition is restored to the file of the High Court for fresh determination. The appeal is disposed of in the above terms with no order as to costs.

b) Whirlpool Corporation (Supra):

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ, petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

16. *Rashid Ahmed Vs. Municipal Board, Kairana* laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another *Rashid* case, namely, *K.S. Rashid & Son vs. Income Tax Investigation Commission* which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

17. A specific and clear rule was laid down in *State of U.P. v. Mohd. Nooh* as under: "But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate remedies."

18. This proposition was considered by a Constitution Bench of this Court in *A.V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani* and was affirmed and followed in the following words:

"The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

19. Another Constitution Bench decision in *Calcutta Discount Co. Ltd. Vs. ITO, Companies Distt. laid down:*

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against the Income Tax Officer acting without jurisdiction under Section 34, Income Tax Act.

20. Much water has since flown under the bridge, but there has been no corrosive effect on there decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had pruported to usurp jurisdiction without any legal foundation.

21. That, being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show-cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the "Tribunal".

c) Rajendra Prasad Upadhyaya (Supra):

So far as the legal proposition that the existence of alternative remedy is not an absolute bar, it does not require any adjudication as the law laid down by the Supreme Court as well as this High Court is well settled. In order to summarize the aforesaid legal position we reiterate the same as under-

(i) Statutory alternative remedy is not an absolute bar for the High Court to entertain a writ petition under Article 226 of the Constitution.

(ii) Refusal to entertain a writ petition on existence of statutory alternative remedy is a self imposed restriction broadly based on following considerations, namely;

(a) alternative remedy is adequate, efficacious and speedy.

(b) writ petitions involving complex and disputed question of facts may be relegated to statutory alternative forum;

(iv) If a writ petition has been entertained despite there being a statutory remedy, which may be adequate, and the said petition has remained pending for considerable long time then there would be little justification for relegating the petitioner to the alternative remedy, unless there are valid and cogent reasons for doing so.

(v) Even if there exists an adequate alternative, efficacious speedy remedy in the alternative forum, the High Court may entertain the writ petition in the following circumstances.

- (a) for enforcement of any of the fundamental rights,
- (b) where there has been a violation of principle of natural justice,
- (c) where the order or proceedings are wholly without jurisdiction, or
- (d) the vires of the Act is challenged.

It will depends upon the facts and circumstances of each case as to whether the discretion of entertaining the writ petition in the light of the availability of statutory remedy has to be exercised or not. There cannot be any straight jacket formula or a hard and fast rule so as to either entertain such writ petition or throw it away at the threshold asking the petitioner to approach the alternative forum.

The learned Single Judge while dismissing the writ petition on the ground of availability of alternative remedy did not address itself on the plea of violation of principles of natural justice in the departmental enquiry and relegated the appellant to avail departmental remedy, we are of the considered opinion that the impugned order requires interference. In cases of violation of principles of natural justice and denial of reasonable opportunity to defend in the disciplinary proceedings, the writ petition is fully maintainable and it shall not be normally dismissed on the ground of availability of alternative remedy, as was the position in the present case.

Since the writ petition was dismissed on the very first date without calling for counter affidavit, therefore, it would be appropriate that the matter may be remanded back to the learned Single Judge to decide the writ petition on merit.

In this view of the matter the special appeal is allowed and the order dated 30.1.2012 passed by the learned Single Judge in W.P. No. 529 (SS) of 2012 is hereby set aside. The matter is remanded back to the learned Single Judge with a request to decide the same on merits in accordance with law. The parties shall appear before the writ Court as and when the case is listed. Cost made easy.

d) Durga Enterprise (P) Ltd. and another (Supra):

3. The High Court, having entertained the writ petition, in which pleadings were also complete, ought to have decided the case on merits instead of relegating the parties to a civil suit.

e) State of U.P and Ors. (Supra):

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority / Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the un rebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been taken into consideration to conclude that the charges have been proved against the respondents.

29. Apart from the above, by virtue of Article 311(2) of the Constitution of India the departmental enquiry had to be conducted in accordance with the rules of natural justice. It is a basic requirement of the rules of natural justice that an

employee be given a reasonable opportunity of being heard in any proceedings which may culminate in punishment being imposed on the employee.

30. When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal /removal from service.

33. As noticed earlier in the present case not only the respondent has been denied access to documents sought to be relied upon against him, but he has been condemned unheard as the inquiry officer failed to fix any date for conduct of the enquiry. In other words, not a single witness has been examined in support of the charges levelled against the respondent. The High Court, therefore, has rightly observed that the entire proceedings are vitiated having been conducted in complete violation of the principles of natural justice and total disregard of fair play. The respondent never had any opportunity at any stage of the proceedings to offer an explanation against the allegations made in the charge-sheet.

34. This Court in *Kashinath Dikshita v. Union of India* had clearly stated the rationale for the rule requiring supply of copies of the documents sought to be relied

upon by the authorities to prove the charges levelled against a government servant. In that case the enquiry proceedings had been challenged on the ground that non-supply of the statements of the witnesses and copies of the documents had resulted in the breach of rules of natural justice. The appellant therein had requested for supply of the copies of the documents as well as the statements of the witnesses at the preliminary enquiry. The request made by the appellant was in terms turned down by the disciplinary authority.

35. In considering the importance of access to documents in statements of witnesses to meet the charges in an effective manner this Court observed as follows: (*Kashinath Dikshita* case, SCC pp.234-35, para 10)

"10. When a government servant is facing a disciplinary proceeding, he is entitled to be afforded a reasonable opportunity to meet the charges against him in an effective manner. And no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies, how can the employee concerned prepare his defence, cross-examine the witnesses, and point out the inconsistencies with a view to show that the allegations are incredible? It is difficult to comprehend why the disciplinary authority assumed an intransigent posture and refused to furnish the copies notwithstanding the specific request made by the appellant in this behalf. Perhaps the disciplinary authority made it a prestige issue. If only the disciplinary had asked itself the question: 'What is the harm in making available the material? and weighed the pros and cons,

the disciplinary authority could not reasonable have adopted such a rigid and adamant attitude. On the one hand there was the risk of the time and effort invested in the departmental enquiry being wasted if the courts came to the conclusion that failure to supply these materials would be tantamount to denial of reasonable opportunity to the appellant to defend himself. On the other hand by making available the copies of the documents and statements the disciplinary authority was not running any risk. There was nothing confidential or privileged in it."

38. The aforesaid proposition of law has been reiterated in Tirllok Nath v. Union of India wherein it was held that non-supply of the documents amounted to denial of reasonable opportunity. It was held as follows: (SLR pp. 764-65)

".... Had he decided to do so, the documents would have been useful to the appellant for cross-examining the witnesses who deposed against him. Again had the copies of the documents been furnished to the appellant he might, after perusing them, would have exercised his right under the rule and asked for an oral enquiry to be held. Therefore, in our view the failure of the inquiry officer to furnish the appellant with copies of the documents such as the first information report and the statements recorded at teh Shidipura house and during the investigation must be held to have caused prejudice to the appellant in making his defence at the inquiry.

39. The proposition of law that a government employee facing a departmental enquiry is entitled to all the relevant statements, documents and other materials to enable him to have a

reasonable opportunity to defend himself in the departmental enquiry against the charges is too well established to need any further reiteration. Nevertheless given the facts of this case we may re-emphasise the law as stated by this Court in State of Punjab v. Bhagat Ram: (SCC p.156, paras 6-8)

"6. The State contended that the respondent was not entitled to get copies of statements. The reasoning of the State was that the respondent was given the opportunity to cross-examine the witnesses and during the cross-examination the respondent would have the opportunity of confronting the witnesses with the statements. It is contended that the synopsis was adequate to acquaint the respondent with the gist of the evidence.

7. The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the government servant is afforded a reasonable opportunity to defend himself against charges on which inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. He can do so by cross-examining the witnesses produced against him. The object of supplying statements is that the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against the government servant. Unless the statements are given to the government servant he will not be able to have an effective and useful cross examination.

8. It is unjust and unfair to deny the government servant copies of statements of

witnesses examined during investigation and produced at the inquiry in support of the charges levelled against the government servant. A synopsis does not satisfy the requirements of giving the government servant a reasonable opportunity of showing cause against the action proposed to be taken."

41. In our opinion the appellants have deliberately misconstrued the directions issued by the High Court in Writ Petition No.937 of 2003. In terms of the aforesaid order the respondent was required to submit a reply to the charge - sheet upon supply of the necessary document by the appellant. It is for this reason that the High Court subsequently while passing an interim order on 7-6-2004 in Writ Petition No.793 of 2004 directed the appellant to ensure compliance of the order passed by the Division Bench on 23-7-2003. In our opinion the actions of the inquiry officers in preparing the reports ex parte without supplying the relevant documents has resulted in miscarriage of justice to the respondent. The conclusion is irresistible that the respondent has been denied a reasonable opportunity to defend himself if the enquiry proceedings.

42. In our opinion, the appellants have miserably failed to give any reasonable explanation as to why the documents have not been supplied to the respondent. The Division Bench of the High Court, therefore, very appropriately set aside the order of removal.

f) Roop Singh Negi (Supra):

14. Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges leveled

against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence.

15. We have noticed hereinbefore that the only basic evidence whereupon reliance has been placed by the Enquiry Officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station. Appellant being an employee of the bank, the said confession should have been proved. Some evidence should have been brought on record to show that he had indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the Enquiry Officer had made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left.

17. In *Moni Shankar Vs. Union of India and Anr.* [(2008) 3 SCC 484], this Court held:

17. The departmental proceeding is a quasi judicial one. Although the provisions

of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The Court exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely - preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality."

21. 15. Yet again in M.V. Bijlani vs. Union of India and ors. (2006) 5 SCC 88, this Court held:

"25 Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, 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."

g) Radhey Kant Khare (Supra):

6. In a Division Bench of this Court in Subhash Chandra Sharma vs. U.P. Co-operative Spinning Mills, 1999 (4) AWC 3227 : 2000 (1) UPLBEC 541. in which one of us (Hon'ble M. Katju, J.) was a member, this law has been laid down. The law is as follows :

"After a charge-sheet is given to the employee, an oral enquiry is a must, whether the employee requests for it or not. Hence, a notice should be issued to him indicating him the date, time and place of the enquiry. On that date the oral and documentary evidence against the employee should first be led in his presence vide, A.C.C. Ltd. vs. Their Workmen (1963) U LLJ 396 (SC). Ordinarily, if the employee is examined first, it is illegal vide Anand Joshi v. M.S.F.C., 1991 LIC 1666 (Bom) ; S.D. Sharma v. Trade Fair Authority of India, (1985) II LLJ 193 and Central Railway vs. Raghubir Saran, (1983) II LLJ 26. No doubt, in certain exceptional cases, the employee may be asked to lead evidence first, vide Firestone Tyre and Rubber Co. Ltd. Vs. Their Workmen, AIR 1968 SC 236, but ordinarily the rule is that first the employer must adduce his evidence. The reason for this principle is that the charge-sheeted employee should not only know the charges against him but should also know the evidence against him so that he can properly reply to the same. Where no witnesses were examined and no exhibit or record is made but straightaway the employee was asked to produce his

evidence and documents in support of his case it is Illegal vide *P. C. Thomas v. Mutholi Co-operative Society Ltd.*, 1978 LIC 1428 (ker and Meengles Tea Estate v. Their Workmen, AIR 1963 SC 1719.

7. It is also necessary that ordinarily the statement of all the witnesses of the employer should be recorded in presence of the employee unless there are compelling reasons to act otherwise vide *Kesoram Cotton Mills v. Gangadhar*, AIR 1964 SC 708 and *Central Bank of India Vs. Prakash Chand*, AIR 1969 SC 983, etc. If the witnesses are examined in the absence of the employee and their recorded statements were also not supplied to him this procedure is illegal vide *Tata Oil Mills. Co. Ltd. Vs. Their Workmen*, (1963) II LLJ 78 ; *India General Navigation and Rly. Co. Ltd. V. Its Employees*, (1961) II LLJ 372 (SC) ; *Bharat Sugar Mills Co. Ltd. vs. Jai Singh*, (1961) II LLJ 644 (SC) : *Sur Enamel and Stamping Works Ltd. vs. Their Workmen*. AIR 1963 SC 1914 and *Vysya Bank v. N. M. Pat*, 1994 LIC 1429 (Kant) etc.

8. In *Meenglas Tea Estate Vs. Their Workmen*. AIR 1963 SC 1719, the Supreme Court observed "It is an elementary principle that a person who is required to answer the charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled if the result of the enquiry can be accepted.

9. In *S.C. Girotra Vs. United Commercial Bank*, 1995 (Supp) 3 SCC 212. the Supreme Court set aside the dismissal order which was passed without giving the employee an opportunity of cross-examination. In *State of U.P. Vs. C.S. Sharma*. AIR 1968 SC 158, the Supreme Court held that omission to give opportunity to an employee to produce his witnesses and lead evidence in his defence vitiates the proceedings. The Court also held that in the enquiry, the witnesses have to be examined in support of the allegations, and opportunity has to be given to the delinquent to cross-examine those witnesses and to lead evidence in his defence. In *Punjab National Bank v. A.I.P.N.B.E. Federation*, AIR 1960 SC 160 (vide paragraph 66), the Supreme Court held that in such enquiries evidence must be recorded in presence of the charge-sheeted employee and he must be given opportunity to rebut such evidence."

22. In our opinion, there was total violation of the principles of natural justice in the alleged enquiry held on 12.6.1985 and hence it was not a valid enquiry at all in view of the decisions of the Supreme Court and this Court referred to above. Since a major punishment was being imposed on the petitioner, there should have been a proper oral enquiry before taking the action against the petitioner, but this was evidently not done.

h) Smt. Mazda Begum and Ors. (Supra):

33. This Court also has taken same view earlier in *Subhash Chandra Sharma Vs. Managing Director, U.P. Co-op. Spinning Mills Federation Ltd., Kanpur* and another, 2000(1) UPLBEC 541 and said:-

"In our opinion after the petitioner replied to the charge-sheet a date should have

been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. If the petitioner in response to this intimation had failed to appear for the enquiry then an ex parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioner's reply to the charge-sheet he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice." "In Meenglas Tea Estate v. The workmen., AIR 1963 SC 1719, the Supreme Court observed "It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way to cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted".

i) State of U.P. and Others (Supra):

24. At this stage it would be appropriate to notice the charges that had been framed against the respondent which are as under:

"I. Work pertaining to Salon Jagat Pur Road, had been given to Sri Jitendra Mohan Bajpai, Contractor vide Tender No.5/AE-2 dated 10.06.1996 through 3054-PW Work Plan. The last payment of the Tender has been paid by the then Executive Engineer Sri Akash Deep Sonkar and accordingly payment of Rs.193047/- was to be paid vide cheque No.13/256064 dated 02.08.1996. Thereafter you have made this payment through No.142 dated 31.12.1998 to the amount of Rs.193047 through Cheque No.78/001355 dated 31.12.1998. At page 138 of the Cash Book Part-73, Entry No. illegible has been made. You have deliberately made aforesaid entry in order to cause loss to the Govt. and had made the payment twice through voucher No.142 for the amount 193047 dated 31.12.1998 and the amount of Rs.193047 has been changed to 134305. Therefore the payment of Rs.58742 which has already made has been shown to be not paid in the aforesaid entry.

In this manner you have deliberately caused loss to the Government by the fraudulent act conspiring for the same and had recovered Rs.58742/- from the contractor through voucher No.141 dated 21.3.2000, reason for which has been mentioned that Rs.58742 has been deducted due to excess payment made for the work at Salon Jagat Pur Road through voucher No.142 dated 31.12.1998. Nowhere in voucher No.142 dated 31.12.1998 it is mentioned that due to what reason deduction has been made after the

issuing of cheque regarding the amount to be paid which shows bad intention on your part. You have made wrong entries regarding deduction mention in the voucher amount which is proved to be violation of financial handbook Section-5(Part-1) para 4 D and 83. Voucher No.141 dated 31.03.2000 and entry to such effect proves that the Divisional Accounts Officer has issued the cheque of Rs.0185777/- regarding the aforesaid payment through cheque and the cheque for amount Rs.0185777/- has been passed by the Assistant Engineer. At the time of issuing cheque deduction of Rs.58742/- from the amount to be paid makes your conduct suspicious and you are found responsible for the misconduct in this regard. Therefore, you are found guilty of misconduct according to Para 3 U.P. Govt. Servant Conduct Rules 1956. II. You had passed order for supply of mobile patcher 6 to M/s B.N. Traders, Karhal Mainpuri through letter Memo-2/Camp-

72-99 dated 17.07.1999, M/s B.N.

Traders, Karhal Mainpuri had submitted receipt No.149 regarding the aforesaid supply. The supply has been passed for the amount of Rs.129600/- by the Asstt. Engineer and had been passed by you for the amount of Rs.129600/- vide Cheque No.96/002075 dated 16.11.1999. The Cheque dated 16.11.1999 has been issued to your name which has been provided for the payment to B.N. Traders to Bank draft. In the place of this cheque you had issued Cheque No.005/003492 dated 13.11.1999 for Rs.129600/- to M/s B.N. Traders and had to be encashed by them.

It is clear from the documents that the

original cheque dated 31.11.1999 has been cut and self has been inserted and the cheque has been encashed by you. In the counter filed of cheque book name of M/s B.N. Trader had been mentioned.

Therefore, the cheque has been wrongly encashed by you after making fraud entry by self name and the amount has not been taken in cash book. Therefore, the forgery in this regard is proved. You have made bank drafts in favour of M/s B.N. Traders on 08.03.2000 for Rs.129600/- from State Bank of India, Rai Bareilly. In the application of form of the draft the name of M/s B.N. Traders is mentioned whereas the order regarding supply of the draft to M/s B.N. Traders, Karhal, Mainpuri has been made in favour of the firm. Therefore bank draft was to be sent on the address of Mainpuri. M/s B.N. Traders, Karhal, Mainpuri had informed Chief Engineer, Lucknow on 28.07.2000 that you have made payment at the address of firm in Mainpuri. In this regard the bank draft has been made in the name of M/s B.N.

Traders and the draft amount has been received in the name of your relative and no payment as such has been made to M/s B.N. Traders. You had cut the cheque and had violated Para 77 of the financial handbook Section 6 and Para 19- 22 of financial handbook Section 5, Part-I. Receiving of payment after cutting the name of firm from the cheque and entering our own name (self) shows that the payment had been received after committing fraud. Again in order to conceal this Act you had made draft No.PL00008/392289 dated 08.03.2000 for Rs.129600/- from SBI, Rai Bareilly. The bank draft had been made for the address of Lucknow of the firm not of the address

Karhal, Mainpuri so that the fraud can be committed and no payment as such has been made to the firm. The firm has alleged that you had received payment after committing fraud therefore, you are found guilty and misconduct regarding the misappropriation of amount of Rs.129600/- after committing fraud on the documents and violating the financial rules. You are also held guilty for mis- conduct according to para 3 U.P. Govt.

Servant Conduct Rules 1956.

III. Case No.37/98 has been instituted for adjudication between M/s Indian Coal Suppliers vs. Govt. of U.P. The case has been decided on 05.01.2000 according to which demand for Rs.26, 00,000/- along with interest has been made by the concerned firm from the Department. The fact has been in your knowledge that the option of appeal in the aforesaid case has been rejected by the Govt. In such situation you had not prepared the defence regarding validity of the agreement during framing of issues in proper manner. The case has been dismissed only on the ground of deficient Court Fees. You have deliberately appointed Special Advocate without permission of Govt., had not paid Court Fees and had colluded with M/s Indian Cola Suppliers to cause loss of Rs.26,00,000/- to the Govt. by presenting weak case before the court in order to cause benefit to the contractor. The aforesaid Act is violation of para 9.01, 9.02 and 9.03 of financial handbook and para 3 of U.P. Govt. Servant Conduct Rules 1956."

29. Apart from the above by virtue of Article 311(2) of the Constitution of India the departmental inquiry had to be conducted in accordance with rules of

natural justice. It is a basic requirement of rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceeding which may culminate in a punishment being imposed on the employee.

31. In Shaughnessy v. United States, 345 US 206 (1953) (Jackson J), a judge of the United States Supreme Court has said :

"procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."

j) Moni Shankar (Supra):

17. The departmental proceeding is a quasi judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The Court exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality.

k) MV Bijlani (Supra):

21. While making the enquiry as against the Appellant, the Enquiry Officer made adverse comments about the correctness or otherwise of the statements made by the witnesses examined on behalf of the department without assigning any reasons therefor. They were examined by the department. If they deposed falsely, they should have been cross-examined. Only because their evidence was totally against the department, the same per se would not mean that they deposed falsely. The Enquiry Officer opined:

"He did not maintain ACE-8 as if the ACE-8 were maintained there was no necessity of preparing document No. 1 viz. numerical account of EST Jagdalpur prepared by Shri M.V. Bijlani, JET Jagdalpur, on 25.12.1973. If there was any ACE-8 prepared earlier by Shri Bijlani, he would have definitely objected to submit another ACE-8 (DOC-1) which is alleged to have been prepared on the basis of document shown to him by JE (Vigilance). According to SDOT Raipur, ACE-8 (document 20) issue of copper wire 150 lbs/mile to EST Jagdalpur had been mentioned on 22.10.1969, 30.10.1969 and 02.12.1969 as 2204 lbs., 2218 lbs and 4398 lbs respectively. There are no entries of the above quantity of wire in ACE-8 (DOC-1) of EST Jagdalpur."

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 evidences to prove the charge. Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all

reasonable doubts, 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.

26. The report of the Enquiry Officer suffers from the aforementioned vices. The orders of the disciplinary authority as also the appellate authority which are based on the said Enquiry Report, thus, cannot be sustained. We have also noticed the way in which the Tribunal has dealt with the matter. Upon its findings, the High Court also commented that it had not delved deep into the contentions raised by the Appellant. The Tribunal also, thus, failed to discharge its functions properly.

27. For the views we have taken, the impugned judgments are wholly unsustainable.

28. The appeal is, therefore, allowed. The consequence of the said order would have been to remit the matter back to the disciplinary authority. We, however, do not intend to do so as the charges relate to the year 1969-1970. The Appellant, due to pendency of these proceedings, has suffered a lot. He is, therefore, directed to be reinstated in service, if he has not reached the age of superannuation. However,

keeping in view the fact that, he has not worked for a long time, we direct that he may only be paid 50% of the back wages. He is also entitled to costs of this appeal. Counsel's fee assessed at Rs.5000/-.

l) Chamoli District Cooperative Bank Ltd. (Supra):

22.2. Mandatory requirement of a disciplinary inquiry i.e. is holding of an inquiry when the charges are refuted and serving the inquiry report to the delinquent has been breached in the present case.

22.4. The disciplinary authority issued show-cause notice dated 4-5-1993 to respondent 1 employee without holding of an inquiry and subsequent resolution by disciplinary authority taken in the year 2000 without there being any further steps is clearly unsustainable. The High Court has rightly quashed the dismissal order by giving liberty to the Bank to hold de novo inquiry within a period of six months, if it so desires.

m) Smt. Chinta Yadav (Supra):

60. The charges which we have discussed, amply prove that despite the finding given by this Court in earlier writ petition filed by the petitioner simply because liberty was given to the State to hold a fresh inquiry, the same charges have been found to be proved, but, in substance, with no proof any by ignoring the relevant admissible material which was available with the enquiry officer. All the charges were not supported by any material evidence and formal enquiry on the basis of such report was held only with a view to oust the petitioner though there is no material against her for such an action.

61. The sequence of events and the manner in which the enquiry has been initiated earlier on the complaint of Sri Umesh Chandra Yadav, belonging to a political party then again on the compliance of Sri K.N. Kharwar, who was Upper Mukhya Adhikari against whom allegations of and mala fide have been made, coupled with the fact that though complaint was not supported by an affidavit and was not in accordance with the Rules of 1997 but was entertained and that despite the fact that the charges which have been dealt with separately, do not make out any case against the petitioner, show that the impugned order has been passed for ceasing her administrative and financial powers and for proceeding with the formal enquiry on non existent charges. The order, therefore, is liable to be set aside, which is hereby quashed. The petitioner shall be allowed to discharge his functions, financial and administrative both, hereafter.

n) Subhas Yadav (Supra):

8. Now on the touchstone of the judgment quoted above, the facts of the present case are being adverted to. In the present case show cause notice has been issued to the petitioner to which petitioner has submitted his reply on 14.2.2008. District Magistrate in impugned order has also taken note of the reply submitted by the petitioner and District Magistrate has proceeded to mention that reply which has been issued to the petitioner and pursuant to which petitioner has submitted his reply. District Magistrate has further proceeded to mention that reply which has been submitted by the petitioner is unsatisfactory without assigning any reasons as to why said reply is not satisfactory. Once reply has been submitted then reason ought to

have been given as to why said reply is unsatisfactory by the District Magistrate . Once no reason has been indicated as to why reply submitted by the petitioner is unsatisfactory then the very purpose of issuance of show cause notice stands frustrated and breached. On this score that admittedly reply has been submitted and District Magistrate while passing order has proceeded to mention that reply submitted by the petitioner is unsatisfactory and as no reason whatsoever has been disclosed as to why reply submitted by petitioner is unsatisfactory, the order passed cannot be sustained.

9. Consequently, order dated 11.7.2008 passed by District Magistrate, Bareilly is hereby quashed. District Magistrate, Bareilly is directed to take fresh decision in the matter after taking into consideration the reply so submitted by the petitioner within next six weeks from the date of production of certified copy of this order.

o) S.R. Tewari (Supra):

6. Thus, the questions that arise for consideration of this Court are whether the punishment of compulsory retirement awarded by the Disciplinary Authority is proportionate to the delinquency proved and whether the respondents in the contempt petitions wilfully violated the order dated 5.10.2012 passed by this Court holding that the punishment should not be given effect to until it is produced before the court at the time of the next hearing.

17. We have reconsidered the case within permissible limits. The case remained limited to the charge nos. 4 and 6 only as all other charges have lost the significance at one stage or the other; and we have to advert only to the said charges.

24. The question of interference on the quantum of punishment, has been considered by this Court in a catena of judgments, and it was held that if the punishment awarded is disproportionate to the gravity of the misconduct, it would be arbitrary, and thus, would violate the mandate of Article 14 of the Constitution.

In *Ranjit Thakur v. Union of India and Ors.*, AIR 1987 SC 2386, this Court observed as under:

“But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on the aspect, which is otherwise, within the exclusive province of the Court Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. In the present case, the punishment is so stringently disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review.” (Emphasis added) (See also: *Union of India and Anr. V. G. Ganayutham (dead by Lrs.)*, AIR 1997 SC 3387; *State of Uttar Pradesh and Ors. V. J.P. Saraswat*, (2011) 4 SCC 545; *Chandra Kumar Chopra Vs. Union of India and Ors.*, (2012) 6 SCC 369; and *Registrar General, Patna High Court v. Pandey Gajendra Prasad & Ors.*, AIR 2012 SC 2319).

25. In *B.C. Chaturvedi v. Union of India and Ors.*, AIR 1996 SC 484, this Court

after examining various its earlier decisions observed that in exercise of the powers of judicial review, the court cannot “normally” substitute its own conclusion or penalty. However, if the penalty imposed by an authority “shocks the conscience” of the court, it would appropriately mould the relief either directing the authority to reconsider the penalty imposed and in exceptional and rare cases, in order to shorten the litigation, itself, impose appropriate punishment with cogent reasons in support thereof. While examining the issue of proportionality, court can also consider the circumstances under which the misconduct was committed. In a given case, the prevailing circumstances might have forced the accused to act in a certain manner though he had not intended to do so. The court may further examine the effect, if the order is set aside or substituted by some other penalty. However, it is only in very rare cases that the court might, to shorten the litigation, think of substituting its own view as to the quantum of punishment in place of punishment awarded by the Competent Authority.

26. In *V. Ramanna V. A.P. SRTC and ors.*, AIR 2005 SC 3417, this Court considered the scope of judicial review as to the quantum of punishment is permissible only if it is found that it is not commensurate with the gravity of the charges and if the court comes to the conclusion that the scope of judicial review as to the quantum of punishment is permissible only if it is found to be “shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards.” In a normal course, if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the Disciplinary Authority to reconsider the penalty

imposed. However, in order to shorten the litigation, in exceptional and rare cases, the Court itself can impose appropriate punishment by recording cogent reasons in support thereof.

30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is “against the weight of evidence”, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

31. Hence, where there is evidence of malpractice, gross irregularity or illegality, interference is permissible.

34. The proved charges remained only charge nos.4 and 6 and in both the cases the misconduct seems to be of an administrative nature rather than a misconduct of a serious nature. It was not the case of the department that the appellant had taken the escort vehicle with him. There was only one vehicle which was an official vehicle for his use and charge no.6 stood partly proved. In view thereof, the punishment of compulsory retirement shocks the conscience of the court and by no stretch of imagination can it be held to be proportionate or commensurate to the delinquency committed by and proved

against the appellant. The only punishment which could be held to be commensurate to the delinquency was as proposed by the Government of India to withhold two increments for one year without cumulative effect. It would have been appropriate to remand the case to the disciplinary authority to impose the appropriate punishment. However, considering the chequered history of the case and in view of the fact that the appellant had remained under suspension for 11 months, suffered the order of dismissal for 19 months and would retire after reaching the age of superannuation in December 2013, the facts of the case warrant that this court should substitute the punishment of compulsory retirement to the punishment proposed by the Union of India i.e. withholding of two increments for one year without having cumulative effect.

p) Union Bank of India (Supra):

28. This takes us to the last question as to whether the punishment of dismissal is shockingly disproportionate to the gravity of the charges. The principles relating to judicial review of punishment imposed, as a part of the decision making process by Court Martial, have been explained, in *Ranjit Thakur Vs. Union of India - 1987 (4) SCC 611*, where this Court interfered with the punishment imposed by a court martial on the ground that it was strikingly disproportionate to the gravity of offence on the following reasoning :

"Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be

vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review."

30. The charges that are held to be proved against the first respondent, are:
(i) Being the Contract Operating Officer for dressed meat, the first respondent with intent to defraud, caused the acceptance of meat from the contractor with 'heart' as part of the meat knowing that the same was not acceptable part of carcasses as per para 86 of special conditions of the contract (vide first charge);

(ii) The first respondent, as the Commandant incharge of the Supply Depot failed to ensure that required stocks were maintained as reserve, in the Butchery as required by para 51(a) of the special conditions of contract (vide fourth charge);
(iii) The first respondent as the Commandant responsible for the overall control of the operation of the Butchery improperly failed to implement the standard operating procedure for Butchery resulting in 'passed' animals not being segregated and being allowed to mix with the other animals of the contractor.

q) Charanjit Lamba (Supra):

12. The doctrine of proportionality which

Lord Diplock saw as a future possibility is now a well recognized ground on which a Writ Court can interfere with the order of punishment imposed upon an employee if the same is so outrageously disproportionate to the nature of misconduct that it shocks conscience of the Court. We may at this stage briefly refer to the decisions of this Court which have over the years applied the doctrine of proportionality to specific fact situations.

13. In Bhagat Ram v. State of Himachal Pradesh (1983) 2 SCC 442 this Court held that if the penalty imposed is disproportionate to the gravity of the misconduct, it would be violative of Article 14 of the Constitution.

11. In Ranjit Thakur v. Union of India and Ors. (1987) 4 SCC 611, this Court was dealing with a case where the petitioner had made a representation about the maltreatment given to him directly to the higher officers. He was sentenced to rigorous imprisonment for one year for that offence. While serving the sentence imposed upon him he declined to eat food. The summary court martial assembled the next day sentenced him to undergo imprisonment for one more year and dismissal from service. This Court held that the punishment imposed upon the delinquent was totally disproportionate to the gravity of the offence committed by him. So also in Ex-Naik Sardar Singh v. Union of India and Ors. (1991) 3 SCC 213 instead of one bottle of brandy that was authorized the delinquent was found carrying four bottles of brandy while going home on leave. He was sentenced to three months rigorous imprisonment and dismissal from service which was found by this Court to be disproportionate to the gravity of the offence proved against him.

19. That the punishment imposed upon a delinquent should commensurate to the

nature and generally of the misconduct is not only a requirement of fairness, objectivity, and non-discriminatory treatment which even those form quality of a misdemeanour are entitled to claim but the same is recognized as being a part of Article 14 of the Constitution. It is also evident from the long time of decisions referred to above that the courts in India have recognized the doctrine of proportionality as one of the ground for judicial review. Having said that we need to remember that the quantum of punishment in disciplinary matters is something that rests primarily with the disciplinary authority. The jurisdiction of a Writ Court or the Administrative Tribunal for that matter is limited to finding out whether the punishment is so outrageously disproportionate as to be suggestive of lack of good faith.

r) Chairman-cum-Managing Director, Coal India Ltd. and another (Supra):

18. 25. Again, in Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Assn. and another this court considered the doctrine of proportionality and it was held :

"19. So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, a court of law can

interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the "doctrine of proportionality".

18. "Proportionality" is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise--the elaboration of a rule of permissible priorities.

19. *de Smith* states that "proportionality" involves "balancing test" and "necessity test". Whereas the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter (necessity test) requires infringement of human rights to the least restrictive alternative. [Judicial Review of Administrative Action (1995), pp. 601-05, para 13.085; see also *Wade & Forsyth: Administrative Law* (2005), p. 366.]

20. In *Halsbury's Laws of England* (4th Edn.), Reissue, Vol. 1(1), pp. 144-45, para 78, it is stated:

"The court will quash exercise of discretionary powers in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is (2007) 4 SCC 669 well established in European law, and will be applied by English courts where European law is enforceable in the

domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground for review in English law, but is regarded as one indication of manifest unreasonableness."

21. The doctrine has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no "pick and choose", selective applicability of the government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a "sledgehammer to crack a nut". As has been said many a time; "where paring knife suffices, battle axe is precluded".

22. In the celebrated decision of *Council of Civil Service Union v. Minister for Civil Service* (1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL) Lord Diplock proclaimed: (All ER p. 950h-j) "Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality'...." (emphasis supplied)

23. *CCSU* has been reiterated by English courts in several subsequent cases. We do

not think it necessary to refer to all those cases.

24. So far as our legal system is concerned, the doctrine is well settled. Even prior to CCSU, this Court has held that if punishment imposed on an employee by an employer is grossly excessive, disproportionately high or unduly harsh, it cannot claim immunity from judicial scrutiny, and it is always open to a court to interfere with such penalty in appropriate cases.

25. In *Hind Construction & Engg. Co. Ltd. V. Workmen* (AIR 1965 SC 917), some workers remained absent from duty treating a particular day as holiday. They were dismissed from service. The Industrial Tribunal set aside the action. This Court held that the absence could have been treated as leave without pay. The workmen might have been warned and fined. (But) "It is impossible to think that any other reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this manner." (AIR p. 919, para 7) (emphasis supplied) The Court concluded that the punishment imposed on the workmen was "not only severe and out of proportion to the fault, but one which, in our judgment, no reasonable employer would have imposed". (AIR pp. 919-20, para 7) (emphasis supplied)

26. In *Federation of Indian Chambers of Commerce and Industry v. Workmen* [(1972) 1 SCC 40], the allegation against the employee of the Federation was that he issued legal notices to the Federation and to the International Chamber of Commerce which brought discredit to the Federation--the employer. Domestic inquiry was held against the employee and his services were terminated. The punishment was held to be disproportionate to the misconduct alleged

and established. This Court observed that: (SCC p. 62, para 34) "[T]he Federation had made a mountain out of a mole hill and made a trivial matter into one involving loss of its prestige and reputation."

27. In *Ranjit Thakur* referred to earlier, an army officer did not obey the lawful command of his superior officer by not

eating food offered to him. Court-martial proceedings were initiated and a sentence of rigorous imprisonment of one year was imposed. He was also dismissed from service, with added disqualification that he would be unfit for future employment.

28. Applying the doctrine of proportionality and following CCSU, Venkatachaliah, J. (as His Lordship then was) observed: (SCC p. 620, para 25) "The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review." (emphasis supplied)

19. The doctrine of proportionality is, thus, well recognized concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole

power of the decision maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review.

20. One of the tests to be applied while dealing with the question of quantum of punishment would be : would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment.

s) Dinesh Kumar Verma (Supra):

5. On a plain reading of paragraph 15 of the impugned judgment, extracted herein above, we gather that the Tribunal has clearly recorded that the delinquent employee in his reply to the charge sheet has either admitted the charges or the reply submitted by him is not in consonance with law, therefore, the case was such that it did not require adducing of any further evidence. As such, the disciplinary authority has rightly proceeded to pass the punishment order advertent to the explanation submitted by the petitioner. It is this finding of the tribunal which has been assailed before this Court and it is strongly argued that the petitioner while submitting his reply in response to the charge sheet has denied all the charges leveled against him, therefore, recital of admission on the part of the petitioner to

have admitted any charge is manifestly perverse and the Tribunal ought not have recorded any such finding contrary to the pleadings available on record. It is further argued that once there was a denial on the part of the petitioner in respect of all the charges imputed against him, the inquiry officer ought to have proceeded in accordance with law by affording due opportunity, i.e. by fixing date, time and place for holding disciplinary proceedings. It is also argued that the charges levelled against the petitioner relied upon certain documentary evidences in support thereof, therefore, the same could not have been proved by mere consideration of the reply submitted by the petitioner in response to the charge sheet. Learned counsel for the petitioner to buttress his submission has placed reliance upon several judgments reported in Writ-A No.10552 of 2016 : Dr. Atul Darbari Vs. State of U.P. and others; Writ Petition No.32680 (S/S) of 2019 (Suresh Ram Vs. State of U.P. and others); (2009) 2 SCC 570 : Roop Singh Negi v. Punjab National Bank; (2006) 5 SCC 88 : M.V. Bijlani v. Union of India; (2005) 1 UPLBEC 276 : Atul Kumar v. U.P. Export Corporation; (2006) 3 SCC 167 : Union of India and another vs. SC Parashar; (2008) ESC (All) 1673 : Smt. Chinta Yadav vs. State of U.P. and others; (2009) 1 UPLBEC 189 : Subhas Yadav vs. State of U.P. and others; (2003) 11 SCC 519 : Raj Kishore Jha v. State of Bihar and others; Writ Petition No.992 (S/B) of 2010 : Amar Kumar v. Central Administrative Tribunal Lucknow and others; (2011) 4 SCC 591 : S.N. Narula v. Union of India and others; (2011) 4 SCC 589 : Union of India and others v. S.K. Kapoor; (2009) 13 SCC 603 : Harbhajan Singh vs. State of Punjab; (2013) 2 SCC 41 : Manager, National Insurance Company Ltd. vs. Saju P Paul and another. It is also gathered that the

petitioner had disputed the contents of documents relied upon in support of charges levelled against him and the pleadings to this effect were made in the claim petition. Therefore, the findings recorded by the tribunal contrary to the what was pleaded in defence is clearly erroneous. The court has further been taken through the reply in response to the show cause notice where the petitioner has reiterated his grievance but the disciplinary authority has nevertheless proceeded to rely upon the enquiry report by ignoring such a defence. The affirmation of the impugned order passed by the disciplinary authority under the seal of the learned tribunal, it is argued, is glaringly wrong and perverse.

7. We may reiterate that the inquiry proceedings held by the inquiry officer are not an empty formality. The purpose of such proceedings is to bring home the material findings which the inquiry officer may record by exposing the oral and documentary evidences to scrutiny for the purposes of judging its admissibility as per the standard of proof attracted in an issue. Where the evidence lead is found admissible, a finding on that premise is open to recorded by the inquiry officer and it is only thereafter that the inquiry report becomes a reliable material for imposing any penalty. Howsoever serious the charges may be, as is the case at hand, the enquiry proceedings had to be held as per the norms prescribed and this quasi judicial function is convincingly shown to us as faulty. Likewise a document on the face of it with respect to date and the signature may not be denied yet its contents may be disputed. In order to prove the contents, the presenting officer may have to call such an officer to substantiate the contents with due opportunity to the

delinquent employee. The attack on the procedural infirmity as regards holding enquiry and reliance placed on such a report, we are convinced, is writ large.

11. We also take note of the fact that the disciplinary proceedings held by the State authorities by and large do not adhere to the well settled principles of law in the matter of holding inquiry as is the case at hand. This amounts to a dereliction of duty embodied under the U.P. Government Servant (Discipline and Appeal) Rules, 1999. The irregularities in the enquiry leave enough scope for indiscipline and the guilty go unpunished in all those cases where the procedural violations shield their misconduct. The discrepancies also prolong the disciplinary action contrary to the objects of service jurisprudence. The dormant role on the part of the State not to have a trained staff for disciplinary enquiry cannot be viewed lightly in every case. The disciplinary action must culminate into reformation and discipline. We would have imposed cost on the State recoverable from the officer, failing to hold inquiry as per law, but looking to the fact that a fresh inquiry is left open, the court reserves exercise of such a power in an appropriate case.

12. For the reasons recorded above, the writ petition is allowed. The impugned judgment as well as the punishment order dated 23rd January, 2019 is hereby set aside. Liberty is, however, granted to the disciplinary authority to proceed with the inquiry from the stage of reply submitted by the petitioner in response to the charge sheet issued to him. The inquiry proceedings shall be concluded by the disciplinary authority not later than a period of six months, strictly in accordance with law.

t) Prakash Chandra Agarwal (Supra):

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.

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.

u) Sanjay Misra vs. Director SGPGI and another (Supra):

13. The U.P. Government (Discipline and Appeal) Rules of 1999 which are admittedly applicable upon the petitioner clearly indicate the procedure that is required to be followed in departmental proceedings with regard to affording a proper and ample opportunity of hearing to the delinquent employee to submit his case in the enquiry proceedings. One of the main facets of the said opportunity is clearly the opportunity to be provided to the delinquent employee to rebut the evidence that is presented against him in the said enquiry proceedings. The said opportunity is in the nature of rebutting not only the documents but also extends to cross-examining the witnesses that are produced in the enquiry proceedings against the petitioner.

15. A perusal of the entire enquiry report and the impugned order clearly indicate only to the fact that the petitioner has been held guilty and has been dismissed from service only on account of police report had been submitted against him. The learned counsel for the petitioner has relied upon the case of State of U.P. and others vs. Saroj Kumar Sinha reported in 2010 Volume 2 SCC Page 772 which clearly indicates the procedure which is required to be followed in any departmental enquiry which is in the nature of a quasi judicial proceedings. The Hon'ble Supreme Court in the said judgment has clearly held that if no oral evidence has been examined and documents have not been proved, they

cannot be taken into consideration to conclude that the charges have been proved against the delinquent employee. It has been further held that the enquiry proceedings cannot be conducted with the closed mind and the enquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of Rules of Natural Justice is to ensure that the delinquent employee is given a fair hearing in proceedings which may culminate in the imposition of a major penalty.

16. With regard to the previous conduct of the petitioner that has been taken into account in the enquiry proceedings, the learned counsel for the petitioner has relied upon the case of Mohd. Yunus Khan vs. State U.P. and others reported in 2010 Volume 10 SCC Page 539 in which it has been clearly held that in case the disciplinary authority wants to consider the past conduct of an employee in imposition of punishment, the delinquent is entitled to notice thereof and charge-sheet should contain such an article or at least he should be informed of the same at the stage of show-cause-notice before imposing the punishments.

17. A perusal of the aforesaid judgment of the Hon'ble Supreme Court clearly indicated that they are perfectly applicable upon the present circumstances inasmuch as the procedure indicated by the Hon'ble Supreme Court in the case of Saroj Kumar Sinha (supra) has not been followed at all, although the same were required to be followed in terms of the Rules of 1999. Furthermore, the petitioner has been held to be guilty of the charges levelled against

him on account of his earlier conduct but neither the charge-sheet nor the show-cause-notice indicates any such charge to have been levelled against him and therefore, the aforesaid findings are also against the judgment of the Hon'ble Supreme Court in the case of Mohd. Yunis Khan (*supra*).

18. As a conclusion it can be said that the aforesaid two basis of holding the petitioner guilty i.e. the police report and the earlier conduct of the petitioner do not hold good and as such the entire enquiry proceedings against the petitioner are vitiated as is the dismissal order.

v) Union of India and others Vs. J. Ahmed (Supra):

7. To appreciate the contention it is better to have a look at the charges framed against the respondent. They are as under:

"(i) Completely failed to take any effective preventive measures against widespread disturbances breaking out in Nowgong District in spite of adequate warning being conveyed.

(ii) Showed complete lack of leadership when the disturbances actually did break out and failed to give proper direction to your subordinate Magistrates and co-ordinate co-operations with the police to restore Law and Order;

(iii) Did not personally visit the scenes of disturbances within the town or in the Rural areas, in time to take personal control of the situation and to exercise necessary supervision;

(iv) Did not keep Government informed of the actual picture and extent of the disturbances;

(v) Showed complete inaptitude, lack of foresight, lack of firmness and capacity to

take quick and firm decision and were, thus largely responsible for complete break down of Law and Order in Nowgong town as well as the rural areas of Nowgong District. Thus you proved yourself completely unfit to hold any responsible position".

9. The five charges listed above at a glance would convey the impression that the respondent was not a very efficient officer. Some negligence is being attributed to him and some lack of qualities expected of an officer of the rank of Deputy Commissioner are listed as charges. to wit, charge No. 2 refers to the quality of lack of leadership and charge No. 5 enumerates inaptitude, lack of foresight, lack of firmness and indecisiveness. These are qualities undoubtedly expected of a superior officer and they may be very relevant while considering whether a person should be promoted to the higher post or not or having been promoted, whether he should be retained in the higher post or not or they may be relevant for deciding the competence of the person to hold the post, but they cannot be elevated to the level of acts of omission or commission as contemplated by Rule 4 of the Discipline and Appeal Rules so as to incur penalty under rule 3. Competence for the post, capability to hold the same, efficiency requisite for a post, ability to discharge function attached to the post, are things different from some act or omission of the holder of the post which may be styled as misconduct so as to incur the penalty under the rules. The words 'acts and omission' contemplated by rule 4 of the Discipline and Appeal Rules have to be understood in the context of the All India Services (Conduct) Rules, 1954 ('Conduct Rules' for short). The Government has prescribed by Conduct Rules a code of conduct for the

members of All India Services. Rule 3 is of a general nature which provides that every member of the service shall at all times maintain absolute integrity and devotion to duty. Lack of integrity, if proved, would undoubtedly entail penalty. Failure to come up to the highest expectations of an officer holding a responsible post or lack of aptitude or qualities of leadership would not constitute failure to maintain devotion to duty. The expression 'devotion to duty' appears to have been used as something opposed to indifference to duty or easy-going or light-hearted approach to duty. If rule 3 were the only rule in the Conduct Rules it would have been rather difficult to ascertain what constitutes misconduct in a given situation. But rules 4 to 18 of the Conduct Rules prescribe code of conduct for members of service and it can safely stated that an act or omission contrary to or in breach of prescribed rules of conduct would constitute misconduct for disciplinary proceedings. This code of conduct being not exhaustive it would not be prudent to say that only that act or omission would constitute misconduct for the purpose of Discipline and Appeal Rules which is contrary to the various provisions in the Conduct Rules. The inhibitions in the Conduct Rules clearly provide that an act or omission contrary thereto as to run counter to the expected code of conduct would certainly constitute misconduct. Some other act or omission may as well constitute misconduct. Allegations in the various charges do not specify any act or omission in derogation of or contrary to Conduct Rules save the general rule 3 prescribing devotion to duty. It is, however, difficult to believe that lack of efficiency, failure to attain the highest standard of administrative ability while holding a high post would themselves constitute

misconduct. If it is so, every officer rated average would be guilty of misconduct. Charges in this case as stated earlier clearly indicate lack of efficiency, lack of foresight and indecisiveness as serious lapses on the part of the respondent. These deficiencies in personal character of personal ability would not constitute misconduct for the purpose of disciplinary proceedings.

11. Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that that conduct which is blameworthy for the Government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct [see *Pierce v. Foster*(1)]. A disregard of an essential condition of the contract of service may constitute misconduct [see *Laws v. London Chronicle* (Indicator Newspapers) (2)]. This view was adopted in *Shardaprasad Onkarprasad Tiwari v. Divisional Superintendent, Central Railway, Nagpur Division, Nagpur*(1), and *Satubha K. Vaghela v. Moosa Raza*(2). The High Court has noted the definition of misconduct in *Stroud's Judicial Dictionary* which runs as under:

"Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct".

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in *Management, Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik*, in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as

misconduct in the context of discharge being assailed as punitive. In S. Govinda Menon v. Union of India(4), the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P.H. Kalyani v. Air France, Calcutta, wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar instances of which a railway

cabinman signals in a train on the same track where there is a stationary train causing headlong collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life. Misplaced sympathy can be a great evil [see Navinchandra Shakerchand Shah v. Manager, Ahmedabad Co- op. Department Stores Ltd.(1)]. But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.

16. On the other hand, learned counsel for the respondent(s) placed before this Court the enquiry report dated 22.04.2004, report of the hearing of the petitioner dated 12.04.2004, charge sheet dated 30.07.2002, reply of show cause notice dated 24.07.2004, letter of non receipt of punishment order dated 31.07.2004, office order dated 29.07.2004, rules of punishment of the department, requisition of the petitioner in regard to necessary documents dated 07.07.2004, letter dated 19.07.2004 and show cause notice dated 24.06.2004.

17. On overall consideration of the matter as well as on perusal of record and judgments relied upon by learned counsel for the petitioner, it is reflected that financial irregularities were found against the petitioner in deposit work done at District Ambedkar Nagar and on the basis of audit report, the inquiry was initiated against the petitioner and relevant documents relating to charges were

supplied to the petitioner and a charge sheet containing eight charges was served upon the petitioner and charge Nos.3&6 were found to be proved against the petitioner.

18. Moreover, the petitioner himself accepted the charges against him and made a request that he should be awarded minor punishment, which itself proves that the charges were proved against him. The show cause notice could not be served upon the petitioner as he was not available in his office / residence and his family members have also denied from receiving the same and thereafter, the said notice was published in daily news papers, namely, Dainik Jagran and Times of India on 29.06.2004 for information upon the petitioner.

19. From the aforesaid, it is crystal clear that the charge Nos.3&6 were rightly proved against the petitioner and he was afforded proper opportunity of hearing while initiating inquiry proceeding against him.

20. This Court is of the considered opinion that the impugned order dated 29.07.2004 has rightly been passed against the petitioner and there is no illegality. The judgments relied upon by learned counsel for the petitioner do not help the petitioner and are distinguishable to the present facts and circumstances of the case.

21. The writ petition lacks merit and is hereby **dismissed**.

(2023) 7 ILRA 1323
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2023

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 254 of 2023

Abhishek Kumar Singh **...Petitioner**
Versus
State of U.P. & Anr. **...Respondents**

Counsel for the Petitioner:
Sri Siddharth Khare

Counsel for the Respondents:
C.S.C., Sri Ashish Mishra, Sri Fuzail Ahmad Ansari, Sri Rahul Srivastava

Criminal Law – Indian Penal Code, 1860 - Sections 420, 467, 468, 471, 472, 120B - Information Technology Act, 2008 - Section 66 - Examination Rules, 1982 - Section 7 - Assistant Review Officer, moral turpitude, cancellation of candidature, criminal cases, disclosure in application form, Government Order 1958, suitability for appointment, Allahabad High Court Rules 1976
The petitioner challenged the order dated October 1, 2022, by respondent no.2 (Registrar General), cancelling his candidature for the post of Assistant Review Officer (ARO) due to two pending criminal cases involving charges under Sections 420, 467, 468, 471, 472, 120B of IPC, Section 66 of the IT Act, 2008, and Section 7 of the Examination Rules, 1982, deemed to involve moral turpitude. The petitioner applied under Advertisement No. 01/R.O. & A.R.O./2021, was successful in the selection process, but failed to disclose the criminal cases in the online application form, revealing them only during document verification via an affidavit dated April 2, 2022. The Recruitment Committee, with approval from the Chief Justice, rejected his candidature. The Court upheld the cancellation of the petitioner's candidature due to pending criminal cases involving moral turpitude and non-disclosure in the application form.

The writ petition was dismissed.

List of Cases referred:

1. *U.O.I. Vs Methu Meda, (2022) 1 SCC 1*
2. *Imtiyaz Ahmad Malla Vs St. of J. & K., AIR 2023 SC 1308*
3. *Satish Chandra Yadav Vs U.O.I., 2022 SCC Online 1300*
4. *Allahabad Bank Vs Deepak Kumar Bhola, (1997) 4 SCC 1*
5. *St. Bank of India Vs P. Soupramaniane, (2019) 18 SCC 135*
6. *Ajeet Kumar Vs St. of U.P., Writ-A No. 31466 of 2010*
7. *Shivendra Kumar Paswan Vs St. of U.P., Writ-A No. 17092 of 2021*
8. *Mohammed Imran Vs St. of Maharashtra, (2019) 17 SCC 696*

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

1. Heard Sri Siddharth Khare, learned counsel for the petitioner, Sri Shrawan Kumar Dubey, learned Additional Chief Standing Counsel for respondent no.1, and Sri Rahul Srivastava, Advocate holding brief of Sri F.A. Ansari, learned counsel for respondent no.2.

2. The petitioner through the present writ petition has assailed the order dated 01.10.2022 passed by respondent no.2 rejecting the candidature of the petitioner for the post of Assistant Review Officer on the ground that criminal cases pending against him fall within the purview of 'moral turpitude'.

3. The brief facts of the case are that under Advertisement No.01/R.O. & A.R.O./2021 dated 17th August 2021, online applications were invited from the eligible candidates for filling up 350 posts of Assistant Review Officers. The

petitioner applied for being considered for appointment on the said post under O.B.C/Physically Handicapped category.

4. The petitioner appeared in each stage of selection and was declared successful for the said post.

5. A notice was issued by the selection committee calling upon the petitioner to appear on 06.04.2022 for document verification. The petitioner was also required to furnish an affidavit to the effect that whether any criminal case is pending against him or not. The petitioner submitted an affidavit dated 02.04.2022 during the document verification disclosing the details of two F.I.Rs lodged against him; (i) Case Crime No.0172 of 2019, under Sections 420, 467, 468 I.P.C. at P.S. Tajganj, District Agra; (ii) Case Crime No.0389 of 2021 under Sections 420, 467, 468, 471, 472 & 120B I.P.C., Section 66 of Information Technology Act, 2008 and Section 7 of the Examination Rules, 1982.

6. Respondent no.2 vide order dated 01.10.2022 cancelled the candidature of the petitioner on the ground that two criminal cases pending against the petitioner come within the purview of 'moral turpitude'. The said order is impugned in the writ petition.

7. It is further stated that in Case Crime No.0172 of 2019, the charge sheet has been filed on 14.03.2020 under Sections 420, 467, and 468 I.P.C. The petitioner in the said criminal case has been enlarged on bail by the Sessions Judge, Agra vide order dated 18.03.2019 passed in Bail Application no.1375 of 2019. In respect to Case Crime No.0384 of 2021, it is stated that a charge sheet has been filed on 17.10.2021 under Sections 420, 467, 468, 471, 472, and 120-B of I.P.C. and

Section 66 of Information Technology Act, 2008 and Section 7 of Examination Rules, 1982. In the said criminal case, the petitioner has also been enlarged on bail by this Court vide order dated 11.08.2021 passed in Criminal Misc. Bail Application No.26707 of 2021.

8. It is further stated that while cancelling the candidature of the petitioner, the procedure contemplated in the Government Order dated 28.04.1958 has not been followed. It is also alleged that the impugned order did not advert to the section under which F.I.R. has been lodged and the conduct of the petitioner, and thus, the impugned order has been passed mechanically.

9. In the counter affidavit filed by respondent no.2, it is stated that the petitioner did not disclose the details about the pendency of criminal cases against him in the online application form. This fact is evident from the online application form appended as annexure 2 to the writ petition in which in the column of 'criminal proceeding' the petitioner has filled as follows:-

“Criminal Proceeding.

<i>Have you ever been tried, convicted or acquitted by Court of law?</i>	<i>No</i>	<i>Whether any criminal complaint cases have ever been registered against you?</i>	<i>No ”</i>

10. It is further stated that in the advertisement, General Instructions were

given under Chapter-9 for filling up the online application form. Under the general instructions, it is specifically stated that if a candidate is found providing incomplete or wrong information, then the candidate will be solely responsible for the same, and based on false and incomplete information, the application form shall be rejected at any stage of selection without giving any reasons/notice. The general instruction also provides that the candidate is required to disclose the details in the application form that any criminal proceeding has been initiated against him/her or the First Information Report has been lodged against him/her, and concealment of any fact may disqualify and entail cancellation of his/her candidature.

11. It is also stated in the counter affidavit that as the petitioner did not disclose the pendency of criminal cases in the online application form as required under Chapter-9 of the advertisement, the candidature of the petitioner has been cancelled.

12. The respondents further stated in the counter affidavit that the petitioner appeared on 06.04.2022 for document verification, and the petitioner for the first time in the affidavit dated 02.04.2022 disclosed the details of two F.I.Rs lodged against him. Thereafter, the matter concerning the petitioner was placed before the Recruitment Committee at Agenda No.6, which in its meeting dated 20.09.2022 has resolved to reject the candidature of the petitioner as the offences under which the petitioner has been charged fall within the purview of 'moral turpitude'. The resolution of the Recruitment Committee dated 20.09.2022 was duly seen by Hon'ble The Chief Justice

on 30.09.2022. In compliance thereof, the impugned order has been passed.

13. Challenging the aforesaid order, learned counsel for the petitioner has contended that the impugned order does not disclose any independent application of mind inasmuch as the impugned order is cryptic. It is contended that a detailed procedure for verification of character and antecedents of government servant before the first appointment is provided in the Government Order dated 28.04.1958 which has to be adhered to before cancelling the candidature of a candidate on the ground that his/her character and antecedents are not such to make him/her suitable for the post.

14. Elaborating the argument, learned counsel for the petitioner has contended that if the District Magistrate of the concerned district where the candidate resides, on verification of character and antecedents of the candidate forms an opinion that the said report is adverse to the candidate, an opportunity of hearing to the candidate is must before furnishing such adverse report. In support of the said contention, he has placed reliance upon the judgement of this Court in the case of *Ajeet Kumar Vs. State of U.P. and Others* passed in Writ-A No.31466 of 2010 and *Shivendra Kumar Paswan Vs. State of U.P. and Others* passed in Writ-A No.17092 of 2021.

15. Learned counsel for the petitioner has further urged that as of today, two criminal cases against the petitioner are pending, and charges against him in the aforesaid two criminal cases are yet to be proved. Thus, it is contended that the pendency of two criminal cases cannot be made basis to

non-suit the petitioner for the post of Assistant Review Officer.

16. It is further contended that the Apex Court in the case of *Mohammed Imran Vs. State of Maharashtra and Others (2019) 17 SCC 696* has allowed the appeal of the appellant who was denied appointment on the ground of 'moral turpitude'. On the strength of aforesaid judgement, it is submitted by the learned counsel for the petitioner that respondent no.2 ought to have deliberated that the nature of the allegation and conduct of the petitioner is such that it falls under the definition of 'moral turpitude' whereas no such deliberation is reflected from the impugned order.

17. It is also urged that under the Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976 (hereinafter referred to as 'Rules, 1976') read with Notification No.70 dated 14.11.2021, the Registrar General is the appointing authority in the matters of appointment, promotion, etc. to Class-II (Non-Gazetted), Class-III and Class-IV posts referred to in Rule 4 to 15(G) of Rules, 1976. Accordingly, it is contended that the decision to appoint or cancel the candidature of a candidate ought to have been taken by independent exercise of powers at the level of appointing authority i.e. Registrar General, and not by Recruitment Committee, as after selection, the role of Recruitment Committee is over, and Recruitment Committee has no power to take a decision with regard to cancellation of candidature of a candidate.

18. It is also urged that this Court cannot go beyond the reasons given in the impugned order for cancelling the

appointment of the petitioner while testing the legality of the said order. It is submitted that in the instant case, the impugned order does not contain any ground that there was concealment of fact in the application form, therefore, such ground is not tenable in the facts of the present case to uphold the impugned order.

19. In the aforesaid backdrop, it is submitted that the matter may be remitted to respondent no.2 to consider the claim of the petitioner afresh.

20. Per contra, learned counsel for the respondents would contend that it is evident from the application form of the petitioner that he did not disclose the pendency of two criminal cases against him in the application form. It is further contended that under the general instructions in the advertisement, it is clearly stated that if there is any concealment or wrong information furnished by the candidate in the application form, he/she shall be solely responsible for the same, and his/her candidature shall be liable to be cancelled at any stage of selection without any reasons/notice. It is further submitted that it is the domain of the appointing authority to consider the suitability of a candidate for a post, and in the instant case, the resolution was passed by the Recruitment Committee and the same was placed before Hon'ble Chief Justice on 30.09.2022, who perused the resolution of the Recruitment Committee, and therefore, there is no illegality in the impugned order passed by the respondent no.2.

21. Thus, it is submitted that the appointing authority in its domain can look into the charges levelled against the petitioner in the criminal cases, and if he finds that charges are such which fall within the

purview of 'moral turpitude', the candidature of the petitioner can always be rejected.

22. It is further submitted that the allegations against the petitioner in two F.I.Rs are grave which come within the purview of 'moral turpitude'. It is submitted that resolution of the Recruitment Committee, which has been perused by Hon'ble The Chief Justice, clearly reflects that there was deliberation with regard to the suitability of the petitioner for the post of Assistant Review Officer, and since charges against the petitioner are such which fall under the definition of 'moral turpitude', therefore, there is no illegality in the impugned order passed by the respondent no.2.

23. It is also urged that by Notification No.70 dated 14.11.2021, Hon'ble The Chief Justice has been pleased to direct the Registrar General of the Court to be the appointing authority in respect of all matters of appointment, promotion, etc. to Class-II (Non-Gazetted), Class-III and Class-IV posts referred to in Rule 4 to Rule 15(G) of Rules, 1976, and under the said notification, Registrar General exercises its power as appointing authority. It is contended that since in the instant case, Hon'ble The Chief Justice has perused the resolution of the Recruitment Committee, and therefore, the decision to cancel the candidature of the petitioner is deemed to be of Hon'ble The Chief Justice, who is the Head of the Institution and who is the appointing authority as per Rule 2(I) of the Rules, 1976, therefore, the petitioner's objection that respondent no.2 ought to have done an independent exercise to cancel his candidature is misconceived.

24. I have considered the rival submissions of the parties and perused the record.

25. The undisputed facts as emanates from the record are that under the advertisement dated 17.08.2021, the petitioner submitted an online application for being considered for appointment under the O.B.C/Physical Handicapped category on the post of Assistant Review Officer. The petitioner was declared successful and was, accordingly, called to appear for document verification on 06.04.2022. The petitioner was also required to furnish an affidavit to the effect whether any criminal case is pending against him or not. The petitioner furnished an affidavit dated 02.04.2022 at the time of document verification on 06.04.2022 disclosing for the first time the details of two F.I.Rs lodged against him, which are as follows:-

I. F.I.R. dated 19.02.2019 lodged against the petitioner as Case Crime No.0172/2019, under Sections 420, 467, 468 I.P.C. at police station-Tajganj, District Agra in which charge sheet dated 14.03.2022 has been filed under Sections 420, 467 & 468 I.P.C. In the said criminal case, the petitioner has been enlarged on bail by Sessions Judge, Agra vide order dated 18.03.2019.

II. F.I.R. dated 08.06.2021 lodged against the petitioner as Case Crime No.0389 of 2021. In the said criminal case, a charge sheet has been filed on 17.10.2021, under Sections 420, 467, 468, 471, 472, and 120B of I.P.C., Section 67 of Information Technology Act, 2008 and Section 7 of Examination Rules, 1982. The petitioner was also enlarged on bail in the said criminal case by this Court vide order dated 11.08.2021 in Criminal Misc. Bail Application No.26707 of 2021.

26. It is also not disputed by the petitioner that he did not disclose the pendency of two criminal cases against him

in the application form. However, in the rejoinder affidavit, it is stated that the said information could not be filled in the application form due to inadvertence as the application form was filled up by the petitioner at the cybercafe with the help of people at the cybercafe, and due to their mistake, the column about 'pendency of criminal case' remained unfilled.

27. In the aforesaid factual backdrop, now this Court proceeds to analyse the argument raised by the respective counsels.

28. Now, coming to the first submission of learned counsel for the petitioner regarding non-adherence to the procedure provided in the Government Order dated 28.04.1958, it is pertinent to reproduce the relevant paragraphs of the Government Order dated 28.05.1958:-

“3(a). Every direct recruit to any service under the Uttar Pradesh Government will be required to produce:-

(i)...

(ii). Certificates of character from two persons. The appointing authority will lay down requirements as to kind of persons from whom it desires these certificates.

(b)...

(c). Persons dismissed by the Central Government or by a State Government will also be deemed to be unfit for appointment to any service under this Government.

In the case of direct recruits to the State Services under the Uttar Pradesh Government besides requiring the

candidates to submit the certificates mentioned in paragraph 3 (a) above the appointing authority shall refer all cases simultaneously to the Deputy Inspector General of Police, Intelligence and the District Magistrate [of the home district and of the district(s) where the candidate has resided for more than a year within five years of the date of the inquiry] giving full particulars about the candidate. The District Magistrate shall get the reports in respect of the candidates from the Superintendent of Police who will consult District Police Records and records of the Local Intelligence Unit. The District Police or the District Intelligence Unit shall not make any enquiries on the spot, but shall report from their records whether there is anything against the candidate, but if in any specific case the District Magistrate, at the instance of the appointing authority asks for an enquiry on the spot, the Local Police or the Local Intelligence Units will do so and report the result to him. The District Magistrate shall then report his own views to the appointing authority. Where the District Police or the Local Intelligence Units report adversely about a candidate, the District Magistrate may give the candidate a hearing before sending his report.”

29. Learned counsel for the petitioner has laid much emphasis upon para-3(c) of the Government Order, extracted above, to contend that as the Government Order dated 28.04.1958, which according to counsel for the petitioner is applicable in respect of recruitment of High Court employees, provides that appointing authority shall simultaneously refer all cases to the Deputy Inspector General of Police, Intelligence and the District Magistrate (of the home district and district where the candidate resides for more than a

year within five years of the date of inquiry) giving full particulars about the candidate. Thereupon, District Magistrate shall get the report in respect of the candidate from the Superintendent of Police, who shall make necessary inquiries as detailed in paragraph 3(c), extracted above, and shall submit a report to the District Magistrate. The District Magistrate thereupon shall report his own views to the appointing authority. It also provides that where District Police or Local Intelligence Units report adversely about a candidate, the District Magistrate may give the candidate a hearing before sending his report.

30. Now, the question arises as to whether at the time of document verification, the procedure contemplated under the Government Order dated 28.04.1958 is attracted or not.

31. In the instant case, it is admitted on record that during the document verification, an affidavit dated 02.04.2022 has been furnished by the petitioner disclosing for the first time the details of two criminal cases pending against him in the affidavit. The purpose of document verification is to assess the suitability of a candidate for the offer of appointment on the basis of the document and other information given by the petitioner in the affidavit. Till the process of document verification is successfully completed by a candidate, the stage of issuing of offer of appointment will not come and as such, at this stage, there is no question of verifying the character and antecedents of the government servant.

32. At the time of document verification, if it is found that a candidate is not suitable for the reason that documents

presented by him/her are not genuine or the candidate does not possess the requisite qualification or criminal case pending against him/her is of serious and grave in nature falling within the definition of 'moral turpitude', his/her candidature can be cancelled and stage of offer of appointment has not yet come. In this respect, it would be apt to have a glance at the subject of Government Order dated 28.04.1958 which reads **"Verification of the character and antecedents of Government servants before their first appointment"**.

33. Thus, it is clear from the subject of the Government Order dated 28.04.1958 that verification of character and antecedents of the government servants are required to be done before their first appointment. In the instant case, that stage has not yet come as at the time of document verification, the petitioner for the first time disclosed the pendency of two criminal cases against him, and the Recruitment Committee considered his candidature and found that he is not suitable for appointment, accordingly, it decided to cancel the candidature of the petitioner, and resolution of the Recruitment Committee was duly seen by Hon'ble The Chief Justice on 30.09.2022.

34. Now coming to the judgment relied upon by the learned counsel for the petitioner, this Court may note that in the case of **Ajeet Kumar (supra)**, the petitioner applied for consideration for the post of Sub-Inspector on compassionate ground. The petitioner underwent the physical test, however, he was not sent for training which led the petitioner to prefer a writ petition before this Court, in which this Court directed the authorities to take a decision. Pursuant to the judgment of this Court, the petitioner was non-suited on the

basis of the report/comment of Sub-Inspector of Police Station-Chajlet, District, Moradabad. This Court found that character verification of the petitioner for appointment was not done as per Government Order dated 28.04.1958, consequently, this Court set aside the order and remanded the matter.

35. The aforesaid case is distinguishable from the facts of the present case since in the case of **Ajeet Kumar (supra)**, the candidature of the petitioner was rejected on the basis of some report/comments submitted by Sub-Inspector of Police Station- Chajlet, District Moradabad whereas in the instant case, that stage has not yet come as during the document verification, disclosure of two criminal cases against the petitioner came into light, and he was non-suited for appointment as criminal cases pending against him fall within the purview of 'moral turpitude'.

36. In the case of **Shivendra Kumar Paswan (supra)** also, the petitioner's claim for appointment as Constable was rejected on the ground of pendency of criminal case bearing Case Crime No.100 of 2016, under Sections 354, 323, 504, and 506 I.P.C. In the said case, a character verification report was sought, and District Magistrate submitted the report of character verification adverse to the petitioner. In such factual backdrop, the petitioner specifically alleged that the report of the District Magistrate cannot be read against him for non-compliance with the provision of Government Order dated 28.04.1958 as no opportunity of hearing was granted by the District Magistrate to the petitioner before forming an adverse opinion to reject his candidature. In such view of the fact, this Court found that since no opportunity

of hearing was afforded to the petitioner by the District Magistrate before forming an adverse opinion, therefore, no reliance can be placed on the report of the District Magistrate, consequently, this Court set aside the impugned order and remanded the matter to the authority concerned.

37. The facts of the present case are different from the facts in the case of **Shivendra Kumar Paswan (supra)** inasmuch as in the present case the stage of character verification has not yet come.

38. Given the aforesaid discussion, this Court finds the submission advanced by the learned counsel for the petitioner that the procedure contemplated under the Government Order dated 28.04.1958 has not been followed lacks merit and deserves to be rejected.

39. Now coming to the second submission of counsel for the petitioner that whether the impugned order has been passed cursorily and without due consideration, and whether the pendency of criminal cases where charges are yet to be proved against the petitioner can be a ground to non-suit the petitioner for appointment; this Court may note that it is the exclusive domain of the employer to assess the suitability of the candidate for the post, and merely because the candidate has disclosed pendency of criminal case against him/her, and that he/she has been acquitted in the criminal case would not automatically entitle him/her for the employment. The only rider on the power of the employer to assess the suitability of a candidate is that his decision shall not reflect arbitrariness or bias or it should not smack of mala-fide.

40. In this regard, it would be apt to reproduce paragraph 21 of the judgment of

Apex Court in the case of **Union of India and Others Vs. Methu Meda 2022 (1) SCC 1:-**

“21. As discussed hereinabove, the law is well-settled. If a person is acquitted giving him the benefit of doubt, from the charge of an offence involving moral turpitude or because the witnesses turned hostile, it would not automatically entitle him for the employment, that too in disciplined force. The employer is having a right to consider his candidature in terms of the circulars issued by the Screening Committee. The mere disclosure of the offences alleged and the result of the trial is not sufficient. In the said situation, the employer cannot be compelled to give appointment to the candidate. Both the Single Bench and the Division Bench of the High Court have not considered the said legal position, as discussed above in the orders impugned. Therefore, the impugned orders passed by the learned Single Judge of the High Court in Writ Petition No.3897 of 2013 and Division Bench in Union of India Vs. Methu Meda 2013 SCC Online MP 10701 are not sustainable in law, as discussed hereinabove.”

41. In the case of **Imtiyaz Ahmad Malla Vs. State of Jammu and Kashmir and Others AIR 2023 SC 1308**, the Apex Court has held that the Director General being the highest functionary in the police hierarchy was the best judge to consider the suitability of the petitioner for induction into the police. Paragraphs 13 and 14 of the said judgement are being reproduced herein below:-

“13. As regards the suppression of relevant information or false information with regard to the criminal prosecution, arrest or pendency of criminal case against

the candidate, a three-judge Bench of this Court in Avtar Singh Vs. Union of India and Others has laid down the precise guidelines. Para 38.5 thereof reads as under:

“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.”

14. In all the above cases, the requirement of integrity and high standard of conduct in police force has been highly emphasised. The High Court in the impugned judgement has also elaborately dealt with each and every aspect of the issues involved, while upholding the order of the Single Bench to the effect that the Director General being the highest functionary in the police hierarchy, was the best judge to consider the suitability of the petitioner for induction into the police force. The impugned order being just and proper, we are not inclined to interfere with the same in exercise of our jurisdiction under Article 136 of the Constitution of India.”

42. So from the reading of aforesaid two judgments, the law on the point that it is the exclusive domain of the employer to assess the suitability of a candidate is no more res-integra.

43. In the instant case, it has come on record that on disclosing the details of two criminal cases in the affidavit by the petitioner, the matter was referred to the Recruitment Committee who in its meeting dated 20.09.2022 at Agenda No.6 resolved to cancel the candidature of the petitioner. The resolution of the

recruitment committee is reproduced herein below:-

“The candidate has been charged under sections 420, 467, 468, 471, 120B of I.P.C. and 66B of I.T. Act. The offence of the candidate falls under purview of moral turpitude as such he can not be offered appointment and his candidature is cancelled.”

44. The aforesaid resolution was duly seen by Hon'ble The Chief Justice on 30.09.2022. Thus, from the aforesaid fact, it is evident that the decision to cancel the candidature of the petitioner is deemed to be of Hon'ble The Chief Justice and he, being the Head of the Institution, has the power to assess the suitability of employees in the High Court.

45. At this point, it is pertinent to mention that a candidate seeking an appointment in the High Court should be of impeccable character and high integrity, and his antecedents should be clean. The High Court is a Court of record and if a person whose integrity is doubtful or his antecedents are not clean is appointed, that can damage the institution inasmuch as if the Court records are misplaced or tampered with that would cause immense prejudice to the litigants and also shake the confidence of the public in the judicial system which would ultimately result in serious damage to the prestige of the institution.

46. The submission that impugned order has been passed cursorily in the opinion of the court is also misconceived as the resolution of the Recruitment Committee clearly discloses the application of mind in passing the resolution in

deciding that the charges against the petitioner fall within the purview of 'moral turpitude' which resolution was duly seen by Hon'ble The Chief Justice on 30.09.2022.

47. In Case Crime No.0172 of 2019, the allegation against the petitioner is that in the RPF CBT Online Exam conducted at Gyan Bharti College of Education opposite Nalanda Town, Shamshabad Road, Agra, the petitioner entered into the said center and on the basis of some forged identity-card, he appeared in the examination for some other candidate. The allegation in the said F.I.R. is that of impersonation, and accordingly, he was charged under Sections 420, 467, and 468 of I.P.C.

48. In Case Crime No.0389 of 2021, the petitioner has again been charged with the allegation of impersonation as he appeared for two candidates namely Ram Prakash and Pankaj in a competitive examination for the post of Constable in the Police Department. Consequently, he was charged under Section 420, 467, 468, 471, 472 & 120B I.P.C., Section 66 of the Information Technology Act, 2008, and Section 7 of the Examination Rules, 1982.

49. Now, the Court considers whether the aforesaid charges against the petitioner come within the purview of 'moral turpitude'; it would be apt to have a glance at the meaning of 'Moral Turpitude' as defined in the following dictionaries:-

“Moral Turpitude- “The act of baseness, vileness, or the depravity in the private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man.” (Black's Law Dictionary) (6th Edn.).

Moral Turpitude-“An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man” (Bouvier's Law Dictionary).

Moral Turpitude- “Bad faith, bad repute, corruption, defilement, delinquency, discredit, dishonour, shame, guilt, knavery, misdoing, perversion, shame, vice, wrong.” (Burton Legal Thesaurus)”

50. At this stage, it would also be apposite to refer few judgments of Apex Court which will be helpful in the facts of the present case.

51. In **Allahabad Bank and Another Vs. Deepak Kumar Bhola 1997 (4) SSC 1**, the Apex Court upheld the suspension order passed against an employee during the pendency of criminal trial for an offence involving 'moral turpitude' where the employee was charged for the offence of committing forgery and wrongfully withdrawal of money which he was not entitled to withdraw. Paragraphs 8 and 9 of the said judgement are reproduced herein below:-

“8. What is an offence involving "moral turpitude" must depend upon the facts of each case. But whatever may be the meaning which may be given to the term "moral turpitude" it appears to us that one of the most serious offences involving "moral turpitude" would be where a person employed in a banking company dealing with money of the general public, commits forgery and wrongfully withdraws money which he is not entitled to withdraw.

9. This Court in **Pawan Kumar Vs. State of Haryana and Another (1996) 4 SCC 17** dealt with the question as to what

is the meaning of expression "moral turpitude" and it was observed as follows:-

"Moral turpitude" is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity".

This expression has been more elaborately explained in *Baleshwar Singh Vs. District Magistrate And Collector Banaras AIR 1959 All. 71* where it was observed as follows:

"The expression 'moral turpitude' is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and wickedness of character or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would be so if it discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellowmen or to the society in general. If therefore the individual charged with a certain conduct owes a duty, either to another individual or to the society in general, to act in a specific manner or not to so act and he still acts contrary to it and does so knowingly, his conduct must be held to be due to vileness and depravity. It will be contrary to accepted customary rule and duty between man and man"

52. In the case of *State Bank of India and Others Vs. P. Soupramaniane 2019 (18) SCC 135*, the Apex Court after considering the definition of 'moral turpitude' laid down the tests which can be applied for judging whether an offence involves 'moral turpitude' or not. Paragraphs 12 and 13 of the said judgement are reproduced herein below:-

"12. There is no doubt that there is an obligation on the management of the Bank to discontinue the services of an employee who has been convicted by a criminal court for an offence involving moral turpitude. Though every offence is a crime against the society, discontinuance from service according to the Banking Regulation Act can be only for committing an offence involving moral turpitude. Acts which disclose depravity and wickedness of character can be categorized as offences involving moral turpitude. Whether an offence involves moral turpitude or not depends upon the facts and the circumstances of the case.

13. Ordinarily, the tests that can be applied for judging an offence involving moral turpitude are:-

(a) Whether the act leading to a conviction was such as could shock the moral conscience or society in general;

(b) Whether the motive which led to the act was a base one, and

(c). Whether on account of the act having been committed the perpetrators could be considered to be of a depraved character or a person who was to be looked down upon by the society."

53. In the light of principles laid down by the Apex Court in the aforesaid judgments, this Court proceeds to consider whether charges against the petitioner in two criminal cases involve 'moral turpitude' or not.

54. Now, the charge against the petitioner in two criminal cases is that he impersonated some other person to appear in the competitive examination to help them. The said act of the petitioner, if leads

to a conviction, would shock the moral conscience of society in general; it is obvious that the motive which led to the commission of offence alleged in two F.I.R against the petitioner was a base one; and the perpetrator of such an offence will be a person of depraved character and a person who will be looked down upon by the society. Thus, the allegation against the petitioner satisfies the three parameters recorded in paragraph 13 of the judgement of Apex Court in the case of *Soupramaniane (supra)* to fall within the ambit of 'moral turpitude'.

55. Sri Siddharth Khare, learned counsel for the petitioner has placed reliance upon the judgement of Apex Court in the case of *Mohammed Imran (supra)* to contend that as the said judgement covers the case of the petitioner, therefore, the impugned order is not sustainable in law. It may be noted that the factual backdrop in which the said judgement was passed is different from the facts of the present case. In the said case, the appellant was successful in judicial service. However, his candidature was cancelled on the basis of a verification report due to a criminal case. The appellant in the said criminal case was acquitted of the charge under Sections 363, 366, and 34 of I.P.C. on 28.10.2004 much before he cleared the examination in the year 2009 for appointment. He had disclosed the said information truthfully. The Apex Court has considered in detail the judgement of the Sessions Court acquitting the appellant to find out whether the case of the appellant falls within the ambit of 'moral turpitude'. It also found from the record that the appellant had wrongly been discriminated against as the respondent had appointed one Sudhir Gulabrao Barde, who also faced criminal

prosecution and was acquitted. Further, the Apex Court in the said case called for a confidential report of the character verification and also the antecedents of the appellant, and after analysing the confidential report, the Apex Court found that the action of the respondents in non-suiting the appellant was arbitrary. The facts in the instant case are different considering the nature of the allegations levelled against the petitioner. Thus, the said judgment also does not come to the aid of the petitioner.

56. Now, so far as the contention of learned counsel for the petitioner that since charges against the petitioner in the two criminal cases are not yet proved, therefore, the pendency of two criminal cases cannot be taken as a ground to disentitle the petitioner for the appointment, it is pertinent to note that there is no provision in the law which mandates the employer not to consider criminal case pending against an employee in which trial has not yet concluded to assess his suitability for the job. The employer cannot be forced to employ a candidate, who in the opinion of the employer, is not suitable nor the employer can be asked to ignore the charges levelled against the candidate in pending criminal cases while assessing his/her suitability on the ground that the trial in a criminal case is still pending and guilt of the candidate is not yet proved.

57. In the instant case, it is evident from the charges levelled against the petitioner that the petitioner is charged with grave offences and it is not one criminal case, but in both criminal cases, the allegations against the petitioner are grave, and looking to the gravity of charges levelled against the petitioner, no prudent

man can conclude that allegations against the petitioner do not involve 'moral turpitude'.

58. In such view of the fact, the said submission of learned counsel for the petitioner is misconceived.

59. In the counter affidavit, respondent no.2 stated that the petitioner has not disclosed the pendency of criminal cases against him in the application form submitted by him for the post of Assistant Review Officer, therefore, his candidature has rightly been cancelled.

60. Learned counsel for the petitioner does not dispute the fact that the petitioner has not disclosed the pendency of criminal cases against him in the application form, but he submits that rejection of the candidature of the petitioner as per the impugned order is only on the ground that he is involved in offences relating to 'moral turpitude', and this Court cannot go beyond the reasons stated in the impugned order to consider the legality of the impugned order.

61. It is true that the impugned order has been passed on the ground that the allegation against the petitioner comes within the purview of 'moral turpitude', but while exercising the power under Article 226 of the Constitution of India, this Court in a given case on admitted facts on record can look into such plea to find out whether the petitioner is entitled to any relief by this Court in its jurisdiction under Article 226 of Constitution of India. The two criminal cases against the petitioner, as delineated above, fall within the purview of 'moral turpitude'.

62. The general instructions contained in the application form stipulate that if any

wrong information is furnished in the application form, the application of such candidate shall be liable to be rejected. The relevant clauses of Chapter-9 of General Instructions are reproduced herein below:-

"9.15. In case a candidate is found providing incorrect information or the identity is proved to be false at any time in the future, the candidate may face penal action as per the law applicable.

9.17. The candidates are required to fill in the Online Application Form with correct and complete information carefully. If any incomplete or false information is given, then the candidate will be solely responsible for the same and on the basis of false and incomplete information, the Application Form shall be rejected at any stage of the selection without giving any reasons/notice. On furnishing any false certificates or indicating wrong category/sub-category regarding caste in the application form or in case of any other default, The Hon'ble High Court of Judicature at Allahabad may reject the candidature at any stage of the selection and may take all necessary action.

9.27. Candidate must disclose the details in the Online Application Form, if any criminal proceeding has been initiated against him/her or First Information Report (FIR) is lodged against him/her. Concealment of any fact(s) may disqualify and entail cancellation of his/her candidature."

63. It is evident from clause 9.15 of the general instruction that if the information furnished by a candidate is incorrect or the identity is proved to be false at any time in the future, the candidate may face penal action as per the law

applicable. Clause 9.17 unambiguously stipulates that if it is found that a candidate has furnished wrong or false information, the candidate shall be solely responsible for the same and his/her candidature shall be liable to be rejected without giving any reason/notice.

64. Clause 9.27 further stipulates that a candidate must disclose the details in the online application form, if any criminal proceeding has been initiated against him/her or First Information Report (FIR) has been lodged against him/her. Concealment of any such fact may disqualify and entail cancellation of his/her candidature. So clause 9.27 is specific and provides that a candidate must disclose the pendency of any criminal case against him/her or first information report has been registered against him/her and non-furnishing of such information may entail cancellation of his/her candidature.

65. In the instant case, the petitioner was well aware of the fact that two criminal cases are pending against him, but despite that, he did not disclose the same in the application form. The petitioner in the rejoinder affidavit has stated that as the application form was filled in at the cybercafe with the help of persons at the cybercafe and because of their inadvertence, the said information could not be filled up in the application form. In this respect, it is pertinent to note that a candidate is expected to read the instructions carefully while filling up the application form, and the candidate is bound by the stipulations contained in the application form, and as such it is not open to take a plea that it was an inadvertent error.

66. For argument's sake, if it is presumed that the petitioner may have inadvertently not furnished the information

about the pendency of criminal cases, but at the same time, it can also not be ruled out that the petitioner may have deliberately concealed the said information knowing well that charges against him in the criminal cases are grave, and on furnishing the said information, his application form may be rejected. Non-furnishing of the said information clearly reflects the character of the candidate.

67. This Court while considering the case that the petitioner has rightly been non-suited by the Recruitment Committee can also look into those facts to find out the antecedents and character of the candidate. In this respect, it would be apt to reproduce paragraph 90 of the judgement of the Apex Court in the case of **Satish Chandra Yadav Vs. Union of India 2022 SCC Online 1300:-**

“90. In such circumstances, we undertook some exercise to shortlist the broad principles of law which should be made applicable to the litigations of the present nature. The principles are as follows:

a) Each case should be scrutinised thoroughly by the public employer concerned, through its designated officials—more so, in the case of recruitment for the police force, who are under a duty to maintain order, and tackle lawlessness, since their ability to inspire public confidence is a bulwark to society's security.

b) Even in a case where the employee has made declaration truthfully and correctly of a concluded criminal case, the employer still has the right to consider the antecedents, and cannot be compelled to appoint the candidate. The acquittal in a

criminal case would not automatically entitle a candidate for appointment to the post. It would be still open to the employer to consider the antecedents and examine whether the candidate concerned is suitable and fit for appointment to the post.

c) The suppression of material information and making a false statement in the verification Form relating to arrest, prosecution, conviction etc., has a clear bearing on the character, conduct and antecedents of the employee. If it is found that the employee had suppressed or given false information in regard to the matters having a bearing on his fitness or suitability to the post, he can be terminated from service.

d) The generalisations about the youth, career prospects and age of the candidates leading to condonation of the offenders' conduct, should not enter the judicial verdict and should be avoided.

e) The Court should inquire whether the Authority concerned whose action is being challenged acted mala fide.

f) Is there any element of bias in the decision of the Authority?

g) Whether the procedure of inquiry adopted by the Authority concerned was fair and reasonable?"

68. The Apex Court in paragraph 90(c) of the judgement of **Satish Chandra Yadav (supra)** has held that suppression of material information and making a false statement in the verification form relating to arrest, prosecution, conviction etc. has a clear bearing on the character, conduct and antecedents of the employee and if it is found that there is suppression of fact by a

candidate, the same may entail consequence of the termination of service.

69. The purpose of seeking information about the pendency of the criminal case against a candidate in the application form is to assess the suitability of the candidate to participate in the selection process as it has a direct bearing on the character and antecedents of the candidate.

70. Thus, for the reasons given above, this Court finds that as the petitioner was bound by the instructions contained in the application form and he did not furnish the vital information with regard to the pendency of two criminal cases against him in the application form, this Court can take into account the said fact, though may not be ground in the impugned order for rejecting the candidature of the petitioner, to refuse the relief prayed for by the petitioner.

71. Now, coming to the last submission of learned counsel for the petitioner that the Registrar General being the appointing authority should have taken the decision about candidature of the petitioner in the independent exercise of power; the said submission in the opinion of the Court is also misconceived. Rule 2(n) of the High Court Employees Rules, 1976 defines 'appointing authority' and is reproduced herein below:-

"2. Definitions.- In these rules unless the context otherwise requires-

(n) 'Appointing Authority' means the Chief Justice of the Court or such other Judge or Officer as he may direct."

72. Hon'ble The Chief Justice in the exercise of the power conferred under Clause 1 of Article 229 of the Constitution of India read with Rule 2(n) of the Rules,

1976 and subject to Rule 6 of the said Rules has been pleased to direct the Registrar General of the Court to be the appointing authority in respect of all matters of appointment, promotion, etc. to Class II (Non-Gazetted), Class-III and Class-IV posts referred to in Rule 4 to 15(G) of the aforesaid rules.

73. Thus, the Registrar General exercises the power which has been delegated to him by Hon'ble The Chief Justice in the exercise of power under Article 229 (2) of the Constitution of India read with Rule 2(n) of Rules, 1976.

74. In the instant case, the specific case of the respondents in the counter affidavit is that resolution passed by the Recruitment Committee regarding the rejection of the candidature of the petitioner was seen by Hon'ble The Chief Justice on 30.09.2022, and in such view of the fact, the decision to cancel the candidature of the petitioner shall be deemed to have been taken by Hon'ble The Chief Justice, therefore, the aforesaid submission also lacks merit and is rejected.

75. Thus, for the reasons given above, the writ petition lacks merit and is accordingly, *dismissed* with no order as to costs.

(2023) 7 ILRA 1339
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.06.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 10209 of 2023

Kul Bhushan Mishra & Anr. ...Petitioners

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

Counsel for the Petitioners:
 Sri Satyendra Chandra Tripathi

Counsel for the Respondents:
 C.S.C., Sri Bipin Bihari Pandey

The petitioners, Assistant Teachers in primary institutions under the District Basic Education Board, challenged Clause 1 and Clause 15 of the Government Order dated 02.06.2023 and the consequential circular dated 08.06.2023 issued by the Secretary, Board of Basic Education. They sought inter-district transfers without the condition of a minimum service period (five years for male teachers, two years for female teachers) and inclusion of mutual transfers in the online transfer process. The writ petition was disposed of, rejecting the challenge to the Government Order and circular. The court protected the petitioners' right to apply for mutual transfers once the online portal is opened, while upholding the minimum service requirements as a legitimate policy to ensure educational stability

Precedents cited:

1. Anuruddha Kumar Tripathi Vs St. of U.P. (Writ Petition No. 4950 of 2018)
2. Kamini Singh Vs St. of U.P. (Writ Petition No. 8532 of 2018):
3. S.K. Nausad Rahaman Vs U.O.I. [AIR 2022 SC 1494]:
4. St. of Assam Vs Ranga Muhammad [AIR 1967 SC 903]
5. Bank of India Vs Jagjit Singh Mehta [(1992) 1 SCC 306]
6. U.O.I. Vs S.L. Abbas [(1993) 4 SCC 357]

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

1. Petitioners in the present writ are Assistant Teacher working in Primary Institution run by the District Basic Education Board. Petitioner No. 1 was appointed by District Basic Education Officer, Kaushambi on 10.3.2019 and is posted in Block Nevada, District Kaushambi. Petitioner No. 2 is appointed as Assistant Teacher in Block Dhanupur, District Prayagraj. Petitioner No. 1 claims to be a resident of District Prayagraj; where petitioner no. 2 is a resident of District Fatehpur. Both the petitioners are desirous of seeking inter-district transfer. They have approached this Court challenging Clause 1 and 15 of the Government Order dated 2.6.2023 as well as the consequential circular issued by the Secretary, Board of Basic Education, dated 8.6.2023. A further prayer is made to command the respondents to entertain their application for inter-district transfer without imposing condition of five years service in the concerned district and to grant approval to their transfer in accordance with Rule 21 of the U.P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as ‘the Rules of

2. It is not in dispute service conditions of both the petitioners are regulated by the Rules of 1981. Rule 21 provides for transfer, which is extracted hereinafter:-

“21. Procedure for transfer - There shall be no transfer of any teacher from the rural local area to an urban local area or vice versa or from one urban local area to another of the same district or from local area of one district to that of another district except on the request of or with the consent of the teacher himself and in either case approval of the Board shall be necessary.”

3. In addition to the Rules of 1981, the respondents have made U.P. Basic Education (Teachers)(Posting) Rules, 2008 (hereinafter referred to as ‘the Rules of 2008’), exercising the powers contained in Section 19(1) of the U.P. Basic Education Act, 1972 (hereinafter referred to as ‘the Act of 1972’). Rule 8 of the Rules of 2008 is relevant and is reproduced hereinafter:-

“8. Posting. - (1)(a) Three options for schools shall be asked from the handicapped candidates in order of their merit and after receiving such options the handicapped candidates shall be posted on the basis of options given by them and the vacancies.

(b) Based on the order of their merit, female teachers would be required to submit under their signature option of three schools each from the general and backward block and accordingly, posting would be given in one of these schools.

(c) The posting of male teachers shall be made in accordance with the order of candidates, in the roster prepared under Rule 7.

(2)(a) The newly appointed male teachers shall initially be posted compulsorily in backward areas for a period of at least five years.

(b) Newly appointed female teachers shall also be compulsorily posted in backward areas for a period of at least two years.

(c) Mutual transfers within the district from general block of backward block and vice-versa would be permitted with the condition that the teacher on mutual transfer to a backward block shall

have to serve in that block compulsorily for five years. Mutual transfers would be permitted only in case of those teachers who have more than remaining five year's service.

(d) In normal circumstances the applications for inter-district transfers in respect of male and female teachers will not be entertained within five years of their posting. But under special circumstances, applications for inter-district transfers in respect of female teachers would be entertained to the place of residence of their husband or in law's district.

(e) If by virtue of posting of newly appointed or promoted teachers the primary and upper primary schools of backward blocks get saturated i.e., no post of teacher is vacant in these schools, then handicapped and female teachers on their choice can be adjusted against the vacant posts of general blocks from these saturated blocks.

(f) Mutual transfers of male/female teachers from one backward block to another can be considered.

(3) Teachers transferred from one district to another will be given posting as per the provisions of these rules.”

4. Clause 1 and 15 of the Government Order dated 2.6.2023, challenged in this petition, are reproduced hereinafter:-

“(1) — जनपद में नियमित सेवाविधि शिक्षिका के लिए 02 वर्ष एवं शिक्षक के लिए 05 वर्ष होना अनिवार्य होगा। सेवाविधि की गणना कार्यरत जनपद के दिनांक से की जायेगी।

(15) — शैक्षिक सत्र 2023 – 24 के लिए अन्तर्जनपदीय एवं पारस्परिक स्थानान्तरण की समस्त प्रक्रिया शासनादेश के क्रम में राष्ट्रीय सूचना विज्ञान केन्द्र लखनऊ से विचार

विमर्श के उपरान्त समस सारिणी के अनुसार ऑनलाइन किया जायेगा। ऑफलाइन आवेदन पत्र पर किसी भी दशा में विचार नहीं किया जायेगा। ”

5. Circular dated 8.6.2023 is also challenged on the ground that the Board has invited applications for inter-district transfer of Assistant Teachers, but while doing so, the transfers by way of mutual consent have been excluded. It is urged that once applications are being entertained by the Board for transfer of teachers, there is no justification for the authorities not to include teachers who are seeking mutual transfer.

6. Grievance of petitioners are essentially two fold. The first part of their grievance is that while inviting applications for transfer of Assistant Teachers, there is no rationale to exclude teachers seeking transfers on mutual consent. Secondly, it is urged that the restriction of five years service by a male teacher before applying for transfer is arbitrary and discriminatory. It is also urged that Rules of 2008 do not regulate transfer of teachers and as no such restriction is contained in Rule 21 of the Rules of 1981, as such, the restriction imposed of five years service is unwarranted and arbitrary.

7. Petitioners rely upon the National Education Policy, 2020 to submit that the policy contemplates decent and pleasant conditions of service at schools and, therefore, request for mutual transfers be considered liberally, without imposing any restriction of minimum length of service in the district concerned. Reliance has also been placed upon the judgment of the Supreme Court in S.K. Nausad Rahaman and others Vs. Union of India and others, AIR 2022 SC 1494 and the Supreme Court in State of Assam Vs. Ranga Muhammad,

AIR 1967 SC 903 to submit that Rules of 2008 will have no applicability in the matter of transfer.

8. Ms. Archana Singh, appearing for the Basic Education Board also places reliance upon the judgment of the Supreme Court in S.K. Nausad Rahaman (supra), particularly paragraphs 25 to 29 thereof, in order to submit that petitioners cannot claim entitlement to transfer as a matter of right. She further submits that the online portal for transfer has so far not been extended to mutual transfer on account of certain technical glitch and that the process would be initiated shortly. She further submits that as and when petitioners apply for such transfer their cases shall be considered as per the policy.

9. We have heard Sri Satyendra Chandra Tripathi for the petitioners, Ms. Archana Singh for District Basic Education Board and learned Standing Counsel for the State.

10. Admittedly both the petitioners are Assistant Teacher. Their service conditions including transfer is governed by the Rules of 1981. Rule 21, extracted above, provides for the procedure for transfer of teacher from rural local area to urban local area or vice-versa or from one local area to another of the same district or local area of one district to that of another district except on the request of, or with the consent of, teacher himself and in either case approval of the Board shall be necessary. Methodology to be followed for transfer of Assistant Teacher appears to have been formulated by the Board, which is consistent with Para 5.3 of the National Education Policy 2020 specifically providing that transfers of teachers will be conducted through online computerized

system that ensures transparency. Clause 5.3 of the Policy is reproduced hereinafter:-

“5.3. The harmful practice of excessive teacher transfers will be halted, so that students have continuity in their role models and educational environments. Transfers will occur in very special circumstances, as suitably laid down in a structured manner by State/UT governments. Furthermore, transfers will be conducted through an online computerized system that ensures transparency.”

11. So far as the petitioners grievance with regard to mutual transfer not being allowed is concerned, we find from the perusal of the Government Order dated 2.6.2023 that it lays down the policy for inter-district transfer of teachers working in the institutions run by the Basic Education Board as also for mutual transfer. Petitioners grievance is that the Board while inviting applications on the online portal has restricted the applications only for inter-district transfer and has kept aside applications for mutual transfer.

12. On behalf of the respondents it is admitted that as of now applications are invited only for inter-district transfers. A categorical statement, however, is made that the process is not initiated for mutual transfer since there are some technical glitch and that the process will be initiated shortly. The statement made by Ms. Archana Singh, therefore, adequately protects the petitioners so far as their grievance on the first count is concerned.

13. It is the second part of the argument relating to requirement of five year working for making application for transfer which requires consideration. Rule

21 has already been reproduced above which provides the procedure for transfer.

14. Part II of the Rules of 1981 specifies the cadre and strength of Assistant Teacher. Rule 4(1) contemplates separate cadre of service under the Rules of 1981 for each local area. Sub-rule (2) stipulates that cadre of teaching staff shall be determined by Board, from time to time, with the previous approval of the State Government. Two kinds of local area are contemplated in the Rules of 1981, namely 'rural local area' and 'urban local area'. This distinction was primarily drawn as initial jurisdiction over rural local area was exercised by Zila Panchayat while for urban local area it was either the Nagar Nigam, Nagar Panchayat, Town Area or notified area, which exercised its jurisdiction. Authority exercising its jurisdiction over such cadre has undergone a change but the two separate cadre subsists in the district. Rule 21 permits transfer from the rural area to an urban local area or vice-versa or from urban local area to another of the same district or from local area of one district to that of another district to be made only on the request or with the consent of teacher himself and in either case approval of the Board is necessary. It is, therefore, apparent that transfer of a teacher from one cadre to another would be permissible either on his consent or on the request of the teacher. In both the exigencies, however, approval of the Board is necessary. Transfer from one cadre to another otherwise is not contemplated.

15. Rules of 1981 do not lay down the criteria for grant of approval by the Board to the request of transfer. In order to ensure that transfers are made in a fair and uniform manner, it is always open for the competent

authority to lay down the criteria for grant of approval to such transfers. The criteria for transfer apparently has been formulated by the State vide Government Order dated 2.6.2023 for the Academic Session 2023-24. Petitioners are aggrieved by Clause 1 and 15 of the Government Order. Clause 1 states that female teacher must complete two years while male teacher must complete five years before her/his transfer would be considered. Clause 15 of the Government Order, under challenge, specifies that the transfer process would be undertaken in consultation with NIC in an online format. In no circumstance an offline application would be considered.

16. So far as the resort to the online process for effecting the transfer is concerned, we find that the direction in that regard is in conformity with Clause 5.3 of the National Education Policy, 2020 which requires transfers to be conducted through an online computerized system that ensures transparency. Even otherwise, we do not find any error in the Government Order dated 2.6.2023; whereby the process is to be undertaken in consultation with NIC Lucknow on the basis of an online process. The process undertaken online, prima facie, eliminates the possibility of any pick and choose and is expected to be transparent. The process undertaken online otherwise does not contravene any provision of statute nor goes contrary to any constitutional scheme. We, therefore, find no error in Clause 15 of the Government Order dated 2.6.2023 requiring the process to be undertaken online and thereby decline the entertainment of application in the offline format. The challenge laid to Clause 15 of the Government Order with regard to Transfer Policy, therefore, fails.

17. So far as Clause 1 of the Government Order dated 2.6.2023 is

concerned, it requires that before applying for transfer under Rule 21, a female teacher must complete two years service in the district while for male teacher such period is specified as five years. The decision to insist upon minimum term of two years for female teachers and five years for male teachers has been subject matter of consideration by this Court in different writ petitions. So far as the decision in respect of a male Assistant Teacher appointed in a Primary School run by Basic Education Board is concerned, this Court in Writ Petition No. 4950 of 2018 (Anuruddha Kumar Tripathi Vs. State of U.P. and 5 others) observed as under in para 19:-

“19. In light of the aforesaid discussions, it is held that transfer of a male assistant teacher from one district to another, in a basic school, can ordinarily be made only after completion of 05 year initial posting in backward area in accordance with Rule 8(2)(d) of the Rules of 2008 as well as the policy framed for the purpose. However, in extraordinary or exceptional circumstances an application for transfer can be considered by the Basic Shiksha Parishad even before expiry of such term. The question whether in a given case extraordinary circumstances exists or not has to be examined by the Basic Shiksha Parishad.”

The above observation appears to have been made relying upon the language used in Rule 8(2)(d) of the Rules of 2008, which contains the expression ‘In normal circumstances’ and therefore clearly excludes exceptional circumstances, to be determined by the Board.

18. Reliance is also placed upon the judgment of this Court in Kamini Singh Vs. State of U.P. and others, Writ Petition No.

8532 of 2018, wherein vires of sub-rule (d) of sub-rule (2) of Rule 8 of the Rules of 2008 had been challenged on the ground that classification of teachers based on their gender is impermissible. The Division Bench repelled the contention in following terms:-

“From a simple reading of the aforesaid Rules, it is apparent that the post of assistant teacher is a district cadre post and the appointing authority is the District Basic Education Officer. Upon selection, posting of a teacher is to be made as per the provisions of Rules 2008. In other words inter-district transfer is an exception to the general rule pertaining to placement and posting of teachers in blocks within the district is compulsory.”

After noticing various judgments of the Apex Court on the issue, the Division Bench observed further as under:-

"The authorities relied upon by the learned counsel for the petitioner is of no assistance. The main part of Rule 8(2)(d) does not discriminate on gender, any teacher can seek transfer outside the district after five years of service, which is applicable to both male and female teachers uniformly, exception has been carved out by the impugned rule in respect of married female teacher to seek transfer after marriage. The rule requiring compulsory posting is to achieve the purpose and policy of providing teachers in schools located in remote areas of the district which ultimately serves the interest of the students and, in particular, teacher less schools. The functioning of schools would come to stand still if request of frequent transfer outside district is entertained, hence, the rules compulsorily requires posting of a teacher for five years before applying for inter-

district transfer. The rule uniformly applies to male/female teachers, except married female teacher. The choice of district upon marriage gets altered, therefore, the married female teacher is permitted by the impugned rule to seek inter-district transfer in the changed circumstances due to her marital status.

When a law is challenged as denying equal protection; the question for determination by the Court is not whether it has resulted in inequality, but whether there is some difference which bears a just and reasonable relation to the object of legislation. Mere differentiation or inequality of treatment or inequality of burden does not perse amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that is it does not rest on any rational basis having regard to the object which the rule making authority has in view. When, therefore, a law is challenged as offending against the guarantee in Article 14, the first duty of the Court is to examine the purpose and policy of the Act/Rule, to be ascertained from an examination of its title, preamble and provisions and then to discover whether the classification made by the law has a reasonable relation to the object which the legislature/rule making authority seeks to obtain. (Vide: *Suraj Mall v. Biswanath*⁷, *Kedar Nath Bajoria v. State of West Bengal*⁸, *P.B. Roy vs- Union of India*⁹.)

For the reasons stated herein above, the challenge raised to the vires of sub-clause (d) of sub-rule (2) of Rule 8 of Rules 2008 fails. The writ petition being devoid of merit is, accordingly, dismissed.”

19. The argument advanced on behalf of the petitioners that Rules of 2008 would

not be applicable in the matter of transfer does not impress us. Petitioner’s argument, in this regard, is essentially based on the observation made by the Supreme Court in Para 9 of the judgment in *State of Assam* (supra), which is reproduced hereinafter:-

“9. In its ordinary dictionary meaning the word 'to post' may denote either (a) to station some one at a place, or (b) to assign someone to a post, i.e., a position or a job, especially one to which a person is appointed. See Webster's New World Dictionary (1962). The dispute in this case has arisen because the State Government applies the first of the two meanings and the High Court the second. In Art. 233 the word 'posting' clearly bears the second meaning. This word occurs in association with the words 'appointment' and 'promotion' and takes its colour from them. These words indicate the stage when a person first gets a position or job and 'posting' by association means the assignment of an appointee or promotee to a position in the cadre of District Judges. That a special meaning may be given to a word because of the collocation of words in which it figures, is a well-recognised canon of construction. Maxwell ("On Interpretation of Statutes", 11th Edn., p. 321 and the following pages) gives numerous examples of the application of this principle, from which one may be given here. The words 'places of public resort' assume a very different meaning when coupled with 'roads and streets' from that which the same words would have if they were coupled with 'houses'. In the same way the word 'posting' cannot be understood in the sense of 'transfer' when the idea of appointment and promotion is involved in the combination. In fact this meaning is quite out of place because 'transfer' operates at a stage beyond

appointment and promotion. If 'posting' was intended to mean 'transfer' the draftsman would have hardly chosen to place it between "appointment" and "promotion" and could have easily used the word 'transfer' itself. It follows, therefore, that under Art. 233, the Governor is only concerned with the appointment, promotion and posting to the cadre of District Judges but not with the transfer of District Judges already appointed or promoted and posted to the cadre. The latter is obviously a matter of control of District Judges which is vested in the High Court. This meaning of the word 'posting' is made all the more clear when one reads the provisions of Arts. 234 and 235. By the first of these articles the question of appointment is considered separately but by the second of these articles posting and promotion of persons belonging to the judicial service of the State and holding any post inferior to the post of a District Judge is also vested in the High Court. The word 'post' used twice in the article clearly means the position or job and not the station or place and 'posting' must obviously mean the assignment to a position or job and not placing in-charge of a station or Court. The association of words in Art. 235 is much clearer but as the word 'posting' in the earlier article deals with the same subject-matter, it was most certainly used in the same sense and this conclusion is thus quite apparent."

20. The above observation came to be made in the context of power of transfer to be exercised over district judges in a State. The Supreme Court found that the authority to make transfers was with the High Court and that the State Government was not the competent authority to exercise such power. Highest weight was directed to be given to the opinion of the High Court. Discussion was thus drawn between the

expression 'posting' and 'transfer'. The factual scenario in the present case is, however, quite distinct. The service conditions of the petitioners are governed by the Rules of 1981. However, specific Rules of 2008 have been framed in the context of posting of teachers in different local area. Rules of 2008 contemplate list of schools to be prepared for posting of teachers in different institutions. Rule 8 stipulates the manner to be followed for posting of teachers in different institutions. It provides that inter-district transfer would be allowed in normal circumstances to the newly appointed teachers only after completing two years service in case of female teachers and five years service in case of male teachers. Rules of 2008 also provides for the posting of newly promoted teachers. Though the Rules of 2008 are christened as posting rules, but it intends to effectively deal not only with initial posting of teachers but also specifies that such teachers posted in the institution would be entitled to transfer, including mutual transfer, after initial service in the block for five years. Rule 8(1)(d) is specific in that regard. Vires of Rule 8(1)(d) has already been upheld by this Court.

21. Rule 8(1)(d) neither violates any provision of the Act of 1972, nor goes contrary to the Rules of 1981. The posting rules of 2008 in fact lays down the criteria for posting of teachers in different institutions and while doing so, restricts the eligibility for seeking transfer in normal circumstances as two years for female teachers and five years for male teachers. The condition requiring the male teacher to work for five years and female teacher for two years is essentially a matter of policy and unless it is shown to be violative of any Act, Rule or Regulation, we would not be

justified in interfering with such policy as it is otherwise not shown to be arbitrary.

22. Assistant Teachers in Basic Education Institutions run by Basic Education Board teach students both in rural local area and urban local area. These teachers are appointed on the basis of a competitive process of recruitment and their posting is also made considering their merit as well as the option exercised by them regarding their place of posting. The roster is also followed for such purposes.

23. The allocation of particular cadre and place of posting to a teacher is thus on the basis of his merit and the option exercised. There is a specific purpose of not entertaining applications for transfer for few years as the teachers are expected to initially work in the specific cadre allocated to them or else the teachers from the very day of their appointment would start maneuvering their transfer to their desired place. The teachers otherwise have an important task to perform and the anxiety on their part must be to impart proper teaching to the students. By restricting their eligibility to seek transfer in normal circumstances for few years the State/Board apparently intends to discourage teachers from hankering for their desired posting soon after their appointment. The requirement for the teachers to serve cadre for a few years before they are allowed to seek transfer thus cannot be said to be arbitrary nor the policy can be questioned on any valid ground.

24. Transfer in the cadre is ordinarily not contemplated for an Assistant Teacher. The transfer from one cadre to another is conditional in terms of Rule 21 and requires approval of the Board. Transfer,

therefore, is not stipulated to be claimed as a matter of right in these institutions. The State/Board would thus be justified in laying down a uniform criteria/process for entertaining applications for transfer.

25. In view of our discussions held above, we find no illegality or infirmity in the policy of the State to restrict entertainment of application for transfer in normal circumstances, unless the teacher has completed specified length of service in the cadre. Even otherwise, this Court has already clarified that in exceptional circumstance minimum period can be waived provided the Board is satisfied with regard to existence of exceptional circumstance for transfer. Old age of grandparents, etc., which is the cause pleaded for transfer, would not constitute exceptional circumstance for transfer. These considerations otherwise are required to be examined by the Board at the first instance.

26. We are not inclined to discard the applicability of Rules of 2008 merely on the nomenclature of it as posting rules as we have already held that the requirement, in normal circumstances, of minimum length of service before seeking transfer does not contravene any provisions of the Rules of 1981 or any provision or Act. Mere nomenclature of Rules as being posting rules is otherwise not decisive.

27. We may gainfully refer to the judgment of the Supreme Court in S.K. Nausad (supra), wherein the Supreme Court has observed as under in paragraphs 25 to 29:-

“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 overarching needs of the administration.

26. Third, policies which stipulate that the posting of spouses should be preferably, and to the extent practicable, at the same station are subject to the requirement of the administration. In this context, J.S. Verma, J. (as the learned Chief Justice then was) speaking for a three-Judge Bench of this Court in *Bank of India v. Jagjit Singh Mehta* [*Bank of India v. Jagjit Singh Mehta*, (1992) 1 SCC 306 : 1992 SCC (L&S) 268] held : (SCC pp. 308-09, para 5)

“5. There can be no doubt that ordinarily and as far as practicable the husband and wife who are both employed should be posted at the same station even if their employers be different. The desirability of such a course is obvious. However, this does not mean that their place of posting should invariably be one of their choice, even though their preference may be taken into account while making the decision in accordance with the administrative needs. In the case of all-India Services, the hardship resulting from the two being posted at different stations may be unavoidable at times particularly when they belong to different services and one of them cannot be transferred to the place of the other's posting. While choosing the career and a particular service, the couple have to bear in mind this factor and be prepared to face such a hardship if the administrative needs and transfer policy do not permit the posting of both at one place without sacrifice of the requirements of the administration and needs of other employees. In such a case the couple have to make their choice at the threshold

between career prospects and family life. After giving preference to the career prospects by accepting such a promotion or any appointment in an all-India Service with the incident of transfer to any place in India, subordinating the need of the couple living together at one station, they cannot as of right claim to be relieved of the ordinary incidents of all-India Service and avoid transfer to a different place on the ground that the spouses thereby would be posted at different places. ... No doubt the guidelines require the two spouses to be posted at one place as far as practicable, but that does not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative needs and the claim of other employees.”

27. The above principle was cited with approval in *Union of India v. S.L. Abbas* [*Union of India v. S.L. Abbas*, (1993) 4 SCC 357 : 1994 SCC (L&S) 230] wherein the Court held that transfer is an incident of service : (SCC p. 359, para 7)

“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 subject. 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.”

28. Fourth, norms applicable to the recruitment and conditions of service of officers belonging to the civil services can be stipulated 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 executive 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. [Union of Indiv. Somasundaram Viswanath, (1989) 1 SCC 175, para 6 : 1989 SCC (L&S) 150]”

28. Paragraphs 43, 51, 52 and 53 of the judgment in S.K. Nausad Rahaman (supra), relied upon by the petitioners, recognize the principle that in exercise of judicial review the Court cannot direct the executive to frame a particular policy. Yet,

the legitimacy of a policy can be assessed on the touchstone of constitutional parameters. The constitutional values are also taken into consideration while designing its policy. In the facts of the case we do not find the policy to be either violating the constitutional parameters or infringing the constitutional values. Petitioners, therefore, cannot draw any substance from the observation contained in paragraphs 43, 51, 52, 53 of the judgment in S.K. Nausad Rahaman (supra).

29. In view of the deliberations and discussion held above, we dispose off the writ petition on following terms:-

(i) Challenge laid to Clause 1 and 15 of the Government Order dated 2.6.2023 as well as challenge to Circular dated 8.6.2023 fails and are rejected.

(ii) In light of the statement made by the Board that online applications for inter-district transfer would be entertained shortly, and claim of eligible Assistant Teachers would be dealt with, it is provided that the Board shall open the online portal for mutual transfer, at the earliest possible, preferably within six weeks and claim of eligible teachers shall be dealt with, as per law.

(iii) Condition contained in the policy requiring, in normal circumstances, minimum length of service of five years in the cadre for male teacher and two years service for female teachers before seeking transfer is upheld. Challenge to such policy fails, accordingly.

(iv) Parties to bear their own costs.

The petitioner, a Medical Officer in the Provincial Medical and Health Services (PMHS), went on a foreign assignment to Nigeria after obtaining a no-objection certificate and earned leave. The St. Government later regularized the period of foreign assignment (16.04.1981 to 09.01.1985) and directed him to deposit GPF, insurance, and pension contributions, which he complied with. Despite this, disciplinary proceedings were initiated against him for alleged unauthorized absence, resulting in the award of a censure entry and stoppage of one increment. The petitioner was also denied promotion and leave benefits. Held, once the foreign assignment was regularized by the St. Government, initiation of disciplinary action and awarding of censure entry was arbitrary and illegal. No finding of willful absence was recorded, and thus, the absence could not be treated as misconduct. The disciplinary authority failed to adhere to principles of natural justice and the U.P. Government

3. Brief facts giving rise to the present writ petition are as under:

Sr. No.	Relevant Facts of the Case
a.	The petitioner was appointed on the post of Medical Officer on 21.08.1974 in Provincial Medical and Health Services on ad-hoc basis.
b.	In the year 1975, the petitioner appeared before the U.P. Public Service Commission and his appointment was approved by the Commission.
c.	The petitioner moved a representation in the year 1976 to the Government for being enrolled / registered in the panel of experts of Foreign Assignments Scheme of Govt. of India.
d.	On 29.06.1978, the petitioner's candidature for being impaneled in the panel of experts in Foreign Assignment Scheme was accepted and he was registered as an Expert and an agreement between the petitioner and authorities of Gongola, State of Nigeria was entered into.
e.	On 27.01.1981, a no-objection certificate was issued by the Additional Director (Administration) for the purpose of passport relating to the petitioner's stay in Nigeria.
f.	On 11.02.1981, the petitioner was sanctioned earned leave for 15 days.
g.	On 16.02.1981, the petitioner was relieved from Unnao.
h.	On 18.03.1981, the petitioner proceeded to Nigeria after informing the Director.
i.	On 16.10.1984, a letter was issued to the Superintendent of Hospital at Unnao by the State Government stating that the petitioner should submit his joining in PHMS within one month.
j.	On 09.11.1984, family of the petitioner received the letter dated 16.10.1984.
k.	On 17.11.1984, wife of the petitioner sent a letter to the petitioner at Nigeria informing about the said letter and requested to the Joint Director for grant of time.
l.	On 10.01.1985, the petitioner on receipt of information, returned back from Nigeria and submitted his joining, which was accepted but he was not given posting.
m.	On 20.03.1985, the State Government wrote a letter to the Director stating that the petitioner may be posted as Medical Officer in any district.
n.	On 12.04.1985, the petitioner was posted in Health Directorate at Lucknow as Medical Officer (Reserved Duty).
o.	On 15.04.1985, the petitioner joined his posting place at Directorate.
p.	On 07.07.1988, the State Government directed the Director (Administration) that since the period of

	petitioner's stay in Nigeria has been regularized, the amount of GPF, Insurance and Pension contribution for the said period be got deposited from the petitioner.
q.	On 07.10.1989, the Joint Director informed the Government that the petitioner had deposited the amount of GPF & GIS.
r.	On 31.08.1990, the petitioner was served with a charge - sheet.
s.	On 10.09.1990, the petitioner submitted his reply to the said charge - sheet.
t.	On 28.10.1991, the petitioner was served a show cause notice to explain his unauthorized absence.
u.	On 26.11.1991, the petitioner filed a writ petition bearing No.7628 (S/B) of 1991 against the said show cause notice. The writ petition was dismissed as pre-mature.
v.	On 22.11.1993, the petitioner was provided inquiry report.
w.	On 16.06.1995, the petitioner submitted detailed reply to the charges levelled against him in the charge sheet / show cause notice.
x.	On 25.04.1996, an adverse entry was awarded to the petitioner.
y.	In the month of May, 1996, the petitioner made representation against the said adverse remark.
z.	On 04.07.1996, the petitioner's representation was rejected.
aa.	On 09.07.1997, petitioner's juniors were promoted but his name was not considered for the promotion.
ab.	On 24.10.1997, the State Government directed the Director General, Medical Health and Family Welfare to provide Annual Confidential Reports (ACR) from 1989 - 90 & 1994-95.
ac.	On 25.10.1997, the said ACR was made available to the Government.
ad.	On 29.01.1998, a decision for giving the petitioner time scale of Rs.3700-5000/- was communicated to the petitioner.
ae.	In May, 1998, the petitioner made representation for his promotion and other service benefits.
af.	On 09.07.1998, the petitioner's juniors were granted notional promotion to the post of Joint Director.
ag.	On 09.12.1998, the petitioner was informed that it was not possible to sanction the leave between the period 16.01.1981 to 09.04.1985.
ah.	Being aggrieved by the act and action of the respondents in not sanctioning the said leave and not granting promotion to the petitioner, the present writ petition has been filed before this Court.

4. Submission of learned counsel for the petitioner is that in compliance of Government Order dated 09.11.1984, the petitioner came back from Nigeria and joined his duties and the State Government vide order dated 07.07.1988 had regularized the foreign assignment period of the petitioner, therefore, the petitioner should not be punished.

5. He next submitted that the respondents in arbitrary and illegal manner instituted a disciplinary proceeding against the petitioner for the charge of unlawful absence from duties during his foreign assignment period and a censure entry was awarded to the petitioner in pursuance of the disciplinary proceeding.

6. He further submitted that the DGME has erred in law while awarding censure entry to the petitioner in view of the fact that on the one hand the State Government has regularized the foreign assignment period of the petitioner and on the other hand censure entry was awarded to him in pursuance to the disciplinary proceeding.

7. He next submitted that while awarding the punishment to the petitioner of censure entry, the year to which the entry relates has not been mentioned and arbitrarily one increment of the petitioner has been stopped without clarifying that whether it is permanent or temporary.

8. He further submitted that the petitioner was entitled to promotion in senior scale after completing 10 years service i.e. Rs.3000-4500/- and time scale of Rs.3700-5000/- after completing 16 years of service but the same has not been provided to him.

9. He next submitted that character roll of the petitioner for the year 1989 - 1995 has not been submitted and subsequently all the annual character roll entries upto year 1997 were made available to the State Government due to which promotion of the petitioner for higher post could not be considered.

10. He lastly submitted that the respondents are under legal obligation to consider the promotion of the petitioner and to provide the other benefits to him and the order dated 09.12.1998 refusing to grant the leave is absolutely arbitrary as the said leave was applied by the petitioner before leaving for Nigeria and the petitioner has also deposited the amount pension and gratuity etc. as was calculated by the respondents in May, 1998. In support of his submissions, he placed reliance upon the judgments in the case of **Dinesh Kumar Verma Vs. State of U.P. and others; Writ A No.20837 of 2020** decided vide judgment and order dated **24.03.2022, Union of India and another Vs. S.C. Parashar; (2006) 3 SCC 167** and **Krushnakant B. Parmar vs. Union of India and another; (2012) 3 SCC 178**.

11. On the other hand, learned Additional CSC submitted that petitioner's application was forwarded to Ministry of Home, Government of India vide letter dated 21.06.1978 with the rider that in case of selection, he has to resign from his original position and there will be no lien available to him. He submitted that the petitioner was granted no objection certificate for arranging the passport for Nigeria with the condition that before moving to Nigeria, he will get necessary instruction in regard to relieving, however, he, without resigning from his original position and without permission, he

departed for Nigeria and no sanction of leave was available to petitioner to depart for Nigeria, therefore, he was directed to re-join his duties under PMHS cadre within one month.

12. He next submitted that a show cause notice was issued to the petitioner for unauthorized absence from duties in view of the fact that the petitioner went to Nigeria will his own will ignoring the instructions / directions issued to him.

13. He further submitted that petitioner's application to regularize the unauthorized absence from duty has been rejected by the State Government vide Government Order dated 09.12.1998 and on being found guilty of unauthorized absence orders, adverse entry was made in his service book.

14. He next submitted that petitioner's candidature for promotion from Class-II to Class-I post was forwarded to the State Government, wherein, his name found place at Sr. No.890, however, the departmental selection committee did not find him suitable due to pendency of departmental inquiry, therefore, his case was not considered for grant of promotion.

15. He further submitted that for petitioner's foreign service i.e. 16.04.1981 to 09.01.1985 no leave was granted and there being no reason to relax the leave rules, it was not possible to sanction his leave. He submitted that pay scale of Rs.3700-5000/- was wrongly granted to the petitioner vide order dated 29.01.1998, which was cancelled vide order dated 30.10.2002.

16. He next submitted that the petitioner did not fulfill 10 year's regular

and continuous service, as required by the Government Orders issued from time to time, therefore, time scale of Rs.3000-4500/- was not sanctioned to him. He submitted that petitioner is not liable to get any relief from this Hon'ble Court and the writ petition is liable to be dismissed.

17. In reply, learned counsel for the petitioner submitted that letter dated 21.06.1978 was never communicated to the petitioner and he was not informed about the said condition that on joining to Nigeria, there will be no lien available to him. He submitted that order dated 11.02.1981 has not been denied by the respondents, whereby earned leave was sanctioned to the petitioner. He also submitted that the application dated 18.03.1981, moved by the petitioner has also not been denied by the respondents, whereby he informed to the respondents about his joining at Nigeria.

18. He next submitted that the petitioner was duly relieved from service from the post of Physician, District Hospital, Unnao, as he handed over the charge vide letter dated 16.02.1981 before proceeding to Nigeria.

19. He submitted that petitioner's service at Nigeria is deemed to have been regularized and continued in view of the fact that the State Government vide order dated 07.07.1988 has regularized the period of 16.04.1981 to 09.01.1985 - the period during which the petitioner remained on foreign assignment, as vide order dated 07.07.1988, the petitioner was required to deposit the amount of GPF, insurance and Pension Contribution for the said period, which has been duly deposited by the petitioner and the said fact has not been denied by the petitioner, therefore, there

was no occasion for issuing charge sheet dated 31.08.1990.

20. He further submitted that the petitioner has never been communicated any order to the effect that he was not found suitable for promotion from Class - II to Class - I post.

21. I have considered the submissions advanced by learned counsel for the parties and perused the material on record as well as the case laws cited by learned counsel for the petitioner.

22. To resolve the controversy involved in the matter, relevant paragraphs of the judgments relied upon by learned counsel for the petitioner are being quoted below:

a) Dinesh Kumar Verma (Supra):

" 9. As noted above, the punishments, major and minor, both have been inflicted upon the petitioner and this, according to learned counsel for the petitioner, is held to be impermissible by the Apex Court in the case of *Union of India and another vs. S.C. Parashar (Supra)*. Paragraph 12, in this regard, has specifically been placed reliance upon, of which the relevant extract is reproduced hereunder :-

"12.....Whereas reduction of timescale of pay with cumulative effect is a major penalty within the meaning of clause (v) of Rule 11 of the CCS Rules, loss of seniority and recovery of amount would come within the purview of minor penalty, as envisaged by clauses (iii) and (iii)(a) thereof. The disciplinary authority, therefore, in our opinion acted illegally and without jurisdiction in imposing both minor and major penalties

by the same order. Such a course of action could not have been taken in law."

b) Union of India and another (Supra):

"12. The penalty imposed upon the respondent is an amalgam of minor penalty and major penalty. The respondent has been inflicted with three penalties : (1) reduction to the minimum of the time-scale of pay for a period of three years with cumulative effect; (2) loss of seniority; and (3) recovery of 25% of the loss incurred by the Government to the tune of Rs.74,341.89p., i.e., Rs.18,585.47p. on account of damage to the Gypsy in 18 (eighteen) equal monthly instalments. Whereas reduction of time-scale of pay with cumulative effect is a major penalty within the meaning of clause (v) of Rule 11 of the CCS Rules, loss of seniority and recovery of amount would come within the purview of minor penalty, as envisaged by clause (iii) and (iii)(a) thereof. The Disciplinary Authority, therefore, in our opinion acted illegally and without jurisdiction in imposing both minor and major penalties by the same order. Such a course of action could not have been taken in law."

c) Krushnakant B. Parmar (Supra):

"16. In the case of appellant referring to unauthorised absence the disciplinary authority alleged that he failed to maintain devotion of duty and his behaviour was unbecoming of a Government servant. The question whether 'unauthorised absence from duty' amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty,

such absence can not be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.

18. *In a Departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct."*

23. In the case of **Dinesh Kumar Verma (Supra)**, the claim petition was filed assailing the order of punishment dated 23.01.2019, whereby three punishments were imposed upon the petitioner. First punishment was related to withholding of 03 increments with cumulative effect. A censure entry was imposed by way of second punishment and thirdly, the integrity of the petitioner was also withheld. Learned tribunal, upon exchange of pleadings and after hearing learned counsel for the parties, allowed the claim petition only to the extent of striking down the punishment of withholding the integrity. In the said case, Division Bench of this Court recorded the finding that disciplinary proceedings held by the State authorities by and large do not adhere to the well settled principles of law in the matter of holding inquiry. The Court held that this amounts to a dereliction of duty embodied under U.P. Government Servant (Discipline and Appeal) Rules, 1999. The irregularities

in the enquiry leave enough scope for indiscipline and the guilty go unpunished in all those cases, where the procedural violations shield their misconduct. The discrepancies also prolong the disciplinary action contrary to the objects of service jurisprudence. The dormant role on the part of the State not to have a trained staff for disciplinary enquiry cannot be viewed lightly in every case. The disciplinary action must culminate into reformation and discipline and for the reasons recorded above, the writ petition was allowed and the punishment order dated 23.01.2019 was set aside. However, liberty was granted to the disciplinary authority to proceed with the inquiry from the stage of reply submitted by the petitioner in response to the charge sheet issued to him.

24. In the case of **Union of India and another (Supra)**, it has been held that the penalty imposed upon the respondent is an amalgam of minor penalty and major penalty. The respondent has been inflicted with three penalties: (1) reduction to the minimum of the timescale of pay for a period of three years with cumulative effect; (2) loss of seniority; and (3) recovery of 25% of the lost incurred by the Government to the tune of Rs.74,341.89p. i.e. Rs.18,585.47p. on account of damage to the Gypsy in 18 (eighteen) equal monthly installments. Whereas reduction of timescale of pay with cumulative effect is a major penalty within the meaning of clause (v) of Rule 11 of the CCS Rules, loss of seniority and recovery of amount would come within the purview of minor penalty, as envisaged by clauses (iii) and (iii)(a) thereof. The disciplinary authority, therefore, in our opinion acted illegally and without jurisdiction in imposing both minor and major penalties by the same order. Such a course of action could not have

been taken in law. In the result, the appeal was allowed and direction was issued for modification of the order of High Court holding that the punishment, which could have been imposed upon the respondent herein was reduction of pay for a period of three years with cumulative effect and, thus, if his case is considered for promotion after the said period, no further direction is required to be issued and the directions issued by the High Court were set aside to the effect:

"The petitioner shall be entitled to the seniority on the basis of DPC which was held on 7-4-1997 when his immediate junior was promoted to the rank of Second-In-Command. The petitioner shall also be entitled to all consequential benefits which stood denied due to punishment of loss of seniority", and direction was issued that the punishment shall be reduction of pay to the minimum of the timescale of pay for a period of three years with cumulative effect.

25. In the case of **Krushnakant B. Parmar (Supra)**, the appellant, who was working as Security Assistant, was proceeded departmentally on 02.09.1996. On receipt of charge sheet, the appellant denied the allegation by his reply dated 07.10.1996 and also alleged bias against his controlling officer - Mr. P. Venkateswarlu with specific stand that he was prevented by him from signing the attendance register and to attend the office. He also explained the reasons of his absence for certain period for which he had applied for leave. During pendency of departmental proceedings, the appellant was transferred to another place, which was challenged by him before Central Administrative Tribunal alleging bias against his superior officer. The CAT vide order dated 15.11.2000 set aside the order by holding that "the order of transfer

is vitiated due to malice in law and fact", which was affirmed by the Gujarat High Court on 17.08.2001. After about seven years the inquiry officer submitted a report on 28.04.2003 and held that the charge has been proved against the appellant beyond all reasonable doubt holding him guilty of violating Rules 3(1)(ii) and 3(1)(iii) of the Central Civil Service (Conduct) Rules, 1964.

The appellant challenged the order of dismissal before the CAT, which by its order dated 04.05.2004 refused to entertain the application and allowed the appellant to avail alternative remedy of appeal. Accordingly, the appellant preferred an appeal on 17.05.2004 before the Director, Intelligence Bureau highlighting the lapses committed by the inquiry officer, and also alleged bias against the controlling officer who prevented him from performing the duty and to sign the attendance register. The appellate authority without discussing the aforesaid objections rejected the appeal by order dated 30.11.2011 and observed that *"the undersigned has come to the same conclusion that the appellant should have been discharged from service under the Temporary Service Rules when the first instance of indiscipline on his part was noticed"* and held that the charge against the appellant - Sri K.P. Parmar that he remained absent unauthorizedly has been established beyond doubt and therefore, directed that *"the undersigned, being the competent appellate authority hereby rejects the appeal dated 17.05.2004 submitted by Shri K.B. Parmar against order of the disciplinary authority dated 02.12.2003 both on account of being time - barred as well as having no merit and confirms the penalty of removal from service on the said Sri K.B. Parmar vide order dated 02.12.2003"*.

The order of punishment and the appellate order in Original Application No.619 of 2004 before the Central Administrative Tribunal, which was dismissed by the order and judgment dated 28.09.2005 and affirmed by the Gujarat High Court. In the said case, Hon'ble Apex Court allowed the appeal and the impugned orders of dismissal passed by the disciplinary authority, affirmed by the appellate authority; the Central Administrative Tribunal and the High Court were set aside. The appellant was directed to be reinstated in service and taking into consideration the fact that the charged officer has suffered a lot since the proceeding was drawn in 1996 for absence from duty for a certain period, the disciplinary proceeding was not remitted to the disciplinary authority for any further action and keeping in view the fact that the appellant has not worked for a long time, it was directed that the appellant be paid 50% of back wages.

26. In the case in hand, the petitioner was appointed on the post of Medical Officer on 21.08.1974. He moved a representation in the year 1976 to the Government for being enrolled / registered in the panel of experts of Foreign Assignments Scheme of Govt. of India and the petitioner's candidature for being impaneled in the panel of experts in Foreign Assignment Scheme was accepted. On 27.01.1981, a no-objection certificate was issued by the Additional Director (Administration) for the purpose of passport relating to the petitioner's stay in Nigeria. On 11.02.1981, the petitioner was sanctioned earned leave for 15 days. On 18.03.1981, the petitioner proceeded to Nigeria after informing the Director. On 16.10.1984, a letter was issued to the Superintendent of Hospital at Unnao by the

State Government stating that the petitioner should submit his joining in PHMS within one month. In pursuance thereof, on 10.01.1985, the petitioner, on receipt of information, returned back from Nigeria and submitted his joining, which was accepted but he was not given posting. Subsequently, on 07.07.1988, the State Government directed the Director (Administration) that since the period of petitioner's stay in Nigeria has been regularized, the amount of GPF, Insurance and Pension contribution for the said period be got deposited from him and in pursuance thereof, the petitioner Joint Director informed the State Government that the petitioner had deposited the amount of GPF and GIS.

27. Subsequently, on 31.08.1990, the petitioner was served with a charge sheet to which reply was submitted by him on 10.09.1990. On 28.10.1991, the petitioner was served with a show cause notice to explain his unauthorized absence. Copy of inquiry report was provided to the petitioner on 22.11.1993 and he submitted reply to the charges levelled against him in the charge sheet / show cause notice on 16.06.1995. On 25.04.1996, an adverse entry was awarded to the petitioner against which a representation was moved in May, 1996, which was rejected on 04.07.1996. On 09.07.1997, petitioner's juniors were promoted but his name was not considered for promotion. On 09.07.1998, juniors to the petitioner were granted notional promotion to the post of Joint Director and on 09.12.1998, the petitioner was informed that it was not possible to sanction the leave between the period 16.01.1981 to 09.04.1985.

28. A disciplinary proceeding was initiated against the petitioner for the charge

of unlawful absence from duties during his foreign assignment period and a censure entry was awarded to him in pursuance of the disciplinary proceeding and while awarding the punishment to the petitioner of censure entry, one increment of the petitioner has been stopped without clarifying that whether it is permanent or temporary.

29. The petitioner was relieved from service from the post of Physician, District Hospital, Unnao and he handed over the charge vide letter dated 16.02.1981 before proceeding to Nigeria. Petitioner's service at Nigeria is deemed to have been regularized and continued in view of the fact that the State Government vide order dated 07.07.1988 has regularized the period of 16.04.1981 to 09.01.1985 - the period during which the petitioner remained on foreign assignment, as vide order dated 07.07.1988, he was required to deposit the amount of GPF, insurance and Pension Contribution for the said period, which has been duly deposited by him and the said fact has not been denied by the respondents, therefore, there was no occasion for issuing charge sheet dated 31.08.1990.

30. The respondents erred in law while awarding censure entry to the petitioner in view of the fact that on the one hand the State Government has regularized the foreign assignment period of the petitioner and on the other hand censure entry was awarded to him in pursuance to the disciplinary proceeding.

31. The disciplinary proceedings held by the State authorities by and large do not adhere to the well settled principles of law in the matter of holding inquiry. This amounts to a dereliction of duty embodied under U.P. Government Servant (Discipline and Appeal) Rules, 1999. The irregularities in the enquiry leave enough scope for indiscipline and the guilty go unpunished in all those cases, where the procedural violations shield their misconduct.

The discrepancies also prolong the disciplinary action contrary to the objects of service jurisprudence. The dormant role on the part of the State not to have a trained staff for disciplinary enquiry cannot be viewed lightly in every case. The disciplinary action must culminate into reformation and discipline.

32. In a departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is wilful and in absence of such finding, the absence will not amount to misconduct.

33. In view of reasons recorded above and judgments relied upon by learned counsel for the petitioner, the impugned orders dated 25.04.1996 awarding censure entry and punishment to the petitioner and order dated 09.12.1998, whereby leave of the petitioner has been rejected, are hereby quashed.

34. The writ petition succeeds and is **allowed.**

35. Consequences to follow.

36. No order as to costs.

(2023) 7 ILRA 1358
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.07.2023

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 902 of 2011
 connected with other cases

Anoop Kumar Saxena & Ors. ...Petitioners
Versus
State of U.P. ...Respondent

Counsel for the Petitioners:

Shobhit Mohan Shukla, Kshemendra Shukla

Counsel for the Respondent:

C.S.C., Abhinav Trivedi, I.P. Singh, Sanjay Bhashin, Shubham Tripathi, Vinayak Saxena

A. Service Law-Constitution of India,1950-Article 226-The petitioners challenged the withdrawal of pay scale benefits that had been granted to them under a Governing Body resolution dated 08.01.1988-The central issue is whether the benefits under this 1988 GB resolution can legally coexist with the State Government's later policy(dated 05.03.1991) of aligning SGPGI employees' pay with that of All India Institute of Medical Sciences(AIIMS), New Delhi-Held, The extension of pay benefits under the 1988 Governing Body decision alongside AIIMS parity granted by Government Order dated 05.03.1991 is impermissible-Dual financial benefit on different principles is unsustainable-The 1988 decision was never formally approved by the State Government as required under section 25(3) of the SGPGI Act, 1983, its implementation in 1994 and subsequent extension in 2002-2003 were thus without lawful authority-Once parity with AIIMS employees was granted and implemented retrospectively w.e.f. 01.01.1986, the 1988 decision stood overridden and became redundant-Petitioners were given show cause notices before withdrawal of benefits and the matter was considered at multiple institutional and statutory levels, including by the Visitor under section 36 of the Act-While the governing body can create and abolish posts u/s 19((2)(f) of the Act, revision of pay scales affecting financial liability requires prior State approval under section 25(3)-Hence, the writ petitions challenging the withdrawal of benefits and the consequential orders were dismissed as being devoid of merit.(Para 1 to 149)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Mallikarjuna Rao & ors. etc. Vs. St. of A.P. & ors. Etc.Etc.(1990) AIR SC 1251:(1990) 2 SCC 707: (1990) 1 SCALE 705
2. Goa St. Cop. Bank Ltd. Vs. Krishna Nath A.(dead) thru LRs. & ors., SC in Civil Appeal No. 10596 of 2010
3. Canara Bank Vs. V.K.Awasthi (2005) 6 SCC 321
4. Charan Lal Sahu Vs. U.O.I. (1990) AIR C 1480
5. Col. B.J. Akkara (Retd.) Vs. G.O.I. & ors. (2006) 11 SCC 709
6. St. fo Punj. & ors. Vs. Rafiq Masih (2015) 4 SCC 334
7. Thomas Daneil Vs. St. of Ker. & ors. (2022) SCC Online SC 536
8. S.I. Roop Lal & anr. Vs. L.G. thru Chief Secy., Delhi & ors. (2000) AIR SC 594=(2000) 1 SCC 644

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

This judgment has been divided into the following sections to facilitate analysis :-

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A. Introduction

(1) Whether benefit or parity in pay-scales with Head of Department (HOD) employees can be extended in view of Governing Body recommendation dated 08.01.1988, even after implementation of the pay-scale parity policy with AIIMS employee vide Government order dated 01.08.1990 and 05.03.1991 to the non-faculty employees of the Sanjay Gandhi Postgraduate Institute of Medical Sciences (hereinafter to be referred in its acronym '**SGPGI or the Institute**') is the core issue engaging the attention of this court in this bunch of writ petition. An ancillary issue relating to the consequential effect of the implementation of the said pay-parity on the seniority list in these cadres is the other issue, which is also to be determined in these petitions.

(2) Procrastination in implementation of the recommendation of the Governing Body dated 08.01.1988 to these non-faculty employees in the "Accounts Cadre, Ministerial Cadre and Secretarial Cadre" of SGPGI is allegedly the axiomatic cause for these bunch of matter as contended by the petitioners, whereas the State & SGPGI have contended that the said recommendation could not had been

implemented as per law in the given facts and circumstances.

(3) Apparently, the present bunch of writ petitions have been filed by two set of petitioners; first set of petitioners are employed in the Accounts, Ministerial and Secretarial Cadres of the SGPGI and the other set of petitioners are the Assistant Accounts-cum-Computer Operators employed in the SGPGI.

(4) The crux of the matter is that as far as the Accounts Cadre is concerned, individuals appointed on the post of Accounts Clerk and Cashier in pay scale of Rs. 1200-2040/- between 1988 to 1991 have been granted promotion to the posts of Assistant Accountants with higher pay scale of 1400-12300 with effect from their date of joining or 08.01.1988, whichever is later, vide order dated 02.07.1994 and difference of salary has been paid, which has all occasioned due to the recommendation of General Body resolution dated 08.01.1988.

(5) Similarly, for the secretarial cadre, individual Stenographers appointed in October, 1991 in the pay scale of Rs. 1200-2040/- have been granted pay-scale of Rs. 1640-2900/- from their date of joining vide order dated 02.04.2003 and difference of salary was paid. As far as Ministerial Cadre is concerned, individual Typists, who were appointed in the pay scale of Rs. 950-1500/- during the year 1988 to 1994, have been granted next higher post and pay-scale of Rs. 1200-2040/- from their date of joining and they have further been granted next higher post and pay scale of Rs. 1400-2300/- after 03 years; and another next higher post and pay scale of Rs. 1640 -2900 after 05 years have been granted, vide order dated 20.03.2002. These all promotions and

grant of pay-scales have also been orchestrated by the implementation of the General Body Resolution dated 08.01.1988. Further, advantage in the promotion and seniority list has also been accorded to these individuals.

(6) However, similar promotional and pay-scales benefits were not extended to some other employees of the Ministerial Cadres and also to the Assistant Accounts-cum-Computer Operators (AACOs) employed in the SGPGI, who have also challenged the seniority list prepared by the Institute from time to time.

(7) Vide the present Judgment, this Court proposes to dispose of the following writ petitions, which raises common question of law :-

S. No.	Particulars	Relief claimed
1.	WRIT-A-902/2011 (Anoop Kumar Saxena V/s State of U.P) Petitioners of this writ petition essentially belongs to Accounts Cadre	Quashing of order dated 15.01.2010 passed by the President of the SGPGI directing SGPGI to withdraw the benefit of the Governing Body decision dated 08.01.1988 and extended on 02.07.1994 to the petitioner. Further, quashing has also been sought of all consequential orders like decision dated 06.03.2010 of the Governing Body, Order dated 11.10.2010 issued by the Director of the institute and order dated 25.01.2011 passed by the Visitor of the SGPGI u/s 36 of the Act.

2.	*WRIT-A-639/1999 (Mahesh Chandra V/s SGPGI)	Quashing of seniority list dated 21.12.1998 and prayer for direction to SGPGI to publish the seniority list after disposal of representation made by the petitioner u/s 36 of the Act to the Visitor.
* This writ petition has become infructuous in the sense that although the seniority list had not been quashed, however these petitioners were permitted to agitate all their issue before the Visitor and after agitating all the issues, another seniority list dated 27.06.2014 was published, which has been challenged vide another writ petition, which is also being decided along with the present bunch of matters.		
3.	WRIT-A-6545/2007 (Ram Naresh Maurya V/s State of U.P) Petitioner of this writ petition essentially belongs to Accounts Cadre and were appointed on the post of Asst. Accountant-cum-computer Operator on 25.05.1992	Writ of Mandamus has been prayed for direction to the Institute to comply with the recommendation of high level committee chaired by secretary, Medical education, Govt. of U.P as per direction of Government order dated 25.01.2006 & 06.09.2006 And to place the high level committee report dated 07.11.2005, opinion of law & finance department of the Govt. of U.P before the Governing body of the Institute.
4.	WRIT-A-903/2011 (Arun Kumar Jaiswal & Ors. V/s State of U.P) Petitioners of this writ petition essentially belongs Ministerial Cadre Petitioner No. 12, 17, 22, 33 were allowed to withdraw vide order dated 23.05.2018.	Quashing of order dated 15.01.2010 passed by the president directing SGPGI to withdraw the benefit of the Governing Body Decision dated 08.01.1988 and extended on 02.07.1994 to the petitioner. Further, quashing has also been sought of all consequential

		orders like decision dated 06.03.2010 of the Governing Body, Order dated 11.10.2010 issued by the Director of the institute and order dated 25.01.2011 passed by the Visitor u/s 36 of the Act.
5.	WRIT-A-904/2011 (Mahendra Kumar Verma V/s State of U.P) Petitioner of this writ petition essentially belongs to Secretarial Cadre Petitioner No. 5 & 6 were permitted to withdraw vide order dated 29.03.2018. Petitioner No. 7 was permitted to withdraw vide order dated 24.01.2019 Petitioner No. 8,9 and 10 sought withdrawal of writ petition vide CMA No. 155962/2022	Quashing of order dated 15.01.2010 passed by the president directing SGPGI to withdraw the benefit of the Governing Body Decision dated 08.01.1988 and extended on 02.07.1994 to the petitioner. Further, quashing has also been sought of all consequential orders like decision dated 06.03.2010 of the Governing Body, Order dated 11.10.2010 issued by the Director of the institute and order dated 25.01.2011 passed by the Visitor u/s 36 of the Act.
6.	#WRIT-A-3607/2014 (Dinesh Chandra Srivastava & Anr. V/s State of U.P)	Prayer to hold DPC for filling of 4 post of Accounts officer and to consider the petitioners to be eligible candidates.
	# The matter was disposed of vide an order dated 07.08.2014 directing to hold DPC within 2 months from 28.09.2014. Further, <i>status quo</i> order passed in Writ A-902/2011 to have no effect. Subsequently, recalling application has been filed vide CMA No. 132871/2014 by one Dilip Singh & Mahesh Chand praying for recalling of the order dated 07.08.2014. Thus, the said Application is also pending and taken together with other writ petitions for disposal.	
7.	WRIT-A-3948/2014 (Dilip Singh & Anr. V/s State of U.P)	Quashing of the seniority list issued vide office memorandum dated

		27.06.2014
8.	WRIT-A-1400/2015 (Dinesh Chandra Srivastava V/s State of U.P)	Quashing of the order dated 20.02.2015 and declaration/implementa- tion of the DPC held on 04.02.2015

B. The SGPGI Act.

(8) Before embarking on to narrate the facts of the present case, it would be profitable to understand the provision of the SGPGI Act, which is the parent law under which the Governing Body and other functionary exercise their power for management & day to day affairs of the Institute.

(9) SGPGI is an autonomous Institute created under the statute, namely, Sanjay Gandhi Post Graduate Institute of Medical Sciences Act, 1983 (hereinafter referred to as the '**Act 1983**'). In pursuance to sub-section (2) of section 41 of the Act, the first regulations were framed in 2011. Thus, after framing of the first statute of the SGPGI in 2011, the Rules and Regulations of the Government are not applicable unless adopted by the Institute. Since, the controversy relates back to pre-2011 era, the said regulation is of little help to the present context. However, the parent Act in itself gains prominence.

(10) Historically, SGPGI was established by an Act of the State of Uttar Pradesh, commonly known as the 'Sanjay Gandhi Post Graduate Institute of Medical Sciences Act, 1983'. Section 4 of the Act, 1983 provides for composition of the Institute and Section 7 of the Act, 1983 provides for the object of the Institute. Section 8 of the Act, 1983 deals with the functions of the institute and Section 9 of the Act, 1983 says as to who shall be the

officers of the institute. Section 10 of the Act, 1983 says that the Governor of the State of Uttar Pradesh shall be the Visitor of the institute and certain sweeping powers have been given to the Visitor under Section 10 as well as under Sections 34 and 36 of the Act, 1983. Similarly, Section 11 of the Act, 1983 says that the President of the institute shall be the Chief Secretary of the State of Uttar Pradesh, who shall also be the Chairman of the Governing Body of the institute preside over such meetings. The said section also entails certain power to the President. Sections 12 and 13 of the Act, 1983 relates to the appointment of the Director and his power and duties under the Act, 1983.

(11) Section 17 of the Act, 1983 mentions as to who shall be the authorities of the institutes and enumerates the name of (a) Governing Body; (b) Academic Board; (c) Finance Committee; (d) Selection Committee for appointment of Professors and Heads of Departments of the Institute; (e) Selection Committee for appointment of teachers other than those specified in clause (d); (f) such other authorities as may be specified in the rules to be authorities of the Institute.

(12) Section 18 of the Act, 1983 relates to who all shall consist of the Governing body, which includes the name of 13 persons, including the President and Director as aforesaid. The said section enumerates the following :

“18. Governing Body.- (1) The Governing Body shall consist of the following persons, namely: -

- (a) the President;
- (b) the Director;
- (c) Secretary to the Government of Uttar Pradesh in the Department of

Medical, Health and Family Welfare, *ex-officio*;

(d) Secretary to the Government of Uttar Pradesh in the Finance Department, *ex-officio*;

(e) Director of Medical Education, Uttar Pradesh, *ex-officio*;

(f) two Principals from amongst the Principals of the State Medical Colleges in Uttar Pradesh in rotation to be nominated by the State Government; (g) two persons being Heads of Departments in the Institute to be nominated in rotation in the prescribed manner;

(h) two persons from amongst the teachers of the Institute to be selected in the prescribed manner;

(i) two persons to be nominated by the Visitor.

(2) The term of office of an *ex-officio* member shall continue so long as he holds the office by virtue of which he is a member,

(3) The term of office of any member nominated under clause (f) or clause (g) or clause (i) of sub-section (1) shall be three years from the date of his nomination.

(4) The term of office of a member under clause (h) of sub-section (1) shall be two years from the first day of January of the year in which he is elected.

(5) The term of office of a member nominated to fill a casual vacancy shall continue for the remainder of the term of the member in whose place he has been nominated.

(6) Notwithstanding anything contained in this Act, a member nominated under this section shall continue in office until another person is nominated as a member in his place.

(7) The Governing Body shall meet at such time and place as the

Chairman may from time to time determine;

Provided that the Governing Body shall meet at least once in three months.

(8) The procedure to be followed by the Governing Body for the transaction of business in any meeting or otherwise or in the exercise of its power or discharge of its functions shall be such as may be laid down in the regulations.

(9) Subject to such control and restrictions as may be prescribed, the Governing Body may constitute such Committees, as it thinks fit, for exercising any power or discharging any functions under this Act."

(13) Section 19 of the Act, 1983 mentions that the Governing Body shall be responsible for the general superintendence, direction and control of the affairs of the institute. The said section *inter alia* states :

"19. Functions of the Governing Body.- (1) Subject to the provisions of this Act, the Governing Body shall be responsible for the general superintendence, direction and control of the affairs of the Institute

(2) Without prejudice to the provisions of sub-section (1), the Governing Body -

(a) Shall take steps for the implementation of the decisions of the Institute on questions of policy relating to the administration of the affairs and working of the Institute;

(b) shall institute courses of study at the institute and take decisions on the advice of the Academic Board on all academic matters including matters relating to the examinations conducted by the Institute;

(c) shall hold and control the property and funds of the Institute;

(d) may acquire or transfer any movable or immovable property on behalf of the Institute;

(e) shall administer any funds placed at the disposal of the Institute for specific purposes;

(f) may create or abolish posts of teachers and other employees of the Institute;

(g) may manage and regulate the finances, accounts, investments property, business and all other administrative affairs of the Institute and for that purpose appoint such agent as it may think fit;

(h) may invest any money belonging to the Institute (including any income from trust and endowed property) in such stocks, funds, shares or securities as it shall from time to time think fit;

(i) may enter into, vary, carry out and cancel contracts on behalf of the Institutes;

(j) may regulate and determine all other matters concerning the Institute in accordance with this Act and the ruler, and regulations made thereunder."

(14) Further, Section 21 of the Act, 1983 says about constitution of the Finance Committee and its duties. Section 21 *inter alia* states :

"21. Finance Committee. - (1) The Finance Committee shall consist of: -

(a) the Director who shall also be the Chairman of the Committee;

(b) Secretary, to the Government of Uttar Pradesh in the Department of Medical, Health and Family Welfare, or his nominee;

(c) Secretary to the Government of Uttar Pradesh in the Department of Finance, or his nominee;

(d) two persons to be nominated by the Governing Body from its members;

(e) the Executive Registrar;

(f) the Finance Officer who shall also be the Secretary of the Committee.

(2) The Finance Committee shall advise the Governing Body on matters relating to the administration of property and funds of the Institute including limits for and principles to be observed with regard to the recurring and non-recurring expenditure for the ensuing financial year, having regard to the income and resources of the Institute.

(3) The Finance Committee shall have such other powers and duties as may be prescribed.”

(15) Section 29 of the Act, 1983 says that all orders and decisions of the Institute shall be authenticated by the signature of the President or any other member or officer authorised by the institute in this behalf and all other instruments shall be authenticated by the signature of the Director or any other officer of the Institute authorised in like manner in this behalf. Section 30 of the Act, 1983 protects the invalidation of any proceeding by the institute due to any vacancies etc., whereas Section 33 of the Act, 1983 prescribes the control of the State Government over the Institute, not being inconsistent with the provisions of this Act and for the purposes of efficient administration of the affairs of the Institute under this Act, 1983. Section 35 of the Act, 1983 gives prominence to the State Government, in case there is any dispute between the institute and the State Government relating to exercise of power and discharge of its function under the Act, 1983. Section 36 of the Act, 1983 talks of reference to the Visitor and gives sweeping power to entertain all kinds of

question arising out of the administration of the institute under the Act, 1983.

(16) Although Section 41 of the Act, 1983 concerning power to make regulations, says that the Institute may with the previous approval of the State Government, make regulations to provide for any matter which is to be or may be provided for by regulations, however, no regulations framed under the Act, 1983 has been argued or has been brought to the knowledge of this Court prior to the year 2011.

C. Facts of the case

(i) Governing Body recommendation dated 08.01.1988

(17) Since, common facts are involved in these bunch of writ petitions, the facts of lead matter being Writ-A-902 of 2011 is being taken for consideration of this court. As per the averment made in the writ petition, the petitioners were appointed as Cashier/Accounts Clerk during the period from 1987-1990. The story unfolds by a meeting of the Finance Committee of SGPGI on 16.09.1987, wherein a decision was taken in principle with regard to revision of pay scales of Ministerial Staff, Accounts Staff and Secretarial Staff at par with maximum permissible pay scales available to such staff in the offices of the Heads of Departments (HOD) in the State Government. The qualifications to be at par with such staff in the Heads of the Department for similar post in the institute was also agreed in the meeting of the said committee.

(18) Based on the aforesaid meeting, the Finance Committee further in its meeting held on 31.10.1987 took a decision to revise the pay-scale/re-designation of the

employees working in the Accounts/Ministerial/Secretarial Cadres of the institute, wherein it was decided to re-designate the posts of Accounts Clerk/Accounts Clerk-cum-Cashier/Cashier carrying the pay scales of Rs. 400-615/- to the post of Assistant Accountants carrying a pay scale of Rs. 515-860/-.

(19) Apparently, the aforesaid decision was ratified by the Governing Body in its meeting dated 08.01.1988 and was also approved by the body of the Institute on 22.04.1988. The implementation of the aforesaid decision and ratification of the Governing Body was procrastinated, leading to representation dated 14.12.1992. After a series of representation, it was only on 02.07.1994, the Director of SGPGI thought of implementing the said decision dated 08.01.1988 of the Governing Body and as such the petitioners were re-designated as Assistant Accountant with effect from 08.01.1988 or from their respective date of joining, whichever was later, in the pay scales of Rs. 515-860/- (revised to Rs. 1400-2300/-) in place of earlier and existing pay-scale of Rs. 400-615/- (Rs. 1200-2040/-).

(ii) Government Order dated 05.03.1991

(20) The said revision has been “*in the eye of the storm*” as the same was implemented without any reference to certain other simultaneous developments relating to the designation and pay-scales during the intervening period of 08.01.1988 and 01.07.1994. Significantly, the State Government, in principle agreed to revise the salary of all the employees and officers of SGPGI at par with the employees of AIIMS, New Delhi, which led to issuance

of Government order dated 01.08.1990 providing for revision of the pay-scales with the consent of the Finance Department. In furtherance to the said development, the State Government, admittedly, issued another Government Order dated 05.03.1991, revising the pay scale of employees of SGPGI at par with the employees of AIIMS, New Delhi. As per the said revision, the Cashier/Accounts Clerks were made available the revised pay-scale of Rs. 1200-2040/-, whereas the Assistant Accountants were admitted to the pay-scale of Rs. 1400-2300/-. Apparently, the said revision in pay-scale was on the basis of recommendation of the Equivalence Committee (*Randhar Committee*) constituted after passing of the Government order dated 01.08.1990.

(iii) Appointment of AACO's

(21) In the year 1992, a Departmental Promotion Committee (DPC) was held for promotion of these Cashier/Accounts Clerks to the post of Assistant Accountant. However, the said DPC was withheld and the Institute issued an advertisement for making direct selection on the post of Assistant Accountant-cum-Computer Operator (“AACO”). The petitioners apprehending that the said direct recruitment was being made at par with their post of Assistant Accountant for which they had been vying, filed a writ petition bearing No. 2358 of 1992, wherein an order dated 24.04.1992 was passed by a Co-ordinate Bench of this court on the statement of the counsel representing the Institute that two cadres i.e. “*Assistant Accountants*” and “*Assistant Accountant-cum-Computer Operator*” are not being merged as they indicated two different qualification. On the facts of the said case, a Co-ordinate Bench of this Court directed

the institute for conducting the DPC at the earliest, which had been pending since 7th of September, 1991.

(22) Apparently, the DPC was not conducted as per the aforesaid direction, however, the Institute went ahead with the recruitment on the post of Assistant Accountant-cum-Computer Operator, who are the petitioners in the other set of writ petitions and have flagged the seniority list prepared by the Institute.

(iv) **Cadre Review dated 03.01.1997**

(23) In the meantime, the Governing Body in its 43rd meeting held on 03.01.1997 made cadre review as well as pay-scales and promotional opportunities, with respect to the employees of the Institute in view of the recommendation dated 01.01.1997 of the Finance Committee. That 'cadre review and promotion policy' for the non-faculty employees of SGPGI, was approved by Governing Body on 03.01.1997 at par with AIIMS, New Delhi. The Governing Body in its 43rd meeting decided to implement the AIIMS package of allowances to all the employees uniformly and also decided in principle to implement the changes at SGPGI similar to changes at AIIMS in future as well. Thus, one of the ground taken by the petitioners of the first set of writ petitions (Writ No. 90 of 2011, 903 of 2011 and 904 of 2011) is that the parity of cadre structure with AIIMS was given with effect from 03.01.997 and not with effect from 05.03.1991 as mentioned in the preceding paragraphs. According to this Court, the determination as to what was the date when AIIMS package of allowance became applicable to employees of SGPGI is clear from the Government order dated 05.03.1991 itself and does not require

deliberation any further, in view of the facts of the present case.

(24) The petitioners in Writ-A-902 of 2011, in order to buttress their case, have also flagged the salient feature of restructuring of Finance and Accounts Cadre approved by the Governing Body on 03.01.997 and have argued that 22 posts of Assistant Accountant were approved at entry level, out of which 8 posts were available in the institute, 8 posts were taken into consideration from re-designated post of Account clerks by Governing Body decision dated 08.01.1988, 4 post of cashier was merged with the post and the remaining 2 post of senior Auditor was also re-designated as Assistant Accountant with effect from 08.01.1988. Thus, it was stated by them that no post in the nomenclature of Accounts Clerk/Cashier remained in the Accounts Cadre and the entry post in the said cadre after restructuring was Assistant Accountant in the pay-scale of Rs. 1400-2300/- and not Account Clerk/ Cashier in the pay scale of Rs. 1200-2040/-.

(25) These petitioners have stated that as per the cadre restructuring, new posts of Junior Accounts officer were created at par with the AIIMS and the said post was a promotional post, meant to be filled from amongst the Assistant Accountants having 5 years' service in the grade and the criteria for promotion was *seniority subject to rejection of unfit*. Accordingly, some of the petitioners were promoted to the Junior Accounts officer vide an order dated 23.12.1998 and others vide an order dated 03.01.2002.

(v) **Re-structuring of the Cadre on 27.11.2001.**

(26) Further, another re-structuring of the cadre was effected on 08.10.2001 by the Finance Committee ratified by the

Governing Body on 27.11.2001, wherein a new post of Assistant Accounts officer was created in between the post of Assistant Accountant and Junior Accounts Officer. Petitioners claimed to be further promoted as Assistant Accounts Officer with effect from 03.01.2002 vide some office memorandum dated 18.03.2002.

(vi) The case of AACO's

(27) As provided by Governing Body on 3.1.1997, the post of AACO's was classified in computer cadre. However, representations were given by the individuals on the post of AACO's against this classification. A joint representation was given by AACO on 06.06.1997 to absorb them in Accounts Cadre and to re-designate them as Junior Accounts Officer, a post higher to Assistant Accountant.

(28) On the representations of the AACOs, the Finance Committee in its 40th meeting agreed to the merger of AACO with Accounts cadre at the level of Assistant Accountant in the pay scale of Rs. 1400-2300. The Finance Committee further recommended that their seniority with Assistant Accountant would be determined from the date of panel against which they were appointed. That the recommendations of above Finance Committee were approved by Governing Body in its meeting held on 04.05.1998.

(29) That in the light of the decision taken by Governing Body on 04.05.1998, a tentative seniority list was published on 26.09.1998 and objections were sought and final seniority list was published on 21.12.1998. The order dated 26.09.1998 further states that AACO stood merged in the Accounts cadre at the level of

Assistant Accountant in the pay scale of Rs. 1400-2300/-.

(30) In the meantime, persons, who were appointed on the post of Assistant Accountant-cum-Computer Operator through direct recruitment prior to implementation of the decision dated 08.01.1988 (with regard to the petitioners of Writ No. 902 of 2011) vide an order dated 02.07.1994, after merger of the two cadres by the Governing Body and decision of the Government order dated 04.05.1998 started agitating their case of seniority over and above the petitioners and also filed writ petition no. 2939 (SS) of 1998, 5609(SS) of 1998, 639 (SS) of 1999 and no. 6545 (SS) of 2007, whereby they had challenged their seniority, merger and incorrect implementation of Governing Body decision dated 08.01.1988 etc. Thus, the second set of writ petition being led by Writ-A-639 of 1999 came to be filed by this AACOs challenging the combined seniority list issued on 21.12.1998 after merger of the said two posts, which is also to be decided by this Court in the present common Judgment.

(31) A Co-ordinate Bench of this Court, while hearing the writ petition no. 639 (SS) of 1999 on 13.12.1999, provided that the promotions shall not take place in pursuance of the Seniority list dated 21.12.1998, which is under challenge, until the seniority dispute is finally determined by the Government. The seniority list dated 21.12.1998 was confirmed by the Institute by an order dated 14.07.2000.

(32) Another 'cadre review & promotion policy' was approved by Governing Body on 27.11.2001 and eligible employees in order of seniority were

promoted w.e.f. 03.01.2002, but being junior in the list, these AACOs were left out from being promoted. Thus, the seniority list is under challenge in these petitioners.

(vii) Implementation of GB dated 08.01.1988 to the Ministerial & Secretarial Cadre

(33) The recommendation of the Governing Body dated 08.01.1988 came to implemented on 02.07.1994 as far as the employees of Accounts Cadre were concerned, however, as far as the other two cadres, namely, Ministerial and Secretarial are concerned, although the recommendation of the Governing Body dated 08.01.1988 came to be implemented on 01.01.1998, however, subsequently the same was cancelled vide an order dated 06.03.1998 and as such the employees of these two cadres preferred a reference petition under Section 36 of the Act, 1983 before the Visitor, wherein vide an order dated 23.08.1999, the issue was referred by the Visitor to the Department of Medical Education, State of Uttar Pradesh. Subsequently, vide an office order dated 13.02.2002, the State Government took a decision to implement the decision and also held the earlier implementation order dated 01.01.1998 to be proper and cancelled the order of cancellation dated 06.03.1998.

(34) Thus, SGPGI issued office orders on 20.03.2002 and 02.04.2003 for granting benefits of Governing body decision dated 08.01.1988 to Ministerial and Secretarial Cadres respectively, from the date of the decision of Governing Body dated 08.01.1988, pursuant to a direction of the State Government dated 13.02.2002. Apparently, some employees appointed in the Ministerial Cadre in the period

intervening 08.01.1988 and 13.02.2002, felt aggrieved by the late implementation of the Governing Body decision as their salary in comparison to the salary admitted to the employees with effect from 08.01.1988 was relatively low as although the pay-scale was similar, however due to the grant of more increments their salary had become higher. Although, there had been no issue relating to seniority as the same was protected.

(viii) The controversy between the AACOS's and Assistant Accountants

(35) In the meantime, the State Government, vide an office order dated 15.05.2000, set the controversy at rest by holding that the seniority of the persons working in the same pay-scale of the date of merger of the two cadres on 04.05.1998 shall be determined from the date of their substantive appointment and the seniority of the incumbents carrying different pay-scales shall be determined on the basis of higher pay-scales. Thus, as stated by the petitioners in Writ-A-902 of 2011 that since the petitioners and AACOs were both having same pay-scale on 04.05.1998 i.e. Rs. 1400-2300, on the date of merger, the Director of the institute in conformity with the office order dated 15.05.2000 of the State Government issued an order dated 14.07.2000 affirming the earlier seniority list dated 21.12.1998.

(36) In the aforesaid backdrop and there being pertinent controversy between the employees, the Finance Committee of the institute constituted a sub-committee vide its decision dated 10.03.2005, to examine the issue. The sub-committee in its meeting held on 07.11.2005 declared the implementation of the decision dated 08.01.1988 of the Governing Body as

illegal, however the re-structuring of the cadre held on 03.01.997 and 27.11.2001 were held to be valid and correct. Thus, the sub-committee recommended for withdrawal of benefit admitted to the employees of Accounts Cadre, Ministerial Cadre and Secretarial Cadre and also further recommended for making recovery.

(37) Obviously, the recommendation dated 07.11.2005 was to the benefit of AACOs, who had been vying for seniority over the petitioners and as such they preferred a writ petition bearing No. 6545 of 2007 before this Court, praying *inter-alia* for taking action in furtherance to the said recommendation of the sub-committee dated 07.11.2005. A Co-ordinate Bench of this Court vide an order dated 15.10.2007 passed in Writ Petition No. 6545 (S/S) 2007, directed the Governing Body to take action as per law, however the Governing Body directed for a constitution of another sub-committee vide its decision dated 15.10.2007, wherein again the matter relating to the recommendation of the Governing Body dated 08.01.1988 was to be considered.

(38) The second sub-committee was constituted as per decision dated 15.10.2007 and comprised of Principal Secretary, Department of Law, Principal Secretary, Department of Finance, Finance Officer, SGPGI and Medical Superintendent/ Member Secretary of SGPGI. In the meeting held on 16.01.2008 in the absence of Principal Secretary, the second sub-committee arrived at a decision that there was no anomaly in the Accounts Cadre on account of the implementation of the decision of the Governing Body decision dated 08.01.1988 and recommended to continue with the exiting practise. The committee also proposed of

no decision in the Secretarial Cadre as there was no dispute in the said cadre, however as far as the Ministerial Cadre was concerned, the Committee proposed pay protection of employees which appeared to be on the lower side than the employee, who had been extended the benefit of the Governing Body decision dated 08.01.1988. The said pay protection was given from the order dated 02.04.2003, by virtue of which the decision of the Governing Body dated 08.01.1988 was implemented.

(39) Further, the proposal/report dated 16.01.2008 of the second committee was placed before the Governing Body on 01.03.2008, which recommended the institute to take a final decision on the implementation in consultation with the finance department of the state Government. However, several employees of the ministerial cadre filed writ petition bearing No. 6555 of 2009, seeking quashing of the office order dated 02.04.2003 and 20.03.2002 and a direction was sought for final decision on the predicament of the decision of Governing Body dated 08.01.1988 in the light of the first sub-committee report dated 07.11.2005 and subsequent Government order dated 25.01.2006 and 06.09.2006 and as such a direction was sought for granting equal benefits to them at par with their juniors in accordance with the light of the second committee report dated 16.01.2008. Further, as far as the said writ petition is concerned, a Co-ordinate Bench of this Court, vide an order dated 15.10.2009, directed the President of the Institute to take a decision in the matter keeping in view the recommendation of the Governing Body in accordance with law and by a speaking and reasoned order.

(40) Pursuant to the aforesaid direction, the President of the Institute, who is also the Chief Secretary of the State Government as per section 11 of the Act, 1983, took a decision dated 15.01.2010, wherein it had observed that once the benefit of the pay parity with that of the AIIMS employee was given to the non-teaching employees of the institute, prior to the implementation of the decision of Governing Body dated 08.01.1998, extending of any benefits to the petitioners was against the orders issued by the State Government and was not approved by the State and as such not worthy of implementation and accordingly recommended for recovery.

(41) The said decision dated 15.01.2010 of the President of the Institute was placed before the Governing Body of the Institute. The Governing Body, in turn, vide its recommendation dated 06.03.2010 approved the decision of the President and authorised the Director of the Institute to act accordingly as per law. Subsequently, the Director of the Institute issued show cause notice dated 01.07.2010 to the petitioners of the first set of writ petitions, calling upon them to file their reply/representation.

(42) Further, representation to the said show cause notice of the Director of the SGPGI also did not yield any result, as the Director of the SGPGI vide his order dated 11.10.2010 reiterated the earlier order of the President/Governing Body, except to the fact of petitioners' status was now to be determined as per Government order dated 05.03.1991. Thus, the petitioners being aggrieved by the three orders preferred a writ petition being 7570 of 2010 before this Court, wherein a Co-ordinate Bench of this Court disposed of the said writ petition vide

an order dated 02.11.2010 by remitting the matter to the Visitor in view of Section 36 of the Act, 1983.

(43) Thereafter, the petitioners preferred a detailed representation before the Visitor in terms of Section 36 of the Act, 1983, however even the said reference was rejected vide an order dated 25.01.2011 and as such the petitioners have filed the first set of writ petitions seeking quashing of order dated 15.01.2010 passed by the President of the SGPGI directing SGPGI to withdraw the benefit of the decision of Governing Body dated 08.01.1988 and extended on 02.07.1994 to the petitioners. Further, quashing has also been sought of all consequential orders like decision dated 06.03.2010 of the Governing Body, Order dated 11.10.2010 issued by the Director of the institute and order dated 25.01.2011 passed by the Visitor u/s 36 of the Act, 1983.

(44) As already narrated in the aforesaid facts, two other similar petitions being Writ No. 903 of 2011 and 904 of 2011 came to be filed by similarly circumstanced employees from the Ministerial and Secretarial Cadre respectively. These petitions were opposed by the state, SGPGI as well as the employees appointed as Assistant Accounts-cum-Computer Operator (AACOs), who claimed equal treatment and as such challenging the seniority list, equal treatment and declaration/implementation of DPC have filed five writ petitions, wherein Writ No. 639 of 1999, Writ No. 6545 of 2007 and Writ No. 3948 of 2014 is for challenging the seniority list and writ petition No. 3607 (S/S) of 2014 was filed for holding of DPC and Writ No. 1400 (S/S) of 2015 for declaration/ implementation.

(45) Although, writ petition No. 3607 (S/S) of 2014 was disposed of vide order dated 07.08.2014 granting relief to the said petitioners, however, subsequently C.M.Application No. 132871 of 2014 has been filed by one Dilip Singh and Mahesh Chand praying for recalling of the said order dated 07.08.2014 *inter alia* on the ground that the order dated 07.08.2014 has been obtained by concealment of material fact. As the issue involved in pending C.M. Application No. 132871 of 2014 in re: Writ Petition No. 3607 (S/S) of 2014 is identical to other above-captioned writ petitions, with the consent of the parties, the same is being decided by this common order .

D. Contention of the Parties

(46) Heard Mr. S.K. Kalia, learned Senior Advocate, Mr. Asit Chaturvedi, learned Senior Advocate, Mr. Shobit Mohan Shukla, learned Counsel representing the petitioners in Writ Petition Nos. 902 of 2011, 903 of 2011 and 904 of 2011, Mr. Sanjay Bhasin, learned Senior Advocate ably assisted by Mr. Shubham Tripathi, learned Advocates for SGPGI, Mr. Jagdambika Prasad Tripathi, Mr. H.S. Tiwari, Mr. Rjendra Singh Chauhan, Mr. V.P. Nag, Mr. Girish Chandra Sinha, Mr. S.P. Singh, Mr. I.P. Singh, learned Advocates representing respective parties.

(47) Mr. S.K. Kali, learned Senior Advocate in his charismatic simplicity submitted that all the petitioners were appointed in SGPGI in Accounts, Ministerial and Secretariat Cadre in the year 1987 onwards and three Writs have been filed by them respectively. He argued that the Finance Committee in its meeting held on 31.10.1987 decided to revise/re-designate the employees of Accounts, Ministerial and Secretarial cadre, which

formed the basis of the decision of Governing Body dated 08.01.1988. However, in the meantime, the State Government vide Government Order dated 01.08.1990 agreed in principle to provide the pay-scale of 4th Pay Commission which was applicable w.e.f. 01.01.1986 at par with AIIMS, New Delhi.

(48) Accordingly, the pay-scales of employees were revised vide Government Order dated 05.03.1991 w.e.f. dated 01.01.1986 based on recommendation of Equivalence Committee. It has been contended by the learned Senior Counsel that during revision, the decision of Governing Body dated 08-01-1988 was not reported to the Committee and as a result thereof Accounts Clerk were given the pay-scale of Upper Division Clerk in AIIMS i.e. Rs. 400-615/- revised Rs. 1200-2040. He emphatically stressed on the point that had the decision dated 08.01.1988 been taken into consideration, Accounts Clerk would have been designated as Assistant Accountants and given the pay scales of Rs. 1400-2300 at that stage itself and there would have been no occasion for any dispute thereafter.

(49) According to the learned Senior Advocate representing the petitioners, representations had been given by the petitioners and in view of the said representation, the Institute constituted a Committee and after consideration of their claims, a D.P.C. was constituted for the said purpose and the petitioners were re-designated as Assistant Accountants from the post of Account Clerk. Since, the unrevised pay-scale of Account Clerk was Rs. 400-615/- and of Assistant Accountant was Rs. 515 to 860/-, as such after re-designation, the petitioners were given the revised pay-scale of Assistant Accountant

i.e. Rs. 1400-2300/- vide order dated 02.07.1994.

(50) Learned Senior Advocate representing the petitioners further submits that the recommendation of the sub-committee dated 07.11.2005 has erroneously declared that implementation of the decision dated 08-01-1988 of the Governing Body as illegal, whereas on the other hand it said that the restructuring held on 3-1-1997 and 27-11-2001 be treated to be implemented, even though the said restructuring was done keeping in view the decision of the Governing Body dated 8-1-1988. According to him, the decision of the sub-committee was contradictory and as such the recommendation for withdrawal of benefit admitted to the employees of the Accounts, Ministerial and Secretarial cadres and further recommendation for making recovery was illegal.

(51) It has been submitted that since there is no other provision in the Act, 1983 providing for regulation of service conditions of the employees of the institute, therefore, as per the General Clauses Act, the power bestowed on the Governing Body to create and abolish the posts as provided under section 19(2)(f) of the Act, 1983 includes the power to regulate the service conditions of the employees of the Institute. Thus, the impugned decision of the President of the SGPGI dated 15-01-2010 to the effect that the decision of the Governing Body dated 08-01-1988 should be discarded, on the ground of it not having been approved by the State Government proves to be misconceived and legally not tenable. According to him, no approval of State Government was required for creation of any post in the Institute, as can be seen from the fact that Section 19(2) (f) was amended in the year 2009 in which

approval of the State Government has now been required for the said purpose. He submits that in any case when the budget required for the purpose of payment of pay-scale in pursuance of decision of the Governing Body dated 08-01-1988 was allocated by the State Government, the requirement of Section 25 of the Act has been complied with and it indicates implied approval of decision of Governing Body dated 08-01-1988 by the State Government.

(52) Learned Senior Counsel has tried to drive home his point by stating that both the decision of the Governing Body dated 08.01.1988 and the decision of granting pay-scale at par with AIIMS dated 05.03.1991 can co-exist as the said two decisions are neither repugnant to each other nor there was any illegality in implementing the two decisions for the employees of the Institute. The grant of aforesaid two benefits to the petitioners cannot be said to be admitting double benefits to the petitioners but the order of the President of the SGPGI is apparently based on the said notion. Furthermore, it has been argued that the other reasons assigned in the impugned order dated 15-01-2010 are legally not tenable and the decision of the Governing Body dated 03-01-1997 cannot be legally tested on the touch stone of Section 41(1) (f) of the Act, 1983 inasmuch as till date no regulations have been framed by the Institute and, therefore, in view of Section 19 (2)(f) of the Act, 1983, the Governing Body was fully competent to review the cadre and to provide pay scale and promotional opportunities to the employees of the Institute. The learned Senior Counsel emphatically asserted that when *ex post facto* approval of State Government for Governing Body decision dated 3-1-1997 can be recommended why not for

Governing Body decision dated 08-01-1988, though at this belated stage it would create chaotic situation in the Cadre. He also stressed on the point that in Cadre Review dated 03.01.1997, re-designation of posts as per decision of Governing Body dated 08.01.1988 was taken into consideration.

(53) According to the learned Senior Counsel, the President of SGPGI, while passing the impugned order dated 15.01.2010, has though tried to create an impression that the Institute is subservient to the State Government but while holding the office order issued by the State Government to be illegal, he has acted as superior authority and not as the President of the Institute. The tenor of the impugned order dated 15.01.2010 goes to show that the President of the Institute has also tried to sit in appeal over the decision taken by the State Government and has annulled the decision of the Governing Body which he happens to be the President.

(54) The learned Senior Counsel has submitted that the alleged parity with AIIMS was granted w.e.f. 1997 and not from 1991 as is also evident from a letter of the Director of the Institute dated 13-10-2008 addressed to the Director of AIIMS. Thus, according to him, the Visitor has failed to examine as to when the AIIMS parity has been granted to the petitioners and secondly whether admitting the benefit of the decision of Governing Body dated 08-01-1988 amounts to admitting dual service benefits to the petitioner or not. In order to affirm decision dated 15-01-2010 and 11-01-2010, the Visitor though has referred to the decision of the first sub-committee meeting dated 07-11-2005 but has utterly failed to consider second sub-committee decision dated 16-01-2008. Not

a single iota has been said with regard to the decision dated 16-01-2008. Further even the State Government vide its order dated 20-10-2010 has held that there is no occasion and purpose to grant *ex-post facto* to the approval decision dated 3-1-1997 as the said decision has already been implemented. Thus it has been submitted that the order of this Court in pursuance to which the President of SGPGI has passed the impugned order dated 15-01-2010 did not deal with the merit of the case. Further, according to the learned Senior Counsel, the post to post parity with AIIMS has never been granted till date and therefore sole premise to snatch the benefits flowing from the decision dated 08.01.1988 is misconceived and while making cadre restructuring in the year 1997, the decision dated 08.01.1988 was taken into consideration. The original impugned order from where the dispute has erupted i.e. order dated 15.01.2010 apart from being illegal and arbitrary is violative of principles of natural justice for the reason that the follow up decision dated 06.03.2010 is also based on prejudices inasmuch as decision to issue show cause notice after a final decision has been taken is nothing but an eyewash and is a camouflage.

(55) Learned Senior Counsel representing the petitioners further submitted that decision dated 08.01.1988 was rightly implemented as it created no hindrance or adverse impact on the alleged grant of parity with All India Institute of Medical Sciences(AIIMS). As a matter of fact, the decision dated 08.01.1988 and its implementation is not in derogation to any further decision taken by the Institute as regards the service conditions and pay scale of the employees of the Institute. The situation can be visualized from a

hypothetical situation that had the decision dated 08.01.1988 been implemented in 1988 itself, no question of any kind would have arisen as regard grant of said benefits. The said decision was implemented so as to boost the morale of the employees.

(56) According to the learned Senior Counsel, the Governing Body of Institute in its 43rd meeting held on 03.01.1997 made cadre review as well as pay scales and promotional opportunities with respect to the employees of the Institute. The said decision was based on the recommendations of the Finance Committee taken in its meeting held on 01.01.1997. The Governing Body on 03-01-1997 decided to implement the AIIMS package of allowances to all the employees uniformly and also decided in principle to implement the changes at Sanjay Gandhi Post Graduate Institute of Medical Sciences, Paripasu with changes at AIIMS in future. Thus, in fact parity of cadre structure with AIIMS was given w.e.f. 3-01-1997 and not w.e.f. 1-08-1990. Moreover, according to him, the aforesaid cadre restructuring/ revision of the pay scale dated 08-01-1988 was taken into consideration while reviewing the cadre restructuring on 03-01-1997. Through the cadre review made on 03-01-1997, the posts of Typist/Junior Clerk (Store) and Hospitality Clerk were declared as dying cadre and two existing Typist and Junior Clerk and Hospitality Clerk were merged to the post of Lower Division Assistant in a phased manner on completion of 03 years' experience on the aforesaid post. The echelon of the cadre structure also goes to show that the same was based on the decision of the Governing Body dated 08-01-1988. Thus, the parity with AIIMS had been approved vide aforesaid decision dated 3-1-1997 yet the actual parity has not

been granted. According to the learned Senior Counsel, in AIIMS, the post of LDC, UDC, Head Clerk and Office Superintendent are in existence but in the Institute, the post of L.D.A., U.D.A. and Office Superintendent are in existence. It was stated that the earlier existing post of Typist was declared as dying cadre vide decision dated 3-1-1997 keeping in view the earlier decision dated 8-1-1988. Thus, parity of AIIMS has not been granted. This was the situation in the cadre of Accounts and Secretariat as well.

(57) The next ground taken by the learned Senior Counsel is that while taking the impugned decision of withdrawal of the service benefits having been made available to the petitioners way back in the year 2002 w.e.f. 08.01.1988, no opportunity has been provided to them as neither any show cause has been issued to the petitioners nor they have been given an opportunity to place their case before the authorities prior to the decision of the Governing Body dated 06.03.2010. Such an action on the part of the respondents is in absolute derogation to the principles of natural justice and as such the same cannot be allowed to be sustained in the eyes of law. According to him, in the Accounts Cadre, the petitioners, who were designated as Assistant Accountant and have been promoted on higher post would be placed at which post is not clear inasmuch as the post of Account Clerk is not in existence and other posts in Ministerial Cadre are also not in existence. The submission of the petitioners is that none of the grounds taken by the President of SGPGI, to cancel the service benefits made available to the petitioners long ago, are tenable either in the eyes of law or on facts. It was further contended that although prior to passing of the order dated 11.10.2010, an exercise to

provide opportunity to the petitioners was undertaken in pursuance of an office order dated 01.07.2010 but as a matter of fact the said opportunity was nothing but an eyewash as after taking a final decision on 06.03.2010 itself, there was no purpose for providing opportunity to the petitioners.

(58) According to the learned Senior Counsel, the entire exercise is malicious and capricious and is oriented to give benefit to a certain class of employees. The Visitor in a pre-determined notion has decided the reference petition without properly appreciating the grounds raised by the petitioners in their reference petition. Thus, he prays for allowing the writ petitions No. 902 of 2011, 903 of 2011 and 904 of 2011.

(59) On the other hand, according to the State of Uttar Pradesh, the order dated 15.01.2010 was passed by the President of the SGPGI and thereafter it was placed before the Governing Body in its 68th meeting held on 06.03.2010 for its deliberation and decision. The Governing Body approved the order of the President of the SGPGI and recommended to set aside the office orders dated 02.07.1994, 20.3.2002 and 02.04.2003 issued on the basis of earlier recommendation of the Governing Body dated 08.1.1988. Thereafter, considering various representations and after approval of the President of SGPGI, the Director of SGPGI passed impugned order dated 11.10.2010 for setting aside the implementation of the decision of the Governing Body taken in its meeting on 08.01.1988, wherein it was mentioned that the employees of ministerial and secretarial cadre shall be restored their designation and pay scale, as per "Cadre restructuring of Promotion Policy", approved by Governing Body on 3.1.1997 subject to

ex-post facto sanction of State Government and employees of accounts Cadre shall be accorded benefits as per decision of the said Governing Body.

(60) According to Mr. V.P. Nag, the learned Standing Counsel for the State, the petitioners and other beneficiary employees preferred writ petition nos. 7570 (S/S) of 2010, 7571 (S/S) of 2010 and 7572 (S/S) of 2010 before this Court, wherein all the said writ petitions were disposed of vide order dated 02.11.2010 with liberty to the petitioners to submit their representations before the Visitor who shall take decision within a month and till then the impugned orders would remain stayed. The learned Counsel has vociferously argued that in view of the order dated 02.11.2010, passed by this Court, petitioners/employees submitted before the Visitor, who sought the comments from the President and the Director of the Institute and also Secretary, Medical Education Department of Govt. of U.P. and after considering the relevant facts, Government Orders, decisions of statutory bodies and provisions of Act, the Visitor passed a self-speaking and reasoned order dated 25.01.2011 thereby upholding orders dated 15.01.2010, 11.10.2010 and recommendation of Governing Body taken on 06.03.2010.

(61) Apparently, the State has tried to build a case by submitting that the resolution of Finance Committee meetings dated 16.09.1987 and 31.10.1987, was ratified by Governing Body in its meeting dated 08.01.1988, whereby the pay scales to ministerial staff of the Institute (i.e. Office Superintendent, Sr. Assistant/U.D.A., Senior Clerk/L.D.A., Senior Accounts Clerk/Cashier/Cashier/Record Keeper and others) was made at par with the pay-scales available to the staffs in

the offices of Heads of Departments in Government Departments. Thereafter, Government accorded sanction to grant pay scales and allowances to the faculty of the SGPGI at par with their counter parts in All India Institute of Medical Sciences, New Delhi (hereinafter referred as 'AIIMS'). Subsequently, vide order dated 01.08.1990 of the Government, employees of SGPGI were also accorded same benefits. Thereafter vide Government Order dated 05.03.1991, revised pay scale was granted to the employees including petitioners w.e.f. 01.01.1986, the date from which the scale was revised in as per recommendations of 4th Pay Commission, in view of option given by the employees and they never protested parity in pay being granted with the employees of AIIMS. According, to the learned Counsel for the State, the pay-scale of all the petitioners in Writ-A No. 902 of 2011 was revised to Rs.1200-2040 (4th Pay Commission) by Government Order dated 05.03.1991 at par with the AIIMS, New Delhi and revised salary along with arrears (difference of salary) was also paid. Thus, he has reiterated that the implementation of resolution of Governing Body dated 08.01.1988 in the year 1994 in respect of Accounts Cadre from retrospective effect was improper. Further, according to the learned Counsel, vide the Government Orders dated 5.3.1991 and 09.07.1991, the revised pay-scales were granted to the ministerial staff and secretarial cadres w.e.f. 1.1.1986 or w.e.f joining, whichever was later, and revised salary along with arrears (difference of salary) was also paid to them.

(62) The learned Counsel has stated that the employees appointed on the post of Accounts Clerk/Cashier (pay-scale Rs. 400-615/ Rs.1200-2010) were re-designated as Assistant Accountant in the pay scale of Rs.

470-735/Rs.1400-2300 (revised) from 08.01.1988 or from their date of joining, illegally and arrears with respect to same were also paid to them.

(63) Learned Counsel for the State has further clarified that the approval of the Governing Body was titled "Cadre Restructuring, Pay Scale and Promotional Opportunities to Employees of the Institute", in brief known as "Cadre Review Report" and which was made effective from 03.01.1997 itself for all employees and officers of the Institute and promotions were made from the month of June, 1997 onwards. The ministerial cadre structure was also approved by the Governing Body on 03.01.1997.

(64) According to learned Counsel for the State, the pay scale of Stenographer as recommended by Governing Body meeting dated 08.1.1988 was Rs. 570-1100 (revised Rs. 1640-2900) and if granting this pay scale was correct, they would have been designated as Stenographer and their promotions made under the Government Order dated 09.07.1991 should be cancelled because benefit cannot be granted as per the choice of the petitioners. It was further submitted that whenever the petitioners were given the benefits of promotions and regularization under the Government Order dated 09.07.1991 they did not protest, and on other hand, they also accepted the pay scale, proposed by Governing Body meeting dated 08.01.1988. It was argued that the pay scale for the post of Stenographer was sanctioned as Rs. 1200-2040/ Rs. 4000-6000 by Governing Body in its meeting held on 03.01.1997 and 27.11.2001. Thus, under these circumstances, granting the pay scale of Rs.1640-2900 (Pre-revised Rs 570-1100) as recommended by Governing Body dated

08.01.88 from their date of joining was illegal and incorrect.

(65) The learned Counsel for the State has also submitted that the promotions in all cadres in the Institute, including the petitioners were made as per the approval of the cadre review report of 27.11.2001 and as such, it was illegal and improper to the application of former resolution passed by Governing Body in its meeting held on 08.01.1988. The learned Counsel has also submitted that on being knowing illegality in payment of arrears as per decision dated 8.1.1988 of Governing Body, recovery was initiated against the petitioner, wherein a Writ Petition No. 2843 (S/S) of 2005 (Anil Kumar Rai & others Vs. Director, SGPGIMS) was filed which was disposed of with liberty to move representation. Thus, according to the learned Counsel for the State, the Institute had been pursuing its cause of wrongful implementation of the recommendation of the Governing Body dated 08.01.1988, ever since the same was discovered as apparent from the report of the 1st committee dated 07.11.2005, which declared the said recommendation to be illegal and also recommended for recovery.

(66) On the legal ground, the learned Counsel for the State argued that the power of Governing Body to create/abolish posts under Section 19(2)(f) of the Act, 1983 does not include power to revise pay-scales. Every revision of pay-scale involves financial implications and requires budgeting, being recurring in nature, requires approval of State Government as per section 25(3) of the Act, 1983 while no approval to implement decision dated 08.01.1988 of the Governing Body was granted. Further, according to the learned Counsel, once Government Order dated

01.08.1990 and Government Orders dated 05.03.1991 and 09.07.1991 was issued giving parity with employees of AIIMS w.e.f. 01.01.1986 (actual payment w.e.f. 01.01.1986 or the date of joining), the decision of Governing Body 08.01.1988 stood rendered ineffective and implementation thereof subsequently was not sustainable on any grounds. He submits that pay-scale of employees should have nexus with duties assigned hence parity with employees attached to the office of HOD in State Government may not be claimed once parity with AIIMS having been extended retrospectively and arrears also paid on basis of option given and received without protest.

(67) Thus, learned Counsel for the State has submitted that the employees may not claim dual benefits arising from two sets of policies nor in such fashion it may be applied amongst employees of Institute, wherein some may get parity with AIIMS and some may get both pay-parity with employees of HOD offices in Government and that of AIIMS. He concluded his argument by submitting that illegality may not be allowed to perpetuate and any attempt to abuse the process of court and process of law must be effectively curbed nor any one may be allowed to get unjust profit.

(68) Mr. Sanjay Bhasin, learned Senior Counsel spearheaded the arguments along with Mr. Subham Tripathi for the SGPGI. The learned Senior Counsel has articulated his argument to submit that pursuant to the order of the Chief Secretary, Uttar Pradesh and decision of the Governing Body taken on 6.3.2010, the Director of the Institute on 1st July 2010 issued office order, whereby the opportunity of hearing was afforded to the

petitioners and other beneficiaries and it was desired from them to submit their representations as to why the orders issued on 02.07.1994, 20.3.2002 and 02.4.2003 should not be cancelled. It was further categorically mentioned that the employees of ministerial and secretarial cadre shall be restored their designation and pay scale, as per “Cadre re-structuring of Promotion Policy”, approved by Governing Body on 3.1.1997 subject to *ex-post facto* sanction of state government and employees of accounts shall be accorded benefits as per decision of governing body.

(69) According to the learned Senior Counsel, in view of the decisions of Statutory Bodies and statutory provisions given in the Act, the Visitor passed an order on 25.01.2011 which is self-speaking and reasoned. The Visitor did not find any illegality in the orders dated 15.01.2010, 11.10.2010 and decision of Governing Body taken on 06.03.2010 and as a result of which all the representations of the petitioners and others were dismissed. Thus, he has argued that since sufficient opportunity of hearing has been given to the petitioners and others by the Director and Visitor against the order of the Chief Secretary dated 15.01.2010 and decision of Governing Body taken on 06.03.2010, the contention of the petitioners with regard to violation of principles of natural justice does not stand substantiated and accordingly there is nothing substantial remaining in the writ petition and same is liable to be dismissed.

(70) The learned Senior Counsel has argued that petitioners were substantively appointed on the post of Accounts Clerk/cashier in the pay scale of Rs.400-615 as per 3rd Pay Commission. The pay scale of all these Petitioners was revised to

Rs.1200-2040 (4th Pay Commission) by Government Order dated 05.03.1991 at par with the AIIMS, New Delhi and revised salary was granted along with arrears (difference of salary) to them. As such, it was illegal and improper to apply the former resolution passed by Governing Body in its meeting held on 08.01.1988 in 1994 upon incumbents of accounts cadre from retrospective effect. The Learned Senior Counsel has painstakingly, submitted that the revised pay scales, as sanctioned vide Government Order dated 5.3.1991 and 09.07.1991 were granted to the employees of ministerial and secretarial cadres w.e.f. 1.1.1986 or their date of joining, whichever later and revised salary along with arrears (difference of salary) was paid to them and as such, it was illegal and improper to apply the former resolution passed by Governing Body in its meeting held on 08.01.1988 in 2002-03 from retrospective effect.

(71) According to the learned Senior Counsel, a perusal of cadre review report of 03.01.1997 and 27.11.2001 clearly shows that earlier the post of Typist was the entry level in the ministerial/ administration cadre and the same was changed to Lower Division Assistant, to be filled by direct recruitment. Further, pay-scales have to be commensurate with nature of work/duty of the post and could not have been casually/whimsically equated with pay-scales of HOD employees, unless some study was carried out establishing that they perform the same nature of duties / work to be entitled to HOD pay-scale. He submits that, once GO dated 01.08.1990 (in principle parity with AIIMS) and GO dated 05.03.1991 (*parity with AIIMS- Accounts Cadre*) and 09.07.1991 (*parity with AIIMS- Ministerial & secretarial cadre*) were issued giving parity with AIIMS

retrospectively w.e.f. 01.01.1986 and actual payment of arrears w.e.f. 01.01.1986 (or the date of joining) was paid, the GB decision of 08.01.1988 became redundant and in effect stood overridden by the government orders.

(72) The learned Senior Counsel has emphatically stressed on the point that dual benefit/second benefit of parity with HOD employees could not have been given after execution/ implementation of parity with AIIMS having been extended retrospectively. In any case, there cannot be two sets of policies applied in the same Institute where few employees in a cadre get the dual benefit of parity with AIIMS as well as parity employees of HOD and the other get benefit of parity with AIIMS only. He further submits that the State Government which had in principle approved parity in pay scale and allowances to SGPGI employees and officers at par with their counterparts in AIIMS vide GO dated 05.03.1991 and others, issued revised pay scales of 4th Pay Commission in accordance with the proposal of the Randhar Committee report and other relevant facts. The Randhar Committee had elaborated the equivalence in pay scales of SGPGI employees as compared to their counter parts in AIIMS.

(73) The learned Senior Counsel has submitted that since opportunity of hearing has also been afforded to the petitioners, which is one of the main grounds of challenge, before annulling the illegal and erroneous implementation of the Governing Body resolution dated 08.01.1988, it is blatant lie to say that they have not been heard. Moreover, since before the decision of Governing Body taken on 6th March 2010 no final opinion was made out in respect to the issue in question, therefore,

the question of making any communication prior to 6 March 2010 did not arise and as soon as opinion was made out, petitioners were afforded opportunity of hearing by Director vide his order dated 1st July, 2010. According to him, it is well settled that court should never permit a litigant to perpetuate illegality by abusing the legal process and it is bounden duty of the court to ensure that the dishonesty and any attempt to abuse the legal process must be effectively curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of process of law. No one should be allowed to use judicial process for earning undeserved gains or unjust profit. He also relies on letter dated 20.10.2010 to shows that there is no mention with respect to budget and the only reason for not giving post facto approval was the long-time gap and the effect of implementation of cadre restructuring dated 03.01.1997 which was already done. Towards the end of the argument, the learned Senior Counsel has submitted that the averments of the petitioners that the present dispute has occurred due to belated decision making of the institute is incorrect as time and again various committees were constituted by the institute, who had also recommended for withdrawal of the implementation of the Governing Body resolution dated 08.01.88, however the said withdrawal could only be done in 2010.

E. Discussion & Findings

(74) This Court, having given its anxious thought to the rival submissions of the learned Counsel for the parties, is of the view that the present decision has to be in two overlapping parts. The first would be relating to the sanctity of the impugned orders (i) dated 15.01.2010 passed by the

President of the SGPGI, (ii) Order dated 06.03.2010 of the Governing Body, (iii) Order dated 11.10.2010 issued by the Director of the institute and (iv) order dated 25.01.2011 passed by the Visitor of the SGPGI under Section 36 of the Act, all impugned order in unison directing SGPGI to withdraw the benefit of the Governing Body decision dated 08.01.1988 and implemented on 02.07.1994, 20.03.2002 and 02.04.2003. The second would be its consequence on the seniority list of the Accounts Cadre as has been agitated in the present bunch of petitions by the Accountant-cum-Computer Operators.

(75) At the outset, this Court would examine the legality of implementation of Governing Body decision dated 08.01.1988. Apparently, it is borne from the records that the recommendation of the Governing Body dated 08.01.1988 relates to granting revised pay-scales to non-faculty employees at par with maximum permissible pay-scales available to such staffs in the offices of Heads of Departments (HOD) in State Government. Noticeably, the aforesaid recommendation was not implemented immediately and in the meantime, the State Government, vide order dated 17.10.1989, had accorded sanction for grant of pay scales and allowances to the faculty of the SGPGI at par with their counter parts in All India Institute of Medical Sciences (AIIMS), New Delhi and on demand of non-faculty employees of SGPGI, same benefits was accorded to the non-faculty employees by the State Government, vide order dated 01.08.1990.

(76) Consequently, in view of the Government Order dated 01.08.1990, the State Government granted the revised pay-scale to the non-faculty employees of the

Institute, including those belonging to the Accounts cadres, Ministerial cadre and Secretarial cadre vide Government Orders dated 05.03.1991 and 09.07.1991 and this pay revision was made effective from 01.01.1986, the date from which the 4th Pay Commission scale was revised.

(77) Three things are clear from the aforesaid unfolding of facts. Firstly, the Governing Body although recommended for pay-parity with the maximum permissible pay-scales available to such staffs in the offices of Heads of Departments (HOD) in State Government on 08.01.1988, however the same was not implemented and in the meantime pay-parity with AIIMS was granted to this non-faculty employees of SGPGI on 05.3.1991. Secondly, the pay-parity with AIIMS was granted to this non-faculty employees on their demand. Thirdly and most significantly, the Government Order dated 5.3.1991 specifically records that the revised pay scale & pay-parity with AIIMS was being given on the basis of the option given by the non-faculty employees of institute and they would not be entitled for the other benefits admissible to employees of State Government.

(78) It is rather amusing and this court rather finds difficult to appreciate as to when pay-parity with AIIMS was granted to the non-faculty employees of SGPGI, how they can claim further pay-parity with maximum permissible pay-scales available to such staffs in the offices of Heads of Departments (HOD) in State Government as resolved in governing Body recommendation dated 08.01.1988. These non-faculty employees cannot be benefited twice by claiming pay-parity with staffs of HOD of state as well as pay-parity with staffs of AIIMS, New Delhi. These

employees can be either entitled to parity with staffs of HOD of State government or with AIIMS, New Delhi and not both. Besides, the fact that the pay-parity with AIIMS was granted to these non-faculty employees of their demand, the records of this case reveal that the pay-parity with AIIMS was accepted by these employees without any demur and it is only after the said acceptance that the pay-parity and the arrears were paid to them. Now, that when these employees have already accepted the said benefits, it is neither fair, nor proper or legal for them to turnaround and again demand implementation of Governing Body resolution dated 08.01.1988. Further, even the Government Order dated 05.03.1991 in clear and unequivocal terms says that they would not be entitled for the other benefits admissible to employees of State Government.

(79) The learned Senior Counsels appearing for these non-faculty employees, have argued that the recommendation of the Governing Body dated 08.01.1988 was not brought to the notice of the authorities while issuance of G.O dated 05.03.1991 and in case the said resolution would had been brought to the notice of the Authorities, the recommendation would had been implemented in the G.O dated 05.03.1991 itself and benefits would had been accordingly extended at that point of time only. Thus, it has been argued that procrastination in implementation is the root cause of the impugned orders. Although, in the first instance, the argument of the learned Senior Counsels appears to be attractive, however it is apparent from records that the said argument is merely a mirage. In fact, the said argument appears to this court as self-defeating. As a matter of fact & records, the G.O dated 05.03.1991 was pursuant to

Governing Body resolution dated 18.07.1989, which was passed after the impugned resolution dated 08.01.1988, which says in as many words as follows:

“The Governing Body noted its earlier decision to implement AIIMS grades of nurses and technical staff at SGPGI. The matter is still pending with the Government. In respect of administration and other staff the Governing Body observed that the State has already decided in principle that the salary of state employees will be in parity to central staff. To ensure that all categories of posts at SGPGI are covered, the Governing Body recommended that the Institute should undertake an in depth examination of post-to-post parity with reference to the grades and other fringe benefits applicable at AIIMS, New Delhi and grades at SGPGI and the grades now being revised by the State Government on the recommendations of the equivalence committee. If there are any anomalies, these should be examined by the Finance Committee and its recommendations be brought before the next Governing Body”.

(80) The aforesaid resolution envisages in clear terms that the State Government in principle has already decided that the salary of state employees will be in parity to Central staff and to ensure that all categories of posts at SGPGI are covered, the Governing Body states that the Institute has already undertaken an in depth examination of post-to-post parity with reference to the grades and other fringe benefits applicable at AIIMS, New Delhi and grades at SGPGI and most significantly it says that the grades now being revised by the State Government are on the recommendations of the equivalence committee. Thus, it cannot be eschewed

that the authorities while issuing the G.O dated 05.03.1991 were not aware of the earlier resolution dated 08.01.1988, in fact by not dealing with the said earlier resolution, it has constructively overruled the same. Further, the resolution also speaks of anomalies, if any, and in that regard says that the Finance Committee shall examine the same and be brought before the next Governing Body. Thus, to say that the G.O dated 05.03.1991 was implemented without noticing the recommendation of the Governing Body resolution dated 08.01.1988 would be a misnomer. It is rather surprising that the resolution dated 18.07.1989, which was much after the resolution dated 08.01.1988 of the Governing Body, came to be implemented vide Government Order dated 05.03.1991, whereas no Government order was issued for implementation of the resolution dated 08.01.1988 before the implementation of Governing Body resolution dated 19.07.1988 or ever thereafter till 02/07/1994, which again was only an office-order and not a Government order, which separates the chaff from the grain that after the resolution dated 19.07.1989, there was no occasion nor any intention for implementation of the earlier Governing body resolution dated 08.01.1988. Ideally, the said resolution would had been withdrawn immediately after the resolution of the Governing Body dated 19.07.1989 or in any circumstances after 05.03.1991, which would nipped the controversy in the bud.

(81) However, in the aforesaid context, this court is reminded of the Judgment passed by the Honble Supreme Court in the case **Mallikarjuna Rao and Others Etc. Etc. Vs. State of A.P. and Others Etc. Etc.** AIR 1990 SC 1251: (1990) 2 SCC 707: 1990 (1) SCALE 705,

wherein the Apex court has distinctively held that the Constitution of India does not permit the Courts to direct or advise the Executive in matters of policy, or to sermonize qua any matter which, under the Constitution, lies within the sphere of Legislature or Executive. Therefore, this Court can only point out the legal consequences of the improper implementation of the erstwhile recommendation of the Governing Body dated 08.01.1988, after the implementation of the pay-parity of the employees of the Institute with AIIMS, New Delhi in view of the Government order dated 05.03.1991 and nothing more.

(82) Pertinently, the State Government vide G.O dated 05.03.1991 had issued the aforesaid revised pay scales of 4th pay commission in accordance with the proposal of the Randhar Committee or the Equivalence Committee, which had recommended the equivalence in pay scales of SGPGI employees at par with their counter parts in AIIMS. Further, since pay revision was made effective from 01.01.1986, the date from which the 4th Pay Commission scale was revised, these employees were granted and also paid arrears of salary as per the revised pay-scale. The result of revised pay-scale is as per the following chart:

Sl. No.	Name of post	Existing pay-scale	Revised pay scales after G.O dated 05.03.1991
1.	Accounts Clerk	400-615	1200-2040
2.	Cashier	400-615	1200-2040
3.	Typist	354-550	950-1500
4.	Lower Division Assistant	400-615	1200-2040
5.	Upper Division	470-735	1400-2300

	Assistant		
6.	Stenographer	515-860	1200-2040

(83) It is available from records that after the implementation of the aforesaid pay-parity with the employees of the AIIMS, the petitioners of Writ-A Nos. 902 of 2011, 903 of 2011 and 904 of 2011, started representing the Institute for implementation of the Governing Body recommendation dated 08.01.1988, which technically would have been withdrawn immediately after the G.O dated 05.03.1991, wherein pay-parity with AIIMS was granted. In any case, the Institute, subduing to the demand of these employees implemented the recommendation of Governing Body dated 08.01.1988 in a phased manner and as such in the 1st Phase, the employees of "Accounts Cadre" were extended benefits vide order dated 02.07.1994, passed by the Senior Administrative Officer. Thus, employees appointed on the post of Accounts Clerk/Cashier (pay-scale Rs. 400-615/1200-2010) were re-designated as Assistant Accountant in the pay scale of Rs. 470-735/Rs.1400-2300 (Revised) from 08.01.1988 or from their date of joining and again arrears with respect to same were also paid to them. Thus, dual financial benefit as well as the benefit in pay-scale has accrued to the petitioners due to the aforesaid G.O dated 05.03.1991 and recommendation of the Governing Body dated 08.01.1988.

(84) It is one thing to say that the employees on the post of Accounts Clerk/Cashier, who had been given parity to the AIIMS pay scale vide G.O dated 05.03.1991, would have been given the pay scale of Assistant Accountant (pay scale of 1400-2300) at that point of time and it is other thing to say that the said pay scale of

Assistant Accountant was granted in view of the implementation of the Governing Body recommendation dated 08.01.1988. The petitioners admittedly did not challenge at any point of time the alleged erroneous grant of pay scale by the G.O dated 05.03.1991 and merely after 32 years of after taking the benefit has tried to make a feeble attempt to argue that the G.O dated 05.03.1991 was wrongly applied to these Accounts Clerk/Cashier and was merely a pay-revision and had the said GO not applied erroneously, these petitioners would have been designated as Assistant Accountant in the pay scale of Rs.1400-2300 at the time of implementation of G.O dated 05.03.1991 itself.

(85) Besides the fact that it is too late in the day to argue on the aforesaid aspect, the said analogy seems to be absurd, especially when the same is not commensurate to the pleadings in the writ petitions. Further, the conduct of these employees apparently seems not to be above suspicion as there is not a single document on records to suggest that these employees have been agitating the implementation of Governing Body resolution dated 08.01.1988 prior to 05.03.1991 i.e the implementation of the pay-parity with AIIMS. However, once these pay-parity with AIIMS was granted, these employees resurrected from their deep slumber and started agitating the implementation of the Governing Body resolution dated 08.01.1988. Thus, apparently it seemed these employees first waited for the pay-parity of AIIMS to be implemented by the State Government and thereafter took a chance in seeking implementation of the Governing Body resolution dated 08.01.1988, which apparently they succeeded due to obvious reasons of lackadaisical attitude of the Institute and the State Government.

(86) This Court has been informed that several complaints of the public

representatives regarding irregularities in the Institute was received by the State Government, who had ordered an enquiry and Sri Rakesh Kumar Goyal, IAS, the then Additional Director of Institute was nominated as enquiry officer. Pertinently, the issue of implementation of the recommendations of the Governing Body dated 8.1.1988 with respect to only a section of employees of the Institute was also one of the issues, enquired by Sri Goyal. After examining relevant files and records, Sri Goyal submitted his report to the State Government on 7-11-2008 and found this issue illegal and identified the erring officials and as a consequence on the direction of a Division Bench of this Court in Public Interest Petition (PIL) No. 8785 (M/B) of 2009, the departmental proceedings against the erring officials of the Institute are underway.

(87) There is another aspect of the matter. As already observed, hereinabove, as far as the employees of Accounts Cadre are concerned, the resolution of the Governing Body dated 08.01.1988 was belatedly implemented on 02/07/1994 i.e. after close to six years after the resolution and this court in the peculiar circumstances has held to be improper and suspicious. However, the case of the Ministerial Cadre and the secretarial Cadre seems to more fragile & worse as far as the date of implementation is concerned. Apparently, on the heels of the aforesaid demand having been implemented for the employees of the Accounts cadre, the other two categories, namely, Ministerial Cadre and Secretarial cadre intensified their demand for implementation of the Governing Body decision taken in its meeting held on 08.01.1988, i.e. parity with the Head of Department of State Government.

(88) This demand of the Ministerial cadre was implemented on 01.01.1998 but was subsequently cancelled on 06.03.1998 and the issue was directed to be re-examined. The employees of Ministerial Cadre, in return preferred a reference petition under section 36 of the Act, 1983 before the Visitor, whereupon the matter was referred to the Department of Medical Education, Government of U.P. Apparently, thereafter the matter had been making rounds of the Institute as well as the State Government and ultimately, the State Government vide an office order dated 13.02.2002 took a decision to implement the decision of the Governing Body dated 08.01.1988 and consequently held the order dated 01.01.1998 to be correct and cancelled the order of cancellation dated 06.03.1998. Thus, the Institute issued office orders on 20-03-2002 and 02-04-2003 for Secretariat Cadre and Ministerial cadre, respectively, for extending the benefit of the decision dated 08-01-1988 w.e.f. the said date/ date of joining to the members of the said cadres. Thus, as far as the Ministerial and secretarial Cadre is concerned, the Governing Body resolution dated 08.01.1988, came to be implemented after close to 14 and 15 years and that too after the cadre restructuring of the Institute was implemented vide Governing Body resolution dated 03.01.1997 and 27.11.2001.

(89) Apparently, the Governing Body vide its recommendation dated 03.01.1997, approved the "Cadre Restructuring, Pay Scale and Promotional Opportunities to Employees of the Institute", in brief known as "Cadre Review Report" and which was made effective from 03.01.1997 itself for all employees and officers of the Institute. In view of the aforesaid Cadre restructuring, the post of accounts clerks,

cashier and senior auditor was re-designated as Assistant accountant. The post of accounts clerk was abolished. Similarly the post of Typist in Ministerial Cadre was also abolished. The Governing Body also decided to implement the AIIMS package of allowances to all the employees uniformly and also decided in Principal to implement the changes at SGPGI aligned with the changes at AIIMS in future. Moreover, another restructuring of the cadre was done on 08-01-2001 and ratified by the Governing body dated 27.11-2001. The sole change incorporated in the cadre structure was that in between posts of office Superintendent and Administrative Officer another post was inserted/ created in the name of Assistant Administrative Officer. The Cadre restricting of the Ministerial and Secretarial Cadre after the aforesaid G.B Meeting dated 03.01.1997 & 27.11.2001, can be depicted in a tabular chart as follows:

Ministerial cadre:

Name of Post	Pay Scale	Experience for Promotion	Remarks
Adm. Officer	2200-4000	5 years as Asstt Adm Officer	
Asstt Adm Officer*	2000-3500	5 years as Asstt Adm Officer	This post was added by GB on 27.11.2001
Office Supdt.	1640-2900	5 years as UDA	
UDA	1400-2300	5 years as UDA	
LDA	1200-2040	3 years as Typist	The post of typist was declared dead and the typist who has and shall pass the computer test will be

			promoted as LDA.
Typist	950-1500		The post declared Dead

Secretarial cadre:

Name of post	Sanctioned vide GO dated 9.7.1991 & 3.1.1997	Sanctioned by GB dated 27.11.2001	Experience for promotion
Stenographer	1200-2040	4000-6000	Direct Recruitment
Personal Asstt	1400-2600	5500-9000	5 years as Stenographer
Private Secy	2000-3500	6500-10500	7 years as Personal Assistant.
PS to Director	3000-4500*	10000-15200	8 years as Private Secretary
* PS to Director was re-designated as Principal Private Secretary by GB on 3.1.1997.			

(90) Thus, as per the cadre review mentioned supra the earlier entry level post of Typist in the ministerial/ administration cadre was changed to Lower Division Assistant, to be filled by direct recruitment. Apparently, in view of the above stated "Cadre Review Report" dated 03.01.1997, employees belonging to the Ministerial Cadre were promoted to the post of Lower Division Assistant, in the pay scale of Rs.1200- 2040 from the post of Typist (pay scale of Rs.950-1500) w.e.f. 03.01.1997 vide office order dated 10.06.1997. However, in the most absurd manner and due to the erroneous implementation of the 14/15 year old Governing Body resolution dated 08.01.1988, these employees pursuant to order dated 18.3.2002 and 02.04.2003 were placed to the higher post of Lower Division Assistant/Office Assistant Grade-III (pay scale Rs.1200-

2040) from their date of joining to the post of Typist and were further placed on the post of Upper Division Assistant/Office Assistant Grade-II (in the pay scale of Rs.1400-2300) after 03 years in between from 1991-95 and some of the employees belonging to the said “Ministerial Cadre” were further placed to next higher post i.e. Office Superintendent/Office Assistant Grade-1 (in the pay scale of Rs.1640-2900) after 05 years from 1996, which apparently is wrong and an erroneous implementation of the recommendation.

(91) Moreover, as far as the “secretarial Cadre” is concerned, a perusal of GO dated 5.3.1991 and 9.7.1991 and the cadre review report of 03.01.1997 and 27.11.2011, clearly shows that post of Stenographer was sanctioned in pay scale of Rs. 1200-2040, whereas apparently they have been given pay scale of Rs.1640-2900 from 08.01.1988 or their date of joining, whichever is later, in view of the implementation of the Governing Body resolution dated 08.01.1988. Similarly, employees were promoted to the post of Personal Assistant w.e.f. 3.1.1997 vide Office Memorandum dated 10.6.1997, issued in pursuance to the decision of Governing Body taken on 3.1.1997 in the pay-scale of 1400-2600, however later on they were given pay scale of Rs 1640-2900 from 3.1.1997 at par with AIIMS.

(92) It is also significant to note that as per the records of the present case, the Finance Committee vide its resolution dated 16.09.1987 had also proposed the name of post & pay-scale to be with pay-parity with the staff of Head of Department of the State, which came to be ratified by the Governing Body on 08.01.1988. Interestingly, since the recommendations of Governing Body meeting dated 8.1.1988

were not found to be accepted by State Government, even no posts were created by the proposed names (Office Assistant Grade 1, Office Assistant Grade II, Office Assistant Grade III) in the cadre review meeting. Therefore granting the benefit of these posts and higher pay scales to the petitioners in 2002-03 from retrospective effect is absolutely preposterous. Thus, the petitioners have been given the benefits of higher posts and pay scales in a very arbitrary, illegal and discriminatory manner in the name of implementation of the resolution passed by Governing Body in its meeting held on 08.01.1988, which is not permissible under law.

(93) Further, this court cannot be oblivious to the fact that once GO dated 01.08.1990 and GO dated 05.03.1991 (*parity with AIIMS- Accounts Cadre*) and 09.07.1991 (*parity with AIIMS- Ministerial & Secretarial Order*) were issued giving parity with AIIMS retrospectively w.e.f. 01.01.1986 and actual payment of arrears w.e.f. 01.01.1986 (or the date of joining) was paid, the recommendation of the Governing Body decision of 08.01.1988 became redundant and in effect stood overridden by the government orders. Thus, it seems dual benefit has been given to these petitioners by first allowing them the benefit of parity with AIIMS as has also been done to other employees of the Institute and secondly by later on implementing the erstwhile recommendation of the Governing Body dated 08.01.1988, as has not been done to other employees of the Institute after 6 or 14/15 years. The said recommendation apparently appears to be discriminatory and hit by the concept of equality as propounded under Article 14 of our constitution.

(94) In any case, the aforesaid implementation was erroneous in view of the fact that it amounts to giving dual benefit to the petitioners because of the implementation of G.O dated 05.03.1991 and recommendation dated 08.01.1988, it is also seen that the said implementation of the Governing Body resolution dated 08.10.1988 lacks the force of law as the same was never sanctioned by the State Government.

(95) Although, it has been attempted to be argued by the learned Senior Counsels of the non-faculty employees, that no sanction from the state Government was required as per the prevailing law and the provisions of the Act, however this court finds the issue otherwise.

(96) As available from records, SGPGI is an autonomous Institute created under the statute namely Act, 1983. In pursuance to sub-section (2) of section 41 of the Act, the first regulations were framed in 2011. Thus, after framing of the first statute of the SGPGI in 2011, the Rules and Regulations of the Government are not applicable unless adopted by the Institute.

(97) Since, the issue relates to pre-2011 era, when the regulations were not in existence, the Act of 1983 would only apply. Moreover, the State Government vide Government Order dated 07.08.1992, has given its consent to implement rules/regulations applicable on the employees of the State Government upon the employees of SGPGI, till the promulgation of the regulations of SGPGI, as per the decision taken by the Governing Body in its meeting held on 22.03.1990.

(98) Section 19(2)(f) of the Act, 1983 has been relied upon by the petitioners to

argue that the Governing Body is the sole authority, which is responsible to create or abolish post of teachers and other employees of the Institute and consequently no approval of state Government was required for creation of any post in the Institute. They have tried to argue that the said provision can be interpreted and extended to mean that the Governing Body is the sole authority for revision in pay-scale of the employees of the institute. They have also relied on the amendment made in the year 2009 to argue that post the said amendment only approval by the statement government has become mandatory and prior to the said year, no approval was required. According to the petitioners, when the budget required for the purpose of payment of pay scale in pursuance of decision of the Governing Body dated 08-01-1988 was allocated by the State Government, the requirement of Section 25 of the Act, 1983 has been complied with and it indicates implied approval of decision of Governing Body dated 08-01-1988 by the State Government.

(99) In the first blush, the argument appears to have some force, however gradually the said force diminishes as it gives way to the literal meaning to the provision of section 19(2)(f) of the Act, 1983. Section 19(2)(f) says in as many words says; the Governing Body “*may create or abolish posts of teachers and other employees of the Institute*”. The revision of pay scales or the right of the institute to incur any financial implications is conspicuously absent from the said sub-section. However, the point is whether the said provision can be interpreted to mean that it includes a power to revise pay-scales. This court is reminded that essentially the recommendation of the Governing Body dated 08.01.1988 is

relating to extending the parity in pay with the Head of Department to the non-faculty members of the Institute and not creation or abolishing of the post as construed by the petitioners. Even this creation and abolition of the post has been made subject to prior approval post the amendment of 2009. Thus, to say that Section 19(1)(f) of the Act, 1983 can be interpreted to give powers to the governing Body to revise the pay-scales would not be in the correct of the things, especially when every revision of pay-scale involves financial implications and requires budgeting, being recurring in nature and as such requires approval of State Government as per section 25 of the Act, 1983.

(100) Although it can be argued that the Act of 1983 specifically does not contain any provisions relating to the power or authority for determination of the pay-scales, but once we see the provisions of section 25 of the Act, 1983 it is clear that the said power of revision in pay-scales involving expenditure is in fact in-built in the said section, which *inter-alia* states:

“25.(1) There shall be prepared in such form and at such time, every year as may be prescribed, a budget in respect of the financial year next ensuing, showing the estimated receipts and expenditure of the institute and the same shall be forwarded to the state Government in such manner as may be prescribed.

(2) The Governing Body shall comply with such direction as may be given by the State Government and approve the budget finally.

(3) It shall not be lawful for the Institute to incur any expenditure either not sanctioned in the budget or in the case of funds granted to the Institute, subsequent to

the sanction of budget, by the state Government or the Government of India, or any international organisation or foundation or any other agency save in accordance with the terms of such grant:

Provided that in the case of sudden or unforeseen circumstances, non-recurring expenditure not exceeding rupees fifteen thousand not sanctioned in the budget may be incurred by the director and he shall immediately inform the state Government in respect of all such expenditure.”

(101) Apparently, section 25(1) of the Act, 1983 in clear and unequivocal terms says that the Institute is mandated to prepare a budget in respect of the financial year next ensuing, showing the estimated receipts and expenditure of the institute and the same shall be forwarded to the state Government. Extending benefits as envisaged by the recommendation of the Governing Body dated 08.01.1988 involves expenditure of the Institute, for which budgeting is mandated and as per the requirement of section 25(1), the estimated expenditure has to be notified before the same is to be ensued in the next financial year. Further, section 25(2) of the Act, 1983 prescribes an obligation on the part of the Institute to comply with such direction as may be given by the State Government and then only the Institute can approve the budget finally. Thus, the role and responsibility of the State Government is paramount in budgeting and involving expenditure by the Institute. Section 25(3) of the Act, 1983 merely protects the Institute in case of any emergency expenditure, which was not sanctioned, which again as a corollary means that sanctioning of expenditure by the state Government is mandatory. Moreover, the proviso limits & curtails the power of the

Institute of spending without prior sanctioning to “sudden or unforeseen circumstances”, “non-recurring expenditure not exceeding rupees fifteen thousand” and further it entails immediate information to the state Government of all such expenditure.

(102) The benefit extended to the petitioner vide the recommendation of the General Body dated 08.01.1988 cannot be construed as emergency by any strength of imagination, nor the same is non-recurring and less than fifteen thousand. Further, this court cannot shut its eye to the provision of Section 41(1)(f) of the Act, 1983 which says that the institute may with the previous approval of the State Government may make regulations for the tenure of office, salaries and allowances and other conditions of service of the officers, teachers and employees of the Institute, which means the Act does not specifically contains any provisions for conditions of service of the employees of the institute . Since, at that relevant point of time, there existed no regulations as the same came into existence only on 2011, it is the Act, 1983 which has to be read and understood in that context and as such section 25 of the Act, 1983 plays a significant role in understanding the manner in which the expenditure involving revision of pay-scale of the Institute can be interpreted.

(103) Further, section 23 of the Act, 1983 provides that the State Government may pay to the institute in each financial year certain sum of money for exercise of its powers and discharge of its function under the Act, 1983. Thus it is apparent, from the perusal of section 23 as well as section 24 and 19 of the Act, 1983 that the State government has a vital role so far as the issues related to budgets and release of

funds of the institute is related. In the present case as the issue involved is increase in the budget as well as recurring expense the concurrence of the State was mandatory as has been reasoned in the preceding paragraph.

(104) Further, on a plain reading of the Act of 1983 including the provisions of sections 33 and 35 of the Act, 1983 brings one to the unescapable understanding that the Institute was servient to the State Government as far as expenditure, budgeting or grant of allowance to any employee of the Institute is concerned. In that context, even the reliance on the letter dated 20.10.2010 by the learned Senior Counsel for the petitioner is also not correct, as a plain reading of the said letter shows that there is no mention with respect to budget and the only reason for not giving post facto approval was the long-time gap and the effect of implementation of cadre restructuring dated 03.01.1997 which was already done. This court is afraid that it is unable to subscribe to the interpretation and reasoning of the learned Senior Counsel and as such holds that as far as the revision of the pay-scale as per the recommendation of the General Body dated 08.01.1988 is concerned, sanction from the state government was obligatory. Thus, the office order dated 02.07.1994, 20.03.2002 and 02.04.2003 without having the sanction of the state Government is held to be without the authority of law.

(105) The learned Senior Counsel for the petitioners have urged that since there was a sanction of amount of Rs. 41.45 Lacs for extending the benefit of Governing Body decision dated 08.01.1988 by the Institute to the petitioners, it has to be construed that the state has granted sanction for the said benefits to be extended

to them. Unfortunately, this court is not able to agree to the said contention of the learned Senior Counsel counsels, inasmuch as if an amount/budget has been released by the State Government on an incorrect premise as at that time the decision with respect to implementation of 08.01.88 was prevailing, it cannot be considered as a reason to perpetuate the illegality committed. In any case, the law stands well settled that the Court should never permit a litigant to perpetuate illegality by abusing the legal process. It is bounden duty of the Court to ensure that the dishonesty and any attempt to abuse the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of process of law. No one should be allowed to use judicial process for earning undeserved gains or unjust profit. The same view was reiterated by the Hon'ble Supreme Court in Civil Appeal No.10596 of 2010 In Re: ***Goa State Cooperative Bank limited Vs. Krishna Nath A. (dead) through LRS. and others.***

(106) Further, the contention of the learned Senior Counsel for the petitioners that the employees of these cadres would be reverted back to non-existing post without considering the intervening services is also not correct, because all posts on which these employees are working like LDA, UDA, Office Superintendent are existing even today and since parity has to be with their counterparts in AIIMS, their promotions would be determined in accordance with the years of service having been put in by the petitioners in the Institute in accordance with the cadre review report of 03.01.1997 and 27.11.2001. The only change is that the these employees/petitioners would resume the promoted posts on which they stood

promoted in accordance with the cadre review report of 03.1.1997 and 27.11.2001, as has been done with respect to all the employees of Institute in other cadres. Only the improper benefit that was extended to them and not to other employees of the Institute would be set at right, as has been in detail elaborated by the Chief Secretary, the Director and the Visitor in the impugned orders.

(107) The conscious of the court is unable to find any legal reasoning for implementation of the recommendation of the Governing Body dated 08.01.1988, especially when the revised pay scale orders as issued by the State Government vide G.O dated 05.03.1991 were made effective from 01.01.1986. In other words, since parity in pay scales and allowances to SGPGIMS employees at par with their counterparts in AIIMS was given w.e.f. 01.01.1986 therefore to implement the decision of the Governing Body taken in its meeting held on 08.01.1988 retrospectively, wherein parity was proposed at par with the Heads of Department of State Government, appears to be totality illegal, as two different standards cannot be imposed on same set of employees at one point of time.

(108) The petitioners have prayed for quashing the decision of 68th meeting of Governing Body held on 6th March 2010 and order dated 15.01.2010, passed by the Chief Secretary, Uttar Pradesh and order dated 11.10.2010, passed by Director of the Institute and order dated 25.01.2011, passed by the Visitor (His Excellency the Governor of Uttar Pradesh) of the Institute. However, this court finds that all these orders are well deliberated, speaking, reasoned and has traced the service history of the petitioners in arriving at the said just, proper and legal decision.

(109) This court finds that the Chief Secretary/President of the Institute has vividly dealt with the issue of irregularity in point nos. 3.5, 7 & 7.2 of his order dated 15.1.2010 and the Director has also mentioned the same in page no.19 of his order dated 11.10.2010, to the effect that, after approval of the State Government, G.O dated 05.03.1991 was issued to extend parity in pay scales and allowances at par with AIIMS w.e.f. 01.01.1986 to the employees and other officers of the Institute and as such there was no occasion and justification to implement the decision of Governing Body taken in its meeting held on 08.01.1988. Both the president and the Director have raised the issue of competency of the Institute to suggest the decision of the Governing Body dated 08.01.1988 to be implemented and that too from retrospective effect. The president and the Director have rightly observed that by extending the aforesaid benefit of a stale Governing Body decision, the Institute has sought to give absolutely illegal leaps and bound of jump to employees who were neither qualified nor were recruited in the Institute on the post and pay scale vide office orders dated 02.07.1994, 20.3.2002 and 02.04.2003.

(110) Interestingly, none of petitioners were appointed as per the GB decision of 8.1.1988. In fact, they were appointed on posts and pay scales approved by subsequent Governing Body approval and Government Orders. The petitioners themselves have stated this and therefore, there was no requirement, occasion and justification to implement the decision of Governing Body of 08.01.1988. The Governing Body on 08.01.1988 proposed new nomenclature and pay scales but no number of the post with the proposed nomenclature was sanctioned by Governing Body, hence the benefit of non-

existing posts cannot be given to any of the employees. This fact has also been stated by the Director of the Institute in last paragraph of page no.24 of the impugned order dated 11-10-2010.

(111) Further, it has to be borne in mind that the Cadre Review Report of 3.1.1997 had already taken into consideration all the relevant orders, facts and all previous decision taken by Governing Body, hence it was totally illegal and arbitrary to side track the decision of Governing Body taken in the meeting of 3.1.1997 by implementing pay scales and structure which already stood superseded by the Cadre review report approved on 3.1.1997.

(112) Therefore, all employees and officers are to be promoted in accordance with the cadre review report approved by Governing Body on 3.1.1997 and 27.11.2001 and this Cadre Review Report was made for the first time and that too for all categories of employees and officers in various cadres. It is correct on the part of the learned Senior Counsel for the Institute that because of this illegal implementation of Governing Body resolution dated 08.01.1988, there was chaos in the Institute because the employees only in the ministerial, secretarial and accounts cadre were placed on higher posts not only by virtue of re designation but even enhanced pay scales on which they were neither appointed nor did they apply for or were eligible. He is right in his submission that other employees and officers of other cadres resented this and demanded equal treatment and there were numerous representations of various section of employees and some of them even approached this Court and filed writ petitions.

(113) Moreover, this Court considers it to be of paramount significance that the

Governing Body resolution dated 8.1.1988 was not implemented till 1994 because the same was not found to be approved by State Government in accordance with the then prevailing practice and procedure and the provisions given in the Act of 1983, but the same came to be implemented in the year of 1994 and thereafter in 2002-03. Apparently, the Chief Secretary and President of the Institute has also arrived at the same finding in point no.4.1 of his order dated 15.1.2010 and further the Director has also mentioned the same in last paragraph of page no.19 of his order dated 11-10-2010. This action of implementing the recommendations of the Governing Body dated 8.1.1988 was also found illegal, arbitrary, and discriminatory by several inquiry officers/committees for reasons given in their reports.

(114) This court also finds support in the reasoning given by a Government's level Committee (under the chairmanship of Sri Prashant Trivedi, Secretary, Medical Education department of Govt. of U.P.) in its report dated 7-11-2005, wherein the Committee recommended that since the pay scales at par with AIIMS, New Delhi have already been granted to all the employees of SGPGI, (including petitioners/the employees of ministerial, accounts and secretarial cadre), vide Government Order dated 1-8-1990 and 5-3-1991 w.e.f. 1.1.1986 and the Cadre Structure and Promotion Policy has been approved by Governing Body on 3.1.1997 and 27.11.2001 after considering all the previous decisions and orders, it was illegal to grant the benefits at par with State Government (as recommended by Governing Body on 08.01.1988) during the year of 1994 & 2002-03 to only a section of accounts, ministerial and secretarial cadre with retrospective effect, therefore, the

same should be cancelled and recovery should be made accordingly. In this context, the Chief Secretary and President of the Institute has also agreed with this finding in point nos. 3.13 and 4.5 of his order dated 15.1.2010.

(115) Further, the illegality of the office memorandum dated 13-2-2002 has in detail been elaborated upon by the Chief Secretary in his order dated 15-1-2010, in which he has clearly mentioned that issuance of office memorandum dated 13-2-2002 was totally illegal, since it was issued without the concurrence of the Finance Department of Uttar Pradesh and also because it was against the provisions laid down in "*Uttar Pradesh Karya Niyamawali 1975*". Since the Governing Body has also taken a decision for annulling the execution of Governing Body dated 08.01.1988, which was executed vide orders dated 2-7-1994, 20.03.2002 and 02.04.2003, nothing remains in the case put forward by the petitioner.

(116) So far as the argument of the Ld. Sr. Counsels, relating to the report of the 6 member committee dated 16.01.2008 is concerned, the Governing Body in its 62nd meeting held on 01.03.2008, after extensive deliberations made a very specific observation that most of the members nominated in the said committee do not have their signatures on the minutes. It was also pointed out by the secretary, finance that the representative of the finance department, Govt. of U.P. was not present. Accordingly, it was resolved that the Governing Body is authorising the President of the Institute to take a final decision on the implementation of the recommendations of the committee in consultation with the Finance Department, Government of Uttar Pradesh.

(117) Moreover, even the recommendations made by the Committee in its meeting held on 16.01.2008 were conditional as it was specifically stated that while implementing the decision of Governing Body dated 8.1.1988 it shall be ensured that no deviation from AIIMS occurs and it was further stated that the recommendations was being made on a condition that establishment and finance department of the state government should be consulted and their consent should be obtained where after the proposal would be kept before the Governing Body of the Institute. Since, neither the Principal Secretary, Department of Finance nor any other authorised representative from the Finance department was a part of the meeting, it is incorrect to presume that merely being nominated in the committee will be considered as the consent of the finance department and the same to be an empty formality is not correct. Merely being a member of a committee and not participating in it will mean that the consent of that individual/concerned department is not obtained, especially when it was also not represented by any other individual of that particular department. It was only due to the said reason that the committee final made a conditional observation of taking the consent of finance and establishment department prior to placing its recommendations before the governing body.

(118) That a perusal of agenda item no. 3 of the impugned Governing Body meeting held on 06.03.2010 clearly shows that prior to implementation of the recommendations made in the impugned office order dated 15.01.2010, detailed deliberations were held where-after the Governing Body took final decision. The Governing Body also had authorized the

President to take a decision on the issue related to implementation of 08.01.88 after consulting with the Finance Department, Govt. of U.P. As such, the president/ Chief Secretary was authorised by the Governing Body also apart from the order dated 15.01.2009 passed by this Court in writ petition no.6555 (S/S) of 2009 (*Mukesh Kumar Srivastava & others Vs. State of UP & others*) to look into the entire issue related to the implementation of 08.01.88 and its implementation and effect. Since this court had directed to Chief Secretary to pass the order in accordance with law, he was fully authorised to pass the orders. Further, the chief secretary of the state is also the president of the Institute as per section 11 of the SGPGI Act, 1983 and as such the contention of some of the petitioner that direction was given to the president and order was passed by the chief secretary is also not correct.

(119) Also, the averments of the petitioner that the present dispute has occurred due to belated decision making of the institute is incorrect and does not hold any water, as time and again various committees has been constituted by the institute, who had also recommended for withdrawal of the implementation of the resolution of Governing Body dated 08.01.1988, however, the said withdrawal could only be done in 2010. Moreover, order dated 08.01.1988 was withdrawn on 06.03.1998 and orders dated 02.07.1999, 20.03.2002 and 02.04.2003 have been found by a High Level Enquiry Committee, in its report dated 07.11.2005 to be illegal and wrongly issued, however the consequent effect of the said could not be implemented because of the pendency of this bunch of writ petitions. Since, this Court is of the view that the dual benefit was not permissible to the petitioners, the

implementation of the recommendation of the Governing Body dated 08.10.1988 is held to be bad in law.

(120) The next ground argued very vociferously by the Ld. Sr. counsels for the petitioner is that no opportunity of hearing has been given to these employees and they were for the first time been asked to file reply to the show cause notice dated 1.07.2010 issued by the Director of the Institute. According to him, no opportunity was granted to them of hearing before the President of the Institute or before the Governing Body and as such the opportunity given was merely an eyewash.

(121) Apparently, this court finds that since before the decision of Governing Body taken on 6th March 2010 no final opinion was made out in respect to the issue in question, therefore, the question of making any communication prior to 6th March 2010 does not arise and by the time an opinion was made, the petitioners were afforded opportunity of hearing by the Director vide his order dated 1st July, 2010. Further, in the case of **“Canara Bank V/s V.K. Awasthi” (2005) 6 SCC 321**, wherein the respondent in that case was served with a show cause notice on 6.08.1992 and was granted 15 days to reply. The respondent failed to reply and as a consequence was terminated from the service on 17.08.1992. The respondent contended that principles of natural justice was not followed and High Court upholding the said contention directed the bank to provide proper hearing to the respondent before the disciplinary committee. Hence, the bank filed an appeal before the Supreme Court. The bank provided the respondent with personal hearing before the appellant authority. The issue concerning in that case was whether post decisional hearing provided by the bank to the respondent before appellant authority is in concurrence with *Audi*

alteram partem or not. The Apex Court relied on **Charan Lal Sahu v. Union of India, AIR 1990 C 1480**, where the Court held that ‘post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing’. Therefore, if there is any lack in the proceedings of any case, then it can be resolved by using post-decisional hearing. Therefore court allowed the appeal and held that no violation of Principle of Natural Justice was witnessed and Post Decisional Hearing in the present appeal serves the purpose of pre decisional hearing. In any case, in view of the orders of this Hon'ble Court, passed on 02.11.2010 in a bunch of writ petition being 7570/2010, 7571/2010 & 7572/2010, petitioners got another opportunity of hearing before the Visitor of the Institute and after hearing the petitioners and other parties concerned, the Visitor passed the impugned order dated 25.01.2011, whereby the representations of the petitioners have been dismissed, being baseless on several reasons and grounds given therein. In view of the above, it is held that the petitioners have been given ample opportunity of hearing.

(122) Thus, this Court is of the considered view that keeping in light of the grant of parity with AIIMS, New Delhi by Governing Body dated 18.07.1989, as well as, GOs dated 01.08.1990 and 05.03.1991, w.e.f. 01.01.1986, the earlier Governing Body decision of 08.01.1988 (qua parity of pay-scale with employees of HOD in State Department) stands superseded and is inapplicable. Consequently, orders like the ones dated 02.07.19994, 01.01.1988, 20.03.2002 and 02.04.2003, giving parity with employees of HOD of Uttar Pradesh are held to be illegal and without any effect.

(123) In view of the above, this court finds that the impugned orders have in no manner missed the woods for the tree and apparently a very detailed and reasoned

order has been passed by the President/Chief Secretary vide order dated 15.01.2010. Further, this court also does not find any error in the decision of 68th meeting of Governing Body held on 6th March 2010 and order dated 11.10.2010, passed by Director of the Institute and order dated 25.01.2011, passed by the Visitor (His Excellency the Governor of Uttar Pradesh) of the Institute. The impugned orders have rightly considered all the relevant facts and has found grave illegality in the matter and therefore has passed order to cancel/withdraw the benefits arising out of the implementation of the resolution of Governing Body dated 08.01.1988. The impugned orders are fair, proper and legal in the facts & circumstances. No grounds for interference against the impugned orders have been made by the petitioner.

(124) As far as the recovery of excess amount paid is concerned, the Hon'ble Supreme court in a catena of decisions has consistently held that if the excess amount was not paid on account of any misrepresentation or fraud of the employee or if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order which is subsequently found to be erroneous, such excess payment of emoluments or allowances are not recoverable. The Hon'ble Apex court in **Col. B.J Akkara (Retd.) V/s Government of India and Others : (2006) 11 SCC 709** has considered an identical question as under:

“27. The last question to be considered is whether relief should be granted against the recovery of the excess payments made on account of the wrong

interpretation/understanding of the circular dated 76 1999. This Court has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled (vide Sahib Ram v. State of Haryana [1995 Supp (1) SCC 18 : 1995 SCC (L&S) 248], Shyam Babu Verma v. Union of India [(1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121] , Union of India v. M. Bhaskar [(1996) 4 SCC 416 : 1996 SCC (L&S) 967] and V. Gangaram v. Regional Jt. Director [(1997) 6 SCC 139 : 1997 SCC (L&S) 1652]).

(a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

(b) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular 2 (2006) 11 SCC 709 interpretation of rule/order, which is subsequently found to be erroneous.

28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter

being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery.

29. On the same principle, pensioners can also seek a direction that wrong payments should not be recovered, as pensioners are in a more disadvantageous position when compared to in service employees. Any attempt to recover excess wrong payment would cause undue hardship to them. The petitioners are not guilty of any misrepresentation or fraud in regard to the excess payment. NPA was added to minimum pay, for purposes of stepping up, due to a wrong understanding by the implementing departments. We are therefore of the view that the respondents shall not recover any excess payments made towards pension in pursuance of the circular dated 761999 till the issue of the clarificatory circular dated 1192001. Insofar as any excess payment made after the circular dated 1192001, obviously the Union of India will be entitled to recover the excess as the validity of the said circular has been upheld and as pensioners have been put on notice in regard to the wrong calculations earlier made.”

(125) Similarly, in the case of **“State of Punjab & Ors V/s Rafiq Masih”, (2015) 4 SCC 334**, the Hon’ble Apex court examined the validity of an order passed by the State to recover the monetary gains wrongly extended to the beneficiary employees in excess of their entitlements without any fault or misrepresentation at the behest of the employees. The Hon’ble Apex court considered situations of hardship caused to an employee, if recovery is directed to reimburse the employer and disallowed the same, exempting the beneficiary employees from such recovery. It was held thus:

“8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.

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18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five

years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

(126) Further, recently the Hon'ble Supreme Court in the case of **"Thomas Daneil V/s State of Kerala & Ors."** (2022 SCC OnLine SC 536) had an occasion to determine similar question of recovery of increment granted on account of an error to an employee while in service, after almost 10 years of his retirement. The Hon'ble court after tracing the history of the settled law refused to allow the recovery of the said amount and set-aside the recovery notice.

(127) As far as the facts of the present case is concerned, it is not the case of the state or the Institute that on account of misrepresentation or fraud played by these employees, the excess amounts have been paid to them. In fact, the excess amount has been paid because of the erroneous implementation of the Governing Body resolution dated 08.01.1988, which has been withdrawn/cancelled by the impugned orders passed by President/ Chief Secretary vide order dated 15.01.2010, decision of the Governing Body held on 6th March 2010, order dated 11.10.2010, passed by Director of the Institute and order dated 25.01.2011, passed by the Visitor (His Excellency the

Governor of Uttar Pradesh) of the Institute. Thus, this court is of the view that an attempt to recover the excess amount already paid would be unjustified.

(128) As far as the second controversy is concerned, the same is relating to seniority dispute amongst employees of the "Accounts Cadre". The controversy herein has emerged on account of a reconstitution of cadres. In the first instance, a separate cadre was constituted being the computer cadre for the "Accountants-cum-Computer Operator" of the Institute. This was necessitated by the decision of the Cadre review meeting dated 03.01.1997 of the Governing Body of the Institute. Consequent upon the representation of these "Accountants-cum-Computer Operator", the separate cadre so created, was sought to be re-amalgamated with the existing Accounts cadre. The said issue was aggravated by the erroneous implementation of the Governing Body decision dated 08.01.1988, which resulted in some employee, who were originally junior in rank, acquiring a higher position in seniority, over and above those who were senior to them in the Accounts Cadre. Before embarking upon the niceties of the seniority dispute, it is imperative to delve upon the chronological turn of events, which resulted in the said dispute.

(129) The petitioners of the second set of petitions, were substantively appointed to the post of Assistant Accountant cum Computer Operator on 12.2.1990 and 20.7.1990 respectively in the un-revised pay scale of Rs.515-860/-. The revised pay scale was made admissible to all the non-faculty employees at par with AIIMS, New Delhi, vide Government order dated 1.8.1990 and 5.3.1991, which, was made effective from 01.01.1986 or the date of joining, whichever was later.

(130) The pay scale for the posts of 'Assistant Accountant' and 'Assistant Accountant cum Computer Operator' (AACCO, for short) was sanctioned as Rs. 1400-2300/- and the same was made admissible from 1.1.1986 or from the date of joining, whichever was later and pay scale for the post of Accounts Clerk and Cashier was sanctioned as Rs. 1200-2040. That as stated above, the petitioners (AACCO) were sanctioned the revised pay scale of Rs. 1400-2300 from their date of joining, whereas Accounts Clerk and Cashier were sanctioned the revised pay scale of Rs 1200-2040.

(131) As discussed herein above, the erstwhile decision of Governing Body taken on 08.01.1988 was made applicable (on 02.07.1994) to the Accounts Clerk and Cashier and the individuals were wrongly sanctioned, pay scale of Rs. 1400-2300 from 08.01.1988 or from their date of joining, whichever was later. The action taken on the basis of Governing Body decision dated 08.01.1988, on 02.07.1994, has been decided against the employees in the aforesaid paragraphs.

(132) As per the 'cadre review & promotion policy' for the non-faculty employees of SGPGI, which was approved by Governing Body on 03.01.1997 at par with AIIMS, New Delhi, the post of these petitioners of the second set of writ petition, was classified in computer cadre. However, representations were given by these petitioner to absorb them in Accounts Cadre and to re-designate them as Junior Accounts Officer, a post higher to Assistant Accountant.

(133) In view of the above, the Finance Committee of the Institute agreed to the merger of AACCO with Accounts cadre at

the level of Assistant Accountant in the pay scale of Rs. 1400-2300. The Finance Committee further recommended that their seniority with Assistant Accountant would be determined from the date of panel against which they were appointed. The recommendations of the said Finance Committee were approved by Governing Body in its meeting held on 04.05.1998.

(134) Thus, in the light of the decision taken by Governing Body on 04.05.1998, a tentative seniority list was published on 26.09.1998 and objections were sought and final seniority list was published on 21.12.1998. The order dated 26.09.1998 further states that AACCO stood merged in the Accounts cadre at the level of Assistant Accountant in the pay scale of Rs. 1400-2300/-.

(135) Obviously, these petitioners were not happy with the said seniority list and as such these AACCOs gave representations from time to time against the seniority list published by Institute and also filed writ petition nos. 2939(SS) of 1998, 5609 (SS) of 1998, 639 of 1999 (SS) and 6545 of 2007 (SS), whereby they had challenged their seniority, merger and incorrect implementation of Governing Body decision dated 08.01.1988 etc. Apparently, writ petition no. 2939(SS) of 1998 was decided on the ground of alternate remedy before the Visitor under section 36 of the Act, 1983. Similarly, writ petition No. 5609 (SS) of 1998 was decided on the basis of statement of SGPGI, to the effect that the objection of the petitioner would be decided first in accordance with law and only then the seniority list shall be published.

(136) In view of the above representation given, the Visitor in his order dated 28.8.1999 observed that there is

prima facie error in fixing seniority of accounts cadre, but did not pass final order and referred the issue to medical education department for necessary examination and order. Thus, this Court, while hearing the writ petition no. 639 (SS)/1999 on 13.12.1999 provided that the promotions shall not take place in pursuance of the Seniority list dated 21.12.1998, which is under challenge, until the seniority dispute is finally determined by the Government. However, in the meantime, the seniority list dated 21.12.1998 was confirmed by the Institute by an order dated 14.07.2000.

(137) Another 'cadre review & promotion policy' was approved by Governing Body on 27.11.2001 and eligible employees in order of seniority were promoted w.e.f. 03.01.2002, but being junior in the list, AACCO's were left out from being promoted due to the effect of Governing Body resolution dated 08.01.1988. In the meantime, the benefits given on the basis of Governing Body decision dated 08.01.1988 was enquired by the Institute authorities time and again and same was found incorrect, irregular and illegal because of the reasons given therein. Thus, another writ petition no. 6555/2009 (SS) was filed by the senior employees of ministerial cadre before this Hon'ble Court and after hearing the parties, this Hon'ble court passed order on 15.10.2009 and directed to the Chief Secretary of Uttar Pradesh to decide the issue/representation and pass reasoned order expeditiously within three months.

(138) The President of the Institute (Chief Secretary) passed the impugned orders on 15.1.2010 in compliance of Hon'ble High Court order dated 15.10.2009 in above stated writ petition no. 6555/2009 (SS) to the effect that orders issued on the

basis of Governing Body decision dated 8.1.1988 were improper, incorrect, irregular and deserved to be withdrawn. However, he further ordered being an important issue, to place the same before Governing Body of the Institute for deliberation and decision. Governing Body took decision on 06.03.2010 to withdraw all the orders issued on the basis of Governing Body decision dated 08.01.1988.

(139) In view of the above stated decision of Governing Body and principle of natural justice, the Director of the SGPGI afforded an opportunity of hearing to the employees concerned vide order dated 01.07.2010 and after considering their representations, relevant facts, orders, subsequent decisions of the authorities of the Institute, passed final order on 11.10.2010 for withdrawal of all the orders, issued on the basis of the decision of Governing Body dated 08.01.1988.

(140) The employees concerned filed writ petition nos. 7570 of 2010 (SS), 7571 of 2010 (SS) and 7572 of 2010 (SS) before this Court against orders dated 15.1.2010, 11.10.2010 and Governing Body decision dated 6.3.2010. This Court, after hearing the parties, disposed of the writ petition on 02.11.2010 and directed that the Visitor may decide the matter within a period of one month from the date of reference is made by the petitioners before him and till then the operation of impugned orders shall remain stayed. In case, the reference is not made within a period of two weeks from that day the order passed would be of no avail.

(141) The Visitor, after considering the representations of the employees concerned and counter reply of the parties, as well as, Institute's stand, passed order on

25.01.2011, whereby it was ordered that there is no illegality in passing orders by the Director, President and Governing Body of the Institute and accordingly the representations were dismissed by the Visitor, being devoid of merit. Thus, all the orders came to be challenged by the employees concerned by filing of writ petition no. 902/2011, 903/2011 (SS) and 904/2011 (SS) before this Court, in which *status quo* order was passed vide interim order dated 24.02.2011.

(142) The status of petitioners of writ petition nos. 902/2011 (SS), 903/2011 (SS) and 904/2011 (SS) as it was prior to passing the orders impugned, is being maintained in the light of the interim order passed by a Co-ordinate Bench of this Court on 24.2.2011 for maintaining '*status quo*'.

(143) In the meantime, a tentative seniority list of petitioners' cadre was published on 4.6.2014 and objections were sought. However, objections given by the petitioners and other similarly situated persons, vide their letters dated 10.6.2014 and 21.6.2014, were disposed of without making changes in their seniority position, in the light of this Court's '*status quo*' order dated 24.2.2011 and final seniority list was published on 27.6.2014, which mentions in the remark column - '*designations because of status quo order of Hon'ble High Court*', against which writ petition no. 3948/2014 (SS) came to be filed before this court and subsequently all the writ petitions were connected to the present bunch of matter vide order dated 11.08.2014.

(144) Essentially the dispute for seniority is three -fold, the first being that the same was not prepared as the *status quo*

order dated 24.02.2011 has adversely effected the said seniority list and secondly, these accountant-cum-computer cadres absorbed in the Accounts cadre were more qualified and deserved higher pay scale than the Cashier and Accounts Clerk. Most importantly, some of the employee of the Accounts Cadre have been extended and given the benefit of implementation of Governing Body order dated 08.01.1988.

(145) In **S.I. Roop Lal and Another vs. Lt. Governor through Chief Secretary, Delhi and Others** : AIR 2000 SC 594=(2000) 1 SCC 644, it was held by the Honble Supreme Court that the salary of the post held by a person alone may also not be the determining factor for considering their equivalence, and for determining their status to be equal, and not only the nature and responsibility of the duties attached to the two posts have also to be taken into consideration, but also (i) the similarity/dissimilarity in the methods of recruitment, and (ii) the qualifications prescribed for their respective selection, and (iii) the process of any such selection.

(146) In the instant case before this Court, it is clear that any claim of similarity or parity in between the employees (Cashier, Accounts Clerk etc.) belonging to the "Accounts Cadre" and the Accountant-cum-Computer Operator dissipates and evaporates when tested on the anvil of the last three tests laid down by the Hon'ble Apex Court, which have been numbered as (i), (ii) & (iii) by this court, for the sake of convenience.

(147) In the instant cases, the difference and distinction between the two groups of person in the Accounts Cadre is so stark and apparent that such difference and distinction cannot cease to exist. Some

employee's taking advantage of the implementation of the Governing Body resolution dated 08.01.1988 have climbed up the seniority, which was not permissible as per law and in the wake of this Judgment, which has found the implementation of the aforesaid Governing Body resolution to erroneous, a need for preparation of a fresh seniority list is warranted, keeping in view the changed circumstances.

(148) Thus, the seniority list as published on 27.06.2014 cannot be sustained as per law. Moreover, as rightly put by the AACO's there was need for fixing of seniority afresh, as a numbers of new incumbents had joined whose names deserved to be incorporated in the seniority list and several persons from the earlier seniority list had retired, who names deserved to be omitted. In any case, this court cannot be mute spectator to one of the submission of the learned Counsel for the Institute that, in light of '*status quo*' order of this court there was little scope to make any changes in the seniority position of the AACCO's.

F. Conclusion

(149) For all the aforesaid reasons, these writ petitions are **disposed of** with the following directions :-

(i) No interference is called for in the decision of 68th meeting of Governing Body held on 6th March 2010, order dated 15.01.2010 passed by the Chief Secretary, Uttar Pradesh, office order dated 11.10.2010 passed by the Director of the Institute and order dated 25.01.2011 passed by the Visitor (His Excellency the Governor of Uttar Pradesh) of the Institute;

(ii) In view thereof, the implementation of the decision of the

Governing Body dated 08.01.1988 vide office orders dated 02.07.1994, 20.03.2002 and 02.04.2003, is held to be illegal and as such they are set-aside;

(iii) However, recovery of excess payment made to the petitioners, in view of the implementation of the Governing Body decision dated 08.01.1988 is found to be unjustified in the given facts and circumstances;

(iv) The *status quo* order dated 24.2.2011 (supra) stands vacated;

(v) Except for the recovery of excess amount already paid, which this Court has found to be unjustified, the order dated 15.01.2010 passed by the Chief Secretary, Uttar Pradesh, the decision of Governing Body dated 06.03.2010 and office order dated 11.10.2010 passed by Director of the Institute, order dated 25.01.2011 passed by the Visitor (His Excellency the Governor of Uttar Pradesh) of the Institute are directed to be complied in its letter and spirit and all promotions, re-arrangement of post, pay-scales, DPC, other service benefits, etc. has to be assessed and calculated in the light of these orders and the cadre review meeting dated 03.01.1997, within a period of two months from today;

(vi) The seniority list published on 27.06.2014 is quashed. The Institute is directed to prepare fresh seniority list of the employees of "Accounts Cadre" in the light of the observations made hereinabove and the decisions of the President dated 15.01.2010, Governing Body dated 06.03.2010, the Director dated 11.10.2010 and the Visitor dated 15.01.2011, within two months from today;

(vii) All the writ petitions and pending Applications are **disposed of** in the above terms.

(viii) There shall be no orders as to cost.
